

Reference No. HRRT 055/2021

UNDER THE PRIVACY ACT 2020

BETWEEN ADAM SHEEHAN

PLAINTIFF

AND BAD TENANTS, NEW ZEALAND
(LANDLORDS ONLY) FACEBOOK
GROUP (NOW KNOWN AS LANDLORDS
PROPERTY MANAGERS [SIC] SEEKING
TENANTS ADVICE), ADMINISTRATOR:
WAYNE WILSON

DEFENDANT

AT WELLINGTON

BEFORE:

Ms J Foster, Deputy Chairperson

REPRESENTATION:

Mr A Sheehan in person

No appearance for the defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 6 October 2022

**DECISION OF DEPUTY CHAIRPERSON
REGARDING ACCESS ORDER ¹**

[1] Mr Sheehan has applied to the Tribunal under s 104 of the Privacy Act 2020 (the Act), for an access order to enforce an access direction issued by the Privacy Commissioner to “Bad Tenants” Facebook Group, currently known as “Landlords Property

¹ [This decision is to be cited as *Sheehan v Bad Tenants Facebook Group (Access Order)* [2022] NZHRRT 37.]

Mangers [sic] Seeking Tenants Advice” (Administrator: Wayne Wilson) (the “Agency”) (called subsequently in this decision “Bad Tenants Facebook Group”).

[2] The access direction required Bad Tenants Facebook Group to respond to Mr Sheehan’s Information Privacy Principle 6 (IPP 6) request in relation to information it holds about him by 11 August 2021. The access direction has not been complied with nor has it been appealed.

BACKGROUND

[3] On 31 January 2021 Mr Sheehan sent a Facebook message to Wayne Wilson, the administrator of Bad Tenants Facebook Group, asking if it held any information about Mr Sheehan and if so, what that information was and whether it had been made available to anyone.

[4] Mr Sheehan’s request was prompted by reading a news article about Facebook groups, such as Bad Tenants Facebook Group, who publish publicly viewable ‘lists’ of tenants deemed undesirable. Mr Sheehan was disturbed to think the housing difficulties he had experienced may have been a result of landlords or property managers sharing information about his undesirability as a tenant.

[5] Mr Sheehan’s request was not responded to, so he complained to the Privacy Commissioner that his right to access his personal information under IPP 6 of the Act had been breached.

[6] On 4 August 2021 the Privacy Commissioner found Mr Sheehan’s complaint had substance and issued the access direction against Bad Tenants Facebook Group under s 92 of the Act.

[7] The access direction refers to Mr Sheehan as the “Individual” and Bad Tenants Facebook Group as the “Agency”. In the access direction the Privacy Commissioner directs the Agency to:

- (i) confirm whether the Agency holds the personal information requested by the Individual by 11 August 2021. For the avoidance of doubt information held by the Agency includes information posted on the Agency’s page by members.
- (ii) respond to the Individual’s access request in accordance with section 44 of the Privacy Act by 11 August 2021.
- (iii) provide the Individual with access to any personal information about him it holds without undue delay and by 11 August 2021 unless the Agency identifies a proper basis under the Privacy Act not to do so.

[8] On 25 August 2021 Mr Sheehan applied to the Tribunal under s 104 of the Act for an access order to enforce the access direction, as Bad Tenants Facebook Group had not complied with the direction nor appealed it under s 105 of the Act.

[9] Bad Tenants Facebook Group was served with the application by way of service on the administrator Mr Wayne Wilson and was given the opportunity to oppose the making of an access order. No opposition to the application or correspondence from Bad Tenants Facebook Group has been received by the Tribunal.

[10] On 22 December 2021 Mr Sheehan advised the Tribunal that the Bad Tenants Facebook Group Facebook page may have been deleted.

ACCESS ORDER

[11] The Tribunal has jurisdiction to make an access order under s 104 of the Act, as set out below:

Access order

104 Enforcement of access direction

- (1) If an agency has not complied with an access direction, or lodged an appeal under section 105, an aggrieved individual may apply to the Tribunal for an access order requiring the agency to comply with the access direction.
- (2) If the Tribunal grants an application, the Tribunal must specify in the access order the date by which the agency must comply with the access direction.
- (3) An application under this section may be heard by the Chairperson sitting alone unless the Chairperson considers that, because of the issues involved, it would be more appropriate for the application to be heard by the Tribunal.
- (4) An agency that, without reasonable excuse, fails to comply with an access order commits an offence and is liable on conviction to a fine not exceeding \$10,000.

[12] As the application for the access order does not involve issues that make it more appropriate to be heard by the Tribunal, it is determined by me sitting alone.

[13] The Tribunal may only make an access order under s 104 of the Act if the access direction has not been complied with and there has been no appeal lodged against it. In this case, as previously referred to, the access direction has not been complied with and no appeal has been lodged against it.

[14] Notwithstanding that Bad Tenants Facebook Group may have deleted its Facebook page, the information required to be provided to Mr Sheehan by the access direction is not limited to the information held by the Facebook page. Accordingly, on that basis, there is no justification for refusing to make an access order.

[15] Turning then to the access direction, in this case that direction has been issued against Bad Tenants Facebook Group. The Bad Tenants Facebook Group is made up of a group of individuals whom have come together for a particular purpose. Bad Tenants Facebook Group is not an incorporated body which has a legal entity separate from its individual members. Nor is Bad Tenants Facebook Group an unincorporated body that can be recognised as having an independent legal existence distinct from its members because it is comparable to a body corporate; see *Edwards v Legal Services Agency* [2003] 1 NZLR 145 (CA) at [26]–[28] and *Cometa United Corp v Canterbury Regional Council* [2008] NZAR 215 (CA) at [23], [30]–[34].

[16] A fundamental consideration, in the context of issuing an access order, is whether the access order has been made against a recognisable legal entity against which that access order can be enforced. As was noted in *Privacy Law and Practice* (online looseleaf ed, LexisNexis) at (the archived) [PVA2.2] in respect of the Privacy Act 1993, in any proceeding under that Act there is a need for a natural person or legally recognised entity (in its own right) which can assume legal liability for any interference with the privacy of an individual. This applies also under the Act, so that an access order is not enforceable unless it is issued against a recognisable legal entity, which can assume legal liability for it.

[17] In this case, there is no legally responsible entity named against which the access direction can be enforced by way of an access order and which can be made liable for the offence of failing to comply with an access order.

[18] Accordingly, the Tribunal must decline the application for the access order in this case, as an access order made against Bad Tenants Facebook Group would be unenforceable and therefore of no practical effect.

[19] When an agency is a body that is not a legally recognisable entity in its own right (such as Bad Tenants Facebook Group) proceedings should not be brought against the body as if it was a legal entity. Rather, the proceedings should be brought against the body's individual members jointly as they are personally liable. If it is not practical to name all the individual members of the body as defendants to the proceeding, then one or more individual members may be named as a representative defendant on behalf of all the members. The relevant considerations are discussed in Robert Osborne (ed) *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) in the commentary to r 4.24 of the High Court Rules 2016, from [HR4.24.01].

[20] In this case the access direction is made against Bad Tenants Facebook Group and not against the individual members jointly or a representative of them in their personal capacities. Although the access direction specifically names Mr Wayne Wilson as the administrator of Bad Tenants Facebook Group it is not clearly brought against him in his personal capacity as a representative defendant on behalf of all the members of the group.

[21] The Tribunal's jurisdiction under s 104 of the Act is confined to issuing an access order requiring the specified agency to comply with the access direction and specifying the date by which the agency must comply. Accordingly, the Tribunal cannot amend or substitute the party against whom an access direction was issued, so as to make it enforceable.

[22] For the above reasons Mr Sheehan's application for an access order must be declined.

Next steps

[23] The application for an access order was only one part of Mr Sheehan's claim. Mr Sheehan has also brought proceedings under s 98 of the Act that allege Bad Tenants Facebook Group interfered with his privacy by not responding to his request for information. It is noted that in proceedings under s 98 of the Act the Tribunal may amend or substitute the named defendant if it is appropriate in all the circumstances. The Tribunal will now convene a case management teleconference to discuss those proceedings.

ORDERS

[24] For the reasons given above, the following orders are made:

[24.1] Mr Sheehan's application for an access order under the Privacy Act 2020, s 104 to enforce an access direction issued by the Privacy Commissioner to "Bad Tenants" Facebook Group, currently known as "Landlords Property Mangers [sic]

Seeking Tenants Advice” (Administrator: Wayne Wilson) (the “Agency”) is declined.

[24.2] The Secretary of the Tribunal is to convene a case management teleconference.

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Ms J Foster
Deputy Chairperson