



office of the
privacy
commissioner
new south wales

Report

Own Motion Inquiry

*The difference between a Privacy Notice and Consent Request -
Privacy protections in places accessible to the public*

December 2016



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The New South Wales Privacy Commissioner makes this report under section 36(2)(l) of the NSW Privacy and Personal Information Protection Act 1998 (PPIP Act) and places it in the public domain as the Privacy Commissioner's public statement under section 36(2)(h) of the PPIP Act.

Part 1: Introduction: the scheme of general functions of the NSW Privacy Commissioner

1. Sections 36 and 37 of the PPIP Act confer on the Privacy Commissioner various functions regarding privacy issues and principles. These functions include making inquiries and investigations into privacy related matters as the Privacy Commissioner thinks appropriate¹, requiring public sector agencies to provide information and documents in connection with the Privacy Commissioner's functions² and the making of public statements about any matter relating to the privacy of individuals generally.³ The Privacy Commissioner does not have determinative powers and can only express opinions and make recommendations.
2. An equivalent scheme applies to public sector agencies and some private sector organisations and individuals regarding the management of personal health information under the *Health Records and Information Privacy Act 2002* (HRIP Act).

Part 2: The informational privacy right

3. The right to informational privacy gives a person the ability to decide who and when others may collect their personal information, how they will use it and for what purposes they may disclose it.
4. Various laws strike a balance of personal rights and public interests. In making this balance they sometimes reduce or remove some of the aspects of a person's informational privacy right in various circumstances.
5. Privacy law, as tempered by exemptions from and modifications to the application of privacy principles, creates the informational norms by which regulated public sector agencies and private organisations must deal with the public. Informational norms are the lawful standards that apply in settings, such as service delivery, employment and the relationship of the individuals with the State.
6. They are equally necessary in the governance of relationships as other laws that promote and enforce standards to protect safety and security, and, the right to be free from discrimination. They promote harmonious relationships and ensure trust between the parties to each transaction.
7. The privacy legislation in NSW enacted a number of obligations regarding the informational privacy rights of the public. Under the PPIP Act the public have a right to enforce those obligations applying to public sector agencies regarding the life cycle of "*personal information*." Under the HRIP Act this right extends to certain private sector entities regarding the life cycle of personal "*health information*."

¹ Section 36(l)

² Section 37(1)

³ Section 36(h)

Part 3: Notice and Consent

8. There are authorised circumstances where a regulated entity is able to collect personal information, and, use it and disclose it for various purposes. In these circumstances the subject person is not required to give their consent for the particular dealing with their personal information. The subject person does not have a choice.
9. In these circumstances regulated entities are only required to provide a privacy notice as to how they propose to deal with the person's personal information. For example, in what circumstances they are authorised to disclose personal information.
10. A privacy notice is a declaration of the terms under which a regulated entity will provide a service or some other type of engagement with the public. It is not a mechanism by which regulated entities may deal with personal information in ways that deviate from their obligations in the privacy legislation. In other words, a privacy notice cannot unilaterally bypass legislated privacy obligations.
11. For example:

Section 9 of the PPIP Act requires public sector entities that provide a service to the public to collect only as much personal information as is reasonable in the circumstances. If an agency provides casual car parking, it would be contrary to the collection informational norm in section 9 for the agency to issue a privacy notice declaring that it will accept customers only if they provide copies of their birth certificate.

Health Privacy Principle 11 restricts the disclosure of health information for purposes that do not relate to the provision of the health service. If a private organisation provides medical services, it would be contrary to the disclosure informational norm to issue a privacy notice that it will sell patient contact details to advertisers.
12. In other circumstances the consent of the subject person is necessary to make dealing with their personal information compliant with the privacy principles.
13. Briefly stated, the circumstances where the subject person's consent is required to deal with personal information are specified in the privacy legislation. Regulated entities are not free to deal with personal information contrary to those provisions without first obtaining the subject person's consent.
14. Consent requires that the subject person understands what will happen with their personal information, in circumstances where they have the right to withhold their consent, and, take some affirmative action to provide their consent, as opposed to passively acquiescing. In other words, the subject person must be left with a genuine choice.
15. The Privacy Commissioner has issued guidance for the benefit of regulated entities titled "*Guidance: Consent.*" It discusses in more detail privacy notices, the elements of what constitutes valid consent and the circumstances where the NSW privacy legislation requires consent for dealings with personal information.⁴
16. It is important that entities that provide documents to the public on these topics be clear as to whether the document they issue is a privacy notice or a consent request. Clarity avoids causing confusion to members of the public as to whether or not the process allows them to exercise a true choice over the collection and use of their personal information.

⁴ Available on the privacy pages of Information and Privacy Commission's website: www.ipc.nsw.gov.au

Part 4: The subject event of this Inquiry

17. In recent months various information came to the Privacy Commissioner's attention that regulated entities had documents in the nature of policies or privacy notices that established practices beyond the informational norms that the privacy legislation allowed.

18. For example

In the private health care sector a health service provider had a stated practice that they would not provide access to a patient's own health information directly to the patient, but would do so only to another health service provider. Such a notice or policy purports to contractually bind the patients, where the HRIP Act includes a right for the patient to have direct access to their health information unless specified reasons exist, which must be assessed on a case-by-case basis.⁵

A regulated entity invited its community to attend activities at its premises, which were free of charge upon making contact with the entity and reserving a place. It came to the Privacy Commissioner's attention that the entity published a document titled "*Photo and Video Consent Information*." This type of document is a one-way form of communication, declaring that attendance at the events equals giving consent to be photographed or videoed, and, giving consent for the entity to distribute the images at its discretion by print and electronic media for purposes of promoting the specific activities.

19. Under section 37 of the PPIP Act the Privacy Commissioner requested the entity to provide information regarding the issuing of that document. The Privacy Commissioner's correspondence to the entity raised the question as to whether or not such notices authorise entities to collect, use, retain and disclose personal information of individuals when they receive services in the absence of a legal obligation on their part to consent to the entity's conduct.

20. The correspondence also raised the question as to compliance by the entity with sections 8, 11, 12, 17, 18 and 19(2) of the PPIP Act.

21. The most significant obligatory of regulated entities in this type of scenario is the obligation in section 18 not to disclose personal information for a purpose that is not directly related to the original purpose of collection, unless the subject person consents. Under section 26, the person's consent must be "express."

22. The entity advised the Privacy Commissioner that it began developing a guideline to apply to privacy notifications regarding events open to the entity's community.

Part 5: Conclusion

23. The ability to control one's personal information is a basic right and the privacy legislation aims to protect this right in order to enable delivery of services in a climate of trust. Loss of this control where the law does not allow regulated entities to deviate from legislated informational norms undermines the confidence the public has in the entities with which it transacts and has a chilling effect on participation.

24. This is especially so when the personal information involved is sensitive information, such as one's image. Recipients of services or participants in events may have a number of reasons why they may not wish information about the fact that they received a particular service or that they attended a particular event to become widely known.

25. Protection from wide dissemination of information facilitates people's right to receive a service or attend an event without the whole community subsequently associating them with the particular type of activity.

26. Dissemination of one's image, especially in electronic form, creates some special risks for a number of members of the community. Such dissemination may enable others to combine information about the subject person from other sources and ascertain more information about

⁵ See for example sections 29 and 30 of the HRIP Act



them. For example, a victim of violence may have relocated to avoid the possibility of the perpetrator of the violence finding them. Publication of their attendance at an event for promotional reasons, especially on the internet, may become a reasonably easy way for the perpetrator to locate the victim, ascertain the areas of their interests and social activities, and, cause the victim further distress.

27. Respect for anonymous attendance at events extends to public decision-making meetings, such as local council meetings. An example that has come to the Privacy Commissioner's attention is a recent announcement by a Council that, during live streaming of Council meetings, cameras will capture video images of the decision-making body and will not be focused on the public.⁶
28. There is some confusion as to what information that is held by regulated entities may be freely disclosed. Namely, that if the information is about an event that took place in a publicly accessible place, the entity may freely disclose it. The Appeal Panel of the NSW Civil and Administrative Tribunal considered this issue as it related to CCTV footage captured in a shopping centre. A copy of the footage was held by the NSW Police Force, which resisted release to the requester.
29. The Appeal Panel distinguished between the event itself and the information recorded about the event. Although the event occurred in a publicly accessible place, privacy protections still apply to recorded information about the event.
30. The Appeal Panel stated that dissemination of information held by regulated entities solely because the event occurred in a publicly accessible place could lead to "*striking results*."⁷
31. The Privacy Commissioner commends the regulated entity for responding promptly after it became aware of the matter and starting the development of an amended document to be used in future events. Under the assistance functions in section 36 of the PPIP Act the

Privacy Commissioner is currently assisting the entity to develop guidance to its decision makers and a new Notice, to ensure that its future practices remain within the legislated informational norms in the privacy legislation.

32. The privacy rights of the community create obligations on organisations that invite the public to events to ensure that:
 - a. They do not collect personal information about attendees that is not reasonably necessary for the performance of functions associated with the event;
 - b. They collect and publish personal information that relates to advertising of future events only with the consent of attendees; and
 - c. They have policy documents in place that give clear guidance to their staff as to how to announce the fact that photographs or video will be taken and make space available in the venue for attendees who may not wish their image to be recorded.

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⁶ Inner West Council, "Inner West Council Meeting Live Streams Next Week" (Media Releases – 30/11/16 – Available at: www.innerwest.nsw.gov.au)

⁷ *Commissioner of Police, NSW Police Force v Field* [2016] NSWCATAP 59, [66]