

## PEEKING BEHIND PRIVACY

### Retirement Views, September/October 2005

Mrs Golightly, a resident at your village, has some of the common signs of dementia. You meet with her and her family and despite the concerns raised they are convinced that she is in perfect health. You suspect that she is currently on some form of medication but the family refuses to acknowledge this or provide you with any information pertaining to Mrs Golightly's health. You wish to access Mrs Golightly's health records but the family insist that any attempt to do so will be a breach of Mrs Golightly's privacy rights and is against the law. What should you do?

#### **Does Accessing Resident's Personal Information Constitute a Breach of Privacy Law?**

There is an underlying assumption in privacy law that information relating to an individual is the property of that individual. The Privacy Act 1993, however, provides for the handling of an individual's personal information in accordance with certain principles. These privacy principles provide rules for the collection, storage, security, accuracy, use and disclosure of personal information as well as the resident's rights to access such information. If that information is wrong in any respect, the resident also has the right to get the information corrected. In general terms, village managers may only utilise a resident's personal information if the requirements detailed below have been complied with;

- The resident's personal information must be collected for a lawful purpose that is connected to and necessary for the functions or activities of the village. This principle is usually covered by the resident's completion of an application form on entry to the village setting out the reasons for collecting such

information and obtaining the resident's express consent to its collection.

- The information must be collected directly from the resident concerned. Again, this is likely to be the case in most situations.
- Upon the collection of the information, the village manager must take necessary steps to ensure that the resident was aware of:
  - the collection of the information;
  - the purpose for its collection;
  - the intended recipients of the information;
  - the name and address of the agent holding the information;
  - the consequences for the individual if the information is not provided; and
  - their rights of access to, and ability to correct, the personal information.

This is where most villages fall short as their standard application form does not satisfy these disclosure requirements. It is therefore important that you consider these issues and ensure that they are covered in the application form when new residents enter your village.

- The information must not be collected by unlawful means or in circumstances which are considered unfair or intrusive to an unreasonable extent upon the personal affairs of the resident.

- The information must only be used for a purpose directly related to the purpose for which it was obtained.
- The information must not be disclosed by the village manager to any other person or body or agency.

The Privacy Act provides for exceptions to the above rules in certain circumstances. However, if any of these rules are broken, a resident has the right to complain to the Privacy Commissioner alleging interference with the privacy of their personal information. The Privacy Commissioner may order an investigation or decide to take no further action.

#### **Does Accessing Resident's Health Information Constitute a Breach of Privacy Law?**

The Health Information Privacy Code 1994 ("Code") applies to information that is collected by a health agency before or in the course of, and incidental to, the provision of any health or disability services to individuals. If your village provides health and disability services to care facility residents and/or village residents then you are likely to fall within the Code's definition of a *health agency* and the Code will apply.

The Code imposes specific principles relating to the use of the health information held on residents which are broadly similar to the principles set out in the Privacy Act. In addition, the Code goes further than the Privacy Act in that it requires the village holding such information to implement a complaints procedure to deal with any breach of the Code's principles. Where the Code has no specific provisions relating to the use of health information, any relevant provisions of the Privacy Act will apply.

In general terms, village managers may use the health information of care residents if the Privacy Act

principles outlined above are satisfied. In terms of exceptions to the principles of the Code, there are fewer available than the exceptions to the principles of the Privacy Act.

#### **Conclusion**

Whether you are legally entitled to access and utilise residents' personal and health information is ultimately determined by the manner in which the information is collected on entry to the village. Assuming that the occupancy documents completed by Mrs Golightly on entry to the village did not comply with the privacy principles and Code outlined above, then she would be entitled to make a legitimate complaint to the Privacy Commissioner. Further, if your village provides health or disability services to Mrs Golightly, then she may be entitled under the Code, to make a complaint in accordance with the complaints procedure directed by the Code.

To avoid this situation in the future, we recommend that your occupation agreements require a resident to sign a Privacy Act authorisation enabling the village operator to collect health information on the resident and permitting health agencies to disclose such information, for the purpose of determining the continuing physical and mental suitability of the resident for occupation of a dwelling at your village.

In addition, operators of care facilities may also have obligations to disclose residents' personal information to the Ministry of Health in certain circumstances pursuant to any agreements with the Ministry of Health relating to the provision of care services. This should therefore also be explained in the admission agreement so that you may fulfil your legal obligation to disclose both the purpose of collecting the information and the identity of the intended recipient.

So is there any other legal means of accessing Mrs Golightly's records in order to assess her mental health and the suitability of her occupation of a unit at your village you ask? The answer is yes, provided you seek and obtain Mrs Golightly's specific consent to access her records and to pass this information on to a health professional if needs be. In this scenario, this may prove difficult especially if Mrs Golightly and the members of her family are unwilling to acknowledge her deteriorating condition.

**Meryl Duval and Jenny Baldwin**

## **Contact Us**

The information in this article is necessarily general.

Please feel free to contact us for more specific advice on privacy matters or about any other matter relating to your retirement village.

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