

EXPLANATORY STATEMENT

Issued by the authority of the Australian Information Commissioner (Commissioner) under the *Privacy Act 1988* (Privacy Act).

Privacy (Australian Honours System) Temporary Public Interest Determination 2018

This explanatory statement relates to the *Privacy (Australian Honours System) Temporary Public Interest Determination 2018* (TPID 2018).

This explanatory statement fulfils the Commissioner's obligations under subsection 15G(4) of the *Legislation Act 2003* (the Legislation Act).

Authority for the making of TPID 2018

The Commissioner is empowered by subsection 80A(2) of the Privacy Act to make TPID 2018.

Under subsection 73(1) of the Privacy Act, an APP entity may apply to the Commissioner for a public interest determination under section 72 in relation to an act or practice of that entity. The Commissioner received such an application from the Department of Home Affairs (the Applicant) on 6 March 2018.

Where the application raises issues that require an urgent decision, a temporary public interest determination (TPID) can be made by legislative instrument under subsection 80A(2). The Commissioner may make a TPID if satisfied that:

- the act or practice that is the subject of an application under section 73 for a determination under section 72 of the Privacy Act breaches or may breach an Australian Privacy Principle (APP);
- the public interest in the entity doing the act or engaging in the practice substantially outweighs the public interest in adhering to the APP in question; and
- the application raises issues that require an urgent decision.

The Applicant's application can be viewed on the Register of Public Interest Determinations on the Office of the Australian Information Commissioner's (OAIC) website, www.oaic.gov.au.

Purpose of TPID 2018

The purpose of TPID 2018 is to permit the Applicant to disclose limited personal information to the Office of the Official Secretary to the Governor-General (OOSGG) and the Department of the Prime Minister and Cabinet (PM&C) without breaching APP 6.1 and section 15 of the Privacy Act.

Specifically, TPID 2018 will ensure that the Applicant is taken not to breach APP 6.1 and section 15 when disclosing specified personal information to the OOSGG and PM&C for the purpose of verifying the Australian citizenship or permanent residency status of individuals who are the subjects of:

- a) nominations for membership or honorary membership of the Order of Australia;

- b) applications for approval for the acceptance and wearing of foreign awards; and
- c) consideration for other awards in the Australian honours system.

APP 6.1 limits the circumstances when the Applicant may use or disclose personal information. Section 15 of the Privacy Act provides that the Applicant must not do an act or engage in a practice that breaches an APP.

Application for a public interest determination

The Applicant's application indicated a concern that, in the absence of a public interest determination, the Applicant may breach APP 6.1 and section 15 of the Privacy Act when disclosing information about Australian citizenship and permanent resident status to OOSGG and PM&C.

The application provided an overview of how the administration of the Australian honours system is conducted. Australian citizens may be recognised through membership of the Order of Australia, while non-citizens (including permanent residents) may be recognised through honorary membership of the Order. A person may become a member or honorary member of the Order through appointment to the Order or the award of the Medal of the Order. Nominations for Australian honours awards are administered by the staff of the OOSGG and staff in the Government Division of PM&C.

Up until September 2016, OOSGG administered all nominations of Australian citizens for membership of the Order (on behalf of the Council for the Order of Australia (the Council)), whilst staff from PM&C administered all nominations of non-citizens (including permanent residents) on behalf of the Minister.

Due to this division in administration, OOSGG and PM&C only needed to obtain information about Australian citizenship from the Applicant. The Applicant's disclosure of Australian citizenship information is permitted under Public Interest Determination No.2 (PID No. 2) issued by the then Privacy Commissioner in 1990. PID No. 2 authorises the Applicant to disclose citizenship information to OOSGG staff and staff in the Government division of PM&C (at the time PID No. 2 was made, this role was undertaken by the Awards and National Symbols Branch of the Department of Administrative Services). PID No. 2 sunsets on 1 October 2018.

However, in September 2016, Her Majesty The Queen approved amendments to the *Constitution of the Order of Australia 1975* which allow the Council to consider nominations of persons who are permanent residents of Australia (in addition to considering nominations of Australian citizens).

With the addition of permanent residents to the class of persons who the Council can consider for membership of the Order of Australia, OOSGG and PM&C now need to obtain information about permanent resident status from the Applicant, in addition to obtaining information about Australian citizenship, so they can determine whether a nomination should be considered by the Council (for citizens and permanent residents) or the Minister (for non-

citizen, non-residents). PID No. 2 does not permit the Applicant to disclose information about permanent resident status.

The Applicant has advised that the personal information it would disclose to OOSGG and PM&C for this purpose would be limited to confirmation that:

- the nominee is an Australian citizen and the date when the nominee became an Australian citizen;
- the nominee is a permanent resident; or
- the Applicant has no record that the nominee is an Australian citizen or permanent resident.

The Applicant will not disclose information about citizenships or residencies of other nations.

Reasons for the decision to make TPID 2018

Might the disclosure of citizenship and residency particulars breach an APP?

Under APP 6.1, APP entities that hold personal information about an individual that was collected for a particular purpose (the 'primary purpose') must not use or disclose the information for another purpose, unless the individual consents to the use or disclosure, or an exception applies. Exceptions to APP 6.1 are found in APP 6.2. Where an APP 6.2 exception applies, the entity may use or disclose the personal information for another purpose (known as the 'secondary purpose').

The Applicant submitted that, in disclosing Australian citizenship and residency details to the OOSGG and PM&C, it would be unable to rely on the exceptions in APP 6.2.

Relevantly, the Applicant submitted that the disclosure of Australian citizenship and residency details for the secondary purpose of administering the Australian honours system would not be authorised under APP 6.2(a). The exception under APP 6.2(a) creates a two-limb test which focuses both on the reasonable expectations of the individual, and the relationship between the primary and secondary purposes. It permits an APP entity to use or disclose personal information for a secondary purpose if the individual would reasonably expect the entity to use or disclose the information for that secondary purpose, and:

- if the information is sensitive information, the secondary purpose is directly related to the primary purpose of collection; or
- if the information is not sensitive information, the secondary purpose is related to the primary purpose of collection.

The primary purpose for which the Applicant collects the relevant personal information is to carry out the Applicant's functions or activities associated with immigration and/or citizenship applications, and the movement of goods across the border. More specifically, the Applicant collects personal information for the purposes of managing the following programs:

- a) visa and migration;

- b) customs and excise, including the administration of certain other Australian laws including taxation, health, quarantine, commerce, criminal, intellectual property and community protection laws;
- c) refugee and humanitarian assistance;
- d) border management;
- e) visa compliance and immigration status resolution;
- f) immigration detention, removal or transfer to a Regional Processing Centre (including service providers and foreign authorities in support of offshore processing, such as law enforcement, the provision of welfare services and settlement); and
- g) citizenship.

In order to rely on the APP 6.2(a) exception, the use or disclosure must also be 'related', or for sensitive information 'directly related', to the primary purpose of collection. A related secondary purpose requires more than a tenuous link, while a 'directly related' purpose is one that is closely associated with the primary purpose. The Applicant submitted that the disclosure of the personal information for consideration under the Australian honours system is not 'related' or 'directly related' to the primary purposes of the collection of information, which are outlined above.

Further, the OAIC's APP guidelines outline requirements of the APPs and how the OAIC will interpret them. Chapter 6 of the APP guidelines states that the 'reasonably expects' test is an objective one that has regard to what a reasonable person, who is properly informed, would expect in the circumstances. For instance, the APP guidelines provide that an example of where an individual may reasonably expect their personal information to be used or disclosed for a secondary purpose is where the entity has notified the individual of the particular secondary purpose under APP 5.1.¹ Under APP 5.1, an entity must take reasonable steps to notify the individual of certain matters when their personal information is collected.

The Applicant submitted that it is unlikely that individuals would 'reasonably expect' that their personal information might subsequently be disclosed for the purposes of the Australian honours system. In particular, the Applicant noted that neither the Applicant's application forms for citizenship and residency, nor the related APP 5 privacy notices, outline the potential disclosure of personal information for the purposes of the Australian honours system. In addition, many nominees became Australian citizens or permanent residents prior to the introduction of the Department's current notices.

Compliance with APP 6.1 not practicable

As the Applicant cannot rely on any of the APP 6.2 exceptions, the Applicant would need to comply with APP 6.1 when disclosing the Australian citizenship and residency information.

¹ APP Guidelines, paragraph 6.22. Available on the OAIC's website at: www.oaic.gov.au.

The Applicant submitted that it is not appropriate or practicable to obtain consent from the individual nominees. If a TPID was not in place and the current PID ceased, the Applicant would be required to obtain a nominee's consent before disclosing Australian citizenship and residency status, two classes of nominees would be created:

- 1) nominees who are known to be Australian citizens or permanent residents who would remain ignorant of their nomination until or unless their nomination is successful; and
- 2) nominees who become aware of their nomination through having to give consent for the disclosure of their citizenship or residency details.

The Applicant submitted that nominees should not be aware of their nomination until, and only if, their nomination is successful. This is because:

- knowledge of the nomination opens up the potential for lobbying. In order to maintain the principles of independence and freedom from political patronage by which the Order of Australia operates, it is important that the nomination and consideration process is not susceptible to attempts to influence outcomes; and
- an unsuccessful nomination could lead to personal and reputational embarrassment and disappointment on the nominee's behalf.

The Commissioner's view

The Commissioner was satisfied that the Applicant may breach APP 6.1 when disclosing Australian citizenship and permanent residency details of individuals to the OOSGG and PM&C for the purpose of determining whether a potential recipient should be recognised through an honorary (or other) award in the Australian honours system and whether the nomination should be considered by the Council or the Minister. Further, the Commissioner accepts, for the Applicant's reasons outlined above, that it is not appropriate or practicable to seek consent from individuals for the disclosure.

Does the public interest in disclosing the personal information substantially outweigh the public interest in complying with the APPs?

The Applicant submitted a number of reasons as to why the public interest in disclosing the personal information of nominees outweighs the public interest in complying with APP 6.1.

Public benefits associated with disclosing citizenship and residency information

The proposed disclosure of Australian citizenship and residency details is to assess whether a nomination should be considered by the Council or the Minister and if successful, whether the individual should be recognised through either an honorary, or other, award in the Australian honours system.

The application noted that the Order of Australia is the principal and most prestigious means of recognising outstanding members of the community at a national level, serving to define, encourage and reinforce community standards and ideals by identifying role models at all levels and in all spheres of the community. The application submitted that there is a public

interest in permitting the disclosure of citizenship and residency details, as it enables nominees to be considered for awards and ultimately supports the objectives of national recognition.

The Applicant also submitted that it is of significant public interest to disclose personal information to the OOSGG and PM&C in the absence of consent from the individual, due to the long-standing tradition of confidentiality around the process of consideration for the awards.

The level of strict confidentiality involved allows for two public benefit interests, with the first being that the Australian honours system operates on the principles of independence and freedom from political patronage, and it is important that the consideration process is not susceptible to attempts to influence outcomes. Limiting awareness of a person's nomination through strict confidentiality will assist to achieve this objective.

Secondly, it is the opinion of the Applicant that it is in the public interest to ensure nominees are unaware of their nomination until, and only if, their nomination is successful. Altering this may lead to processing inconsistencies amongst nominees and personal and reputational embarrassment and disappointment on the part of unsuccessful nominees.

Impact on the privacy of individuals

The Applicant submitted that the disclosure of Australian citizenship and residency details will be limited to disclosing that a nominee is an Australian citizen (and the date the nominee became an Australian citizen), that the nominee is a permanent resident, or that the Applicant has no record that the nominee is an Australian citizen or permanent resident. The Applicant does not disclose information about citizenships or residencies of other nations. As such, the degree of intrusion into an individual's privacy is limited.

Further to this, the purpose of the disclosure of personal information is limited to that of deciding who should consider the nomination and whether, if awarded, an award should be an honorary, or other, award. The Applicant submitted that the proposed disclosures are only for the purpose of conferring privilege on individuals, and that there is no suggestion that the disclosure can lead to an individual suffering detriment or harm.

The Commissioner's view

The Commissioner has considered the available evidence presented in the application and, on balance, has found that the public interest in permitting the relevant disclosures for the purposes of the Australian honours system substantially outweighs the public interest in adherence to the APPs that might be breached.

In forming this view, the Commissioner has had regard to the objects of the Privacy Act, in particular:

- to promote the protection of the privacy of individuals (paragraph 2A(a));
- to recognise that the protection of the privacy of individuals is balanced with the interest of entities in carrying out their functions and activities (paragraph 2A(b)); and

- to promote responsible and transparent handling of personal information by entities (paragraph 2A(d)).

The Commissioner was satisfied that, in the circumstances, the proposed disclosure of personal information is reasonable, necessary and proportionate and that TPID 2018 includes a number of safeguards that mitigate and minimise the privacy impacts to individuals. In particular, the Commissioner took into consideration:

- the important role that the Australian honours system has in the Australian community as a means of recognising and encouraging outstanding community members;
- the importance of maintaining confidentiality in the nomination process;
- that the personal information to be disclosed is limited to the minimum amount necessary to achieve the purpose; and
- that the potential for the disclosures to adversely affect individuals is very limited.

Does the application raise issues that require an urgent decision?

The Applicant sought a TPID under section 80A of the Privacy Act in order to enable consideration of nominees for Australian honours in the Queen's Birthday 2018 honours list. This needs to occur prior to the end of March 2018.

The Applicant also advised that the TPID is necessary for the consideration of urgent requests for honorary awards (for persons who are neither permanent residents nor Australian citizens). The Application explains that the need for urgent consideration arises in circumstances such as where a nominee is elderly or in ill health.

The Commissioner's view

The Commissioner was satisfied that the application raises issues that require an urgent decision because undertaking the required processes in Division 1, Part VI of the Privacy Act will:

- require a period of time that extends well beyond the period in which consideration of nominees for awards in the Queen's Birthday 2018 honours list needs to be finalised; and
- in the interim, prevent the urgent consideration of requests for honorary awards in circumstances such as where a nominee is elderly or in ill health.

Operation

TPID 2018 will remain in force until the end of the day before the day which is 12 months after the day on which TPID 2018 commences, unless it ceases to have effect on an earlier date by the operation of subsection 80D(2) of the Privacy Act.

TPID 2018 applies directly to the Applicant as an APP entity under the Privacy Act.

Consultation

The Applicant was consulted in the making of TPID 2018, in addition to OOSGG and PM&C. No other entities were consulted.

The Privacy Act does not require consultation to occur prior to the making of a TPID. As the TPID is required as a matter of urgency, the Commissioner was satisfied that any further consultation was not reasonably practicable to undertake.

In addition, the OAIC will conduct a public consultation before the Commissioner makes a determination on the Applicant's application under section 72.

Explanation of sections

Section 1 states the full name of TPID 2018.

Section 2 states that TPID 2018 commences on the day on which it is registered on the Federal Register of Legislation.

Section 3 identifies that subsection 80A(2) of the Privacy Act provides the authority under which TPID 2018 is made.

Section 4 defines certain terms used in TPID 2018. A note to section 4 explains that a number of those terms are defined in the Privacy Act.

Section 5 explains that subject to subsection 80D(2) of the Privacy Act, TPID 2018 is repealed at the end of the day before the day which is 12 months after the day on which TPID 2018 commences. Subsection 80D(2) provides that a TPID may cease to be in effect when a determination made under subsection 72(2) about the act or practice comes into effect, or a determination is made under paragraph 78(b) to dismiss the application.

Section 6 repeals the *Privacy Act 1988 – Public Interest Determination No. 2 (F2008B00566)*. In addition to the power to make TPID 2018 under subsection 80A(2) of the Privacy Act, subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

Section 7 confirms that the Department of Home Affairs (Applicant) applied for a public interest determination under section 73 of the Privacy Act, and that the Applicant is an APP entity and an agency for the purposes of the Privacy Act (see subsection 6(1)).

Section 8 identifies the act or practice which is the subject of the Applicant's application for a TPID. It identifies the personal information that the Applicant will disclose under TPID 2018, and the purpose of that disclosure.

Section 9 states that the Commissioner determines that he is satisfied that: the act or practice set out in section 8 breaches or may breach APP 6.1; the public interest in the Applicant doing that act or engaging in that practice outweighs to a substantial degree the public interest in adhering to APP 6.1; and the Applicant's application raises issues that require an urgent decision.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Privacy (Australian Honours System) Temporary Public Interest Determination 2018

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The purpose of the *Privacy (Australian Honours System) Temporary Public Interest Determination 2018* (TPID 2018) is to permit the Department of Home Affairs (Applicant) to disclose limited personal information to the Office of the Official Secretary to the Governor-General (OOSGG) and the Department of the Prime Minister and Cabinet (PM&C) without breaching Australian Privacy Principle (APP) 6.1 and section 15 of the Privacy Act.

APP 6.1 limits the circumstances when the Applicant may use or disclose personal information. Section 15 of the Privacy Act provides that the Applicant must not do an act or engage in a practice that breaches an APP.

Specifically, TPID 2018 will ensure that the Applicant is taken not to breach APP 6.1 and section 15 of the Privacy Act when disclosing specified personal information to OOSGG and PM&C for the purpose of verifying the Australian citizenship or permanent residency status of individuals who are the subjects of:

- a. nominations for membership or honorary membership of the Order of Australia;
- b. applications for approval for the acceptance and wearing of foreign awards; and
- c. consideration for other awards in the Australian honours system.

Nominations for Australian honours awards are administered by the staff of the OOSGG and staff in the Government division of PM&C. OOSGG administers all nominations of Australian citizens and permanent residents for membership of the Order of Australia (on behalf of the Council for the Order of Australia), whilst PM&C administers nominations of non-citizen, non-residents on behalf of the Minister. Due to this division in administration, OOSGG and PM&C need to obtain the Australian citizenship or permanent resident status of nominees in order to determine whether a nominee is under consideration for an honorary, or other, award and whether the nomination should be considered by the Council or the Minister.

Under TPID 2018, the information the Applicant discloses to OOSGG and PM&C for this purpose will be limited to confirmation that:

- the nominee is an Australian citizen and the date when the nominee became an Australian citizen;
- the nominee is a permanent resident of Australia; or

- the Applicant has no record that the nominee is an Australian citizen or permanent resident.

The Applicant will not disclose information about citizenships or residencies of other nations.

Human rights implications

TPID 2018 engages Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR). This Article provides that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation, and that everyone has the right to the protection of the law against such interference and attacks.

TPID 2018 limits the right against the arbitrary interference with privacy, and the right to the protection of the law against such interference, by limiting the application of protections in the Privacy Act in relation to the disclosure of personal information.

However, the right to privacy is not absolute, and there may be circumstances in which the rights in Article 17 can be outweighed by other considerations.

The Order of Australia is the principal means of recognising outstanding members of the community at a national level. There is a public interest in permitting the disclosure of the Australian citizenship and residency details outlined above, as it facilitates the processing of nominations and consideration of nominees for these awards.

In addition, the Applicant has advised the Commissioner that the nomination process is confidential and that there is a strong public interest and legitimate objective in maintaining this confidentiality by allowing the disclosures to occur without individuals' knowledge or consent. Strict confidentiality facilitates two main public interest benefits:

- limiting the awareness of a person's nomination assists with maintaining the principles of independence and freedom from political patronage by which the Order of Australia operates, and therefore ensures the consideration process is not susceptible to attempts to influence outcomes; and
- avoiding the personal and reputational embarrassment that nominees could suffer following an unsuccessful nomination.

The Applicant noted that while the proposed disclosures do limit the right to privacy, the impact on privacy is reasonable, necessary and proportionate for the following reasons:

- the disclosures are limited to the fact that an individual is an Australian citizen (and the date citizenship was acquired) or a permanent resident, or that the Applicant has no record that the person is an Australian citizen or permanent resident; and
- the disclosures are for the purpose of appropriately assessing a nomination and deciding whether an individual should, potentially, receive an honorary, or other award (and whether the nomination should be considered by the Council or the Minister).

Additionally, the limitation is reasonable, necessary and proportionate in that TPID 2018 includes a number of safeguards that mitigate and minimise the privacy impacts to individuals. In particular, these safeguards include:

- that the personal information to be disclosed is limited to the minimum amount necessary to achieve the purpose; and
- that the potential for the disclosures to adversely affect individuals is very limited.

Further, in all other respects, the Applicant, OOSGG and PM&C will be required to handle the Australian citizenship and residency status information in accordance with the Privacy Act.

Conclusion

TPID 2018 is compatible with human rights because to the extent that the disclosures authorised by TPID 2018 limit the right to privacy, those limitations are reasonable, necessary and proportionate.