

submission

Submission by Privacy NSW
to the

**Australian Government Discussion Paper on
Information Privacy and Employee Records**



privacy**nsw**

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Views expressed in this submission

Privacy NSW is the Office of the NSW Privacy Commissioner. The Privacy Commissioner is the holder of an independent statutory office, created under the Privacy and Personal Information Protection Act 1998.

The functions of the Privacy Commissioner include making public statements about any matter relating to the privacy of individuals generally, and publishing reports and recommendations about any matter that concerns the need for, or the desirability of, legislative, administrative or other action in the interest of the privacy of individuals.

This submission reflects the views of the NSW Privacy Commissioner. It does not reflect the views of the NSW Government.

Introduction

A respect for individual privacy has increasingly come to be seen as a necessary precondition for the operation of a democratic society. Privacy seeks to minimise the kind of assaults on individual autonomy and dignity that arise as a consequence of unequal access to personal information. Employment remains a significant area of potential privacy abuse because of the important role that employment plays in people's lives and the imbalances in power and access to information that often characterise the employment relationship.

Our experience of employment privacy

Under the Privacy and Personal Information Protection Act 1998 (the PPIP Act), the NSW Privacy Commissioner can receive complaints about alleged violations of or interferences with privacy, not limited to conduct of the NSW public sector. The functions of the Privacy Commissioner include providing advice on matters relating to the protection of personal information and the privacy of individuals and to conduct inquiries into privacy related matters. In accordance with these provisions we recognise that a person's privacy can be breached even though there is no breach of relevant information privacy legislation. We can therefore deal with complaints and issues raised by employees or ex-employees about their privacy including matters that are excluded from the Privacy Act by the employee record exemption and other exemptions such as the small business exemption.

In 2002-2003 we recorded 2,848 inquiries. 207 inquiries (7.3%) related to employment records. 298 (10.5%) related to surveillance and physical privacy often in relation to employment issues such as workplace video surveillance. In the same period we received 180 formal complaints. 45% of these were against private and

non-Government organisations. 20 complaints involved employment records and 35 involved surveillance and physical privacy issues.

Because inquiries come from employers and employees in both the public and private sectors and do not necessarily involve a complaint, these figures can not give a clear indication of the proportion of individuals aggrieved by workplace privacy issues. We do not suggest that these numbers reflect the full scale of concern in the community owing to limited awareness of the existence or operation of privacy laws and agencies.¹ However in responding to inquiries both before and after the commencement of the Privacy Amendment (Private Sector) Act, we have gathered a body of information in relation to workplace privacy issues that is relevant to the issues raised in the Discussion Paper.

Case Studies

It is useful to discuss a number of the privacy issues that arise in relation to employment records. Some of these are broadly applicable across the area of public and private sector employment. Others are more atypical and could be characterised as a departure from best practice in human resource management. Each of these areas is characterised by a significant level of uncertainty as to legal requirements and acceptable practice because of the absence of privacy regulation or uncertainty as to the scope of existing exemptions.

1. Monitoring employee email and Internet use

Many employees expect that their email communications will be protected and are surprised at the limited and uncertain scope of existing legal protection. This extends not only to the practice of monitoring email for offensive or improper content, but also to the use that management make of information obtained through monitoring. The ease of communication provided by email means that individuals use it for a range of functions that are not strictly work related. Some of these functions are ancillary to work, for example maintaining social contacts with clients and colleagues. Others reflect the reasonable communication needs of people who spend a lot of time at work, or have the use of an employer-provided home account.

The personal nature of email often makes it difficult to make a clear distinction between records relating to an employment relationship and other information disclosed through monitoring. Also there are two parties to email communication. Email policies often purport to treat incoming emails in the same way as internal or outgoing messages. Although employers may rely on the employee record exemption to authorise monitoring, they may collect personal information about parties that are not employees.

¹ Roy Morgan Research (1994) *Privacy Act Survey; Prepared for the Human Rights and Equal Opportunity Commission*, pages 28-39; (2001) *Privacy and the Community July 2001: Prepared for Office of the Federal Privacy Commissioner*, paragraphs 4.18-4.20

The Federal Privacy Commissioner's 2000 *Guidelines on Workplace Email Web Browsing and Privacy* reflected the legal position immediately before the Privacy Amendment (Private Sector) Act came into force. The Guidelines referred to the proposed employee record exemption in the amendments. The uncertainty as to the scope of the exemption was reflected in the Commissioner's recommendations. The Guidelines said little about protection of communications, but rather emphasised the need for clear policies covering acceptable use of email and informing how this would be enforced through monitoring.

2. Seeking information from previous employers who are not nominated referees

The giving and receiving of references from previous employers is essential to the employee selection process. As a matter of general principle we would certainly not discourage the practice or dispute the need for a degree of confidentiality to allow frank and candid assessments to be given. However it is generally accepted human resources best practice to limit inquiries to the manager or supervisor nominated by the applicant. Our phone inquiries suggest a reasonably widespread problem of former employers giving unfavourable references that are allegedly unsolicited, inaccurate, based on personal dislike, contrary to what was agreed when the individual resigned or intended to prevent the applicant gaining employment in a particular sector.

In theory an aggrieved party may have a legal remedy where affected by a negligent reference. In practice the absence of any privacy protection for information relating to the former employment relationship makes it extremely difficult for most people to establish the basis for seeking such a remedy. As with other employment related privacy issues, the aggrieved party has little or no means of establishing how their information has been used in the absence of specific rights.

3. Collecting and disclosing information about prior workers compensation claims, criminal records, health etc.

The basic objection to the way in which these kinds of information are collected by new employers, or disclosed by former employers is that they tacitly permit various kinds of discrimination, but in such a way that the employer can not be proved to have breached anti-discrimination laws. If covered by privacy legislation the dissemination of such information would often amount to unnecessary or unlawful collection or unauthorised disclosure.

Obtaining information about previous workers compensation claims from former employers without consent may involve a breach of secrecy provisions in workers compensation legislation. A number of state awards require employees to disclose prior claims to ensure the proper management of any subsequent claims. This can be done in a way that avoids the potential for discrimination and lack of accountability.

Spent conviction legislation supposedly protects workers against being required to disclose old minor convictions or charges that have been disposed of without conviction. Some employers pose questions about a previous record in a way that conceals the entitlement to rely on a conviction being spent. Commonwealth Human Rights legislation recognises discrimination on the basis of a criminal record. Such discrimination applies when an employer gives undue weight to a minor conviction. Laws that impose screening for child related employment have modified these protections in some respects.

The lack of privacy safeguards surrounding the way in which criminal record information is solicited and used increases the likelihood of discrimination and provides inadequate protection for sensitive personal information that results from criminal record checking. This is not merely an issue for employment selection, which falls outside the current employee record exemption. It potentially affects checks conducted in the course of employment and disclosure by ex-employees of records that have become spent since they were originally acquired.

Similar issues arise in relation to the collection of health information. We recently had a call from the parent of a teenage girl about her employer in a fast food shop requiring her to complete a form giving intimate details about her health. She had already started the job. The details sought were so personal and so lacking in obvious justification as to raise concerns in the mind of the officer taking the call that the information amounted to or was sought as a preliminary step to sexual harassment.

4. Drug and alcohol testing

There has been a recent expansion of drug testing in both public and private sector employment. Testing is no longer limited to risky occupations or in a way that measures current impairment. Testing for use of prohibited drugs blurs the borders between workplace safety, private life and functions normally associated with law enforcement.

More sophisticated forms of drug testing often require employees to declare current medical conditions and prescribed medication that could affect test results. This involves an ancillary collection of personal health information that is also excluded from privacy protection, both under the Privacy Act and the yet to be commenced NSW health privacy legislation. Employees we have spoken to have expressed concern about the confidentiality of this information.

Best practice in drug testing involves specifying which drugs are to be tested for, cut-off levels before a person is deemed to have failed a test, confidential sampling and reporting, and the provision of rehabilitation. The provisions of privacy laws that emphasise fair and lawful collection for specific purposes, limited and secure retention, and ensuring accuracy before use would provide a framework in which employers could be made

accountable for maintaining best practice standards. This is similar to the arguments referred to in the Discussion Paper for privacy laws to cover DNA testing in employment.

5. Details of sick leave

While it is legitimate for employers to expect employees to provide a satisfactory explanation for repeated or prolonged sick leave absences, we have noted a number of instances where the process is complicated by other factors. These can include the extremely sensitive nature of the condition for which leave was applied, a lack of trust in the capacity of the employer's representative to maintain the confidentiality of this information, or gratuitously providing details of sick leave in performance tables for staff across a workplace. The lack of an appropriate privacy framework makes it difficult to advise employees in relation to such practices even when they contravene widely expected privacy assumptions.

These examples serve to illustrate the way in which a basic privacy framework for employee records could address concerns that go to the heart of people's expectations of privacy. They also suggest that the distinction between employment records and pre-employment records is somewhat artificial, given that records of previous employment are likely to be used to determine suitability for employment, and some practices associated with employment selection also take place after a person has been employed.

The effect of the exemption

In an earlier submission on the Privacy Amendment (Private Sector) Act the then NSW Privacy Commissioner warned against the effect that exemptions for specific groups or classes of information would have on the capacity of that Act to confer realistic privacy benefits. In our experience this has been borne out by the operation of the Act. Inquirers understandably consider their own privacy as a single issue and are confused by the fact that they may need to pursue different remedies depending on whether they are dealing with an employer, a retail store a service provider or a different branch of Government, or that they may have no remedies at all.

The problem is compounded by the fact that information, by its general nature flows in and out of different organisations covered by different laws. The way in which privacy laws apply to personal information means they are often ill equipped to deal with the changing contexts in which information is held.

In some contexts uneven legal coverage is an inevitable consequence of our federal system. Yet there is increasing recognition of the need to overcome the obstacles that federalism poses for activities based on national and global information flows. Exemptions like that for employee records simply compound the problem.

Paragraph 2.8-9 of the Guidelines suggests a neat distinction between use of records in an employment context and other non-exempted uses. In practice the distinction is often much less certain, when applied to such broad categories as 'acts

and practices' in relation to 'performance and conduct'. For instance how should the exemption be applied to records arising through workplace monitoring and surveillance? A case in point would be where bus drivers are taped ostensibly in case of incidents they may be involved in, but tapes are then used for range of less immediately related purposes such as workers compensation claims. More intensive use of employee information in the interests of knowledge management could also be seen as largely unregulated.

Any suggestion that employee privacy is currently adequately covered by employment and industrial relations legislation is largely unsustainable. Provisions under Part 9A of the Workplace Relations Regulations 1996 only apply to a restricted definition of employment record which is largely concerned with period of employment, entitlements and the manner in which employment was terminated. Employees have the right to access, copy and seek correction of errors in their record, but there is no protection against improper disclosure of the prescribed information. Nor is there any protection against collecting, storing or using non-prescribed information in a form that is inconsistent with other National Privacy Principles (NPPs).

The statement in paragraph 3.4 that employees would have remedies under other legislation, for example where listening devices are illegally used to intercept telephone calls, illustrates a further weakness in the general argument that employee privacy is covered under other legislation. Privacy laws often depend on the existence of other laws to define the parameters of legally acceptable forms of information processing. Privacy offers a practical remedy where the offence provisions under alternative legislation are often difficult to invoke given the higher standard of evidence required.

Employers who comply with section 6(2) of the Telecommunications Interception Act are largely exempt from telephone interception offences. The application of the interception legislation to employee email is also less certain than paragraph 3.62 of the Discussion Paper suggests. If non-compliance with these provisions involves a breach of state listening devices legislation, the only remedy is dependant on a public prosecution. Under section 28 of the Listening Devices Act 1984 (NSW) a prosecution can only be launched with the approval of the Attorney General.

Employees seeking to exercise alternative civil remedies such as defamation or breach of confidentiality, face a different set of hurdles that include cost, the absence of non-damage based remedies, disruption to the employment relationship and the onerous evidential requirements of the court system.

Health Records

The NSW Health Records and Information Privacy Act (HRIPA) adopted the employee record exemption for private sector organisations otherwise covered by the Act along with the exemption under section 4(3)(j) of the PPIP Act for information about an individual's suitability for public sector employment in relation to public sector organisations. This creates different (and conflicting) standards for the public

and private sector. However the inclusion of both exemptions on the grounds of consistency with existing legislation is problematic in itself.

In 2002 the NSW Privacy Commissioner released a position paper on the proposed HRIPA which stated as follows:

Employment records

I disagree in principle with the exclusion (from the definition of 'personal information') in s.5(m) and (n) for "employee records" (with respect to the private sector) and "information or an opinion about an individual's suitability for appointment or employment as a public sector official" (with respect to the public sector).

While I note that this is consistent with current NSW and Federal laws (that is, the PPIP Act excludes "information or an opinion about an individual's suitability for appointment or employment as a public sector official"; the Federal Privacy Act excludes "employee records"), I note that no issue of Constitutional inconsistency is raised should the HRIP Bill not include these exemptions. As I understand it, the rationale behind these two exemptions is so as not to introduce an "unreasonable impost on business".

I do not find this a persuasive argument in favour of a scheme which fails to protect health information held by employers, given the very sensitive nature of health information and its possible misuse in the employment context.

This failure to protect particularly vulnerable people is a great disappointment to me. All employers should be obliged to treat health information they hold about an employee (such as the nature of a disability, their history of illnesses and other reasons for sick leave) in accordance with the HPPs. A failure to do so may in any event render the employer liable to allegations of disability discrimination under s.49D of the Anti-Discrimination Act 1977.

*The very first judgment from the Administrative Decisions Tribunal under the PPIP Act turned on the scope of the exclusion provided to "information or an opinion about an individual's suitability for appointment or employment as a public sector official". In *Y v Director General, Department of Education & Training* [2001] NSWADT 149, President Kevin O'Connor found that such information need not be limited to selection, promotion, disciplinary or involuntary retirement processes [para 34]. It could include management reviews of work practices, work arrangements, and performance [para 35].*

This judgment highlighted the very wide scope of the current exemption under the PPIP Act, and my belief that the exemption is inappropriate extends now to the HRIP Bill as well as the PPIP Act.

Under the current review of the PPIP Act we are also recommending a review and clarification of the section 4(3)(j) exemption.

Options

Paragraphs 4.17 to 4.23 discuss non-legislative measures to ensure privacy protection for employee records. Many of these proposals would simply reinforce existing best practice on human resource management and as such fail to address the real problem of those employers or managers whose conduct falls short of best practice.

The proposal in paragraphs 4.26 to 4.28 to narrow the scope of the exemption together with the options canvassed in paragraphs 4.1 to 4.7 look to an amelioration of the less desirable consequences of the employee record exemption while otherwise maintaining the scope of the exemption. In view of the general criticisms we have expressed about the confusing nature of exemptions, this approach will only serve to further complicate an already unsatisfactory situation.

The proposal in paragraphs 4.29 to 4.31 to apply the NPPs selectively to employee records is open to similar objections, that it would complicate the process of complying with privacy principles and be contrary to the reasonable expectation of employees.

The final four options canvas special purpose privacy protection for employee records, either through amendment of Workplace Relations legislation, or agreements made under that legislation, or by additional legislation with the potential to cover employees who are not under the Commonwealth industrial relations system. We do not have any in principle objection to such proposals, which could be made to meet what we have identified as a current need for a comprehensive privacy framework for employee records. However there may still be problems with this approach.

The jurisdictional split between Federal and State industrial relations jurisdictions means that coverage is still likely to be uneven. A special purpose privacy regime for private sector employment may be more likely to conflict with state laws designed to regulate various forms of employment surveillance, for example the Workplace Video Surveillance Act 1998 (NSW), Listening Devices Act 1984 (NSW) or workplace surveillance legislation recently announced by the NSW Attorney General. Specific employment privacy legislation would also raise the issue of small business coverage. It would be arguably inequitable to extend the current small business exemption to such an Act. As a broad generalisation, our complaints and inquiries suggest that privacy breaches are just as common among small business employers.

Our preferred approach would be either to narrow the scope of the exemption so that it served to facilitate practices which are necessary to employment, such as the giving of references and managing performance and discipline, or to modify the provisions in the NPPs to achieve a similar effect by specifying exemptions which apply to the more common employment practices.