



**Australian  
Privacy  
Foundation**

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31 August 2012

Dr Terry Beed  
Chair  
Independent Code Review Panel  
AMSRO

Dear Terry

**Re: Review of Market and Social Research Privacy Code**

I refer to our previous correspondence on the above matter.

Thank you for the opportunity to consider the current version of the Code.

I attach the APF's Submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Roger Clarke', with a long horizontal flourish extending to the right.

Roger Clarke  
Chair, for the Board of the Australian Privacy Foundation  
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## **Review of Market and Social Research Privacy Code**

### **Submission to the Independent Review of the Code**

**31 August 2012**

The Australian Privacy Foundation (APF) is the country's leading privacy advocacy organisation. A brief backgrounder is attached.

#### **Introduction**

The Market and Social Research Privacy Code (the 'Code'), developed by the Association of Market and Social Research Organisations (AMSRO), was approved by the Commonwealth Privacy Commissioner on 1<sup>st</sup> September 2003. In accordance with Subclause G .1 of the Code, an Independent Code Review Panel has been established to undertake the required three-yearly review, which is to be submitted to the Privacy Commissioner. The APF made a submission to the previous review of the Code on 6 October 2006. This submission identifies continuing weaknesses with the Code, and with the operation of the Code, including weaknesses that were not addressed in the previous review.

#### **No timely review of the Code**

Subclause G.3.1 of the Code requires an independent review of the Code once every three years. The terms of reference for the current review acknowledge that the last review was undertaken in 2007. The APF points out that independent reviews at least once every three years are expected under the Privacy Commissioner's *Code Development Guidelines*, and that the failure to conduct a review of the Code within the specified time is a serious breach. The APF considers that this breach must be taken into account in any assessment of the adequacy of the Code.

#### **Conclusion 1**

AMSRO has an obligation to explain the delay in undertaking a timely independent review as required by the Code.

#### **Objectives and definition of 'identified information'**

The objectives of the code include:

to facilitate the protection of identified information provided by, or held in relation to, the participants or subjects of market and social research;

The use of the term 'identified information' differs from the terminology used in the *Privacy Act 1988* (Cth), which uses the term 'personal information'. 'Personal information' is currently defined to mean information or an opinion about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion. Although this meaning is captured, to an extent, by the definition of 'identified information' in the Code, the APF considers that the use of the term 'identified information' may be misleading. Moreover, the APF notes that the legislative definition of 'personal information' is proposed to be amended by the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth) to mean information or an opinion about an identified individual or an individual who is reasonably identifiable. The APF notes that we have been highly critical of this definition, which

derives from the ALRC report, on the basis that a broader definition is required to deal with technological change interactions with individuals without them being identified. Accordingly, the APF has recommended replacing 'reasonably identifying' with 'potentially identifying'. As we consider that the Code should enhance the protection of data subjects, we recommend amending the definition of information that falls within the Code to include 'potentially identifying' information.

### **Conclusion 2**

- 2.1 All instances of 'identified information' should be replaced with 'identifiable information' throughout the document.
- 2.2 The definition of 'identified information' should be replaced with a definition of 'identifiable information' that incorporates 'potentially identifying' information.

### **'Research purpose'**

The privacy principles in the Code are related to the purposes of processing the identified information, which are defined in terms of a 'research purpose'. A 'research purpose' is defined to mean 'the handling of information in order to carry out any function considered essential to the conduct or communication of the results of a market or social research project'. The definition of the purpose for collection by reference to an activity ('handling of information') is potentially confusing. We therefore recommend amending the definition of 'research purpose' so that it refers to a specific purpose (or purposes), rather than an activity, that is related to 'market and social research'.

### **Conclusion 3**

The definition of 'research purpose' should be amended so that it refers to a specific purpose (or purposes) rather than an activity.

### **Collection principle**

Subclause E.1.1.5 provides that a research organisation must take reasonable steps to ensure that the data subject is aware of certain matters when identified information is collected. The APF considers that there is a significant distinction between social and market research. We therefore recommend that, in addition to the matters identified in E.1.1.5, a research organisation should be required to disclose whether it is engaged in social research or market research.

### **Conclusion 4**

When identified information is collected from an individual, a research organization should be required to disclose whether the information is being collected for social research or market research.

### **Use/disclosure of identified information**

Sub-paragraph E.2.2.4(d) provides that, in the absence of consent for broader research purposes, use of identified information is restricted to research on the same (or substantially the same) topic. Similarly, sub-paragraph E.2.2.5(d) provides that, in the absence of consent for broader research purposes, disclosure of identified information is restricted to research on the same (or substantially the same) topic. The APF considers that the term 'substantially the same' is insufficiently certain, and may allow for function creep. We therefore recommend that use or disclosure of the information be restricted to use on the same topic. We note that this recommendation does not interfere with use or disclosure of information made with the consent of the data subject.

### **Conclusion 5**

Use or disclosure of identified information should be restricted to research on the same topic as that for which the information was collected, unless the data subject consents to use or disclosure for other purposes.

### **Transborder data flows (TBDF)**

Subclause E.9.1 states that transborder transfers of identified information is dealt with in E.2.5. TBDF are only specifically referred to in sub-clause E.2.6. The reference in E.9.1 should therefore be corrected.

Given the dangers to individual privacy posed by unrestricted cross-border disclosure, the APF considers that the Code should be both more specific and more stringent in the way in which it addresses TBDF. In this respect, the APF notes its past criticisms of the current NPP 9, which in effect allows personal data to be exported provided 'reasonable steps' are taken to ensure the data is used consistently with the NPPs. The APF further notes the significant weaknesses with the proposed new TBDF principle in APP 8 which, together with proposed s 16A, provides at least nine grounds on which a data exporter may be exempt.

The APF therefore considers that the Code should include a specific clause that specifically deals with TBDF, such as the following:

A research organisation may transfer identified information to someone who is in a foreign country only if the organisation enters into a binding contract which effectively upholds principles for fair handling of the information that are at least equivalent to the principles in this Code.

### **Conclusion 6**

The Privacy Principles should be amended to include express reference to a TBDF principle that incorporates a requirement for AMSRO members to enter a binding contract which ensures protection of personal data transferred out of Australia.

### **Deletion principle**

The APF notes that proposed APP 11.2 provides for personal information to be destroyed or de-identified when it is no longer needed for a purpose for which it may be used or disclosed. The APF further notes that this principle accords with applicable international standards. The Code incorporates a version of this principle in 4.1, which provides that:

A research organisation may retain identified information only while the details of the identity of the individual whom the information is about continue to be necessary for research purposes.

The difficulty with this form of the principle is the breadth of the definition to a 'research purpose'. To ensure that identifiable personal data is not retained by AMSRO members when it is no longer needed, but merely on the chance that it may be used, the APF recommends that the Code specifically adopts a form of the deletion principle, such as the following:

A research organisation must take reasonable steps to de-identify or destroy identifying information when it no longer needs the information for the research purpose for which it was collected, or for a directly related research purpose.

### **Conclusion 7**

The Privacy Principles should be amended to include an express deletion principle that requires identifying information to be de-identified or destroyed when it is no longer needed for the research purpose for which it was collected, or for a directly related purpose.

For further information please contact:

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Board Member  
Australian Privacy Foundation

# Australian Privacy Foundation

## Background Information

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters.

Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance.

When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

The APF is open to membership by individuals and organisations who support the APF's Objects. Funding that is provided by members and donors is used to run the Foundation and to support its activities including research, campaigns and awards events.

The APF does not claim any right to formally represent the public as a whole, nor to formally represent any particular population segment, and it accordingly makes no public declarations about its membership-base. The APF's contributions to policy are based on the expertise of the members of its Board, SubCommittees and Reference Groups, and its impact reflects the quality of the evidence, analysis and arguments that its contributions contain.

The APF's Board, SubCommittees and Reference Groups comprise professionals who bring to their work deep experience in privacy, information technology and the law.

The Board is supported by Patrons The Hon Michael Kirby AC CMG and The Hon Elizabeth Evatt AC, and an Advisory Panel of eminent citizens, including former judges, former Ministers of the Crown, and a former Prime Minister.

The following pages provide access to information about the APF:

- Policies <http://www.privacy.org.au/Papers/>
- Resources <http://www.privacy.org.au/Resources/>
- Media <http://www.privacy.org.au/Media/>
- Current Board Members <http://www.privacy.org.au/About/Contacts.html>
- Patron and Advisory Panel <http://www.privacy.org.au/About/AdvisoryPanel.html>

The following pages provide outlines of several campaigns the APF has conducted:

- The Australia Card (1985-87) <http://www.privacy.org.au/About/Formation.html>
- Credit Reporting (1988-90) <http://www.privacy.org.au/Campaigns/CreditRpting/>
- The Access Card (2006-07) [http://www.privacy.org.au/Campaigns/ID\\_cards/HSAC.html](http://www.privacy.org.au/Campaigns/ID_cards/HSAC.html)
- The Media (2007-) <http://www.privacy.org.au/Campaigns/Media/>