



**Australian
Privacy
Foundation**

email: mail@privacy.org.au
web: www.privacy.org.au

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20 November 2011

John McMillan, Information Commissioner
GPO Box 2999 Canberra ACT 2601

Timothy Pilgrim, Privacy Commissioner
GPO Box 5218 Sydney NSW 2001

Dear John and Timothy

Congratulations on an interesting and well organised conference last week, which I attended on behalf of the Australian Privacy Foundation (APF). The event successfully advanced two of the three OAIC functions – freedom of information/open government and government information policy, which was clearly the declared objective, encapsulated in the title of the conference – *Public Sector Information – A National Resource*.

I would however like to raise a concern which I would have put to you in the OAIC update session had there been time for questions. It is the same concern as APF and others raised in the meeting between yourselves and NGO representatives last year, and in representations on the OAIC legislation.

As you know, there is a view, which we share, that the ‘new’ government information policy function is not appropriate for an independent rights/watchdog body, and sits particularly uneasily alongside the privacy functions. While there are clearly strong public interests in sharing and re-use of government information, these are essentially part of an Executive Government agenda. They often conflict directly with some of the fundamental information privacy principles expressed not only in the existing IPPs and NPPs, but also in the proposed APPs. These principles include data minimisation, limitation of use to the primary purpose of collection, and strictly limited retention – all of which are clearly in tension with the promotion of data sharing and re-use.

We have suggested that the inherent tension between these two functions can be addressed by a clear affirmation by OAIC that for personal information, the otherwise admirable default presumption of openness should be reversed. OAIC guidance should clearly indicate that where government agencies hold personal information (other than about public officials in the course of their duties), the starting point should be limited use and disclosure, with secondary uses, release and sharing needing to be

justified in accordance with one of the many relevant exceptions provided in the Privacy Act for other private and public interests.

It is disappointing not only that this message did not clearly emerge from the conference, but also that it is absent from much of the guidance material emanating from OAIC since its inception.

In too many of the OAIC publications, privacy is mentioned only as a secondary constraint or factor, and often only in the limited context of disclosure, rather than reflecting the full 'information life cycle' scope of privacy principles. Choice of expression can be significant – the new Issues Paper launched at the conference talks of 'protecting personal information' (Limits to openness, page 6). This runs the risk of reinforcing the still common misconception that privacy is only about non-disclosure, security and confidentiality. Protection of privacy, under information privacy laws both in Australia and overseas, is not synonymous with protection of personal information, as many of the principles deal with threshold issues including collection limitation, data minimisation, and proportionality. APF will separately make a submission on Issues Paper No 2, but these comments will give you advance notice of at least one issue we will be raising.

In retrospect, we should have raised these concerns more vigorously in the context of the Principles on open public sector information issued by OAIC earlier this year. This clearly laid the foundation for the unfortunate promotion of an overriding presumption of openness as the default position even for personal information, with 'protection ... against inappropriate or unauthorised use, access or disclosure' relegated to only one of nine 'asset management' requirements.

You will gather from the above that the APF fears that our concerns about the risks to privacy protection in the new regulatory framework are being borne out in practice.

It may be that a strong privacy message has been an unintended casualty of the understandable enthusiasm of the new office for its new functions.

We seek your re-assurance that there is no deliberate playing down of the importance of the full range of privacy principles, including collection limitation, data minimisation, and proportionality, and their necessary limiting role in relation to data sharing and re-use.

A related matter is the public presentation or 'branding' of the privacy function. As we have said before, there is a risk that 20+ years of hard won, but still limited, public recognition of the Privacy Commissioner as the official responsible for privacy protection in Australia (re-inforced more recently in NSW, Victoria and Queensland) will be wasted if OAIC (and its State counterparts) move towards promoting the Information Commission(er) as the privacy 'watchdog'. We recognise that the legislation requires this to be the official position at least in some contexts, but it is entirely within your discretion to maintain the Privacy Commissioner brand in public communications, thereby building the efforts of previous Commissioners. We urge you to do so.

On a separate point, it was also disappointing that you did not expressly recognise civil society as stakeholders. On two occasions you mentioned agencies, academic and the private sector as stakeholders represented at the conference. While there may have been few NGO representatives attending, it would have been re-assuring to hear that OAIC recognises the importance of engagement with civil society. In recent years in the privacy sphere, the various international fora (OECD, Council of Europe, APEC and the International Commissioners' Conference) have expressly provided for civil society input – in some cases through formal structures (e.g. the OECD CSISAC, and the annual Public Voice event preceding the Commissioners' Conference).

Privacy regulators at these events have expressly acknowledged the contribution of civil society to better policy development and improved outcomes. In the context of the open government function and objective, there is arguably an even wider range of civil society organisations with a direct interest than in the privacy sphere. Express public recognition of civil society as stakeholders may seem a small thing but would, I suggest, engender greater confidence that OAIC has a balanced approach to consultation and input. In this respect we also look forward to resumption of regular meetings with privacy and consumer NGOs on privacy matters.

I would be pleased to discuss these concerns with you, and look forward to your reply.

Yours sincerely

Nigel Waters
Board Member, on behalf of the APF Board
board5@privacy.org.au
Phone: 02 4981 0828, 0407 230342