



information  
and privacy  
commission  
new south wales

# Statutory guidelines

**Health Records and Information Privacy  
Act 2002 (NSW)**

**Statutory guidelines on the collection of  
health information from a third party**

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*The statutory guidelines were issued in 2004 by former NSW Acting Privacy Commissioner John Dickie.*

## From the NSW Privacy Commissioner

The *Health Records and Information Privacy Act 2002 (NSW)* (the HRIP Act) creates a scheme to regulate the collection and handling of health information by public and private sector organisations in New South Wales. It applies to every organisation that is a health service provider or collects, holds or uses health information.

The HRIP Act will be fully operational from 1 September 2004. It aims to promote fair and responsible handling of health information by:

- protecting the privacy of an individual's health information held in the public and private sectors
- enabling individuals to gain access to their health information
- providing an accessible framework for resolving complaints about the handling of health information.

The objects of the HRIP Act are to:

- balance the public interest in protecting the privacy of health information with the public interest in the legitimate use of that information
- enhance the ability of individuals to be informed about their health care
- promote the provision of quality health services.

The HRIP Act contains 15 Health Privacy Principles (HPPs). These HPPs are the key to the HRIP Act. They are legal obligations that describe what organisations must do when they collect, store, use or disclose health information.

This publication outlines the notification requirements when collecting health information about an individual from someone else. It has been prepared after public consultation. You should read it in conjunction with the HRIP Act and the Office of the Privacy Commissioner NSW 'User Manual: Handbook to Health Privacy'. If you are from the public health system, you should also read it in conjunction with the NSW Health Department's 'Privacy Manual'.

Part 1 explains some of the issues you need to consider when collecting health information about a person from someone else. It includes your notification obligations and some examples to help you decide what you should do in different circumstances.

Part 2 contains the statutory guidelines on notifying a person when you have collected health information about them from someone else. You must comply with these statutory guidelines if you are seeking to rely on the 'notification exemption' in HPP 4(3). These statutory guidelines are issued under section 64 of the HRIP Act.

If you need any further information, please contact Office of the Privacy Commissioner NSW on (02) 8019 1600.

**John Dickie, Acting Privacy Commissioner      1 September 2004**

## **PART 1: NOTIFYING A PERSON WHEN YOU HAVE COLLECTED HEALTH INFORMATION ABOUT THEM FROM SOMEONE ELSE**

### **1.1 Collecting health information**

In very general terms, 'collection' refers to the process by which you come into possession of health information. You collect health information if you gather, acquire or obtain it directly from the person to whom it relates or from someone else.

Under the Health Privacy Principles, the basic standards for collection are:

- only collect health information for a lawful purpose
- only collect health information if it is directly related to your organisation's activities and necessary for that purpose
- make sure the health information is relevant, accurate and up to date and not excessive
- make sure the collection does not unreasonably intrude into the personal affairs of the individual
- collect directly from the person where reasonable and practicable
- tell people you are collecting the health information and why.

This is a summary of the collection standards in Health Privacy Principles 1-4. The full text of Health Privacy Principles 1-4 is in Appendix A of this publication.

## 1.2 When can I collect health information about a person from someone else?

Under Health Privacy Principle 3, you must collect health information about a person directly from that person unless it is unreasonable or impracticable to do so. If it is unreasonable or impracticable, you may need to collect the health information from someone else.

Some examples of when it may be unreasonable or impracticable are:

- If a person presents unconscious to an emergency ward you may, as a health service provider, need to ask their relatives for any background health information of relevance to how the person is treated.
- If a person lacks the capacity to provide their health information, you may need to collect health information about them from an authorised representative such as a carer or guardian.  
For more information on who is an authorised representative and when they should be contacted, please see section 7 and 8 of the HRIP Act at Appendix B of this publication.
- In the course of taking the family, social or medical history of a patient, you may collect health information about a person other than your patient if this is relevant to providing the health service to your patient.  
Example: Sue goes to a doctor for a health check. As part of the routine check, the GP takes Sue's blood pressure which shows she is hypertensive. To investigate Sue's blood pressure problem, the GP asks about her family history. Sue says that her father, Frank, suffers from hypertension and is currently receiving treatment for his condition. Here the doctor is collecting health information about a person (Frank) from someone else (Sue).
- *In certain circumstances your organisation may collect health information about a person from another person or organisation rather than directly from the person themselves.*  
Example: Linda's GP (the disclosing organisation) explains to her that he is referring her to a specialist for an opinion or treatment. When receiving such a referral, the specialist is collecting health information about a person (Linda) from someone else (the GP).

## 1.3 Am I required to notify the person?

When you collect a person's health information you are required to tell them certain things. This is the case even when you collect health information about them from someone else.

### Take reasonable steps to notify the person of certain information

Under HPP 4(1), you must take 'reasonable steps' to make sure that the person is aware of the following points:

- the identity of the organisation collecting the information and how to contact them
- the purposes for which the information is collected
- who the organisation usually discloses information of that kind to

- any law that requires the particular information to be collected
- the fact that they are able to request access to the information
- the main consequences, if any, for them if all or part of the information is not provided.

The meaning of 'reasonable steps' will vary depending on the circumstances of the collection, and what the reasonable person would expect in those circumstances.

**Best practice tip:**

Where an organisation collects health information on a form, an organisation's obligations under HPP 4(1) could be satisfied by a prominent and easy to read statement on that form. For health service providers, one useful way to provide the information is via a notice clearly displayed in the admissions or patient waiting area of the organisation, or via pamphlets and brochures.

**When to notify the person**

You must notify the person of the points at or before the time of collection. If that is not practicable you must notify them as soon as practicable after that time. For example where a patient presents to the hospital's emergency department, there simply may not be time or the person may not be in a fit state to comprehend the information. In such circumstances you should notify them of the points as soon as it is practical afterwards.

**Sometimes you may need to notify an authorised representative instead**

Under HPP 4(5), if you reasonably believe that the person is incapable of understanding the general nature of these points, you can and should notify any authorised representative of the person instead. For more information on who is an authorised representative and when they should be contacted, please see section 7 and 8 of the HRIP Act at Appendix B.

**Best practice tip:**

Where you need to deal with an authorised representative you should still, where practicable, explain the points to the person to whom the information relates in a way that is appropriate to their level of understanding. This is to enable the person to be involved in the notification process to the greatest extent possible.

**In certain circumstances you are not required to notify the person**

In certain circumstances, notifying the person is not necessary or appropriate. Under HPP 4(2) and 4(4) you are not required to notify the person if:

- the person has expressly consented to not being notified

- your organisation is lawfully authorised or required not to notify the person
- not notifying the person is permitted or is necessarily implied or reasonably contemplated under an Act or any other law
- notifying the person would prejudice their interests
- the information has been collected for law enforcement purposes
- your organisation is an investigative agency and notifying the person might detrimentally affect or prevent the proper exercise of your organisation's complaint handling or investigative functions
- you collect health information about the person from someone else and notifying the person would pose a serious threat to the life or health of any individual.

#### **1.4 When can I rely on the 'notification exemption' and these statutory guidelines?**

If you collect health information about the person from someone else you may also be able to rely on the 'notification exemption' in HPP 4(3) to not notify the person as long as you comply with the statutory guidelines in Part 2 of this publication.

## **PART 2: STATUTORY GUIDELINES ON NOTIFYING A PERSON WHEN YOU HAVE COLLECTED HEALTH INFORMATION ABOUT THEM FROM SOMEONE ELSE**

### **1. Application of the statutory guidelines**

- 1.1 These statutory guidelines provide an exemption to the obligation in Health Privacy Principle 4(2) which requires an organisation to notify a person of certain information when it collects health information about them from someone else (a third party).
- 1.2 These statutory guidelines are in addition to the specific exemptions already provided for in Health Privacy Principles 4(4) and 4(2)(a).
- 1.3 To rely on the 'notification exemption', an organisation must comply with all the duties imposed by these statutory guidelines.

### **2. Respect for dignity and personal privacy**

- 2.1 An overriding obligation for those who seek to collect health information about a person from someone else is at all times to respect the dignity and personal privacy of the person to whom the information relates.

### **3. Circumstances where an organisation is not required to notify a person when collecting health information about them from someone else (a third party)**

- 3.1 In addition to the circumstances set out in Health Privacy Principles 4(4) and 4(2)(a), an organisation is not required to notify a person when it collects health information about them from someone else (a third party) in any of the following four sets of circumstances:

#### **3.1.1 Unreasonable or impracticable**

- (a) The organisation collects the health information from someone else (a third party) because it is unreasonable or impracticable to collect directly from the person as permitted by Health Privacy Principle 3(1); and
- (b) Notifying the person would be unreasonable or impracticable in the circumstances.

#### **3.1.2 Taking a family, social or medical history**

- (a) The collection of the person's information as part of the third party's family, social or medical history is reasonably necessary for the organisation to provide a health service directly to the third party; and
- (b) The person's health information is relevant to the family, medical or social history of the third party.



### **3.1.3 Authorised representatives**

- (a) The organisation reasonably believes that the person is incapable of understanding the general nature of the information in Health Privacy Principle 4(1); and
- (b) The organisation takes reasonable steps to ensure that any authorised representative of the person is aware of that information as required by Health Privacy Principle 4(5); and
- (c) Where practicable, the organisation also takes reasonable steps to explain the points to the person to whom the information relates in a way that is appropriate to their level of understanding, and so as to enable the person to be involved in the notification process to the greatest extent possible.

### **3.1.4 Person already notified of the collection**

- (a) The health information was initially collected from the person to whom it relates by another organisation (the disclosing organisation); and
- (b) The organisation now receiving the information has reasonable grounds to believe that the disclosing organisation has already notified the person of the information in Health Privacy Principle 4(1).

## **4. Uses or disclosures must be in accordance with the HRIP Act**

- 4.1 Where an organisation collects health information about a person from someone else without notifying the person in accordance with these statutory guidelines, the organisation must ensure that any subsequent uses or disclosures it proposes to make of that information are in accordance with Health Privacy Principles 10 and 11. In this regard, the organisation should recognise that some of the exemptions in the Health Privacy Principles, may be difficult to apply if the person is unaware that their information has been collected. For example, exemptions based on 'consent' [Health Privacy Principles 10(1)(a) and 11(1)(a)] and the person 'reasonably expecting' the use or disclosure [Health Privacy Principles 10(1)(b) and 11(1)(b)] will generally not be available where the person has not been notified and is not aware that their information has been collected.

## Appendix A

### Health Privacy Principle 4

#### *HEALTH PRIVACY PRINCIPLE 4 - Individual to be made aware of certain matters*

(1) An organisation that collects health information about an individual from the individual must, at or before the time that it collects the information (or if that is not practicable, as soon as practicable after that time), take steps that are reasonable in the circumstances to ensure that the individual is aware of the following:

- (a) the identity of the organisation and how to contact it,
- (b) the fact that the individual is able to request access to the information,
- (c) the purposes for which the information is collected,
- (d) the persons to whom (or the types of persons to whom) the organisation usually discloses information of that kind,
- (e) any law that requires the particular information to be collected,
- (f) *the main consequences (if any) for the individual if all or part of the information is not provided.*

(2) If an organisation collects health information about an individual from someone else, it must take any steps that are reasonable in the circumstances to ensure that the individual is generally aware of the matters listed in subclause (1) except to the extent that:

- (a) *making the individual aware of the matters would pose a serious threat to the life or health of any individual, or*
- (b) *the collection is made in accordance with guidelines issued under subclause (3).*

(3) The Privacy Commissioner may issue guidelines setting out circumstances in which an organisation is not required to comply with subclause (2).

(4) An organisation is not required to comply with a requirement of this clause if:

- (a) the individual to whom the information relates has expressly consented to the organisation not complying with it, or
- (b) the organisation is lawfully authorised or required not to comply with it, or

(c) non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law (including the *State Records Act 1998*), or

(d) compliance by the organisation would, in the circumstances, prejudice the interests of the individual to whom the information relates, or

(e) the information concerned is collected for law enforcement purposes, or

*(f) the organisation is an investigative agency and compliance might detrimentally affect (or prevent the proper exercise of) its complaint handling functions or any of its investigative functions.*

(5) If the organisation reasonably believes that the individual is incapable of understanding the general nature of the matters listed in subclause (1), the organisation must take steps that are reasonable in the circumstances to ensure that any authorised representative of the individual is aware of those matters.

(6) Subclause (4) (e) does not remove any protection provided by any other law in relation to the rights of accused persons or persons suspected of having committed an offence.

(7) The exemption provided by subclause (4) (f) extends to any public sector agency, or public sector official, who is investigating or otherwise handling a complaint or other matter that could be referred or made to an investigative agency, or that has been referred from or made by an investigative agency.

## Appendix B

### *HRIP Act Section 7 - Capacity*

(1) An individual is incapable of doing an act authorised, permitted or required by this Act if the individual is incapable (despite the provision of reasonable assistance by another person) by reason of age, injury, illness, physical or mental impairment of:

- (a) understanding the general nature and effect of the act, or
- (b) communicating the individual's intentions with respect to the act.

(2) An authorised representative of an individual may do such an act on behalf of an individual who is incapable of doing that act.

(3) An authorised representative may not do such an act on behalf of an individual who is capable of doing that act, unless the individual expressly authorises the authorised representative to do that act.

### *HRIP Act Section 8 - Definition of "authorised representative"*

(1) In this Act, "authorised representative" , in relation to an individual, means:

- (a) an attorney for the individual under an enduring power of attorney, or
- (b) a guardian within the meaning of the Guardianship Act 1987 , or a person responsible within the meaning of Part 5 of that Act, or
- (c) a person having parental responsibility for the individual, if the individual is a child, or
- (d) a person who is otherwise empowered under law to exercise any functions as an agent of or in the best interests of the individual.

(2) A person is not an authorised representative of an individual for the purposes of this Act to the extent that acting as an authorised representative of the individual is inconsistent with an order made by a court or tribunal.

(3) In this section:

"child" means an individual under 18 years of age.

"parental responsibility" , in relation to a child, means all the duties, powers, responsibility and authority which, by law, parents have in relation to their children.

### *Guardianship Act 1987 – Section 33A Person responsible*

(1) Object The object of this section is to specify the person who is the "person responsible" for another person for the purposes of this Part.

(2) Person responsible for child The "person responsible" for a child is the person having parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*) for the child. However, the person responsible is the Minister if the child is in the care of the Minister or the Director-General if the child is in the care of the Director-General.

(3) Person responsible for person in care of Director-General The "person responsible" for a person in the care of the Director-General under section 13 is the Director-General.

(4) Person responsible for another person There is a hierarchy of persons from whom the "person responsible" for a person other than a child or a person in the care of the Director-General under section 13 is to be ascertained. That hierarchy is, in descending order:

(a) the person's guardian, if any, but only if the order or instrument appointing the guardian provides for the guardian to exercise the function of giving consent to the carrying out of medical or dental treatment on the person,

(b) the spouse of the person, if any, if:

(i) the relationship between the person and the spouse is close and continuing, and

(ii) the spouse is not a person under guardianship,

(c) a person who has the care of the person,

(d) a close friend or relative of the person.

**Note:** Circumstances in which a person is to be regarded as "having the care of another person" are set out in section 3D. The meaning of "close friend or relative" is given in section 3E.

(5) Operation of hierarchy If:

(a) a person who is, in accordance with the hierarchy referred to in subsection (4), the "person responsible" for a particular person declines in writing to exercise the functions under this Part of a person responsible, or

(b) a medical practitioner or other person qualified to give an expert opinion on the first person's condition certifies in writing that the person is not capable of carrying out those functions,

the person next in the hierarchy is the "person responsible" for the particular person.