

Immigration Data Breach Privacy Complaint

Decision handed down by the Administrative Appeals Tribunal regarding the determination made by the Commissioner in January 2021

Summary

On 11 January 2021, the Australian Information and Privacy Commissioner (**Commissioner**) made a determination relating to a data breach by the former Department of Immigration and Border Protection (**Determination**).

In February 2021, an application was lodged with the Administrative Appeals Tribunal (**Tribunal**) seeking a review of the Commissioner's Determination. In response to that application, the Tribunal reviewed all aspects of the Determination, except for the finding that the former Department of Immigration and Border Protection engaged in conduct interfering with the privacy of those affected by the data breach, and that it must not repeat that conduct.

On 21 June 2021, the Tribunal decided to 'stay' (that is, put on hold) the operation and implementation of the Commissioner's Determination until the Tribunal had made a decision in response to the application for review, and that decision had come into operation.

On 13 September 2023, the Tribunal handed down its decision in *HYYL and Privacy Commissioner* [2023] AATA 2961. In its decision, the Tribunal ordered that a scheme administrator be appointed to assess the compensation claims made by class members.

This means that the OAIC will **not** be assessing the compensation claims of class members.

Further background information is set out below.

What happens now?

Following the decision made by the Tribunal on 13 September 2023, Norton Rose Fulbright Australia (**NRFA**) has been appointed as the independent scheme administrator to assess loss or damage and to provide a specified amount of money by way of compensation to individuals affected by the Data Breach.

The first step in the administration of the scheme involves publishing a notice to all individuals who may have been affected by the Data Breach. Individuals responding to the notice will be required to provide important information, including evidence of loss or damage caused by the Data Breach. This information will enable NRFA to determine the amount of compensation that a person is entitled to.

If you wish to participate in the scheme, please respond to the notice. A link to the notice is published on the OAIC's website.

If you have questions concerning the scheme and wish to contact NRFA, please email auscas@nortonrosefulbright.com or call +61 2 9330 8006.

Background

On 10 February 2014, the Department of Immigration and Border Protection (now the Department of Home Affairs) (**Department**) published, in error, a detention report on its website that contained embedded personal information (**Data Breach**).

The report contained the personal information of all 9,258 persons who were in immigration detention on 31 January 2014.

On 30 August 2015, a representative complaint was made to the Office of the Australian Information Commissioner (**OAIC**) on behalf of all persons whose information was published by the Department in error (**Class Members**). The complaint requested the Department provide an apology and compensation.

On 9 February 2018, the original representative complainant's solicitor advised the OAIC that their client had passed away. On 10 October 2018, the Commissioner made a decision to replace the original representative complainant with another Class Member (**the Representative Complainant**) pursuant to s 38B(1) of the *Privacy Act 1988* (Cth) (**Privacy Act**).

On 24 January 2018, the Commissioner gave notice (**the Notice**) that if Class Members believed they had suffered loss or damage because of the Data Breach and wanted the opportunity to potentially recover compensation for that loss or damage, they needed to provide information about their loss or damage to the OAIC by 19 April 2018. The due date for responding to the Notice was extended to 19 October 2018, although the OAIC granted further extensions on the due date to some Class Members and submissions were finalised on 22 April 2019.

On 11 January 2021, the Commissioner issued a determination under s 52 of the Privacy Act (i.e. the Determination).

The Determination found that:

- as a result of the Data Breach, the Department had engaged in conduct that interfered with the privacy of an individual; and
- Class Members who made submissions and/or provided evidence of loss or damage in response to the Notice (**Participating Class Members**) are to be paid compensation in the manner determined by the Commissioner.

You can read the Determination online [here](#).

Stay of the Determination

On 24 February 2021, a Class Member filed an application with the Administrative Appeals Tribunal (**the Tribunal**) seeking review of the Determination on behalf of all persons whose interests are affected by the Determination (**the Application**). The Representative Complainant was also joined to the proceeding.

The Application sought a review of:

- the Commissioner's declaration that it is inappropriate for further action to be taken in relation to Class Members who did not make submissions and/or provide evidence of loss or damage (**the Non-Participating Class Members**);

- the Commissioner’s compensation scheme including amount(s) payable to Participating Class Members; and
- the Commissioner’s decision not to include a declaration requiring the Department to provide translation services to Class Members during the course of implementing the compensation scheme.

There was no dispute about – and the Tribunal did not review - the finding that the Department engaged in conduct interfering with the privacy of those affected by the data breach, and that it must not repeat that conduct.

The Tribunal provides independent merits review of administrative decisions and has the power to set aside, vary or affirm the Determination. In light of that function, on 21 June 2021, the Tribunal ordered that the operation and implementation of the Determination be stayed until the Tribunal reaches its decision in relation to the Application.

[The Tribunal’s decision](#)

On 13 September 2023, the Tribunal handed down its decision in *HYYL and Privacy Commissioner* [2023] AATA 2961. In its decision, the Tribunal ordered that a Compensation Assessment Scheme be established with the purpose of assessing compensation claims. The Tribunal ordered that a Compensation Assessment Scheme is to be administered by a ‘scheme administrator’ that is an independent law firm appointed by the Department of Finance.