



**COMMITTEE ON THE OMBUDSMAN, THE LAW ENFORCEMENT CONDUCT
COMMISSION AND THE CRIME COMMISSION**

Thursday, 2 May 2024

2023 REVIEW OF ANNUAL AND OTHER REPORTS OF OVERSIGHTED BODIES

INFORMATION AND PRIVACY COMMISSION NSW

ANSWERS TO QUESTIONS TAKEN ON NOTICE

Sonia Minutillo – Acting Privacy Commissioner

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QUESTION:

Are either of you aware of the Department of Communities and Justice AI research project in relation to out-of-home care?

ANSWER:

The Acting Privacy Commissioner understands that the Artificial Intelligence (AI) research project referred to by the committee is the 'Tools of Intelligent Practice'. The Acting Privacy Commissioner was not aware of the research project.

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QUESTION:

Did the privacy commission provide consent for the use of any health or personal information in relation to the Department of Communities and Justice AI research project in relation to out-of-home care?

ANSWER:

The Acting Privacy Commissioner understands that the Tools of Intelligent Practice is a project that was commissioned by the NSW Department of Communities and Justice for Monash University data scientists and researchers to build artificial intelligence data analytics systems that can predict when a child is at an increased risk of a negative outcome.

The Acting Privacy Commissioner's understanding is that the project was approved by Monash University Human Research Ethics Committee (HREC). The project's use of the Human Services Dataset was endorsed by the Human Services Dataset Governance Advisory Committee and approved by the Human Services Dataset Custodian on 17 March 2023.

As a HREC project it does not require the consent of the Privacy Commissioner and in which case the Privacy Commissioner did not provide consent.

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QUESTION:

What was the basis on which the decision to provide consent was made?

ANSWER:

As a HREC project it does not require the consent of the Privacy Commissioner and in which case the Privacy Commissioner did not provide consent.

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QUESTION:

Is there a requirement to disclose every time there's a request for access that health information for an ethical research purpose?

ANSWER:

Under the NSW Health Records and Information Privacy Act 2002 (HRIP Act), the Privacy Commissioner has issued legally binding [statutory guidelines](#) on the use or disclosure of health information for research purposes. Organisations seeking to use or disclose health information (without the individual's consent) must comply with the statutory guidelines if they seek to rely on the research exemption in Health Privacy Principle 10(1)(f) or 11(1)(f). The guidelines require research proposals to be submitted and reviewed by the Human Research Ethics Committee (HREC). The guideline sets out the procedure for the preparation of proposals.

Proposals are approved once the HREC determines, as set out in the guidelines, whether the public interest in the research substantially outweighs the public interest in maintaining the level of privacy otherwise afforded by the HPPs. The Privacy Commissioner does not consent to these research exemptions, with all approvals determined by HRECs.

The guidelines require HRECs to provide a compliance report to the Privacy Commissioner after 30 June each year. The compliance report identifies where HRECs have approved research proposals seeking to use or disclose personal or health information without consent, on the basis that the public interest in the research substantially outweighs the public interest in maintaining the level of privacy protection provided by the HRIP Act.

The Privacy Commissioner provides details of the compliance report in the Information and Privacy Commission's annual report. Of the 19 HRECs currently operating in NSW, all submitted compliance reports for 2022/23, covering a total of 483 research proposals. Of these research proposals, 411 (85%) used personal or health information without consent, based on the public interest value of the proposed research substantially outweighing the public interest in the protection of privacy.

The AI research project in question 'Tools of Intelligent Practice' is subject to review by the Monash Human Research Ethics Committee which is based in Victoria and therefore does not report to the IPC in accordance with the guidelines.

Rachel McCallum – Information Commissioner

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QUESTION:

Some 55 per cent of the community were aware that they have a right to access government information in 2022-23. This fell from 59 per cent in 2021-22. Could you comment on this? Why the reduction in people knowing that they can access government information through the Government Information (Public Access) Act?

ANSWER:

Over the past three periods of reporting, community awareness of the right to access government information under NSW access to information laws has remained consistent, between 55-59%. Survey respondents are engaged through a random selection of 800 NSW residents, so the variance in percentages only represents small fluctuations in numbers of respondents. The survey is designed include respondents from diverse NSW communities, including across gender and age ranges. It is not clear from the results, therefore, whether individual factors may influence levels of awareness about information access rights.

The IPC has undertaken the survey for 2024, and the outcome for this question was again that 55% of respondents were aware. The full results from this survey will be released later in 2024.

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QUESTION:

Do you think the Information and Privacy Commission is currently able to effectively deal with AI-related issues and complaints within its current powers and regulatory framework?

ANSWER:

Information access legislation in New South Wales should be updated to respond directly to current AI-related issues. In 2023, the former Information Commissioner made a submission to the NSW Parliament's Inquiry into Artificial Intelligence proposing specific amendments to legislation to address the risks to information access rights and open government arising from AI and automated decision-making. These amendments would protect information access rights more effectively and could be made separately from any other legislation or other framework that may be introduced to regulate or manage AI technology and its uses. In particular, the following amendments to the *Government Information (Public Access) Act 2009* and Regulation have been proposed:

- mandatory proactive disclosure of the use of AI and automated decision-making by agencies through its inclusion as open access information in Agency Information Guides
- annual reporting of AI-related open access information to the Information Commissioner
- expanded information access rights and obligations where government decisions are automated or augmented through the use of technology services (including AI) being supplied to government agencies by third parties

- specifying AI use and the automation of decision-making as factors in favour of the disclosure of government information, to avoid an asymmetry with existing factors against disclosure that protect business interests of agencies and third-party suppliers

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QUESTION:

Just in terms of retention rates of staff, what do we know about that?

ANSWER:

Over the past three financial years the retention rates for the Information and Privacy Commission (IPC) have been relatively stable being 69% in 2020/21, 73% in 2021/22 and 69% in 2022/23.