SG 2013/07

NEW SOUTH WALES

SOLICITOR GENERAL

QUESTION OF OPERATION OF DIRECTION MADE BY PRIVACY COMMISSIONER UNDER PRIVACY AND PERSONAL INFORMATION PROTECTION ACT 1998

I have been asked by the Ombudsman to advise in relation to the operation of a direction made by the Privacy Commissioner under s 41 of the Privacy and Personal Information Protection Act 1998 ("the Act").

This request for advice arises out of discussions between the Ombudsman and Housing NSW concerning the investigation by Housing NSW of complaints made to it about the conduct of public housing tenants but the relevant direction of the Privacy Commissioner applies generally to public sector agencies as defined in s 3 of the Act.

Relevant legislative provisions

Section 18 of the Act provides that a public sector agency that holds personal information about a person must not disclose this information to another person except in circumstances that are not relevant to the present case. Section 25, however, removes the requirement to comply with a number of provisions, including s 18, where the public sector agency in question is lawfully authorised not to comply with those provisions. Such an authorisation is relevantly provided for in s 41 of the Act in the following terms:

> (1) The Privacy Commissioner, with the approval of the Minister, may make a written direction that:

(a) a public sector agency is not required to comply with an information protection principle or a privacy code of practice, or

(b) the application of a principle or a code to a public sector agency is to be modified as specified in the direction.

(2) Any such direction has effect despite any other provision of this Act.

Section 18 embodies an information protection principle under the Act..

It might be noted that "personal information" is relevantly defined by s 4(1) of the Act as meaning "information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion".

On 23 December 2011 the Privacy Commissioner published a "Direction on Processing of Personal Information by Public Sector Agencies in relation to their Investigative Functions" which was stated to apply to each public sector agency as defined in s 3 of the Act. The Direction is stated to apply from 1 January 2012 to 31 December 2013 or until the making of a Privacy Code of Practice for Investigations, whichever is earlier.

Clause 4AA of the Direction is in the following terms:

> A relevant agency need not comply with sections 9, 10, 13, 14, 15, 17, 18, or 19 (1) of the PPIP Act if non-compliance is reasonably necessary for the relevant agency to conduct an investigation for a public sector agency (the client agency) and:
>
> (i) the investigating agency or the client agency has specific legislative authority to carry out the investigation; or
>
> (ii) the power of the investigating agency or the client agency to conduct the investigation is necessarily implied or reasonably contemplated under an Act or other law; and
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> the investigation may lead to the client agency taking or instituting formal action in relation to the behaviour under investigation.

The Direction does make provision for investigations conducted by a public sector agency on its own account but cl 4AA is applicable in this instance because it appears that Housing NSW carries out investigations in the complaints about public housing tenants on behalf of the NSW Land and Housing Corporation which is the landlord for those tenants.

The Direction defines "investigation" of a matter as including "any examination of or any preliminary or other inquiry, including but not limited to a preliminary inquiry within the meaning of the Public Sector Management Act, into the matter. This includes matters where it is decided to take no further action on the information and matters which arise by way of complaint or otherwise".

Is information about the outcome of a complaint investigation "personal information" under s 4(1) of the Act?

It will only be necessary to consider the operation of cl 4AA of the Direction if information conveyed to a complainant about the person who is the subject matter of the complaint amounts to disclosure of "personal information" within the meaning of s 4(1) of the Act because otherwise s 18 of the Act would not be applicable at the outset. It will be recalled that s 4(1) relevantly refers to "information or an opinion ... about an individual whose identity is apparent or can reasonably ascertained from the information or opinion".

Insofar as the information conveyed to the complainant about the person who was the subject matter of the complaint refers to the identity of that second person, it must be doubtful, in my view, that this falls within the terms of s 18. This is because the word "disclose" in this context involves the disclosure for the first time of the personal information of one individual to another. In Nasr v State of NSW (2007) 107 A Crim R 78 at 106 [127] – a case in which the Court of Appeal considered, inter alia, an alleged breach of s. 18 of the Act – Campbell JA (Beazley and Hodgson JJA agreeing) stated "[t]he essence of disclosure of information is making known information to a person that the person did not previously know": see also at 107 [132]. But the complainant already knows the identity of the individual in question because he or she has nominated that person in making the complaint. It is obvious, therefore, to the complainant that any investigation of the complaint has involved a consideration of the conduct of that person.

It may be, however, that information or an opinion about the individual in question is conveyed by a report to the complainant of how the complaint was dealt with. This would not be so if, for example, the report simply noted that there was no evidence to support the complaint. But a report stating that the complaint has been made out in whole or in part or that particular action will be taken would seem likely to provide information or an opinion about the subject of the complaint that is not already known to the complainant, unless the report is confined to any action taken by the investigating agency without any specific reference to the subject of the complaint. Arguably, of course, a report in this last category may not be possible to formulate in many cases.

Is a report to a complainant "reasonably necessary" for the conduct of an investigation?

On the assumption that in some cases at least a report to a complainant on the outcome of the complaint will contravene s 18 of the Act, a question arises as to whether, under cl 4AA of the Direction, non-compliance with s 18 is "reasonably necessary for the relevant agency to conduct an investigation for a public sector agency".

The broad variety of contexts where a "reasonably necessary" test is applied was considered in Thomas v Mowbray (2007) 233 CLR 307 at 331 [20]-333 [27] per Gleeson CJ. His Honour pointed out that the High Court, when applying a "reasonably necessary" test in Zhu v Treasurer of NSW (2004) 218 CLR 530 at 587 [161]-590 [171] had referred to Devlin J's judgment in In re Chemists' Federation Agreement (No. 2) (1958) 1 WLR 1192 at 1206, where his Honour applied dicta from an earlier English case and construed "reasonably necessary" to mean something less than absolutely necessary. Chief Justice Gleeson referred to the "reasonably necessary" test in common law restraint of trade doctrine and noted that, "translated" to the statutory context at issue in Thomas v Mowbray, this would require consideration of whether the relevant thing involved more than what was required for the reasonable achievement of the object: at 331 [22]. The Chief Justice also stated that the expression was well-known in real property law. In a number of real property cases construing the statutory term "reasonably necessary", the courts have taken the view this means more than something desirable or preferable: see eg In the Matter of an Application by Kindervater [1996] ANZ Conv Rep 331; Gittany v McDowell [2009] NSWSC 591 at [78]-[79]; O'Shea v Athanaskis [2009] NSWSC 1150 at [114].

I do not see any reason to think that the expression "reasonably necessary" in cl 4AA would be given a broader meaning than that applied in the cases discussed by Gleeson CJ in Thomas v Mowbray, which seem to me to be consistent with the ordinary meaning of the word (noting that the first sense of the Macquarie Dictionary definition of "necessary" is "that cannot be dispensed with").

The question of what is "reasonably necessary" will always be one of fact, the word "reasonably" suggesting the question is to be determined by application of an objective standard. It is not possible to advise in the abstract on what will be "reasonably necessary" in a particular case. This is consistent with the approach taken by O'Connor DCJ when considering an earlier equivalent of cl 4AA of the Direction in NZ v Director General, NSW Department of Housing [2005] NSWADT 58 at [75]. But some general observations can be made. There is no doubt, in my view, that a report to a complainant in relation to the outcome of the complaint is an important part of the complaint process and highly desirable as a matter of administrative practice. It is, however, very doubtful, in my opinion, that a court would find disclosing another person's personal information in such a report to be "reasonably necessary" for the conduct of an investigation. It would require giving a broad and expansive meaning to "reasonably necessary" to bring the making of a report to the complainant disclosing another person's personal information within the terms of cl 4AA and it would not be safe, in my view, to assume that a court (or the Administrative Decisions Tribunal) would come to that conclusion.

Answers to specific questions

In the light of the matters discussed above, I have set out below the specific questions asked and the answers to them:

Q1. Whether information about the outcome of a complaint investigation (noting that the allegations under investigation would generally identify the individual, that is, by name, address etc, whose conduct is in issue and any action taken by the agency conducting the investigation would relate in some way to that individual) is 'personal information' within the meaning of s 4(1) of the PIPP Act.

A1. In some cases at least the answer is almost certainly yes.

Q2. Whether it is 'reasonably necessary' within the meaning of cl 4AA of the Direction to disclose personal information to the complainant for the purposes of informing the complainant of the outcome of their complaint.

A2. I doubt that a court would adopt this construction of cl 4AA.

Q3. Your advice as to the appropriate wording of a direction made under s 41 of the PIPP Act to enable the disclosure of personal information in the exercise of a public sector agency's investigative functions or the conduct of any lawful investigation.

A3. There would, in my view, need to be specific reference in the Direction to non-compliance with s 18 and, in this context, a report to a complainant as to the outcome of the complaint.

Please do not hesitate to contact me in relation to any of the matters raised in this advice.

MG Sexton SC

5 April 2013

Director General

Assistant Director General, Legislation, Policy and Criminal Law Review

NSW Ombudsman (Mr Timothy Lowe)