

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
OFFICE OF THE PRIVACY COMMISSIONER

Question No. 149

Senator Carr asked the following question at the hearing on 25 May 2006:

The complaint of Mr Mark McBurney, an American citizen and holder of a Permanent Residency visa:

- a) What was the date on which Mr McBurney originally lodged his complaint with the Office of the Privacy Commissioner?
- b) Did you take seven and a half months to undertake a preliminary investigation of this matter?
- c) What is the usual length of time, or the average length of time, for the investigation of complaints like this one?
- d) What were the grounds for your deciding, at the conclusion of those preliminary investigations, not to investigate the complaint formally?
- e) Is it the case that the decision you made at that juncture was made on incorrect grounds under the Privacy Act?
 - (i) Can you provide details?
- f) When do you expect to finalise your investigation of this complaint and respond to Mr McBurney?
- g) What action will you be taking beyond that, should his complaint be found to be upheld?
- h) What remedy will be offered to Mr McBurney?
- i) Mr McBurney claims that he has lost his livelihood – his permanent job with the US State Department - because private personal information about his employment status has been provided to the United States Government by the Australian Government. Do you have the power to order restitution of some kind?
- j) What other action can you take, and might you consider?
- k) I understand that, at various times, Mr McBurney's case has been handled by five different members of your staff. Is that normal procedure?

The answer to the honourable senator's question is as follows:

- a) The Office of the Privacy Commissioner (the Office) received Mr McBurney's complaint on 12 August 2005
- b) No.

The Office received Mr McBurney's complaint on 12 August 2005. The complaint identified the Department of Immigration and Multicultural Affairs (DIMA) or the Department of Foreign Affairs and Trade (DFAT) as possible respondents. In the Office's initial assessment of the complaint, DFAT was identified as the most appropriate respondent. On 23 August 2005 the Office declined to investigate the complaint under section 40(1A) of the Privacy Act as Mr McBurney had not complained to DFAT before making the complaint to the Commissioner.

On 30 August 2005 Mr McBurney contacted the Office via phone. Following this discussion the Office decided on 1 September 2005 that it was necessary to seek information from DIMA to clarify the procedures in place for diplomatic nationals of foreign countries. Mr McBurney was advised of our intentions on 1 September 2005.

On 26 September 2005 the Office commenced preliminary enquires under section 42 of the Privacy Act with DIMA. Following those enquiries, the Office decided to decline to investigate Mr McBurney's complaint on 13 February 2006 on the grounds that DIMA were undertaking an internal investigation into the matters raised by Mr McBurney. This amounts to 4.5 months.

- c) The average length of time for the conduct of preliminary enquiries is 5.4 months.
- d) Section 41(2)(b) of the Act provides that the Privacy Commissioner (the Commissioner) may decide not to investigate, or not to investigate further, an act or practice, if the Commissioner is satisfied that the complainant has complained to the respondent about the act or practice and the respondent has not yet had an adequate opportunity to deal with the complaint. As DIMA was in the process of conducting an internal investigation into Mr McBurney's allegations the Office considered that it had not yet had an adequate opportunity to deal with the complaint.
- e) On 13 February 2006 the Office wrote to Mr McBurney to advise that it had declined to investigate his complaint against DIMA. The section of the Privacy Act cited in this correspondence was section 41(1)(e) which states that the Commissioner may decide not to investigate the complaint on the grounds that the act or practice is the subject of an application under another Commonwealth, State or Territory law and the subject matter of the complaint has been or is being dealt with adequately under that law. This was the incorrect section.

The Office apologised to Mr McBurney for citing the incorrect section of the Act and noted that the correct section of the Act was section 41(2)(b) which, as noted above, permitted the Commissioner to decline to investigate the complaint on the grounds that the respondent (DIMA) had not yet been given an adequate opportunity to deal with the complaint.

- f) The Office is currently considering the responses from DFAT and DIMA and additional information obtained from the Victorian Department of Justice (DOJ).

The Office is also currently seeking additional information from DIMA and another third party. The Office expects to receive a response to these additional enquires by mid July 2006. Consequently our Office expects to be in a position to finalise the complaint in approximately two months.

- g) Under section 27(1)(a) of the Act, the Commissioner is afforded the role of attempting to settle matters that are subject to investigation under the Act, by means of conciliation. Our preference remains to settle this complaint by means of a mutually satisfactory agreement

between the parties.

However, if the matter cannot be resolved by conciliation, the Commissioner may consider making a determination under section 52 of the Act. Under section 52, the Commissioner may dismiss the complaint or make a determination that includes:

- (i) a declaration that DIMA perform an act or course of conduct to redress any loss or damage suffered by Mr McBurney;
 - (ii) a declaration that Mr McBurney is entitled to a specified amount by way of compensation for any loss or damage suffered;
 - (iii) a declaration that it would be inappropriate for any further action to be taken in the matter;
 - (iv) a declaration that the complainant is entitled to a specified amount to reimburse the complainant for expenses reasonably incurred by the complainant in connection with the making of the complaint and the investigation of the complaint.
- h) The Office is not in a position to answer this question as the investigation and subsequent conciliation process have not advanced to that stage.
- However, the powers available to the Commissioner to resolve the matter are set out in our response to question (g).
- i) Please refer to our response to question (g)
 - j) Please refer to our response to question (g).
 - k) The Office attempts to resolve complaints as expeditiously as possible. This includes moving a file between Officers while a staff member is on leave or when an employee leaves the agency. While it is preferable that one individual handles a complaint it is not always possible or practical to do so.