‘QD’ and Dr ‘QE’ and Idameneo (No.123) Pty Limited (Privacy) [2019] AICmr 17 (3 May 2019)

Decision and reasons for decision of the Australian Information Commissioner and Privacy Commissioner, Angelene Falk

Complainant	**‘QD’**
Respondents	**Idameneo (No. 123) Pty Limited** **Dr ‘QE’**
Decision date	**3 May 2019**
Application numbers	**CP15/00971 and CP16/00433**
Catchwords	**Privacy – Privacy Act 1988 (Cth) s 52 – Australian Privacy Principles – APP 12 – Access to personal information – Exception to access – Other means of access – Refusal to give access – No breach**

Determination

1. I find that Idameneo (No. 123) Pty Limited (**Idameneo (No 123)**) and Dr QE did not interfere with the complainant’s privacy as defined in the *Privacy Act 1988* (Cth) (**Privacy Act**) in relation to providing access to the complainant’s personal information upon request under Australian Privacy Principle (**APP**) 12.

2. Accordingly, under s 52(1)(a) of the Privacy Act the complainants’ privacy complaints against Idameneo (No 123) and Dr QE are dismissed.

Background

3. I have set out below the events leading to the making of the privacy complaints, based on the information provided by the parties to the Office of the Australian Information Commissioner (**OAIC**).

4. As the complainant and Dr QE are individuals they have not been named in this determination to protect their privacy.

5. Idameneo (No. 123) owns and operates a number of medical and allied health service centres and provides premises, administrative staff, computers, medical records software, furniture and consumables to general medical practitioners for a fee in order to treat patients.[1]

6. Idameneo (No. 123) holds the medical records of patients who attend its centres and asserts control over those records.[2]

7. Dr QE is a general practitioner who was located at one of Idameneo (No. 123)'s centres (**the medical centre)** at the relevant dates.

8. The complainant was hospitalised overnight by the mental health facility at a hospital (**the hospital**), from 31 May 2014 to 1 June 2014. The discharge summary from the hospital (**the discharge summary**) indicates, among other things, the dates of admission, some background to the hospitalisation, diagnosis, medications, treatment and reasons for discharge.

9. Some time before early May 2015, the complainant contacted the hospital and requested a copy of the discharge summary. The complainant submits they could not pay the fee associated with gaining access to the discharge summary, so the hospital agreed to send it to the medical centre.[3]

10. The complainant submits the discharge summary was required to support an application for admission to a professional body.[4]

11. On 11 May 2015, the complainant phoned the medical centre to ask if it had received a copy of the discharge summary and the receptionist suggested they attend its centre to see one of the general practitioners in relation to the document.[5]

12. On 18 May 2015 the hospital faxed the discharge summary, together with a facsimile coversheet that was marked "private and confidential" to the medical centre addressed to the attention of the complainant's "Treating Doctor"[6].

13. On 23 May 2015 the complainant consulted Dr QE at the medical centre and made a verbal request for a copy of the discharge summary but it was not provided.[7]

14. The complainant telephoned the medical centre on 2, 3 and 4 June 2015 to follow up on the request for a copy of the discharge summary.[8]

15. On 9 June 2015 the complainant attended the medical centre and provided a letter confirming the request to access the discharge summary.[9]

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[1] Idameneo (No. 123)'s submission of 24 February 2017, paragraphs 15 and 34.
[2] Idameneo (No. 123)'s submission of 24 February 2017 paragraph 9; Dr QE's submission of 17 February 2017, paragraph 8.
[3] Complainant's complaint of 16 June 2015.
[4] Complainant's complaint of 16 June 2015; Statutory Declaration of 14 July 2015;
[5] Complainant's complaint of 16 June 2015; and Idameneo (No. 123)'s submission of 24 February 2017, paragraph 22 (a).
[6] Dr QE's submission of 17 February 2017, paragraph 4.
[7] Idameneo (No. 123) submission of 24 February 2017, paragraph 22(b); Dr QE's submission of 17 February 2017, paragraph 4; and Complainant's complaint of 16 June 2015.
[8] Complainant's complaint of 16 June 2015.
[9] Complainant's complaint of 16 June 2015, and Idameneo (No. 123)'s submission of 24 February 2017, paragraph 22(f).

16. The complainant submits that when they attended the medical centre on 9 June 2015, the Practice Manager advised they had consulted with 'the relevant Doctor', who was prepared to release only the front page of the discharge summary. The complainant did not accept this and requested the Practice Manager review the letter and action the request urgently.[10]

17. On 16 June 2015, the complainant made a complaint to the OAIC about the refusal to provide access.

18. The complainant contends that Idameneo (No. 123) and Dr QE have unlawfully interfered with an individual's privacy, breaching the APPs, by:

    - failing to provide access to personal information (the discharge summary) upon request (APP 12.1) **(the first issue)**
    - failing to take steps that are reasonable in the circumstances to give access in a way that meets the needs of the entity and the individual (APP 12.5) **(the second issue)**
    - failing to provide reasons for the refusal to provide access (APP 12.9) **(the third issue)**.

19. On 20 July 2015, the OAIC commenced an investigation into the complaint about Idameneo (No. 123) under s 40(1) of the Privacy Act.

20. On 9 October 2015, Idameneo (No. 123) provided a copy of the full discharge summary to the OAIC and it was provided to the complainant on 12 October 2015.

21. On 9 November 2015, the OAIC commenced an investigation into the complaint about Dr QE under s 40(1) of the Privacy Act.

22. On 12 August 2016, the complainant received an expression of regret from Idameneo (No. 123) and a letter of apology from Dr QE.

23. As the matter was not resolved through conciliation I decided to make this determination under s 52 of the Privacy Act.

24. At the time of this determination, the complainant seeks a declaration of entitlement to compensation for both economic and non-economic loss.

25. In making my determination, I have considered the documents all parties have provided during the course of the investigation, including:

    - the complainant's complaint to the OAIC, received 16 June 2015
    - the complainant's Statutory Declaration dated 14 July 2015 and correspondence dated 15 July 2015, 22 September 2015, 3 January 2016, 3 April 2016, 1 May 2016 and 26 July 2016
    - Idameneo (No. 123)'s submissions dated 24 February 2017, 22 May 2017 and 4 July 2017
    - Dr QE's submissions dated 17 February 2017 and 15 May 2017
    - the complainant's submissions dated 22 February 2017, 21 May 2017 and 4 June 2017

[10] Complainant's complaint of 16 June 2015.

- the discharge summary dated 31 May 2014 -1 June 2014.

The Law

26. 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)(ii));
    - 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 complaint (s 52 (1)(b)(iii))
    - it would be inappropriate for any further action to be taken in the matter (s 52(1)(b)(iv)).

27. As the request for access was made after 12 March 2014, the APPs at Schedule 1 to the Privacy Act apply. The APPs regulate the collection and handling of personal information held by government agencies and certain private sector organisations, known as **APP entities**. 'APP entity' is defined at section 6 of the Privacy Act as an 'agency or organisation'. APP 12 provides for access to an individual's personal information on request by the individual.

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

29. Idameneo (No. 123) falls within the definition of an 'organisation' under s 6C of the Privacy Act and is accordingly an organisation bound by the APPs.

30. Dr QE also falls within the definition of an 'organisation', as s 6C includes an individual, and by operation of s 6D extends to an individual providing a health service that holds health information, such as a medical practitioner. The APPs therefore apply to Dr QE in respect of the complaint.

The first issue – APP 12.1

31. The complainant alleges that Idameneo (No. 123) and Dr QE failed to comply with APP 12.1, which provides that if an APP entity holds personal information about an individual the entity must, on request by the individual, give the individual access to the information.

32. There are a number of exceptions to access, including APP 12.3(a), APP 12.3(d), APP 12.3(f) and APP 12.3(g), which are considered below.

33. Under s 6 of the Privacy Act, an entity 'holds' personal information if the entity has possession or control of a record that contains the personal information. An entity will hold personal information if it physically possesses a record containing the personal information or can access the information by use of an electronic device. An entity also holds a record if it has the right or power to deal with the personal information, even if it does not physically possess or own the medium on which the personal information is stored.[11]

34. 'Personal information' is defined at s 6 of the Privacy Act to be 'information or an opinion about an identified individual, or an individual who is reasonably identifiable'.

35. 'Sensitive information' is also defined at s 6 of the Privacy Act, and includes, among other things, health information, which is defined at s 6FA of the Privacy Act.

36. I am satisfied the discharge summary that was created by the hospital includes the complainant's sensitive information.

37. At relevant times Idameneo (No. 123) held the discharge summary for the purpose of the Privacy Act as it had possession and control of it from the date the hospital faxed it across.

38. As a contractor of Idameneo (No. 123), Dr QE also had the power to deal with certain medical records that Idameneo (No. 123) had possession of and controlled, including the complainant's records and the discharge summary. Dr QE also held the discharge summary for the purposes of the Privacy Act.

39. Idameneo (No. 123) submits that the complainant had not supplied sufficient proof of identity to properly identify the complainant or the records sought. APP entities have obligations to verify an individual's identity before providing access to personal information.[12] If the medical centre was of the view the complainant had not provided sufficient identifying information it could have requested this through its staff or through Dr QE, to readily ascertain the identity.

40. It appears it did not do so at that time because (a) it appeared satisfied of the complainant's identity during their various interactions and (b) it had resolved or formed the view not to release the information. Regardless, this issue was resolved by 9 October 2015 when Idameneo (No 123) provided the discharge summary to the OAIC who then provided it to the complainant.

Approach to construction of APP 12.3(a) exception

41. APP 12.3(a) provides that the entity is not required to give the individual access to 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'.

42. The words 'health' and 'safety' are not defined in the Privacy Act and take on their ordinary meaning. The Macquarie Dictionary defines 'health' to include 'the general condition of the body or mind with reference to soundness and vigour.' 'Safety' is

[11] APP Guidelines (as at 2 March 2018) [B.79, B.81].
[12] APP Guidelines (as at 2 March 2018) [12.15-12.17].

defined to include 'the state of being safe; freedom from injury or danger'.[13] 'Threat' is defined to include 'an indication of probable evil to come; something that gives indication of causing evil or harm; a person or a thing which is deemed to have a negative impact on one's fortunes.'[14]

43. It is apparent that many different circumstances may pose a threat to life, health or safety. The APP guidelines provide guidance on how agencies may interpret the APPs and indicate that a circumstance causing an individual significant distress or one which may lead to self-harm would be circumstances that pose a threat to an individual's life, health or safety.[15]

44. I consider that a 'serious' threat is one that is likely to cause 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 to determining the seriousness of the threat. The APP guidelines provide that a threat that may have dire consequences but is unlikely to occur might not necessarily constitute a serious threat. A potentially harmful threat that is likely to occur, but at an uncertain time, might on the other hand, be a serious threat.[16]

45. The APP guidelines provide that the belief must not merely be a genuine or subjective belief, it must be reasonably held.[17] It is the responsibility of an entity to be able to justify its reasonable belief. The test is an objective one, based on the evaluation of the known facts, circumstances and consideration which may bear rationally upon the issue in question.[18] However, a reasonable belief does not mean that something must actually be the case.

46. In exercising my powers under s 52 of the Privacy Act I must determine whether the respondent could properly rely on 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.[19]

Idameneo (No. 123)'s reliance on exceptions to APP 12

47. Idameneo (No. 123) submits the complainant first enquired about access to the discharge summary on 11 May 2015 and that two exceptions to APP 12.1 apply, being APP 12.3(a) and 12.3(f).

Idameneo (No. 123)'s submissions about APP 12.3(a)

48. Idameneo (No. 123) advises that it operates 71 medical centres within Australia that are generally large scale, multi-disciplinary practices. As a result, it receives a large number of requests for access to medical records that are typically sent to its records department. However, as the complainant was seeking a single document, the request did not go through its records department and was dealt with directly by the medical centre.[20]

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[13] *Macquarie Dictionary Online*, 6th edition, accessed 23 July 2018.
[14] *Macquarie Dictionary Online*, 6th edition, accessed 23 July 2018.
[15] APP Guidelines (as at 2 March 2018) [12.35], [C.10].
[16] APP Guidelines (as at 2 March 2018) [C.9].
[17] APP Guidelines (as at 2 March 2018) [B.111].
[18] 'LS' and 'LT' (Privacy)[2017] AICmr 60 (26 June 2017) [35].
[19] LS' and 'LT' (Privacy)[2017] AICmr 60 (26 June 2017) [36]
[20] Idameneo (No. 123)'s submission of 24 February 2017, paragraphs 15 and 19.

49. Idameneo (No. 123) submits that as it is not a medical practitioner and its staff are not medical practitioners it 'should not be making judgements in relation to medical matters, particularly those involving the kinds of issues raised in the discharge summary'.[21] It therefore sought the opinion of Dr QE to deal with the complainant's request to access the discharge summary.

50. In support of its reliance upon APP 12.3(a), Idameneo (No. 123) submits the following:

    a. the discharge summary contained a number of notations about the complainant's medical history including psychiatric history, which prompted Idameneo (No. 123) to seek the view of Dr QE in its consideration of whether the document should be released to the complainant

    b. Dr QE ultimately advised Idameneo (No. 123) that the discharge summary should not be released as it would pose a serious threat to the complainant's or others health and safety

    c. it had no reason to doubt Dr QE's advice as a reputable and experienced medical practitioner who has worked as a General Practitioner for approximately 30 years

    d. it could infer that the hospital's course of action in sending the discharge summary to the medical centre instead of providing it to the complainant was because there was a risk of harm to the complainant or others.[22]

Findings about Idameneo (No. 123)'s reliance on APP 12.3(a)

51. Firstly, I do not accept that a belief about a serious risk of harm to the complainant or others can be reasonably drawn from the hospital's decision to send the discharge summary to the medical centre rather than providing it directly to the complainant. There may have been any number of reasons for directing the discharge summary to the medical centre including, as the complainant submits, the complainant's inability to pay the fee for access to the discharge summary. There is no factual foundation for the assertion made by Idameno (No. 123) on this point and I accordingly give no weight to this as evidence that the hospital had a reasonably held belief that there was a risk of harm to the complainant or others in releasing the discharge summary.

52. I accept Idameneo (No. 123)'s submission that its staff, who are not medical practitioners, are not qualified to make decisions about whether to provide access to personal information in circumstances where there are questions around whether access would pose a risk to an individual's life, health or safety.

53. I therefore find it was appropriate for Idameneo (No. 123) to seek the opinion of Dr QE for a decision on whether to provide the complainant with access to the discharge summary.

54. I am satisfied that Idameneo (No. 123), having relied on the opinion of Dr QE, formed the requisite belief that providing access to the discharge summary would pose a serious threat to the life, health or safety of the complainant and possibly other individuals.

55. I am further satisfied that, given Dr QE's long-term experience as a medical practitioner, the information available at the time, and the steps taken to consider the

[21] Idameneo (No. 123)'s submission of 24 February 2017, paragraphs 33 and 34.
[22] Idameneo (No. 123)s submission of 24 February 2017, paragraph 25.

complainant's request for access (discussed below), that it was open to Idameneo (No. 123) to have formed the belief that it did about the potential impact of the discharge summary on the complainant or others.

56. I am therefore satisfied that Idameneo (No. 123) had, at the relevant time, an objectively reasonable basis for the belief that giving access to the discharge summary would pose a serious threat to the life, health or safety of the complainant and possibly other individuals.

57. I am accordingly of the view that Idameneo (No. 123) could rely on the exception at APP 12.3(a) to refuse to grant access at the time of the request.

Idameneo (No. 123)'s submissions about APP 12.3(f)

58. Idameneo (No. 123) also submits that the exception at APP 12.3(f) applies. This exception allows an APP entity to refuse to provide an individual with access to their personal information to the extent that giving access would be unlawful. It submits that the manner in which the complainant dealt with staff when telephoning or attending the medical centre was hostile and aggressive and staff reported their perception that they were under stress and felt intimidated by the complainant's conduct at the centre.[23]

59. Idameneo (No. 123) submits that, in accordance with its obligations to its staff under workplace health and safety law it may, in certain circumstances, refuse access to an individual's records on the grounds of APP 12.3(f).[24] It submits that under this exception an organisation may refuse access where giving access would be unlawful; under the *Occupational Health & Safety Act 2004* (Vic) (the OHS Act) an employer must maintain a working environment that is safe and without risks to health; and if it acquiesces in, or gives implicit approval to, or facilitates, patient behaviour that poses a threat to staff it may breach the OHS Act, and thereby have been unlawful under APP 12.3(f).[25]

60. Idameneo (No. 123) submits that for these reasons it was entitled to refuse to grant access to the complainant and asks me to accept the principle that abusive and intimidatory behaviours can, depending on the circumstances, potentially entitle an organisation to refuse access to that individual's records on the grounds of APP 12.3(f).[26]

61. I consider that APP 12.3 (f) concerns the character of the information to which access is sought, rather than the separate behaviours of the requestor, even if unlawful. In this case the request itself was lawful. There is, however, no need to determine the application of APP 12(f) here, having regard to my conclusion that Idameneo (No. 123) could refuse the complainant's request for access pursuant to the APP 12.3(a) exception.

Dr QE's reliance on exceptions to APP 12

62. Dr QE submits a verbal access request from the complainant was received on 23 May 2015, but relies on the exception at APP 12.3(a). Dr QE also seeks to rely on the exception under APP 12.3(g).

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[23] Idameneo (No. 123)'s submission of 24 February 2017, paragraphs 62, 71.
[24] Idameneo (No. 123)'s submission of 24 February 2017, paragraphs 72 and 73.
[25] Idameneo (No. 123)'s submission of 24 February 2017, paragraphs 66 to 72.
[26] Idameneo (No. 123)'s submission of 24 February 2017, paragraph 73

Dr QE's submissions regarding APP 12.3(a)

63. In support of the reliance on the APP 12.3(a) exception to access, Dr QE submits:

    a. Dr QE had one consultation with the complainant prior to the request for the discharge summary on 23 May 2015. This consultation was on 1 April 2015 and was at the request of another doctor[27] to discuss a pathology result. Dr QE was concerned that the complainant did not comprehend the gravity of the pathology result and advised the other doctor of these concerns.[28]

    b. The other doctor had expressed concerns about the complainant's 'psychological issues' and 'ongoing psychiatric care'. These matters are reflected in Dr QE's notes from 22 April 2015 and in a letter from the other doctor to Dr QE of 23 April 2015.[29]

    c. In the absence of an extensive treating relationship with the complainant, Dr QE was limited in accurately gauging the risk of the situation described in the discharge summary, regardless of the amount of time that had passed between discharge and the complainant's access request (almost one year). It was Dr QE's view that a repeat of the situation would be a very serious threat to the health and safety of the complainant and their partner.[30]

    d. The discharge summary included observations that the complainant had threatened self-harm and harm to another individual, had probable post-traumatic stress disorder (PTSD) and borderline personality disorder, regarded themselves as having an anger problem and being easily roused to disproportionate anger and it contained a statement that there was 'no significant risk at this time of harm to self or partner, though chronic significant risk of misadventure during future altercations.'[31]

    e. Dr QE was asked by the hospital that had provided the discharge summary not to provide it to the complainant. Dr QE's progress notes reflect efforts to investigate this. In an entry dated 27 May 2015, Dr QE noted a discussion with an advisor from a medical defence organisation on 25 May 2015 who recommended contact be made with the hospital. Dr QE left messages for the hospital, which returned the call on 27 May 2015 and advised that the complainant could be provided with the front page of the discharge summary, only, however to obtain access to the entire document the complainant would need to contact the hospital and make a request under FOI.[32]

    f. Dr QE also had 'a well-founded fear of how [the complainant] might react if provided with a copy of the confronting information…set out in the discharge summary'.[33]

[27] For completeness, I note in submissions the Complainant has questioned the other doctor's competence.
[28] Dr QE's submission of 17 February 2017, paragraph 2.
[29] Dr QE's submission of 17 February 2017, paragraph 2.
[30] Dr QE's submission dated 17 February 2017, paragraph 11.
[31] Dr QE's submission of 17 February 2017, paragraph 4.
[32] Dr QE's progress notes 23 and 27 May 2015, attachment to submission of 17 February 2017.
[33] Dr QE's submission of 17 February 2017, paragraph 11.

g. It was reasonable for Dr QE to place significant weight on the opinion of the hospital, whose representatives both treated the complainant and then wrote the discharge summary.[34]

h. It was entirely reasonable and appropriate to respect the request of the hospital which had provided specialist psychiatric treatment that the complainant not be provided with a copy of the discharge summary.[35]

Findings about Dr QE's reliance on APP 12.3(a)

64. In relying on the exception at APP 12.3(a), the onus is on the entity to justify its reasonable belief about the effect of giving access. What gives rise to that belief will depend on the circumstances of each case.

65. I accept that Dr QE had a duty of care to the complainant and others in considering whether to release the full discharge summary. I also accept that given the limited consultation with the complainant it was open to Dr QE in the circumstances, as an experienced medial practitioner, to take into account the contents of the discharge summary itself to form a view as to its potential impact on the complainant.

66. The discharge summary observed the complainant threatening self-harm and harm to another individual. The summary also indicated that the risk of such threatening behaviour was 'chronic' and 'significant'. I am satisfied that the potential harm identified by Dr QE from the material in the discharge summary was serious and that Dr QE was qualified to hold that view.

67. Given Dr QE was not the author of the discharge summary and not the complainant's treating doctor, I accept Dr QE considered their ability to gauge the risk of release of the document to the complainant was limited, regardless of the time that had passed since the hospitalisation.[36] It was therefore appropriate and reasonable in the circumstances for Dr QE to give weight to the views of the complainant's treating doctors at the relevant time, in considering the complainant's access request.

68. Given that the discharge summary concerned the complainant's admission to, and treatment in, a mental health facility, the passage of time since the complainant was discharged, and the limits on Dr QE's ability to gauge the risk to the complainant, I consider it was appropriate to seek and take into account the opinion of the hospital regarding access, as well as the opinion of a current treating doctor of the complainant who had expressed concerns about the complainant's 'psychological issues' and 'ongoing psychiatric care'.

69. I note that Dr QE did not seek the contemporary view of a mental health practitioner, which may have provided a valuable opinion as to the effect on the complainant's mental health of access to the discharge summary. Nonetheless, I am satisfied that in light of Dr QE's medical experience, the material in the discharge summary, the views of the treating hospital and a contemporary treating doctor, and the steps taken to consider the complainant's request for access, Dr QE held a reasonable belief that providing the complainant with access to the discharge summary would pose a serious threat to the life, health or safety of the complainant or possibly other individuals.

[34] Dr QE's submission of 17 February 2017, paragraph 7.
[35] Dr QE's submission of 17 February 2017, paragraph 7.
[36] Dr QE's submission of 17 February 2017, paragraph 11.

70. I am therefore satisfied Dr QE could rely on the exception at APP 12.3(a) to refuse to grant the complainant access to a copy of the discharge summary.

Dr QE's submissions regarding APP 12.3(g)

71. Dr QE also submits that APP 12.3(g) applies. This exception provides that an entity is not required to provide access where denying access is required or authorised by or under an Australian law or a court/tribunal order. To this end, Dr QE relies on section 27(2) of the *Health Record Act 2001* (Vic) which provides that an organisation must not give an individual access to their health information if it is subject to confidentiality.

72. There is, however, no need to further address the application of APP 12.3(g), having regard to my conclusion that Dr QE could refuse the complainant's request for access pursuant to the APP 12.3(a) exception.

The second issue – APP 12.5

73. APP 12.5 provides that, if an APP entity refuses to give access to personal information because an exception under APP 12.2 or 12.3 applies, or refuses to give access in the manner requested by the individual, it must take such 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.

74. In other words, the entity has a positive obligation to do what is reasonable in the circumstances to give access in a way that satisfies the needs of both parties. APP 12.3 sets out a number of situations in which an individual's access to their personal information may be refused. There may also be a range of means of giving partial or alternative access in the manner requested by the individual. Therefore, relevant considerations in determining whether the steps taken by an APP entity in compliance with APP 12.5 will depend on the circumstances of each particular case.

75. The term 'reasonable' is not defined in the Privacy Act, therefore conveys its ordinary meaning, 'as being based upon or according to reason and capable of sound explanation'.[37] What is reasonable is a question of fact in each individual case.[38] What I must determine is not whether the steps taken (if any) were the correct ones or whether better steps may have been taken, but rather whether the steps taken were reasonable having regard to all the circumstances of the case.[39]

Findings about Idameneo (No. 123)'s compliance with APP 12.5

76. Idameneo (No. 123) refused to give the complainant access to the discharge summary for reasons covered by APP 12.3 and was therefore required under APP 12.5 to consider if there were steps it could take to provide access in another way that met the needs of both the entity and the individual.

77. As the former Commissioner noted in, the matter of *'LS' and 'LT'*, a determination also dealing with a request for access to medical information:

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[37] APP Guidelines (as at 2 March 2018) [B.105].
[38] APP Guidelines (as at 2 March 2018) [B.105].
[39] *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 50 ALD 360, per curium, in consideration of the meaning of 'reasonable in the circumstances' in the context of the *Sex Discrimination Act 1984* (Cth), similarly beneficial legislation.

> '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 are no steps available and to refuse access. However, APP 12.5 does require that there has been at least some consideration.'[40]

78. Idameneo (No. 123) submits that there were no steps it could have taken to provide access in another way because of the 'content of the discharge summary, which posed the threat of harm to the complainant and/or others.' [41] Idameneo (No. 123) also submits that the complainant did not want to consider any intermediary, however, it is unclear whether this alternative was offered as a form of resolution, or whether the complainant's probable view on the matter was inferred because of the complaint lodged with the OAIC shortly after the refusal to release the document.

79. In any event, Idameneo (No 123) advised the OAIC on 19 August 2015, that it would consider releasing all the complainant's medical records, including the discharge summary to an alternative medical centre to the attention of another general practitioner who could then make an independent decision regarding how the contents might be articulated to the complainant. Ultimately, Idameneo (No.123) provided the discharge summary to the OAIC who provided it to the complainant on 12 October 2015.

80. Though not raised by Idameneo (No. 123) in its submissions, the complainant claims that after seeing Dr QE on 23 May 2015, and contacting Idameneo (No. 123) staff on 2, 3 and 4 June 2015, the 'relevant doctor' was prepared to release the front page of the discharge summary.[42] This alternative was not accepted by the complainant.

81. The question before me is to determine is whether the actions taken by Idameneo (No. 123) were reasonable in all the circumstances.

82. Idameneo (No. 123) submits that following the complainant's request on 11 May 2015 for a copy of the discharge summary a medical centre employee suggested that the complainant consult with Dr QE. The complainant saw Dr QE on 23 May 2015 at which time the doctor declined to provide the complainant with a copy of the discharge summary. These events are supported by the complainant's submissions. Following the complainant's 9 June 2015 request, Idameneo (No. 123) advised the complainant it had consulted with Dr QE and decided that it would not release the document, though according to the complainant, at this time, it was prepared to release the front page of the discharge summary.

83. It is clear that Idameneo (No. 123) relied on Dr QE's advice in relation to release. As noted above, I accept that Dr QE is an experienced medical practitioner who had concerns over release, and it is reasonable for Idameneo (No. 123) to rely on the knowledge and long-term experience of Dr QE in determining whether to release the document to the complainant. Idameneo (No. 123) did not employ doctors and was not medically qualified to make decisions on possible alternatives such as those outlined in the APP guidelines such as the provision to the requestor of redacted or summarised

[40] 'LS' and 'LT' (Privacy)[2017] AICmr 60 (26 June 2017), [52].
[41] Idameneo (No. 123)'s submission of 24 February 2017, paragraph 60.
[42]Complainant's complaint of 16 June 2015 .

versions of the discharge summary, or the making of alternate arrangements for access through a specialist such as a psychiatrist.[43]

84. Notwithstanding this, Idameneo (No 123) had a positive obligation to consider whether there were any reasonable steps it could take to provide access in a way that meets the needs of the entity and the individual. The steps actually taken could have been documented more clearly to show not only the alternatives considered but the reasons for rejecting them and why, in the particular circumstances, there were no other steps which could meet the needs of both parties. However, given Dr QE's opinion that provision of the discharge summary posed the threat of harm to the complainant and/or others, and that was what the complainant sought, there were limited means to give the complainant alternative access to it.

85. Idameneo (No. 123) staff and Dr QE consulted with a medical defence advisor, the complainant's treating doctors including the referring doctor and the hospital doctors who authored the summary. They knew the complainant was aware access could be sought via FOI processes and Dr QE offered the front page of the discharge summary which contained a number of details about the admission. In these circumstances I am satisfied that Idameneo (No. 123) gave sufficient consideration to alternative steps to access to meet the needs of the entity and the complainant.

86. Accordingly, I find that Idameneo (No. 123) did not breach APP 12.5.

Findings about Dr QE's compliance with APP 12.5

87. Dr QE refused to give the complainant access to the discharge summary, apart from the front page, for reasons covered by APP 12.3 and was therefore required under APP 12.5 to consider steps to provide access in another way. As noted above, compliance with APP 12.5 will depend on the circumstances of each particular case.

88. On 23 May 2015, the complainant had explained to Dr QE that the discharge summary was needed to support an application for admission to a professional body.

89. Dr QE has outlined the steps taken to consider whether access to the discharge summary should be provided. These included the doctor's own medical opinion formed from viewing the contents of the discharge summary, the doctor's consideration of the opinion of a contemporary treating doctor, and the view of the hospital that had authored the discharge summary, which advised that only the front page could be provided to the complainant.

90. As with Idameneo (No 123), Dr QE had a positive obligation to consider whether there were any reasonable steps that could be taken to provide access in a way that met the needs of both Dr QE and the complainant. In my view it was open to Dr QE to make enquiries of the hospital or mental health specialists about other possible ways the discharge summary information could be imparted to the complainant. It is evident Dr QE made some enquiries. The question before me is whether those enquiries, or steps taken, were reasonable in the circumstances.

91. On 23 May 2015, Dr QE file noted the complainant's dissatisfaction with the FOI process ('[the complainant] applied to [the hospital] under FOI but was told it was a lengthy process, that could be circumvented by faxing it to me where I could print it off for [the complainant]'). Dr QE's 27 May 2015 progress note indicates the hospital had advised

[43] APP Guidelines (as at 2 March 2018) [12.71].

that the front page may be provided to the complainant, and if that was unsatisfactory, the complainant could apply to the hospital for a copy of the discharge summary under FOI.

92. Although, the steps considered and the reasons for rejecting any alternatives could have been better documented, I am satisfied that the alternatives were limited. As noted above, in this case Dr QE consulted with a medical defence advisor, a contemporary treating doctor of the complainant as well as the hospital whose representatives authored the discharge summary. Dr QE knew the complainant was aware of access via FOI processes and had offered the front page to the complainant. I am satisfied that the steps taken by Dr QE were reasonable in the particular circumstances.

93. Accordingly, I find that Dr QE has not breached APP 12.5.

The third issue – APP 12.9

94. 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:

    a. the reasons for the refusal, except to the extent that it would be unreasonable to do so, having regard to the grounds for refusal;

    b. the complaint mechanisms available to the individual; and

    c. any other matters prescribed by the regulations made under the Privacy Act.

Findings about Idameneo (No. 123)'s compliance with APP 12.9

95. The complainant alleges that Idameneo (No. 123) did not provide a written notice setting out the reasons for refusal and the complaint mechanisms available, as required by APP 12.9.

96. The complainant saw Dr QE on 23 May 2015 and requested a copy of the discharge summary. I accept the response given was that Dr QE was 'not inclined' to provide it but would make further enquiries. The complainant re-contacted the medical centre on 2, 3 and 4 June 2015 to follow up the request for access. On 9 June 2015 the complainant attended the medical centre in person with a letter of request for access to the discharge summary. The complainant was (verbally) refused access by centre staff relying on Dr QE's advice, though the complainant was offered the front page of the document. On 16 June 2015, the complainant lodged a privacy complaint with the OAIC.

97. Idameneo (No. 123) submits that it has not breached APP 12.9 because the written notice of refusal was not due until 30 days after the complainant made the request, and 'the time had not begun to run' because the request had not properly identified the complainant or the records sought.[44]

98. APP 12.4 expressly provides that entities that are organisations must respond to a request within a reasonable period after the request is made. There is no requirement under APP 12.4 that the response be in writing. APP 12.9 obliges entities who refuse a

[44] Idameneo (No. 123)'s submission of 24 February 2017, paragraphs 56 and 57.

request for access to provide written notice setting out reasons for refusal except to the extent it would be unreasonable to do so, as well as to set out the complaint mechanisms available to the individual.[45] The obligation under APP 12.9 is triggered at the time the entity decides to refuse to give access. The obligation to provide a written notice under APP 12.9 does not have an express time limit. There is no express or implied requirement under APP 12.9 that the written statement of reasons be contemporaneous with the APP 12.4 obligation to respond to the request. In the context of APP 12.9, the giving of reasons for refusal is separate from, and may be subsequent to, the entity's response to the request.

99. It is well established that where a statute is silent on the question of time in which a duty is to be performed, as in this case, the courts will imply 'compliance within a period of time that is reasonable in the particular circumstances including the legislative context'.[46]

100. It would seem that the Privacy Act, its purpose and objectives, would have relevance in determining what amounts to a 'reasonable time' for the provision of a written notice of reasons following refusal of a request for access. APP 12 promotes the giving of access in a way that meets the needs of both the entity and individual. This aligns with the Privacy Act's objective to recognise that the protection of an individual's privacy must be balanced with the interests of entities in carrying out their functions or activities.

101. Seven days had elapsed between Idameneo (No. 123)'s refusal to provide access on 9 June 2015 to the discharge summary and the complainant's lodging of a complaint with the OAIC on 16 June 2015. In the circumstances of a busy medical practice, a period of seven days could not in my view, be considered an unreasonable period in which to provide a written statement of reasons as to why an individual's request for their information was refused. I accept that there may be some cases where special circumstances would render the seven days unfair or inappropriate. In this case though, I have no information before me to demonstrate that seven days marked a length of time which went beyond what in all circumstances, was a reasonable time for Idameneo (No. 123) to explain to the complainant in writing its reasons for denying access to the discharge summary, having regard to the ground for refusal.

102. In this matter, the complainant has sought to characterise the circumstances as 'urgent' and submits a copy of the discharge summary was needed for disclosure to a professional body for consideration of eligibility to practice in that profession. The complainant contends that the application to practice in that profession was delayed through being unable to make full disclosure to the professional body without the full discharge summary.

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[45] APP 12.9(3) provides that entities who refuse access to personal information requested by an individual must also provide, in its written notice to that individual, any matters prescribed by regulation. However, no other relevant matters are prescribed by regulation, so this does not presently arise.

[46] *Giddings v Australian Information Commissioner* [2017] FCA 677 at [26] (Tracey J), citing *Koon Wing Lau v Calwell* (1949) 80 CLR 533 per Dixon J at 573-4; *Re Federal Commissioner of Taxation; Ex parte Australena Investments Pty Ltd*(1983) 50 ALR 577 at 578 (Murphy J);*Plaintiff S297/2013 v Minister for Immigration and Border Protection*(2014) 255 CLR179; [2014] HCA 24 at [37] (Crennan, Bell, Gageler and Keane JJ);*Shahi v Minister for Immigration and Citizenship*(2011) 246 CLR163 at 174; [2011] HCA 52 at [28] (French CJ, Gummow, Hayne and Bell JJ). See also *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 per Windeyer J at 383-4; *BTR plc Westinghouse Brake and Signal Co (Aust) Ltd* (1992) 26 ALD 1 per Lockhart and Hill JJ.

103. It is evident that any alleged delay was not because there was a delay with providing written reasons for access refusal, but because there was no access to the full discharge summary. In my view, there is no evidence of any particular prejudice suffered by the complainant because written notice of refusal was not provided contemporaneously or near contemporaneously with the 9 June 2015 verbal response to the complainant's request for access.

104. There is nothing in the information before me to suggest that the circumstances were such that in this case the obligation under APP 12.9 could only be satisfied by providing a written statement of reasons contemporaneously with the APP entity's verbal response to the request for access to the discharge summary.

105. In my view, at the time the complaint was lodged with the OAIC, Idameneo (No. 123) had not yet failed in its obligation to provide written notice of access refusal because the 'reasonable' time limit had not yet expired.

106. I must review the act or practice of the entity at the time the complaint was lodged with the OAIC. Idameneo (No. 123) had not yet provided the complainant with a written notice of refusal on 16 June 2015, but at that time, the 'within reasonable time' limit had not yet expired. I am therefore satisfied that Idameneo (No. 123) has not breached APP 12.9.

Findings about Dr QE's compliance with APP 12.9

107. As noted above, when the complainant asked for a copy of the discharge summary on 23 May 2015, the complainant was advised that Dr QE was not prepared to release a copy of the document at that time, but would make further enquiries. File notes on the complainant's medical records, dated 23 and 27 May 2015 support this summation of the 23 May 2015 consultation.

108. Dr QE's 27 May 2015 file note states the following:

> '[Hospital staff] informs me we can supply front page of the discharge summary routinely and freely but to supply the full discharge should go through FOI wher [sic] an officer in the hospital reviews it. [Hospital staff] will ring [complainant] informing [complainant] of this and start the FOI process if [complainant] wishes'.

109. Though Dr QE's progress notes are silent on the matter, I accept that, consistent with Idameneo (No. 123)'s 24 February 2017 submissions and the information on the complainant's privacy complaint form, Dr QE advised medical centre staff that the discharge summary, with the exception of the front page, should not be released to the complainant. This advice was conveyed to the complainant in person at the medical centre on 9 June 2015. I therefore accept 9 June 2015 as the date Dr QE responded (via medical centre staff) to the complainant's request for a copy of the discharge summary by refusing access.

110. Dr QE had not yet provided the complainant with a written notice of refusal on 16 June 2015, the date of lodgement of the complaint with the OAIC. Notwithstanding this, for reasons outlined above I am of the view that as at 16 June 2015, the 'within reasonable time' limit had not yet expired. Accordingly, I find that Dr QE has not breached APP 12.9.

Compensation

111. I acknowledge that the complainant has put forward information and documentation as evidence of economic loss and of non-economic loss or damage arising from not having been given access to the discharge summary by Idameneo (No 123) or Dr QE at the time the request was made.

112. However, because I have found that neither Idameneo (No 123) nor Dr QE interfered with the complainant's privacy as defined in the Privacy Act, I have no authority to award any compensation to the complainant.

Conclusion

113. I have found that neither Idameneo (No 123) nor Dr QE interfered with the complainant's privacy as defined in the Privacy Act, in relation to their obligations under APP 12.1, APP 12.5 or APP 12.9. Consequently the privacy complaints made by the complainant about Idameneo (No 123) and Dr QE are dismissed.

Angelene Falk
Australian Information Commissioner and Privacy Commissioner

3 May 2019

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 Australian Information Commissioner and Privacy Commissioner's decision was wrong in law or the Privacy 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.