



CDPP

Australia's Federal Prosecution Service

National Legal Directions



## Release of personal information under the Privacy Act

Last Updated: July 2020

### Contents

Release of Personal Information under the <i>Privacy Act 1988</i> .....	2
Relevant Australian Privacy Principles .....	2
Australian Privacy Principle 5 – Notification of Collection of Personal Information .....	2
Australian Privacy Principle 6 – Use and Disclosure of Personal Information.....	3
What is outside the scope of the Privacy Act? .....	4
Other considerations .....	5
Material that is used or disclosed for the same purpose as the primary purpose of collection of that information.....	6
Disclosure of Personal Information.....	6
Disclosure of Personal Information to Disciplinary and/or Regulatory Bodies.....	7
Requests for Personal Information from Disciplinary/Regulatory Bodies .....	7
Procedure for release of information to disciplinary/regulatory bodies .....	8
Statistics.....	8
Disclosure of Information to Research Bodies .....	9
Publication of Reasons for Entering a ‘No Bill’ and other Similar Prosecution Decisions.....	9
Disclosing Personal Information to Interested Persons .....	9
Procedure for release of information to interested persons .....	10
Records kept by the case officer .....	10
Breach of Privacy by an APP Entity.....	10
Other Legislation Restricting Disclosure of Information .....	11
Offences relating to disclosure of information - section 122.4 of the <i>Criminal Code</i> (Cth).....	11
Part VIID of the <i>Crimes Act 1914</i> (Cth) .....	11
Resources .....	12
Annexure A – Australian Privacy Principles 5 and 6 .....	13

## 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. This National Legal Direction (NLD) focuses on the Privacy Act, however prosecutors should be aware that there may also be State or Territory legislation governing the release of personal information in criminal matters.
2. The CDPP is 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 Australian Privacy Principles (APPs).<sup>1</sup> 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. APP 5 and 6 have been extracted at Annexure A.
6. Compliance with the Privacy Act is coordinated by the Governance Team located within the Enabling Services Group. The CDPP has a designated Privacy Officer, who is the primary point of contact for advice on privacy related matters and who is responsible for ensuring operational privacy activities are undertaken, and a Privacy Champion, who is responsible for leadership activities and engagement that requires broader strategic oversight.

## Relevant Australian Privacy Principles

### Australian Privacy Principle 5 – Notification of Collection of Personal Information

7. APP 5 requires notice of certain matters to be given to an individual when personal information is collected (referred to in this NLD as a “collection notice”), regardless of whether the

---

<sup>1</sup> Formerly called ‘Information Privacy Principles’ (IPPs) prior to March 2014.

information has been collected from the individual themselves, or from a third party.<sup>2</sup> 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 agencies. The APP states that notification must only be given if it is reasonable to do so. APP 5 is attached at Annexure A.

8. The Information Commissioner's guidelines<sup>3</sup> ("the OAIC Guidelines") outline clearly that where there are ongoing activities by a "law enforcement agency", it would be reasonable not to issue a collection notice. The term "law enforcement agency" is not defined in the OAIC Guidelines or Privacy Act. However the term "enforcement body" is defined in the Privacy Act to include the CDPP. 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". The examples provided in the OAIC Guidelines are consistent with the CDPP's view that it would be reasonable for the CDPP not to provide a collection notice, given the nature of the CDPP's enforcement related activities.
9. 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.
10. 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**

11. APP 6 is most relevant to the CDPP in relation to the use and disclosure of personal information. Use and disclosure of personal information will, in the vast majority of cases, relate to the CDPP's primary purpose, and therefore be permissible. APP 6 makes clear that use and disclosure of personal information for a different purpose (i.e for a secondary purpose) is permissible only in very limited circumstances. Those various circumstances are outlined below. APP 6 is attached at Annexure A.
12. APP 6 provides an exception from prohibitions on the use and disclosure of personal information for a "secondary purpose", 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" (APP 6.2(e)):
  - There is a distinction between 'primary purpose' and 'secondary purpose'. 'Primary and secondary' purpose are not defined in the Privacy Act. However, the OAIC Guidelines define the terms. The purpose for which an APP entity collects personal information is known as the 'primary purpose' of collection. This is the specific function or activity for which the entity collects the personal information. In the case of the CDPP, the CDPP collects personal information for the primary purpose of prosecuting crimes against Commonwealth law as an independent prosecution service.<sup>4</sup>
  - If an APP entity uses or discloses the personal information for another purpose (other than the primary purpose), this is known as a 'secondary purpose'. In the case of the CDPP, use or disclosure of personal information for a purpose other than prosecuting crimes against Commonwealth law, would be use or disclosure for a secondary purpose.

---

<sup>2</sup> Third party would include, in the scenario of pre-brief advice or a brief referral, a referring agency who provides the personal information of a defendant (or potential defendant), to the CDPP.

<sup>3</sup> The 'Australian Privacy Principles (APP) guidelines', July 2019. Refer to Chapter 5, section 5.7: "When not taking any steps might be reasonable".

<sup>4</sup> The specific functions of the CDPP are set out in section 6 of the *Director of Public Prosecutions Act 1983* (Cth).

- “Reasonably necessary” is not defined in the Privacy Act. The OAIC Guidelines define it as follows: “whether a reasonable person who is properly informed would agree that the collection, use or disclosure is necessary”.
  - The term “enforcement related activities” is defined in paragraph 8 above; and
  - The term “enforcement body” is defined in section 6(1) of 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”.<sup>5</sup>
13. The other relevant exceptions to the prohibitions on the use and disclosure of personal information for a secondary purpose under APP 6.1 and APP 6.2 are set out below and include:
- if the individual has consented to the use or disclosure (6.1(a));
  - if the individual would reasonably expect the CDPP to use and disclose the information for a secondary purpose, and the secondary purpose is:
    - a. if the information is sensitive information<sup>6</sup> — directly related to the primary purpose; or
    - b. if the information is not sensitive information — related to the primary purpose; (6.2(a)) or
  - if it is required or authorised by or under an Australian law or Court/Tribunal order (6.2(b)) (including under a subpoena or under the *Freedom of Information Act 1982* (Cth) (FOI Act)); or
  - If a “permitted general situation” exists (6.2(c)), for example, where 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, among other listed general situations. 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?

### *Material that does not comprise a ‘record’ under the Privacy Act*

14. 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.
15. “Holds” is defined in section 6 of the Privacy Act to mean: ‘the entity has possession or control of a record that contains the personal information’.
16. 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

---

<sup>5</sup> ‘Enforcement body’ also includes Federal, State and Territory Police, which means that the CDPP can release information to Police pursuant to APP 6.2(e).

<sup>6</sup> ‘Sensitive information’ is a subset of personal information and includes information or an opinion about, an individual’s race, sexual orientation, and criminal record (s6 of the Privacy Act).

(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.

17. 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.”

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.

18. 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).

19. 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, Court Attendance Notices, 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.

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

20. 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).<sup>7</sup>
- The term "law" includes State and Territory law and is not restricted to Commonwealth law.
- The FOI Act 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).<sup>8</sup>
- Under APP 6.5, where personal information is disclosed pursuant to APP 6.2(e), a note must be made of that disclosure. This should be in the form of a file note or minute by the case officer or relevant Officer who is making the disclosure.

#### **Material that is used or disclosed for the same purpose as the primary purpose of collection of that information**

21. If an APP entity holds personal information about an individual that was collected for a particular purpose (the primary purpose), the APP entity is permitted to use or disclose the information for the same primary purpose. In the case of the CDPP's work, the function of the CDPP is to prosecute offences against Commonwealth law, and specifically, as set out in section 6 of the *Director of Public Prosecutions Act* (Cth), to prosecute offences on indictment, run committal proceedings, prosecute summary matters, and to do "anything incidental or conducive to the performance" of any of those functions. The CDPP collects personal information relating to potential or current defendants, for the primary purpose of prosecuting offences against Commonwealth law, and may therefore use or disclose such information for the same primary purpose.
22. It is the CDPP position that disclosures such as the release of confidential medical or psychological reports to the informant in a prosecution are authorised as part of sentencing proceedings (including where the report is provided to the CDPP by the defence before the report is tendered to the court and where the CDPP then provides the report to the informant). This is because it is part of the CDPP's primary purpose to share new information about the defendant, being information relevant to sentence, with the investigating agency as part of the CDPP's consideration of Crown submissions on sentence. Note however, that any use or disclosure of personal information for a secondary purpose, is regulated by APP 6 (refer to paragraph 12).

#### **Disclosure of Personal Information**

23. 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 6.1(a) (consent) or APP 6.2 (one of the

---

<sup>7</sup> Refer also to the 'Australian Privacy Principles (APP) guidelines', July 2019, Chapter B, para B.130-B.132, for guidance on the meaning of 'authorised'.

<sup>8</sup> However, the FOI Act prevents the release of documents if it would "involve the unreasonable disclosure of personal information about any person" (s47F(1) FOI Act).

listed exceptions to the prohibitions on the use and disclosure of personal information for a secondary purpose).

24. 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 State/Territory Medical Boards, the Pharmacy Board, the Teachers' Board, Financial Services/Accountancy regulatory bodies, Law Societies, and other professional registration Boards (this will not usually contravene APP 6 provided that the information is not a 'record', or where the information is a record, provided that consent is obtained or one of the exceptions discussed later below applies);
  - the release of information by the CDPP to persons, bodies or agencies for research purposes in relation to criminal matters (this will not usually contravene APP 6 provided the information is not 'personal information');
  - 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 (this will not usually contravene APP 6 provided the disclosure is 'reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body'); and
  - the release of information by the CDPP to persons with an interest in a particular prosecution (this will not usually contravene APP 6 provided the information is not "personal information", or where the information is personal information, provided that consent is obtained or one of the exceptions discussed later below applies).

#### **Disclosure of Personal Information to Disciplinary and/or Regulatory Bodies**

25. 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.<sup>9</sup> If appropriate, such requests should be directed to investigative agencies.
26. 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**

27. Requests such as this most commonly arise where a regulatory or disciplinary body becomes aware of one of its members having been charged with or 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.
28. 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

---

<sup>9</sup> Some States and Territories, including WA, SA, Qld, and the NT, have legislated to provide that the State or Territory DPP must notify the relevant Teacher's Board whenever a teacher is charged with and/or convicted of certain child exploitation offences – for example, s41 of the *Western Australian Teacher Registration Act 2012* (WA). However, such legislation does not include the CDPP within its definition of 'DPP', and this is a deliberate omission by the relevant State/Territory in order to comply with the rule that State/Territory legislation cannot bind the Commonwealth in terms of restricting or modifying the Crown's capacities: *Re Residential Tenancies Tribunal of NSW and Henderson; ex parte the Defence Housing Authority* (1997) 190 CLR 410.

Act. If it is not, then the information can be disclosed after obtaining the requisite internal approval (see 'Procedure for release').

29. 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 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 (APP 6.1(a)); or
  - whether the disciplinary body/regulatory body has a statutory power to compel production of the records containing the personal information, such as a power to subpoena records (APP 6.2(b)).
30. If consent has not already been obtained, the CDPP should obtain written consent before disclosure is made pursuant to APP 6.1(a).
31. 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. The case officer must also consider whether a suppression order currently exists for the material, and if so, the date that the order expires (where applicable).
32. 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 of information to disciplinary/regulatory bodies**

33. If the information is not subject to the restrictions of the Privacy Act, Branch Head approval for release will be required, or for sensitive matters, approval by the Practice Group Leader (PGL).
34. 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.
35. 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.
36. In any case, if there are any issues, the case officer, Branch Head or Practice Group Leader is encouraged to liaise with the CDPP Privacy Officer.

#### **Statistics**

37. Details of *all* releases of information to disciplinary bodies should be sent to the CDPP Privacy Officer, Governance Team, for statistical purposes.



### **Disclosure of Information to Research Bodies**

38. 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.
39. 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).
40. 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**

41. 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) (APP 6.2(e) permits the use or disclosure of personal information for a secondary purpose, where an APP entity "reasonably believes that 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"), would have to be construed to cover those matters reasonably incidental to the prosecution of the criminal law.<sup>10</sup>
42. 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.
43. 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' in indictable matters, or discontinuance of a summary prosecution, should therefore be considered by the Branch Head. Consultation with the CDPP Privacy Officer may also occur if assistance is thought to be necessary.
44. Brief reasons for discontinuance, such as 'lack of reasonable prospects of conviction', are unlikely to be covered by legal professional privilege, however any detailed reasons for discontinuance are very likely to be covered by legal professional privilege and consideration would also need to be given to whether waiver of the privilege is appropriate.

### **Disclosing Personal Information to Interested Persons**

45. It is not unusual for friends or relatives of an accused person, non-referring agency 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.
46. Requests from victims are subject to the special rules in paragraph 4 of the CDPP Victims of Crime Policy, and such requests may require referring to the Witness Assistance team.<sup>11</sup>

---

<sup>10</sup> Advice dated 17 July 1989, from the Privacy Commissioner to the CDPP.

<sup>11</sup> The CDPP Victims of Crime Policy provides: "A victim's privacy and personal information will be protected as appropriate and as far as possible".

47. For requests from persons who are not victims, 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:
- If the information sought does not constitute personal information, then the information is not subject to the Privacy Act and it can be disclosed, after obtaining the requisite internal approval; or
  - If the information sought constitutes personal information, the obtaining of consent or the operation of an exemption may allow the CDPP to provide the information, after obtaining the requisite internal approval; or
  - If the information sought constitutes personal information and consent has not been obtained 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.
48. 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.

#### **Procedure for release of information to interested persons**

49. If the information is not subject to the restrictions of the Privacy Act, Branch Head approval for release will be required, or for sensitive matters, approval by the PGL.
50. If the restrictions of the Privacy Act do apply but the request from the interested person 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.
51. If the restrictions of the Privacy Act do apply and the request from the interested person 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. The Privacy Officer may also be consulted if it is considered necessary.

#### **Records kept by the case officer**

52. Case officers should keep a record on file of any consideration of privacy-related issues, as this forms part of the CDPP’s general requirements for practice management.

#### **Breach of Privacy by an APP Entity**

53. The Privacy Commissioner may investigate an act or practise of an APP entity which may be an interference with privacy, upon receiving a written complaint from an individual who alleges (pursuant to section 36 of the Privacy Act) that the act or practice may interfere with their privacy. Alternatively, the Privacy Commissioner may investigate a matter on their own initiative (pursuant to section 40(2) of the Privacy Act).

## Other Legislation Restricting Disclosure of Information

54. 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.

## Offences relating to disclosure of information - section 122.4 of the *Criminal Code* (Cth)

55. Section 122.4 of the *Criminal Code* (Cth) ('Criminal Code') provides:

Unauthorised disclosure of information by current and former Commonwealth officers

(1) A person commits an offence if:

- (a) the person communicates information; and
- (b) the person made or obtained the information by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and
- (c) the person is under a duty not to disclose the information; and
- (d) the duty arises under a law of the Commonwealth.

Penalty: Imprisonment for 2 years.

(2) Absolute liability applies in relation to paragraph (1)(d).

56. The subsection refers to 'duty'. There is a legal duty for Australian Public Service employees not to disclose information, pursuant to the regulation 2.1 of the *Public Service Regulations 1999* (Cth). A duty may also arise under another statute. Therefore, a person who breaches the duty in Regulation 2.1 or as set out in any other statute, risks committing an offence against 122.4 of the Criminal Code.
57. Part 5.6 of the Criminal Code also contains other offences relating to secrecy of information and espionage.

## Part VIID of the *Crimes Act 1914* (Cth)

58. Part VIID of the *Crimes Act 1914* (Cth) ('Crimes Act') commenced 25 August 2018 and creates a scheme authorising the collection, use and disclosure of personal information by Commonwealth entities for the purposes of preventing, detecting, investigating or dealing with:

- serious misconduct by persons working for Commonwealth bodies (note: this does not necessarily need to constitute criminal offending),
- fraud against Commonwealth bodies (note: this does not necessarily need to constitute criminal fraud and can include civil or common law fraud), or
- an offence pursuant to Chapter 7 of the Criminal Code (for example, theft, bribery and forgery),

while maintaining appropriate safeguards to protect the privacy of individuals.

59. The Part enables Commonwealth entities (referred to as 'target entities' in the Privacy Act, because the relevant misbehaviour is targeted against them), who are not enforcement bodies, to gather the information they need to carry out their own internal misconduct, fraud, or offence-related investigations in situations where ordinarily the Privacy Act would not permit this to occur.

60. The target entity can obtain information from Commonwealth or State/Territory persons, bodies or authorities, meaning that Part VIID provides an exception to the Privacy Act and allows information-sharing between entities. APP 6.2(b) applies: 'the use or disclosure of the information is required or authorised by or under an Australian law', and the relevant authorising law is therefore Part VIID of the Crimes Act.

#### **Part VIID and the CDPP**

61. The CDPP is classed as an enforcement body under the Privacy Act. Part VIID Crimes Act allows the CDPP to provide personal information to target entities (who are not enforcement bodies), where the Privacy Act would not ordinarily allow this.

62. In other situations, the CDPP itself may be the target entity, however in that circumstance, Part VIID plays no role. The CDPP is already authorised under the Privacy Act to collect, use and disclose personal information as part of its own such internal investigations:

- Section 16A Privacy Act - Item 2 of the table in section 16A provides that an agency can collect, use or disclose personal information as part of taking appropriate action in relation to suspected unlawful activity or serious misconduct (where this is related to that entity's own functions or activities); and
- In situations where the misconduct, fraud, or offending is by a CDPP employee and where CDPP needs to provide personal information to an enforcement body such as the Police to allow a criminal investigation to occur, APP 6.2(e) may apply. 6.2(e) provides that personal information can be 'used or disclosed for a secondary purpose where an entity reasonably believes that the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body'. The enforcement body in this instance is the Police.

#### **Resources**

63. The CDPP Privacy Policy can be located on the CDPP website.

64. The CDPP Victims of Crime Policy covers release of case information to victims.

65. For further information on the privacy obligations of Government Agencies, refer to the ["Privacy \(Australian Government Agencies – Governance\) APP Code 2017"](#).

## 5 Australian Privacy Principle 5—notification of the collection of personal information

- 5.1 At or before the time or, if that is not practicable, as soon as practicable after, an APP entity collects personal information about an individual, the entity must take such steps (if any) as are reasonable in the circumstances:
- (a) to notify the individual of such matters referred to in subclause 5.2 as are reasonable in the circumstances; or
  - (b) to otherwise ensure that the individual is aware of any such matters.
- 5.2 The matters for the purposes of subclause 5.1 are as follows:
- (a) the identity and contact details of the APP entity;
  - (b) if:
    - (i) the APP entity collects the personal information from someone other than the individual; or
    - (ii) the individual may not be aware that the APP entity has collected the personal information;  
the fact that the entity so collects, or has collected, the information and the circumstances of that collection;
  - (c) if the collection of the personal information is required or authorised by or under an Australian law or a court/tribunal order—the fact that the collection is so required or authorised (including the name of the Australian law, or details of the court/tribunal order, that requires or authorises the collection);
  - (d) the purposes for which the APP entity collects the personal information;
  - (e) the main consequences (if any) for the individual if all or some of the personal information is not collected by the APP entity;
  - (f) any other APP entity, body or person, or the types of any other APP entities, bodies or persons, to which the APP entity usually discloses personal information of the kind collected by the entity;
  - (g) that the APP privacy policy of the APP entity contains information about how the individual may access the personal information about the individual that is held by the entity and seek the correction of such information;
  - (h) that the APP privacy policy of the APP entity contains information about how the individual may complain about a breach of the Australian Privacy Principles, or a registered APP code (if any) that binds the entity, and how the entity will deal with such a complaint;
  - (i) whether the APP entity is likely to disclose the personal information to overseas recipients;
  - (j) if the APP entity is likely to disclose the personal information to overseas recipients—the countries in which such recipients are likely to be located if it is practicable to specify those countries in the notification or to otherwise make the individual aware of them.

## 6 Australian Privacy Principle 6—use or disclosure of personal information

### *Use or disclosure*

6.1 If an APP entity holds personal information about an individual that was collected for a particular purpose (the **primary purpose**), the entity must not use or disclose the information for another purpose (the **secondary purpose**) unless:

- (a) the individual has consented to the use or disclosure of the information; or
- (b) subclause 6.2 or 6.3 applies in relation to the use or disclosure of the information.

Note: Australian Privacy Principle 8 sets out requirements for the disclosure of personal information to a person who is not in Australia or an external Territory.

6.2 This subclause applies in relation to the use or disclosure of personal information about an individual if:

- (a) the individual would reasonably expect the APP entity to use or disclose the information for the secondary purpose and the secondary purpose is:
  - (i) if the information is sensitive information—directly related to the primary purpose; or
  - (ii) if the information is not sensitive information—related to the primary purpose; or
- (b) the use or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order; or
- (c) a permitted general situation exists in relation to the use or disclosure of the information by the APP entity; or
- (d) the APP entity is an organisation and a permitted health situation exists in relation to the use or disclosure of the information by the entity; or
- (e) the APP entity reasonably believes that 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.

Note: For **permitted general situation**, see section 16A. For **permitted health situation**, see section 16B.

6.3 This subclause applies in relation to the disclosure of personal information about an individual by an APP entity that is an agency if:

- (a) the agency is not an enforcement body; and
- (b) the information is biometric information or biometric templates; and
- (c) the recipient of the information is an enforcement body; and
- (d) the disclosure is conducted in accordance with the guidelines made by the Commissioner for the purposes of this paragraph.

6.4 If:

- (a) the APP entity is an organisation; and
- (b) subsection 16B(2) applied in relation to the collection of the personal information by the entity;

the entity must take such steps as are reasonable in the circumstances to ensure that the information is de-identified before the entity discloses it in accordance with subclause 6.1 or 6.2.

### *Written note of use or disclosure*

6.5 If an APP entity uses or discloses personal information in accordance with paragraph 6.2(e), the entity must make a written note of the use or disclosure.

### *Related bodies corporate*

6.6 If:

- (a) an APP entity is a body corporate; and
  - (b) the entity collects personal information from a related body corporate;
- this principle applies as if the entity's primary purpose for the collection of the information were the primary purpose for which the related body corporate collected the information.

*Exceptions*

6.7 This principle does not apply to the use or disclosure by an organisation of:

- (a) personal information for the purpose of direct marketing; or
- (b) government related identifiers.