

Impact of COVID-19 on privacy obligations of agencies

Public sector agencies are required to comply with the information protection principles and health privacy principles when handling personal and health information. Familiarity with the application of these principles will assist agencies to continue to operate during the COVID-19 pandemic without breaching privacy.

KEY POINTS

- ▶ An agency's handling of personal or health information relating to the COVID-19 pandemic must comply with the *Privacy and Personal Information Protection Act 1998* ("the *PPIP Act*") and the *Health Records and Information Privacy Act 2002* ("the *HRIP Act*"). Agencies should consider what steps they can take now to minimise the risk of breaches of privacy in light of the pandemic.
- ▶ On 25 March 2020, agencies were authorised to exchange personal and health information where necessary for the purposes of protecting the health or welfare of members of the public during the COVID-19 pandemic: *Public Health (COVID-19 Gatherings) Order (No 2) 2020*, cl. 8.
- ▶ Other circumstances where the use or disclosure of such information will be lawful include where it is necessary to prevent or lessen a serious and imminent threat to a person's life or health or if the use or disclosure is necessarily implied or reasonably contemplated under another law, such as the *Work Health and Safety Act 2011* ("the *WHS Act*").

Keep privacy obligations in mind

Privacy obligations continue to apply during the pandemic. Generally, personal and health information can only be collected where reasonably necessary for a lawful purpose, collection must not be unreasonably intrusive and the information must be collected from the individual to whom it relates. There are limits on when personal and health information can be used or disclosed to another person or body. Privacy obligations continue to apply in the case of information about recently deceased persons.

Agencies that do not routinely deal with health information should be aware that the health privacy principles in the *HRIP Act* differ from the information protection principles in the *PPIP Act*. For example, an agency can collect health information (but not personal information) from a third party if it is unreasonable or impracticable to collect it from the individual concerned. Privacy notice requirements also differ between the two regimes.

The *PPIP Act* and *HRIP Act* only apply to information or an opinion about an individual whose identity is apparent or is reasonably ascertainable from the information or opinion. If information about individual cases of COVID-19 is sufficiently de-identified, it will not constitute personal or health information and can be shared without further consideration of the *PPIP Act* or the *HRIP Act*.

There are special provisions that govern the provision of personal or health information to someone outside NSW or to a Commonwealth agency: *PPIP Act*, s. 19(2) and *HRIP Act*, Sch. 1, cl. 14. These may be relevant if an agency is asked to share information with a person outside NSW as part of the response to the COVID-19 pandemic.

COVID-19 order authorising exchange with other agencies to protect health or welfare

On 25 March 2020, the Minister for Health and Medical Research made the *Public Health (COVID-19 Gatherings) Order (No 2) 2020*, an order under s. 7 of the *Public Health Act 2010*. It authorises government sector agencies to exchange personal or health information with other government sector agencies if necessary for the purposes of protecting the health or welfare of members of the public during the COVID-19 pandemic: cl. 8.

Relevant exceptions and exemptions

The main exceptions and exemptions of assistance to agencies dealing with COVID-19 related personal and health information are:

- Section 25 of the *PPIP Act* and Sch. 1, cl. 10(2) and 11(2) of the *HRIP Act*, which allow agencies to use or disclose personal or health information where this is lawfully authorised or permitted, necessarily implied or reasonably contemplated under an Act or any other law. Examples include:

- Disclosure to another agency in accordance with cl. 8 of the *Public Health (COVID-19 Gatherings) Order (No 2) 2020*, referred to above, or any forthcoming orders made under s. 7 of the Public Health Act (or s. 8 of the *Public Health Act*, should a state of emergency be declared), and
- Action taken to ensure the health and safety of workers and other persons at work, including the provision of information necessary to protect workers and others from risks to their health and safety, under s. 19 of the *Work Health and Safety Act*.
- Sections 17(c) and 18(1)(c) of the *PPIP Act* and Sch. 1, cl. 10(1)(c) and 11(1)(c) of the *HRIP Act*, which allow agencies to use or disclose information where necessary to prevent or lessen a serious and imminent threat to a person's life or health. Health information can also be used or disclosed where necessary to prevent or lessen a serious threat to public health or public safety. These exemptions may assist in circumstances where the authorisation under cl. 8 of the *Public Health (COVID-19 Gatherings) Order (No 2) 2020* does not apply (for example, where it is proposed to provide information to an individual, not another agency).
- Section 27A of the *PPIP Act*, which allows for the exchange of information between agencies in order to refer inquiries between the agencies concerned or to respond to correspondence from Ministers or members of Parliament. There is no direct equivalent for health information.

For example, an agency may need to consider whether to share information such as whether a particular person has been exposed to COVID-19 or has travelled recently. This will not be in breach of privacy provided it is genuinely done for the purpose of complying with the *WHS Act*: *PN v Department of Education & Training* [2010] NSWADTAP 59 at [54] to [59]; *Department of Education and Communities v VK* [2011] NSWADTAP 61 at [14]-[16]. However, to minimise the risk of a person bringing proceedings for breach of privacy, agencies should share such information only on a need-to-know basis, and should consider whether it is possible to address the health risk without disclosing information that identifies the individual involved or asking the

individual if he or she consents to the information being shared. If it is necessary to share personal or health information, agencies should state that it is being done in accordance with obligations under the *WHS Act*, so that it is clear what alternative law the agency relies on for the purpose of the exemption in the privacy legislation.

Take steps to avoid breaches of privacy

There are a number of steps that agencies can take now to minimise exposure to proceedings for breach of privacy.

- Agencies are required to keep personal and health information secure and protect it from misuse: *PPIP Act*, s. 12(c) and *HRIP Act*, Sch. 1, cl. 5(1)(c). If staff are working from home, security safeguards should be similar to those applying to usual places of work.
- Personal and health information can be used for the purposes for which they are collected. Consider amending privacy notices and consent forms if you think that you may need to use COVID-19 related information for a purpose that is not specified on your current forms.
- Consider what information may need to be collected, used or disclosed in the event that there is a case of COVID-19 in the workplace.
- Seek external advice where appropriate. For example, you may need specialist health advice to decide whether disclosure of a person's health information is necessary for the purposes of protecting the health or welfare of members of the public, or specialist IT advice to assess whether remote access and other work from home arrangements are sufficient to comply with legal obligations.

Privacy directions and urgent circumstances

In urgent circumstances, an agency may wish to consider asking the Privacy Commissioner to make directions modifying the application of an information protection principle or health privacy principle to the agency: *PPIP Act*, s. 41 and *HRIP Act*, s. 62. This would enable the agency to handle information in a way that would otherwise be in breach of privacy.

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