

24 February 2005

The Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Sir / Madam

SUBMISSION TO SENATE INQUIRY INTO THE PRIVACY ACT 1988

The frustrations I have experienced over the past year, as a result of the failure of the Privacy Act (**Act**) to provide prompt and effective redress for my daughter and me, has prompted me to write this submission.

Notwithstanding those frustrations, I wish to place on record that I have had very positive dealings with the staff of the Office of the Federal Privacy Commissioner (**OFPC**). I have phoned the help desk a couple of times and my husband and I have had contact with investigating staff. At all times we have found the staff courteous, knowledgeable and helpful.

My concerns about the Privacy Act relate to the following parts of the Committee's Terms of Reference:

- (b) the effectiveness of the Privacy amendment (Private Sector) Act 2000 in extending the privacy scheme to the private sector, and any changes which may enhance its effectiveness and*
- (c) the resourcing of the Office of the Federal Privacy Commissioner and whether current levels of funding and the powers available to the Federal Privacy Commissioner enable her to properly fulfil her mandate.*

This submission is divided into two parts,

- Part A (including Attachments 1 and 2) and
- Part B.

I ask that Part B (on page 5) be kept confidential (subject to the exception in Part B).

PART A

My concerns relate to the working of the Act and the OFPC in relation to a School. The School is a large, wealthy Protestant school for girls in Sydney. From the outset the School has been advised by its lawyers, one of the biggest law firms in Australia.

We have had two experiences with the workings of the Act and the OFPC. These are set out below.

Experience No 1

Background

My husband made a detailed complaint to the School's Chairman of Council in December 2002 relating to events in July and August 2002. The complaint concerned the behaviour of the senior staff of the School towards our daughter, which severely impacted on her mental health, and also the peremptory banning of me for allegedly harassing staff. An investigation which related to part of the complaint was carried out.

During the course of subsequent communications with the School and its Chairman, it became apparent that the School was holding personal information about my daughter and me that could be inaccurate.

What happened?

A record of our communications with the School and with the OFPC appears in Attachment 1.

In summary, on 4 April 2004 my daughter and I requested access to personal information, which had been collected by the School about us during 2002 and subsequently. The requests identified at least ten specific documents.

The School initially advised us that it had sent the request to its lawyers for advice. On 28 May it supplied us with photocopies of personal information. Most were outside the period covered by our requests and none related to the documents that were specifically identified in our requests.

We complained to the OFPC on 24 May 2004 about the School's failure to provide us with our requested personal information. On 1 June, we were advised that the OFPC would conduct preliminary enquiries to determine whether our complaint could be investigated.

On 12 August 2004, the School advised that our request for personal information was denied because of the impact it would have on the privacy of others. It asserted that masking of identifying information was not possible because it would render the document meaningless or would still not protect the privacy of others.

On 29 November 2004 OFPC advised that our complaint was to be investigated. This was almost 8 months after we applied to the School for access and 6 months after we complained to the OFPC.

It is my understanding that the OFPC wrote to the School seeking a response to our complaint. Under the OFPC's guidelines the respondent has 28 days in which to respond. The School and its lawyers met with the OFPC on 15 December 2004 to clarify some issues, but it was not until February that the OFPC received a written response from the School. I further understand that the response did not answer all the questions raised by the OFPC.

Concerns about the working of the Privacy Act and the OFPC

In relation to our access requests from the School

- The School was able to delay the process because no time limits are set in the Act in which respondents have to reply.
- The OFPC does have guidelines which suggest access should be able to be provided within 14 – 30 days. The School took 4 months to deny our specific requests. There are no sanctions in the Act for failure to comply with the guidelines.
- The School's eventual reason for denying access was based on NPP 6.1 (c). The School was not required under the Act to explain how or why our access would have an "unreasonable impact" upon the privacy of others. "Unreasonable impact" is not defined in the Act.

- The School indicated that masking the documents would render them meaningless. We have pointed out to the School that this is not for the School to decide, nor is this an exemption provided under NPP 6.1. The School has made no comment.
- The School indicated that masking the document would not provide necessary privacy of others. Who determines the validity of this statement?
- The School has not attempted to facilitate access or to consider any alternative means of access to us (as per NPP 6.3). There are no effective sanctions for failure to comply with the provisions of the Act.
- It would seem that the School has no desire to give my daughter and me access to our requested personal information and consequently no desire to maintain correct records.
- The Act provides for no arbiter and no sanctions. Our only recourse was to the OFPC.

In relation to the OFPC's investigation of the School.

- My daughter and I complained to the OFPC on 24 May 2004. A pamphlet supplied with the OFPC's letter dated 1 June 2004, stated that the complaint process usually take 6 months, or longer for more complex cases. However, it took OFPC 6 months just to commence the investigation of our case.
- The School has delayed responding to the OFPC and is able to do so because there are no sanctions for a belated response. It has not provided the OFPC with all the information sought and is able to do so with impunity.
- We have no idea when this investigation is going to be concluded. There is no time frame in which the investigation is to be completed.
- It appears that the information in the OFPC's pamphlet, "What will happen to my complaint?" may not reflect the OFPC's current practices or capabilities, particularly with regard to expected time periods.
- My feeling is that the OFPC is snowed under and that staff find it impossible to achieve a timely and effective outcome of investigations.

Experience No 2

Background

In talking with the OFPC, my husband realised that the School may have failed to comply with provisions of the Act in six instances concerning the collection and use of sensitive and personal information relating to my daughter and me in the latter half of 2002.

What happened?

A record of our communications with the School and with the OFPC appears in Attachment 2

My husband wrote to the School on 2 September 2004 asking it to investigate the circumstances of each of these instances and respond. The School has not done so. Consequently, my husband, on behalf of my daughter and me, complained to the OFPC on 15 January 2005 about those six instances. We have not heard from the OFPC (despite a recent follow up fax); nor has the School made any attempt to respond to our complaint.

Concerns with the working of the Privacy Act and the OFPC

In relation to the School

- It is now nearly 6 months since we made the complaint. The School has made no attempt to address the complaint, nor has it given us any reason for its delay.

- The School has been able apparently to ignore the complaint because there is neither a time limit nor sanctions in the Act to force the School to respond.
- Our complaint to the School involved instances of possible failure of the School to adhere to the NPPs. If the School has not investigated these, then it may be continuing to disregard the NPP's in relation to others students and parents of the School.

In relation to the OFPC

- It now nearly 6 weeks since we made this second complaint to the OFPC and we have not had an acknowledgement.
- From our past experience I can only presume the pressure of work has prevented the acknowledgement. It gives me little hope that we are going to get any timely satisfaction from the OFPC.

Summary

The Act has not worked satisfactorily for my daughter and me in relation to the above two experiences. An organisation subject to the Act has been allowed to disregard its provisions and the OFPC has not been able to deliver a timely, effective and satisfactory outcome. It is now nearly 11 months since we sought access to our personal information.

I am concerned that if organisations get to know that the OFPC is unable to be effective, the community will lose confidence in the protection of their privacy and large organisations will be encouraged to disregard their obligations under the Act.

Recommendations

Pursuant to Terms of Reference (b), the Privacy Act should be changed

- (i) to include specific time limits for respondents
- (ii) to provide sanctions for the failure to comply with sections of the Act
- (iii) to provide time frames for investigations

Pursuant to Term of Reference (c), the OFPC

- (i) should be better funded to enable it to have the resources, especially staff levels, to be able to fulfil its responsibilities.
- (ii) be required to provide comprehensive information about the process of investigations

Attachment 1

Experience No 1

Summary of correspondence to and from the School

Date	Response
2004	
4 April	My daughter and I made access requests to the School for their personal information, including at least 10 specifically named documents
13 April	The School acknowledged our letters and advised that the request had been sent to the School's lawyers
17 May	I wrote to the School requesting access by 21 May and advising that, if access was not forthcoming, we would take appropriate action to obtain access.
17 May	The School advised that the information was taking time to arrange and that the School was unable to do this within the 30 day guideline set by the OFPC. (This letter was sent 6 weeks after the access requests.)
28 May	<p>The School provided us with photocopies of personal information, most of which</p> <ul style="list-style-type: none"> (i) were outside our access requests and (ii) had either been provided by us to the School (e.g. birth certificates and enrolment forms) or the School had already provided us (e.g. School reports). <p>None of the specifically named documents were provided.</p>
21 June	I wrote to the School requesting access by 28 June and advising that we had made a complaint to the OFPC.
2 July	The School advised that the personal information held by it involved the privacy of others and that consent had been sought from the individuals for the disclosure of the information. (This is not a requirement of the Privacy Act.)
12 August	<p>Letter from the School enclosing a further document that we had originally provided the School. We were advised that</p> <ul style="list-style-type: none"> (i) individuals had refused the disclosure of information that contained personal information about them (ii) the School was unable to mask our personal information because it either <ul style="list-style-type: none"> (a) would made the documents meaningless or (b) not protect the privacy of others
16 August	My husband wrote to the School objecting to their denial of access
2 September	<p>Mu husband wrote to the School outlining our objections to their denial of access, pointing out</p> <ul style="list-style-type: none"> (i) under the Act documents are not exempted from access because they have been rendered meaningless by masking (ii) any handwritten documents can be typed to protect the identity of the writer (iii) the School's failure to provide alternative means of access
11 November	My husband wrote to the School requesting its response to our previous two letters.
24 November	Letter from the School which ignored the objections raised by us about its denial of access.

Summary of contact with the Office of the Federal Privacy Commissioner

2004	
24 May	My daughter and I complained about the School's failure to comply with requests for specified personal information.
1 June	Acknowledgment of our letter, advising that the OFPC would make preliminary enquiries to determine whether our complaint could be investigated.
8 September	My husband wrote to the OFPC formally requesting an investigation of the complaint
23 September	The OFPC acknowledged my husband's letter and advised that a letter would be sent to the School soon.
12 October	The OFPC sent a copy of its letter to the School. This letter required information from the School as part of its enquiry into whether the OFPC would investigate the complaint made by us.
29 November	The OFPC advised that it would investigate the complaint. We understood the School has 28 days to respond to our allegations
2005	
31 January	My husband phoned the OFPC to enquire about the progress of the investigation. He was advised that the School and its lawyers, consulted OFPC on 15 December and had been given a month to respond in writing from that date. (It was then over 6 weeks.)
10 February	My husband wrote to the OFPC to clarify the stages of the investigation.
14 February	I phoned OFPC and had a wide-ranging discussion about the issues and processes involved in the investigation. I was advised that the School had given the OFPC 3 e-mails that contained personal information about me and my daughter. I was also advised that the School had made a written response to the OFPC requests, but that not all questions had been answered.
20 February	I wrote to the OFPC clarifying that our request for personal information was not limited to the relevant parts of the report of the investigation and was only one of the specific documents requested. I suggested that we would seek access in stages. I requested copies of the 3 e-mails and any correspondence the OFPC had with the School in the hope that this might facilitate a faster resolution.

Attachment 2

Experience No 2

Summary of correspondence to and from the School

2004	
2 September	My husband formally complained to the School about 6 possible breaches of the Privacy Act in relation to the collection and use of personal and sensitive information about either my daughter or me. He requested certain information regarding the possible breaches and the steps the School had taken to ensure the security of the information as required by NPP4.
16 September	The School acknowledged the letter. A file was being reviewed and a fuller comment would be made.
11 November	My husband wrote to the School asking for a response to his letter of 2 September
5 December	My husband again wrote to the School asking for a response to his letter of 2 September and advising that if we did not receive a response by 15 December we would ask the OFPC to investigate the matter.
14 December	The School acknowledged the letter and advised that it could not respond in the time frame but that it would respond as soon as possible. (It was then 3 ½ months since our initial complaint.)
19 December	My husband wrote to the School advising that it had failed to (i) respond to his complaint in 3 ½ months. (ii) give any reason for the delay He asked for a progress report on the School's investigation of the 6 possible breaches. He advised the School that we would ask the OFPC to investigate our complaint.
22 December	The School acknowledged receipt of the letter and noted the comments. Our request for a progress report was ignored.

Summary of contact with the Office of the Federal Privacy Commission

2004	
8 September	My husband alerted the OFPC to the possible breaches of privacy and advised that we would advise the OFPC if we obtained a response from the School.
2005	
15 January	My husband formally complained to the OFPC, on behalf of my daughter and me, about the School's failure to comply with its obligations under the Privacy Act
About 25 January	My husband phoned the OFPC to enquire whether the OFPC had received his letter. He was advised that acknowledgement would take 14 days.
8 February	My husband faxed a letter to OFPC expressing concern that his letter of 15 February had not been acknowledged.