Australian Government
Office of the Australian Information Commissioner

'OJ' and Department of Home Affairs (Privacy) [2018] AICmr 35 (19 March 2018)

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

Complainant:	**'OJ'**
Respondent:	**Department of Home Affairs**
Decision date:	**19 March 2018**
Application number:	**CP16/00535**
Catchwords:	**Privacy — *Privacy Act 1988* (Cth) — Information Privacy Principles — IPP 11 — Australian Privacy Principles — APP 6 — Required disclosure of personal information — No breach**

Contents

Determination

1. I find that the respondent, the Department of Home Affairs (formerly the Department of Immigration and Border Protection) (**the Department or DHA**), did not interfere with the complainant's privacy by using and disclosing the complainant's personal information in response to *A Current Affair*'s request for comment.

2. I find that the respondent did not interfere with the complainant's privacy by disclosing the complainant's personal information to the Department of Human Services Victoria (**DHSV**).

The Complaint(s)

3. The complainant complained to the Office of the Australian Information Commissioner **(OAIC**) on 24 December 2014, alleging that the Department has interfered with his privacy by:

   (i) disclosing his personal information to the Department of Human Services Victoria (**DHSV complaint**); and

   (ii) disclosing his personal information to the television show, *A Current Affair* (**ACA, ACA complaint**).

4. The DHSV complaint arises from an affidavit filed in the Federal Circuit Court of Australia on 3 September 2013, which suggests that the Department disclosed information about the complainant's immigration status to the DHSV. The Department has admitted to disclosing the information to DHSV and explained that the disclosure was pursuant to a subpoena issued by that Court.

5. The circumstances giving rise to the ACA complaint are outlined below.

6. The Minister for Home Affairs (**Minister**) is responsible for the administration of the *Migration Act 1958* (Cth) (**Migration Act**). In July 2014, the complainant was in an immigration detention centre following the cancellation of his visa on character grounds. The matter of the complainant's detention, his visa status and his departure arrangements are all matters dealt with by the DHA. The decision to cancel visas and make deportation orders are decisions of the Minister under the Migration Act[1].

7. On or about 30 July 2014, ACA contacted the Department's Portfolio Media Unit, initially by phone and then by email seeking a response to a number of allegations and questions about the complainant (**the ACA email**). These relevantly included:

   - an allegation that the complainant was interacting with children at the immigration detention centre despite his criminal convictions;
   - an allegation that the complainant had access to a phone in the immigration detention centre which he was using to access and send pornography;
   - an allegation that the complainant was unsupervised in the immigration detention centre;
   - a question in respect to the status of a deportation order that had been made against the complainant;
   - a question about how Family Court proceedings in which the complainant was involved were being funded.

8. The ACA request included personal information about the complainant including:

   - his name;
   - the location of the detention centre where he was being detained;
   - information about his immigration visa status.

9. The ACA email was forwarded by the Portfolio Media Unit to the Minister's Media Adviser and the then Minister. The Minister's Media Adviser responded and asked that the matter be dealt with as a matter of urgency. The DHA's Portfolio Media Unit subsequently prepared a response to the ACA request. The response contained a section titled "*Talking Points*." Some of those talking points were general in nature, however some contained information specifically about the complainant, relevantly:

   > "This person's visa was cancelled as a result of his offences, and he will be removed from the country as soon as possible.
   >
   > My department and I continue to liaise with the relevant authorities in this person's country of nationality to progress his removal from Australia;
   >
   > It is incorrect to suggest that this individual has unsupervised access to children…"

10. The DHA's response also contained a section titled "*Re mobile phones,*" and a section titled *"Background (not for release to media),"* which contained a number of sub-headings with detailed information about the complainant's visa and immigration status, his criminal history and details of a search that had been conducted on the complainant's room at the detention centre.

[1] Sections 116, 200 and 203 of the Migration Act.

11. The DHA advises that it followed its "usual procedures" to obtain clearance from various senior members of the Department, before the DHA's response was provided to the Minister's office, which subsequently dealt with the media outlet.

12. The complainant has provided my office a copy of an article published on the ACA website. The relevant part of the article is entitled "*Statement from a Minister of Immigration Spokesman*," and relevantly contains the following statements:

> "The person's visa was cancelled as a result of his offences and he will be removed from the country as soon as possible."
>
> "The Minister and Department continue to liaise with the relevant authorities in this person's country of nationality to progress his removal from Australia."
>
> "The Minister is advised that during a search of the detainee's room a mobile phone was found and removed."[2]

13. The DHA submits that the information that was disclosed to the Minister in response to the media request specifically responded to the matters on which the ACA sought clarification and to the allegations made against the Department and the Minister. The DHA contends that the amount of detail provided in the response to ACA's request was reasonably necessary to respond meaningfully to the criticism of the administration of legislation for which the Minister is responsible.

The Law

14. The DHSV complaint relates to conduct that occurred before the date the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (**Privacy Amendment Act**), substantively took effect, being 12 March 2014. Prior to the Privacy Amendment Act, the Information Privacy Principles (**IPPs**) regulated the standards for the collection, use, disclosure and security of personal information, which government agencies subject to the Privacy Act had to uphold. Since 12 March 2014, the Australian Privacy Principles (**APPs**) have been the standards that regulate the collection, use, disclosure and security of personal information held by APP entities, including agencies, subject to the Privacy Act.

15. The Privacy Amendment Act also amended the meaning of 'personal information' within the Privacy Act.

16. Prior to 12 March 2014, 'personal information' was defined under section 6 of the Privacy Act as:

> "'personal information' means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion."

17. Since 12 March 2014, personal information has been defined under section 6 of the Privacy Act as:

> "'personal information' means information or an opinion about an identified individual, or an individual reasonably identifiable:
>
> (a) whether the information or opinion is true or not; and
>
> (b) whether the information or opinion is recorded in a material form or not."

[2] This last statement was not one of the 'talking points' and appears to have been drawn from the further background information. I have not been provided with correspondence, which approved the release of this information to ACA.

18. Section 6 of the Privacy Act defines an 'APP entity' to include an agency, which relevantly includes *a Minister or a Department. '*Department' is defined by the Privacy Act to mean *an agency* within the meaning of the *Public Service Act 1999* (**PS Act**). The PS Act defines 'agency' to mean a Department of State. The DHA is a Department of State listed within the *Administrative Arrangements Order* (1/9/2016) (Cth) (**Administrative Arrangements Order**). The DHA is therefore an APP entity within the meaning of the Privacy Act.

19. Section 13 of the Privacy Act provides that an act or practice of an APP entity that breaches an APP in relation to personal information is, for the Act, an interference with the privacy of the individual who the information is about. Section 13 of the Privacy Act, prior to 12 March 2014, similarly provided that an act or practice is an interference with the privacy of an individual, where the act of or practice engaged in by an agency breaches an IPP in relation to personal information that relates to the individual. Section 15 of the Privacy Act requires an APP entity not to do an act or engage in a practice that breaches the APPs. An equivalent provision was contained in section 16 of the Privacy Act prior to 12 March 2014.

20. The DHSV complaint alleges a breach of IPP 11, and the ACA complaint alleges a breach of APP 6.

21. Under the IPPs, IPP 11.1 limited disclosures of personal information to specific circumstances, relevantly in this case:

> d) the disclosure is required or authorised by or under law.

22. Under the APPs, APP 6 relevantly provides:

> 6.1 If an APP entity holds personal information about an individual that was collected for a particular purpose (the primary purpose), the entity must not use or disclose the information for another purpose (the secondary purpose) unless:
>
> (a) the individual has consented to the use or disclosure of the information; or
>
> (b) subclause 6.2 or 6.3 applies in relation to the use or disclosure of the information.
>
> 6.2 This subclause applies in relation to the use or disclosure of personal information about an individual if:
>
> (b) the use or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order;…

23. Both the DHA and the Minister are APP entities within the meaning of the Privacy Act. Section 7 of the Privacy Act relevantly provides as follows:

> **Acts and practices of agencies, organisations etc.**
>
> (1) except so far as the contrary intention appears, a reference in this Act (other than section 8) to an act or to a practice is a reference to:…
>
> (a) an act done, or a practice engaged in, as the case may be, by an agency (other than an eligible hearing service provider), a file number recipient, a credit reporting body or a credit provider other than:…
>
> (iii) a Minister…
>
> (e) an act done, or a practice engaged in, as the case may be, by a Minister in relation to a record that is in the Ministers' possession in his or her capacity as a Minister and relates to the affairs on an agency…

24. Section 52 of the Privacy Act provides that, after investigating a complaint, I may make a determination dismissing the complaint, or finding the complaint substantiated and making certain declarations provided for under that section.

IPP 11

25. The complainant alleges that the Department failed to comply with IPP 11.1(d). Prior to 12 March 2014, IPP 11.1 outlined when an agency, which had possession or control of a record that contained personal information, may disclose the information. Those exceptions to the general prohibition on disclosure were found in IPP 11.1(a) – 11.1(e).

The DHSV complaint

26. In respect to the DHSV complaint, the DHA has informed my office that it disclosed the complainant's personal information in compliance with a subpoena. The Department relies on the IPP 11.1(d) 'required or authorised by or under law' exception and states that the disclosure was required by Australian laws.

27. The DHA advises that the complainant's personal information was sought under statutory power by a subpoena issued by the Federal Circuit Court. The DHA advises it disclosed the complainant's personal information in compliance with that subpoena. I note that its disclosure was required by Australian laws, those being the *Federal Circuit Court of Australia Act 1999* (Cth) and *Federal Circuit Court Rules 2001*. These laws make it an offence not to comply with a subpoena. Accordingly, I am of the view that the disclosure of the complainant's personal information pursuant to this subpoena falls within the scope of the IPP 11.1(d) exemption to the prohibition on disclosing personal information.

28. I find therefore that the DHA did not interfere with the complainant's privacy in respect to the DHSV complaint.

APP 6

29. The complainant also alleges that Department failed to comply with APP 6, in respect of the DHA's disclosure to the Minister's office.

30. APP 6 outlines when an APP entity may use or disclose personal information. Specifically, APP 6 requires that if an APP entity holds personal information about an individual that was collected for a particular purpose (the **primary purpose**), the entity must not use or disclose the information for another purpose (the **secondary purpose**) unless the individual has consented to the use or disclosure of the information or where an exception under APP 6.2 applies to the use or disclosure.

31. Having determined that there has been a disclosure or use of the complainant's personal information, consideration then turns to the purpose for which the information was collected (termed the primary purpose). In this case, the primary purpose of the collection of the complainant's information was to assess and control his visa status and for purposes associated with his detention in the immigration detention facility. That is, the information was collected for administration of immigration laws as they pertained to the complainant personally.

The ACA complaint

32. There are a number of acts which are relevant to the ACA complaint:

    (i) the preparation of the response to the ACA request by the Department and the provision of that response, including the complainant's personal information, by the Department to the Minister's office; and

    (ii) the provision of the complainant's personal information by the Minister's office to ACA.

33. As I note at paragraphs [18] and [23] that the Department and the Minister are separate entities under the Privacy Act. This complaint is against the Department, not the Minister, and solely concerns the acts and practices of the Department. The acts that fall within my consideration for the purpose of this determination are therefore necessarily, the Department's use of the complainant's personal information and its disclosure to the Minister's office.

34. The Department's position generally is that this use and disclosure fell within its ministerial reporting obligations about the operation and administration of the Minister's portfolio.

35. The response to the ACA request, through which the complainant's personal information was disclosed to the Minister's office, was prepared and coordinated by the Department's media branch. Some of the information included in the disclosure to the Minister relates to decisions, which the Minister made under the Migration Act, being the decision to cancel the complainant's visa and the decision to make a deportation order in respect to the complainant[3]. The response expressly authorised some of the information to be released publicly. The DHA has explained that this response was prepared in accordance with its usual procedure, including obtaining clearance from senior members of the Department, as I understand it, the Secretary's delegates.

36. I consider that the disclosure of the complainant's personal information in connection with Ministerial reporting obligations and in response to a media enquiry are not consistent with the primary purpose of the collection of that information and are therefore secondary purposes within the meaning of APP 6.

Authorised or required by or under Australian law

37. The disclosure or use of the complainant's personal information for a secondary purpose is only permitted under APP 6.2 in limited circumstances, the relevant exception in this case being APP 6.2(b) whereby the act of use or disclosure is required or authorised by, or under, Australian law.

38. The DHA contends that the APP6.2(b) exception applies as the use and disclosure of the complainant's personal information was authorised or required by or under the following Australian laws:

    (i) the *Public Service Act 1999* (**PS Act**);

    (ii) the *Public Governance, Performance & Accountability Act 2013* (**PGPA Act**);

    (iii) the doctrine of responsible government arising from the Administrative Arrangements Order and section 64 of the Constitution.

39. 'Required' has been found to mean 'demands' or 'necessitates'.[4] An APP entity that is 'required' by an Australian law to handle information in a particular way has a legal obligation to do so, and cannot

[3] Sections 116 and 200 of the Migration Act.
[4] *Secretary to the Department of Prime Minister & Cabinet v Hulls* [1999] VSCA 117.

choose to act differently.[5] There could be situations where some actions, impliedly require an APP entity to disclose personal information. This is the Department's contention in this case. It argues that the PS Act required it to disclose to the Minister information about the complainant, which of necessity involved a disclosure of personal information.

40. In contrast, an APP entity that is 'authorised' under an Australian law or a court/tribunal order has discretion as to whether it will handle information in a particular way. The entity is permitted to take the action but is not required to do so.[6] The authorisation may be indicated by a word such as 'may', but may also be implied rather than expressed in the law or order.[7]

41. The Department refers to s 57(2) of the PS Act as constituting a 'requirement' within the meaning of APP 6.2(b). Section 57(2) of the PS Act relevantly provides:

> **Responsibilities of Secretaries**
>
> (2) The responsibilities of the Secretary of a Department are as follows:
>
> (a) to manage the affairs of the Department efficiently, effectively, economically and ethically;
>
> (b) to advise the Agency Minister about matters relating to the Department;
>
> (c) to implement measures directed at ensuring that the Department complies with the law;
>
> (d) to provide leadership, strategic direction and a focus on results for the Department;
>
> (e) to maintain clear lines of communication within the Agency Minister's portfolio, as negotiated between the Secretary and the other Agency Heads in the portfolio;
>
> (f) to engage with stakeholders, particularly in relation to the core activities of the Department;
>
> (g) to manage the affairs of the Department in a way that is not inconsistent with the policies of the Commonwealth and the interests of the APS as a whole;
>
> (h) to ensure that the Agency Minister's portfolio has a strong strategic policy capability that can consider complex, whole-of-government issues;
>
> (i) to assist the Agency Minister to fulfil the Agency Minister's accountability obligations to the Parliament to provide factual information, as required by the Parliament, in relation to the operation and administration of the Department;
>
> (j) such other responsibilities as are prescribed by the regulations.

42. Section 57(3) of the PS Act provides:

> (3) Subsection (2) does not affect a Secretary's responsibilities under any other law.

43. The Department relies generally on the whole of section 57(2) as giving rise to the relevant requirement for the use and disclosure of the complainant's personal information, and has highlighted the particular relevance of section 57(2)(b), being the Secretary's responsibility to advise the Minister about matters relating to the Department. The DHA contends that the disclosure of personal information to the Minster fell within the scope of this responsibility.

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[5] Australian Privacy Principles Guidelines, Office of the Australian Information Commissioner (March 2015) (**APP Guidelines**), [B.129].
[6] APP Guidelines, [B.130].
[7] Ibid.

44. I therefore need to consider whether the use and disclosure to the Minister of personal information held by the Department to respond to the media request goes beyond what would be generally understood to be the fulfilment of a reporting responsibility to the Minister.

45. The Privacy Act seeks to promote the protection of the privacy of individuals. The objects of the Privacy Act include promoting the protection of the privacy of individuals and the balancing of that protection with the interests of entities carrying out their functions or activities.[8] The protection of individual privacy would not, generally, be displaced except by clear and direct provision to the contrary.[9] The PS Act does contain a mechanism for the Regulations to displace the APP 6 protections.[10] The Department does not seek to rely on any such direct authorisation and I note in any case that there is no such direct authority, which is applicable to the circumstances of this complaint.

46. The provision of the PS Act which the Department contends gives rise to the authority or requirement to use and disclose personal information is framed very broadly as "*to advise the Agency Minister about matters relating to the Department."* It is a general conduct requirement, which falls upon the Secretary in the performance of their duties but does not clearly or directly displace any of the Privacy Act protections.

47. The APP guidelines provide nonetheless that an APP entity may be impliedly required or authorised by law to handle personal information in a particular way.[11]In this case, the disclosure is not expressly required or authorised by the PS Act, so I must decide whether s 57 of the PS Act impliedly authorises or requires the DHA's act of disclosure. Whether a disclosure is by implication required or authorised by or under law within the meaning of the Privacy Act, was considered by Deputy President Forgie in *TYGJ and the Privacy Commissioner.*[12]In that case, the Deputy President examined the Department of Veteran Affairs' disclosures of TYGJ's personal information to Defence personnel:

> "The nature of the task to determine whether there is such an implication was described by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*. His Honour considered whether, in exercising powers under s 11(1(1)(b) of the *Aboriginal Land Rights (Northern Territory) Act 1976*, the Minister for Aboriginal Affairs was bound to take into account the comments made by the Aboriginal Land Commissioner on matters in ss50(3)(a) to (d) of that Act. His Honour said:
>
> > The Act does not expressly state that the Minister is bound to take into account the Commissioner's comments on the matter in paras (a) to (d) of s 50(3) in exercising his power under s 11(1)(b) to decide whether or not he is satisfied that a land grant should be made. But a consideration of the subject matter, scope and purpose of the Act indicates that such a finding is necessarily implied by the Statute….The legislature was clearly concerned that the Minister not overlook crucial considerations which might counterbalance or outweigh the fairness and justice of granting the land when making his decision under s 11(1)(b). Accordingly, it provided the means whereby such factors would be analysed and drawn to his attention for the purpose of having them taken into account. That purpose would not be achieved if the Minister was merely entitled, but not bound, to consider these factors."

48. In the *TYGJ case*, DP Forgie found that although the *Occupational Health and Safety (Commonwealth Employment) Act 1991* does not confer power on an employer to release information, the power to do

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[8] Section 2A (a) and (b) of the Privacy Act.
[9] See *Coco v the Queen* (1994) 179 CLR 427.
[10] Section 72E of the PS Act (release of personal information) states that: the Regulations: (a) may authorise the use or disclosure, in specific circumstances, of personal information (within the meaning of the *Privacy Act 1988*); and (b) may impose restrictions on the collection, storage, access, further use or further disclosure of personal information used or disclosed under regulations made for the purposes of paragraph (a).
[11] APP Guidelines, [B.129]-[B.131].
[12] [2017] AATA 1560 (27 September 2017), [298].

so could be implied from the nature of an employer's obligation to protect the health and safety of its workers at work. DP Forgie found that if the disclosure of personal information was made for that purpose, it will have been authorised under law within the meaning of IPP 11.1(d), the former (and equivalent) exception provision to the prohibition on disclosure under the Privacy Act.

49. The objects of the PS Act are set out in s 3 of that Act:

    (a) to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public; and

    (b) to provide a legal framework for the effective and fair employment, management and leadership of APS employees; and

    (c) to define the powers, functions and responsibilities of Agency Heads, the Australian Public Service Commissioner and the Merit Protection Commissioner;

    (d) to establish rights and obligations of APS employees.

50. The responsibilities of the Secretary of the Department under s 57 of the PS Act exist alongside and are limited by other legislative requirements, including those arising under the Privacy Act. Nonetheless, keeping the objects of the Privacy Act in mind, the protections under the Act do not go so far as to prevent the Secretary from fulfilling their responsibilities, relevantly in this case, the section 57(2) responsibility to advise the Minister. In the event that it would not be possible to advise the Minister about a particular matter, without disclosing personal information, such that the disclosure is made for that purpose, then in my view, it will have been required under law within the meaning of APP 6.2(b).

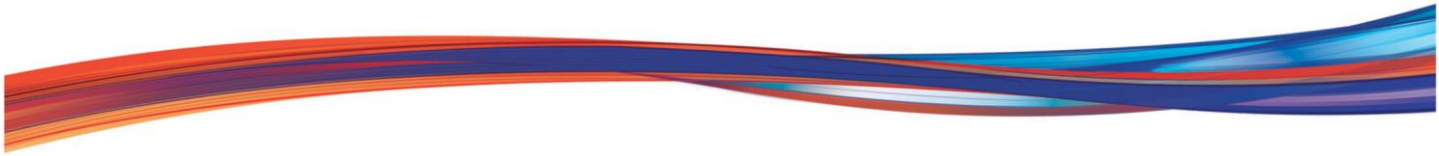
51. In this case, the Department's response to the Minister formed the basis for the Minister to respond to adverse and damaging media reports. The advice canvassed responses specific to the issues raised by ACA. The personal information disclosed was, in my view, necessary to meaningfully respond to the criticisms and questions raised by the ACA. The use and disclosure of that personal information was made for the purpose of discharging the Secretary's obligation to provide the Minister with advice. I am therefore satisfied that the disclosure was required under the PS Act and so comes within the APP 6.2(b) exception to the prohibition on disclosure.

52. The Department also makes a similar submission in respect of an authorisation or requirement arising from the PGPA Act and the duty contained within s 19(1)(b) of that Act, which deals with an entity's duty to keep the responsible Minister informed. The Department additionally relies on the doctrine of responsible government arising from s 64 of the Constitution, which creates "a responsibility for Commonwealth Ministers to account to the Commonwealth Parliament for the administration of Commonwealth departments".

53. There is, however, no need to further address the application of APP 6.2(b), having regard to my conclusion that the disclosure was required under the PS Act pursuant to the APP 6.2(b) exception.

Findings

54. For the reasons I have given, I have decided to make a determination dismissing the complainant's ACA complaint against the DHA. I have made that decision on the ground that the Department's use and disclosure of the complainant's personal information to the Minister of Home Affairs was required under law, coming within the exception to APP 6, set out in APP 6.2(b).



55. For the reasons I have given, I have also decided to make a determination dismissing the complainant's DHSV complaint against the DHA. I have made that decision on the ground that the Department's disclosure of the complainant's personal information to the DHSV was required by law and comes within the exception to IPP 11, set out in 11.1(d).

Declarations

56. I declare that the respondent did not interfere with the complainant's privacy in breach of the Privacy Act by using and disclosing the complainant's personal information to the Minister of Home Affairs in response to *A Current Affair's* request for comment, contrary to APP 6.

57. I declare that the respondent did not interfere with the complainant's privacy in breach of the Privacy Act by disclosing the complainant's personal information to the Department of Human Services Victoria, contrary to IPP 11.

58. I declare, in accordance with s 52(1)(a) of the Privacy Act, that the ACA and DHSV complaints are dismissed.

Timothy Pilgrim
Privacy Commissioner

19 March 2018

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.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman).

The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly. If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other

action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the **Commonwealth Ombudsman's website.**

Accessing your information

If you would like access to the information that we hold about you, please contact the enquiries line. More information is available on the **Access our information** page on our website.