

EXPLANATORY STATEMENT

Privacy (Disclosure of Homicide Data) Public Interest Determination 2019

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

This explanatory statement relates to the *Privacy (Disclosure of Homicide Data) Public Interest Determination 2019* (PID 2019).

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 PID 2019

The Commissioner is empowered by subsection 72(2) of the Privacy Act to make PID 2019.

Under subsection 73(1) of the Privacy Act, an APP entity may apply to the Commissioner for a public interest determination (PID) under section 72 in relation to an act or practice of that entity. The Australian Information Commissioner received such an application from the Australian Federal Police (the Applicant) on 1 November 2018.

The Commissioner may make a PID 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); and
- 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.

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

Purpose of PID 2019

The purpose of PID 2019 is to permit the Applicant to disclose limited personal information to the Australian Institute of Criminology (AIC) without breaching APP 6.1 and section 15 of the Privacy Act.

Specifically, PID 2019 will ensure that the Applicant is taken not to breach APP 6.1 and section 15 when disclosing the following personal information to the AIC for the purposes of the AIC's research under the National Homicide Monitoring Program (NHMP) and the publication of aggregate findings:

- personal information (including sensitive information) requested by the AIC about the offender in relation to homicides in the Australian Capital Territory

- personal information (including sensitive information) requested by the AIC about suspects in relation to homicides in the Australian Capital Territory.

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 outlines a concern that, in the absence of a PID, the Applicant may breach APP 6.1 and section 15 of the Privacy Act when disclosing personal information of homicide offenders and suspects in the Australian Capital Territory to the AIC.

The Applicant wishes to disclose the personal information, including sensitive information, of homicide offenders and suspects in the ACT to the AIC to enable the AIC to use the information for its research under the NHMP.

The Applicant has advised that the personal information it would disclose to the AIC for this purpose is limited to:

- personal information (including sensitive information) requested by the AIC about the offender in relation to homicides in the Australian Capital Territory; and
- personal information (including sensitive information) requested by the AIC about suspects in relation to homicides in the Australian Capital Territory.

The application explains that the NHMP collects data from each Australian state and territory police service for the purpose of monitoring homicide rates, facilitating detailed analysis of homicide types and trends and communicating this information to stakeholders such as police, government, non-government organisations and the general public. It also explains the Applicant's understanding that the AIC's collection of detailed information from police services facilitates cross-checking of the information with other data sources accessible by the AIC to maximise the accuracy of data used. More information on the NHMP is available on the AIC's Crime Statistics website: www.crimestats.aic.gov.au.

The application contains the NHMP data template for the 2014-2016 reporting period, which shows the types of personal information that the AIC requests from the Applicant. Examples include the offender or suspect's full name, gender, age, address, country of birth and indigenous status. The information may also include whether they were under the influence of alcohol or other drugs, any prior criminal history, and any relationship to the victim.

The Applicant has been permitted to disclose personal information to the AIC for the purposes of the NHMP since 1991 under the terms of Public Interest Determination No. 5 (PID No. 5). PID No. 5 expired on 1 October 2018.

The Applicant submits that PID 2019 is necessary to ensure the Applicant can continue to provide relevant data to the AIC whilst complying with its obligations under the Privacy Act. While PID No. 5 allowed the disclosure of information relating to witnesses in addition to

offenders and suspects, the Applicant's application does not seek authorisation for the disclosure of witness information.

Reasons for the decision to make PID 2019

Might the disclosure of homicide data 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. Where an exception applies (see APP 6.2), the entity may use or disclose the personal information for another purpose (known as the 'secondary purpose').

The Applicant submitted that, in disclosing homicide data to the AIC, it is unlikely it would be able to rely on the exceptions in APP 6.2.

Relevantly, the Applicant submitted that the disclosure of homicide data for the secondary purpose of enabling the AIC's research under the NHMP would not be authorised under APP 6.2(a), 6.2(b) or 6.2(e).

APP 6.2(a)

The exception under APP 6.2(a) 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 relating to homicides in the ACT is to carry out the Applicant's statutory functions or activities associated with providing police services in the ACT.

To rely on APP 6.2(a), 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 proposed disclosure of personal information is unlikely to be 'related' or 'directly related' to the primary purpose of the collection of information.

Further, the OAIC's APP Guidelines provide guidance regarding the interpretation of the APPs. 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. The Applicant submitted that:

- although individuals might expect law enforcement bodies to undertake some form of profiling for the prevention of crime, it is unlikely that individuals would 'reasonably

expect' that their personal information might subsequently be disclosed for the purpose of enabling the AIC's research under the NHMP; and

- even if a reasonable expectation was established, it is unlikely that the secondary purpose could be considered 'related' (or 'directly related' in the case of sensitive information) to the primary purpose of collection.

APP 6.2(b)

The exception under APP 6.2(b) permits an APP entity to use or disclose personal information for a secondary purpose if required or authorised by or under an Australian law.

The Applicant submitted that:

- with regard to section 60A of the *Australian Federal Police Act 1979* (AFP Act), which regulates the disclosure of 'prescribed information' by Australian Federal Police (AFP) employees:
 - 'prescribed information' includes information obtained by an AFP employee in the course of carrying out duties, functions or powers under the AFP Act; and
 - information obtained by ACT Policing as part of investigating homicides would constitute 'prescribed information'.
- with regard to subsection 60A(2) of the AFP Act (which prohibits the disclosure of prescribed information unless an exception applies), paragraph(f) permits disclosure where it is made in the carrying out, performance or exercise of duties, functions or powers under the AFP Act. Accordingly, a disclosure of prescribed information will be lawful under section 60A of the AFP Act where it is linked to a function as prescribed by section 8 of the AFP Act. The relevant functions are:
 - the provision of police services in relation to the ACT (section 8(1)(a)); and
 - anything incidental or conducive to the performance of the above function (section 8(1)(c)).
- its provision of homicide data to the AIC could be interpreted as incidental or conducive to providing police services in the ACT, in the context of crime prevention. This is because the AIC would use the data to monitor trends in homicide, victimisation and offending to identify changes in risk markers associated with incidents, victims and offenders/suspects.
- however, an authority for an agency to do anything convenient for, or incident to, a specific power or function is not generally sufficient to authorise an act for the purposes of the APPs (paragraph B.132, APP Guidelines). The disclosure for the secondary purpose of enabling the AIC's research under the NHMP therefore may not be authorised under APP 6.2(b).

APP 6.2(e)

The exception under APP 6.2(e) permits an APP entity to use or disclose personal information for a secondary purpose where the APP entity reasonably believes the use or disclosure is

reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body. The Applicant submitted that:

- the AIC is not an 'enforcement body' for the purposes of the Privacy Act; and
- even if the AIC was an 'enforcement body', it is unlikely that an 'enforcement related activity' would include research of the kind proposed by the secondary purpose.

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(a) (disclosure with consent) when disclosing the homicide data.

The Applicant submitted that it is not appropriate or practicable in the circumstances to seek consent from individuals for the disclosures, because relying on consent from the relevant offenders and suspects would compromise the integrity of the research as datasets would not be complete in circumstances where consent is withheld.

Use of de-identified data not appropriate

APP 6.1 regulates the use and disclosure of personal information. It would not apply to the Applicant's use or disclosure of de-identified data.

However, the Applicant submitted that it is not appropriate in the circumstances to de-identify the information to be disclosed to the AIC. This is because information obtained from police services, such as the Applicant, is cross-checked by the NHMP against information obtained from other sources such as coronial and media reports.

If the Applicant was to provide de-identified information to the AIC, this would limit the ability of the AIC to carry out this cross-checking process.

The Commissioner's view

The Commissioner was satisfied that the Applicant may breach APP 6.1 when disclosing personal information (including sensitive information) requested by the AIC about offenders and suspects in relation to homicides in the ACT for the purpose of enabling the AIC's research under the NHMP.

In particular, the Commissioner considered that:

- there are no applicable exceptions under APP 6 that would permit the disclosure;
- it is not appropriate or practicable in the circumstances to seek consent from individuals for the disclosures – datasets would not be complete in circumstances where consent is withheld, thereby compromising the integrity of the research; and
- it is not appropriate in the circumstances to de-identify the information to be disclosed because such information is cross-checked by the NHMP against information obtained from other sources. The ability of the AIC to carry out this cross-checking process would be limited if the Applicant was to provide de-identified information.

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 why the public interest in disclosing the personal information of offenders and suspects outweighs the public interest in complying with APP 6.1.

Public benefits associated with disclosing homicide data

The proposed disclosure is for the purpose of enabling the AIC's research under the NHMP and the publication of aggregate findings.

The Applicant submitted that it is of significant public interest to identify trends and changes to risk markers relating to homicide incidents for the prevention of future homicides and lethal violence given the gravity of these crimes. In particular, the Applicant submitted that:

- the information provided by the Applicant to the AIC is integral to the AIC's production of accurate, reliable and useful research;
- although data is presented in aggregate form, ongoing monitoring of homicides locates short-term changes within a longer timeframe and enables policymakers and law enforcement personnel to identify changes in risk markers associated with incidents, victims and offenders;
- the continued provision of information from all police services, including the Applicant, is necessary for the AIC to obtain complete data on which to provide meaningful research concerning homicides in Australia; and
- the Applicant's role in facilitating the AIC's research around homicide incidents may also assist the Applicant in undertaking its functions to provide police services – greater understanding of trends and risk markers could advance crime prevention.

Impact on the privacy of individuals

The Applicant submitted that the disclosure of homicide data for the purpose of enabling the AIC's research under the NHMP does not lead to the individual suffering detriment or harm. This is because:

- the disclosure of homicide data will be limited to personal information (including sensitive information) requested by the AIC about the offender/suspect in relation to homicides in the ACT;
- the purpose of the disclosure of personal information is limited to that of research and analysis as part of the NHMP; and
- the homicide data is to be reported only in aggregate form.

In addition, the Applicant advised that the AIC's research, including the NHMP, is underpinned by the following research guidelines and approvals:

- the National Health and Medical Research Council's National Statement on Ethical Conduct (National Statement) and the Australian Code for the Responsible Conduct of Research (Code), which guides the conduct of all of the AIC's research; and

- review of AIC’s proposed research by an independent Human Research Ethics Committee to assess whether such research is consistent with the National Statement and the Code, and where the research involves human participants, to assess that the research is consistent with the National Statement on Ethical Conduct in Human Research.

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 purpose of enabling the AIC’s research under the NHMP and publication of aggregate findings 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 the proposed disclosure of personal information is reasonable, necessary and proportionate and that a number of safeguards will be in place to mitigate and minimise the privacy impacts to individuals. In particular, the Commissioner took into consideration:

- the role that the provision of ACT homicide data plays in the NHMP, without which the NHMP could not provide a complete, national picture of homicide statistics and trends in Australia. The NHMP monitors and analyses homicide rates, types and trends, and communicates this information to stakeholders such as police forces, government and non-government bodies, and to the general public;
- that the personal information to be disclosed is limited to the minimum amount necessary to achieve the purpose;
- the information to be disclosed by the Applicant will only be used by the AIC for the purposes of the NHMP;
- the research guidelines and approvals that underpin all of the research conducted by the AIC;
- that the Applicant anticipates entering into an agreement with the AIC to govern the terms of the disclosure of information, with safeguards including that:
 - the AIC staff responsible for inspecting information is limited to those who have substantial prior experience in criminological research involving access to sensitive data and who have been personally authorised by the Director of the AIC to undertake the research; and

- the results of the research are published in de-identified, aggregate form, and
- given these safeguards, the potential for the disclosures to adversely affect individuals is limited.

Operation

PID 2019 will remain in force until the end of the day before the day which is seven years after the day on which PID 2019 commences.

PID 2019 applies directly to the Applicant as an APP entity under the Privacy Act.

Consultation

The Commissioner has consulted on the development of PID 2019 in accordance with Part VI of the Privacy Act and section 17 of the *Legislation Act 2003*.

As required by subsection 74(1) of the Privacy Act, the Applicant's application was published on the OAIC's website on 9 November 2018.

The Commissioner consulted with the Applicant during her consideration of the issues raised in the Applicant's application.

As required by section 75, the Commissioner prepared a draft of her proposed public interest determination. The draft was made publicly available on the OAIC's website, along with an explanation of the Commissioner's preliminary view on the Applicant's application. The draft was available on the website from 7 December 2018 until 1 February 2019 and the public was invited to make submissions on the draft determination and on the issues raised in the Applicant's submission. The public consultation was also publicised through an article in the OAIC's 'OAICnet' and Privacy Professionals Network (PPN) publications (both of which were emailed to subscribers on 7 December 2018).

As required by subsection 75(2), the Commissioner also invited the Applicant and the AIC to request a conference about the draft determination as well as referring the parties to the general invitation to make a submission.

No submissions were received in relation to the proposed draft public interest determination and no requests to hold a conference were received.

As a result, PID 2019 contains no substantive changes from the proposed draft version released for public consultation

Explanation of sections

Section 1 states the full name of PID 2019.

Section 2 states that PID 2019 commences on the day on which it is registered on the Federal Register of Legislation.

Section 3 identifies that subsection 72(2) of the Privacy Act provides the authority under which PID 2019 is made.

Section 4 defines certain terms used in PID 2019. A note to section 4 explains that a number of those terms are defined in the Privacy Act.

Section 5 explains that PID 2019 is repealed seven years from the day on which it commences.

Section 6 confirms that the Australian Federal Police (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 7 identifies the act or practice which is the subject of the Applicant's application for a PID. It identifies the personal information that the Applicant will disclose under PID 2019, and the purpose of that disclosure.

Section 8 states that the Commissioner determines that she is satisfied that the act or practice set out in section 7 breaches or may breach APP 6.1 and 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.

Statement of Compatibility with Human Rights

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

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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 (Disclosure of Homicide Data) Public Interest Determination 2019* (PID 2019) is to permit the Australian Federal Police (Applicant) to disclose limited personal information to the Australian Institute of Criminology (AIC) without breaching Australian Privacy Principle (APP) 6.1 and section 15 of the *Privacy Act 1988* (Cth) (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, PID 2019 will ensure that the Applicant is taken not to breach APP 6.1 and section 15 when disclosing the following personal information to the AIC for the purposes of the AIC's research under the National Homicide Monitoring Program (NHMP) and the publication of aggregate findings:

- personal information (including sensitive information) requested by the AIC about the offender in relation to homicides in the Australian Capital Territory; and
- personal information (including sensitive information) requested by the AIC about suspects in relation to homicides in the Australian Capital Territory.

The NHMP collects data from each Australian state and territory police service for the purpose of monitoring homicide rates, facilitating detailed analysis of homicide types and trends (more information on the NHMP is available on the AIC's Crime Statistics website: www.crimestats.aic.gov.au). It is the only national program to monitor and analyse homicide rates, types and trends, and to communicate this information (which it publishes in aggregate form) to stakeholders such as police forces, government and non-government bodies, and to the general public.

The types of personal information that the AIC requests from the Applicant include the offender or suspect's full name, gender, age, address, country of birth and indigenous status. The information may also include whether they were under the influence of alcohol or other drugs, any prior criminal history, and any relationship to the victim.

The Applicant has been permitted to disclose personal information to the AIC for the purposes of the NHMP since 1991 under the terms of Public Interest Determination No. 5 (PID No. 5). PID No. 5 expired on 1 October 2018.

The Applicant has advised the Information Commissioner (Commissioner) that PID 2019 is necessary to ensure the Applicant can continue to provide relevant data to the AIC whilst complying with its obligations under the Privacy Act.

Human rights implications

PID 2019 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.

PID 2019 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 AIC states in the NHMP report (Monitoring Reports No. 23, publish date 5 February 2015) that it now has over 20 years of data on incidents, victims and offenders of homicide in Australia and the understanding of homicide crime has improved over that time. Consequently, law enforcement, policymakers, researchers and the general public are better informed in relation to its occurrence and can better target measures to reduce homicide rates.

There is a strong public interest in permitting the disclosure of specified ACT homicide data to the AIC. This is because such disclosure facilitates ongoing monitoring of homicide, thereby assisting in identifying short-term changes within a longer timeframe and enabling policymakers and law enforcement personnel to identify changes in risk markers associated with incidents, victims and offenders. Without the provision of ACT homicide data, the NHMP could not provide a complete, national picture of homicide statistics and trends in Australia.

In addition, the Applicant has advised the Commissioner that there is a strong public interest and legitimate objective in allowing the disclosures to occur without individuals' consent. This is because datasets would not be complete in circumstances where consent is withheld, thereby compromising the integrity of the research.

The Applicant further advised that it is necessary to use personal information and not appropriate in the circumstances to de-identify the information to be disclosed because such information is cross-checked by the NHMP against information obtained from other sources to ensure accuracy. The ability of the AIC to carry out this cross-checking process would be limited if the Applicant was to provide de-identified information.

While the proposed disclosures do limit the right to privacy, the Commissioner was satisfied that the impact on privacy is reasonable, necessary and proportionate for the following reasons:

- the personal information to be disclosed is limited to the minimum amount necessary to achieve the purpose;
- the information to be disclosed by the Applicant will only be used by the AIC for the purposes of the NHMP; and
- the homicide data is to be reported only in aggregate form.

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

- Research guidelines and approvals that underpin all of the research conducted by the AIC, including:
 - the National Health and Medical Research Council's National Statement on Ethical Conduct (National Statement) and the Australian Code for the Responsible Conduct of Research (Code) which guide the conduct of all of the AIC's research; and
 - the independent review by the Human Research Ethics Committee of research proposed by the AIC to assess whether such research is consistent with the National Statement and the Code, and where the research involves human participants, whether the research is consistent with the National Statement on Ethical Conduct in Human Research.

These processes and guidance provide further checks and balances by providing a framework in which to assess the public interest in, and ethics of, using personal information for this research purpose.

- The following requirements which the Applicant has indicated it anticipates applying by way of an agreement with the AIC:
 - the AIC staff responsible for inspecting information is limited to those who have substantial prior experience in criminological research involving access to sensitive data and who have been personally authorised by the Director of the AIC to undertake the research; and
 - the results of the research are published in de-identified, aggregate form.

Given the above existing and anticipated safeguards, the potential for the disclosures to adversely affect individuals is limited.

Further, in all other respects, the Applicant and AIC will be required to handle the homicide data in accordance with their obligations under the Privacy Act.

Conclusion

PID 2019 is compatible with human rights because to the extent that the disclosures authorised by PID 2019 limit the right to privacy, those limitations are reasonable, necessary and proportionate.