



Our reference: D2017/001301

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Secretary, Department of the Prime Minister and Cabinet
PO Box 6500
CANBERRA ACT 2600

Dear Secretary

Request for PM&C to develop an APS privacy code

As you may be aware, the *Privacy Act 1988* (Cth) (Privacy Act) enables the Australian Information Commissioner to request the development of a privacy code where they are satisfied that it is in the public interest to do so.¹ While the Privacy Act empowers the Commissioner to develop a code on their own initiative, in the first instance I am formally required to nominate an APP entity as the relevant code developer, and give that entity the opportunity to develop the code itself.

In this regard, I am writing to request that the Department of the Prime Minister and Cabinet (PM&C) develop an Australian Public Service (APS) privacy code. More particularly, I am requesting PM&C to draft a code that:

- applies to Australian government agencies covered by the Privacy Act, and
- addresses those agencies' obligations under Australian Privacy Principle (APP) 1.2 by requiring the adoption of effective privacy governance measures.

I have set out some further information for you below about the request, including the reasons why I believe the development of a privacy code is in the public interest and why I believe my Office is well placed to develop that code. In summary, I believe that the code will symbolise the APS's commitment to the protection of privacy, and build public trust and confidence in the Australian Government's information-handling practices and proposed new uses of data.

Further specifics of the code are set out in the attached formal request, which I am required to make publically available as soon as practicable.² I would appreciate your response to the request as soon as possible.

¹ See s 26E of the Privacy Act. More broadly, Part IIIB of the Privacy Act sets out the requirements for the development and registration of APP codes.

² As per s 26F(7) of the Privacy Act.

PM&C as the code developer

Your Department is recognised as a strong supporter of privacy-enhancing initiatives. This has been particularly evident through the lead role PM&C plays in the implementation of the Prime Minister's *Public Data Policy Statement*,³ committing to uphold the highest standards of security and privacy for the individual. This also aligns with PM&C's responsibility for fostering a high performing public sector. For these reasons, in accordance with the technical requirements of Part IIIB of the Privacy Act, I have nominated PM&C to act on behalf of all APS agencies as the code developer.

Having said that, I am mindful that the development of the proposed privacy code will require specific privacy expertise and experience that my Office may be uniquely placed to provide. For this reason, while I know that you would strongly support development of the code as an initiative that supports the Australian Government's commitment to upholding privacy, I am also aware that you may be minded to decline my request to develop the code, preferring to support its development and implementation by my Office. Should this be the case, I would be pleased to act as the code developer.⁴ In doing so, I would seek close engagement with your Department. I would also ensure that the broader APS is consulted appropriately throughout the development process and would welcome opportunities your Department could provide to facilitate this.

As your Department has consistently advocated for the protection of privacy as part of its ongoing work on the Public Data Policy agenda, I am confident that you will lend your support to this initiative, and assist by providing the cultural leadership that will be necessary for successful implementation of the code. In this regard, I believe that the code will be a key privacy protection mechanism which will help to facilitate the success of the Australian Government's broader data, cyber and innovation agendas.

Enhancing privacy capability across the APS

There are a number of key factors and policy drivers that have informed my decision to propose the development of an APS-wide privacy code. As you would be aware, a number of policy developments demonstrate the increasing centrality of personal information to all aspects of government activity and policy-making. In particular, there is a growing emphasis on maximising the utility of government data, and ensuring that data can be shared efficiently and effectively.

Some of these key developments include:

- The Australian Government's data innovation agenda, as outlined in its *Public Data Policy Statement*, which seeks to optimise the use and reuse of public data; to release non-sensitive data as open by default; and to collaborate with the private and research sectors to extend the value of public data for the benefit of the Australian public.

³ Available on PM&C's website, at: <https://www.PM&C.gov.au/resource-centre/data/australian-government-public-data-policy-statement>.

⁴ As I am empowered to do under s 26G of the Privacy Act.

- The broader work of the Australian Government, and particularly the new Digital Transformation Agency (DTA), to move to a 'digital first' service delivery model. As part of this, the DTA is implementing wide scale change in digital capability across government departments, with the aim of benefiting the public and other users of government services.
- The Open Government Partnership, which aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. In particular, commitment 2.2 in the Government's National Action Plan proposes to build and maintain public trust to address concerns about data sharing. A key milestone is to 'work with the Office of the Australian Information Commissioner to improve privacy risk management capability across the Australian Public Service'.
- The Productivity Commission's Data Availability and Use Draft Report, which recommends the creation of a new framework to facilitate data sharing and access. The central component of this new framework would be a 'Data Sharing and Release Act' that will apply across Australia to all digital data.⁵
- The Office of the Cyber Security Special Adviser's *Review of the Events Surrounding the 2016 eCensus* (the MacGibbon Review), which noted the OAIC's recommendation for an APS-wide privacy code to 'assure Australians that privacy is a key consideration in the planning and execution of government projects'.
- The EU's *General Data Protection Regulation* (GDPR), which will enter into force in 2018. The GDPR will have a significant impact on Australian business, as organisations will have to comply with obligations under the GDPR, for example, if they want to provide goods or services in the EU. There may also be regulatory implications for Australian Government agencies. A privacy code would therefore assist APS agencies to prepare for the introduction of the GDPR, and allow the APS to show leadership in the Australian context against the backdrop of a global shift towards greater accountability for privacy matters.

I believe that together, these factors underline the existence of a strong need for APS agencies to enhance their existing privacy capability to enable them to better prepare for (and address) contemporary privacy issues. Given the range of new policy proposals which seek to expand uses of (and access to) personal information held by government, in my view the APS first needs to take steps to build public trust and confidence in the ability of the APS to implement its agenda consistent with community expectations, and in a way that respects privacy.

Against this background, it is particularly important to remember that many APS agencies have powers to collect personal information on a compulsory basis, in exchange for the

⁵ Further consideration may need to be given to the interaction between the Productivity Commission's *proposed Data Sharing and Release Act* and the Privacy Act. However, I do not consider that the Productivity Commission's agenda is incompatible with progressing the code. On the contrary, I believe that now is the right time to be addressing these matters, at a stage when privacy can be considered meaningfully during the design and implementation phase of any proposed reforms.

provision of services and payments. This means that in a practical sense, individuals are not always able to exercise meaningful choice over how their personal information is used.

Finally, a number of Australian Government agencies have been involved in several high profile privacy incidents in recent times. While these have been the result of a range of circumstances, through my Office's subsequent involvement in them, I have formed the view that there is a need to strengthen the overall privacy governance processes within APS agencies. I believe that if this is not done, there is a risk that the community may lose trust in the ability of government to deliver on key projects which involve the use of personal information.

The public interest in a privacy code

In light of all of these contextual factors, I believe there is a clear and demonstrable need for APS agencies to move beyond a focus on mere compliance with the APPs, towards a best practice approach to privacy governance. In particular, APS agencies need to be prepared for the numerous modern privacy challenges that lie ahead.

In my view, there is also an urgent need for the Australian Government to build a social licence for its uses of data, particularly in the current context where there are plans to increase data use and availability, and increasingly to make data 'open' by default. A social licence for data use is built on a number of elements. It is important for agencies to be transparent about their practices, so that individuals understand how government intends to use their personal information. Further, the broader community must believe that the uses of data which are permitted are valuable and reasonable, considering the relevant circumstances.

The proposed privacy code would facilitate the building of a social licence for the Australian Government's current and future uses of data, by ensuring that Agencies are implementing the practices, procedures and systems required under APP 1.2 to ensure effective privacy governance. Importantly, the effective implementation of APP 1.2 via the proposed privacy code will also help to build greater transparency, and to foster an APS-wide culture of respect for privacy and the value of personal information.

I therefore consider that the development of an APS-wide privacy code is in the public interest.

What the privacy code should contain

The privacy code will make explicit how all APS agencies are to meet their obligations under APP 1.2. This APP relates to the implementation of reasonable practices, procedures and systems to ensure that an entity complies with the APPs, and to enable it to deal with privacy-related inquiries and complaints.

The proposed privacy code would not create additional obligations per se. Instead, it would set out the key practical steps that I expect agencies to take in order to comply with APP 1.2. As outlined in the attachment, I believe that the proposed code should require all agencies to take the following practical steps:

- have a privacy management plan
- appoint a dedicated privacy contact officer
- appoint a senior official as a ‘Privacy Champion’ to provide cultural leadership and promote the value of personal information
- undertake written Privacy Impact Assessments (PIAs) for all ‘high risk’ projects or initiatives that involve personal information
- keep a register of all PIAs conducted and make this available to the OAIC on request, and
- take steps to enhance internal privacy capability, including by undertaking any necessary training, and conducting regular internal audits of personal information-handling practices.

At this stage, I would expect that the code would maintain the flexibility and scalability of the APPs. In addition, key concepts such as ‘Privacy Champion’ and ‘high risk projects’ should be drafted broadly.

My Office would also issue comprehensive guidance and educational materials to assist agencies to comply with the code. Your Department’s input would be invaluable and the OAIC would seek to work closely with you in developing and disseminating these resources. I would also seek your support to engage the APSC to help ensure that privacy capability and skills are built into APS learning and development offerings.

Regulatory Impact

As outlined above, the code would not create new obligations, but would instead assist agencies to meet their existing obligations by making explicit how they are to comply with APP 1.2.

As many agencies already have some of these practical measures in place, such as the Department of Immigration and Border Protection’s Privacy Management Plan, meeting the proposed requirements of the code is unlikely to be onerous. However, implementation of the code requirements across the board will be necessary to ensure a consistent level of privacy governance across the APS.

Further, the development of OAIC guidance and educational materials will not only help to enable the broader cultural change across the APS which the privacy code seeks to achieve, it will also support agencies (and particularly smaller agencies) to meet their existing obligations, creating regulatory efficiencies.

In addition, the development of a privacy code may provide an opportunity to consider whether the *Data-matching Program (Assistance and Tax) Act 1990* and the *Guidelines on Data Matching in Australian Government Administration* (the voluntary data matching guidelines produced by my Office) remain necessary. Instead, the code could regulate these activities, allowing agencies to take a more flexible, modern approach to addressing the privacy risks associated with data-matching. This would also allow agencies to take a consistent approach to privacy regulation across all their high-risk activities involving personal information.

I therefore consider that the code will not result in any overall net increase in regulation, and would likely create efficiencies.

Way forward

As stated above I would appreciate your response to the attached request as soon as possible.

I am, of course, available to discuss any aspect of this request with you personally. However, if your staff would like to discuss this letter or the request, the OAIC contacts for this matter are Ms Angelene Falk, Deputy Commissioner and Ms Melanie Drayton, Assistant Commissioner, who can be contacted on [*contact details removed*].

Yours sincerely

Timothy Pilgrim PSM
Australian Information Commissioner
Australian Privacy Commissioner

27 March 2017