



**Australian
Privacy
Foundation**

<http://www.privacy.org.au>

Secretary@privacy.org.au

<http://www.privacy.org.au/About/Contacts.html>

11 November 2011

Mr P. Fleming
CEO, National E-Health Transition Authority Limited

Dear Mr Fleming

Multiple APF Board members have invested a vast amount of time on the PCEHR project during the last three years. Our motivation has been to assist in the effective application of IT to healthcare, by ensuring that standards, protocols and designs are privacy-protective. We have made in excess of 25 submissions to your organisation during this time.

In your response to one of our expressions of concern, precisely one year ago, you wrote that "NEHTA is committed to the ongoing consideration of privacy within the context of our work with a view to avoiding and mitigating privacy risks as early as possible in the design of e-Health solutions ... in consultation with our stakeholders".

Regrettably, your organisation has not respected your words, and has continued to be extremely difficult to deal with. NEHTA has built barriers between the people who are doing the work and those who are seeking to influence them. There is no coherent consultation process. Instead, occasional invitations are issued to participate in short-term processes, with yet another new set of faces in the room. These are always side-shows to the main game. Meanwhile, design goes on.

The latest passage has been the most extraordinary of any behaviour I have experienced in decades of advocacy work. Your Head of Policy & Information Services, Bettina McMahon:

- has made vague and unreasonable accusations that an email I sent "creates a risk of bullying and harassment"
- based on those accusations, has made unreasonable demands of me
- has instructed your staff that emails from me are to be filtered through a faceless and nameless administrative email-address
- has instructed your staff that I am not to be permitted to participate in workshops

I invite you to examine the material in the attachment. If, as I do, you find your staff-member's behaviour to be unjustified and inappropriate, would you please let me know as soon as possible.

Thank you for your consideration.

Yours sincerely

Roger Clarke
Chair, Australian Privacy Foundation

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Chair@privacy.org.au

The Sequence of Events

As APF's nominee, I participated in a couple of events of a technical nature in late 2011, to do with security standards and technical risk assessment. The discussions were conducted professionally, the technical understanding among participants was strong, and their privacy understanding was good as well.

Very substantial problems were evident, however.

I sent Notes immediately following one event, which identified those problems.

After a 9-day delay, NEHTA provided comments on the Notes that I had sent.

I was appalled by the complete lack of any constructive response.

I said so, in an email dated 29 October, copy attached.

Ms McMahon emailed me, concerned about the expression used in the email, saying "if the email below was sent by someone internal to NEHTA to [NEHTA officer], she would have grounds to raise a harassment claim against that person".

Ms McMahon demanded an undertaking from me that I not write this way again.

The segments of her emails that express her accusations and demands are attached, and my responses to her demands are interspersed, in date order.

On 8 November, Ms McMahon concluded that "we will need to assess each correspondence from you [via] admin@nehta.gov.au". I said that I would copy all subsequent emails to that address.

On 9 November, I emailed to a NEHTA officer regarding travel arrangements for an event on 14-15 November. I sent a copy to admin@nehta.gov.au.

On 10 November, the NEHTA officer said she was under instructions from Ms McMahon that I was not to be involved in any further NEHTA events.

I urgently emailed Ms McMahon, seeking clarification about this escalation of her already exaggerated and completely non-constructive reaction. By phone that evening:

- she confirmed that she had issued that instruction, and considered herself to have the organisational authority to do so
- she stated that the grounds for taking both actions were that:
 - the email (copy attached) "was inappropriate"
 - I had declined to comply with her demand that I commit to not "sending emails like this to NEHTA staff in the future" (which is a correct statement of the position)
 - I had advised that I was likely to communicate in an inappropriate way in the future (which is a fabrication on Ms McMahon's part)
- she agreed that she had no evidence of me on any occasion using "inappropriate" speech in any meeting with NEHTA staff

The Email in Question

Roger Clarke's email to the relevant NEHTA staff:
Sat, 29 Oct 2011 11:27:46 +1100

I'm flabbergasted at the uselessness of your responses.

I infer from the expression "our comments" that you are representing your comments as being those of NEHTA as a whole.

If that's the case, then the policy staff are not playing a role as a facilitator. You're instead acting as a barrier, preventing the design teams from gaining an understanding of the concerns of consumer and privacy advocates.

Your refusal to address the issues leaves me with no option but to inform the APF Board that:

- your responses to the concerns expressed were variously excusatory and obstructionist
- not one, single concern has been addressed in a positive manner
- yet again, privacy advocacy participation in a process has been a complete waste of time, because policy staff are precluding effective interactions between civil society and the designers

In those circumstances, the only possible outcome is that the APF's public stance will be re-affirmed.

NEHTA blocks every attempt by civil society to ensure that these initiatives are designed in a privacy-sensitive manner. People who value their privacy need to use all available means to avoid their data being caught up in the national database that NEHTA is seeking to build.

Yours in complete disgust at your response ... Roger Clarke

Ms McMahon's Accusations and Demands, and My Responses

McMahon on Sat, 29 Oct 2011 18:42:18 +1000

I was surprised, to put it mildly, to read your email this afternoon. ...

I cannot accept the sort of communication below going to one of my staff members. When my staff are acting diligently and respectfully towards others, at the very least I expect respectful communication back. We both represent professional organisations and our communication needs to reflect that. While I see that you are upset with [Staff-member's] response to you, it in no way warranted the attack in your email. My words may seem harsh, but if the email below was sent by someone internal to NEHTA to [staff-member], she would have grounds to raise a harassment claim against that person. So as a benchmark of the sort of professional communication we require in our work, the email doesn't meet the test. ...

The actions you wish to take are up to you, Roger. I would hope that you will continue to work with us, but I will need to know that you will resist sending emails like this to NEHTA staff in the future if we are to work together.

Clarke on Sunday, 30 October 2011 5:39 PM

... the comments provided in response to my Notes on the 18 October Workshop were appalling ...

Over a period of 3 years, APF has provided many submissions expressed politely. When those were ignored, we upgraded the expression to 'firmly'. They have not achieved constructive responses from your organisation. It's apparent that we have to use direct speech.

McMahon on Tue, 1 Nov 2011 07:16:39 +1000

... it appears that you consider your communication to [staff-member] as appropriate. I think you are also saying that you will continue to communicate in this way in some circumstances ...

... my request that you do not send this type of communication again ...

Clarke on Tue, 1 Nov 2011 09:01:32 +1100

"We express things as we feel we need to, in order to convey each particular message. For submissions, we normally adopt a straightforward business style. For informal communications (e.g. about logistics), we normally adopt a more relaxed style. When the points we make are ignored, we express things more firmly. Because of the highly unsatisfactory nature of our dealings with NEHTA and DOHA over a period of years, quite a few of our submissions have had to be expressed 'more firmly'".

McMahon on Mon, 7 Nov 2011 19:08:50 +1000

1) ... you see your email correspondence as appropriate

2) ... you have advised me that **you are likely to communicate in this way again in the future**

... your communication creates a risk of bullying and harassment ...

... you have confirmed you may continue with this behaviour ...

... we will need to assess each correspondence from you to determine whether it is an appropriate communication ... If it contains any bullying type communication we will advise you that we will not be sending it on to the relevant staff, but if you resubmit your correspondence in a way that does not contain any bullying or harassing comments, we will forward it on ...

... your decision to defend your email communication and to reinforce **the fact that you will do this again** ...

... sending harassing emails ...

Clarke on Tue, 8 Nov 2011 10:57:21 +1100

When I reviewed the email that you're so upset about, I could see four words that people might call strong - "useless", "excusatory", "obstructionist" and "disgust". All of them related specifically to "your responses", and certainly did not relate to the addressee personally.

Further, I stated my assumption that the comments I was appalled by were a corporate response, i.e. that the staff-member who sent them to me, and to whom I was, in the normal course of business, responding, was the messenger, relaying content variously prepared by her, prepared by her based on others' verbal comments, and prepared by other people.

I'll continue to communicate on the same, appropriate basis as I have been doing in the past.

You state "[I] have advised [you] that [I am] likely to communicate in this way again in the future", and you refer to "the fact that [I] will do this again". Both are misrepresentations.

McMahon on Tue, 8 Nov 2011 11:36:23 +1000

[You must accept] that:

- the language you used in your email was not appropriate to send ...
 - you will resist sending communication with that sort of language again in the future ...
- ... bullying or harassing communication ...

Clarke on Tue, 8 Nov 2011 13:26:11 +1100

As explained [in the previous email], **I do not accept that the language used in that email was 'bullying', 'harassment' or otherwise 'inappropriate to send to a person in a workplace'.**

As explained on 30 Oct, 1 Nov and 8 Nov, I'll use language as polite, or as firm and direct, as I judge to be necessary in the particular circumstances. Just as I have done in all my advocacy roles for industry, for consumers, and for privacy interests, since 1971.

I completely agree that there are boundaries to appropriate language. The difference in our positions is whether I've at any stage crossed those boundaries.

I have no intention of using inappropriate language in any form of communication. In almost 50 years of public life (I've been public speaking and debating since I was 13), I can't recall an occasion on which there's been a need for me to apologise for the expression of anything I've written or spoken. (As distinct from the content, which from time to time can end up needing clarification and sometimes correction).