Australian Government
Office of the Australian Information Commissioner

'LS' and 'LT' (Privacy)[2017] AICmr 60 (26 June 2017)

Decision and reasons for decision of
Australian Privacy Commissioner, Timothy Pilgrim

Complainant:	**LS**
Respondent:	**LT**
Decision date:	**26 June 2017**
Application number:	**CP14/04346**
Catchwords:	**Privacy — *Privacy Act 1988* (Cth) — s 52 — Australian Privacy Principles – APP 12 – Access to personal information – APP 12.3 — Serious threat to life, health or safety – Breach of APP 12.5 — Failure to consider steps (if any) to give access — Breach of 12.9 — Failure to give written reasons for refusal — Use of intermediary – Compensation awarded – non-economic loss – Aggravated damages not awarded**

Contents

Determination

1. I find that the respondent interfered with the complainant's privacy as defined in the *Privacy Act 1988* (Cth) (**Privacy Act**) by:

    - breaching Australian Privacy Principle (APP) 12.5 by failing to consider what steps, if any, may have addressed any concerns as to the effect of access on the complainant's health, having regard to the circumstances and meeting the needs of the entity and the complainant; and

    - breaching APP 12.9 by failing to provide the complainant with a written notice that sets out the reasons for the refusal and the mechanisms to complain about the refusal.

2. Within 60 days from the date of this determination, the respondent shall:

    - provide the complainant's personal information, being the Board Response, to a psychiatrist of the complainant's choice, so long as that psychiatrist is a member of the Royal Australian and New Zealand College of Psychiatrists (RANZCP). That psychiatrist will form their own professional judgment about how the access, if any, will be provided to the complainant; and

    - pay the complainant the amount of $1000 for non-economic loss caused by the respondent's interference with the complainant's privacy.

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. As both the complainant and respondent are individuals, the parties have not been named in this determination to protect their privacy.

5. The respondent is a consultant psychiatrist, who works in a clinic with an inpatient and outpatient practice. The complainant was a patient of the respondent between 2003 and 2013, and would typically consult with the respondent twice per week. While the complainant was an inpatient in the respondent's care, she was administered electroconvulsive therapy (ECT).

6. In 2014, the complainant made a complaint to the Medical Board of Australia (**Board**) through the Australian Health Practitioner Regulation Agency (**AHPRA**) concerning the administration of ECT by the respondent.

7. In the course of the Board's investigation, the respondent provided a letter (the **Board Response**) to the Board which contained:
    a. clinical notes for the respondent's treatment of the complainant;

b. hospital records for the complainant's inpatient treatment;
c. written passages by the complainant;
d. second opinion reports; and
e. character references.

8. Following its investigation, the Board dismissed the complaint. On 15 July 2014, the complainant wrote to AHPRA, requesting a copy of the Board Response.

9. On 30 July 2014, AHPRA wrote to the complainant, informing her that the respondent did not consent to the Board Response being provided to her. AHPRA offered that the complainant could lodge a freedom of information request to it to obtain the records, but indicated that the respondent objected to access being provided.

10. On 3 September and 17 September 2014, the complainant wrote directly to the respondent requesting a copy of the Board Response.

11. On 18 September 2014, the respondent responded to the complainant (the **18 September Letter**), stating only "I received your letter requesting a copy of my response to AHPRA [*the Board Response*] regarding your notification. I am afraid I cannot help you with your request".

12. The complainant made two further requests of the respondent for access to the Board Response, on 21 October and 8 December 2014. The respondent did not respond to those requests.

13. On 30 September 2014, the complainant made a complaint to the OAIC about the refusal to provide access.

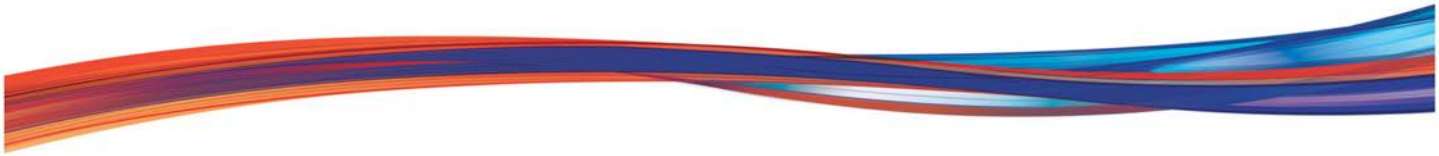
14. The complainant contends that the respondent unlawfully interfered with her privacy, breaching the APPs, by:

- failing to provide her with access to her personal information (the Board Response) (APP 12.1) (**Issue 1**)
- failing to respond to her request for access within a reasonable period of time (APP 12.4) (**Issue 2**)
- failing to take steps that are reasonable in the circumstances to give access in a way that meets her needs and the respondent's needs (APP 12.5) (**Issue 3**); and
- failing to provide reasons for the refusal to provide access (APP 12.9) (**Issue 4**).

15. The complainant seeks a declaration that she is entitled to direct access. The complainant does not seek an apology or compensation from the respondent.

16. On 26 February 2015, the OAIC commenced its investigation into the complainant's complaint under section 40(1) of the Privacy Act.

17. The matter was not resolved through conciliation and I have decided to determine the matter under section 52 of the Privacy Act.



18. In making my determination, I have considered the following documents, provided to the OAIC by each of the parties during the course of the investigation:

    - email from AHPRA to the complainant dated 20 July 2014;
    - letter from AHPRA to the complainant dated 30 July 2014;
    - letter from the respondent to the complainant dated 18 September 2014;
    - complaint to the OAIC dated 26 September 2014;
    - the respondent's submissions dated 12 March 2015; 14 April 2015; 9 July 2015 and 9 December 2016; and
    - the complainant's submission dated 7 June 2016.

The Law

19. 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:

    - 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));
    - the respondent must take specified steps within a specified period to ensure that such conduct is not repeated or continued (s 52(1)(b)(ia));
    - the respondent must perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant (s 52(1)(b)(iii)); or
    - it would be inappropriate for any further action to be taken in the matter (s 52(1)(b)(vi)).

20. As the request for access was made after 12 March 2014, the Australian Privacy Principles apply. The 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**).

21. Subject to certain exceptions, which do not arise in this case, section 15 of the Privacy Act prohibits an APP entity from doing an act, or engaging in a practice, that breaches an APP.

22. The respondent is a medical practitioner, and as such is an APP entity. 'APP entity' is defined at section 6 of the Privacy Act as 'agency or organisation'. 'Organisation' is defined at section 6C to include an individual, and by operation of section 6D will extend to an individual providing a health service that holds health information, such as a medical practitioner. The APPs therefore apply to the respondent in respect of the complaint.

The First Issue - APP 12.1

23. The complainant alleges that the respondent failed to comply with APP 12.1, which provides that where an APP entity holds personal information about an individual, it must on request from that individual, give access to the individual to their personal information. There are a number of exceptions to this requirement, and apart from APP 12.3(a), which is addressed below, these do not arise in this case.

24. 'Personal information' is defined at section 6 to be "information or an opinion about an identified individual, or an individual who is reasonably identifiable". I am satisfied that the Board Response constitutes personal information. Despite the respondent's contention that she had in fact not retained the Board Response in full (as it was apparently a lengthy report),[1] the respondent has the right or power to deal with that information, including to access it. If required, the respondent could readily request that AHPRA provide the Board Response to her. I am therefore also satisfied that it is information "held" by the respondent.

25. At the time of the complainant's original request for information in September 2014, the respondent gave no reason for the refusal to provide access to the personal information sought. Since the OAIC commenced its investigation, the respondent has relied upon an exception to APP 12.1, contained at APP 12.3(a). That exception provides that the entity is not required to give the individual access to the personal information to the extent that "the entity reasonably believes that giving access would pose a serious threat to the life, health or safety of any individual, or to public health or public safety".

26. In support of her reliance on APP 12.3(a), the respondent says the following:

    a. She believes that if the complainant was to be granted access, that this would cause her significant distress, and deterioration of her mental condition which poses a threat to life, health and safety.

    b. She considers that her concerns are reasonable and justified where she treated the complainant for severe bipolar and depression for over 10 years, and is intimately familiar with the nature of the complainant's mental condition.

    c. She is aware that the complainant's mental disorder developed in her early twenties and has remained with her for her entire life without ever resolving. The complainant's disorder has resulted in serious attempts on her life and led to multiple hospital admissions. The respondent's opinion is that the complainant's health condition is not one that she can recover from, rather it presents as times of wellness and times of intense illness. It requires ongoing treatment and is lifelong.

    d. The complainant's condition can become very serious very quickly in response to trigger events.

[1] The Respondent's submissions to the OAIC; 9 July 2015, page 2 and 9 December 2016, page 2.

e. The seriousness of the complainant's mental condition is further emphasised by the need for ECT, which is used for patients whose mental illness cannot be managed by other forms of less invasive treatment.

f. She recalls that the complainant's previous deterioration was triggered by feedback relating to her personality, behaviour and/or presentation.[2]

27. The complainant has provided a letter from her treating general practitioner, who has treated the complainant since September 2014 on eleven occasions. That letter includes the following statements:

> In making a decision about whether to give access, providers may need to take into account when they last saw the patient….the respondent saw the complainant 2 years and 9 months ago…at no stage since September 2014 did the complainant display any evidence of mental instability particularly of a type and severity which could induce self-harm under any stress or provocation. I believe that the probability of harm being caused to the complainant by the disclosure would be extremely remote.[3]

28. In response to that letter, the respondent submits that she is a highly qualified and experienced psychiatrist who would have a better understanding of the complainant's mental health after 10 years of care than a general practitioner who has consulted with the complainant on 11 occasions. The respondent notes that the complainant's general practitioner has also not seen the Board Response, and would thus be unable to fully assess its possible impact upon the complainant.[4]

Approach to construction of APP 12.3(a) exception

29. The approach to statutory construction set out by the High Court in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 ("Alcan") summarises the current approach in Australia. The majority of Hayne, Heydon, Crennan and Kiefel JJ said at [47]:

> This court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.

30. Section 29 of the Privacy Act states that I must have due regard to the objects of the Act in performing my functions and exercising my powers, conferred by the Act. Relevantly, the objects of the Act include to promote responsible and transparent handling of personal information by entities and to recognise that the protection of the privacy of individuals is balanced with the interests of entities in carrying out their functions or activities (section 2A).

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[2] The Respondent's submission to the OAIC, 9 December 2016, pages 2-4.

[3] Letter from the Complainant's treating GP to the OAIC, 8 February 2016.

[4] The Respondent's submission to the OAIC, 9 December 2016, pages 3-4.

31. There are a number of matters which must be considered in respect of the APP 12.3(a) exception. These are:
    - what constitutes a serious risk to life, health or safety?
    - where is the threshold of "serious" risks, and those which are not serious?
    - is the test of whether the entity holds the relevant belief an objective or subjective one?
    - at what time must the belief be formed?

32. Neither the composite words "life, health or safety" nor the individual words are defined in the Privacy Act. They will therefore take on their ordinary meaning. The *Macquarie Dictionary* relevantly defines 'safety' to be "the state of being safe; freedom from injury or danger". 'Health' means "the general condition of the body or mind with reference to soundness and vigour".[5]

33. It is apparent that many different matters may constitute a risk to life, health or safety. In my view, this includes risks to a person's mental health. The APP guidelines, which provide guidance on how the OAIC will interpret the APPs, and matters that may be taken into account when exercising functions and powers under the Privacy Act, confirm the position that serious threat to life, health or safety can include a threat to a person's physical or mental health and safety, such as the incursion of significant distress or lead to self-harm.[6]

34. In relation to what level of risk constitutes a 'serious' risk, the APP guidelines provide:

> A 'serious' threat is one that poses a significant danger to an individual or individuals. The likelihood of a threat occurring as well as the consequences if the threat materialises are both relevant. A threat that may have dire consequences but is highly unlikely to occur would not normally constitute a serious threat. On the other hand, a potentially harmful threat that is likely to occur, but at an uncertain time, may be a serious threat.[7]

35. As to whether the nature of belief is to be determined objectively or subjectively, the APP guidelines note that the entity must have a reasonable basis for the belief, and not merely a genuine or subjective belief. It is the responsibility of an entity to be able to justify its reasonable belief.[8] The test is an objective one, based on an evaluation of the known facts, circumstances and consideration which may bear rationally upon the issue in question.[9]

36. As a matter of practicality, the time at which the decision is to be made is when the entity is considering the request for access, based on the information available at the time. In exercising my powers under section 52 of the Privacy Act, I must determine whether the respondent could properly rely upon the exception at the time of refusal. In determining the appropriate relief to be granted, if any, I may have regard to the circumstances since that time, and what is now reasonable in the circumstances.

37. I have conflicting opinions from the respondent and the complainant's treating general practitioner as to whether accessing the Board Response would pose a serious threat to the complainant's life, health or safety. The respondent is a highly qualified psychiatrist, who treated the complainant for approximately

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[5] *Macquarie Dictionary Online*, 6th edition, accessed 22 December 2016.

[6] APP Guidelines, [12.35].

[7] APP Guidelines, [C. 9].

[8] APP Guidelines, [B. 111].

[9] *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 430 (Gleeson CJ & Kirby J).

ten years, and I accept that she is well placed to provide an opinion as to the effect on the complainant's mental health if she were to access the Board Response. It is the respondent's position that access to the Board Response would cause the complainant significant distress, and cause deterioration in her mental state.

38. As noted by the complainant's treating general practitioner, the respondent has not treated the complainant since May 2013. It is the general practitioner's view that this is a relevant factor in assessing whether or not access should be provided. In response, the respondent notes that the complainant's condition is lifelong and will not resolve. The respondent also notes that the general practitioner has not seen the Board Response and is unable to fully assess its impact on the complainant.

39. I hold some concern that the respondent did not raise this basis for refusal to provide access prior to the OAIC commencing its investigation and did not provide reasons for refusal to provide access. Nonetheless, I am satisfied that the respondent did in fact hold this view, and continues to do so. I am also satisfied that the potential harm identified by the respondent, as identified at paragraph 26, is serious.

40. In determining whether the respondent's belief was reasonably held, I have had regard to the letter provided by the complainant's treating general practitioner. I accept that the general practitioner is qualified to express the opinion contained in that letter. I would expect that she would be required to make similar decisions on access herself from time to time.

41. I must determine whether to accept the belief held by the respondent, supported by her medical opinion, or the opinion offered by the complainant's current treating general practitioner. In light of the respondent's knowledge of the material contained in the Board Response, her history of treatment of the complainant, and the ongoing nature of the complainant's mental condition, I am satisfied that the respondent held the reasonable belief that giving access would pose a serious threat to the life, health or safety of the complainant and that the exception at APP 12.3(a) could have been relied upon to refuse to grant access at the time of the request, and could continue to be relied on.

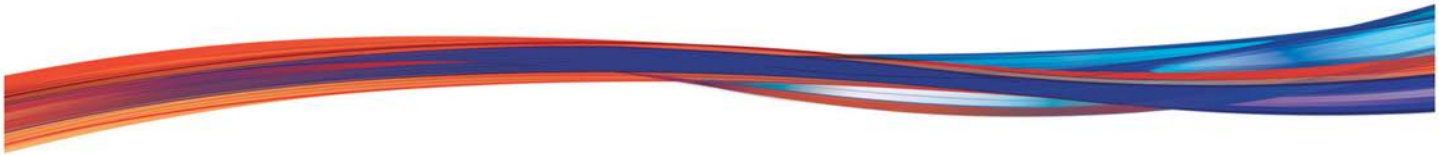
42. In making this finding, I have considered both the right of the complainant to access her personal information and the interests of the respondent in acting to prevent a serious threat to the complainant's life, health or safety.

The Second Issue - APP 12.4

43. The complainant alleges that the respondent failed to respond to her request for access on a number of occasions, contrary to APP 12.4(a)(ii) which requires an organisation to respond to a request for access within a reasonable period.

44. On 3 September and 17 September 2014, the complainant wrote to the respondent requesting a copy of the Board Response.

45. On 18 September 2014, the respondent replied to the request in the terms set out at paragraph 11 of this determination, namely "I received your letter requesting a copy of my response to AHPRA regarding your notification. I am afraid I cannot help you with your request".



46. I must determine whether the period between the request and the respondent's refusal, being 15 days, is a reasonable period in the circumstances. The APP guidelines indicate that as a general guide, a reasonable period should not exceed 30 calendar days.[10]

47. The guidelines outline some of the factors that may be relevant in assessing what is a reasonable period for responding to a request for access under APP 12, including the scope and clarity of the request, whether the information can be readily located and assembled and whether consultation with the individual seeking access is required.[11] There is no information before me to suggest that any delay in responding to the complainant's request was justified. Even so, on general administrative terms, 15 days is not indicative of a delay and would, on any view, be considered a reasonable period in the circumstances to respond to the request.

48. I am therefore satisfied that the respondent did not breach APP 12.4(a).

The Third Issue - APP 12.5

49. APP 12.5 provides that where an APP entity refuses to give access to personal information because of APP 12.3, it must take steps (if any) as are reasonable in the circumstances to give access in a way that meets the needs of the entity and the individual. This may include the use of a mutually agreed intermediary.

50. The relevant time to determine whether there has been a breach of APP 12.5 is at the time the respondent received the request and has refused to grant access, relying on the exception at APP 12.3. The APP entity is required to give some consideration, nonetheless, as to what steps it may take to give access in some alternative or reduced manner. Those steps must be reasonable in the circumstances, which is to be assessed objectively.

51. It is apparent that, at the time that the complainant sought access, the respondent did not give any consideration as to what steps she might take to give access in a way that meets the needs of both the entity and the individual.

52. Depending on the particular circumstances, it may be that there are no steps which would be reasonable in the circumstances and access could not be granted in a way which meets the needs of both the entity and the individual. There is also an obvious tension between the needs of both the entity and individual, and in some circumstances no steps which could meet the needs of both. Taking these matters into account, it may have been open to the respondent to form the view that there were no steps available and to refuse access. However, APP 12.5 does require that there has been at least some consideration.

53. While I accept that the respondent did ultimately consult with the complainant about providing access, this did not occur until approximately six months after the complainant's initial request for access on 3 September 2014 was refused, and after subsequent access requests on 21 October and 8 December 2014 were not responded to, and the OAIC had commenced its investigation.

[10] APP guidelines, [12.67].

[11] APP guidelines, [12.67].

54. Over that period, the respondent took no steps to consult with the complainant about providing access. The respondent maintains the primary position that access to the personal information should not be provided to the complainant.

55. Under APP 12.5, the respondent was required to give consideration to what steps (if any) were reasonable in order to give access. One way to do so would be to consult with the complainant about facilitating access in a way that sought to manage the complainant's disorder, in order to mitigate the perceived threat to her life, health or safety. The APP Guidelines provides a number of examples of ways in which the respondent could have explored providing at least some information to the complainant. These include, for instance:

    - deleting certain personal information, and providing a redacted version
    - giving a summary of the requested personal information; and
    - facilitating access through a mutually agreed intermediary, which is referred to in APP 12.6.

56. The respondent in this case, gave no consideration at all as to what steps may have addressed any concerns as to the effect of access on the complainant's health, having regard to the circumstances and meeting the needs of the entity and the complainant. Even if there were no steps, that consideration must first be undertaken. Accordingly, I find that the respondent has breached APP 12.5.

57. As to whether I should make any further declaration as to access, I may have regard to material which was not available to the respondent at the time she was required to consider access. I address this below in my findings as to access.

The Fourth Issue - APP 12.9

58. APP 12.9 provides that, if an APP entity refuses to give access, or to give access in the manner requested by the individual, the entity must give the individual written notice, setting out:

    - the reasons for the refusal, except to the extent that it would be unreasonable to do so, having regard to the grounds for refusal;
    - the complaint mechanisms available to the individual; and
    - any other matters prescribed by the regulations made under the Privacy Act.

59. The written notice provided to the complainant by the respondent on 14 September 2014 did not provide any reasons at all for the refusal to provide access, or any complaint mechanisms available. No other relevant matters are prescribed by regulation, so this does not arise.

60. No written notice was provided to the requests for access of 21 October and 8 December 2014.

61. An APP entity is not required to explain the ground of refusal to the extent that it would be unreasonable to do so. The complainant was aware, in general terms, of the content of the Board Response and I consider that it would have been reasonable for the respondent to provide some explanation of the reason for refusal, even if she were circumspect in explaining her reasons for refusal.

62. The complaint mechanisms that were available to the complainant were not set out in the reply of 14 September 2014. The respondent's reply should have explained the complaint options available and the steps that should be followed, including that a complaint may be made to the OAIC.[12]

63. For the reasons set out above, I am satisfied that the respondent has breached APP 12.9.

Findings

Access

64. I have found that the respondent has interfered with the complainant's privacy, by not taking reasonable steps, if any, to give access in a way that meets the needs of the entity and the individual, and by not providing the complainant with some explanation of the reason for access refusal and the mechanisms available to her to complain about the refusal.

65. The complainant seeks a declaration that she is entitled to direct access to her personal information.

66. The respondent has indicated that, failing acceptance of her primary position, and if I proceed to grant access to the Board Response, then access should be provided with appropriate psychiatric support. The respondent suggests that access be in the presence of an independent, senior psychiatrist, of similar medical training and experience as the respondent, who could adequately explain the content of the Board Response. She suggests that such an approach would mitigate against the risk of psychological harm to the complainant. The respondent suggests that the practitioner should review the Board Response prior to consulting with the complainant, and that the complainant must have access to the documents on one occasion only, and take no photographs, in order that she does not fixate on the Board Response.

67. The respondent opposes the complainant having access through a treating psychologist, who she considers would not have the appropriate qualifications, background and skills to interpret the hospital records contained in the Board Response. The respondent also considers that the intermediary psychiatrist should be an impartial third party, as the information may be negatively construed, and have the real risk of destroying any therapeutic relationship with that practitioner.[13]

68. Section 52(1)(b) provides that I can make a declaration that the respondent must perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant.

69. I am satisfied that in the circumstances, and considering the complainant's right to access her personal information as well as the needs of the respondent, that, in line with the intent of APP 12.5 it is reasonable and appropriate that any access be provided through an intermediary, as contemplated by APP 12.6.

70. I have considered the respondent's submission as to the best manner in which access through an intermediary may be facilitated, to best reduce any potential of harm. I accept that access should be

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[12] APP guidelines, [12.87]. Where applicable the complaint mechanisms may also need to include information about any relevant recognised external dispute resolution body.

[13] The Respondent's submissions to the OAIC, 9 July 2015; 15 December 2015; 9 December 2016.

through a qualified psychiatrist, who will understand and be able to explain the documents to the complainant. I have also had access to the report of the complainant's general practitioner, and the complainant's submissions. This material would not have been available at the time the respondent was required to consider how access should be granted, if at all. Since it is now before me, I may consider it. In my view, access should be provided through a qualified and registered psychiatrist with whom the complainant feels comfortable. I therefore find that it is reasonable that access be provided through the complainant's psychiatrist of choice, so long as they are a member of the RANZCP.

71. In circumstances where the intermediary will be required to consider a large volume of documents, and explain their contents to the complainant, I do not consider it reasonable that access be granted on one occasion only.

72. The intermediary psychiatrist will have the opportunity to assess the effect of access on the complainant's mental health and is expected, as part of the therapeutic relationship, and in light of my findings, to have regard to whether any parts of the Board Report would pose a serious threat to the complainant's life, health or safety. If such a view is formed, the intermediary is expected to use their professional judgment as to how access may be granted, if at all. This will include using that judgment to determine:
    a. whether to grant access at all;
    b. how many sessions would be required;
    c. whether the complainant should be allowed access to any part of the Board Report; and
    d. any other matters relating to how access should be granted.

Damages

73. Having found that the complainant has breached APP 12.5 and APP 12.9, 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'.

74. I am guided by the principles on awarding compensation summarised by the Administrative Appeals Tribunal (**AAT**) in *Rummery and Federal Privacy Commissioner.*[14]

Economic loss

75. In *EQ and Office of the Australian Information Commissioner,*[15] 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'.

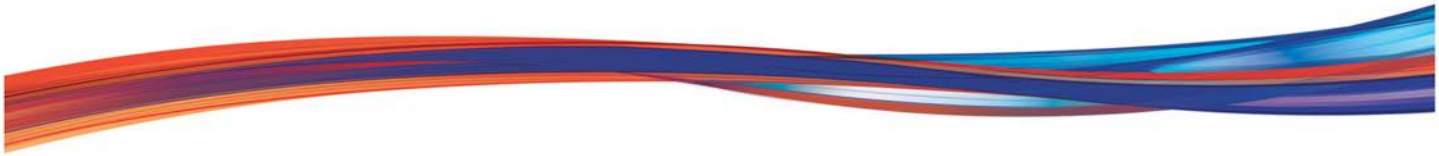
76. The complainant has not provided any information in relation to actual loss or damage suffered, and has not requested compensation for economic loss. In these circumstances, I am satisfied that there is no basis for awarding compensation for economic loss.

Non-economic loss

77. In *EQ and Office of the Australian Information Commissioner,* the AAT noted that "it is well settled that the damages for non-economic loss are paid as compensation for pain and suffering, loss of amenity in a

[14] [2004] AATA 1221, [32].

[15] [2016] AATA 785 (6 October 2016).



life and a loss of enjoyment of life and that an award of non-economic loss is an evaluative judgement" and is a matter of "opinion, impression, speculation and estimation" (see *Dell v Dalton* [1991] 23 NSWLR 528).[16]

78. It was further noted in *EQ and Office of the Australian Information Commissioner* 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 Shieban Pty Ltd*[17] 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.

79. In this case, it is open to me to consider whether or not it is appropriate to award damages for non-economic loss in respect of the impact of the respondent's interference with the complainant's privacy.

80. In determining whether it is appropriate to award damages, I have taken into account the circumstances of the refusal to provide access. These circumstances included that the respondent provided no reasons for refusal, and resolutely maintained that access should not be granted at all, without consideration of any other manner of access, prior to the complaint being made to the OAIC and subsequent attempts to conciliate. The complainant has provided information that she has experienced "pressure" from "this protracted frustrating process".[18]

81. Having regard to all the circumstances, I have determined that $1,000 is an appropriate amount of compensation, for the complainant's non-economic loss.

Aggravated damages

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

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

- where the respondent behaved 'high-handedly, maliciously, insultingly or oppressively in committing the act of discrimination' and
- 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.'[19]

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[16] [2016] AATA 785 (6 October 2016) at [53].

[17] *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.

[18] Complainant email to the OAIC, 20 July 2015.

[19] *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].

84. I do not consider the way in which the respondent has conducted her case falls within those categories, as to justify an award of aggravated damages.

Declarations

85. I declare that the complaint is substantiated under section 52(1)(b)(i)(B) of the Privacy Act, on the following bases:

    a. the respondent breached APP 12.5 by failing to consider what steps, if any, may have addressed any concerns as to the effect of access on the complainant's health, having regard to the circumstances and meeting the needs of the entity and the complainant; and

    b. the respondent breached APP 12.9 by failing to provide the complainant with a written notice that sets out the reasons for the refusal to provide access and the mechanisms to complain about the refusal.

86. I declare, under section 52(1)(b)(ia) of the Privacy Act, that within 60 days of the date of this determination, the respondent shall provide the complainant's personal information, being the Board Response, to a psychiatrist of the complainant's choice, who is a member of the RANZCP and who will act as an intermediary in respect of the complainant's access to the Board Response. The intermediary is expected to use their professional expertise and judgment in deciding how access by the complainant to the Board Response is to be provided, if at all. Any access is to be on as many occasions as the intermediary psychiatrist considers appropriate, and in whatever way the intermediary psychiatrist considers appropriate, including by providing copies of the information.

87. I declare, under section 52(1)(b)(iii) of the Privacy Act, that within 60 days of the date of this determination the respondent must pay the complainant the amount of $1,000 for non-economic loss caused by the respondent's interference with the complainant's privacy.

Timothy Pilgrim
Australian Privacy Commissioner
26 June 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 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.