
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

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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

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