s 22

From: Curtis, Jonathan (DPS) <Jonathan.C.Curtis@aph.gov.au>
Sent: Wednesday, 25 July 2018 13:33
To: YANNOPOULOS, Matt
Cc: DAVIS, Jackie; s 22
Subject: RE: URGENT - Request to correct elements of article re access to My Health Record data by law enforcement [SEC=UNCLASSIFIED]

Thanks Matt

I'll discuss with my colleagues and get to you as soon as possible.

Regards
Jonathan

Jonathan Curtis
Assistant Secretary Research Branch
Parliamentary Library
T: 02 6277 2470 | M: s 22 | E: jonathan.c.curtis@aph.gov.au
Parliament House | PO Box 6000 | Canberra ACT 2600

PARLIAMENT OF AUSTRALIA
DEPARTMENT OF PARLIAMENTARY SERVICES

Senate F&PA Committee
Tabled Document
Inquiry: SUPP. ESTIMATES
Date/Time: 22/10/2018 1.55pm
Witness Name: Dr Heriot, Mr Curtis
Organisation: Dept of Parliamentary Services

From: YANNOPOULOS, Matt [mailto:Matt.Yannopoulos@health.gov.au]
Sent: Wednesday, 25 July 2018 1:31 PM
To: Curtis, Jonathan (DPS)
Cc: DAVIS, Jackie; s 22
Subject: URGENT - Request to correct elements of article re access to My Health Record data by law enforcement [SEC=UNCLASSIFIED]
Importance: High

Dear Jonathan,

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The three areas of most concern to us are that the article states that:

- the My Health Record "represents a significant reduction in the legal threshold for the release of private medical information to law enforcement" and suggests that currently, in the absence of consent, law enforcement agencies can only access a person's records with a warrant, subpoena or court order;
- "Although it has been reported that the ADHA's 'operating policy is to release information only where the request is subject to judicial oversight', the *My Health Records Act 2012* does not mandate this and it does not appear that the ADHA's operating policy is supported by any rule or regulation"; and
- "the Health Minister's assertions that no one's data can be used to 'criminalise' them and that the 'Digital Health Agency has again reaffirmed today that material ... only be accessed with a court order' seems at odds with the legislation which only requires a reasonable belief that disclosure of a person's data is reasonably necessary to prevent, detect, investigate or prosecute a criminal offence".

Interaction between ADHA's policy and legislation

The last two statements above deal broadly with the same issue, being the interaction between policy and the *My Health Records Act 2012* (MHRA) and specifically references s 70 of the MHRA. As indicated in the article, s 70 authorises the ADHA to disclose information to enforcement agencies where it "reasonably believes" that disclosure is "reasonably necessary" for certain law enforcement purposes. The Agency's published position is that whilst it assesses each formal request on a case by case basis, the legislative test would be met with a court/coronial or similar order. It is a matter for the ADHA, as the System Operator, as to how it applies the legislation and the ADHA have been open and categorical in how they do so.

Factual context is also an important factor in assessing the application of the legislation in practice. The ADHA has indicated in the media that it has not released any documents to any law enforcement agencies in the last six years.

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Personal Control

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I'd be grateful for your reply and clarifications as soon as practicable.

Thankyou,

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Cc: Heriot, Dianne (DPS); DAVIS, Jackie
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The article fails to mention public statements by the Australian Digital Health Agency as to how it is applying the law.
We also consider that the article's omission of reference to the *Privacy Act 1988* (Privacy Act) has given rise to a public misunderstanding that the *My Health Record Act 2012* (MHRA) has significantly altered the legal protections available in relation to the disclosure of health information, particularly in the context of the statement that the MHRA "represents a significant reduction in the legal threshold for the release of private medical information to law enforcement".
In this context, we note that GPs fall within the definition of an 'APP entity' under the Privacy Act (see ss 6C and 6D(4)(b)) and that there is a comparable provision in that Act to s 70 of the *My Health Records Act 2012*. For your reference, the relevant provision in the Privacy Act is APP6.2(e), which establishes that an APP entity is authorised to disclose personal information to an enforcement body about an individual where the entity "reasonably believes" that it is "reasonably necessary" for one or more enforcement related activities. 'Enforcement activities' is defined in s 6 of the Privacy Act, as is 'enforcement body'.
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Given the above, we request that you issue an addendum to the article, setting out the ADHA's published position as to its application of the MHRA. The ADHA's published position is at:
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To: YANNOPOULOS, Matt <Matt.Yannopoulos@health.gov.au>
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Thanks Jonathan,

I appreciate your consideration and response to my email.

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Subject: Request to correct elements of article re access to My Health Record data by law enforcement [SEC=No Protective Marking]

Dear Matt

Thanks for your email raising the department's concern over some of the content in the Flagpost 'law enforcement access to My Health Record data'. We've carefully reviewed your comments on the Flagpost, as well as associated legislation and other policy documents.

The key issue relates to the legal basis on which information is released. We are in complete agreement that, as Minister Hunt stated, although the wording of section 70 of the 2012 Act sets out the 'reasonably believes test', the Agency itself has adopted a policy that it will require a court order to enable it to be 'reasonably satisfied'. Our point (and that of a number of other commentators) is not that this doesn't happen, but simply that there is a difference between law and policy as the agency is not required or obligated to take a court order as its standard. The requirement for a court order is an administrative policy; not a legislative requirement.

Although the ADHA has not released any documents to law enforcement agencies in the last six years, it is relevant to note that the ADHA states that it has also not received any requests (according to a quote appearing in a story for the ABC). It is arguable that this situation may change with the commencement of the current opt-out phase on 16 July and the degree of public commentary.

The purpose of the article's reference to the Social Security regime was its use of criteria that includes the seriousness of the matter involved: the enforcement of a criminal law that relates to an *indictable offence punishable by imprisonment of 2 years or more*; or a law *imposing a pecuniary penalty equivalent to 40 penalty units or more*; or to prevent an act that may have a *significant adverse effect on the public revenue*. It is this element that differs from the section 70 provisions.

On the matter of personal control in your last point: our view is that your statements go toward a quite separate question: not the rules governing *how* law enforcement agencies may access the record, but what information is contained in a health record (important as this is). Our publication addressed the first question only.

Overall, we have concluded that the statements made in the Flagpost blog are accurate and justifiable. I would also point out in passing that the article itself used rather more circumscribed language than is implied in some of the media reports quoting it.

I have copied Dr Dianne Heriot, the Parliamentary Librarian, into this reply.

Regards
Jonathan

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PARLIAMENT OF AUSTRALIA
DEPARTMENT OF PARLIAMENTARY SERVICES

From: YANNOPOULOS, Matt [mailto:Matt.Yannopoulos@health.gov.au]
Sent: Wednesday, 25 July 2018 1:31 PM
To: Curtis, Jonathan (DPS)
Cc: DAVIS, Jackie; s 22
Subject: URGENT - Request to correct elements of article re access to My Health Record data by law enforcement [SEC=UNCLASSIFIED]
Importance: High

Dear Jonathan,

Thanks for your time on the telephone this morning regarding the article by Nigel Brew, entitled "Law enforcement access to My Health Record data". As discussed, Health has concerns that some of the information in the article is misleading and/or inaccurate. We welcome your indication that you would retract or amend the publication to correct errors or statements that are incorrect or have potential to be misleading. As you will appreciate, the My Health Record has significant public health benefits and it is important that information that is publicly available is

balanced and as accurate as possible, so people can make informed choices in relation to whether to opt out of the system. Below, I have set out the main areas of concern that we have with the article. As discussed, should you require further information or rationale for our position, I would be pleased to make arrangements with our General Counsel, Jackie Davis, to speak with you directly.

The three areas of most concern to us are that the article states that:

- the My Health Record "represents a significant reduction in the legal threshold for the release of private medical information to law enforcement" and suggests that currently, in the absence of consent, law enforcement agencies can only access a person's records with a warrant, subpoena or court order;
- "Although it has been reported that the ADHA's 'operating policy is to release information only where the request is subject to judicial oversight', the *My Health Records Act 2012* does not mandate this and it does not appear that the ADHA's operating policy is supported by any rule or regulation"; and
- "the Health Minister's assertions that no one's data can be used to 'criminalise' them and that the 'Digital Health Agency has again reaffirmed today that material ... only be accessed with a court order' seems at odds with the legislation which only requires a reasonable belief that disclosure of a person's data is reasonably necessary to prevent, detect, investigate or prosecute a criminal offence".

Interaction between ADHA's policy and legislation

The last two statements above deal broadly with the same issue, being the interaction between policy and the *My Health Records Act 2012* (MHRA) and specifically references s 70 of the MHRA. As indicated in the article, s 70 authorises the ADHA to disclose information to enforcement agencies where it "reasonably believes" that disclosure is "reasonably necessary" for certain law enforcement purposes. The Agency's published position is that whilst it assesses each formal request on a case by case basis, the legislative test would be met with a court/coronial or similar order. It is a matter for the ADHA, as the System Operator, as to how it applies the legislation and the ADHA have been open and categorical in how they do so.

Factual context is also an important factor in assessing the application of the legislation in practice. The ADHA has indicated in the media that it has not released any documents to any law enforcement agencies in the last six years.

The MHRA privacy protections

We also disagree with the assertion that the MHRA represents a significant reduction in the legal threshold for the release of a person's medical information to law enforcement.

In support of this assertion, the article references the Ethical Guidelines for Doctors on Disclosing Medical Records to Third Parties 2010 (revised 2015), although I note that the document itself refers at paragraphs 1.7 and 7 for the potential for Commonwealth, State and Territory legislation to require disclosure.

The article specifically mentions (through a link) the *Social Security (Administration) Act 1999* as an example of a law that is asserted to establish a higher bar than the MHRA. Although there are differences between the legislative schemes in regard to relevant considerations that need to be taken into account, in our view the schemes have comparable protections in place in regard to disclosing information for law enforcement purposes.

Personal Control

Personal control is one of the central elements of the MHR system. Significantly, the protections in the my MHRA are further enhanced by the fact that a health care recipient is able to expressly advise that a record must not be uploaded (see section 9, Schedule 1 of the MHRA). A registered healthcare provider's authorisation to upload a record into the MHR system is subject to this important qualification.

I'd be grateful for your reply and clarifications as soon as practicable.

Thankyou,

Matt

Matt Yannopoulos CPA

Chief Operating Officer

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The Department of Health acknowledges the traditional owners of country throughout Australia, and their continuing connection to land, sea and community. We pay our respects to them and their cultures, and to elders both past and present.

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s 22

From: Curtis, Jonathan (DPS) <Jonathan.C.Curtis@aph.gov.au>
Sent: Thursday, 26 July 2018 18:24
To: DAVIS, Jackie
Subject: Flagpost [SEC=No Protective Marking]

Hi Jackie

We have just published the revised flagpost.
https://www.aph.gov.au/FlagPost

regards
jonathan