

# workplacedirections

April 2010 – Issue 20

## Legal Leaks – The extent of the “Employee Records Exemption”

We have recently received a number of enquiries about the extent of employee privacy.

Many employers assume that they can do whatever they like with employee records because they are covered by the ‘employee records exemption’. However, the case law makes it clear, that this assumption is based on a misunderstanding about when the exemption applies.

### The Employee Records Exemption under the *Privacy Act 1988 (Cth)*

The *Privacy Act 1988* applies to all bodies corporate, unincorporated associations, partnerships, trusts and sole traders including State government instrumentalities.

Section 7B(3) of that Act provides for an exemption from the National Privacy Principles for acts and practices regarding ‘employee records’ if the act or practice is *directly related to*:

- A current or former employment relationship between the employer and the individual
- The employee record held by the organisation and relating to the individual.

Any use of employee personal information which is not directly related to the current or former employment relationship is not covered by this exemption.

One example of when the employee records exemption has been misused by an employer was detailed in the case of *B v Cleaning Company*<sup>1</sup>.

### *B v Cleaning Company*

In this case, the complainant had been employed by the respondent cleaning company for a number of years.

At the time of the employment relationship coming to an end, the employee owed a sum of money to a creditor who was not the employer and had defaulted on that debt.

The creditor contacted the cleaning company seeking information about the former employee’s whereabouts.

The cleaning company revealed the complainant’s address and financial details to the creditor.

When a complaint was made by the former employee to the Privacy Commissioner, the cleaning company claimed that the disclosure was subject to the employment records exemption.

The Commissioner found that the personal information in question was held in an employment record by the cleaning company. However, the act complained about was the disclosure of the complainant’s personal information to another organisation. Because the disclosure was not related to the employment relationship, the Commissioner found that the disclosure did not fall within the exemption.

The Commissioner found that as such, the company was obliged to comply with National Privacy Principle 2.1 and had interfered with the complainant’s privacy.

### Conclusion

It is important to ensure that when dealing with employee records, any usage or disclosure of employee personal information is related to the employment relationship and is not used or disclosed for unrelated purposes. Examples of usage of personal information which would fall within the exemption would be for the following purposes:

- PAYG tax
- Superannuation
- Workers compensation premiums.

Prior consent from the employee should be obtained for uses that fall outside the exemption.

www.moray.com.au

### SYDNEY

Level 24  
233 Castlereagh Street  
SYDNEY NSW 2000  
Telephone +61 2 9232 2255  
Facsimile +61 2 9232 1004

### MELBOURNE

Level 8  
440 Collins Street  
MELBOURNE VIC 3000  
Telephone +61 3 9600 0877  
Facsimile +61 3 9600 0894

### BRISBANE

Level 19  
66 Eagle Street  
BRISBANE QLD 4000  
Telephone +61 7 3221 3311  
Facsimile +61 7 3221 9650

### CANBERRA

Level 5  
11 London Circuit  
CANBERRA CITY ACT 2601  
Telephone +61 2 6262 6922  
Facsimile +61 2 9232 1004

### NEWCASTLE

Level 1  
8 Auckland Street  
NEWCASTLE NSW 2300  
Telephone +61 2 4911 5400  
Facsimile +61 2 9232 1004

<sup>1</sup> *B v Cleaning Company* [2009] Priv Cmr A 2

*This publication does not constitute legal advice and should not be relied upon without first consulting a lawyer.*

For further information please contact:



Reg Whare, Partner  
Tel +61 2 4911 5411  
Mob +61 410 080 192  
E [rwhare@moray.com.au](mailto:rwhare@moray.com.au)



Stephen Marriott, Lawyer  
Tel +61 2 9234 4535  
Mob +61 405 923 854  
E [smarriott@moray.com.au](mailto:smarriott@moray.com.au)