Australian Government
Office of the Australian Information Commissioner

'BO' and AeroCare Pty Ltd [2014] AICmr 32 (8 April 2014)

Determination and reasons for determination of Privacy Commissioner, Timothy Pilgrim

Complainant:	**'BO'**
Respondent:	**AeroCare Pty Ltd**
Determination date:	**8 April 2014**
Application number:	**CP13/00643**
Catchwords:	**Privacy — Privacy Act — National Privacy Principles — (CTH) *Privacy Act 1988* s 52 — NPP 1 — NPP 1.2 and NPP 1.3 —Collection —NPP 4 — NPP 4.1 — Data security — Compensation — Non-economic loss — Aggravated damages not awarded**

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Summary

1. AeroCare Pty Ltd (AeroCare) interfered with the complainant's privacy by collecting and disclosing the complainant's sensitive personal information in the departure lounge of the Sunshine Coast Airport, in breach of National Privacy Principles (NPPs) 1.2, 1.3 and 4.1 of the *Privacy Act 1988* (Cth) (the Privacy Act).

2. To redress this matter, AeroCare shall:

    - apologise in writing to the complainant within 4 weeks of this determination
    - review its training of staff in the handling of sensitive personal information
    - confirm that this review of training has been completed and advise me of the results of review no later than six months from the date of this determination, and
    - pay the complainant $8500 for non-economic loss caused by the interference with the complainant's privacy.

Background

3. The complainant is blind and utilises the assistance of a Sighted Guide and Seeing Eye Dog.

4. In 2013, the complainant underwent surgery for a medical condition. Following the surgery, the complainant was required to wear a medical device as part of his recovery. Shortly after undergoing surgery, the complainant was required to travel on a return flight from Melbourne to the Sunshine Coast. The complainant obtained a letter from his treating hospital stating that he had the medical device in situ and that this device should only be turned off for take-off and landing.

5. The complainant presented the letter to staff at the check-in counter at Melbourne Airport and proceeded to travel to the Sunshine Coast without incident. However, on his return journey from the Sunshine Coast to Melbourne, the complainant says that he was subjected to a series of questions about his medical condition by an AeroCare staff member in the departure lounge of Sunshine Coast Airport. The complainant states that these questions were asked in the presence of his Sighted Guide (who did not know the details of his medical condition) and a number of other passengers in the departure lounge.

Privacy complaint and remedy sought

6. On 12 May 2013, the complainant lodged a complaint with the Office of the Australian Information Commissioner (OAIC) against AeroCare, under s 36 of the Privacy Act.[1]

7. The complainant alleged that AeroCare interfered with his privacy by:

   - collecting his personal medical information in an unreasonable and intrusive manner by asking him a number of personal medical questions in the departure lounge of the Airport.
   - disclosing his personal medical information to third parties in the departure lounge of the Airport
   - failing to advise him of the reason for the collection of his personal information.

8. The complainant seeks a declaration by me that he is entitled to:

   - an apology from AeroCare
   - a declaration that AeroCare implement appropriate privacy and sensitivity training for its staff
   - compensation of $28,000 for non-economic loss.

9. AeroCare disagrees that it has breached NPPs 1.2 (collection not unreasonably intrusive), 1.3 (informing individuals when collecting directly) and 4.1 (protecting personal information).

Relevant legislation

10. The NPPs contained in Schedule 3 of the Privacy Act outline the standards for 'organisations' handling personal information.

11. Section 6C of the Privacy Act defines 'organisation' as meaning:

    (a) an individual; or

    (b) a body corporate; or

    (c) a partnership; or

    (d) any other unincorporated association; or

    (e) a trust

    that is not a small business operator, a registered political party, an agency, a State or Territory authority or a prescribed instrumentality of a State or Territory.

12. 'Personal information' is defined in s 6(1) of the Privacy Act as:

[1] The complainant's complaint was originally about Virgin Australia (Virgin) with whom he was flying. However, following discussions with Virgin, the OAIC determined that AeroCare (who have an arrangement with Virgin to provide passenger services at the Sunshine Coast Airport) is the appropriate respondent in this matter.

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.

13. Section 52 of the Privacy Act provides that, after investigating a complaint, I may make a determination:

- dismissing the complaint (s 52(1(a)); or
- finding the complaint substantiated and declaring:
  - that the respondent has engaged in conduct constituting an interference with the privacy of an individual and should not repeat or continue such conduct (s 52(1)(b)(A)); and/or
  - the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant (s 52(1)(b)(ii)); and/or
  - the complainant is entitled to compensation for any loss or damage suffered by reason of the act or practice the subject of the complaint (s 52(1)(b)(iii)); and/or
  - it would be inappropriate for any further action to be taken in the matter (s 52(1)(b)(iv)).

Investigation process

14. The OAIC's investigation of this complaint involved the following:

- On 5 September 2013, the Assistant Commissioner, Dispute Resolution Branch, opened an investigation into the complainant's allegations under s 40(1) of the Privacy Act.
- the written submissions and evidence provided by both the complainant and AeroCare were considered.
- On 25 November 2013, the OAIC provided AeroCare and the complainant with its preliminary view on the complaint which found that AeroCare had breached NPPs 1.2, 1.3 and 4.1 but had not breached NPP 2.
- In response to the OAIC's preliminary view, both the complainant and AeroCare provided further submissions.
- The parties were unable to reach a mutually agreeable outcome through conciliation and I decided to determine the matter under s 52 of the Privacy Act.

National Privacy Principle (NPP) 1.2

15. NPP 1.2 provides that:

> An organisation must collect personal information only by lawful and fair means and not in an unreasonably intrusive way.

16. Neither the NPPs nor the Guidelines to the National Privacy Principles provide a definition of what is meant by 'unreasonably intrusive'. It is my view that this is a concept that needs to be considered on a case-by-case basis taking into account all the relevant circumstances of a case.

17. The complainant says that AeroCare breached NPP 1.2 by asking him a number of intrusive questions about his medical condition in the departure lounge of the Sunshine Coast Airport. The complainant says that, by asking these questions in the departure lounge and in close proximity to a number of other travellers, AeroCare collected his personal information in an unreasonably intrusive way.

18. The complainant and his Sighted Guide have both said that the questions asked by Aero Care included his name and date of birth, what his medical condition was, where his cancer was located, and where his wound was located.

19. The complainant further said that AeroCare did not offer him a more private location in which to discuss his medical condition and collect the personal information. The complainant also submitted that he did not ask to be taken to a private room before AeroCare commenced asking him questions as he was not aware of the personal nature of the questions until the AeroCare representative started asking them. The complainant also advised that he felt shocked, upset and intimidated by the nature of the questioning and, in the circumstances, felt compelled to respond in order to be able to proceed with his flight.

20. Further, the complainant said that he had chosen not to disclose the nature or details of his medical condition to his Sighted Guide or others as he had wanted to keep the condition private.

21. In submissions to the OAIC, AeroCare submitted that the letter provided by the complainant's treating hospital did not include all of the required information (for example, it did not state that the complainant was fit to fly and was not signed by a doctor) and therefore AreoCare were required to make further inquiries with the applicant regarding his medical condition in order to determine whether it was safe for him to travel.

22. AeroCare further submitted that, in consideration of the complainant's medical condition and accompaniment by his Sighted Guide and Seeing Eye Dog, and in order to minimise any imposition on the applicant, it decided not to ask the complainant to return to the check-in counter to answer the necessary questions.

23. AeroCare accepted that it did not offer the complainant a more private location in which to question him about his medical condition, but submitted that, in any event, there was no suitably private area within the Sunshine Coast Airport in which to ask the questions.

24. AeroCare further said that, in purchasing his ticket to travel, the complainant had consented to providing the personal information requested of him in order to determine his fitness for travel.

25. Finally, AeroCare submitted that there was no evidence that the other passengers had heard the collection of the complainant's personal information.

Findings

26. I accept that AeroCare was required to collect the information in order to determine the complainant's fitness to fly. However, I consider that the manner in which the information was collected in this instance — in the departure lounge of the Sunshine Coast Airport, in the presence of the complainant's Sighted Guide and in close proximity to a number of other passengers — was undertaken in an unreasonably intrusive manner and was not in accordance with NPP 1.2.

27. In relation to NPP 1.2, I do not think it is relevant whether other passengers in fact did hear the information AeroCare collected from the complainant about his medical condition. In any event, it is clear that, at a minimum, the complainant's Sighted Guide (whom he had chosen not to disclose the details of his medical condition to) did hear the collection of the complainant's personal information and the complainant had not consented to this.

28. Further, while I accept that the Sunshine Coast Airport may not have a private room available in which to collect such information, I consider that AeroCare should have offered the complainant the opportunity to have the information collected in a more private location than the departure lounge. For example, AeroCare could have spoken to the complainant away from the seated area of the departure lounge.

29. While there may have been an obligation, contractual or otherwise, on the part of the complainant to provide sufficient medical information to enable AeroCare to determine his fitness for travel, I do not accept that any such obligation required the complainant to have this information collected in an unreasonably intrusive way or in a public location.

30. I am satisfied that, by questioning the complainant about his medical condition in the departure lounge of the Sunshine Coast Airport and in the presence of other travellers, AeroCare collected his personal information in an unreasonably intrusive way. AeroCare breached NPP 1.2.

National Privacy Principle (NPP) 4.1

31. NPP 4.1 provides:

> An organisation must take reasonable steps to protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure.

32. The Guidelines to the National Privacy Principles state that '[i]n general terms an organisation discloses personal information when it releases information to others outside the organisation'.[2]

33. The complainant says that AeroCare disclosed his personal information to his Sighted Guide and other passengers in the departure lounge of the Sunshine Coast Airport.

34. Both the complainant and his sighted guide provided Statutory Declarations to the OAIC stating that the disclosure of the complainant's personal information was done in the departure lounge of the Sunshine Coast Airport, in the presence of the complainant's Sighted Guide (to whom he had chosen not to disclose the details of his medical condition) and in close proximity to a number of other travellers.

35. In submissions to the OAIC, AeroCare said that there was no evidence that the complainant's personal information was disclosed in an unauthorised fashion and that reasonable steps were taken by the company to avoid the risk of unreasonable disclosure. In particular, AeroCare submitted that there was no evidence that the other passengers heard the complainant's personal information.

36. AeroCare did acknowledge that the complainant's personal information had been disclosed to his Sighted Guide but said that, as an employee of the complainant, the Sighted Guide would have been under an obligation of confidentiality to the complainant.

Findings

37. The content of the questions asked by AeroCare (for example, where the complainant's cancer was) and the circumstances in which they were asked (in the departure lounge of the Sunshine Coast Airport and in the presence of third parties) was an unreasonable disclosure of the complainant's sensitive personal information.

38. I think it is reasonable to assume that, given there were a number of other passengers in close proximity to the complainant and his Sighted Guide during the questioning, those passengers were capable of hearing the exchange and that this constitutes an unreasonable disclosure of the complainant's personal information. This is supported by a statement made by the Sighted Guide regarding the close proximity of other passengers.

39. However, irrespective of whether those passengers did in fact hear the exchange, it is clear that the disclosure was made in the presence of the complainant's Sighted Guide. The complainant has stated that he had not disclosed the details of his condition to his Sighted Guide, nor had he consented to AeroCare disclosing the information to his Sighted Guide. I do not

[2] *Guidelines to the National Privacy Principles*, page 23.

think the contractual relationship between the complainant and his Sighted Guide makes the disclosure of the applicant's personal information authorised or reasonable.

40. I am satisfied that, in approaching the complainant in the departure lounge of the Sunshine Coast Airport, revealing personal information about his medical condition and asking the complainant to provide additional information about the condition in the presence of third parties, AeroCare failed to take reasonable steps to protect the complainant's information from unreasonable disclosure. AeroCare breached NPP 4.1.

National Privacy Principle (NPP) 1.3

41. NPP 1.3(c) provides that:

> At or before the time (or, if that is not practicable, as soon as practicable after) an organisation collects personal information about an individual from the individual, the organisation must take reasonable steps to ensure that the individual is aware of:
>
> (a) the identity of the organisation and how to contact it;
> …
>
> (c) the purposes for which the information is collected.

42. The complainant says that AeroCare failed to inform him of its identity and the purpose of the collection of his personal information. The applicant said that he was of the understanding that the letter from his treating hospital was sufficient to determine his fitness to fly and was unsure as to why AeroCare were questioning him.

43. In submissions to the OAIC, AeroCare submitted that it had reasonably assumed that the complainant was aware of the reason it was collecting his personal information – in order to determine his fitness to fly. AeroCare further said that the complainant was aware of the reason it was collecting his personal information because this is set out in Virgin's Conditions of Carriage and Privacy Policy.

Findings

44. I am satisfied that, when approaching the complainant, the AeroCare representative did not clearly identify who she was, the organisation she was representing or clearly explain the reason for the collection of the complainant's personal information.

45. I do not consider it sufficient in order to meet the requirements of NPP 1.3 for AeroCare to *assume* that the complainant understood the reason it was collecting his personal information, particularly where the information being collected is sensitive personal information. Nor do I consider any information provided in Virgin's Conditions of Carriage or Privacy Policy (which I note advise only that sensitive personal information, such as health information, will

be collected with the individual's consent) to obviate the requirement to comply with NPP 1.3 or the requirements of the Privacy Act more broadly.

46. I am satisfied that AeroCare failed to ensure that the complainant was aware of its identity and to explain to the complainant the purpose for which it was collecting his personal information. AeroCare breached NPP 1.3.

Finding on damages

47. 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) states that loss or damage can include 'injury to the complainant's feelings or humiliation suffered by the complainant'.

48. I am guided by the following principles on awarding compensation, summarised by the Administrative Appeals Tribunal (AAT) (Full Tribunal) in *Rummery and Federal Privacy Commissioner*:[3]

    a. where a complaint is substantiated and loss or damage is suffered, the legislation contemplates some form of redress in the ordinary course

    b. awards should be restrained but not minimal

    c. in measuring compensation the principles of damages applied in tort law will assist, although the ultimate guide is the words of the statute

    d. in an appropriate case, aggravated damages may be awarded

    e. compensation should be assessed having regard to the complainant's reaction and not to the perceived reaction of the majority of the community or of a reasonable person in similar circumstances.

49. The Tribunal in *Rummery* went on to express its own view, that it would:

> ... not go so far as deciding that we must award compensation once a loss is established. However, we are of the view that once loss is proved, there would need to be good reason shown to the Tribunal as to why compensation for that loss should not be awarded.[4]

Non-economic loss

50. In correspondence to the OAIC, the complainant has said that he was 'extremely upset, distressed, depressed, shocked and amazed' by the actions of AeroCare at the Sunshine Coast Airport. The applicant has also stated that he felt humiliated and intimidated when being questioned about his medical condition in the departure lounge.

51. In particular, the applicant has said that he felt upset and distressed because other passengers in the departure lounge were able to hear about what he

[3] [2004] AATA 1221 [32] (*Rummery*).
[4] [2004] AATA 1221 [34].

considers to be a deeply personal situation. In addition, the complainant had chosen not to disclose the details of his medical condition to family or friends and the disclosure of this information to his Sighted Guide also contributed to his feelings of distress.

52. It is my view that the manner in which AeroCare collected and disclosed the complainant's personal information has caused the complainant significant distress and humiliation and that an award of damages is consequently appropriate.

53. In deciding the appropriate damages for non-economic loss, I have considered previous Privacy Act determinations, discrimination cases that have considered compensation for non-economic loss, as outlined in *Federal Discrimination Law Online*,[5] and the Conciliation Register of the Australian Human Rights Commission.[6]

54. In *'D' and Wentworthville Leagues Club* [2011] AICmr 9, I awarded $7500 for non-economic loss caused by the interference with the complainant's privacy. That case concerned an unauthorised disclosure of the complainant's former gambling habits which caused the complainant to suffer humiliation as well as serious anxiety, panic attacks and physical symptoms. In making that decision, I was guided by the AAT's decision in *Rummery*. In that case, the AAT was guided by the complainant's evidence as to the injury to his feelings and humiliation and made a declaration awarding $8000 to Mr Rummery. The amount was awarded for loss and damage in circumstances where personal information concerning Mr Rummery's background and former employment was disclosed by an officer of Mr Rummery's former employer to the ACT Ombudsman, during an investigation into a public interest disclosure Mr Rummery made to the ACT Ombudsman.

55. I consider the present case of non-economic loss to the complainant to be, at a minimum, as serious as the previously mentioned cases. In this instance, I consider the complainant's vulnerability as a person with a disability, the highly sensitive nature of the medical information that was collected and disclosed, and the responsibility of AeroCare, as an organisation, to have a sound understanding of its privacy obligations, are factors for me to consider in deciding the quantum of damages to award.

56. I consider that the manner in which AeroCare collected and disclosed the complainant's personal information caused non-economic loss to the complainant, including injury to the complainant's feelings and humiliation and distress. In all the circumstances, I have decided that compensation in the amount of $8500 for non-economic loss would be appropriate.

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5 Australian Human Rights Commission, *Federal Discrimination Law* (2011) www.hreoc.gov.au/legal/FDL/index.html, ch 7 at 20 March 2014.

6 Australian Human Rights Commission, *Conciliation Register*, http://www.humanrights.gov.au/complaints/conciliation-register

Aggravated damages

57. The power to award damages in s 52 of the Privacy Act includes the power to award aggravated damages in addition to general damages.[7] I am guided by the following principles:

    a. aggravated damages may be awarded where the respondent behaved 'high-handedly, maliciously, insultingly or oppressively in committing the act of discrimination'[8]

    b. the 'manner in which a defendant conducts his or her case may exacerbate the hurt and injury suffered by the plaintiff so as to warrant the award of additional compensation in the form of aggravated damages.'[9]

58. I note that AeroCare has maintained throughout this investigation that it has not breached the complainant's privacy and, has on a number of occasions, appeared to place the responsibility for the circumstances that led to the complaint on the complainant.

59. The applicant has claimed that the manner in which AeroCare have responded to his complaint has exacerbated the intense and deep hurt he feels about the disclosure of his personal information.

60. However, I do not consider AeroCare's conduct to be high-handed, malicious, insulting or oppressive, and so do not think the threshold has been met for aggravated damages.

Determination

61. I declare in accordance with s 52(1)(b)(i)(B) of the Privacy Act that:

- the complainant's complaint is substantiated;
- the respondent has breached NPP 1.2 by collecting the complainant's personal information in an unreasonably intrusive way;
- the respondent has breached NPP 1.3 by failing to take reasonable steps to ensure that the complainant was aware of the reasons it was collecting his personal information; and
- the respondent has breached NPP 4.1 by disclosing the personal information of the complainant.

62. I declare in accordance with s 52(1)(b)(ii) of the Privacy Act that the respondent must:

- apologise in writing to the complainant within 4 weeks of this determination

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7 *Rummery* [2004] AATA 1221 [32].
8 *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72 [75].
9 *Elliott v Nanda & Commonwealth* [2001] FCA 418 [180].

- review its training of staff in the handling of sensitive personal information and
- confirm that this review of training has been completed and advise me of the results of review no later than six months from the date of this determination

63. I declare in accordance with s 52(1)(b)(iii) that the complainant is entitled to $8500 for the non-economic loss suffered as a result of the respondent's interference with their privacy.

Timothy Pilgrim
Privacy Commissioner

8 April 2014

Review rights

If a party to a privacy determination is unsatisfied with the privacy determination, they may apply under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* to have the determination reviewed by the Federal Court of Australia or the Federal Circuit Court. The Court will not review the merits of the determination, but 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.

Determinations involving Australian Government agencies – compensation

If a party to a privacy determination about a complaint involving an Australian or ACT government agency disagrees with the amount of compensation set by the Information Commissioner, they may apply under s 61 of the *Privacy Act 1988* to the Administrative Appeals Tribunal (AAT) to review the declaration about compensation. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm the Information Commissioner's declaration about compensation.

An application to the AAT must be made within 28 days of the day on which the applicant 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. The current application fee is $816, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.

Enforcement of determination

Under s 55 of the *Privacy Act 1988*, a respondent to a privacy determination is obliged to comply with any declarations made by the Information Commissioner in that determination.

Section 55A of the *Privacy Act 1988* provides that either the complainant or Information Commissioner may commence proceedings in the Federal Court or the Federal Circuit Court for an order to enforce the determination.