



information
and privacy
commission
new south wales

Enquiries: Sarah Wyatt
Telephone: 1800 472 679
Our reference: IPC18/A000491

National Arrangements
For the Protection and Management of Identity Information
C/o Home Affairs
4-6 Chan St
BELCONNEN ACT 2613

By email: submissions@homeaffairs.gov.au

Dear Sir/Madam,

Review of National Arrangements for the Protection and Management of Identity Information

The purpose of this correspondence is to provide a submission to the Review of National Arrangements for the Protection and Management of Identity Information (the Review). The following comments are provided for consideration by the Review.

Recent developments in the protection and management of identity information

An example in NSW of a recent development in this area is the NSW Fair Trading Complaints Register (the Register), which provides information about businesses that are the subject of the most complaints received by NSW Fair Trading each calendar month. The Register is available online and provision of the information is intended to provide an incentive for businesses to deliver better customer service, and help consumers make informed decisions about where to shop.

Only complaints that have been made by a real person, relating to a real interaction with a business will be listed on the Register. Information listed includes: the name of the business (the recognised business/brand name); the number of complaints received by Fair Trading about the business in the last month and the product groups complained about.

The *Complaints Register Guidelines* (the Guidelines) provides information about what constitutes a complaint; how Fair Trading deals with complaints; and the limitations of the complaints data. The Guidelines set out service delivery arrangements and the context and purpose for data collection, use and disclosure.

It is submitted that the Register and accompanying Guidelines are a good example of how a contemporary government service can have a built-in arrangement to protect identity information and inform the community about the collection of data in specific and detailed terms.

Consumer protection principles underpin the publication of information and the objective of better regulation is also achieved through the establishment of the Register. These dual objectives serve and highlight a purposeful release of information, in the public interest. Such an arrangement, in turn, creates community trust in information management.

Use of a 'public interest test' in deciding to release or refuse information

In NSW under the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act) there is a general public interest in favour of the disclosure of government information. The GIPA Act provides for a balancing of considerations in favour of and against disclosure, having regard to the public interest. This is known as the 'public interest test'. The test requires consideration of:

1. The presumption in favour of release of government information;
2. Identification of factors in favour of disclosure;
3. Identification of factors against disclosure; and
4. Balancing of factors to determine where the public interest lies.

There is an overriding public interest against disclosure of government information if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.

The balancing of public interest considerations may necessitate consideration of privacy protection principles and the interaction between the GIPA Act and the *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act) is well established within both statutes.

The GIPA Act facilitates privacy protection through mechanisms including creation of a new record and redaction of information and the PPIP Act recognises the pre-eminence of the GIPA Act. Sections 5 and 20(5) of the PPIP Act recognise that the GIPA Act is not limited by the PPIP Act and therefore information may be released under the GIPA Act (either proactively or in response to an application) under the GIPA Act.

The public interest balancing test under the *Right to Information Act 2009* (Qld) is slightly different and requires:

1. Identifying any irrelevant factors to be disregarded;
2. Identifying any relevant public interest factors favouring disclosure and non-disclosure;
3. Balancing the relevant factors favouring disclosure and non-disclosure; and
4. Deciding whether disclosure of the information would, on balance, be contrary to the public interest.

However the objects of the Qld legislation differ fundamentally from section 3 of the GIPA Act in that the Qld legislation is not restricted in its application to members of the public. Accordingly the Qld legislation has application in release of information between government agencies. This broader application ensures a proper decision making process and the protection of officers acting in good faith in exercising their decision making functions.

In NSW the GIPA Act includes principles to guide the application of the public interest test.¹ One principle recognised in both the NSW and Qld legislation is that disclosure of information which might cause embarrassment to or loss of confidence in the Government is irrelevant and must not be taken into account.

The protections applying to decision makers under the GIPA Act apply broadly against a threshold of actions and decisions made in good faith.²

It is submitted that such legislative frameworks are enablers in the protection and management of information. Legislation is an important tool for setting out rights and responsibilities. There is scope for a 'public interest test' to be utilised in the regulation of various forms of data sharing and the protection of identity information. The definition of 'government information' under the GIPA Act extends to all forms of government information held in a record by an agency.³ This definition has application to information held in digital format.

Developments in the social licence and ethical management of information

It is submitted that ethical principles should govern data usage with a view to promoting rights and accountability. This is particularly so in the absence of a legislated public interest test. Ethical principles should include:

- Respect for individuals – including protecting their autonomy, treating them with courtesy and allowing for informed consent;
- Beneficence – producing benefits and minimising risks;
- Fairness and justice - ensuring reasonable, non-exploitative and well considered procedures are administered fairly and equally; and
- Utility – determining what action produces the most good and the least harm.

An ethical framework promotes public engagement, transparency and accountability, which are the pillars of Open Government and a powerful tool for rebuilding public trust in the management of identity information. Likewise ethical considerations can take into account individual rights such as privacy.

Those considerations, like the public interest test require the identification of factors for and against disclosure of information with a particular focus on the use of information.

Having a 'social licence' to act means having community support following consultation and consensus building. It is submitted that social licence is critical in the delivery of arrangements for the protection, use and management of identity information. It is the basis with which to ask whether a particular act or practice will maintain trust in how data relating to individuals is used, disclosed or applied.

¹ Section 15 GIPA Act

² Part 6 Division 1 GIPA Act

³ Section 4 GIPA Act

Trust in data use is an important part of the social licence and if people trust that their data will only be used as they understand it and for a valuable purpose, they are more likely to be comfortable with its use.

Trust can be built by developing social licence and an ethical framework for the management of information. In other words, collaboration is an enabler for the protection and management of identity information. Public participation in this regard is paramount.

The New Zealand Data Futures Partnership⁴ has considered data social licence. They found that for people to feel comfortable about proposed data use, they first need good information on eight key questions that can be grouped under headings of 'Value', 'Protection' and 'Choice'.

Value

1. What will my data be used for?
2. What are the benefits and who will benefit?
3. Who will be using my data?

Protection

4. Is my data secure?
5. Will my data be anonymous?
6. Can I see and correct data about me?

Choice

7. Will I be asked for consent?
8. Could my data be sold?

Some of these concepts are already contained in Australian data privacy laws. But privacy laws generally only address (and this is so in NSW) the collection, use, disclosure, retention and security of personal information and not uses of non-personal information which may nonetheless have significant legal and social effects upon individuals.

Within Australia's federated model divergent legislation may give rise to anomalies in application of legislation together with the obligations rights and protections enshrined in legislation. Accordingly, the Review may wish to consider the development and protection of new rights and responsibilities to supplement gaps in existing data privacy and information access laws, as well as, new requirements for ethical oversight.

⁴ <https://trusteddata.co.nz/wp-content/uploads/2017/08/Background-Trusted-Data.pdf>

I hope these comments will be of assistance. Please do not hesitate to contact us if you have any queries. Alternatively, your officers may contact Sarah Wyatt, Assistant Director, Legal Counsel and Regulatory Advice on 1800 472 679 or by email at [REDACTED]

Yours sincerely

[REDACTED]
Elizabeth Tydd
Information Commissioner

16 October 2018

[REDACTED]

for Samantha Gavel
Privacy Commissioner
16 October 2018