

Contracting and the Information Privacy Principles

Introduction

On 18 May 2009, the Information Privacy Principles Instruction (IPPs) was amended by Cabinet to allow agencies to disclose personal information to contracted service providers delivering services on behalf of government and to ensure that personal information related to the service provided was managed in line with the IPPs.

The IPPs apply to most South Australian Government agencies and regulate the collection, storage, use and disclosure of the personal information. The IPPs also provide a right for individuals to access and amend personal information that an agency holds about them. The IPPs are issued as *Department of the Premier and Cabinet Circular 12* and available at <https://www.dpc.sa.gov.au/resources-and-publications/premier-and-cabinet-circulars>

It is common practice for government to engage private sector organisations to provide services on their behalf. The IPPs recognise this practice, and include provisions to ensure both agencies and the contracted service providers are accountable for the protection of the personal information they handle.

The IPPs require personal information handled by contracted service providers, undertaking a service on behalf of government, to be treated the same way it would be if the agencies were delivering the service themselves.

Purpose

The purpose of this information sheet is to provide advice to agencies on their obligations in managing personal information when engaging a contracted service provider to provide a service on behalf of government.

What were the changes to the IPPs?

Section 5 of the IPPs was amended to deem that an act done, or practice engaged in, by a person or an external organisation providing a service to government under contract, is taken to have been done, or engaged in, by the agency.

Section 5 allows agencies to disclose personal information to contracted service providers without breaching the IPPs. This section also stipulates that a contract for service, which will necessitate the disclosure of personal information to a contracted service provider, must include conditions to ensure that the IPPs are complied with as if the contracted service provider were part of the agency. A contract for service should also include provisions to enable audit and verification of compliance with these obligations.

Why were these changes important?

Agencies are accountable for the protection of personal information that has been entrusted to them for the performance of public services. This accountability cannot be passed on to contracted service providers delivering these services on the agency's behalf. Contractually binding the service provider to good privacy practices while delivering services on behalf of government ensures that the responsibility for the security, access, disclosure and ownership of the information is beyond doubt.

There has also been a misconception by some agencies that the *Commonwealth Privacy Act 1988* applies to the private sector organisations while delivering services on behalf of the State Government and therefore the personal information would be protected. However, the *Commonwealth Privacy Act* does not apply to an organisation in respect of any work it performs under contract to a State or Territory Government agency. It only applies to Commonwealth Government agencies and the private sector. That is, while many organisations have practices in place to comply with privacy provisions in the *Commonwealth Privacy Act*, they are not required or legally bound to extend these obligations to a service provided under contract on behalf of a South Australian Government agency.

Will this cause a burden on contracted service providers?

All private sector businesses with a turnover of at least three million dollars and small businesses delivering health services are subject to the *National Privacy Principles* under the *Commonwealth Privacy Act*. These principles are similar to the IPPs.

While there will be some business impact such as demonstrating that appropriate processes are in place for the protection of personal information this is considered minimal if the organisation is already complying with the *Commonwealth Privacy Act*.

Some small businesses, not bound by the *Commonwealth's Privacy Act* may be required to adopt privacy management practices. These businesses can be assisted by a range of business support materials available from the Office of the Federal Privacy Commissioner. In addition, agencies' Contract Managers should be able to provide advice to small businesses to help them understand their contractual obligations regarding personal information.

What do agencies need to do?

Any contracts that involve the handling of personal information must include obligations on the service provider to ensure the personal information is treated in line with IPPs. Model terms and conditions have been developed by the Crown Solicitor's Office (CSO) to assist agencies to meet these obligations.

These model terms and conditions were also developed to assist agencies meet their obligations under the Contracting and Official Records Standard issued under the *State Records Act 1997*. This Standard and an accompanying guideline should be applied to all South Australian Government contracts as appropriate. The Contracting and Official Records Standard and Guideline are available from the State Records Website at: <https://www.archives.sa.gov.au/management/standards.html>

If an agency is applying these model terms and conditions to a contract that does not involve the handling of personal information they will need to remove the references and obligations related to the IPPs.

Application of model terms and conditions

Agencies can choose between a short clause or a longer clause of the model terms and conditions depending on the type of contract and the service being delivered.

Generally the short clause is to be used for basic or simple contracts, such as a letter of engagement, where the risk to information is assessed as low. The longer clause version is recommended for more detailed contracts particularly where sensitive or personal information is involved.

A copy of the model terms and conditions can be obtained from the State Records website at <http://government.archives.sa.gov.au/content/privacy-guidelines-infosheets>.

Need further assistance?

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