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Privacy
Foundation**

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Australian Privacy Foundation Submission to the Office of the Privacy Commissioner

Submission: The Biometrics Institute Privacy Code should be de-registered

About the Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. For information about the Foundation see www.privacy.org.au

About this submission

This submission sets out the formal policy of the Australian Privacy Foundation in relation to the Biometrics Institute Privacy Code. We note that the Institute has recently completed its first Code Review and has presumably submitted the review panel's report, and the Institute's response, to your office.

For the reasons outlined below we submit that the Biometrics Institute Privacy Code should not be approved or recognised in any way by the Office of the Privacy Commissioner. It should be removed from the register of approved Codes immediately.

Problems with the Biometrics Institute Privacy Code

The Biometrics Institute Privacy Code is heavily promoted by the biometrics industry as a positive form of privacy protection and as a significant achievement of the Biometrics Institute. In reality, after three years of operation, the Code has only five subscribers (out of a base of 106 members). When the details of the five subscribers are examined, it becomes clear that the Code has no support from major biometrics vendors or users. In addition, none of the subscribers provides a link or any information about the Code on their websites or in their privacy policies.

| Signatory | Type of business | Link to Code | Mention of Code |
|-------------------------------|-------------------------|---------------------|------------------------|
| Argus Solutions | Small Vendor | No | No |
| Aulich & Co | Consultant | No | No |
| Biometix Pty Ltd | Consultant | No | No |
| Biometric Innovations Pty Ltd | Small Vendor | No | No |
| IDW Technologies Pty Ltd | Small Vendor | No | No |

Two of the signatories are consultants. It is difficult to see how the provisions of the Code have any relevance to consultants, as they will not collect or use personal information. Key Code provisions such as access rights and audit requirements appear completely irrelevant to consultants.

Three of the signatories are vendors. However, these vendors are not large or significant organisations. The Biometrics Institute membership list includes major vendors such as IBM and UNISYS who have not signed the Code.

Overall, a subscription rate of 5 out of 106 (including two consultants) is an embarrassing level of support for a Code that has been in place and heavily promoted since July 2006.

This level of support reveals the true nature of the Code. It is a token form of privacy protection that provides positive PR for the biometrics industry, without providing any additional requirements for the real providers and users of biometrics in Australia.

Problems with the OPC registration

The Code was approved by the OPC in July 2006 (effective from 1 September 2006).

The Biometrics Institute constantly draws attention to the OPC approval and highlights this as a significant achievement for the Institute.

For example the Institute website states:

The Code has been registered on the Federal Register of Legislative Instruments as well as entered into the Privacy Commissioner's register of approved privacy codes.

There are also numerous references, photos and logos regarding the nomination of the Code for a Privacy Award in 2008 and again in 2009 in the NGO / Community category.

None of this promotion of the Code and promotion of the OPC's approval mentions that the Code has virtually no subscribers.

The constant promotion of the OPC approval of the Code and regular nomination for Privacy Awards is starting to have a detrimental impact on the reputation of the Office of the Privacy Commissioner. In short, the Biometrics industry is using the name of the Office of the Privacy Commissioner to promote the sale and distribution of biometrics technology in Australia, without any evidence that the Code provides any additional privacy protection for the bulk of biometrics implementations beyond the default requirements of the Privacy Act.

There should be a threshold level of support for a Code (especially after more than three years of operation) before the Code qualifies for the continued recognition of the Office of the Privacy Commissioner.

Announcement of the Code Review

The Code requires an independent review to be conducted every three years. The Biometrics Institute approached the APF on 22 July 2009 with an invitation to participate in its review.

APF replied the same day as follows:

"Thanks for the invitation.

Frankly, the credibility of your Code has been effectively destroyed by the failure of your members to sign up - as of today your website shows only 5 of more than 100 - and none of the major user members. The Institute has managed to generate an impression of taking privacy seriously beyond the strict requirements of the Privacy Act without this being backed up by actual practice.

In light of this I suspect we will have severe reservations about contributing to any process which lends spurious credibility to the Code. I will consult with [the APF chair] on his return (soon) and we will let you know whether we are prepared to engage and if so on what terms - my suggestion will be that the terms of

reference for the review must include questioning why the take-up has been so low and whether there is any rationale for continuing to have a Code which is largely aspirational.

I am copying the OPC into this as I would expect them to have similar concerns.

The Institute replied, also that day and again on 27 July, with copies to the Office of the Privacy Commissioner, citing various reasons for the low take-up rate - essentially blaming features of the Privacy Act, and seeking our input:

"because attempts by bodies like the Institute to lift the bar should be encouraged."

There was some internal discussion within APF, but no further response was made to the Institute.

We note however that the Institute (and your office) were clearly on notice about our concerns before the closing date for nominations for the 2009 Privacy Awards. It was the announcement that a nomination by the Institute for its Code had been accepted and shortlisted for the Awards that provoked a nomination for the Big Brother Awards organised by the APF. As you are aware, the Institute was awarded the 'Orwell' award for 'greatest corporate invader' by popular vote at the BBA awards ceremony held simultaneously in Sydney and Canberra on 11 November 2009, specifically for misleading and deceptive conduct in relation to its Privacy Code. See:

<http://www.privacy.org.au/bba/>

Problems with the 'independent' review

The Commissioner's Code Development Guidelines (Sept 2001) include an expectation of an independent and adequately resourced review at least once every three years.

The Biometrics Institute Privacy Code includes a review process, which includes the establishment of an Independent Code Review Panel, comprising:

1. An independent chairperson; and
2. An equal number of consumer and industry representatives which the Biometrics Institute Board may from time to time nominate.

In fact, the Independent Code Review Panel for the first review, recently published, consisted of:

1. The Hon. Terry Aulich, Aulich & Co (Chair)
2. Dr Ted Dunstone, Biometix (Supplier)
3. Phillip Youngman, former Privacy Officer of the NSW Roads and Traffic Authority, now retired (User)
4. Ross Summerfield, Operations Manager, IT Services, Centrelink (User)

All of these Panelists were members of the Biometrics Institute. The supposedly independent Chair was in fact a Code subscriber. Three of the four members of the Panel are consultants to the biometrics industry and subscribers to the Code.

The composition of the Panel bears absolutely no resemblance to the requirements for the establishment of an Independent Code Review Panel as set out in the Code.

In addition, the supposedly independent Chair of the Review Panel is the sole authorised provider of Privacy Impact Assessments by the Biometrics Institute:

<http://www.biometricsinstitute.org/associations/4258/files/PIA%20Flyer.pdf>

It is an unusual situation where the Code contains a requirement for subscribers to conduct Privacy Impact Assessments, which the Biometrics Institute offers as a (paid) service, which are in turn supplied by the independent Chair of the Code Review Panel. The Australian Privacy Foundation is not aware of any definition of the word "independent" which would cover this scenario.

Next steps

The Office of the Privacy Commissioner should withdraw its approval of the Biometrics Institute Privacy Code immediately. The Code may still exist and be promoted by the Biometrics Institute, but its true nature as a PR instrument for the industry will then be clearer to consumers, and the reputation of the Office of the Privacy Commissioner will be protected.

In addition, the Office of the Privacy Commissioner should give serious consideration to whether the Code qualifies for repeated nominations for the Privacy Awards when it has virtually no subscribers or support, as these nominations further damage the reputation of both the Office and the Awards.

It is important to note that privacy and consumer advocacy groups have declined to give any legitimacy to the Code by engaging in consultations with the Biometrics Institute regarding Code content (for example, code reviews). Until the industry shows a substantial degree of commitment to the Code (e.g. through a majority of large members signing the Code) the privacy and consumer advocacy community has no plans to re-engage with the Biometrics Institute on this issue.

We look forward to your response.

For further information contact:

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APF Web site: <http://www.privacy.org.au>