VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

human rights DIVISION

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| HUMan rights LIST | vcat reference No. H256/2022 |
| CATCHWORDS | |
| Human Rights List – application under section 75(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic)for summary dismissal of privacy complaint referred under section 66(4) of the *Privacy and Data Protection Act 2014* (Vic)*.* | |

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| COMPLAINANT: | Ekaterina Send |
| RESPONDENT: | Department of Jobs, Precincts and Regions |
| WHERE HELD: | Melbourne |
| BEFORE: | Member C. Thwaites |
| HEARING TYPE: | Section 75 Summary Dismissal Hearing |
| DATE OF HEARING: | 16 August 2023 |
| DATE OF ORDER and WRITTEN REASONS | 21 November 2023 |
| CITATION | Send v Department of Jobs, Precincts and Regions (Human Rights) [2023] VCAT 1267 |

# Orders

1. The application for summary dismissal under section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) is refused.
2. On or before 24 December 2023, the complainant is to provide by email to the Tribunal and to the respondent a document titled Particulars of Claim, setting out the particulars of each claimed breach of an IPP that is raised in the privacy complaint referred to Tribunal by the Information Commissioner. The particulars of claim must be in numbered paragraphs and must state:
   1. what the complainant says happened;
   2. why they say this was a breach of the IPP, and
   3. what orders they are seeking and what outcome they want.
3. On or before 24 January 2024, the respondent is to provide by email to the Tribunal and the complainant a document titled Particulars of Defence, setting out their particulars of defence, responding to each aspect of the applicant’s particulars of claim.
4. The Tribunal will then list a directions hearing to make orders about how the complaint will proceed.
5. Parties are at liberty to apply.

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| C. Thwaites **Member** |  |  |

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| APPEARANCES: |  |
| For complainant | In person |
| For respondent | N. Boyd-Caine, counsel C. Pervaiz, solicitor |

# Reasons

1. This is an application for summary dismissal of a privacy complaint the complainant made against the respondent. That complaint was referred to the Victorian Civil and Administrative Tribunal (‘the Tribunal’) by the Information Commissioner.
2. The complaint relates to the complainant’s application to be part of the respondent’s digital jobs program. The respondent had engaged Hudson Global Resources to assist with the recruitment process. As part of the process, the complainant was required to complete an online text-based behavioural interview via PredictiveHire’s artificial intelligence (‘AI’), Phai, as well as two psychometric assessments.
3. While the complainant was successful in her application to be part of the program, the complainant alleges that during and after the recruitment process, the respondent breached a number of information privacy principles (IPPs) which are set out in the *Privacy and Data Protection Act* 2014.
4. The parties did not settle their dispute though mediation at the Tribunal, and the respondent filed an application for summary dismissal.
5. The respondent submitted that the complaint should be summarily dismissed in whole or in part because it was frivolous, vexatious, misconceived, lacking in substance or an abuse of process.
6. A hearing of the application for summary dismissal was held on 16 August 2023. I was the presiding member. During the hearing I heard oral submissions from the complainant and respondent. At the conclusion of the hearing, I set down dates for which the complainant and respondent could file any further written submissions. I have now received and considered those submissions.

## Assessment under section 75

1. Section 75(1) of the *Victorian Civil and Administrative Tribunal Act* *1998* (Vic) (‘VCAT Act’) states that at any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion –
   1. is frivolous, vexatious, misconceived or lacking in substance; or
   2. is otherwise an abuse of process.
2. The principles that guide the Tribunal when considering an application for summary dismissal are well established. The Tribunal should exercise caution before summarily dismissing a proceeding because such action will have the effect of depriving a litigant of the opportunity to have their case decided in the ordinary course. This is of particular importance where the complainant is self-represented.
3. The Tribunal should only make an order summarily dismissing a proceeding when satisfied to a high degree of satisfaction, that the proceeding is obviously unsustainable in fact or on law, can on no reasonable view justify relief or must be bound to fail. The power to order summary dismissal should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried. It must be very clear that the proceeding is absolutely hopeless.
4. The respondent bears the persuasive burden of showing the complaint is undoubtedly hopeless.[[1]](#footnote-1)The power to summarily dismiss a proceeding should not be invoked where on the material currently before the Tribunal, the complainant may fail to adduce evidence substantiating an essential element of the complaint. The proceeding should not be dismissed if the ultimate fate of the proceeding depends upon disputed questions of fact.
5. If the Tribunal is not satisfied the proceedings should be summarily dismissed or struck out, the matter should go to a hearing so the complainant has the chance to have the complaint heard and the evidence tested in the usual way.

### Is the complaint vexatious and/or an abuse of process?

1. One of the grounds raised by the respondent for summary dismissal was that there was a collateral purpose for the complainant’s complaint, and therefore it was vexatious and/or an abuse of process and should be dismissed.
2. The respondent submitted that in correspondence to the respondent, the complainant had indicated that this matter was part of her academic research and that all information (outside the privacy compliant conciliation process) would be used in the research and it was highly likely it would be published in the public domain. The complainant had also stated it will be important for her research to understand how the respondent enforces and actions contract clauses and whether having a clause was sufficient to make sure the service the government provides meets all necessary standards.
3. The respondent submitted that the complainant had clearly identified a motive outside the resolution of the dispute. The complaint had been made in circumstances where the complainant had been successful in her application to be part of the respondent’s digital jobs program, and no harm had occurred or wrong alleged on the basis that the complainant was denied entry to the program due to personal information.
4. The respondent submitted that the complainant was seeking to use the Tribunal to require the respondent to answer unsubstantiated assertions and then use those answers in her academic research.
5. The respondent submitted that this collateral purpose was sufficient for the Tribunal to deem the proceeding vexatious litigation and summarily dismiss the complaint. The respondent referred to the decision in *Falconbridge Pty Ltd v Yarra City Council* [2005] VCAT 2449 [11] (‘Falconbridge’).
6. In response, the complainant submitted that while she is an academic and had undertaken research into AI, that was in July 2021. Her research into AI algorithms used in digital jobs in not a topic of interest any longer because large language models have evolved significantly since 2021. The understanding of AI has grown in the community, and there are hundreds of research papers published every week about it. While she does intend to do more research and write a book, the subject matter of her research is unclear at the moment. The respondent also noted *Privacy Commissioner v Telstra Corporation Ltd* (2017) where the complainant was a journalist, and the complaint was part of the journalist’s investigation.
7. The complainant submitted she has a deep knowledge of privacy issues and is very much concerned about organisations protecting the privacy of individuals. She also submitted that her intention was to seek the Tribunal’s decisions on the concerns she had raised, improve government agencies’ understanding of the importance of using privacy by design principles when designing programs, and show government agencies the importance of having a well-working process of responding to feedback and addressing the public's concerns diligently, and at an early stage.

### Assessment

1. I note that the Falconbridge decision relates to a costs application following a planning matter that had been struck out. The decision did not find the application was vexatious due to a collateral purpose, and was decided on other reasons. In relation to whether a matter was vexatious due to a collateral purpose, the decision referred to *Cabot v City of Keilor* [1994] VicRp 14; [1994] 1 VR 220; *Attorney General v Wentworth* (1998) 14 NSWR 481; and *Al-Hakim v Arthur Robinson and Hedderwicks* [2001] VCAT 1767.[[2]](#footnote-2)
2. In *Cabot v City of Keilor* Justice Gobbo referred to the test set out in *Attorney General v Wentworth* (1998) 14 NSWR 481 at 491 in relation to whether a proceeding was vexatious due to collateral purpose. That test was: if the proceeding is brought for a collateral purpose, and not for the purpose of having the Court adjudicate on the issues to which they give rise.
3. I have also considered the decisions in *Brown v Corrections Victoria & Ors* [2022] VSC 217 (3 May 2022), and *Axicom v Melton CC* [2020] VCAT 190 referred to by the respondent during oral submissions.
4. While I accept the complainant is an academic and has undertaken academic research and has sought information from the respondent under FOI processes, I am also satisfied the complainant has a deep knowledge and interest in privacy issues and is genuinely concerned about how organisations protect an individual’s privacy. While I have considered the respondent’s oral submissions that the complainant has been inconsistent in relation to the reasons why she is pursuing the complaint, I accept her submissions that her intention in pursuing her complaint is to seek the Tribunal’s decision on the concerns she has raised.
5. I am not satisfied the complainant has bought the proceeding for a collateral purpose and not for the purpose of having the Tribunal adjudicate on the issues she has raised. I am not satisfied the complainant has brought the complaint not to prosecute it to a conclusion but to use it as a means of obtaining some advantage for which it was not designed or some collateral advantage beyond what the law offers.
6. Therefore, I am not satisfied the complaint is vexatious or an abuse of process and I am not of the opinion it should be summarily dismissed for those reasons.

### Is the complaint frivolous, misconceived and/or lacking in substance?

1. The respondent also submitted the complaint should be summarily dismissed in whole or in part on the basis it was misconceived or lacking in substance.
2. The complaint outlined claims that the respondent breached a number of IPPs. These claims relate to the collection and handling of personal information throughout the recruitment process, the accuracy of the personal information collected, the adequacy of the respondent’s privacy policies, access to the personal information, and transfer of the personal information outside Victoria.
3. I will consider the application for summary dismissal against each of the claims and submissions made about the IPPs.

## IPP 1.1

1. According to the complaint, the complainant asserts that through Phai, inferences were made about her personality and employability. She asserts that it was not necessary for the respondent to collect this inferred information about her to assess her suitability for a position in the program, and therefore the respondent had contravened IPP 1.1.
2. The respondent submitted that the complainant did not identify the inferences made, but rather simply asserted their existence. The respondent submitted that while it was not necessary that the full evidence of a claim be presented and considered prior to hearing, there nonetheless needs to be some proper basis upon which the claim is made. No such basis is presented here. Moreover there was an incoherence in the claim to the extent that the complainant gained entry into the program. The respondent acknowledged that they did collect some personal information of applicants’, but that the information was necessary to ensure selection of the most suitable, motivated, and employable applicants occurred. The information was deemed necessary to fit the applicants into that category.
3. The respondent submitted that the claim had the perverse effect of suggesting that the information that the respondent in part used to determine that the complainant was a successful candidate was information that should not have been used, but that presumably the decision to offer the complainant a placement which led in part from that information should nonetheless remain.
4. The respondent also submitted that it was uncontroversial that the creation and running of the program falls within the respondent’s functions or activities as required by IPP 1.1. As such, any claim that arises requires that the complainant identify private information that falls outside of this accepted boundary within the legislation. By failing to identify any of the information collected generally, the complainant has failed to demonstrate any capacity for the Tribunal to determine whether such information was inappropriately used. In effect, the complainant seeks to reverse the onus of the claim by pushing the respondent to disprove an unsupported allegation. This misconceives the manner in which a claim is to be made, and highlights the absence of support for the assertion made.
5. The complainant submitted that it was not necessary to use PredictiveHire to collect new personal information about candidates, an opinion about their personality. To assess candidates’ suitability for the program the respondent used two assessment tools that assessed personality.

* One was the PredictiveHire AI algorithm.
* The second was another personality assessment.

1. There was also a third assessment that was a psychometric assessment.
2. The complainant submitted that the program did not use a single assessment that would be directly related to the digital focus of the digital jobs program, such as logical thinking, basic maths, basic ability to code, basic understanding of information technologies. The learning that the program provided was a 12 week study in a selected area of digital technologies.
3. The complainant’s selected area was data analytics with Python. The complainant stated it was a difficult course that participants would only be able to do if they had prior basic knowledge in the field. The complainant submitted that a candidate’s understanding of the basics would be important for the overall success of a participant in the program itself.
4. The complainant submitted that the selection process had two personality assessments but no knowledge or skill base assessments. Each of these personality assessments collected new personal information about a candidate, an opinion about their personality.
5. The complainant claimed that the use of at least one of these tools was excessive. The use of PredictiveHire was not necessary as the personal information that it produced was not accurate. It did not produce meaningful information about a candidate to assess a candidate’s suitability for the program and therefore it was excessive and not necessary.

### Assessment

1. IPP 1.1 states that an organisation must not collect personal information unless the information is necessary for one or more of its functions or activities.
2. While I have considered the respondent’s submissions, I note the applicant has provided further information in her oral and written submissions in relation to her claim that the respondent has breached IPP 1.1.
3. The power under section 75(1) does not allow the Tribunal to strike out a proceeding on the basis of poor drafting, it looks to the cause or causes of action. I consider the concerns raised by the respondent can be addressed by requiring the complainant to consolidate and focus the information she has provided in relation to her claims in a particulars of claim document.
4. As noted above, the respondent bears the persuasive burden of showing the complaint should be summarily dismissed or stuck out.
5. On the material before me, I am not of the opinion that the complainant’s claims in relation to IPP1.1 are frivolous, vexatious, misconceived or lacking in substance or otherwise an abuse of process.
6. I am not satisfied that the complaint in relation to breach of IPP 1.1 should be summarily dismissed or struck out.

## IPP 1.3

1. According to the complaint, the complainant asserted that when applying to the program:
   1. she was not made aware of what she would be assessed upon by Phai – employability or personality;
   2. she may have been misled in that the Department indicated that her employability would be assessed when it may only have been her personality that was being assessed;
   3. she was not made aware of the basis upon which inferences would be made about her employability or personality by Phai;
   4. the respondent did not explain how it would use the inferred information to make a decision about her suitability for the program;
   5. she was not made aware of all the purposes for which her information would be used by PredictiveHire, such as for the purpose of training the relevant algorithm; and
   6. she was not made aware of the purpose for which her information was being disclosed to QuestionPro when she undertook the midpoint survey she completed, or the purpose for which QuestionPro would use her information.
2. The respondent submitted that their concerns in relation to IPP 1.1 are also relevant to this complaint. The complainant had based the claim on an unsupported assertion of breach. This is most clearly seen in the language pertaining to the second of the six assertions. Similarly the complainant acts on a presumption that the information was used for the purpose of training the relevant algorithm. This claim has no basis in fact whatsoever. Concerns that the complainant has about how information can be used at large are not sufficient to ground a complaint about the actual use of information in a program to which the complainant was admitted. While the claim does not need to be proven at this stage of a proceeding, it must have a basis to be made. Where such a basis is absent, the complaint should be dismissed.
3. In response, the complainant submitted that the application form for the program, which was the first point where the complainant’s personal information was collected, collected sensitive information about ethnic origins, language, health information about disability, and sensitive personal information about criminal records.
4. The complainant submitted that the application form IPP 1.3 notice was not clear on the purpose of the collection of the personal and health information. The notice was not about the purpose of collection of personal information, it was about permission to contact people or companies for the purpose of assessing the application.
5. The applicant also submitted that the IPP 1.3 notice did not specify how to contact the organisation, the fact that the individual was able to gain access to the information, and to who (or the types of individuals or organisations to which a) the organisation usually discloses information of that kind.
6. The applicant also made submissions about the request for information about criminal records and about the validity of accepting the privacy policy.

### Assessment

1. IPP 1.3 states that at or before the time (or if that is not practicable, as soon as practicable after) an organisation collects personal information from that individual, the organisation must take reasonable steps to ensure that the individual is aware of—
   * + - 1. the identity of the organisation and how to contact it;
         2. the fact that the individual is able to gain access to the information;
         3. the purposes for which the information is collected;
         4. to whom (or the types of individuals or organisations to which) the organisation usually discloses information of that kind;
         5. any law that requires the particular information to be collected; and
         6. the main consequences (if any) for the individual if all or part of the information is not provided.
2. I accept the respondent is concerned about unsupported assertions of breach raised by the complainant, and I accept their submissions that the respondent must be able to understand and respond to the complaints made.
3. I also note that the complainant is self-represented, and therefore the Tribunal does not expect her documents to be prepared with the same level of legal finesse as those drafted by a lawyer.
4. While I note the complainant raised a number assertions as listed above, she has clarified her claims in relation to the purpose for which the information was collected, to whom the organisation usually discloses information of that kind, and the adequacy of the IPP 1.3 notice in relation to IPP 1.3(a), (b), & (d).
5. While there may be a dispute in relation to the facts of these claims, that is for a hearing to decide.
6. After considering all the submission before me, I am not satisfied that the complaint in relation to breach of IPP 1.3 should be summarily dismissed or struck out.

## IPP 1.4

1. IPP 1.4 states that where reasonable and practicable, an organisation must collect personal information about an individual directly from that individual.
2. According to the complaint, the complainant asserted that it was reasonable and practicable for the respondent to collect personal information about her employability from her directly, such as through her resume. The complainant asserts that by the respondent collecting personal information from her indirectly through inferences made about her via Phai, the respondent contravened IPP 1.4.
3. The respondent submitted this claim was misconceived, in that the claim is in fact what had occurred. The only personal information collected, indeed the only personal information available to the respondent, came directly from the complainant. The collection point of that information was singular; from the complainant, by way of answers given in the application process, or material provided in support of that application. That information may have formed the basis for an inference to be drawn, but the inference is not the information itself. As a matter of law, IPP 1.4 does not operate as alleged in the complainant’s claim.
4. The complainant submitted the personal information was the opinion about the candidate produced by the PredictiveHire algorithm (in the ‘employer report’). The respondent’s ‘Digital Jobs – program overview’ document indicated the PredictiveHire AI tool assessed candidates’ employability through inferring insights from the 250+ words of text written by the candidate. The complainant raised concerns about the accuracy of the insights, and submitted that should the respondent want to gain insights about a candidate’s employability, the information could have been obtained from the candidate’s resume and employment history.

### Assessment

1. There appears to be a dispute about the facts in this claim. Did the respondent collect personal information about the respondent from PredictiveHire? Was it reasonable and practicable for the respondent to collect that personal information about the individual directly from that individual? Did a breach of IPP 1.4 occur? This is for a hearing to decide.
2. On the material before me, I am not satisfied that the complaint in relation to breach of IPP 1.4 should be summarily dismissed or struck out.

## IPP 2.1

1. According to the complaint, the complainant is concerned that the respondent inappropriately disclosed her personal information to various third parties throughout the recruitment process in contravention of IPP 2.1.
2. Some of the complainant’s concerns include, but aren’t limited to:
3. Hudson sharing her contact information with QuestionPro;
   * + - 1. PredictiveHire sharing her personal information with potential internship providers; and
         2. PredictiveHire sharing her personal information with educational providers.
4. The complainant also asserted that her personal information was inappropriately used by the respondent, as her personal information was likely used by Phai for the purposes of machine learning.
5. The respondent submitted the information was collected for the purpose of determining entry into the program. The entities identified in the complaint had contracted with, or were sub-contractors to, the respondent, for the purposes of determining the framework by which admission to the program could be attained. That was the primary purpose of those relationships, and the only purpose identified for which the information was used. As such, the claim does not identify a breach, but rather accurately identifies the pathways down which information flowed, so as to determine successful and unsuccessful candidates to the program.
6. The claim that the information may have been used for a collateral purpose, particularly machine learning, simply has no basis. The complainant again identifies a generalised concern as to how information may be used, and applies that concern to the current proceedings with no apparent basis upon which to do so. As such, the complainant once again reverses the onus of the application onto the respondent, requiring it to disprove an assertion the origin of which is completely unclear.
7. In response, the complainant submitted that at the time of collection of personal information in the Digital Jobs application, the collection notice did not specify which of her personal information would be disclosed to which entities.
8. From the correspondence with PredictiveHire CEO, the applicant found out that the following personal information was disclosed to PredictiveHire:
9. her full name;
   * + - 1. her email address; and
         2. her mobile phone number.
10. The complainant submitted that PredictiveHire is a fully digital online interview tool. The company does not interact with candidates in any other way than digital. All her correspondence with PredictiveHire was via the email correspondence. Therefore, there was no need for PredicitveHire to hold information about a candidate’s phone number. However, this information was disclosed to PredictiveHire without the respondent assessing whether the disclosure was necessary.
11. The complainant referred to the Electronic Frontier Foundation report: ‘Behind the One-Way Mirror: A Deep Dive Into the Technology of Corporate Surveillance’. In that report, they explain how trackers tie data to people and what identifiers are being used. The report explains the significance of a phone number as a unique and persistent identifier, and how the combination of identifiers is used to build profiles of real people. The applicant submitted that disclosing a phone number without necessity to a third-party, especially in combination with other unique identifiers has potential to create significant privacy harms. Not only does this expose candidates’ personal information to data breaches, it is also unable to be guaranteed that a commercial entity would not sell this information together with the candidates’ personality profiles to data brokers and other interested entities.

### Assessment

1. IPP 2.1 states that an organisation may only use or disclose personal information about an individual for the primary purpose it was collected for, or for one of the other purposes listed in IPP 2.1(a) – (h).
2. The complainant has clarified the issue in relation to the disclosure of her telephone number to a third party in the circumstances as described. The question as to whether that happened, and if such a disclosure was a breach of IPP 2.1, is an issue to be considered and concluded at a hearing of the evidence.
3. On the material before me, I am not satisfied that the complaint in relation to breach of IPP 2.1 should be summarily dismissed or struck out.

## IPP 3.1

1. IPP 3.1 states that an organisation must take reasonable steps to ensure that the personal information it collects, uses, or discloses is accurate, complete and up to date.
2. According to the complaint, the complainant suspects that PredictiveHire’s assessment of her personality was inaccurate. Whilst she has not been able to access the report of PredictiveHire’s assessment of her, she notes that an email she received from PredictiveHire titled ‘Your Personality Results: Ekaterina’ made inferences about her personality which were not accurate.
3. The complainant states that this email contained a coaching tip hinting that she lacks ability to listen to others and tends to overshare her thoughts and ideas out loud which can feel stressful for others. She also received recommendations to learn to listen, not to overshare ideas, and ask clarifying questions before making judgements.
4. The complainant disputes these inferences noting that she is an introvert who treasures her ability to listen to others, and who tends to hold her thoughts and ideas until the right moment. She states that she never speaks first unless taking initiative is necessary for the circumstances or until she is asked to speak.
5. The complainant further notes that the inferences about her were stated as though they were facts. She complains that the email did not contain any caveats to note that her personality results contained opinions only and that the opinions could be inaccurate.
6. The complainant therefore believes that the inferences made about her by Phai, which the respondent used to assess her application, are likely to have been inaccurate. She claims that the respondent failed to take reasonable steps to ensure that the information it collected about her was accurate, complete and up to date because:
7. there was no evidence that the respondent took any steps to satisfy that Phai can accurately assess personality and upon what basis; and
   * + - 1. the Privacy Impact Assessment that the respondent undertook in relation to the program demonstrates that it did not consider the risks that the inferences generated by Phai could be inaccurate or include any steps to mitigate this risk.
8. The respondent submitted that this complaint was misconceived. Inferences drawn by Phai from the information available to it are not the same as the information itself. Rather, the personal information that was collected came directly from the complainant. No other personal information gathering was undertaken. As such, the accuracy, completeness, and timeliness of that information is rightly in the hands of the complainant. In circumstances where the only information stems from the complainant, the respondent has satisfied the requirements of IPP 3.1 as a matter of fact and law, and the claim cannot be sustained.
9. In response, the complainant submitted that the opinion about candidates’ personality that the PredictiveHire tool produced was personal information and was inaccurate.
10. According to PredictiveHire’s research paper, the model’s Pearson correlation coefficient r was 0.39. On the scale of strong – moderate – weak - no correlation, r = 0.39 is in the ‘weak’ zone. Weak or incorrect predictions are evidenced from the email that the applicant received from PredictiveHire. The applicant submitted that this was an entirely inaccurate opinion of her personality, character and behaviour.
11. The applicant submitted that the respondent did not take reasonable steps to ensure that the personal information it collected, used, or disclosed was accurate. She referred to extracts of the FOI Notice of Decision #5714 on 7 September 2021:

4) Privacy Impact Assessment of PresictiveHire

As the Department does not have a contract with PredictiveHire, no assessment has been conducted or is required.

5) Algorithmic Impact Assessment containing assessment of PresictiveHire

As the Department does not have a contract with PredictiveHire, no assessment has been conducted or is required.

5) (sic) Alternatively, Risk and control metrics or other equivalent document where legal, ethic, bias, discrimination and other risks considered,

As the Department does not have a contract with PredictiveHire, no assessment has been conducted or is required.

6) Emails, minutes of meetings, other correspondence and documents related to PresictiveHire that contain discussions of features and risks of the PredictiveHire algorithm solution,

No additional documents were located relating to PredictiveHire.

### Assessment

1. I do not accept the submissions that this complaint is misconceived. There appears to be a dispute about facts in relation to this claim, including a dispute about what personal information was collected, and whether the respondent took reasonable steps to ensure the personal information it collected and used was accurate, complete and up to date? Was there a breach of IPP 3.1?
2. This is a dispute to be considered and concluded at a hearing of the evidence.
3. On the material before me, I am not satisfied that the complaint in relation to breach of IPP 3.1 should be summarily dismissed or struck out.

## IPP5.1

1. According to the complaint, the complainant asserts that the respondent contravened IPP 5.1 as neither the respondent, Hudson, PredictiveHire, nor QuestionPro, had a clear privacy policy that referred to how they would handle her personal information in relation to the program.
2. The respondent submitted that both the respondent and Hudson have privacy policies that were and are available to the complainant. The Hudson policy includes specific sections concerning the collection, use, and disclosure of personal information. The complainant has not identified any way in which the information used deviated from those policies. Moreover, the complainant has failed to identify any specific failings of those policies; rather, the claim asserts a general, ambiguous failing, leaving the respondent unable to determine what it is responding to. Whilst as a self-represented litigant, the applicant is not required to provide pleadings with the precision of a represented party, those pleadings must still leave the respondent with an understanding as to what has been alleged, and the capacity to respond to that allegation. A failure to do so makes such a pleading untenable.
3. In response, the applicant submitted that to her knowledge the program’s candidates’ personal information was shared with the following providers:
4. Hudson;
   * + - 1. PredictiveHire;
         2. JobAdder;
         3. JobAccelerator;
         4. GO1;
         5. QuestionPro; and
         6. LiveHire;
5. The complainant submitted that none of these providers, except for Hudson, were mentioned in the IPP 1.3 collection notice at the time of collection of personal information.
6. The complainant also submitted that there is also confusion about what policies on management of personal information apply in what circumstances. For example, when the complainant could not find a link to the QuestionPro privacy policy that would apply to participants that take surveys, she asked the Digital Jobs staff about how she could access it. She was told to use the Hudson’s privacy policy.
7. The complainant submitted that IPP 5.1 requires that an organisation set out clearly expressed policies on its management of personal information. An umbrella privacy policy of a contracted service provider cannot cover the third party’s specifics of how the third party collects, uses and discloses personal information. Therefore, by sending the complainant to the link to the Hudson privacy policy when she asked for a policy of how QuestionPro handles personal information, the respondent was in breach of IPP 5.1.

### Assessment

1. IPP 5.1 states that an organisation must set out in a document clearly expressed policies on its management of personal information and that the organisation must make the document available to anyone who asks for this.
2. While I accept the information provided by the complainant contains numerous concerns about the existence and adequacy of policies of third parties, I note she has also clearly raised a complaint about the policy of the respondent, and whether the respondent has breached IPP 5.1.
3. On the material before me, I am not satisfied that the complaint in relation to breach of IPP 5.1 should be summarily dismissed or struck out.

## IPP 6.1

1. According to the complaint, the complainant asserts that the respondent contravened IPP 6.1. because it did not provide her with access to her personal information relating to the program upon her request.
2. The respondent submitted that the complainant is in possession of that information, as it came from the complainant herself. There has been no generation of private information by the respondent or a third party. Moreover, the complainant has sought that information via a FOI request to the respondent, which is still proceeding. This represents the correct legal process by which to obtain the information, given the exceptions to providing such information that exist within IPP 6.1 (a) – (j), and the need to determine whether any such exceptions apply.
3. The respondent submitted the claim for that information in this proceeding is misconceived, as there has been no refusal to provide that information which would enliven IPP 6.1, and the process by which that information may be accessed is ongoing.
4. The complainant submitted that through this complaint process that first involved communications with the respondent, then a privacy complaint with the Office of the Victorian Information Commissioner (OVIC), and now through the VCAT proceedings, she has been asking for access to her personal information.
5. The personal information that she is referring to in this claim is the opinion, the inference that the PredictiveHire AI recruitment algorithm made about her personality (or employability), in the so called ‘employer report’, on which the decision was made to progress her to the next stage of the program recruitment process.
6. This information was not a part of the VCAT review proceedings Z646/2022, as the respondent stated, due to that the Commissioner in its Decision C/22/00496 dated 27 June 2022 was ‘satisfied the agency does not have constructive possession of a document of the type requested by the applicant’.
7. The complainant submitted that privacy legislation operates differently from the access to information legislation. Where the FOI legislation may satisfyingly conclude that the requested information is not in the physical possession of an agency and therefore the agency cannot provide access to this information, for the purpose of privacy legislation, the agency has wider powers to access the range of other documents that might have not been historically in the physical possession of the agency, but are residing with other entities. The FOI legislation is about giving access to a historical record; privacy legislation includes a wider number of documents that are in control of the agency, but not necessarily in the physical possession of the agency.
8. The complainant referred to OVIC’s clarification in regard to the above::

When is information ‘held’ by an organisation?

6.9 An organisation is required to provide access to personal information it ‘holds’. Under s 4(1) of the PDP Act, an organisation holds personal information ‘if the information is contained in a document that is in the possession or under the control of the organisation, whether alone or jointly with other persons or bodies, irrespective of where the document is situated, whether in or outside Victoria.’ In an outsourcing context, this means IPP 6 can apply to the personal information ‘held’ by a CSP, if the outsourcing government organisation can ‘control’ that information.[[3]](#footnote-3)

1. The complainant submitted that she has been denied access to this personal information.

### Assessment

1. IPP 6.1 states that an organisation who holds personal information about an individual must provide that individual with access to their information except where IPP 6.1(a) – (j) applies.
2. The above submissions indicate there is a dispute on the facts in relation to this claim. Therefore, the claim that the respondent has breached IPP 6.1 is a matter to be considered and concluded at a hearing of the evidence.
3. On the material before me, I am not satisfied that the complaint in relation to breach of IPP 6.1 should be summarily dismissed or struck out.

## IPP 9.1

1. According to the complaint, the complainant is concerned that the respondent breached IPP 9.1 by transferring her personal information outside of Victoria at various stages throughout the selection process. This includes where her personal information was handled by Hudson, PredictiveHire and QuestionPro.
2. The respondent submitted that IPP 9.1(b) permits the transfer of information outside of Victoria where the individual about whom the information exists consents.
3. The respondent submitted that the complainant provided such consent in the application process. By signing and/or agreeing to the various wavers in the program application process, the applicant consented to the transfer of such data, as articulated in the privacy policies of Hudson and PredictiveHire. No breach can arise unless an allegation is made either that such consent was not obtained, or that the consent contained was faulty, fraudulent, etc. In the absence of any such material or claim, the pleading is wrong in law.
4. The complainant submitted that the respondent cannot rely on her consent for the transfer of her personal information as the consent was not valid.
5. The complainant submitted that by clicking on the ‘I accept the privacy policy (Hudson)’ she had to consent to what she would deem the unlimited use and disclosure of her personal information including transborder transfer of her personal information to entities in China and other countries. That is because the Hudson’s privacy policy in her view was very broad and might not provide the relevant level of privacy protections guaranteed by the *Privacy and Data Protection Act* 2014 (PDP Act). She did not want to give her consent to many types of collection use and disclosure of her personal information, in particular to overseas transfers, without being sure that the proper safeguards were in place. But giving consent was a condition of applying to the digital jobs program.
6. The complainant submits that the consent given was not valid as it was not informed, voluntary and specific.
7. The applicant also submitted that ‘wavers’, as the respondent called them, are not a recognised term of the PDP Act. Signing and/or allegedly agreeing to ‘wavers’ is not equivalent to consenting.
8. The complainant submitted that the respondent did not receive her consent.
9. The complainant also submitted that in the Digital Jobs Privacy Impact Assessment, the respondent only mentioned JobAdder and JobAccellerator as the platforms transferring personal information outside of Victoria, to New South Wales. There were no assessments done whether other providers were transferring candidates’ personal information outside of Victoria and whether all the transfers were consistent with requirements of IPP 9.

### Assessment

1. IPP 9.1 states that an organisation must not transfer personal information to someone who is outside of Victoria unless one of the exemptions in IPP 9.1(a) – (f) are satisfied.
2. There is a dispute on the facts in relation to this claim, including whether the complainant consented to the transfer of information, and if that consent was valid, and the status of the waivers referred to, and if the respondent breached IPP 9.1. This dispute needs to be considered and concluded at a hearing of the evidence.
3. On the material before me, I am not satisfied that the complaint in relation to breach of IPP 9.1 should be summarily dismissed or struck out.

## IPP 10.1

1. According to the complaint, the complainant is concerned that sensitive information about her may have been collected by PredictiveHire. That is, she believes that when Phai made inferences about her personality traits, these traits could be used as proxies to predict her political opinions and other sensitive information about her.
2. The respondent submitted that no basis for this claim exists; not on the materials available to the complainant during the application process, nor once she gained entry to the program, nor on materials existing collaterally to the claim. The complainant was asking the respondent to disprove an allegation that simply has no basis on the facts of the dispute. As with the various previously identified assertions, such a pleading is wrong at law.
3. The complainant submitted that the personal information she was referring to in this claim is the opinion, the inference that the PredictiveHire AI algorithm Phai made about her personality and provided to the respondent. It was recorded in a form of an ‘employer report’, access to which was denied.
4. The complainant submitted there is a body of research that shows that personality and political views are correlated, therefore an opinion about someone’s personality can be a proxy for their political opinions, which is sensitive personal information.
5. The program collected information about candidates’ ethnic origin in the Digital Jobs application form and during the second personality assessment. No IPP 1.3 collection notices were provided on either occasion, and no valid consent for the collection was received.
6. The complainant claims that the second personality assessment collection of the ethnic origin information was not justified by any of the exemptions in IPP 10.

Collection of sensitive information: Criminal record, information about charges

1. The complainant claims that the program collected information about candidates’ charges and offences in the Digital Jobs application form. No IPP 1.3 collection notice was provided on either occasion, and no valid consent for the collection was received.
2. The complainant claims that collection of this sensitive information was not necessary as she found no documented evidence via FOI requests that the respondent carefully considered whether this sensitive information was necessary for the program functions.

### Assessment

1. IPP 10.1 states that an organisation must not collect sensitive information about an individual unless one of the exemptions in IPP 10.1(a) – (d) are satisfied.
2. While I have considered the respondent’s submissions in relation to this claim, the complainant has provided further details in relation to her claim that the respondent has breached IPP 10.1.
3. This is a dispute that needs to be considered and concluded at a hearing of the evidence.
4. On the material before me, I am not satisfied that the complaint in relation to breach of IPP 10.1 should be summarily dismissed or struck out.

## Conclusion

1. In these circumstances, it is not appropriate to dismiss the complaint. I am not of the opinion that all or part of the proceedings are frivolous, vexatious, misconceived or lacking in substance, or are otherwise an abuse of process.
2. Therefore, the application for summary dismissal under section 75 of the VCAT Act is refused.
3. I will order the applicant now file and serve her particulars of claim and the respondent file and serve particulars of defence.
4. The Tribunal will then set down a directions hearing to consider how the complaint will proceed.

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| C. Thwaites  **Member** |  |  |

1. *Owners Corporation No. 1 PS537642N v Hickory Group Pty Ltd* [2015] VCAT 1638; *Axicom v Melton CC* [2020] VCAT 190 [9]. [↑](#footnote-ref-1)
2. In his decision in *Al-Hakim v Arthur Robinson & Hedderwicks and Anor* [2011] VCAT 1767 (28 August 2001), Judge Duggan accepted the complainant’s principal motivation was a passionately held belief that he had been ill-treated and overlooked for positions for which he was the most qualified applicant, and his Honour was not satisfied the complainant wished to annoy or embarrass the respondents or that he had some collateral purpose. [↑](#footnote-ref-2)
3. OVIC, *IPP 6 – Access and Correction* < https://ovic.vic.gov.au/book/ipp-6-access-and-correction> [↑](#footnote-ref-3)