

## Preliminary findings on breach

### Claim 1 - APP 12 breach in relation to access to information

32. Where an APP entity holds personal information about an individual, APP 12.1 requires that APP entity to give access to the information following a request by an individual unless certain exceptions in APP 12.3 apply. APP 12.4 requires that an organisation respond to the request for access within a reasonable period after the request is made and give access to the information in the manner requested by the individual, if it is reasonable and practicable to do so.

33. In order to consider this claim, therefore, I must consider whether:

- a. there was a request for access
- b. if so, whether the request was for personal information that the respondent held
- c. if so, whether the respondent provided the personal information
- d. if the respondent did not provide the personal information, whether any exceptions apply to the requirement to provide the personal information
- e. if the respondent did not provide access, and no exceptions apply, whether the respondent responded to the request within a reasonable period
- f. if the respondent provided access, whether she provided access in the manner requested by the individual, and if not, whether it was reasonable and practicable to do so.

#### **Request for access**

34. I am satisfied that the complainants requested access to a report of their treatment from the respondent, as accepted by the respondent in her email dated 4 April 2019.<sup>43</sup>

#### **Personal information held**

35. The complainants requested access to their reports, which I consider likely contained the complainants' names and their health information, amounting to personal information.

36. I am satisfied that the respondent held at the time of those requests (and continues to hold) the requested personal information about the complainants.

#### **Failure to provide access**

37. I am satisfied that the respondent has not provided access to the requested personal information for the following reasons:

<sup>42</sup> O17.1.

<sup>43</sup> R3.

- a. Following receipt of the complaints, the OAIC attempted to assist the representative to obtain access to the personal information on behalf of the complainants. This assistance included telephone conversations and emails with the respondent.
- b. The respondent advised the OAIC on 4 April 2019 that she had received a request for a report for each of the complainants from the representative and would send the reports by email to their representative's email address. The OAIC requested the information be provided by registered post to the complainants' residential address.
- c. The representative maintains that neither she nor the complainants have received the reports from the respondent.
- d. While in a phone call on 26 August 2019, the respondent advised the OAIC that she had sent the complainants' reports to their home address by regular mail:
  - i. The complainants state they did not receive the reports; and
  - ii. the respondent had previously agreed with the complainant's and had been asked by the OACI to send the reports by registered post. The respondent did not explain why she had chosen to use regular mail.

### Exceptions to access

38. APP 12 allows for an APP entity to refuse to provide personal information requested if certain exceptions apply. The respondent has not raised any exception to APP 12 to providing the complainants with their requested personal information.

39. I am satisfied that none of the exceptions under APP 12.3 apply to the respondent.

### Response to access requests

40. I am minded to recommend that the Commissioner finds that the respondent failed to respond to the request within a reasonable period after the request was made. I am of that view for the following reasons:

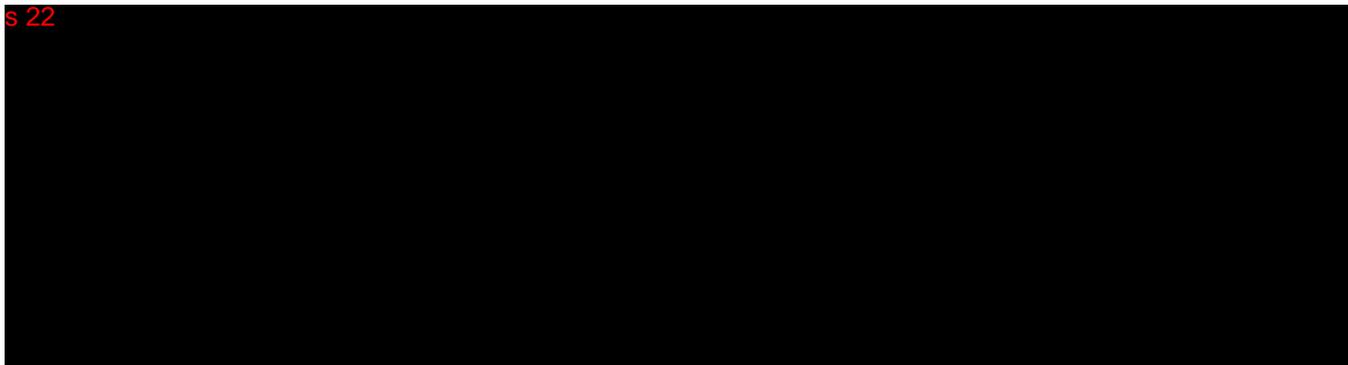
- a. APP 12.4(a) requires the respondent to respond to the complainant's request within a reasonable time after the request is made. The Privacy Act does not define 'reasonable period', though it is likely to depend on the clarity of the request, difficulty of locating the information and whether consultation is required with the individual and other parties.<sup>44</sup>
- b. The complainants' information request was specific, in that the complainants seek access to a report of their treatment provided by the respondent.
- c. By email on 4 April 2019 the respondent acknowledged the request for information and advised she would provide it 'over the coming couple of weeks'.<sup>45</sup>
- d. Over 10 months have lapsed since the respondent agreed to provide the requested information and the respondent has not, to date, provided any of the requested personal information to the complainants or their representative.
- e. The respondent indicated that she was keeping the complainants' clinical records at her residential address, in a locked filing cabinet.

<sup>44</sup> *Australian Privacy Principles Guidelines*, issued by the Australian Information Commissioner, March 2014, (APP Guidelines) at 12.67.

<sup>45</sup> R3.

- f. Given the respondent's proximity to the complainants' clinical records, the clarity and specificity of the complainants' request, the respondent's agreement to provide the information and the relative ease for the respondent to gather the information, I am of the view that the respondent has failed to respond to the complainants' requests within a reasonable timeframe.
41. Regardless of whether the complainant did in fact post to the personal information on or around 26 August 2019, in all the circumstances, I consider that it would have been reasonable for her to provide the personal information within a few days of the request being made on 19 April 2019.
42. I therefore find that the respondent has breached APP 12.4(a) by failing to provide the complainants with their personal information within a reasonable timeframe. For the above reasons, my preliminary view is that the respondent has breached APP 12.1 and APP 12.4.

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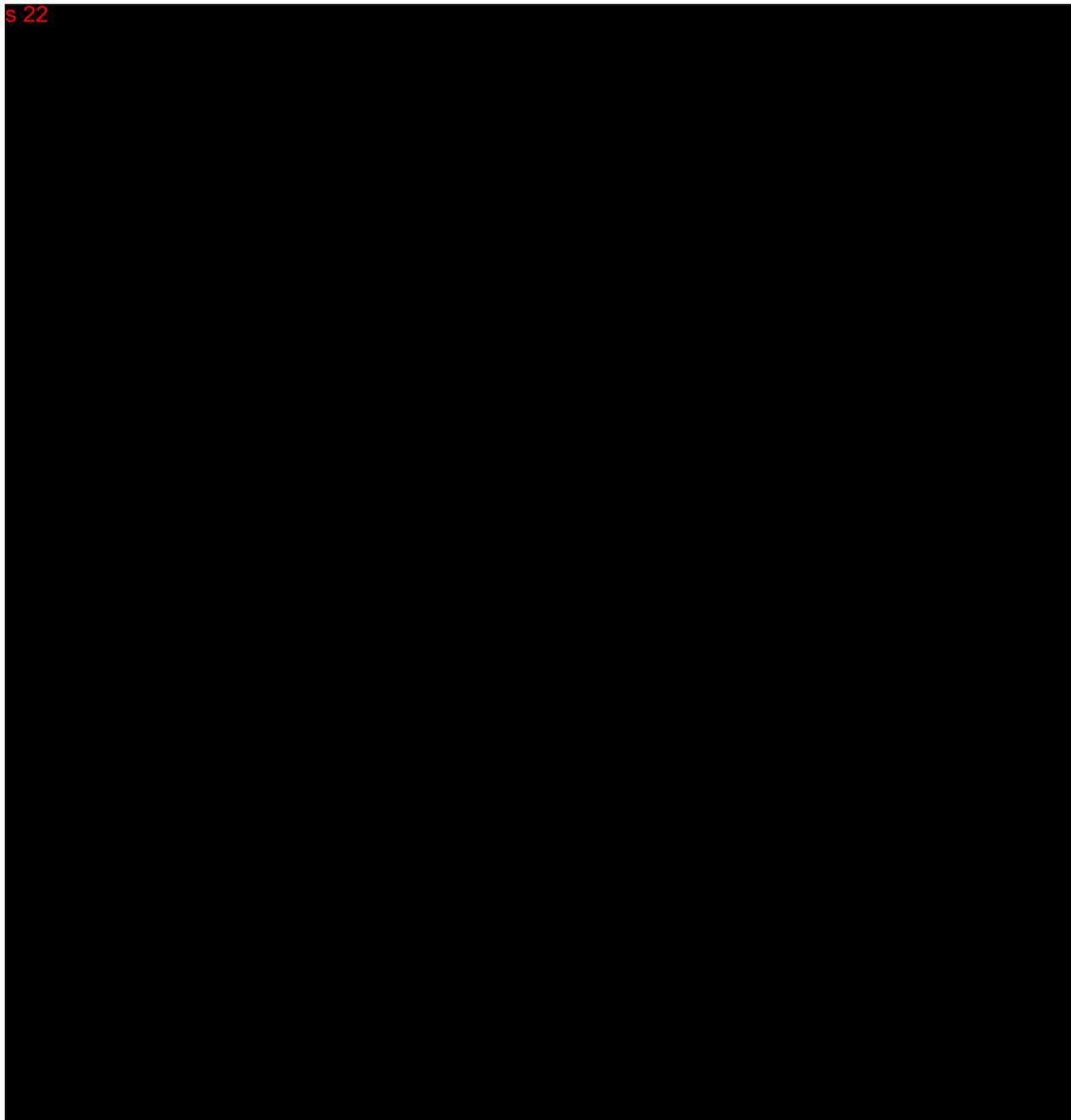
*Cloudsdale*

**Cate Cloudsdale**

Director, Determinations

28 May 2020

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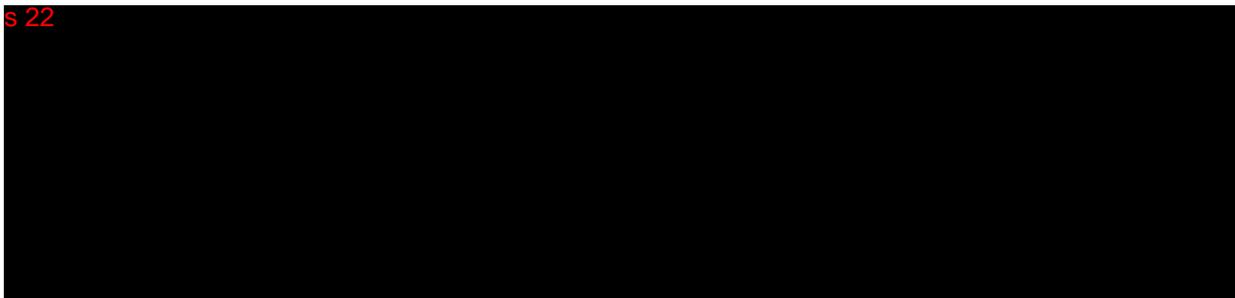


## Privacy breach

### Claim 1 – APP 12 - Failure to provide access

33. Where an APP entity holds personal information about an individual APP 12.1 requires that APP entity to give access to the information following a request by an individual, unless certain exceptions in APP 12.3 apply. APP 12.4 requires that an organisation

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respond to the request for access within a reasonable period after the request is made and give access to the information in the manner requested by the individual, if it is reasonable and practicable to do so.

34. In order to consider this claim, therefore, I must consider whether:

- there was a request for access
  - b. if so, whether the request was for personal information that the respondent held
- if so, whether the respondent provided the personal information
- if the respondent did not provide the personal information, whether any exceptions apply to the requirement to provide the personal information
- if the respondent did not provide access, and no exceptions apply, whether the respondent responded to the request within a reasonable period
- if the respondent provided access, whether she provided access in the manner requested by the individual, and if not, whether it was reasonable and practicable to do so.

## Consideration

### Request for access

35. I am satisfied that the complainants requested access to a report of their treatment from the respondent, as accepted by the respondent in her email dated 4 April 2019.<sup>35</sup>

### Personal information held

36. The complainants requested access to their reports, which I understand contained the complainants' names and their health information, amounting to personal information.

37. I am satisfied that the respondent held at the time of those requests (and continues to hold) the requested personal information about the complainants.

### Failure to provide access

38. The respondent did not provide access to the requested personal information until 25 June 2020, over a year after the access requests.

- Following receipt of the complaints, the OAIC attempted to assist the representative to obtain access to the personal information on behalf of the complainants. This assistance included telephone conversations and emails with the respondent.
- The respondent advised the OAIC on 4 April 2019 that she had received a request for a report for each of the complainants from the representative and would send the reports by email to their representative's email address. The OAIC requested the information be provided by registered post to the complainants' residential address.
- While in a phone call on 26 August 2019, the respondent advised the OAIC that she had sent the complainants' reports to their home address by regular mail:
  - The complainants state they did not receive the reports; and

<sup>35</sup> R7 - Email from the respondent to the OAIC dated 4 April 2019.

- the respondent had previously agreed with the complainant's and had been asked by the OACI to send the reports by registered post. The respondent did not explain why she had chosen to use regular mail.

### Exceptions to access

39. APP 12 allows for an APP entity to refuse to provide personal information requested if certain exceptions apply. The respondent has not raised any exception to APP 12 to providing the complainants with their requested personal information.

40. I am satisfied that none of the exceptions under APP 12.3 apply to the respondent.

### Response to access requests

41. I am satisfied that the respondent failed to respond to the request within a reasonable period after the request was made. I am of that view for the following reasons:

- APP 12.4(a) requires the respondent to respond to the complainant's request within a reasonable time after the request is made. The Privacy Act does not define 'reasonable period', though it is likely to depend on the clarity of the request, difficulty of locating the information and whether consultation is required with the individual and other parties.<sup>36</sup>
- The complainants' information request was specific, in that the complainants sought access to a report of their treatment provided by the respondent.
- By email on 4 April 2019 the respondent acknowledged the request for information and advised she would provide it 'over the coming couple of weeks'.<sup>37</sup>
- The respondent indicated that she was keeping the complainants' clinical records at her residential address, in a locked filing cabinet.
- Over a year passed before the respondent provided access.
- Given the respondent's proximity to the complainants' clinical records, the clarity and specificity of the complainants' request, the respondent's agreement to provide the information and the relative ease for the respondent to gather the information, I am of the view that the respondent has failed to respond to the complainants' requests within a reasonable timeframe.

42. Regardless of whether the complainant did in fact post to the personal information on or around 26 August 2019, in all the circumstances, I consider that it would have been reasonable for her to provide the personal information within a few days of the request being made in April 2019.

43. I therefore find that the respondent has breached APP 12.4(a) by failing to provide the complainants with their personal information within a reasonable timeframe. For the above reasons, my preliminary view is that the respondent has breached APP 12.1 and APP 12.4.

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<sup>36</sup>APP Guidelines [12.67].

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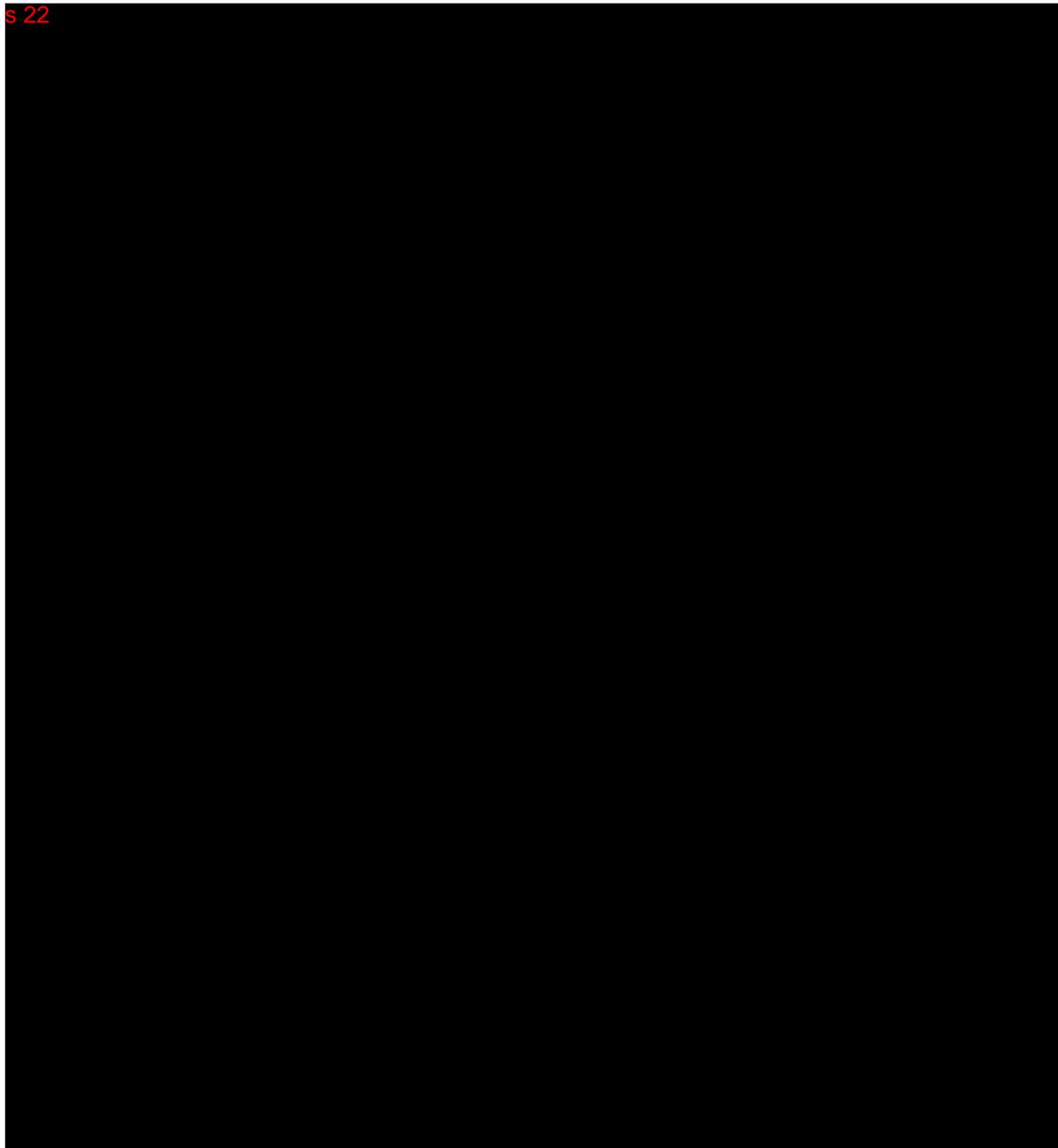
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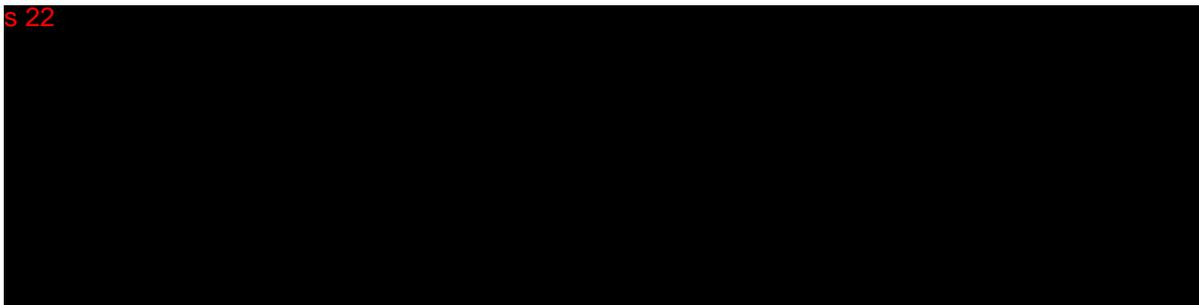


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- Over a year passed before the respondent provided access.
- Given the respondent's proximity to the complainants' clinical records, the clarity and specificity of the complainants' request, the respondent's agreement to provide the information and the relative ease for the respondent to gather the information, I am of the view that the respondent has failed to respond to the complainants' requests within a reasonable timeframe.

42. Regardless of whether the respondent did in fact post to the personal information on or around 26 August 2019, in all the circumstances, I consider that it would have been reasonable for her to provide the personal information within a few days of the request being made in April 2019.

43. I therefore find that the respondent has breached APP 12.4(a) by failing to provide the complainants with their personal information within a reasonable timeframe. For the above reasons, my preliminary view is that the respondent has breached APP 12.1 and APP 12.4.

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## Preliminary findings on breach

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36. I am satisfied that the respondent held at the time of those requests (and continues to hold) the requested personal information about the complainants.

#### **Failure to provide access**

37. I am satisfied that the respondent has not provided access to the requested personal information for the following reasons:

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<sup>43</sup> R3.

- a. Following receipt of the complaints, the OAIC attempted to assist the representative to obtain access to the personal information on behalf of the complainants. This assistance included telephone conversations and emails with the respondent.
- b. The respondent advised the OAIC on 4 April 2019 that she had received a request for a report for each of the complainants from the representative and would send the reports by email to their representative's email address. The OAIC requested the information be provided by registered post to the complainants' residential address.
- c. The representative maintains that neither she nor the complainants have received the reports from the respondent.
- d. While in a phone call on 26 August 2019, the respondent advised the OAIC that she had sent the complainants' reports to their home address by regular mail:
  - i. The complainants state they did not receive the reports; and
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### Exceptions to access

38. APP 12 allows for an APP entity to refuse to provide personal information requested if certain exceptions apply. The respondent has not raised any exception to APP 12 to providing the complainants with their requested personal information.

39. I am satisfied that none of the exceptions under APP 12.3 apply to the respondent.

### Response to access requests

40. I am minded to recommend that the Commissioner finds that the respondent failed to respond to the request within a reasonable period after the request was made. I am of that view for the following reasons:

- a. APP 12.4(a) requires the respondent to respond to the complainant's request within a reasonable time after the request is made. The Privacy Act does not define 'reasonable period', though it is likely to depend on the clarity of the request, difficulty of locating the information and whether consultation is required with the individual and other parties.<sup>44</sup>
- b. The complainants' information request was specific, in that the complainants seek access to a report of their treatment provided by the respondent.
- c. By email on 4 April 2019 the respondent acknowledged the request for information and advised she would provide it 'over the coming couple of weeks'.<sup>45</sup>
- d. Over 10 months have lapsed since the respondent agreed to provide the requested information and the respondent has not, to date, provided any of the requested personal information to the complainants or their representative.
- e. The respondent indicated that she was keeping the complainants' clinical records at her residential address, in a locked filing cabinet.

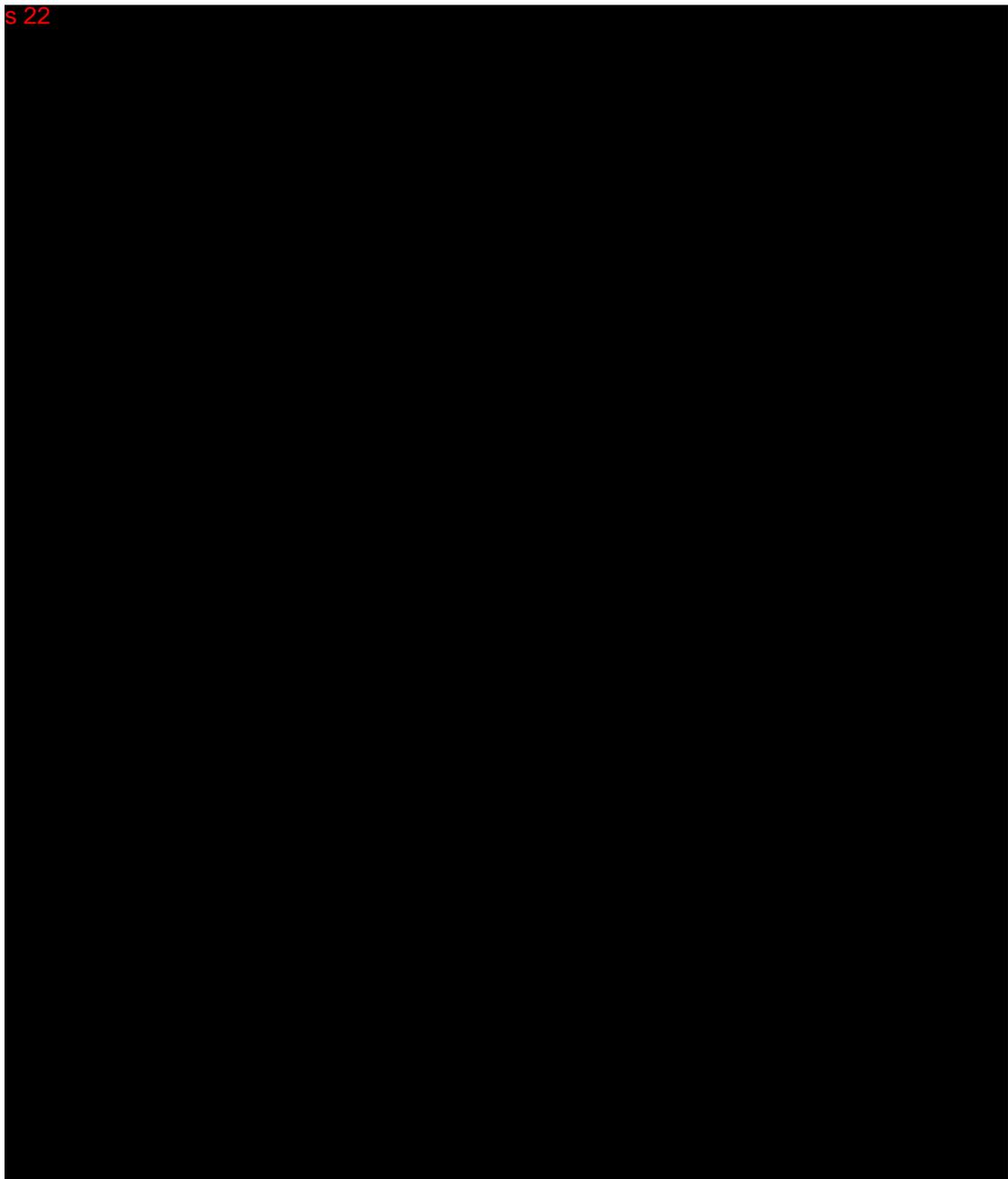
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- f. Given the respondent's proximity to the complainants' clinical records, the clarity and specificity of the complainants' request, the respondent's agreement to provide the information and the relative ease for the respondent to gather the information, I am of the view that the respondent has failed to respond to the complainants' requests within a reasonable timeframe.
41. Regardless of whether the complainant did in fact post to the personal information on or around 26 August 2019, in all the circumstances, I consider that it would have been reasonable for her to provide the personal information within a few days of the request being made on 19 April 2019.
42. I therefore find that the respondent has breached APP 12.4(a) by failing to provide the complainants with their personal information within a reasonable timeframe. For the above reasons, my preliminary view is that the respondent has breached APP 12.1 and APP 12.4.

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*Cate Cloudsdale*

**Cate Cloudsdale**

Director, Determinations

28 May 2020



## 'VJ', 'VK', 'VL' and 'VM' (Privacy) [2020] AICmr 45 (2 September 2020)

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

Complainant	'VJ' – First complainant 'VK' – Second complainant 'VL' – Third complainant
Respondent	'VM'
Decision date	2 September 2020
Application number	CP 19/01079 CP 19/01406 CP 19/01407
Catchwords	Privacy — <i>Privacy Act 1988</i> (Cth) — Australian Privacy Principles — Breach of APP 12 — Breach of APP 11 — Psychologist delayed access to personal information — Damages for non-economic loss awarded — Aggravated damages awarded

## Determination

1. I find that the respondent interfered with the complainants' privacy as defined in the *Privacy Act 1988* (Cth) (**Privacy Act**) by:
  - 1) failing to provide the complainants with access to their personal information, in breach of Australian Privacy Principle 12.
  - 2) failing to take such steps as are reasonable in the circumstances to protect the complainants' personal information, in breach of Australian Privacy Principle 11.1.

## Declarations

2. I make the following declarations under s 52(1)(b) of the Privacy Act:
  - 1) The respondent must, within 60 days of deemed receipt of this determination, pay:
    - a) \$4,500 to the first complainant. This amount comprised of \$3,000 for non-economic loss and \$1,500 for aggravated damages.

- b) \$3,500 to the third complainant. This amount comprised of \$2,000 for non-economic loss and \$1,500 for aggravated damages.
- 2) The respondent must provide a written apology to each of the complainants. The written apology must be addressed to each complainant separately and be sent by registered post to the complainants' representative's address within two weeks of the date of this determination.
  - 3) The respondent must:
    - a. engage an independent auditor to assess her compliance with APP 11 of Schedule 1 to the Privacy Act with respect to the physical security of the personal information she holds
    - b. engage the auditor within two weeks of deemed receipt of the determination
    - c. require the auditor to complete the audit, including a written report, within two months of their engagement
    - d. provide a copy of the auditor's report to the Office of the Australian Information Commissioner (**OAIC**) within two weeks of the date of the report
    - e. implement the auditor's recommendations, if any, within two months of the date of the auditor's report.

## Findings and Reasons

### Background

3. The complaints involve the respondent's alleged failure to provide the complainants with access to their personal information and the steps taken by the respondent to store their personal information securely.
4. The respondent is a registered psychologist who provided psychological services to the complainants, which ceased between 2016 and 2017.<sup>1</sup>
5. Between October 2018 and April 2019 the complainants each requested the respondent provide access to their personal information in the form of a report (**report**).<sup>2</sup>
6. The respondent agreed to provide access,<sup>3</sup> however, it was not until 3 July 2020 that the complainants received the reports,<sup>4</sup> which the respondent sent by registered post on 25 June 2020.<sup>5</sup>

<sup>1</sup> C4 - Email from the representative to the OAIC dated 4 November 2018; C28 - Email from representative to the OAIC dated 23 May 2019.

<sup>2</sup> C1 - Email from the representative to the OAIC dated 16 October 2018; C21 - Email from representative to the OAIC dated 22 May 2019.

<sup>3</sup> R2 - Email from the respondent to the OAIC dated 26 February 2019.

<sup>4</sup> C52 - Email from the representative to the OAIC dated 3 July 2020.

<sup>5</sup> R10.1 - Registered Post Lodgement Receipt post marked 25 June 2020.

7. The three complainants, who are siblings, have each given their mother (**representative**) authority to represent them in these complaints. The complainants were all adults at the time of making their complaints.
8. The representative lodged a complaint on behalf of the first complainant on 24 April 2019.<sup>6</sup> The representative lodged complaints for the second and third complainants on 30 May 2019.<sup>7</sup>

## Law

9. All references to provisions in this determination are to those contained in the Privacy Act except where indicated.
10. The Australian Privacy Principles (**APPs**), which are set out in Schedule 1 to the Privacy Act, regulate the collection, use, disclosure and security of personal information held by Australian government agencies and certain private sector organisations (**APP entities**). An act or practice of an APP entity is an interference with the privacy of an individual if the act or practice breaches an APP (s 13).
11. In particular:
  - APP 11 relates to the security of personal information and requires APP entities to take such steps as are reasonable in the circumstances to protect personal information that it holds from misuse, interference, loss, unauthorised access, modification or disclosure.
  - APP 12 places obligations on APP entities to provide individuals with access to their personal information on request.
12. Section 36 of the Privacy Act allows an individual to complain to the Commissioner about an act or practice that may be an interference with their privacy.
13. Section 52 of the Privacy Act provides that, after investigating a complaint, the Commissioner may make a determination either dismissing the complaint, or finding the complaint substantiated and making one or more declarations, which can include the award of compensation where the complainant has suffered loss or damage.
14. The law relevant to this complaint is set out at **Attachment A**.

## Material considered

15. In making this determination I have considered the following:
  - Information and submissions provided by the parties
  - Information obtained by my officers
  - *Australian Privacy Principles Guidelines*, issued by the Australian Information Commissioner, February 2014 (**APP Guidelines**).<sup>8</sup>

## Complainants' claims

16. With respect to breach of the Privacy Act the claims are:

<sup>6</sup> CT - Privacy complaint form lodged 24 April 2019.

<sup>7</sup> CJ and CA - Privacy complaint forms lodged 30 May 2019.

<sup>8</sup> As at July 2019.

- The respondent provided psychological services to each of the complainants.
- The representative contacted the respondent on behalf of the complainants to request access to their records at various times before April 2019.<sup>9</sup>
- The first complainant contacted the respondent in October 2018<sup>10</sup> seeking access to their personal information in the form of the report.<sup>11</sup>
- Following the access requests, and after lodging the complaints on behalf of the first, second and third complainants the representative sent the respondent further emails, again requesting access to the complainants' health information held by the respondent.<sup>12</sup> None of the complainants received a report from the respondent until July 2020.

17. In respect of the security of their records, the complainants made claims that the respondent was not taking reasonable steps to ensure their personal information was, and is, protected from misuse, interference and loss and unauthorised access, modification or disclosure.

18. The representative has complained on behalf of the complainants to the Australian Health Practitioner Regulation Agency (**AHPRA**) and the Health Care Complaints Commission (**HCCC**) in relation to the business structure of the respondent's practice, her record keeping, moving and storage of clinical records, and, the respondent's failure to provide requested information.<sup>13</sup>

19. The representative provided a letter from the HCCC which indicated that it had decided not to further investigate those complaints on the basis that it was being dealt with by the OAIC.<sup>14</sup>

## Damage

20. The representative makes a number of claims on behalf of the complainants with respect to how the alleged interferences with privacy have impacted them. Essentially, these claims are that each complainant has been deprived of the benefit of access to their own personal information from the respondent, which has caused them to encounter difficulties and distress, including distress in accessing healthcare.

21. I note that the representative has provided information about various emotional issues and problems facing the complainants, which is not connected to the privacy breach.<sup>15</sup>

<sup>9</sup> C16 - Email from the representative to the OAIC dated 10 February 2019; C20 - Email from the representative to the OAIC dated 18 March 2019.

<sup>10</sup> C9- Email from the representative to the OAIC dated 5 December 2018; C15- Email from the representative to the OAIC dated 10 February 2019; C19 - Email from the representative to the OAIC dated 18 March 2019.

<sup>11</sup> C9- Email from the representative to the OAIC dated 5 December 2018; C15- Email from the representative to the OAIC dated 10 February 2019; C19 - Email from the representative to the OAIC dated 18 March 2019.

<sup>12</sup> C16 - Email from the representative to the OAIC dated 10 February 2019; C20 C9- Email from the complainant to the OAIC dated 18 March 2019; R4 – Email from the respondent to the OAIC dated 26 February 2019.

<sup>13</sup> C6 - Email from the representative to the OAIC dated 27 November 2018.

<sup>14</sup> C26.1 - Letter from HCCC to the representative dated 22 May 2019.

<sup>15</sup> Including in her responses to the preliminary view – emails C43-C57, various dates.

## Claims arising from complainant's material

22. Based on what is before me, I understand the complainants' claims regarding APP breaches to be:

- Claim 1 – The respondent breached APP 12 by failing to provide the complainants with access to their personal information on request.
- Claim 2 – The respondent breached APP 11 by failing to securely store the complainants' personal information.

## Jurisdiction

23. The Privacy Act applies to 'APP entities'. Section 6 defines an 'APP' entity as meaning among other things an 'agency' or an 'organisation'.

24. Section 6C defines 'organisation' to mean (among other things) an 'individual' or a 'body corporate'. However, an organisation cannot be a 'small business operator'.

25. Subparagraph 6D(4)(b) provides that (among other things), an individual or body corporate is not a small business operator if they provide a 'health service' to another individual and the individual or body corporate holds health information (other than employee records) about that other individual.

26. Section 6FB states that an activity performed in relation to an individual is a 'health service' if the activity is intended or claimed (expressly or otherwise) by the individual or the person performing it to (among other things) 'assess, maintain or improve an individual's health; or ... to treat the individual's illness ... or injury'. Subsection 6FB(3) provides that a reference to an individual's health includes the individual's 'psychological health'.

## Respondent as an APP entity

27. The complainants claim that while they received psychological services from the respondent, the respondent operated as a psychologist under two separate names, a business name and a company name. An ASIC search of those two entities shows the business name has been cancelled and the company name was deregistered on 6 April 2018.<sup>16</sup>

28. The respondent in her individual capacity as a registered psychologist<sup>17</sup> provided a health service, in the form of an activity to assess, maintain or improve the complainants' mental health.<sup>18</sup> Throughout the provision of that health service, the respondent was the individual responsible for collecting, making and storing the relevant personal information that arose from those relationships, such as clinical records and treatment plans.

<sup>16</sup> O29 - ASIC Organisation and Business Name Search dated 16 January 2020; O30 - ASIC Organisation and Business Name Search dated 16 January 2020.

<sup>17</sup> s 6C(1)(a) Privacy Act.

<sup>18</sup> s 6FB(1)(a) Privacy Act.

29. The respondent acknowledged that she holds the complainants' requested personal information.<sup>19</sup>
30. Accordingly, I am of the view that the respondent as an individual, in her capacity as a registered psychologist, was an APP entity for the purposes of these complaints.
31. Given the requested personal information contains information or opinions about the complainants' health and health services provided to them, I am of the view that the information sought by the complainants is health information<sup>20</sup> and therefore constitutes sensitive information.<sup>21</sup>

## Inquiries to facilitate access

32. Throughout the conduct of the complaints process, the OAIC attempted to facilitate access for the complainants by engaging with the respondent as follows:
- On 4 April 2019 the respondent emailed the OAIC advising that she had received further requests from the representative for reports in relation to the first, second and third complainants. The respondent advised that she would provide the information to the complainants by email 'in the coming couple of weeks'.<sup>22</sup>
  - On 12 April 2019 the OAIC replied to the respondent, advising that the material should be provided to the complainants and the representative by registered post, as the respondent had agreed to do.<sup>23</sup>
  - On 12 June 2019 the OAIC wrote to the respondent advising that the OAIC had opened an investigation into the complaints of the first, second and third complainants and asking the respondent to indicate her willingness to provide the complainants with access to their personal information.<sup>24</sup>
  - On 2 July 2019 the OAIC emailed the respondent seeking her response to the letter of 12 June 2019 and providing an extension of time to 5 July 2019.<sup>25</sup>
  - On 2 July 2019 and 5 August 2019 the OAIC attempted to contact the respondent by telephone, leaving voicemails requesting a return call.<sup>26</sup>
  - On 13 August 2019 the OAIC issued a notice issued under s 44 of the Privacy Act (**s 44 notice**), to the respondent legally compelling her to produce information and documents to the Commissioner,<sup>27</sup> sent by both email and registered post to the respondent's work address. The s 44 notice required the respondent to provide the information by 23 August 2019.

<sup>19</sup> R2.1 - Respondent's response, attached to email from the respondent to the OAIC dated 25 February 2019.

<sup>20</sup> Section 6FA Privacy Act.

<sup>21</sup> Section 6 Privacy Act.

<sup>22</sup> R3 - Email from the respondent to the OAIC dated 4 April 2019.

<sup>23</sup> O1 - Email from the OAIC to the respondent dated 12 April 2019.

<sup>24</sup> O4.1 - Letter from the OAIC to the respondent dated 12 June 2019.

<sup>25</sup> O6 - Email from the OAIC to the respondent dated 2 July 2019.

<sup>26</sup> O8 - File note of 5 August 2019.

<sup>27</sup> O9.1 - Letter from the OAIC to the respondent dated 13 August 2019.

- On 23 August 2019 OAIC received confirmation that the s 44 notice, sent by registered post to the respondent's work address, had been delivered and signed for on 16 August 2019 at 10:27 am.<sup>28</sup>
- On 26 August 2019 the OAIC spoke to the respondent, who advised that the email address being used by the OAIC was no longer in use and provided a new email address. The respondent advised she did not receive the correspondence that was sent by registered post to her work address, despite the package having been signed for. The respondent also advised that she had sent the reports to the complainants and the representative, by regular post rather than registered post. The respondent did not explain why she had departed from her previous undertaking to send the reports by registered post. The respondent again agreed to send the reports by registered post.<sup>29</sup>
- On 26 August 2019 the OAIC emailed the respondent, attaching the s 44 notice and requesting that the respondent send the complainants their reports by registered post to their home address by 30 August 2019.<sup>30</sup>
- On 2 September 2019 the OAIC attempted to contact the respondent by telephone and left a voicemail requesting a return call.<sup>31</sup>
- On 4 September 2019 the respondent sent the OAIC an email which stated, 'please find attached information regarding the forwarding of information to [the representative]'. The email did not contain any attachments. The OAIC replied approximately an hour later advising the respondent that her email contained no attachments and requested the information be attached and sent.<sup>32</sup>
- On 4 October 2019 the OAIC wrote to the respondent advising that the matter would be referred to the Privacy Commissioner for determination unless the personal information was provided by the respondent by 11 October 2019.<sup>33</sup> The respondent did not respond to that letter.
- It was only in response to a preliminary view issued on 28 May 2020 that the respondent acknowledged her failure to provide access to the complainants' personal information. The respondent stated: 'I acknowledge that there has been a failure to follow through with my initial intention to forward the reports for these three individuals which I outlined that I would do in 2019.' The respondent undertook to provide the reports to the complainants by registered post by 22 June 2020. She has since provided evidence of having done so by 25 June 2020.<sup>34</sup>

## Privacy breach

### Claim 1 – APP 12 - Failure to provide access

33. Where an APP entity holds personal information about an individual APP 12.1 requires that APP entity to give access to the information following a request by an individual, unless certain exceptions in APP 12.3 apply. APP 12.4 requires that an organisation

<sup>28</sup> O22 - Copy of delivery status of tracked letter.

<sup>29</sup> O23.2 - File note regarding telephone call between the OAIC and the respondent dated 26 August 2019.

<sup>30</sup> O24 - Email from the OAIC to the respondent dated 12 April 2019.

<sup>31</sup> O25 - File note regarding voicemail left by the OAIC for the respondent dated 24 May 2019.

<sup>32</sup> O26 - Email from the OAIC to the respondent dated 4 September 2019.

<sup>33</sup> O27.1 - Letter from the OAIC to the respondent dated 4 October 2019.

<sup>34</sup> R10.1 - Registered Post Lodgement Receipt post marked 25 June 2020.

respond to the request for access within a reasonable period after the request is made and give access to the information in the manner requested by the individual, if it is reasonable and practicable to do so.

34. In order to consider this claim, therefore, I must consider whether:

- there was a request for access
- if there was a request for access, whether the request was for personal information that the respondent held
- if so, whether the respondent provided the personal information
- if the respondent did not provide the personal information, whether any exceptions apply to the requirement to provide the personal information
- if the respondent did not provide access, and no exceptions apply, whether the respondent responded to the request within a reasonable period
- if the respondent provided access, whether she provided access in the manner requested by the individual, and if not, whether it was reasonable and practicable to do so.

## Consideration

### Request for access

35. I am satisfied that the complainants requested access to a report of their treatment from the respondent, as accepted by the respondent in her email dated 4 April 2019.<sup>35</sup>

### Personal information held

36. The complainants requested access to their reports, which I understand contained the complainants' names and their health information, amounting to personal information.

37. I am satisfied that the respondent held at the time of those requests (and continues to hold) the requested personal information about the complainants.

### Failure to provide access

38. The respondent did not provide access to the requested personal information until 25 June 2020, over a year after the access requests.

- Following receipt of the complaints, the OAIC attempted to assist the representative to obtain access to the personal information on behalf of the complainants. This assistance included telephone conversations and emails with the respondent.
- The respondent advised the OAIC on 4 April 2019 that she had received a request for a report for each of the complainants from the representative and would send the reports by email to their representative's email address. The OAIC requested the information be provided by registered post to the complainants' residential address.
- While in a phone call on 26 August 2019, the respondent advised the OAIC that she had sent the complainants' reports to their home address by regular mail:
  - the complainants state they did not receive the reports; and

<sup>35</sup> R7 - Email from the respondent to the OAIC dated 4 April 2019.

- the respondent had previously agreed with the complainants and had been asked by the OAIC to send the reports by registered post. The respondent did not explain why she had chosen to use regular mail.

### Exceptions to access

39. APP 12 allows for an APP entity to refuse to provide personal information requested if certain exceptions apply. The respondent has not raised any exception to APP 12 to providing the complainants with their requested personal information.

40. I am satisfied that none of the exceptions under APP 12.3 apply to the respondent.

### Response to access requests

41. I am satisfied that the respondent failed to respond to the request within a reasonable period after the request was made. I am of that view for the following reasons:

- APP 12.4(a) requires the respondent to respond to the complainant's request within a reasonable time after the request is made. The Privacy Act does not define 'reasonable period', though it is likely to depend on the clarity of the request, difficulty of locating the information and whether consultation is required with the individual and other parties.<sup>36</sup>
- The complainants' information request was specific, in that the complainants sought access to a report of their treatment provided by the respondent.
- By email on 4 April 2019 the respondent acknowledged the request for information and advised she would provide it 'over the coming couple of weeks'.<sup>37</sup>
- The respondent indicated that she was keeping the complainants' clinical records at her residential address, in a locked filing cabinet.
- Over a year passed before the respondent provided access.
- Given the respondent's proximity to the complainants' clinical records, the clarity and specificity of the complainants' request, the respondent's agreement to provide the information and the relative ease for the respondent to gather the information, I am of the view that the respondent has failed to respond to the complainants' requests within a reasonable timeframe.

42. Regardless of whether the respondent did in fact post to the personal information on or around 26 August 2019, in all the circumstances, I consider that it would have been reasonable for her to provide the personal information within a few days of the request being made in April 2019.

43. I therefore find that the respondent has breached APP 12.4(a) by failing to provide the complainants with their personal information within a reasonable timeframe. For the above reasons, my preliminary view is that the respondent has breached APP 12.1 and APP 12.4.

### Finding

44. For the above reasons, I find that the respondent has breached APP 12.1 and APP 12.4.

<sup>36</sup>APP Guidelines [12.67].

<sup>37</sup>R7 - Email from the respondent to the OAIC dated 4 April 2019.

## Claim 2 – Failure to take reasonable steps to secure personal information

### APP 11 – breach in relation to storage at home

45. APP 11 requires an entity to take such steps as are reasonable in the circumstances to protect personal information that it holds from misuse, interference and loss, and from unauthorised access, modification or disclosure.

46. Under the APP Guidelines, the reasonable steps that an APP entity must take will depend upon circumstances including:

- Nature of the APP entity, including its size, resources, complexity of operations and business model.
- Amount and sensitivity of the personal information held.
- Possible adverse consequences for an individual in case of breach.
- Practical implications of implementing security measures.<sup>38</sup>
- Reasonable steps should be considered for internal practices, procedures and systems, access security and physical security, among other matters.<sup>39</sup>

### Respondent's submissions

47. The respondent advised that at all times, she stored the complainants' clinical records in the same way as her other clients, specifically, that the respondent kept all client clinical records in a locked filing cabinet in her locked garage at her home, with key access required to both the garage and filing cabinet. The respondent stated she is the only person who holds a key to the filing cabinet.<sup>40</sup> The respondent further clarified that while her husband and children do have access to the garage, the cabinets are locked and she has the only key.<sup>41</sup>

48. She submitted:

'At no time were any files from [the respondent's] private practice stored in [her] offices at [name of school], or [her] car, or anywhere inappropriate.'<sup>42</sup>

### Consideration

49. I have considered the nature of the respondent's business, including that she is a sole practitioner providing health services to individuals. I place weight on the fact that clinical records held by the respondent would contain highly sensitive personal information of individuals who have received psychological services. I consider that it is likely that should such information be lost or accessed by someone who is unauthorised

<sup>38</sup> APP Guidelines [11.7].

<sup>39</sup> APP Guidelines [11.8].

<sup>40</sup> R2.1 - Respondent's response, attached to email from respondent to the OAIC dated 4 February 2019 p 2.

<sup>41</sup> R9.1 - Letter from the respondent to the OAIC undated, attached to email dated 5 March 2020 p 2.

<sup>42</sup> R9.1 - Letter from the respondent to the OAIC undated, attached to email dated 5 March 2020 p 2.

to access it, there is potential for significant adverse effects on such individuals, including distress.

50. The information held by the respondent is health information and therefore sensitive information.
51. In the circumstances, I am not satisfied that the respondent has taken reasonable steps to protect the personal information she holds, particularly given the nature of the information, being a health record and therefore sensitive information.
52. The respondent was provided with an opportunity to provide further particulars about the manner in which she stores personal information.
53. The respondent indicated in response to the preliminary view that she could provide more information about the security measures she was taking in relation to the personal information she held.<sup>43</sup> Despite being on notice of these issues, she has not provided such particulars in her response.
54. Given the highly sensitive nature of the information stored, I am not satisfied that the respondent has taken reasonable steps to protect the personal information she holds.

### Finding – APP 11 breach in relation to storage

55. I am not satisfied that the respondent has complied with APP 11 in the storage of the complainants' clinical records at her home.

## Damages

56. I find Claims 1, 2 and 3 of the complaint to be substantiated. As a result, I have the discretion under s 52(1)(b)(iii) to award compensation for 'any loss or damage suffered by reason of the interference with privacy'. Subsection 52(1AB) states that loss or damage can include injury to the complainant's feelings or humiliation suffered by the complainant.

### Non-economic loss

#### Pain and suffering

57. The representative has provided specific examples of pain and suffering the complainants have been caused due to the interference with their privacy, including the following:
  - The representative required a report for the third complainant to provide to disability employment services. Without a report, the third complainant required reassessment, which would be difficult to do and was a difficult process on the first occasion.<sup>44</sup>
  - Without the report, the third complainant would be 'pushed' back around 10 sessions in consulting with a new psychologist.<sup>45</sup>

<sup>43</sup> R9.1 - Letter from the respondent to the OAIC undated, attached to email dated 5 March 2020 p 2.

<sup>44</sup> C40 - Email from the representative to the OAIC dated 8 October 2019.

<sup>45</sup> C41 - Email from the representative to the OAIC dated 17 October 2019.

- The first complainant has difficulty opening up and may hold back information from treating health professionals and they could not give their GP the ‘full picture’ without records from the respondent.<sup>46</sup>
- The representative advised that the first complainant no longer trusts psychologists and is ‘dealing with some heavy stuff at the moment but can’t even follow through with history to go to gp’.<sup>47</sup>
- The first complainant is distressed at the uncertainty of whether they will receive a copy of the report as they require.<sup>48</sup>
- The second complainant needed to transfer their care to another psychologist.<sup>49</sup>
- The complainants each have ‘lifelong disorders’ and required a clinical history, which would have been included in the requested reports.<sup>50</sup>

58. The representative was of the view that the respondent was refusing to provide the first complainant with access to their personal information in retribution for the representative making complaints about the respondent to AHPRA and HCCC.

59. The representative has more recently referred to all three complainants getting ‘angrier the longer [the respondent] takes.’<sup>51</sup>

### **The first complainant’s evidence**

60. The first complainant has provided a statement which outlines how the privacy breach has affected them as follows:

- The uncertainty of where their health records are and the delay in their health summary being provided has affected them.
- The first complainant is ‘angry, upset, hurt and distressed that a grown adult of [their] profession could ignore a child who was only 17 years old at the time ...’
- The first complainant feels that the respondent, in ‘holding onto’ their records, involved ‘an inexcusable, unprofessional attack on [them] and [their] rights as a person.’
- The first complainant continues to have ‘anger’ that the respondent: ‘ignored [them] and thinks [they are] not important or a separate person ...’<sup>52</sup>
- The first complainant was offered a traineeship and conveyed to the course teacher that they had learning difficulties and disabilities, requiring additional support, and was unable to provide the information the subject of the APP 12 request. The first complainant ‘struggled through the course’, ‘found it difficult to ask for help’ and had their ‘records on [their] mind.’ The respondent has submitted that the first complainant’s learning needs had been previously discussed with the school.<sup>53</sup> I have no evidence of that information being provided in the context of a traineeship. Regardless of what the school knew about the first complainant’s disabilities, I consider that the first

<sup>46</sup> C38 - Email from the representative to the OAIC dated 27 September 2019.

<sup>47</sup> C13 - Email from the representative to the OAIC dated 19 March 2020.

<sup>48</sup> C25 - Email from the representative to the OAIC dated 22 May 2019.

<sup>49</sup> C35 - Email from the representative to the OAIC dated 23 August 2019.

<sup>50</sup> C36 - Email from the representative to the OAIC dated 31 August 2019.

<sup>51</sup> C43 - Email from the representative to the OAIC dated 29 May 2020.

<sup>52</sup> C59.1 - Statement made by the first complainant dated 14 July 2020.

<sup>53</sup> R11.1.B - Attachment with annotated version of C59.1, attached to email from the respondent to the OAIC dated 11 August 2020.

complainant experienced the distress, as stated, in the absence of having access to her summary.

- The first complainant says that their anxiety prevented them from catching up on modules, and they were worried that their supervisor would not believe the impact of their disabilities on their participation.
- The first complainant has been seeing a doctor who needs to see their health records, and the respondent's failure to transfer the records has increased anxiety for fear that the doctor will 'keep bringing up psychologists'.<sup>54</sup>
- The respondent's actions have caused 'distress, anger, uncertainty, sleepless nights, struggles with the traineeship.'<sup>55</sup>

61. A statement from the first complainant's former teacher, and colleague during the traineeship, has corroborated that the first complainant experienced distress about not been provided with access to their records as follows:

'During the lunch break several hours later, [the first complainant] apologise for being "rude" that morning. {They} then proceeded to tell me how "worried" [they were] about not having [their] records and how that may negatively impact on [their] mum. [The first complainant] said [they] just wanted [their] records and was worried that a "random" was going to see them. [The first complainant] proceeded to talk about how [they] couldn't sleep and continued to reiterate that [they] wanted [their] information back. [The first complainant] and I went for a walk to try and help regulate and ease [their] anxiety surrounding this.

There were a number of occasions throughout 2019 where [the first complainant] presented in the same or similar fashion and commented on how the situation with their "old psychologist" was the cause of [their] anxiety [the first complainant] made a number of comments like "this is why I don't trust people".'

62. I accept this evidence that the privacy breach caused the first complainant distress.

### **The third complainant's evidence**

63. The third complainant has provided a statement setting out how the privacy breach has affected them as follows:

- The delay in providing their health records has increased anxiety. They needed their records for an 'ESAT' assessment 'done through Centrelink', which I understand to be an employment services assessment.
- They say that the records were not available for the assessment and that:

'My mother had to come with me due to no information and high anxiety. I was also put on a 3-month medical certificate which [Doctor] did and it went to Centrelink. [Doctor] had to write another medical certificate to me and my medication has increased but it got knocked back with no new conditions. If you had my records and I had my promised information it would not have been difficult.'<sup>56</sup>

- Without their records, they 'went to the psychologist with no information' and they 'found it hard, overwhelming with so many questions [they] could not answer.' The respondent has submitted that the third complainant's transition to a new psychologist and related treatment may not have been due to her failure to provide a summary, but

<sup>54</sup> C59.1 - Statement made by the first complainant dated 14 July 2020 p 2.

<sup>55</sup> C59.1 - Statement made by the first complainant dated 14 July 2020 p 3.

<sup>56</sup> C58.1 - Statement made by the third complainant undated p 1.

because ‘transition is often difficult’.<sup>57</sup> I do not consider that this negates the third complainant’s distress as stated.

- The third complainant is ‘worried about [their] health records, how and when they were moved.’ It was only through the OAIC’s process that they found out they were moved in 2016.<sup>58</sup>

64. I accept this evidence that the privacy breach caused the third complainant distress.

65. Both the first and third complainants have also made claims about the summaries containing inaccuracies and how this has affected them. As these claims do not form part of the original complaint, these aspects were not investigated. The representative has been invited to make a separate complaint should they wish to do so.

### **The second complainant’s evidence**

66. The second complainant did not provide a statement. The complainant’s representative advises that ‘[they] said [they] didn’t want to write.’<sup>59</sup> I have no direct information from the second complainant about how the privacy breach has affected them.

### **Findings**

67. I accept the statements of the first and third complainants as evidence of their distress arising out of the privacy breach. I am not satisfied that the second complainant has suffered harm as a result of the privacy breach in the absence of direct evidence from them.

### **Economic loss**

68. The representative indicated that the third complainant would require approximately 10 additional sessions with a psychologist. The representative has not provided any information about the likely cost of those sessions or any evidence from a treating professional (such as GP or psychologist) supporting this claim. In such circumstances, I am not minded to award compensation for this claim.

### **Aggravated Damages**

69. The complainants sought access to their personal information since before April 2019, over a year ago. The respondent, in breach of her obligations under APP 12, has failed to provide the complainants with access to their personal information within a reasonable period. The complainants have experienced damage as a result.

70. The first and third complainants have pointed to aspects in the case that have aggravated their injuries. The third complainant has pointed to the delay in receiving their summary, noting that the summary was ‘dated December 2019 but only just received in July 2020’. The first complainant has referred to having been ‘ignored’ by the respondent.

71. I consider that there are factors in this case that warrant an award of aggravated damages.

<sup>57</sup> R11.1.A - Attachment with annotated version of C58.1, attached to email from the respondent to the OAIC dated 11 August 2020.

<sup>58</sup> C58.1 - Statement made by the third complainant undated p 1.

<sup>59</sup> C60 - Email from representative to the OAIC dated 27 July 2020.

72. In particular, I consider for the following reasons, that the respondent's conduct in this case has been insulting towards the first and third complainants and reveals a disregard for their rights to access their personal information:

- On 4 April 2019 the respondent told the OAIC that she intended to prepare and email the summaries for the complainants to their representative 'over the coming couple of weeks'.<sup>60</sup> In a telephone call with the OAIC on 26 August 2019, the respondent advised that she would provide the information by registered post.<sup>61</sup>
- In September 2019 the respondent stated that the summaries had been sent by regular post, and after agreeing with the OAIC that she would send it by registered post, did not do so. Instead, the respondent maintained, in a phone call with the OAIC, that she had again sent the complainants summaries by regular post.<sup>62</sup>
- On 4 September 2019 the respondent stated that she had attached the personal information to an email to the OAIC, however there were no attachments to the email. The respondent did not respond to the OAIC when it alerted her to the fact that there were no attachments.<sup>63</sup>
- On 11 June 2020 the respondent admitted that 'there has been a failure to follow through with my initial intention to forward the reports for these three individuals which I outlined that I would do in 2019'.<sup>64</sup>
- The respondent further made a submission to the OAIC on 11 June 2020 indicating that she intended to provide the reports, and that she would do so by 22 June 2020.<sup>65</sup> She has provided a lodgement receipt showing that mails was sent to the complainants on 25 June 2020.<sup>66</sup> She has not provided any explanation for this additional three day delay.

73. Having regard to all the circumstances, I consider that the respondent's approach to the case demonstrates a lack of regard for the first and third complainants' rights and for the respondent's own obligations under the Privacy Act. Based on the circumstances and the claims of the complainants, particularly their distress arising out of the delay and feelings of being ignored, the conduct of the respondent has exacerbated the harm experienced by the first and third complainant arising out of the breach. For these reasons, I consider this case to be appropriate for the award of aggravated damages.

## Remedies

### Access to personal information

74. Under s 52(1)(b)(ii) I may declare that the respondent is to perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainants.

75. The complainants sought access to their personal information, which has recently been provided.

76. Accordingly, I make no declaration under s 52(1)(b)(ii).

<sup>60</sup> R3 - Email from respondent to the OAIC dated 4 April 2019.

<sup>61</sup> R4 - Email from respondent to the OAIC dated 4 September 2019.

<sup>62</sup> O23.2 - File note of conversation between respondent and the OAIC dated 26 August 2019.

<sup>63</sup> R8 - Email from the respondent to the OAIC dated 4 September 2019.

<sup>64</sup> R9.1 - Letter from the respondent to the OAIC dated 11 June 2020.

<sup>65</sup> R9.1 - Letter from the respondent to the OAIC dated 11 June 2020.

<sup>66</sup> R10.1 - Attachment to R2 - Registered Post Lodgment Receipt dated 25 June 2020.

## Apology

77. I have considered whether it would be a reasonable course of conduct for the respondent to give an apology in order to redress the damage suffered by the complainants.

78. I note that in her response to the preliminary view, the respondent indicated an intention to apologise to the complainants and that she would do so by sending a personal letter to each complainant when providing the reports.<sup>67</sup> The first and third complainants have indicated in their statements that the respondent provided a joint apology addressed to all three complainants. Both the first and third complainants are dissatisfied with the apology.<sup>68</sup>

79. I consider it appropriate to require the respondent to issue a written apology to each of the complainants. The apology is to be written to each complainant individually and sent to them by registered post within two weeks of the date of this determination.

## Compensation

80. Where the complainant has established loss or damage caused by the privacy breach, I have a discretion to award compensation under s 52(1)(b)(iii). Any award of compensation will have regard to the principles set out in *Rummery and Federal Privacy Commissioner* [2004] AATA 1221, namely:

- where a complaint is substantiated and loss or damage is suffered, the legislation contemplates some form of redress in the ordinary course
- awards should be restrained but not minimal
- in measuring compensation, the principles of damages applied in tort law will assist, although the ultimate guide is the words of the statute
- in an appropriate case, aggravated damages may be awarded
- 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.<sup>69</sup>

81. The representative has not claimed any amounts of compensation for any of the complainants.

82. I have had regard to the following previous determinations in deciding upon appropriate amounts of compensation:

- '*SF*' and '*SG*' (*Privacy*) [2020] AICmr 22, in which I found that the failure of a psychologist to provide the complainant with access to her personal information warranted an award of \$3,000 for non-economic loss. This was in circumstances where I found the complainant had suffered a high degree of emotional distress.<sup>70</sup>
- '*LS*' and '*LT*' (*Privacy*) [2017] AICmr 60, in which the then Commissioner awarded \$1,000 for hurt feelings arising out of an APP 12 breach.

<sup>67</sup> R9.1 - Letter from the respondent to the OAIC dated 11 June 2020.

<sup>68</sup> C58.1- Statement made by the third complainant undated p 2; C59.1 - Statement made by the first complainant dated 14 July 2020 p 3.

<sup>69</sup> [2004] AATA 1221 at [32]-[35], with reference to *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72; (1989) 20 FCR 217.

<sup>70</sup> '*SF*' and '*SG*' (*Privacy*) [2020] AICmr 22 [99].

83. Having regard to the evidence the first complainant has provided of their emotional distress, I consider it appropriate for them to be compensated \$3,000 for non-economic loss.

84. Having regard to the evidence the third complainant has provided for their emotional distress, I consider an amount of \$2,000 for non-economic loss to be appropriate.

## Aggravated damages

85. I can also award aggravated damages as well as general damages where I am of the view it is warranted. In particular, I can award aggravated damages in certain circumstances, including where:

- the respondent behaved ‘high-handedly, maliciously, insultingly or oppressively in committing the act’ complained about<sup>71</sup>
- 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.’<sup>72</sup>

86. I have set out above my findings with respect to aggravation of injury experienced by the first and third complainants due to the manner with which the respondent has behaved.

87. I consider that damages of \$1,500 for each of the first complainant and third complainant, is properly reflective of the degree of aggravation to the injuries arising out of the respondent’s manner of conduct.

## Physical security of personal information

88. Under s 52(1)(b)(ia) I may declare that the respondent must take specified steps within a specified period to ensure that the conduct constituting the interference with privacy is not repeated or continued. Given my finding that the respondent has breached APP 11, and given the complainants’ concerns about the physical security with which their personal information is currently being held, I make a declaration requiring the first respondent to:

- engage an independent auditor to assess her compliance with APP 11 of Schedule 1 to the Privacy Act with respect to the physical security of the personal information she holds
- engage the auditor within two weeks of the determination
- require the auditor to complete the audit, including a written report, within two months of their engagement
- provide a copy of the auditor’s report to the OAIC within two weeks of the date of the report
- implement the auditor’s recommendations, if any, within two months of the date of the auditor’s report.

<sup>71</sup> *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72 at [75].

<sup>72</sup> *Elliott v Nanda & Commonwealth* [2001] FCA 418 at [180].

## Section 44 notice – Non-compliance

89. As set out above, on 13 August 2019 I issued a s 44 notice to the respondent, requiring the production of information relevant to the investigation. The s 44 notice set out how the respondent was to produce the information and required production by 19 August 2019.
90. On 26 August 2019 the OAIC sent the s 44 notice to an email address provided by the respondent. The time allowed for the respondent to produce the information was extended to 30 August 2019.
91. I have not received a response from the respondent.
92. Under s 66, it is an offence for a person to fail to give information or produce a document when required under the Privacy Act. In the case of an individual, this offence is punishable by 12 months imprisonment or 20 penalty units or both.
93. The letter of 21 August 2019 specifically drew the respondent's attention to these provisions.
94. The respondent has not complied with the s 44 notice and I will consider taking further action to address this non-compliance.

Angelene Falk  
Australian Information Commissioner and Privacy Commissioner  
2 September 2020

# Attachment A

## Relevant Law – Privacy Act 1988

### Determination powers

#### 52 Determination of the Commissioner

(1) After investigating a complaint, the Commissioner may:

- (a) make a determination dismissing the complaint; or
- (b) find the complaint substantiated and make a determination that includes one or more of the following:
  - (i) a declaration:
    - (A) where the principal executive of an agency is the respondent—that the agency has engaged in conduct constituting an interference with the privacy of an individual and must not repeat or continue such conduct; or
    - (B) in any other case—that the respondent has engaged in conduct constituting an interference with the privacy of an individual and must not repeat or continue such conduct;
  - (ia) a declaration that the respondent must take specified steps within a specified period to ensure that such conduct is not repeated or continued;
  - (ii) a declaration that the respondent must perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant;
  - (iii) a declaration that 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;
  - (iv) a declaration that it would be inappropriate for any further action to be taken in the matter.

### APP entity

#### 6 Interpretation

In this Act, unless the contrary intention appears:

...

APP entity means an agency or organisation.

### Interference with privacy

#### 13 Interferences with privacy

##### APP entities

- (1) An act or practice of an APP entity is an interference with the privacy of an individual if:

- (a) the act or practice breaches an Australian Privacy Principle in relation to personal information about the individual; or
- (b) the act or practice breaches a registered APP code that binds the entity in relation to personal information about the individual.

...

## APP compliance

15 APP entities must comply with Australian Privacy Principles

An APP entity must not do an act, or engage in a practice, that breaches an Australian Privacy Principle.

## Personal information

6 Interpretation

In this Act, unless the contrary intention appears:

... personal information means information or an opinion about an identified individual, or an individual who is 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.

## Sensitive information

Section 6 defines 'sensitive information' to mean:

**sensitive information** means:

...

- (b) health information about an individual

...

## Health information

6FA Meaning of *health information*

The following information is **health information**:

- (a) Information or an opinion about:
  - (i) the health, including an illness, disability or injury, (at any time) of an individual; or
  - (ii) an individual's expressed wishes about the future provision of health services to the individual; or
  - (iii) a health service provided or to be provided to an individual;
  - (iv) that is also personal information;
- (b) other personal information collected to provide, or in providing, a health service to an individual; and

...'

6FB Meaning of *health service*

- (1) An activity performed in relation to an individual is a **health service** if the activity is intended or claimed (expressly or otherwise) by the individual or the person performing it:
- (a) to assess, maintain or improve the individual's health; or
  - (b) where the individual's health cannot be maintained or improved – to manage the individual's health; or
  - (c) to diagnose the individual's illness, disability or injury; or
  - (d) to treat the individual's illness, disability or injury or suspected illness, disability or injury; or
  - (e) to record the individual's health for the purposes of assessing, maintaining, improving or managing the individual's health
- ...
- (3) To avoid doubt:
- (a) a reference in this section to an individual's health includes the individual's physical or psychological health
- ...'

## Australian Privacy Principles

### 11 Australian Privacy Principle 11 – security of personal information

11.1 If an APP entity holds personal information, the entity must take such steps as are reasonable in the circumstances to protect the information:

- (a) from misuse, interference and loss; and
- (b) from unauthorised access, modification or disclosure

...'

### 12 Australian Privacy Principle 12 – access to personal information

#### Access

12.1 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.

...

#### Exception to access – organisation

12.3 If the APP entity is an organisation then, despite subclause 12.1, the entity is not required to give the individual access to the personal information to the extent that;

- (a) 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; or

...

#### Dealing with requests for access

12.4 The APP entity must:

(a) respond to the request for access to the personal information:

...

(ii) if the entity is an organisation – within a reasonable period after the request is made; and

(b) give access to the information in the manner requested by the individual, if it is reasonable and practicable to do so

Other means of access

12.5 If the APP entity refuses:

(a) to give access to the personal information because of subclause 12.2 or 12.3; or

(b) to give access in the manner requested by the individual

The entity 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.

12.6 Without limiting subclause 12.5, access may be given through the use of a mutually agreed intermediary.

...

Refusal to give access

12.9 If the APP entity refuses to give access to the personal information because of subclause 12.2 or 12.3, or to give access in the manner requested by the individual, the entity must give the individual a written notice that sets out:

(a) the reasons for the refusal except to the extent that, having regard to the grounds for the refusal, it would be unreasonable to do so and

(b) the mechanisms available to complain about the refusal; and

(c) any other matter prescribed by the regulations.’