CDPP
Australia's Federal Prosecution Service

Release of personal information under the Privacy Act

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Release of Personal Information under the Privacy Act 1988

1. The *Privacy Act 1988* (the Privacy Act), which came into operation on 1 January 1989, imposes obligations on Commonwealth agencies with respect to the collection, handling and disclosure of personal information. Significant amendments to the Privacy Act commenced on 12 March 2014 and replaced the Information Privacy Principles (IPP) which applied to Government agencies and the National Privacy Principles (NPP) which applied to organisations – with a single set of Australian Privacy Principles (APP).

2. The CDPP is also now specifically defined in section 6 as an *"enforcement body"* which enables the CDPP to more confidently rely upon some of the exemptions for the use and disclosure of personal information to third parties.

"Personal information" is defined as "information or an opinion about an identified individual, or an individual who is reasonably identifiable:

(a) whether the information or opinion is true or not; and

(b) whether the information or opinion is recorded in a material form or not."

3. The CDPP is regarded as a *"collector"* of personal information in accordance with the definition provided for in section 6 and as a *"record-holder"* for the purposes of section 10 of the Privacy Act.

4. The Privacy Act requires APP entities to comply with statutory rules, called APPs. An APP entity is defined as an *"agency or an organisation"*. An agency is further defined as:

"…a body (whether incorporated or not), or a tribunal, established or appointed for a public purpose by or under a Commonwealth enactment, not being:

(i) an incorporated company, society or association; or

(ii) an organisation that is registered under the Fair Work (Registered Organisations) Act 2009 or a branch of such an organisation."

Such a definition makes the CDPP an APP entity under the Privacy Act.

5. Some of the APPs are relevant to the work of the CDPP. However, some only relate to private enterprise. A full list of the APPs can be found in Schedule 1 of the Privacy Act (here). The most relevant ones to the CDPP are APPs 5 and 6. APP 5 relates to the notification of the collection of personal information and APP 6 relates to the use and disclosure of personal information.

Relevant Australian Privacy Principles

Australian Privacy Principle 5 – Notification of Collection of Personal Information

6. APP 5 requires a collection notice to be given when personal information is collected, even from a third party. However, the CDPP is not required to send out a collection notice to every person for whom it receives a brief or a request for pre-brief advice as there is a very wide exemption for law enforcement bodies. The APP states that notification must only be given if it is reasonable to do so.

7. The Information Commissioner's guidelines outline clearly that where there is ongoing "enforcement related activities", it would be unreasonable to issue a collection notice. The term "enforcement related activities" is defined in the Privacy Act to mean "the prevention, detection, investigation, prosecution or punishment of criminal offences or breaches of a law imposing a penalty or sanction". An APP entity is also exempted from having to notify an individual of the collection of personal information where doing so may result in the waiver of legal professional privilege. Both exceptions are highly relevant to the operations of the CDPP and provide strong exemptions from the general notification obligation imposed under APP 5.

Australian Privacy Principle 6 – Use and Disclosure of Personal Information

8. APP 6 is the most relevant APP to the CDPP, providing an exception from prohibitions on the use and disclosure of personal information if the CDPP believes "the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by or on behalf of an enforcement body". The term "enforcement related activities" is defined in the paragraph above and an "enforcement body" is defined in the Privacy Act to include "the

Office of the Director of Public Prosecutions, or a similar body established under a law of a State or Territory".

9. The other relevant exceptions to the prohibitions on the use and disclosure of personal information under APP 6.2 are set out below and include:

- if the use and disclosure is directly related to the primary purpose for which the personal information was originally collected;
- if the individual has consented to the use or disclosure;
- if the individual would reasonably expect the CDPP to use and disclose the information for a secondary purpose;
- if it is required or authorised by or under an Australian law or Court/Tribunal order (including under the FOI Act);
- If a "permitted general situation" exists such as the CDPP reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety. Further information on a "permitted general situation" can be found at section 16A of the Privacy Act.

What is outside the scope of the Privacy Act?

10. In accordance with section 6 of the Privacy Act, the CDPP *holds* personal information if the agency has possession or control of a *record* that contains personal information.

11. A *"record"* is also defined in section 6 of the Privacy Act as to include:

(a) a document; or

(b) an electronic or other device;

but does not include:

(d) a generally available publication; or

(e) anything kept in a library, art gallery or museum for the purposes of reference, study or exhibition; or

(f) Commonwealth records as defined by subsection 3(1) of the Archives Act 1983 that are in the open access period for the purposes of that Act; or

(fa) records (as defined in the Archives Act 1983) in the care (as defined in that Act) of the National Archives of Australia in relation to which the Archives has entered into arrangements with a person other than a Commonwealth institution (as defined in that Act) providing for the extent to which the Archives or other persons are to have access to the records; or

(g) documents placed by or on behalf of a person (other than an agency) in the memorial collection within the meaning of the Australian War Memorial Act 1980 ; or

(h) letters or other articles in the course of transmission by post.

12. A *"generally available publication"* is defined in section 6 to mean *"a magazine, book, article, newspaper or other publication that is, or will be, generally available to members of the public:*

(a) whether or not it is published in print, electronically or in any other form; and

(b) whether or not it is available on the payment of a fee."

13. A number of points arise out of this definition:

- "other publication" is clearly wide enough to encompass publication or distribution in a court;
- a publication that is in the public domain falls within the phrase "that is or will be generally available to the public"; and
- press clippings and similar material remain "generally available publications" even if placed on CDPP files.

14. In so far as the second "dot point" above (public domain) is concerned, the decision of the High Court in *Johns v Australian Securities Commission* (1993) 116 ALR 567 should be noted. In *Johns,* Brennan CJ held:

"When the proceedings of a court, tribunal or commission created by statute or in the exercise of the prerogative are open to the public and a fair report of the proceedings can lawfully be published generally, it is not possible to regard information published in those proceedings as outside the public domain. Information published in those circumstances enters the public domain by a lawful gate. Once in the public domain, it can be freely used or disseminated…" (page 581).

15. See also Dawson J at page 585 and Toohey J at pages 600-601. The effect of the *Johns* decision is that material held by the CDPP which has been presented/tendered in open court (statements of fact, CANS, Informations, etc.) falls outside the scope of the term *"record"* for the purposes of the *Privacy Act*, and therefore is not subject to APP 6. The judgment in *Johns* makes it clear that such material is in the public domain and can be released as there is no *"disclosure"*. Accordingly there should be no difficulty in releasing information about past trials and revealing the name of a defendant where the information has been presented in open court or is contained in the transcript of an open court hearing.

16. This principle underpins why personal information can be published in the CDPP's Annual Report and website. The information published is not "use" or "disclosure" under the Privacy Act as the information is already in the public domain.

Other considerations

17. The following points with respect to exemptions under APP 6.2 should be noted:

- Pursuant to section 6 "consent" means express or implied consent. Whilst express or implied oral consent would likely be sufficient, out of an abundance of caution, prior to records containing personal information being released that are subject to APP 6 (i.e. not records that are classified as generally available publications), the written consent of the individual should be obtained. Such written consent should protect the CDPP from breach of confidence proceedings in the event that such an action was brought by the individual concerned.
- The term "authorised" can be taken to have its dictionary meaning of "sanction, approve, countenance" (*University of New South Wales v Moorhouse* (1974-5) 6 ALR 193 per Gibbs J. at 200).
- The term "law" includes State and Territory law and is not restricted to Commonwealth law.
- The *Freedom of Information Act 1982* provides right of access to documents of agencies other than exempt documents. Accordingly if a document is properly requested under the FOI Act, and no exemption can be claimed, an agency would be "authorised by or under law" to disclose that document and such disclosure would attract the exemption in APP 6.2 (b).

- Under APP 6.5, where personal information is disclosed pursuant to APP 6.2 (e), a note must be made of that disclosure.

Disclosure of Personal Information

18. For the most part, release of information that does fall within the scope of the Privacy Act to persons, bodies or agencies will be authorised by APP 6.

19. However, while the everyday practices of the CDPP do not contravene APP 6, there are four situations which warrant closer attention. Those situations include:

- the release of personal information obtained by the CDPP to disciplinary/regulatory bodies such as the Nurses' Board, the Teachers' Board the State Medical Boards, the Pharmacy Board and other professional registration Boards;
- the release of information by the CDPP to persons, bodies or agencies for research purposes in relation to criminal matters;
- the publication by the CDPP of reasons for deciding not to proceed with a trial on indictment notwithstanding that the defendant concerned has been committed for trial; and
- the release of information by the CDPP to persons with an interest in a particular prosecution.

Disclosure of Personal Information to Disciplinary and/or Regulatory Bodies

20. The CDPP does not provide personal information to disciplinary bodies and/or regulatory bodies, of its own volition as it is not viewed as one of our legislated functions. If appropriate, such requests should be directed to investigative agencies.

21. However, the CDPP may provide personal information to such bodies at their request, in limited circumstances. For example, if the individual concerned consents or the disclosure is authorised or required by or under an Australian law or court/Tribunal order, then disclosure may occur as set out below.

Requests for Personal Information from Disciplinary/Regulatory Bodies

22. Requests such as this most commonly arise where a regulatory or disciplinary body becomes aware of one of its members having been convicted of an offence and makes a request to the CDPP for information to help it determine if it should take administrative action against the individual.

23. The first issue to consider is whether or not the personal information sought by the disciplinary body can be classified as a *"record"* and is therefore subject to the restrictions of the Privacy Act. If it is not, then the information can be disclosed after obtaining the requisite internal approval.

24. Personal information coming within the scope of the Privacy Act (i.e. a 'record') may not be released at the request of disciplinary/regulatory bodies unless one of the exceptions in APP 6 applies. In such a situation, the CDPP should ascertain whether one of the exceptions in APP 6.2 applies, for example , whether:

- it is possible for the disciplinary/regulatory body to obtain the consent of the person(s) to whom the personal information pertains to allow the CDPP to disclose that information to the disciplinary body; or
- whether the disciplinary body has a statutory power to compel production of the records containing the personal information, such as a power to subpoena records.

25. If consent has been obtained, the CDPP should obtain written consent before disclosure is made pursuant to APP 6.1(a).

26. If a disciplinary/regulatory body has statutory power to compel the production of documents, the CDPP may invite the body to use that power and thereby invoke the exemption in APP 6.2(b). Note that such powers do not override privilege. Documents that are privileged do not have to be produced and will not attract the exemption in APP 6.2(b). In reality, most, if not all disciplinary/regulatory bodies will neither want nor request material that is subject to legal professional privilege.

27. A body should not be invited to compel the production of documents until after the criminal process has been completed (e.g. after a final appeal, after sentence upon a plea) and there will be no further involvement by the CDPP in the matter.

Procedure for release

28. If the information is not subject to the restrictions of the Privacy Act, as per paragraph 23, Branch Head approval for release will be required, or for sensitive matters, approval by the PGL.

29. If the restrictions of the Privacy Act do apply but the request from a disciplinary/regulatory body for personal information is with the consent of the individual who is the subject of the information, then a person occupying or performing the duties of a Senior Federal Prosecutor and above can authorise the release of the information.

30. If the restrictions of the Privacy Act do apply and the request from a disciplinary/regulatory body for personal information is without consent of the individual who is the subject of the information, Branch Head approval for release will be required, or for sensitive matters, approval by the PGL.

31. In any case, if there are any issues, the case officer, Branch Head or Practice Group Leader is encouraged to liaise with the local FOI officer and the CDPP Privacy Champion.

Statistics

32. Details of *all* releases of information to disciplinary bodies should be sent to the local FOI officer and CDPP Privacy Champion for statistical purposes.

Disclosure of Information to Research Bodies

33. Because of the nature of this Office's practice, it is uniquely placed to provide information concerning the administration of the Commonwealth criminal justice system.

34. Since the establishment of the CDPP, it has been the Office's policy to respond positively to requests for information and assistance wherever practicable (and where resources permit).

35. The Privacy Act does not preclude the disclosure of information for research purposes provided it is in a form, such as statistics, which does not identify an individual i.e. the information provided is not personal information.

Publication of Reasons for Entering a 'No Bill' and other Similar Prosecution Decisions

36. In response to a request from the CDPP, the former Privacy Commissioner advised that the old IPP 11(1)(e), which is essentially replicated by APP 6.2(e), would have to be construed to cover those matters reasonably incidental to the prosecution of the criminal law.

37. The Privacy Commissioner was of the view that the publication by the CDPP of reasons for not proceeding with a trial on indictment would normally be a matter reasonably incidental to the prosecution of the criminal law. Therefore, the *Privacy Act*, as it was, did not prevent the publication of reasons for 'no bill' decisions.

38. It was considered that the Privacy Commissioner's reasons applied with equal force to giving reasons for prosecution decisions similar to the decision to 'no bill' (e.g. a decision to discontinue a summary prosecution). Given that IPP 11.1(e) and APP 6.2(e) are so similar, there is no reason why the Information Commissioner would take a different view. For this reason, requests for reasons for a 'no bill' or discontinuance of a summary prosecution should therefore be considered by the Branch Head in consultation with the local FOI officer and CDPP Privacy Champion.

Disclosing Personal Information to Interested Persons

39. It is not unusual for friends or relatives of an accused person, non-Departmental witnesses or a victim of an alleged offence to seek information from the CDPP about a prosecution. Requests are often made by telephone and typical questions relate to court dates, the nature of the allegations and the result of a prosecution.

40. It is never appropriate for a legal officer to refer such a request to a non-legal or paralegal member of staff. Such requests should be dealt with by a legal officer who has sufficient knowledge of the case to be able to decide whether the requested information constitutes "personal information" about someone other than the person making the request, and whether any exemptions under APP 6 apply.

41. If the information sought constitutes personal information and it is not certain that an exemption applies, the person should be told that the *Privacy Act* prevents the CDPP from providing the information. The person may be advised that an application under the FOI Act is an option, and if appropriate, referred to the CDPP Privacy Policy.

42. The CDPP Privacy Policy sets out how the CDPP complies with the Privacy Act. The CDPP Privacy Policy should also be read by:

- An individual whose personal information may be given to or held by the CDPP;
- A contractor, consultant, supplier or vendor of goods or services to the CDPP;
- A person seeking employment with the CDPP; and
- A person who is or was employed by the CDPP.

Other Legislation Restricting Disclosure of Information

43. There are other statutory provisions that prohibit disclosure of information, such as section 16 of the *Income Tax Assessment Act 1936* and Division 2.1 of the *Public Service Regulations*. Each prohibition differs in the type of information it applies to and in the exemptions that apply. It is important to bear in mind that the mere fact that disclosure is permitted under the Privacy Act does not mean that it will not contravene a different statutory provision, and vice versa.

Section 70 Crimes Act 1914

44. Section 70 provides:

(1) *A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he is authorized to publish or communicate it, any fact or document which comes to his knowledge, or into his possession, by virtue of being a Commonwealth officer, and which it is his duty not to disclose, shall be guilty of an offence.*

(2) A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him), any fact or document which came to his knowledge, or into his possession, by virtue of having been a Commonwealth officer, and which, at the time when he ceased to be a Commonwealth officer, it was his duty not to disclose, shall be guilty of an offence.

Penalty: Imprisonment for 2 years.

45. A duty of non-disclosure may arise under APP 6 of the *Privacy Act* (or another statute). Therefore, a person who breaches the Privacy Act (or another statute) risks committing an offence against s70 of the *Crimes Act 1914*.

46. Section 70 is shortly to be repealed[1], with new secrecy offences to be inserted in Division 122 of the Criminal Code.

Resources

47. Privacy and FOI related resources are available on e-hub on the Privacy and FOI pages:

- http://e-hub.intranet/legal-centre/legal-practice-and-procedure/privacy;
- http://e-hub.intranet/legal-centre/legal-practice-and-procedure/freedom-information-foi.

[1] See *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018*