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## IPOLA GUIDELINE

### Interpreting the legislation – Information Privacy Act 2009

#### QPP 6 – Use or disclosure

**This guide does not reflect the current law.**

**It highlights important changes to the *Information Privacy Act 2009*.**

**This guide does not constitute legal advice and is general in nature only. Additional factors may be relevant in specific circumstances. For detailed guidance, legal advice should be sought.**

#### 1.0 Overview

All Queensland government agencies<sup>1</sup> must handle personal information in accordance with the Queensland Privacy Principles (QPP) in the *Information Privacy Act 2009* (Qld) (IP Act).

This guideline is based on and includes material from the Australian Privacy Principle guidelines developed by the Office of the Australian Information Commissioner.

#### 1.1 What is personal information?

Section 12 of the IP Act provides that personal information means information or an opinion about an identified individual or an individual who is reasonably identifiable from the information or opinion, whether it is true or recorded in a material form.

The individual does not need to be directly identified in the information for it to be personal information. It is sufficient if they can reasonably be identified by reference to other information.

Refer to [Key privacy concepts – personal and sensitive information](#) for more information.

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<sup>1</sup> References to an agency in this guideline include a Minister, bound contracted service provider, or other entity required to comply with the QPPs.



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## **1.2 Use and disclosure**

An agency can use and disclose personal information for the reason it was collected (the primary purpose). An agency can only use or disclose personal information for a secondary purpose as set out in QPP 6.<sup>2</sup>

Use and disclosure are both defined in the IP Act.<sup>3</sup> Refer to [Key privacy concepts – use and disclosure](#) for more information.

## **2.0 QPP 6 – Use or disclosure with consent**

Under QPP 6.1(a), an agency may use or disclose personal information for a secondary purpose where the individual has consented to the use or disclosure.

### **2.1 Consent**

Certain things must be present for consent to be valid. The individual must have the capacity to agree and their consent must demonstrate:

- the individual is adequately informed before giving consent
- the individual gives consent voluntarily
- the consent is current and specific, and
- the individual has the capacity to understand and communicate their consent.

Whether these factors can be met will depend on the specific circumstances and the nature of the information and the individual.

For the QPPs, consent includes implied consent. As a general rule, an agency should seek express consent. Implied consent arises where consent may reasonably be inferred in the circumstances from the conduct of the individual and the agency.

The more sensitive the personal information, or the more privacy-invasive the use or disclosure, the more important it is to have express agreement. It is a risk for agencies to rely on implied agreement.

Agencies cannot:

- assume that an individual has consented to a use or disclosure just because it appears to the agency the use or disclosure would advantage the individual; or
- establish implied consent by stating that if the individual knew about the benefits of the use or disclosure, they would probably consent to it.

Refer to [Key privacy concepts – consent](#) for more information.

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<sup>2</sup> 'Health agencies' as defined in schedule 5 of the IP Act also have certain de-identification obligations, under QPP 6.4.

<sup>3</sup> Section 23 of the IP Act.

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## **2.2**      *Opting in versus opting out*

Consent can be sought in two ways. An agency can:

- ask an individual if they agree to their information being used or disclosed (opt in); or
- tell an individual that they are going to use or disclose their information unless the individual tells them not to (opt out).

Use of an opt-out mechanism to infer an individual's consent will only be appropriate in limited circumstances, as the individual's intention in failing to opt-out may be ambiguous. Where an individual is provided with an option to opt out, such as a box to tick, there may be a question of whether they chose not to tick it because they agreed, or because they did not see it or did not understand it, or because they never received the document containing the box.

An agency will be in a better position to establish the individual's consent when using an opt out mechanism where:

- the opt out option was clearly and prominently presented
- it is likely that the individual received and read the information about the proposed use or disclosure, and the option to opt out
- the individual was given information on the implications of not opting out
- the opt out option was freely available and not bundled with other purposes
- it was easy for the individual to exercise the option to opt out, for example, there was little or no financial cost or effort required by the individual
- the consequences of failing to opt out are not serious.

Agencies should approach opt-out consent methods with considerable caution, and take a great deal of care in using such methods. The more sensitive the information and the more widespread the use or disclosure, the less appropriate it will be to rely on an opt out method.

## **2.3**      *Consent compared with notice*

Obtaining an individual's consent is not the same as providing information or a notice under QPP 5.

When an agency gives a notice or information under QPP 5 it is telling the individual what will happen with their personal information, i.e., what it will be used for and how it will be disclosed.

When an agency seeks an individual's consent it is asking for their permission to use or disclose their information for the secondary purpose.

An agency can ask for consent at the same time it provides the QPP 5 information, but it must take care not to confuse the two processes.

### 3.0 QPP 6.2 – Use or disclosure for a secondary purpose

QPP 6.2 sets out several exceptions permitting use or disclosure by agencies of personal information for secondary purposes, without an individual's consent:

- a) where the individual would reasonably expect use/disclosure for the secondary purpose, and that purpose is related to the primary purpose of collection, or, in the case of sensitive information, directly related to the primary purpose
- b) the secondary use or disclosure is required or authorised by or under an Australian law or a court/tribunal order
- c) a permitted general situation exists in relation to the secondary use or disclosure
- d) the agency is a health agency, and a permitted health situation exists in relation to the secondary use or disclosure
- e) an agency reasonably believes that the secondary use or disclosure is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, a law enforcement agency
- f) ASIO has asked the agency to disclose the personal information
- g) the secondary use or disclosure is necessary for public interest research or statistical purposes.

Exceptions (b)-(e) are discussed in separate dedicated guidelines: see ***Authorised by law or court order, Natural justice, Law enforcement agencies and activities, Collection use or disclosure of health information, Permitted general situations*** (guidelines under development). Exceptions (a), (f) and (g) are considered further below.

### 4.0 QPP 6.2(a) – Use or disclosure where reasonably expected

Under QPP 6.2(a), an agency may use or disclose personal information for a secondary purpose if the individual would reasonably expect the agency to use or disclose the information for the secondary purpose, and:

- for sensitive information, the secondary purpose is directly related to the primary purpose; or
- for all other personal information, the secondary purpose is related to the primary purpose.

#### 4.1 Sensitive information

Sensitive information<sup>4</sup> is a defined category of personal information. It includes any of the following:

- the individual's racial or ethnic origin
- the individual's political opinions
- the individual's membership of a political association
- the individual's religious beliefs or affiliations
- the individual's philosophical beliefs

<sup>4</sup> Schedule 5 IP Act.



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- the individual's membership of a professional or trade association
  - the individual's membership of a trade union
  - the individual's sexual preferences or practices; or
  - the individual's criminal record.

It also includes health information held by a health agency.

#### **4.2 *Would the individual reasonably expect the secondary purpose***

QPP 6.2(a) requires that the individual would reasonably expect their information to be used or disclosed for the secondary purpose.

The 'reasonably expects' test is an objective one that has regard to what a reasonable person who was properly informed would expect in the circumstances. It is a question of fact in each individual case and it is the responsibility of the agency to be able to justify its conduct. The subjective expectations of an individual are relevant, but they are not the final answer as to whether an individual would reasonably expect the use or disclosure.

The agency should consider whether an individual would reasonably expect it to use or disclose all their information for the secondary purpose or only some of it. For example, it would be unlikely that an individual would reasonably expect an agency investigating their complaint against a contractor to disclose the individual's residential address to the contractor as part of its investigation. The individual would reasonably expect the entity to give the contractor only the minimum amount of personal information necessary to enable them to respond to the complaint.

Regardless of the individual's reasonable expectations, the agency should only use or disclose the minimum amount of personal information necessary for the secondary purpose.

Examples of where an individual may reasonably expect their personal information to be used or disclosed for a secondary purpose could include where:

- the individual makes adverse comments in the media about the way an agency treated them. In these circumstances, it may be reasonable to expect that the agency would respond publicly to these comments in a way that reveals personal information specifically relevant to the issues that the individual has raised
- the agency notified the individual of the secondary purpose under QPP 5; or
- the secondary purpose is a normal internal business practice, such as auditing, business planning, billing or deidentifying personal information.

A secondary use or disclosure may be reasonably expected where the use or disclosure is inextricably linked to the primary purpose of collection. However, in some circumstances, despite the link between the primary and secondary purpose, the use or disclosure would not be reasonably expected. For example,

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where an agency collects the contact details of an individual turning in a lost wallet, providing that information to the wallet's owner so the owner could thank the finder would not be a reasonably expected secondary purpose, despite its link to the primary purpose.

### **4.3 Related or directly related to the primary purpose**

QPP 6.2(a) also requires that the proposed secondary purpose be related – or, for sensitive information, *directly* related – to the primary purpose of collection.

#### **What was the primary purpose**

Under QPP 3, agencies can only collect personal information for an identified primary purpose. Determining if the proposed secondary purpose relates or directly relates to the secondary purpose requires the person making that determination to know what the primary purpose was.

If the individual the information is about was given a notice or information under QPP 5,<sup>5</sup> it will assist in determining the primary purpose of collection.

If the individual was not given a notice or information under QPP 5, the agency will need to consider other information to determine the primary purpose, eg:

- the information itself
- the context in which the information was collected
- the entity the information was acquired from
- what the agency did with the personal information after it acquired it; and/or
- any legislation, policies, plans or schemes underpinning its acquisition and/or original use.

#### **Related to**

For personal information that is not sensitive information the secondary purpose only needs to be related to the primary purpose.

A related secondary purpose is one which is connected to or associated with the primary purpose. There must be more than a tenuous link.

Examples of where a secondary purpose is related to the primary purpose of collection could include:

- for personal information collected for the primary purpose of collecting a debt, contacting the individual's former neighbours to ask if they know where to locate them would be a disclosure for the secondary purpose of locating the individual, which is a related and reasonably expected secondary purpose

<sup>5</sup> See QPP 5 guideline [Informing people when collecting personal information](#).



- for employee personal information collected for the primary purpose of administering their employment and included in their employee file, a related and expected secondary purpose would be using it as part of a workplace investigation into complaints by the individual about working conditions; or
- using personal information for the purpose of deidentifying that information, as required by QPP 11, is a related and reasonably expected secondary purpose.

### **Directly related to**

Sensitive personal information can only be used or disclosed under QPP 6.2(a)(i) for a secondary purpose *directly related* to the primary purpose. This requires a stronger connection between the use or disclosure and the primary purpose of collection.

The contemplated secondary purpose must be directly connected to or associated with the primary purpose or arise in the context of the primary purpose. There must be a close relationship between the purpose of the use or disclosure and the purpose for which the personal information was obtained.

A directly related purpose can be sufficiently associated with the primary purpose even if it is not strictly necessary to achieve that purpose.

Examples of secondary uses or disclosures which may be directly related to the primary purpose could include where:

- information obtained for the primary purpose of operating a program is used or disclosed for the purpose of monitoring, evaluating, auditing or managing that program
- information obtained for the primary purpose of investigating complaints is used or disclosed for the secondary purpose of reporting investigation results to a relevant oversight body or responsible senior officer; or
- information obtained for the primary purpose involving payment of a fee or charge is used or disclosed for the secondary purpose of recovering or writing off the unpaid money.

## **5.0 QPP 6.2(f) – Disclosure to ASIO**

An agency can disclose personal information to ASIO where all the criteria under QPP 6.2(f) have been met.

### **5.1 Definitions for QPP 6.2(f)**

ASIO is the Australian Security Intelligence Organisation established under the *Australian Security Intelligence Organisation Act 1979* (Cwlth).



The Director-General of ASIO is the person who has been appointed as the Director-General of Security under the *Australian Security Intelligence Organisation Act 1979* (Cwlth).

## **5.2 What does QPP 6.2(f) require?**

Under QPP 6.2(f), ASIO must ask the agency to disclose the personal information.

The request must be made in writing by an officer or employee of ASIO who has written authorisation from the Director-General of ASIO to make the request. The authorised officer or employee must also certify in writing that the personal information they are asking for is required in connection with the performance by ASIO of its functions.

The personal information must only be disclosed to an officer or employee of ASIO who has written authorisation from the Director-General of ASIO to receive the information.

## **6.0 QPP 6.2(g) – Use and disclosure for public interest research**

Under QPP 6.2(g) personal information can be used or disclosed where:

- the personal information is necessary for research or the compilation or analysis of statistics in the public interest
- the use or disclosure does not involve the publication of all or any of the personal information in a form that identifies any individual
- it is not practicable to obtain the express or implied consent of each individual the subject of the personal information before the use or disclosure; and
- if the personal information is disclosed to another entity, the agency is satisfied on reasonable grounds that the relevant entity will not disclose the personal information to another entity.

### **6.1 Health agencies and health research**

In addition to disclosure under QPP 6.2(g), health agencies may collect, use, and disclose personal information which is health information for research or the compilation or analysis of statistics relevant to public health or public safety: collection, use or disclosure of health information in this context is a 'permitted health situation', stated in schedule 4, part 2 of the IP Act .

Refer to ***Health agencies – collection, use or disclosure of health information*** for more information.

### **6.2 De-identified or unidentified data**

The privacy principles only apply to information that can be linked to an identifiable individual. If the information can be de-identified, or broken down into aggregated



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unidentified data such as statistics, the use or disclosure can proceed without having to consider the QPPs.

Refer to ***Privacy and De-identification*** (guideline under development) for assistance on de-identifying information.

### **6.3**      ***Consent and planning for future research needs***

As a general rule, it is preferable for personal information to be used for research with the consent or reasonable awareness of the individual.

Where an agency collects or holds information with research value, potential future research needs should be considered. Where appropriate, the use of personal information for future research can be built into the information provided under QPP 5.

### **6.4**      ***Research in the public interest***

Before an agency can rely on the QPP 6.2(g) public interest research exception, it must first consider:

- whether the work can be undertaken with unidentified or de-identified information instead of personal information
- what method will be used to ensure the final product is effectively de-identified
- for disclosure, what steps the agency will take to ensure it can be satisfied that the recipient will not disclose the information to anyone else
- whether the information will be transferred outside Australia as part of the research; if so, it must comply with section 33 of the IP Act - refer to [\*\*\*Disclosing personal information out of Australia\*\*\*](#) for information
- whether it is impracticable to seek the consent of the potential subjects; and
- whether the work is in the public interest.

### **6.5**      ***Key criteria for QPP 6.2(g)***

#### **Necessary**

When considering whether the use or disclosure is necessary, an agency must consider to what degree the personal information is needed for the research. 'Necessary' requires that the use or disclosure be more than helpful, desirable or convenient.

Whether the use or disclosure will be necessary will be a question of degree, to be determined having regard to the purpose of the research, its intended outcomes, and the extent to which the research is dependent on the personal or health information. If de-identified information can or would serve the same purpose, then the use or disclosure of the information is not necessary.



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## **Research**

Research generally involves diligent and systematic inquiry or investigation into a subject in order to discover facts or principles. It must begin with a clearly defined goal around which the study is designed. The data gathered as part of the research must be aimed at assisting the researcher towards achieving that goal.

It should be more than a reorganisation or restatement of the facts contained in the data; it must use a clear procedure to analyse a body of information or data and extract new meaning from it or develop unique solutions to problems or cases.

## **Statistics**

Compilation or analysis of statistics is the act or process of collecting numerical data or undertaking a detailed examination of the elements or structure of numerical data, especially in or about large quantities, and inferring conclusions about the whole from conclusions reached from the whole or a representative sample.

## **In the public interest**

For research to be in the public interest, it must be done ethically. The results it is aimed at achieving, the questions it is attempting to answer, or the knowledge it is seeking to gain must be of potential benefit to more than just the agency which holds the information or the individual conducting the research.

Research in the public interest would commonly involve something beneficial to the well-being of society as a whole, or a specific segment of it, with an emphasis on areas for which the government has responsibility.

Research that may be in the public interest could include research into:

- public health issues
- public safety issues
- social welfare issues
- criminal matters, such as trends, prevention, effectiveness of deterrence measures
- protection of children and disabled or disadvantaged members of society
- environmental health, protection, and improvement
- better delivery and increased effectiveness of government services.

All proposed research projects where personal information is considered necessary must be individually assessed to determine if they are actually in the public interest. When making this assessment, agencies should consider how the public interest is being defined, e.g.,

does it go beyond the agency's own needs/potential benefit to consider the greater implications for the public as a whole.

Agencies should also consider how the public is expected to benefit from this research. Will the research, for example:

- bring greater knowledge, insight, or understanding
- improve social welfare, public safety, or individual well-being or minimise a serious harm; or
- enhance the delivery or improve the effectiveness of a government service.

Other relevant considerations may include whether:

- there is a risk or potential cost to the community if the research is not conducted
- the potential subject of the research is at any risk of harm as a result of their personal information being used in this way; and
- the research is being conducted in an ethical way, consistently with the accepted standards for research involving human beings.

### **Not practicable to obtain agreement**

Agreement or consent is the simplest way of using or disclosing personal information for a purpose not contemplated at the time of collection. The public interest exception in QPP 6.2(g) can only be relied on if it is not practicable to obtain agreement.

'*Not practicable*' does not mean difficult or undesirable. To be impracticable, it must be impossible, or extremely difficult, to seek consent. The fact that seeking consent is inconvenient or would involve expenditure of some effort or resources is not sufficient.

The impracticability of obtaining agreement must not be confused with the undesirability of obtaining agreement. For example, it is not sufficient that, if consent were sought, refusal by some individuals would make the research project more difficult.

Whether it is impracticable to seek consent will depend on the individual circumstances. When making this determination, the following are relevant considerations:

- the age of the information
- the size of the subject pool
- whether the individuals concerned are likely to have moved or died
- the lack of current or ongoing contact with the individuals, and a lack of sufficient information to determine their current contact details (bearing in mind the obligation to ensure information is accurate and up to date before use); and

- the resources required to obtain consent would be a significant drain on the agency or researcher to the extent that the research could not be done.

### **Satisfied the relevant entity will not disclose**

Where agencies are disclosing personal information under QPP 6.2(g) rather than using it themselves, they must be satisfied on reasonable grounds that the entity receiving it will not disclose it to anyone else.

In addition, agencies should ensure the entity will:

- appropriately safeguard the information against loss, misuse, and unauthorised access
- not use the information for any other purpose; and
- return the information or destroy it at the conclusion of the research.

This could be achieved by way of a contract, Memorandum of Understanding, Deed of Privacy or other instrument that binds the recipient of the information to deal with it in a specific way.

Agencies and entities discussing disclosure under QPP 6.2(g) may find ***Accessing personal information from government - a guide for researchers*** (guideline under development) useful.

**For additional IPOLA assistance, please contact the IPOLA team by email [IPOLA.Project@oic.qld.gov.au](mailto:IPOLA.Project@oic.qld.gov.au)**

**For information and assistance on current legislation, please refer to the OIC's guidelines, or contact the Enquiries Service on 07 3234 7373 or by email [enquiries@oic.qld.gov.au](mailto:enquiries@oic.qld.gov.au)**

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