

# Health Privacy it's my business



Health Records Act

Health Privacy Principles

Right of Access

Information Sheet No. 2

## Unlawful Activity and Law Enforcement

### Key Message

The Health Privacy Principles (HPPs) **do not** require an organisation to disclose health information about an individual unless they have a legal obligation under another law. However, there are circumstances where they are able to do so.

### Purpose

This information sheet provides guidance to holders of health information in relation to disclosing health information for investigation of suspected unlawful activity and law enforcement purposes.

Information relating to the Commonwealth legislation is included in **italics**.

*Organisations and consumers need to be aware that the Privacy Act 1988 (Cwth) which includes the 10 National Privacy Principles (NPPs), regulates the handling of personal information, including health information, in the Commonwealth public sector and in the private sector (including the private health sector) throughout Australia.*

### Use and disclosure

The intent of HPP 2 is that health information about an individual must only be used or disclosed for the primary purpose for which it was collected unless one of the exemptions in HPP 2.2 applies. These include investigating suspected unlawful activity and law enforcement. (HPP 2.2(i) and (j)).

Some organisations have obligations dealing with disclosure under other legislation, such as s. 141 of the *Health Services Act*; these obligations override HPP 2.

*The Privacy Act does not compel a health service provider to use or disclose personal information, but other laws may do so. For example, in relation to NPP 2.1(g), where another law requires that a health service provider use or disclose certain personal information, a provider must do so. Examples of such requirements include the mandatory*

*reporting of child abuse (under care and protection laws) or the notification of diagnoses of certain communicable diseases (under public health laws) – see the Federal Privacy Commissioner's Guidelines on Privacy in the Private Health Sector (p. 26).*

### Investigating or reporting suspected unlawful activity

'Unlawful activity' refers to acts or omissions expressly prohibited by Commonwealth, State or Territory law. HPP 2.2(i) allows organisations to use or disclose an individual's health information where they suspect unlawful activity has been, is being, or may be engaged in if it would not be a breach of confidence (see discussion below). Organisations can use or disclose the information if it is necessary for investigating or reporting concerns to the relevant persons or authorities.

*NPP 2.1(f) permits the use or disclosure of personal information (including health information) when an organisation suspects unlawful activity has been, is being, or may be engaged in, and the use or disclosure is necessary for that organisation's investigations or its reporting of the matter to relevant persons/authorities.*

### Law enforcement functions

In Victoria, the term 'law enforcement agency' may include Victoria Police or other State or Territory police, the Australian Crime Commission (previously the National Crime Authority) and other public bodies carrying out law enforcement functions. In some circumstances this could also include statutory bodies regulating professional standards, and certain activities of government departments and contractors (within the meaning of the *Corrections Act 1986*).

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HPP 2.2(j) allows use or disclosure where an organisation reasonably believes it is necessary for a law enforcement function by or on behalf of a law enforcement agency.

*NPP 2.1(h) permits an organisation to use or disclose personal information (including health information) where the organisation reasonably believes the use or disclosure is reasonably necessary for a range of law enforcement functions. For more detail, see Information Sheet 7 – 2001 Unlawful Activity and Law Enforcement (OFPC- Nov 2001 – 25).*

## Breach of confidence

Under HPP 2.2(i) and (j), if the organisation is a registered health service provider, it cannot use or disclose health information for these purposes if doing so would be a breach of confidentiality<sup>1</sup>.

The balancing of a health service provider's duty of confidentiality with the public interest in the investigation and enforcement of criminal law is a key issue when considering disclosure of health information.

## Search warrants

The police or other law enforcement body may obtain a search warrant in order to seek health information, irrespective of whether the organisation is willing/able to disclose it. Search warrants are returnable to the court or body of issue and if necessary can be opposed. Organisations should only provide health information specified in the warrant.

## Information to be provided to a court or tribunal under subpoena

Health professionals or organisations holding health information may on occasion be served with a subpoena compelling attendance at a court or other body to give evidence in person and/or produce documentary evidence. A subpoena compels attendance and/or production of all the documents described in the subpoena (whether or not they were created by the organisation). In some circumstances it may be necessary to oppose such a subpoena.

<sup>1</sup> Endnotes to the Health Records Act (p145) explain "breach of confidence":

*'This refers to the general law of confidence (including but not limited to the common law or in equity), which requires, amongst other things, that a duty of confidence exists under that law which is not, in the particular circumstances, outweighed by any countervailing public interest under that law.'*

The information (which may be health information relating to individuals) generally should not be handed to the party at whose request the subpoena was issued – it is required to be returned to the issuing court or tribunal.

*The NPPs permit the use or disclosure of personal information where this is 'required or authorised by or under law' (NPP 2.1(g)). This includes, for example, where a disclosure is required by a subpoena or otherwise compelled by a Court or Tribunal.*

## Written note of use or disclosure

HPP 2.3 requires an organisation that discloses health information for investigating unlawful activity or law enforcement to make a written note of the disclosure.

The note should include:

- when the use or disclosure occurred;
- what was used or disclosed;
- who authorised the use or disclosure;
- to whom the information was provided;

*The Privacy Act requires a health service provider to make a written note of any use or disclosure of personal information that occurs under NPP 2.1(h), (i.e. where the use or disclosure occurs in relation to law enforcement functions).*

## About information sheets

Information sheets are advisory only and do not constitute legal advice nor are they law.

They are intended to help organisations apply the HPPs in everyday or practical circumstances. Organisations may need to seek separate legal advice on the application of the *Health Records Act* to a particular situation.

Nothing in an information sheet limits the Health Services Commissioner's powers to investigate complaints under the Act or to apply the HPPs in the way that seems most appropriate to the facts of any case being dealt with.

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## MORE INFORMATION:

Office of the Health Services Commissioner

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