PRIVACY NSW

Office of the Privacy Commissioner

Special Report to NSW Parliament

under section 65 of the
Privacy & Personal Information Protection Act 1998

Complaint by Student A and his father against Hon John Aquilina MP Mr Walt Secord Mr Patrick Low

Special Report No 2

7 May 2002

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PRIVACY NSW

Executive Summary of a Special Report on an Investigation of a Complaint by Student A and his father

This Special Report made under section 65 of the Privacy & Personal Information Protection Act 1998, documents my investigation of a complaint by Student A and his father concerning action taken on 10 April 2001 by the Hon John Aquilina MP, the then Minister for Education, Mr Walt Secord, Communications Director for the Premier's Office, and Mr Patrick Low, the then Senior Media Adviser to Mr Aquilina.

The actions investigated by Privacy NSW concerned the provision of personal information to the media about Student A, and the steps taken to check the accuracy of that information before it was provided to the media. I have reached the following conclusions regarding this matter:

- The information provided to the media on 10 April 2001 by Mr Aquilina, Mr Low and Mr Secord about Student A and the events on 6 April 2001 at Cecil Hills High School constructively identified the student at the school and in his local community as the boy referred to in the reporting of the events of 6 April 2001.

- There is no evidence that Mr Aquilina, Mr Low or Mr Secord provided the name of the school to the media. The individual or individuals who provided the name of the school to the media could not be identified. I also concluded that the provision of the name of the school to the media extended the constructive identification of Student A and his family in the school and local community, and showed scant regard for his feelings or those of his family.

- There were insufficient steps taken by Mr Low, Mr Secord and Mr Aquilina to ensure that the mere suggestion that Student A had access to a gun, wherever it initially originated, was sufficiently verified before it was used and disclosed to third parties.

- Because Student A was able to be identified at Cecil Hills High School and in his local community as the subject of the media reports, because information about Student A was disclosed to the media, and because false information about him was provided to the media and consequently widely reported on, Student A and his family were subject to a violation of their privacy.

I have made a number of recommendations arising from those conclusions.

1. I recommend that the student and his family receive an unqualified public apology from Mr Aquilina for his role in violating the privacy of the student and his family.

2. I recommend that Mr Aquilina make a public statement, acknowledging that (i) at the time that he mentioned on radio that Student A "could have had access to a gun", there was in fact no evidence from the Department of Education and Training or the NSW Police Service to suggest this was the case, and (ii) that insufficient steps were taken by Mr Aquilina, Mr Low and Mr Secord to ensure that the mere suggestion that Student A had access to a gun, wherever it initially originated, was sufficiently verified before it was used and disclosed to third parties. Such a statement will correct the public record in relation to these events and will go some way to mitigating the harm done to Student A and his family.

3. I recommend that the Director General of the Department of Education and Training revise the current Guidelines for the Management of Serious Incidents so that access to information contained in Serious Incident Reports be limited to only those who need to know.

4. I recommend that the Director General of the Premier's Department forward an apology to Student A and his family on behalf of Mr Low and Mr Secord for their role in violating the privacy of the student and his family. [1]

5. I recommend that the Director General of the Premier's Department give consideration to implementing a training programme for ministerial staff on the legal and policy requirements relating to privacy.

6. I recommend that Parliament itself consider the question of the acceptance of third party complaints regarding alleged breaches of the PPIP Act and alleged violations or interferences with privacy generally.

While I recognise the significant public interest in this matter, in the interests of protecting Student A and his family from further violations of or interferences with their privacy, I request that the media makes no further attempts to interview or photograph Student A or his family regarding this matter.

In line with this request I will make no further public statements on this matter. The Report speaks for itself and as Privacy Commissioner I rely on the contents of the Report and have nothing further to add.

[1] The PPIP Act does not anticipate employees of public sector agencies being held individually responsible for breaching Part 2, 5 or 6 of the Act. Additionally, there is no forum through which Mr Low or Mr Secord could apologise to Student A or his family. The IPPs however place obligations on public sector agencies. The Premier's Department is the official employer of Ministerial staff such as Mr Low and Mr Secord.

A copy of this Special Report will be available at www.lawlink.nsw.gov.au/pc shortly.

Chris Puplick
PRIVACY COMMISSIONER

7 May 2002

Special Report

under s65 of the
Privacy & Personal Information Protection Act 1998
on an investigation of a complaint by:

Student A and his father
about the actions of
the Hon John Aquilina MP, Mr Walt Secord and Mr Patrick Low

PNSW Ref 01/224 Date: 7 May 2002

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1. **Overview**

This Special Report documents my dealings with two complaints concerning an alleged violation of privacy by the then Minister for Education, the Hon John Aquilina MP, Mr Patrick Low (at the relevant time the Senior Media Officer of the Minister for Education) and Mr Walt Secord (Director of Communications for the Premier's Office). The subjects of the alleged breach are a student at Cecil Hills High School, and his father. Cecil Hills High School is a government school which operates under the supervision of the Minister for Education.[2] The complaint was made on behalf of the student and his father by their solicitor Mr Chris Burt. The student identified himself on television sometime after the events giving rise to the complaint, but for the purposes of this Special Report and in order to minimise further adverse impact on the student and his family, he will be referred to as Student A.

This matter was dealt with in accordance with the Privacy & Personal Information Protection Act 1998 (PPIP Act) and with Privacy NSW's Protocol for the Handling of Complaints[3].

This Report is made under section 65(1) of the PPIP Act which enables me to:

> …at any time, make a special report on any matter arising in connection with the discharge of [my] functions to the Presiding Officer of each House of Parliament…

2. Complaints

On 17 April 2001 I received a complaint from Mrs Kerry Chikarovski MP, the then Leader of the Opposition. Mrs Chikarovski alleged that the Minister for Education, Hon John Aquilina MP had violated the privacy of a student, by making a statement in the Legislative Assembly of the NSW Parliament on 10 April 2001 and by discussing the matter in the media. Mrs Chikarovski was

[2] Section 19(6) Education Act 1990
[3] November 2000.

particularly concerned that Mr Aquilina had quoted from Student A's diary and made it known that Student A was receiving treatment from a mental health unit. Mrs Chikarovski also expressed concern that Mr Aquilina should have been aware that it was likely that the school would have been identified after he had made the statement.

On 8 June 2001 I also received a complaint from Mr Chris Burt, solicitor acting on behalf of student A, and his father. The student and his father alleged that the Minister violated Student A's privacy and that of his family by making the statement. This complaint also included an allegation that the statement included inaccuracies, and that information about the statement, excerpts from Student A's diary and the name of the school were provided to the media. It was alleged that Student A was constructively identified in the school community as the student referred to in Mr Aquilina's statement when it was reported in the media. The complainants also alleged that members of the press gallery were provided with false information about Student A's alleged access to a gun. It was further alleged that in a radio interview Mr Aquilina had said that Student A had access to a gun.

While the allegations in the complaint made by Student A and his father concern actions taken by the Minister, the investigation into the complaint also raised questions as to whether public sector officials employed by the Department of Education, the Police Service or the Premier's Department were responsible for breaching Student A's privacy and that of his family.

I must note at the outset that my investigation of this complaint has been one of the most complex dealt with by my Office for a number of reasons. As outlined below, I have no power or authority to investigate complaints arising from statements made in the Parliament. The operation of Parliamentary privilege prevents me from so doing, regardless of any privacy issues which may arise.

Consequently, it has been necessary for me to confine my inquiries and findings to matters arising purely from statements made publicly outside the Parliament. This has required me both to procure and study transcripts and to seek information from journalists. In relation to the latter I acknowledge the right of journalists to claim protection of their sources of information and to decline to reveal them to me.[4]

Secondly, my powers to investigate and report upon even the more limited matters which I have identified, have been called into question. Since the basis of that challenge to my right to investigate possible breaches of the PIPP Act have been grounded in opinions given by the Crown Solicitor on behalf of one of the parties, I have been obliged to go outside the normal channels of legal advice available to me and seek assistance from the private Bar.

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[4] Senate Standing Committee on Legal and Constitutional Affairs, *Off the Record: Shield for Journalists' Confidential Sources: Inquiry into the Rights and Obligations of the Media*, First Report, 1994; Senate Information Technology Committee*: In the Public Interest: Monitoring Australia's Media,* April 2000

These factors have occasioned delay in the completion of my investigation. This is a matter which I regret and for which I apologise to all the parties concerned. I should however say that in relation to answering my inquiries, either in writing or personally, I am grateful to all parties (other than Mr Low who could not be contacted) for their co-operation with my Office.

Nevertheless, and not withstanding that I am not able to refer to matters which are the subject of Parliamentary privilege, I am confident that I have the necessary legislative authority to proceed as I have done, both to issue an Investigation Report (under s.50 of the PIPP Act), and to report to Parliament under section 65 of that Act.

An Investigation Report under section 50 of the PPIP Act empowers me to "make a written report on any findings or recommendations" which arise "in relation to a complaint" dealt with by the Privacy Commissioner. The Act provides that the Privacy Commissioner "may" give a copy of such report "to the complainant, and to such other persons or bodies as appear to be materially involved in matters concerning the complaint". A Special Report to Parliament may be made by the Privacy Commissioner under s65 of the Act "at any time" and "on any matter arising in connection with the discharge" of the functions of the Privacy Commissioner.[5]

I believe that natural justice has been done to all parties in that they have been provided with ample time and opportunity to place material before me and to comment on my findings and recommendations before any of these have been made.[6] I have, during the course of this investigation, taken note of all matters put to me including all challenges as to alleged facts, before arriving at my conclusions.[7]

3. The Privacy & Personal Information Protection Act 1998

Part 2 Division 1 of the PPIP Act sets out 12 information protection principles (IPPs) to which public sector agencies are required to adhere when dealing with personal information. The principles specify the standards for collecting and dealing with personal information, which will minimise the risk of misuse of that information and allow individuals to exercise a reasonable degree of control over what happens to their personal information. The principles are based on international best practice standards for the protection of personal information. They closely follow the information privacy principles in the Privacy Act 1988 (Cth). The IPPs in the PPIP Act do not regulate other privacy issues such as physical privacy, and they do not have application in the private sector or in relation to Members of Parliament.

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[5] Privacy NSW, Special Report to NSW Parliament, No. 1, September 2001, Atkins/Queanbeyan City Council.

[6] This comment does not apply to Mr Low. Despite considerable efforts made on my part his whereabouts could not be established and so he has not seen the material made available to all the other parties.

[7] NSW Ombudsman, *Investigating Complaints, A Manual for Investigators,* June 2000 Chapter 8.

Personal information is broadly defined in the PPIP Act to include "information or an opinion about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion" (section 4(1)). The definition is not limited to information which is sensitive or confidential, although the degree of sensitivity or confidentiality may influence the way the IPPs are applied in particular instances.

Public sector agencies must not do anything or engage in any practice which contravenes an IPP, or a Privacy Code of Practice made under Part 3 of the PPIP Act, or a Public Register provision in Part 6 of the Act. In the event that an individual believes that an agency has dealt with their personal information in a manner which breaches an IPP, a Privacy Code of Practice made under the PPIP Act or the Public Register provisions, he or she is entitled to seek an Internal Review by the agency. Agencies must advise me as Privacy Commissioner of the receipt, progress and outcomes of Internal Reviews and they must advise applicants of the outcomes and their right to seek a review of the outcome by the Administrative Decisions Tribunal.

Under section 45 of the PPIP Act I may accept complaints "about the alleged violation of, or interference with, the privacy of an individual". Where an individual lodges a complaint about a violation of or interference with their privacy, it is not always clear at the outset whether the complaint concerns a possible breach of the Act, and it may not be evidenced until the conclusion of an investigation. In the given case, I ascertained in the concluding phase of my investigation that Student A and his father had a right to request an Internal Review by the Premier's Department in relation to their complaint, because I concluded that staff of the Department had dealings with personal information which appeared to have breached the IPPs. The complainants have been advised of their right to apply for such an Internal Review.

My powers to investigate complaints which do not concern a breach of the IPPs, a Privacy Code of Practice or the Public Register provisions of the PPIP Act are discussed in more detail in Part 4 of this Report.

4. Complaint Handling and Investigative Powers

Section 36 (1) of the PPIP Act sets out my general functions as Privacy Commissioner. Section 36(2) specifically describes those functions. My powers to receive and investigate complaints are thus described:

> (k) to receive, investigate and conciliate complaints about privacy related matters (including conduct to which Part 5 applies),
> (l) to conduct such inquiries, and make such investigations, into privacy related matters as the Privacy Commissioner thinks appropriate.

Section 39(a) of the PPIP Act enables me to determine the procedures to be followed in exercising my functions under the Act and in that regard I adhere to the procedures described in Privacy NSW's Complaints Handling Protocol (tab 1). The Protocol provides guidance on complaint handling procedures and is written to conform with the NSW Ombudsman's best practice guide,

Investigating Complaints, A Manual for Investigators[8]. I am empowered to determine my investigation procedures[9] and the PPIP Act indicates that I should apply these procedures by:

- acting in an informal manner (s39(b)),
- acting according to the substantial merits of the case (s39(d)), and
- not being bound by the rules of evidence, so that I may inform myself in any way that I consider just (ss 39(c)).

Section 45(1) provides that complaints may be made to me about the "alleged violation or interference with the privacy of the individual". There is no requirement in Part 4 Division 3 of the Act that a person making a privacy related complaint must use the terms "alleged violation of privacy" or "alleged interference with privacy" when they draw matters to my attention.

When I receive a complaint, I may conduct a preliminary assessment for the purposes of determining whether I should deal with the complaint. I may do any of the following in relation to complaints:

- decline to deal with the complaint (s46(3)),
- refer the complaint to other authorities (s47), or
- deal with the complaint (s48)

5. Breaches of the PPIP Act

The preliminary assessment of the complaint also allows me to determine whether the substance of a complaint relates to conduct by a public sector agency which may involve a breach of Part 2 (the IPPs), Part 6 (the Public Register Provisions) or a Privacy Code of Practice made under the Act (s46(1)). If I determine that the complaint relates to such matters I must inform the complainant/s about the review process and the remedies available if he or she decides to seek an Internal Review under the PPIP Act.

Remedies are available to individuals where they have some idea which agency may have violated their privacy. In such cases individuals have the right to request that the public sector agency conducts an Internal Review of the conduct giving rise to their complaint under the Act. Privacy NSW is sometimes of assistance in advising individuals in this regard.

6. Violations of or interferences with privacy generally

As described above, section 36(2)(k) grants me the powers to receive, investigate and conciliate complaints about "privacy related matters" and to conduct such inquiries, and make such investigations, into "privacy related matters" as I think appropriate. As stated above, section 45(1) provides that complaints may be made to me about the "alleged violation of or interference with the privacy of the individual". These are broad powers which enable to me deal with matters which are not regulated by the IPPs in Part 2 of the

[8] NSW Ombudsman, June 2000
[9] Privacy & Personal Information Protection Act 1998, section 39(a)

PPIP Act. They may be matters which do not concern the conduct of public sector agencies and they generally concern the use of personal information by organisations not regulated by the PPIP Act. Such complaints sometimes concern physical incursions or surveillance by organisations and/or individuals.

The PPIP Act does not require me to establish "facts" before investigating a complaint. The process of investigating a complaint itself is the means by which certain facts may or may not be established. Where it is not possible to "establish" facts definitively, my determination to decline or investigate a matter will be based on a likelihood or a probability that certain conduct did or did not take place. If an individual lodges a privacy related complaint, I will make that determination in accordance with section 46 of the Act. If I decide to deal with a complaint I do so in accordance with section 48 of the Act and the matter will be investigated from that point.

Section 48 provides that once I have "decided to deal with a complaint" I am empowered to "make such inquiries and investigations in relation to the complaint" as I think "appropriate".

The Privacy NSW Complaints Protocol describes the process of investigation of an alleged violation of or interference with the privacy of individuals which does not necessarily involve an alleged breach of the PPIP Act. The first stages of investigation involve requests for information from the named parties or from other sources including information in media reports, policy documents and legislation. It is at this stage that the party or parties complained about are made aware that an allegation has been made against them which concerns an alleged violation of or interference with the privacy of an individual.

The information provided to me by the party or parties complained about, or which has come from other sources, is then analysed. It is at this point that further information is often requested from the parties. When I believe that there is sufficient information for me to come to a view regarding the allegation and the response/s I may make a determination as to whether the information indicates that the complainant's privacy has been violated or interfered with. I will then make recommendations. A finding that a complainant's privacy has been violated or interfered with is based on either Privacy NSW's Data Protection Principles (DPPs) or what have become known as the Prosser tests.

If the complaint concerns the misuse of personal information by an organisation I refer to the DPPs to determine whether an individual's privacy may have been violated. The DPPs are similar to the Information Protection Principles in the PPIP Act but they do not have the force of law. The DPPs pre-date the IPPs. They were prepared by the NSW Privacy Committee in 1991[10], and have been used by the Privacy Committee and Privacy NSW

[10] The DPPs were published by the Privacy Committee in a submission to the Independent Commission Against Corruption, *Privacy and Data Protection in New South Wales: A Proposal for Legislation*, No 63, June 1991.

since that time. In the first full Annual Report of Privacy NSW, the DPPs were re-published, and it was stated in that report that "when investigating complaints, the Privacy Commissioner will apply Privacy NSW's Data Protection Principles and encourage organisations to adopt these principles in their activities".[11] The DPPs serve as a general guide for the handling of personal information and provide me with a basis for determining whether a person's privacy has been violated or interfered with through a misuse of their personal information. The DPPs have been published on Privacy NSW's website[12].

Where a complainant alleges that a person's privacy has been violated or interfered with by other means such as physical incursion or the use of surveillance, and in the absence of a settled legal or statutory definition of privacy, I rely on a standard described in the 1973 *Report to the NSW Parliament on the Law of Privacy*, by Professor W L Morison[13]. The Report was the basis upon which the original Privacy Committee Act 1977 was enacted to establish the Privacy Committee of NSW, which in turn was superseded by Privacy NSW upon the passage of the Privacy & Personal Information Protection Act in 1998. In that Report Professor Morison referred extensively to the United States tort of privacy which was authoritatively summarised by Dean William L Prosser as based on:

1. The intrusion upon the plaintiff's seclusion or solitude, or into his private affairs
2. Public disclosure of embarrassing facts about the plaintiff
3. Publicity which places the plaintiff in a false light in the public eye
4. Appropriation for the defendant of advantage of the plaintiff's name or likeness[14]

Notwithstanding the legal terms of "plaintiff" and "defendant", the above definitions of breaches of privacy reflect a broad range of community expectations about privacy. These expectations are reflected in the telephone enquires and written complaints received by Privacy NSW and by its predecessor, the Privacy Committee, over many years. Like the DPPs such standards do not have the force of law.

Matters for consideration in the investigation of this complaint were whether the Minister, Mr Low or Mr Secord acted in a manner contrary to the Data Protection Principles by not checking the accuracy of information about Student A before using it, and whether Mr Low and Mr Secord, as public sector officials responsible for providing information to the Minister and media, breached the PPIP Act in not checking the accuracy of information before using and disclosing it.

DPP 8 provides that:

[11] *Privacy NSW Annual Report*, 1999-2000, pp 12-13.
[12] at: www.lawlink.nsw.gov.au/pc
[13] W.L Morison, Report on the Law of Privacy, 1973, No. 170, Parliament of New South Wales at paras 22 & 23 at page 20.
[14] William L Prosser, Privacy (1960) California Law Review 48, 383

> A recordkeeper who has possession or control of a record that contains personal information shall not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is relevant accurate, up to date and complete.

IPP 9 (section 16 of the PPIP Act) provides that:

> A public sector agency that holds personal information must not use the information without taking such steps as are reasonable in the circumstances to ensure that, having regard to the purpose for which the information is proposed to be used, the information is relevant, accurate, up to date, complete and not misleading.

More generally, the allegations in this matter raised questions about the use of information relating to Student A in a manner which:

- intruded upon Student A's seclusion or solitude, or into his private affairs
- was a public disclosure of embarrassing facts about Student A
- generated publicity which placed Student A in a false light in the public eye

It should be noted that unlike other investigative agencies such as the Independent Commission Against Corruption (ICAC) and the Police Integrity Commission, I am not required to conduct formal hearings. I am required by section 39(b) of the Act to act informally and by section 39(d) to act according to the substantial merits of the case without undue regard to technicalities. To that end, and because of the limited resources available to Privacy NSW, the investigation of the complaints against the Minister, Mr Low and Mr Secord was conducted primarily by correspondence. While this method has resulted in some delay in finalising this matter, it has also provided opportunities for the parties concerned to respond fully and with due consideration to my enquiries.

It should also be noted that the PPIP Act includes criminal sanctions which may be imposed on public sector officials who corruptly disclose personal information[15] or who interfere with the exercise of the Privacy Commissioner's functions[16]. The Act also creates an offence for offering an inducement to public sector officials to disclose personal information[17], or to offer to supply personal information which is improperly obtained[18].

7. Methodology

Following is a summary and chronology of my dealings with the complaints under Part 4 of the PPIP Act. I believe this chronology indicates that both Mr Aquilina and Mr Secord were provided with adequate and sufficient opportunity to respond to the allegations and to my findings.

[15] Privacy & Personal Information Protection Act 1998 , section 62(1)
[16] Privacy & Personal Information Protection Act 1998, section 68
[17] Privacy & Personal Information Protection Act 1998 , section 62(2)
[18] Privacy & Personal Information Protection Act 1998 , section 63

(a) Assessment of complaints

The complaint from Mrs Chikarovski and the complaint from Mr Burt (on behalf of Student A and his father) were received by Privacy NSW at different times. However they were both assessed independently in accordance with section 46(1) of the Act.

(b) Decision to deal with complaints

I determined that both complaints would be dealt with in accordance with section 48(1)(a) and investigated in accordance with section 48(1)(b) of the Act.

(c) Information requested

The investigation of this matter was conducted by correspondence. Before Mr Aquilina raised his concerns about the Commissioner's powers to investigate third party complaints (discussed further in Part 8 of this Report), I had requested and received certain information from Mr Aquilina and from Dr Ken Boston, Director General of the Department of Education and Mr P J Ryan QPM, Commissioner of Police regarding their knowledge or involvement with the matter. I also sought information from the *Australian* newspaper, the Nine Network, Radio 2UE, Channel Seven and the NSW Teacher's Federation. I also had reference to the ICAC's Report, *Investigation Into Matters Arising from a Ministerial Statement presented to the Legislative Assembly on 10 April 2001.*

(d) Information received and analysed

Information which was received from the above individuals and organisations was analysed to determine whether the complaint made by Student A and his father could be substantiated in terms of section 45(1).

I found that there were three issues arising from the information obtained in the course of my investigation.

(e) Issues identified

The three issues identified were:

(i) Were Student A, his family and/or the school constructively identified by the reporting of the information provided to the media by Mr Aquilina or other individuals or organisations? If so, did the identification violate or interfere with Student A's privacy or that of his family?
(ii) Who provided the name of the school to the media? Did it violate or interfere with Student A's privacy or that of his family?
(iii) Was false information about Student A's access to a gun provided to the media? Did this violate or interfere with Student A's privacy or that of his family?

(f) Further analysis and respondents identified.

In order to make clear the means by which the respondents to this matter were afforded procedural fairness I have set out a chronology of my dealings

with both parties in as far as they relate to their identification as respondents, notification of the applicable privacy standard and the provision of the opportunity to respond to the allegations and my conclusions.

Respondent	Date of letter from Privacy NSW	Action
Mr Aquilina	27 April 2001	Notification of Chikarovski complaint and request for response.
	8 June 2001	Information provided regarding the stage of the investigation.
	19 June 2001	Notification of complaint from Student A and his father.
	11 July 2001	Request for response on the complaint of Student A and his father and notification of suspension of the Chikarovski complaint as a result of Mr Aquilina raising this matter with the Privacy Commissioner on 5 July 2001.
	11 September 2001	Information via telephone to Mr Aquilina's lawyer, the Crown Solicitor, regarding the status of the complaint, possible conciliation and the content of the investigation report. Advice that the Data Protection Principles would be the standard applied for determinations about information privacy complaints.
	20 September 2001	Notification regarding pending finalisation of complaint. Invitation to attend conciliation conference and explanation of powers to conduct conciliation under PPIP Act.
	5 October 2001	Further particulars given about Student A's complaint and the "factual basis" for my complaint. Information provided about Privacy NSW's complaint processes. More specific advice about the DPPs and advice that no finding had been reached regarding the Minister and the DPPs. Suggestion that any further relevant information should be provided to Privacy NSW by Mr Aquilina at this stage. Advised that there would be a further opportunity to clarify information following the completion and provision of the Investigation Report.

		Advice that the contents of the Investigation Report and comments on the Report may be incorporated into a Special Report under section 65.
	15 October 2001	Answer to Mr Aquilina's claim that I did not have the power to deal with the complaint of Student A and his father's complaint. Explanation of my powers, the history of the term "violation of privacy" and advice as to the Prosser Tests. Re-statement of my power to conduct a conciliation conference in answer to objections by the Minister.
	18 October 2001	Provision of a section 50 Investigation Report following attendance at conciliation conference. Acknowledgment of attendance at conciliation conference and invitation to provide comment on the Report or any other relevant matter. Advice that section 50 Report would be the basis for a section 65 Report to Parliament.

	28 November 2001	Advice to Mr Aquilina's lawyer via telephone that legal advice was being sought on the matters raised in Mr Aquilina's comments on the Investigation Report with respect to the Privacy Commissioner's jurisdiction and dealings with privacy complaints.
	12 December 2001	Letter to Mr Aquilina's lawyer in response to a letter of complaint about the Commissioner's comments in an article on the progress of the investigation.
	12 April 2002	Draft Special Report provided and invitation to provide comment before final version provided to Parliament.
	30 April 2002	Request to clarify comments made on 24 April 2002 with reference to a draft Special Report.
	6 May 2002	Notification given of consideration given to previous comments. Extracts provided of revisions made to draft Special Report accordingly

Mr Secord	7 August 2001	Request for response on the complaint of Student A and his father and allegations made in 60 Minutes programme.
	27 August 2001	Request for advice on further information from journalists. Information provided regarding requirements under the Act to act informally.
	29 August 2001	Information via telephone to Mr Secord's lawyer regarding the complaints procedures.
	11 September 2001	Clarification given regarding the powers to require the production of information under the PPIP Act.
	4 October 2001	Advice via telephone to Mr Secord's lawyer regarding the resolution of the investigation. Advised that further information could be provided by Mr Secord at this stage and after the Investigation Report had been given to the parties.
	18 October 2001	Provision of Investigation Report. Invitation via telephone to provide

		comments. Notified that a Special Report would follow some time later.
	29 November 2001	Advice via telephone to Mr Secord's lawyer regarding the reasons for delay. Advised that legal advice being sought as a result of matters raised by Mr Aquilina. Advice that notice would be given to Mr Secord before a Special Report would be tabled in Parliament.
	11 December 2002	Letter to Mr Secord's lawyer in response to a letter of complaint about the Commissioner's comments in an article on the progress of the investigation.
	12 April 2002	Draft Special Report provided and invited to provide comment before final version provided to Parliament.
	30 April 2002	Acknowledgment of comments received on 23 April 2002. Notification given of consideration given to previous comments.
	6 May 2002	Advice that revisions made to draft Special Report concerning recommendations.

(g) Allegations put

As a result of my investigation, as noted above, I prepared an Investigation Report under section 50 of the PPIP Act, dated 18 October 2001. In that Report I found that Student A's privacy and that of his family had been violated by Mr Aquilina, Mr Secord and Mr Low. Section 50 provides:

> (1) The Privacy Commissioner may make a written report as to any findings or recommendations by the Privacy Commissioner in relation to a complaint dealt with by the Commissioner under this Division.
> (2) The Privacy Commissioner may give a copy of any such report to the complainant, and to such other persons or bodies as appear to be materially involved in matters concerning the complaint.

A section 50 Report is not a public report and it was only provided to the parties concerned. On 18 October 2001 Mr Aquilina and Mr Secord were provided with the section 50 Report and were invited to respond to my findings in that Report. Mr Aquilina and Mr Secord both provided comments. Mr Low no longer worked for Premiers' Department as Mr Aquilina's Senior Media Adviser and could not be located in order to respond to my findings. A copy was provided to Student A and his father, on 18 October 2001.

It was at this point that Mr Aquilina and Mr Secord were made aware that my findings in the section 50 Investigation Report were based on the IPPs where

they concerned a possible breach of the PPIP Act (that is, where the conduct at issue was that of a public sector agency bound by the IPPs), and on the DPPs or the Prosser test otherwise. I am satisfied that in doing so both parties were afforded procedural fairness as recommended in the NSW Ombudsman's Investigation Manual[19] referred to above.

It was at this time also that Mr Aquilina and Mr Secord were notified that I would be providing a Special Report to Parliament under section 65 of the PPIP Act, which would be based on my findings in my section 50 Investigation Report.

(h) Responses

Both Mr Aquilina and Mr Secord provided responses to my findings in the Investigation Report and their comments were taken into account prior to the preparation of this Special Report, which was provided to them in draft form on 12 April 2002. Both Mr Aquilina and Mr Secord responded to the draft Special Report and their views were considered before the completion of this Special Report.

8. Objections Raised

(i) Power to investigate complaints by third parties

In the course of the investigation of Mrs Chikarovski's complaint Mr Aquilina expressed the view that as Privacy Commissioner I did not have jurisdiction under the Act to investigate complaints from third parties and that on this basis I could not investigate Mrs Chikarovski's complaint.

While the Act is silent on the issue of third party complaints, the investigation of Mrs Chikarovski's complaint was put on hold and was later discontinued in the light of Mr Aquilina's concerns. Mrs Chikarovski was advised accordingly.

I regard this as an unsatisfactory situation, since the ability to raise questions of privacy should not, in my view, be limited to only those who have suffered personal damage, harm or embarrassment. There are many circumstances in which complaints might be brought by third parties including alleged violations of privacy in the workplace or in matters affecting children and individuals under the care of others. There are also circumstances where a third party acting in the capacity of a whistleblower might wish to bring matters to my attention which do not necessarily affect him or her, such as the misuse of personal information contained in a database.[20] I do not believe the Parliament intended that I would be unable to deal with such matters and I am inviting the Parliament, by way of a Recommendation in this Report, to

[19] at page 45

[20] In early 2001 for example, I received a complaint about the alleged violation of the privacy of a large number of individuals whose personal information had been stored on an illegal database. The complainant's personal information was not stored on the database, but he made an allegation that that the privacy of the subject individuals had been violated. I conducted an investigation which revealed serious breaches of privacy in relation to numerous individuals.

consider this matter and examine possible amendments to the PPIP Act accordingly.

(ii) Complaint threshold

In his response to my section 50 Investigation Report Mr Aquilina made certain claims about my powers to deal with the complaint of Student A and his father. He claimed that I had no jurisdiction to deal with the complaint because I had not used the language of section 45(1) in my Report which provides that complaints may be made about the "violation of or interference with the privacy of an individual". In my Report I had found that Student A had been constructively identified and that his privacy had been breached by Mr Aquilina, Mr Low and Mr Secord. Mr Aquilina claimed that constructive identification is not contemplated in the PPIP Act, and because Student A had not been named it was therefore not possible that his privacy could have been breached. Mr Aquilina argued that by dealing with the complaint and by relying on the DPPs I acted outside the scope of my powers.

Clearly the PPIP Act does contemplate constructive identification as it defines personal information as "information or an opinion about an individual whose identity is apparent or can be reasonably ascertained from the information or opinion". Thus the Act contemplates the possibility that the identity of the individual can be constructed or ascertained from the information or opinion. In Student A's case I stand by my view that he was constructively identified by the actions of Mr Aquilina, Mr Low and Mr Secord. This issue is dealt with in more detail in Part 10 of this Report.

Advice that I have received from Counsel regarding my power to investigate the Student A complaint is that because the PPIP Act is remedial legislation it should be construed so as to give maximum effect to its purpose of preventing unjustifiable invasions of privacy. To that end it is therefore open to me to find that an individual has been constructively identified by certain actions, which are alleged to have violated or interfered with an individual's privacy.

(iii) Parliamentary Privilege

Mr Aquilina objected to certain parts of the Investigation Report prepared under section 50. One of his objections was that as Privacy Commissioner I called into question matters which were subject to Parliamentary privilege. I accept without qualification or reservation that Parliamentary privilege based on the provision of the Bill of Rights 1689 and the Imperial Acts Application Act 1969 (NSW) preclude me from in any way calling into question statements made in the Parliament of this State. Having sought legal advice about this issue, I concede that some of Mr Aquilina's objections in this area were valid. As a result I have limited the scope of my investigations and considerations and the contents of this Special Report to matters which demonstrably occurred outside the Parliament and where no claim of privilege could be raised.

(iv) Application of the PPIP Act to Members of Parliament

In an opinion provided to Privacy NSW in August 2000, the Crown Solicitor advised that Ministers are not part of the Department or the Ministry which

they administer, and they are not therefore bound by the requirements in the PPIP Act which relate to a public sector agency. From this it is evident that Mr Aquilina was not prohibited by the PPIP Act from disclosing information relating to this matter outside Parliament. While remaining mindful of this, and of the fact that I could not investigate the Minister's statement to the Legislative Assembly itself by virtue of Parliamentary privilege, I formed the view based on advice, that it was open to me to investigate events which led to his making the statement and which followed the statement. As discussed above, the standard by which I determined these matters was Part 2 of the Act (the IPPs) if they concerned information or individuals subject to the Act, and by reference to Privacy NSW's Data Protection Principles and to the Prosser Test if they concerned information or individuals not subject to the Act.

(v) Content of a Special Report

Section 65 of the PPIP Act provides that at any time I may make a Special Report to Parliament on any matter arising in connection with my powers under the Act. Mr Aquilina claimed that I did not have the power to make a Special Report to Parliament on the matters dealt with in my Investigation Report into this matter. Mr Aquilina quoted the legal advice provided to him by the Crown Solicitor that:

> The substance of the s.50 investigation report cannot be contained in the special report to Parliament under s.65 if it contains the findings and recommendations of the investigation report…

The Crown Solicitor's advice also stated that:

> Section 65 [of the PPIP Act] is concerned with "any matter arising in connection with the discharge of" the Commissioner's functions, not matters arising in connection with the functions themselves (assuming, for the moment that the Commissioner had jurisdiction to deal with this complaint). The discharge of the Privacy Commissioner's function in s.65 does not, in my view, include repeating the substance of an investigation report under s.50. Moreover, section 50(i) is a code for reports under Pt.4, Div.3 and s50(2) would be subverted if the substance of a s.50 report could be made by a special report to Parliament.

I have received advice from Counsel which supports my actions in making this Special Report. My advice also states that because section 65(1)[21] provides that I may make a Special Report on "any" matter arising in connection with the discharge of my functions, it is consistent with my obligations under Part 4 of the Act that I provide a Special Report to Parliament on any matter arising in the course of taking steps in connection with a particular complaint. I have also been advised that the concentration in section 65 on the word "discharge" rather than "functions" indicates that the Report must be the product of my day-to-day activities, and that the scope of a report under

[21] "S65(1). The Privacy Commissioner may, at any time, make a special report on any matter arising in connection with the discharge of his or her functions to the Presiding Officer of each House of Parliament and must also provide the Minister with a copy of the report."

section 65 includes matters arising from the discharge of my investigatory functions in relation to particular complaints.

Furthermore Counsel stated that:

> The scheme of the Act places the s.65 Report on a different plane to the s.50 investigation report, which relates to the performance of just one of the many functions of the Privacy Commissioner, upon the discharge of any of which the Privacy Commissioner may report to Parliament under s.65.
> …
> The Crown Solicitor's argument…appears to be based on an assumption, that the function of reporting to Parliament is to be found within the general function to 'publish reports' in sub-paragraph 36(2)(j). If it were accepted, it would mean the report could not include reference to matters arising from any of the other 'distinct functions' from sub-paragraph (a) through (l), the use of the plural 'functions' and reference to their 'discharge' in s.65 would need to be ignored in favour of a limited power to report to Parliament 'on any matter…that concerns the need for…action in the interests of the privacy of individuals.

(vi) Dispute on the facts and interpretation

Both Mr Aquilina and Mr Secord objected to my findings as to the facts and my interpretation of those facts as set out in my Investigation Report. Some of those objections are discussed in Part 10 below. I noted some objections and responded or amended my findings where I considered they were of substance.

9. Chronology of Events

In order to make clear how I arrived at my finding that Student A's privacy and that of his family were violated it is important that I set out in a detailed chronology the chain of events which led to and which followed the violation of Student A's privacy. The information in this chronology is based upon information provided to this Office, information on the public record and information in the ICAC Report.

Date 2001	Time	Event
5 April	unknown	Two un-named students from Cecil Hills High School remove Student A's diary from his school bag
6 April	am	Teacher at Cecil Hills High School obtains the diary and brings it to the attention of the Principal.
	11.00am	The Principal advises the District Office about the diary. Student A is asked to see the Principal after which he leaves the school with his father.
	2.55pm	The Principal reports the contents of the diary to the Green Valley Police and advises Police that he will attend the station the

		following day with a copy of certain diary entries.
	3.35pm	District Office submits a Serious Incident Report to the Department of Education State Office and to the Minister's Office.
9 April	4.00pm	Minister's Office requests briefing from District Superintendent regarding the Serious Incident Report.
10 April	9.30am	Minister's Senior Media Adviser, Mr Patrick Low discusses the Serious Incident Report with Mr Walt Secord, Director of Communications for the Premier's Office
	10.15am	District Superintendent sends briefing to the Minister's Office
	10.30am	Mr Low discusses the briefing with the District Superintendent. Mr Low, Mr Secord and Mr Aquilina then discuss the content of a statement to be given by Mr Aquilina in Parliament.
	1pm	Mr Aquilina discusses progress of the statement with Mr Secord and Mr Low.
	unknown	Mr Aquilina contacts the Principal to advise that he will be making a statement on this matter in Parliament.
	2.18pm	Minister holds a press conference after speaking in Parliament.
	4.12pm	Radio 2SM makes reference to a gun in its reporting of the Minister's statement in a news bulletin.

	5.12pm	Minister conducts radio interview with Mr Mike Carlton on Radio 2UE. Reference is made to Student A's alleged access to a gun. During the interview Mr Carlton asks the Minister whether the school in question is Cecil Hills High School. The Minister refuses to confirm or deny that the school in question is Cecil Hills High School.
	pm	Inspector from Green Valley Police contacts Principal to confirm contact with Police on 6 April and discuss media's references to a gun. Principal informs the Inspector he has no knowledge of a gun.
	6pm	Police Service Media Unit receives request for advice from media representatives. Media Unit are unable to provide such information. The media representatives provide the name of the school to the Police Service Media Unit.
	6pm	Channel Seven News programme identifies school as Cecil Hills High School.
11 April	am	Detective Sergeant Warren Shiell of the Green Valley Police attends the school to interview the Principal regarding the reference to gun. Principal informs DS Shiell he has no knowledge of a gun. Later that day DS Shiell makes an official report on the Police Computer system about the matter and ascertains that there is no Police record of a firearms licence or criminal history.
	10.35am -12.00 noon	Student (un-named) at Cecil Hills High School makes allegations to teacher that in March 2001 Student A had written in his English book that he wanted to "kill everyone". The student also alleged that Student A had said there was a gun at his Uncle's home.
	pm	Teacher completes a Referral Slip and advises Principal of the conversation with the student.
	pm	Principal and Head Teacher Welfare interview un-named student who repeats the allegations.

	2.45pm	Principal rings District Superintendent regarding the allegations. District Superintendent advises Principal to ring the

		Police.
	2.45pm	Principal rings Green Valley Police to notify the Detective Sergeant of the content of the Referral Slip. The Detective Sergeant advises the Principal that he will visit Student A's family regarding the information in the Serious Incident Report and the Referral Slip.
	unknown	Police Service Media Unit receives Situation Reports from Green Valley Police regarding the contact made by the Principal on 6 April.

10. Privacy Issues

Issue 1: Were Student A, his family and/or the school constructively identified by the information provided to the media by the Minister or other persons or organisations? If so, did the information provided to the media breach the privacy of Student A or that of his family?

Student A and his father alleged that Student A had been identified in the school community and that their family had been identified in their local community by the reporting of the Minister's statement and other information provided to, and reported on, in the media. The question at issue is whether the combination of items of information about Student A reasonably enabled the receivers of the information to ascertain or deduce Student A's identity.

As stated earlier, I am precluded from making any findings on the Minister's statement to Parliament. However, I am able to determine whether the alleged breach of privacy resulted from the constructive identification of Student A by any other actions on the part of the Minister or any other party.

Mr Aquilina

In a 2UE radio interview with Mike Carlton which aired at 5.12 pm on 10 April 2001 Mr Aquilina spoke extensively about this matter (full transcript at tab 2). Mr Carlton opened the interview with an introduction which stated that the matter concerned events at a school in Sydney. Mr Carlton then asked Mr Aquilina to describe those events and Mr Aquilina said:

> Well, late last week, three year ten students went to their principal with some discerning (sic) information about another student. They handed a diary they had obtained from that student and it described a massacre list with descriptions of suicide and plans to kill other students during a school assembly, which was to take place the next day[22].

Mr Carlton asked Mr Aquilina questions about the means by which the Principal came to have the diary:

> Carlton: How old were these kids?
> Aquilina: Oh, year ten. They'd be around fifteen

[22] Transcript by Rehame of interview on Radio 2UE at 5.12pm on 10 April 2001

Carlton: Fifteen, sixteen? All right. All were boys?
Aquilina: All boys, yes.
Carlton: How old was the boy with the diary?
Aquilina: Almost sixteen, he's fifteen.

Later in the interview Mr Carlton asked what steps the Principal took after he received the diary:

Aquilina: Well, the first action was to take the student out of the classroom and then to contact the police as well as the student's family and a clinical psychologist.

…

Carlton: Right. Where is the student now?
Aquilina: Well, he's receiving counselling and he'll be working with a mental health unit. And he's undergoing clinical diagnosis.
Carlton: Have charges been laid or is it possible that charges might be laid?
Aquilina: I don't have that information, but the Police are following this matter up.

Mr Carlton asked when it was intended that the massacre take place, to which Mr Aquilina replied that it was the Thursday of the previous week which was 5 April. Mr Aquilina added that on 6 April, after Student A's diary had been provided by a teacher to the Principal, Student A was immediately removed from class in order to undergo counselling.

Mr Aquilina refused to confirm or deny that the school in question was Cecil Hills High and he stated that he had no intention of doing so because:

Aquilina: I mean as you start identifying the school then straight away the student becomes identified and straight away the whole issue related to who was involved becomes identified.

…

My purpose in this is not to put the finger on anyone (sic) person or any group of persons, but to indicate to parents, to indicate to other schools that behaviour of this nature cannot be ignored, it could have had serious consequences, either for other people or for the student himself…

Ministerial Staff

Copies of the Minister's statement to Parliament, together with significant other information were provided direct to the media on 10 April by Mr Patrick Low, Senior Media Adviser to Mr Aquilina, and Mr Walt Secord, Director of Communications for the Premier's Office. This information was widely reported on in the media.

Conclusion

In his responses to me on this matter Mr Aquilina pointed out that he did not name Student A in his description of the student in question and I acknowledge that there is no evidence available to me which indicates otherwise. However, despite Mr Aquilina's stated concern in the interview about the need to prevent the identification of the school, it is implicit in his comment that there was a risk that the student would in turn be identified.

In giving this interview, Mr Aquilina provided enough information to allow Student A to be identified by the students who took his diary, the teacher, the principal and his classmates. I take the view that Student A's absence would have aroused suspicion and generated gossip among students at the school, but the reasons for that action would have remained private for the purposes of the school community and the local community prior to 10 April. It was only after the reporting of the Minister's statement, his media briefings and interviews that enough of Student A's personal information together with information about the school such as the date of the relevant assembly, was disclosed to enable the student to be more certainly identified in the school community as the subject of the "story". It was at this point that Student A was constructively identified in the school community.

If an individual can be constructively identified by certain information, a disclosure of this information without the individual's consent can be said to have violated or interfered with the individual's privacy. Constructive identification does not require all the parties to be in full possession of all the details, but results in the public revelation of discrete details which when taken together enable an identity to be constructed.

For the purposes of the PPIP Act, the information contained in the Serious Incident Report submitted to the Department and the Minister by the District Office on 6 April 2001 meets the definition in section 4 of the Act:

> "personal information" means information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.

In his response to my Investigation Report, Mr Aquilina disputed my finding that Student A was constructively identified by his actions. He asserted that up until the time of his statement it was not widely known in the school that Student A was on "special leave" and that "no members of the general school community" wanted an explanation from the Principal and that no gossip had been generated as a result of Student A's absence from class. Mr Aquilina provided statistics about the numbers of students on leave each day from NSW high schools and asserted that:

> …in the abstract, publicly referring to a student as not being in attendance, without naming the student or the school attended by the student, is extremely *unlikely* to identify that student. Conversely, knowledge that a particular student was absent from school could not lead a reasonable person to conclude that an absent student referred to in Parliament was *that* absent student. [Mr Aquilina's emphasis]

On 24 June the *60 Minutes* television program included a story about Student A and the Minister's statement. In interviews with journalist Mr Peter Overton, three journalists gave their account of the events in the press gallery before and after the Minister's statement. The story also concerned the effect that the Minister's statement and the consequent events had on Student A and his

family. Most telling is Student A's statement in the interview in which he described how he felt after the Minister's statement and the media publicity:

> I didn't want to show my face anywhere.

Clearly Student A felt that he had been identified as the student in the story and the above statement demonstrates that he felt that there was nowhere he could go where he would not be identified as the boy referred to in the public arena. I therefore make the finding that Student A was constructively identified by the information disclosed publicly by Mr Aquilina, Mr Secord and Mr Low.

DPP 10 provides that personal information should only be used where:

1. (a) the individual concerned has been informed that information of that kind is usually passed to that person, body or agency;

   (b) the individual concerned has consented to the disclosure;

   (c) the recordkeeper believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or of another person;

   (d) the disclosure is required or authorised by or under law.

2. A person, body or agency to whom personal information is disclosed under clause 1 of this Principle shall not use or disclose the information for a purpose other than the purpose for which the information was given to the person, body or agency.

IPP 11 (Section 18) provides that:

> (1) A public sector agency that holds personal information must not disclose the information to a person (other than the individual to whom the information relates) or other body, whether or not such other person or body is a public sector agency, unless:
>
> (a) the disclosure is directly related to the purpose for which the information was collected, and the agency disclosing the information has no reason to believe that the individual concerned would object to the disclosure, or
>
> (b) the individual concerned is reasonably likely to have been aware, or has been made aware in accordance with section 10, that information of that kind is usually disclosed to that other person or body, or
>
> (c) the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person.

In disclosing personal information about Student A to the media, in circumstances other than those contemplated in DPP 10(1)(a)-(c) and IPP 11(1)(a)-(c), I conclude that Mr Secord and Mr Low may have breached IPP 11, and that Mr Secord, Mr Low and Mr Aquilina acted in a manner contrary to

DPP 10. I therefore conclude that this action violated the privacy of Student A and that of his family.

The fact that Mr Aquilina made statements about the involvement of a clinical psychologist and the student's attendance at a mental health unit exacerbated the gravity of this violation of the student's privacy, by virtue of the fact that mental health information is a sensitive class of information, generally subject to client confidentiality.

Issue 2: Who provided the name of the school to the media? Did it violate or interfere with Student A's privacy?

If the name of the school was intentionally used or disclosed by a public sector official in a manner which was not in connection with the lawful exercise of his or her official function, the individual concerned could be prosecuted under section 62(1) of the PPIP Act. Any individual who induces or attempts to induce a public sector official to disclose personal information about another person to which the official has or had access in the exercise of his or her official functions could be prosecuted under section 62(2) of the Act. These offences each carry a maximum penalty of 100 penalty units or 2 years imprisonment.

From the chronology it is evident that the name of the school had been provided to the media by the time Mr Aquilina gave the interview on radio 2UE at 5.12pm on 10 April. Mr Aquilina was asked by Mr Carlton in the radio interview wether the school in question was Cecil Hills High School. Mr Justin Kelly a journalist employed by 2UE at the time, advised that an anonymous caller had rung the radio station after the Minister's statement and had named the school as Cecil Hills High School. Mr Kelly stated that he had not since ascertained the identity of the caller.

Mr Secord, Communications Director for the Premier's Office, alleged that in a conversation with Mr Kelly on the day of the statement, Mr Kelly had named the school and indicated that had received this information from the Teacher's Federation. Mr John Hennessey, General Secretary of the Teacher's Federation denied that the name of the school had been provided to Mr Kelly or any other media representative despite numerous requests to do so. There is no other information available to me which supports either Mr Kelly's or Mr Secord's version of events.

At 6pm on 10 April 2001 the Channel Seven News programme identified the school as Cecil Hills High School.

On 5 May 2001 Mr Luke McIlveen, political roundsman for the *Australian* newspaper, alleged in an article that a representative from the Minister's office had confirmed the name of the school on 10 April to Ms Megan Miller, a journalist with Channel 7 (tab 3). On TCN 9's *60 Minutes* program Mr Luke McIlveen stated that on the day of the Minister's statement he was given certain information relating to the matter by staff from the Premier's office. I asked Mr McIlveen to describe the nature of the information provided and to

identify the individual who provided the information. Mr McIlveen declined to provide a response. He said that he gave the *60 Minutes* interview on the proviso that he would not reveal his sources.

Mr Burt, solicitor for the Student A and his father, also made a claim that a journalist had been provided with the name of the school. I formally requested that Mr Burt provide the name of the journalist and Mr Burt identified her as Ms Megan Miller of Channel Seven.

I asked Mr Geoff Hill, General Manager, Channel Seven Sydney to request that Ms Miller provide the names and designations of the representatives from Mr Aquilina's office who allegedly provided the information and the nature and substance of the information provided. Ms Miller advised that she had not been privy to any information about the matters raised in relation to Mr Aquilina's statement, and that she had been assigned to other work at the time. I wrote to Mr Hill again asking that he endeavour to ascertain whether any Channel 7 journalist had been provided with the name of the school. In response Mr Michael Lloyd Jones, General Counsel for Seven Network Ltd advised that a Channel 7 journalist had been provided with the name of the school, but the journalist declined to provide the name of the individual who had provided the information on the basis that the information had been provided by a "confidential source".

While there has been no suggestion that staff of the Department of Education or the Police Service provided the name of the school to the media, I sought advice on this issue from Dr Ken Boston, Director General of the Department of Education and Acting Police Commissioner, Mr Ken Moroney. Following enquires, Dr Boston and Mr Moroney advised that no officer from either organisation had disclosed the name of the school to the media.

There is no evidence that Mr Aquilina, Mr Secord or Mr Low provided the name of the school to the media.

Conclusion

The name of the school could have been provided by a number of individuals who were apprised of the events commencing on 5 April and ending after the Minister's statement on 10 April. The anonymous caller to 2UE has not been identified and the un-named journalist who was given the name of the school declines to identify the person responsible. The individual who disclosed the name of the school extended the constructive identification of Student A, and his family and showed scant regard for his feelings or those of his family. Those who chose not to identify that individual denied Student A the right to know who was responsible and thereby to obtain a full explanation as to their reasons for doing so.

I note however, that the chronology provided by Dr Boston showed that a large number of Departmental and Ministerial employees received the Serious Incident Report which was sent by the Principal to the District Office on 6 April. While this does not in any way suggest that the recipients of the Serious Incident Report were responsible for disclosing the name of the

school, it does indicate to me that the privacy of staff and students of the Department could be compromised in the absence of a "need to know" policy on the provision of information about "serious incidents". This matter is the subject of one of my recommendations in Part 13 of this Report.

Issue 3: Was false information about Student A's access to a gun provided to the media? Did this violate his privacy?

IPP 9 (section 16 of the PPIP Act) states:

> A public sector agency that holds personal information must not use the information without taking such steps as are reasonable in the circumstances to ensure that, having regard to the purpose for which the information is proposed to be used, the information is relevant, accurate, up to date, complete and not misleading.

This IPP imposes on all public sector agencies a specific responsibility to take all "such steps as are reasonable" in the circumstances to ensure that, when they use information which they have gathered they are in a position to vouch (as far as is possible) for the accuracy of such information. It is clear from the Act that where agencies cannot vouch for the accuracy of the information, or where they have taken no reasonable steps to do so, they should refrain from use of that information. A breach of this IPP may form the basis of an Internal Review arising under part 5 of the Act.

Likewise DPP 8 provides that:

> A recordkeeper who has possession or control of a record that contains personal information shall not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is relevant, accurate, up to date and complete.

There is no dispute that the information about Student A's alleged access to a gun was provided to the media. In his response to me on this matter Mr Secord admitted making references to Student A's access to a gun. He advised that in a conversation with Mr Daniel Blyde, a journalist from Channel 9, he said:

> It is believed the boy had access to a gun.

In his radio interview Mr Aquilina made the following statement on this issue:

> Carlton: Tell be more of the details.
> Aquilina: Well, late last week, three year ten students went to their principal with some discerning (sic) information about another student. They handed a diary they had obtained from that student and it described a massacre list with descriptions of suicide and plans to kill other students during a school assembly, which was to take place the next day.
> …
> Carlton: Did he have access to a gun?
> Aquilina: Yes.

Carlton: What sort of gun?

Aquilina: Well I'm not going to go into that detail, but the actual case, as I understand it was that, yes, he could have had access to a gun. I want to stress that he could have had access to a gun.

…

Carlton: But in this case, well we're talking about today there were real fears, were there, that this student may have carried out his intentions?

Aquilina: Absolutely. That's why the Principal took the action that he took and that's why the police were called in, that's why counsellors and other expert medical officials were brought in because of the concerns both for the welfare of other people as well as for the welfare of the student himself.

In the *60 Minutes* interview Mr McIlveen said that the information about the alleged access to a gun seriously "magnified the story". Mr Kelly also stated in that interview that the information about the alleged access to a gun "turned a good story into an extraordinary story".

This information about Student A's alleged access to a gun was later proved to be false and the question therefore follows, who was the source of the incorrect information about the gun and what steps were taken to verify it before it was made public?

Source

In his statement to Privacy NSW Mr Blyde said that in the afternoon of the day on which the Minister made his statement to Parliament, Mr Secord told him "the boy had access to a gun". Mr Blyde said that he asked Mr Secord why the information relating to the gun had not been mentioned in the Minister's statement to Parliament, and he asked for clarification of Mr Secord's statement. Mr Blyde stated that Mr Secord then said that if Mr Blyde wanted to be more correct in his reporting of the matter he should say that "authorities" had found a gun at Student A's house.

In the interview with Mr Peter Overton in the 60 Minutes interview, Mr Justin Kelly from radio 2UE stated that on the day of the Minister's statement he was given certain information relating to the matter. Mr Kelly stated in the interview that Mr Secord had said to him, "the boy had access to a gun… you can mention that".

Mr Kelly stated that later that day he had another discussion with Mr Secord, in which Mr Secord had said, "While I won't tell you the name of the school, you can say, it's believed the boy had access to a gun." Mr Kelly said that when he asked him to confirm this, Mr Secord had said, "You can say it's believed a gun was found at the boy's home."

In his response Mr Secord denied that he told Mr Kelly that it was believed that a gun had been found at Student A's home. He in turn alleged that Mr Kelly had confirmed the information about the finding of the gun with the Teacher's Federation and the Police Service ninety minutes later. Mr Kelly denied this allegation when it was put to him by Privacy NSW.

Mr Secord also alleged that Mr Kelly had been given the name of the school by the Teacher's Federation and the Police Service. Mr Kelly denied this allegation when it was put to him. Mr John Hughes, the Federation Media Officer, denied that the Federation had provided any information that the student in question had access to a gun.

In response to the allegations raised by Mr Blyde, Mr Secord denied that he had said that "if [Mr Blyde] wanted to be more correct in his reporting of the matter he should say that authorities had found a gun at Student A's house".

On the issue of information regarding Student A's access to a gun, Dr Boston stated that neither the Principal nor any departmental officer had requested information from the NSW Police Service.

The chronology provided by Dr Boston (tab 4) confirms Mr Moroney's advice that the Principal had reported the contents of the diary to the Green Valley Police on the morning of 6 April 2001 but he made no mention of a gun. The chronology records the first reference to a gun at 4.12pm on 10 April on radio station 2SM. In the evening of 10 April 2001 a Duty Inspector rang the Principal to clarify the media references to a gun and at that point the Principal indicated that he had no knowledge of a gun. When Green Valley Police interviewed the Principal in the morning of 11 April he again indicated that he had no knowledge of a gun.

It was not until the afternoon of 11 April, that is, that day after the gun had first been mentioned in the media, that the Principal was made aware by a teacher of the alleged conversation between Student A and another student concerning his possible access to a gun. After notifying the District Superintendent the Principal notified a Green Valley Police Detective Sergeant who advised that he would speak to Student A and his father about the diary and the allegation that Student A had access to a gun.

According to Acting Commissioner Moroney, on 11 April the Police Service Media Unit received "situation reports" from Green Valley Police which documented a report by the school Principal on 6 April concerning the student. As reported by Dr Boston, the Principal notified the Police about the contents of Student A's diary and he stated that he did not require Police intervention. The situation report documented the Principal's advice that he would provide copies of the diary entries to Green Valley Police. The Police Service media unit prepared a statement for release on the incident following:

> The diary entries have been reviewed…There has been no suggestion of a weapon at any stage.

<u>Verification</u>
I asked Mr Aquilina how it was that he came to report this incorrect information. He advised that it was provided to him at the time by his Senior Media Adviser, Mr Patrick Low. Mr Aquilina was asked whether he or his staff made enquires of the Police Service or the Department of Education

regarding Student A's access alleged to a gun. Mr Aquilina stated that neither he nor his staff had requested such information from the Police Service. On the question of information requested from the Department of Education, Mr Aquilina noted that the account of events provided by Mr Low and that of a senior officer of the Department of Education were contradictory in this regard. Mr Aquilina stated:

> According to my former media adviser, a senior officer of the Department told him that Police had information that the student had access to a gun.

This was denied by the senior officer of the Department, Mr Richard Booth who is the Liverpool District Superintendent for the Department of Education. Mr Aquilina added that "there is, however, some evidence to suggest that prior to April 10, 2001 there was talk by the student at the school regarding the existence of a gun". In a letter dated 8 June 2001 I asked Mr Aquilina to provide further information about that evidence and how it came to his attention. In response Mr Aquilina stated that after he received my letter dated 27 April his office requested and received the following information from the Department of Education:

> On May 14, 2001, in the course of answering those questions, it was volunteered by the Principal of the school that on April 11 there had been a report by a teacher of an episode in class that day. A teacher had filled in a school "referral slip" that said that in class that day a student (student X) was talking to other students about the student who had written the diary (student Y)…Student X had shown other students in the teacher's class the writing in the English book. In private afterwards student X had told the teacher that:
>
> *Student Y had told him during a conversation that he was very angry, wants to kill people and then himself, has family problems and hates going home, and that there is a gun at his uncle's home.*

While Mr Aquilina had earlier claimed that "prior to April 10" there was "talk of a gun" it should be noted firstly that the Minister stated that he only requested such information from the Department of Education sometime after April 27, and second that the only evidence provided relates to events only brought to the attention of the school and the Department after April 10, that is after the media had already run a story about the student at Cecil Hills High School having access to a gun.

It should also be noted that in relation to this issue Mr Secord drew my attention to an article in the Daily Telegraph newspaper dated 25 May 2001.[23] That article discusses the referral slip given by the teacher to the Principal on 11 April and notes that prior to the afternoon of 11 April the staff at the school had no knowledge of the student's alleged access to a gun.

That an event did in fact occur on 11 April, which led to the Principal being made aware of an alleged conversation some time previously between

[23] "Memo says boy made gun claim", David Penberthy and Kathy Lipari.

Student A and another student, cannot have had a bearing on what information was available to Mr Low, Mr Secord and Mr Aquilina on 10 April.

On the issue of discussions with departmental staff or the Police Service, Mr Low advised the ICAC that he had a discussion with Mr Richard Booth, regarding the content of the Serious Incident Report and the briefing documents. Mr Low told the ICAC that he asked Mr Booth if the student had access to a gun and that Mr Booth was "uncertain" about this matter[24]. Mr Booth told the ICAC that he denied that this discussion took place[25]. This accords with Dr Boston's advice regarding the allegation that information was provided by departmental staff about the student's access to a gun. The ICAC Report states that Mr Low did not follow up the issue with the Police Service[26]. This was verified by the information provided by Acting Police Commissioner Moroney to Privacy NSW.

In the ICAC Report Mr Booth is quoted as saying that no information was provided to Mr Low regarding Student A having access to a gun.[27] Dr Boston, Director General of the Department of Education stated that neither the Principal nor any departmental officer requested information from the NSW Police Service regarding Student A's access to a gun.

While, to his credit, Mr Low told the ICAC he did not want to research the "story" because he "[did] not agree with making this kind of thing public"[28], and the ICAC Report records the fact that Mr Low did not take steps to ascertain the veracity of the notion that Student A had access to a gun, he nevertheless allowed Mr Secord and the Minister to believe that this was the case. He described the reasons for his failure to check the veracity of the claim as follows:

> …the issue now had a life of its own. I did not want to get in trouble by calling it off. I let the Minister believe that the student had access to a gun.[29]

Mr Low earlier gave evidence to the ICAC that he felt pressured by Mr Secord to obtain information about the alleged access to a gun:

> He said without a gun we could not do the story. He wanted to do the story on the following Tuesday. I agreed to do the story and I said I would find out more details.[30]

Mr Secord disputed this account of events in his evidence to the ICAC:

> He [Mr Low] was the person that mentioned the gun, it was conveyed to me.[31]

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[24] *ICAC Report on an Investigation Into Matters Arising from a Ministerial Statement to the Legislative Assembly on 10 April 2001*, at page 5
[25] ICAC Report at page 5
[26] ICAC Report at page 5
[27] ICAC Report at page 5
[28] ICAC Report at page 5
[29] ICAC Report at page 10
[30] ICAC Report at page 4
[31] ICAC Report at page 4

In his response to my Investigation Report Mr Secord emphasised that it was Mr Low who generated the information about access to a gun.

Mr Secord referred to the ICAC Report into matters arising from the Minister's statement, in particular the part of the report which dealt with the communication between Mr Secord and Mr Low. According to the ICAC Report, Mr Secord had told the ICAC that Mr Low had said that a Department of Education report into the diary "alleged in part that the student had access to a gun". Mr Secord also told the ICAC that Mr Low "took no action" to tell Mr Secord that this information was "false, incorrect or had not been confirmed". In his statement to the ICAC, Mr Secord further said that he was not responsible for checking the accuracy of the information and that he provided it to the media in "good faith"[32].

With respect to Mr Kelly's statement that Mr Secord had told him "you can say, it's believed the boy had access to a gun", Mr Secord stated:

> The word "believed" is a professional comment…that is commonly used between journalists and media advisors at Parliament House.

Mr Secord expressed the view that:

> …all members of the press gallery understand that when the word "believed" is given to a journalist that journalist is expected to independently confirm the information.

I asked the Director General of the Premier's Department, Dr Col Gellatly, to conduct enquiries in response to the allegations raised by Mr Secord against Mr Low. I acknowledged that Mr Low was no longer employed as Senior Media Adviser to the Minister for Education but I asked Dr Gellatly to conduct enquiries into this matter on the basis that as a ministerial staffer, Mr Low had been an employee of the Premier's Department when this matter arose.

In his reply Dr Gellatly stated that he was unable to contact Mr Low to put any questions to him. He advised that while political office staff are employees of Premier's Department for the purpose of the Public Sector Management Act 1988 the daily activities and duties of those staff are subject to the direction and control of the Chief of Staff and the relevant Minister or the Leader of the Opposition.

In response to the conclusion in my Investigation Report regarding this issue, Mr Aquilina disagreed with my conclusion that he did not take sufficient steps to verify the information about the access to a gun. He asserted that by asking Mr Low how he knew that Student A had access to a gun prior to providing this information on air, and by asking questions of his office and the Director General of the Department of Education, he had taken steps to verify the source of the information.

[32] ICAC Report at page 9

Conclusion

In her report on this matter Ms Irene Moss, Independent Commissioner Against Corruption (ICAC) concluded that while Mr Low did not act 'corruptly', he acted negligently by allowing Mr Secord and Mr Aquilina to "labour under the misapprehension that the student had access to a gun"[33]. While I do not question the conclusions reached by the ICAC investigation I should make it clear that the Independent Commission Against Corruption is charged with determining whether a public official acted corruptly according to the definition contained in the ICAC Act[34]. I am charged with the responsibility of determining whether the privacy of Student A and that of his family were violated and if so, who was responsible.

I note that Mr Aquilina qualified his assertion in the Radio 2UE interview that Student A had access to a gun. However his later statement regarding the action taken by the Principal and the actions taken by health or welfare authorities to protect the welfare of Student A and other people demonstrates a belief that Student A had certain means to endanger himself or other people.

Both Mr Secord and Mr Aquilina have attributed the responsibility for checking the accuracy of this information to Mr Low. That Mr Low did not carry out this responsibility is clear, on his own admission. In response to my Investigation Report Mr Secord pointed out that the ICAC had found that Mr Low was responsible for generating the information about the gun, and he suggested that I make this point also in this report.

It is clear from Mr Low's evidence to the ICAC that the environment in which he was working at the time focussed on the importance of "the story", and that "calling it off" was less palatable an option than letting an inaccurate story become current in the media. In particular it should be noted that, according to Mr Low, Mr Secord had earlier told him, "without a gun we could not do the story"[35]. In his response to my Investigation Report Mr Secord disputed this account of events and relied on the information he provided to the ICAC:

> He came - Mr Low came to me with this information. He was the person that the mentioned the gun, it was conveyed to me.

Indeed no respondent could point to any evidence, and nor could the Principal of the school or the Department, that prior to 10 April there had ever been a suggestion made to the Principal, the Department or the Minister's office that Student A had access to a gun.

I have seen no evidence to suggest that steps were taken by Mr Low, Mr Secord or Mr Aquilina to ensure that the mere suggestion that Student A had access to a gun, wherever it initially came from, was sufficiently verified before it was used and disclosed to third parties.

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[33] ICAC Report at page 10
[34] Independent Commission Against Corruption Act 1988, section 8
[35] ICAC Report at page 4

To suggest as Mr Secord has done, that a press officer can use the word "believed" to mean that the recipient of the information is bound to check its accuracy before further use, is not in my view, action which would constitute taking "such steps as are reasonable" to comply with the requirements of IPP 9 in the PPIP Act.

I conclude that false information about Student A's access to a gun was provided to the media by Mr Low, Mr Secord and Mr Aquilina. The failure of Mr Low, Mr Secord and Mr Aquilina to take reasonable steps to check the accuracy of the information before its use was contrary to DPP 8 and possibly breached IPP 9. I therefore conclude that this action violated the privacy of Student A and that of his family.

Summary

Because Student A was able to be identified at Cecil Hills High School and in his local community as the subject of the media reports, because information about Student A was disclosed to the media, and because false information about him was provided to the media and consequently reported on, it is my view that Student A and his family were subject to a violation of their privacy.

In terms of the DPPs I conclude that the use of this information was contrary to DPP 8 (accuracy) and DPP 10 (disclosure), and therefore violated the privacy of Student A and his family. In terms of the PPIP Act it would also appear to have breached IPP 9 (requirement to check accuracy before use) and IPP 11 (limitations on disclosures), but this is a matter to be determined by the Premier's Department in the event that the complainants seek an Internal Review under Part 5 of the Act, or a subsequent external review by the Administrative Decisions Tribunal.

Furthermore, in terms of the 'Prosser tests' of privacy, I conclude that the use and subsequent disclosure of the false information put Student A and his family in a "false light in the public eye" when it was disseminated through the media.

11. Subsequent Events

As noted in the chronology Mr Aquilina, Student A and his father attended a conciliation conference conducted by Privacy NSW on 18 October 2001. All parties attending the conference agreed that the substance of the conciliation would remain confidential.

I note that Mr Aquilina made an apology in Parliament to Student A and his family on 29 May 2001. I also note that Mr Aquilina sent a written apology to Student A and his family on 7 May 2001 and that he visited their home on 23 August 2001 in order to apologise personally.

Mr Aquilina's previous apologies and his participation in the conciliation conference have been considered in formulating the recommendations in Part 13 of this Report.

12. Conclusion

My investigation into this matter has disclosed a course of conduct by Mr Aquilina, Mr Secord and Mr Low, the overall effect of which has been to violate the privacy of Student A and his family. In particular, Student A and his family's privacy was violated by the following actions:

1. The disclosure of the personal information to the media by Mr Aquilina, without the consent of the individual or evidence of any lawful authority. This took the form of information provided in the radio interview by the Minister. This action was contrary to DPP 10.

2. The disclosure of personal information to the media by Mr Secord and Mr Low without the consent of the individual or evidence of any lawful authority. This took the form of statements Mr Low and Mr Secord provided to the press gallery. These actions were inconsistent with DPP 10 and may have breached IPP 11.

3. The use of personal information without checking its accuracy. This concerned the use of the personal information by Mr Low, Mr Secord and Mr Aquilina with respect to the alleged access to a gun. Its use was inconsistent with DPP 8 and may have breached IPP 10.

In summary, I am of the opinion that in giving a radio interview and other interviews which focussed on one incident at a New South Wales High School, Mr Aquilina violated the privacy of Student A and his family. The Minister's actions described above, taken together with those Mr Low and Mr Secord further violated the privacy of Student A and his family. I am concerned that there appears to be an inadequate understanding by all parties concerned of their obligations under the PPIP Act and it appears that little or no thought was given to the privacy rights of Student A or his family.

It is fitting to note the observations of legal academic and journalist Jeffrey Rosen in his commentary on the importance of privacy in the 'information age':

> Privacy protects us from being mis-defined and judged out of context in a world of short attention spans, a world in which information can be easily confused with knowledge.[36]

Anyone making a decision to provide information to the media would surely have been aware that such statements would generate further media interest, and indeed that journalists would act quickly to find out more about the story and the parties involved. The involvement of the Director of Communications for the Premier's Office, Mr Secord, in the distribution of information to the media points to the level of importance no doubt accorded the story by various parties.

Therefore while Mr Low may have admitted that he did not check the accuracy of the allegation about the access by Student A to a gun, or that he did not disabuse Mr Secord or Mr Aquilina of their notion that Student A had access to a gun, under our system and conventions of government the ultimate responsiblility rests with the Minister.

[36] *The Unwanted Gaze: The Destruction of Privacy in America*, Random House, New York 2000

13. Recommendations

In light of the conclusions reached in this matter:

1. I recommend that the student and his family receive an unqualified public apology from Mr Aquilina for his role in violating the privacy of the student and his family.

2. I recommend that Mr Aquilina make a public statement, acknowledging that (i) at the time that he mentioned on radio that Student A "could have had access to a gun", there was in fact no evidence from the Department of Education and Training or the NSW Police Service to suggest this was the case and (ii) that insufficient steps were taken by Mr Aquilina, Mr Low and Mr Secord to ensure that the mere suggestion that Student A had access to a gun, wherever it initially originated, was sufficiently verified before it was used and disclosed to third parties. Such a statement will correct the public record in relation to these events and will go some way to mitigating the harm done to Student A and his family.

3. I recommend that the Director General of the Department of Education and Training revise the current Guidelines for the Management of Serious Incidents so that access to information contained in Serious Incident Reports be limited to only those who need to know.

4. I recommend that the Director General of the Premier's Department forward an apology to Student A and his family on behalf of Mr Low and Mr Secord for their role in violating the privacy of the student and his family.[37]

5. I recommend that the Director General of the Premier's Department give consideration to implementing a training programme for ministerial staff on the legal and policy requirements relating to privacy.

6. I recommend that Parliament itself consider the question of the acceptance of third party complaints regarding alleged breaches of the PPIP Act and alleged violations or interferences with privacy generally.

14. Final Comment

While I recognise the significant public interest in this matter, in the interests of protecting Student A and his family from further violations of or interferences with their privacy, I request that the media makes no further attempts to further identify, interview or photograph Student A or his family regarding this matter.

[37] The PPIP Act does not anticipate employees of public sector agencies being held individually responsible for breaching Part 2, 5 or 6 of the Act. Additionally, there is no forum through which Mr Low or Mr Secord could apologise to Student A or his family. The IPPs however place obligations on public sector agencies. The Premier's Department is the official employer of Ministerial staff such as Mr Low and Mr Secord.

In line with this request I intend to make no further public comments on this matter. The Report speaks for itself and I have nothing further to add.

Chris Puplick
PRIVACY COMMISSIONER

7 May 2002