

Australian Institute of Private Detectives

The Australian Institute of Private Detectives (38) suggests the definition of 'enforcement body' should be extended to include private detectives. This would permit private detectives to more readily collect personal information about individuals from organisations. This matter is further explored at section 7.9.

7.9 Private investigation

Introduction

The private sector provisions seek to balance an individual's right to privacy with other social interests that compete with privacy. The Office has been made aware for some time now that those involved in private investigation consider that a number of social interests that their work furthers are being impeded by the private sector provisions of the Privacy Act. The private sector provisions make no specific provisions for the activities of private investigators.

What submissions say – issues

Work of private investigators

The Australian Institute of Private Detectives (AIPD) (38) comments extensively on how the Privacy Act impacts on their functioning. It outlines the work of private investigators as being crucial in workers' compensation and third party injury cases as well as commercial areas, such as process serving and debt collection and the repossession of goods and/or services. It says private detectives sometimes play a watchdog role in conducting investigations into the conduct of the authorities on the behalf of individuals.

Unequal access to information

The main concern expressed by the AIPD (38) is that private investigators are excluded from the definition of 'enforcement body' in the Privacy Act. The AIPD is concerned that enforcement bodies have access to information under NPP 2.1 that is denied to other organisations and individuals. The AIPD submits that this inequality in access to information could lead to inequality and unfairness before the law.

The AIPD (38) refers extensively to legislation, Charters and Treaties from around the world in demonstrating that an individual has the right to have equality before the law and a right to a fair trial¹. The AIPD uses these

¹ The United States Drivers Privacy Protection Act 1994; Europa Justice and Home Affairs Charter of Fundamental Rights; Human and Constitutional Rights South Africa;

documents to substantiate its argument that private investigators should have the same right of access to information as enforcement bodies. The submission argues that the Privacy Act excludes private investigators and individuals from being able to access information in order to prepare adequately for matters or potential matters before a court or tribunal. The submission contends that because enforcement bodies can access this information, private investigators and other individuals are at a disadvantage before courts and tribunals and this means there is inequality before the law. The AIPD argues that, particularly in relation to criminal matters, if an individual does not have the right to access information to adequately defend themselves, that person has not been granted a fair trial.

The AIPD argues that equality before the law is a constitutional right². It argues that the inequality in access to information caused by the Privacy Act, resulting in inequality before courts and tribunals means the Privacy Act is unconstitutional. The AIPD launched legal proceedings in the Federal Court of Australia during March 2004 challenging the constitutional validity of the Privacy Act. The Application stated that:

‘the Privacy Act is unconstitutional due to section 6(1) as it denies the right to access information in the public and private sectors to private investigators acting on behalf of their clients for matters and potential matters before the courts and tribunals. It also denies ordinary citizens representing themselves the same rights to access information in the public and private sectors for matters and potential matters before the courts and tribunals’.

The AIPD later filed an amended Application claiming that the Office had declined to grant a Public Interest Determination under section 72(2) of the Act to authorise the disclosure of personal information by organisations to its members for the purpose of investigating matters in relation to litigation or potential litigation.

In November 2004 the case was dismissed on the grounds that the Court lacked jurisdiction to grant relief, and costs were awarded to the Commonwealth.

Do the private sector provisions unduly hamper the activities of private investigators?

Collection

International Covenant on Civil and Political Rights; European Convention on Human Rights

² Reference is made to the decision in *Leeth v The Commonwealth of Australia* [1992] HCA 29

One concern for private investigators could be the obligation to let individuals know if a private investigator is collecting information about them under NPP 1.3 and NPP 1.5. However, *Information Sheet 18 'Taking Reasonable Steps to Make Individuals Aware that Personal Information about Them is Being Collected'*, published by the Office, makes it clear that in some situations, many of which may apply to the work of private investigators, no steps will constitute reasonable steps to notify. For example, the information sheet says:

'To investigate and confirm a suspicion of fraud or unlawful activity it will often be necessary to collect information about an individual's activities without alerting them to the fact that information is being collected for this purpose. Raising awareness about this may give the individual an opportunity to cover-up evidence of unlawful activity. There is a clear public interest in the detection of fraud and unlawful activity.

In the case of fraud investigation which is in the public interest, it will generally be reasonable not to take steps to ensure awareness of the NPP 1.3 matters at the time of collection, where:

- fraud or other unlawful activity is suspected on reasonable grounds
- information being collected is necessary for the investigation of the suspected fraud or other unlawful activity and
- there are sound reasons for concluding that providing notice at or before the time of collecting the information would significantly reduce the integrity and usefulness of the information.'

These circumstances arise where unlawful activity is being investigated. However, investigators may be investigating activity which is improper rather than unlawful; for example, misuse of employer resources, abuse of power or position, or marital infidelity. Complying with NPP 1.3 or NPP 1.5 in these circumstances may impinge on the activities of private investigators. However, it is considerably less clear in these circumstances that the public interest in investigating possibly improper activity outweighs the individual and the public interest in individuals being aware that they are under investigation.

Disclosure

The AIPD (38) submits that the activities of private investigators are severely hampered by NPP 2. Its main concern is that NPP 2 prohibits organisations from disclosing information to private investigators. The AIPD (38) argues that NPP 2 limits the ability of private investigators to have access to all information necessary to proceed before a court or tribunal. A similar argument is made by the Australian Collectors Association, Institute of Mercantile Agents, Australian Institute of Credit Management (Joint Credit Industry) (115) in relation to debt collection. Their submission argues that the Privacy Act impedes debt collection practice as credit providers are unable to access information about individuals that would enable them to investigate fraud or serve legal process.

The submission also raises concerns that the Privacy Act limits the ability of credit providers to access information that would assist in locating debtors who have left their last known addresses even where the defaulters have provided express authority.

It is possible that, without consent, NPP 2 will impede the ability of private investigators to collect information from organisations in these circumstances. The law enforcement exceptions to NPP 2, such as NPP (f) (g) and (h) do not apply to these situations.

Other legislation that impacts on private detectives

The AIPD (38) contends that the Privacy Act impacts on the ability of private detectives to access information needed to investigate fraud and other crime. However, there is other state and territory legislation and also privacy-related legislation at the federal level that also has an impact on the ability of private detectives to have access to information. For example, state legislation prevents information about drivers' licences from being disclosed. *The Commonwealth Electoral Act 1918* prevents private detectives from accessing the electoral roll, except in hard copy. Some states also have privacy legislation which may prevent government agencies from disclosing personal information to private detectives. As a result, this issue must be seen as broader than the Privacy Act.

Other views

The Australian Privacy Foundation (90) is concerned that the business activities of private detectives are significantly likely to be in violation of an individual's privacy. In criticising the small business exemption, the Australian Privacy Foundation (90) remarks that 'some of the most privacy intrusive activities are carried out by small companies [such as] private detectives'. The core business of private detectives appears to involve collecting information about individuals without their consent upon the wish of a third party client. There are public interest arguments in favour, therefore, of regulating the activities of private detectives.

Private detectives and other jurisdictions

The Data Protection Act 1998 (UK) enables the disclosure of personal information in order to establish, exercise or defend legal rights. Privacy provisions and practices in other jurisdictions do not appear to be significantly out of step with the private sector provisions.

United Kingdom

Subsection 35(2) of the Data Protection Act 1998 (UK) provides an exemption from the non-disclosure provisions where the disclosure is necessary:

- (a) for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings) or
- (b) for the purpose of obtaining legal advice, or is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

New Zealand

Under the New Zealand Privacy Act 1993, Information Privacy Principles 2, 3, 10 and 11 provide an exception where the agency collecting or holding the information believes on reasonable grounds that non-compliance is necessary:

‘to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences’.

The exception refers only to ‘public sector agency’. Private investigators as private sector agencies would not, therefore, be able to rely on this exception. Discussion Paper No 8 states:

‘The words ‘public sector agency’ are included in the exception to ensure that only agencies with a proper function connected with the maintenance of the law would be able to act in reliance on the section. For instance there was concern that if the exception was not limited in this way that private investigators might rely on the exception to justify their actions³.

Canada

³ Discussion paper no 8 Law Enforcement Information and Other Related Issues.
<http://www.privacy.org.nz.html>

The Personal Information Protection and Electronic Documents (PIPED) Act (2000, c. 5) does allow for information to be collected without consent where the knowledge or consent of the individual would compromise the availability or accuracy of the information, and where the collection is 'reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province.'

The Canadian Privacy Commissioner expressed reservations, however, about granting an entire industry or industry body status as an investigative body, particularly because this power may be abused by companies. According to the Canadian Privacy Commissioner, private investigative work can be conducted without resorting to the provisions that allow for disclosures to designated investigative bodies without consent⁴. Instead, the Canadian Privacy Commissioner recommends that the Private investigator act as an 'agent' of the company. If the client organisation has the consent of the individual, this would then flow through to the investigator.

Options for Reform

Amend definition of enforcement body under section 6(1)

The AIPD considers that the way to even up the imbalance between the amount of information available to enforcement bodies (as defined in section 6(1)) on one side and private detectives on the other is to amend the Privacy Act to include private detectives in the definition of 'enforcement body'. The definition of 'enforcement body' could be amended to include 'private investigators in relation to matters before courts or tribunals'.

However, it is not clear that the public interest reasons for doing so outweigh the risks to the privacy of individuals. The fact that Parliament has found it in the interests of the community for law enforcement agencies to have access to information, does not necessarily mean that all others should have an equal right. Although some of the activities of private investigators may appear to be similar to those of law enforcement agencies, particularly where they are acting on behalf of law enforcement agencies, or are carrying out activities that might have been done by law enforcement agencies in the past for example, investigating fraud, this is not the case for all of their activities.

Private investigators carry out investigations on behalf of third parties, who are often private individuals. Law enforcement agencies carry out investigations on behalf of the state. Giving private investigators access to personal information in this way could mean that they are carrying out investigations without the important scrutiny and accountability mechanisms that law enforcement agencies are subject to.

Accountability

⁴ http://www.privcom.gc.ca/speech/2003/02_05_a_030320_e.asp

Private detectives licences are granted in New South Wales, Queensland, Victoria, South Australia and Western Australia under various pieces of legislation⁵. Such licences can be cancelled if a private detective's conduct breaches legislation. Members of the AIPD must also comply with the association's Code of Ethics. According to the Joint Credit Industry submission (115), almost all members of the Institute of Mercantile Agents hold a commercial agent licence and a private inquiry agent licence.

Nevertheless, the laws and institutional bodies that regulate private detectives are quite different to the conditions under which law enforcement agencies operate. For example, complaints against state or territory police forces that conduct surveillance operations and collect individual's personal information can be made to the state or territory ombudsman or the police complaints commission.

Accountability mechanisms help to legitimise surveillance and reassure the community that the negative impacts on privacy by law enforcement activities are minimal and warranted. Accordingly, the Privacy Commissioner has suggested in submissions⁶ and a recent speech⁷ that new surveillance and law enforcement policies and initiatives that potentially violate privacy should be balanced by accountability measures that ensure collection and disclosure of individual's personal information is conducted with accountability and that collection is justified and proportional to the threat.

Private detectives can be distinguished from other enforcement bodies on the basis that they are not accountable to the government or the community, or any accountability body such as an ombudsman who can investigate complaints and award compensation, in the same way that law enforcement agencies are. It would therefore be difficult to recommend private detectives be accorded similar access rights to personal information as law enforcement agencies as proposed by the AIPD.

On the other hand, the AIPD and the Joint Credit Industry raise some issues relating to the public interest that may merit further consideration. There is a social interest in individuals being able to take effective action to recover debts owed to them, or to find a person who is at fault in a car accident. It is also fair that individuals be able to prepare a defence case for court proceedings. Where the balance lies however is not clear on the evidence so far available to the Office.

Public Interest Determination

⁵ Commercial Agents and Private Inquiry Agents Act 1963 (NSW) section 10 (6) (a) (iii); Security Providers Act (1993) (Qld); Private Agency Act (1966) (Vic); Security and Investigation Agents Act (1995) (SA); Security and Related Activities (Control) Act (1996) (WA)

⁶ <http://www.privacy.gov.au/publications/secleg.pdf>

⁷ See http://www.privacy.gov.au/news/speeches/sp5_04p.html

The Privacy Commissioner could issue a Public Interest Determination enabling organisations to private detectives acting in specified circumstances. The PID process involves public consultation and could be a chance for stakeholders to provide views and information on where the balance in public interest lies. However, as discussed, the issues on access to personal information arise more broadly than the Privacy Act, and a PID would not necessarily solve all the matters of concern to private investigators. It is also the case that even if actions were taken to allow organisations to disclose personal information to private investigators without consent, it cannot force organisations to do so.

This is a complex matter. There are many social policy issues involved in this debate and the wider community should have the opportunity to comment on this issue. There are also a range of laws that have an impact on the activities of private investigators. This would be a matter for state and territory governments.

It would therefore be preferable for the governments to consider this issue so that there is a wider public debate with all relevant federal, state and territory stakeholders involved.

Private detectives acting as agents

For private investigators acting as agents of organisations such as insurance companies, it may be possible to gain consent to collect through the organisation. The notice given by an insurance company, for instance, could flow through to cover the investigator⁸. Insurance companies could make individuals aware of NPP 1.3 matters at the time a customer takes out an insurance policy, or at the time the customer makes a claim. The notice could include information about the general circumstances in which the insurer might engage a private investigation firm, the circumstances in which the customer could be subject to covert surveillance, what the information could be used for and to whom the information would be disclosed.

7.10 Recommendation: Private investigations

66 The Australian Government, through the Attorney-General, should consider requesting that the Standing Committee of Attorneys General (SCAG) consider the issues raised by the Australian Institute of Private Detectives as they are broader than the Privacy Act.

⁸ This is a preferred approach of the Canadian Privacy Commissioner.