

Surveillance and Privacy

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Board-member of the Australian Privacy Foundation, 1987-

U3A – Ainslie – 19 October 2021

[{.html, .pdf}](http://rogerclarke.com/DV/SandP-U3A)

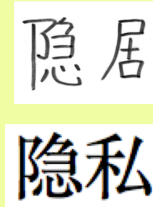
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Privacy

The interest that individuals have
in sustaining 'personal space'
free from interference by
other people and organisations



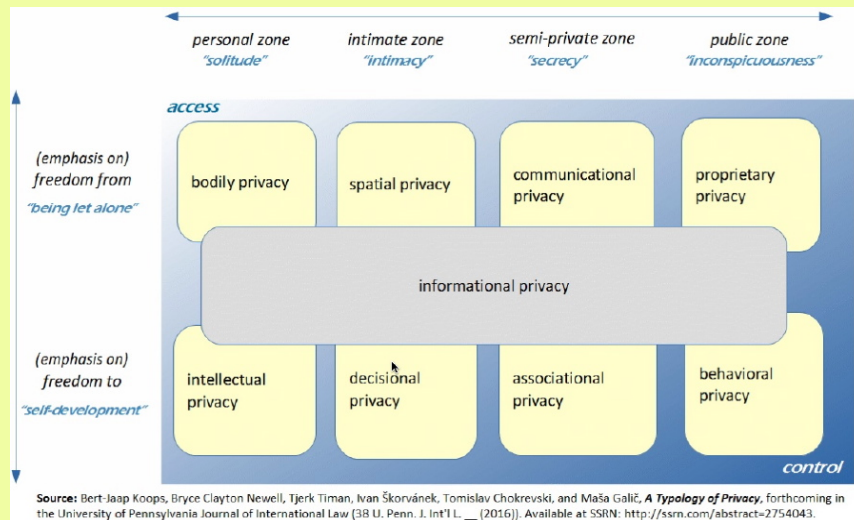
Very different from Security, and from
Inaccessibility / 'Confidentiality' / Secrecy / Non-Disclosure

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Morison (1973)
<http://www.rogerclarke.com/DV/Privacy.html>
<http://www.rogerclarke.com/DV/Intro.html>

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Source: Bert Jaap Koops, Bryce Clayton Newell, Tjerk Timan, Ivan Škorvánek, Tomislav Chokrevski, and Maša Galić, *A Typology of Privacy*, forthcoming in the University of Pennsylvania Journal of International Law [38 U. Penn. J. Int'l L. __ (2016)]. Available at SSRN: <http://ssrn.com/abstract=2754043>.

8 Privacy Types and 1 Aspect

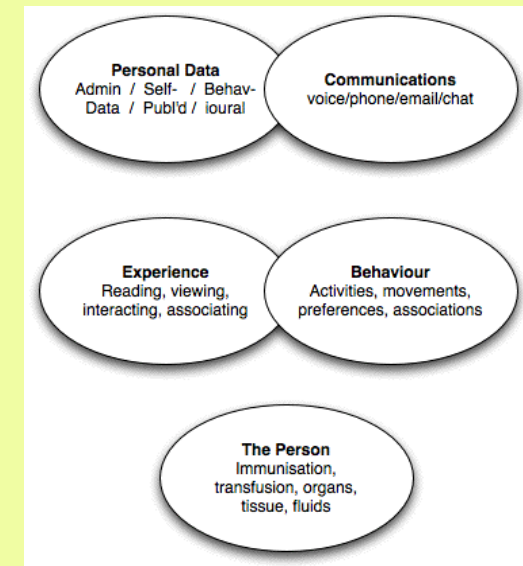
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Koops et al. (2016)
<http://rogerclarke.com/DV/PItyp-1701.html>

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Privacy Dimensions



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<http://www.rogerclarke.com/DV/Intro.html#Priv> (1997)

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Why Privacy ?

- Human Dignity / Autonomy
- Political Needs
- Economic Needs / Asset Protection
- Social / Sociological Needs
- Psychological Needs
- Physical Needs / Safety

cf. the Maslowian Hierarchy of Needs

https://en.wikipedia.org/wiki/Maslow%27s_hierarchy_of_needs

<http://www.rogerclarke.com/DV/Biel15.html#PM>

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Types of Harm from Privacy Invasions

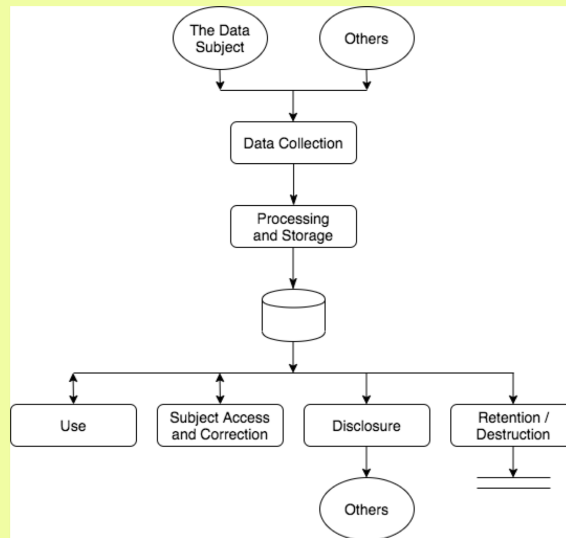
- **Physical**
Discovery of identity or location leads to assault and worse
- **Psychological**
Closed doors, drawn curtains, 'jumping for joy'; loss of control over one's life, image, and respect, undermining social cohesion
- **Economic**
Stifling of non-conformist, risk-taking, inventive and innovative behaviour, undermining cultural, scientific and economic change
- **Political**
Embarrassments, stigmas; self-repression (the 'chilling effect'); political repression; a reduced pool of political contributors
- **Philosophical**
Autonomy, self-determination, human dignity, personal integrity

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The Life-Path of Personal Data



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Privacy Protection

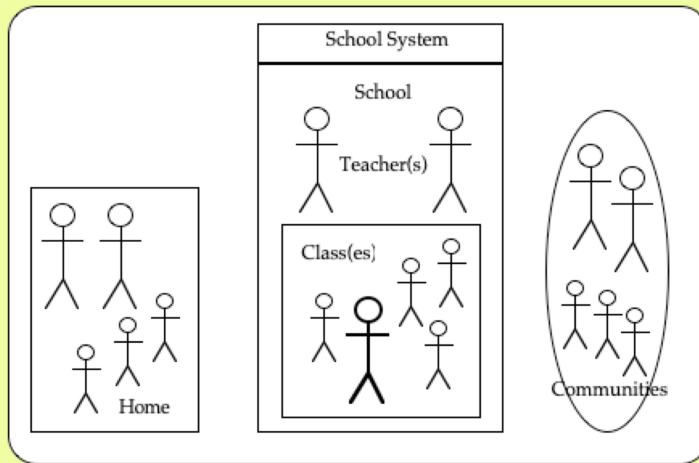
- Privacy is one interest among many
- Privacy may conflict with other interests:
 - of the person themselves
 - of another person
 - of a group or community
 - of an organisation
 - of society as a whole
- Privacy Protection is a process of **finding appropriate balances between privacy and multiple competing interests**

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Stakeholders and Trade-Offs



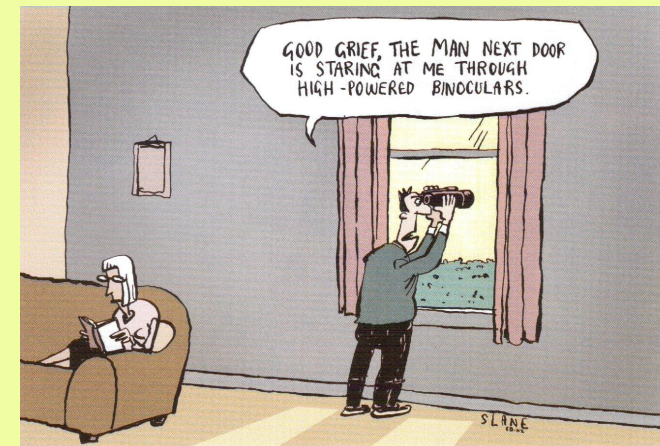
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'Handholding or Handsets:
School-Children's Tablets and Privacy'
<http://rogerclarke.com/DV/PTedPhtml>

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'If there's one thing I can't stand, it's intolerance'



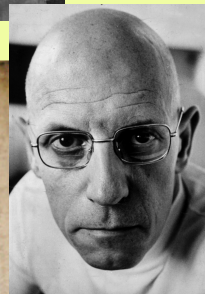
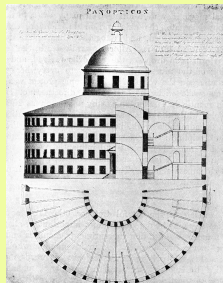
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Surveillance Visual and Spatial

- Veiller
Observe, watch (out for), ...
- Sur-
On, about, to, over, ...
- Surveillance
Watching over, supervision
- France – 1790s
- UK – 1810s
- France – 1970s
- Spain – 2010s



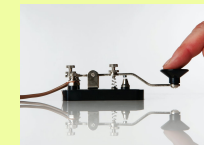
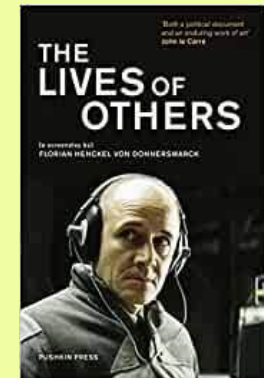
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Extensions Geo-Spatial and Beyond

- Aural
- Tele-
- Retrospective
- Electronic



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Surveillance

- The systematic investigation or monitoring of the actions or communications of one person ('personal surveillance') or many people ('mass surveillance')

Surveillance

- The systematic investigation or monitoring of the actions or communications of one person ('personal surveillance') or many people ('mass surveillance')

Dataveillance

- The consolidation of personal data from multiple sources, and the use of information technologies to exploit that data

Surveillance

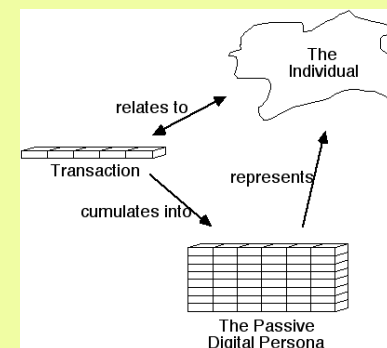
- The systematic investigation or monitoring of the actions or communications of one person ('personal surveillance') or many people ('mass surveillance')

Dataveillance

- The consolidation of personal data from multiple sources, and the use of information technologies to exploit that data
- Less expensive. Even in 1986, nearly as good**
More efficient watching of more people
More efficient behaviour-influence and control

The Digital Persona

A model of a human entity, or of one of their identities, based on data, maintained by transactions, and intended for use as a proxy for the individual



Location and Tracking

- **Location**

An entity's proximity to known reference points, within a defined space, at a defined point in time

- Physical Space ('Geo-Location')
- Network Space
- Intellectual Space

- **Tracking**

The entity's sequence of locations over a period of time

- **Temporality**

Retrospective / Contemporaneous / Real-Time / Prospective

- **Risks**

Correct **Inferences re Actions, Attitudes, Intentions, Associates**
Incorrect Inferences about <ditto> Interception

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<http://rogerclarke.com/DV/PLT.html> (1999)
<http://rogerclarke.com/DV/YAWYB-CWP.html> (2011)

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Case was at a vending console **at the end of a rank of payphones.**

The phone nearest him rang. Automatically, he picked it up.

'Yeah?'. 'Hello, Case. Wintermute, Case. It's time we talk'.

He hung up.

On his way back from the vending machine, he had to walk the length of the ranked phones.

Each rang in turn as he passed, but only once.

William Gibson
'Neuromancer', 1984

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'Ain't nobody here but us turkeys'



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Digitalisation

The adaptation of organisational processes to take full advantage of Digitisation

- **Interactions are with Digital Personae, not people**
Each human, and their identities, can be largely ignored
- **Organisations reduce their costs and their risks**
No wet-chem emotions, ambiguity, tolerance, compassion, ...
- **Web 2.0 technologies (2005-)**
- **The Privacy of Personal Experience has been shredded**
Access to live events, text, data, image and video switched from mostly-anonymous analogue to mostly-identified digital forms

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The Textbook Message

*"[marketers'] strategy should be to **bribe** users to give [marketers] the appropriate demographics, which in turn can be passed onto advertisers ...*

*"[The game is about] **inducing** consumers to give [marketers] the information they want.*

"we expect that many consumers will be happy to sell information about themselves for a nominal amount ..." (pp. 35-36)

Shapiro C. & Varian H.R. (1999)
'Information Rules: A Strategic Guide to the Network Economy'
Harvard Business School Press, 1999

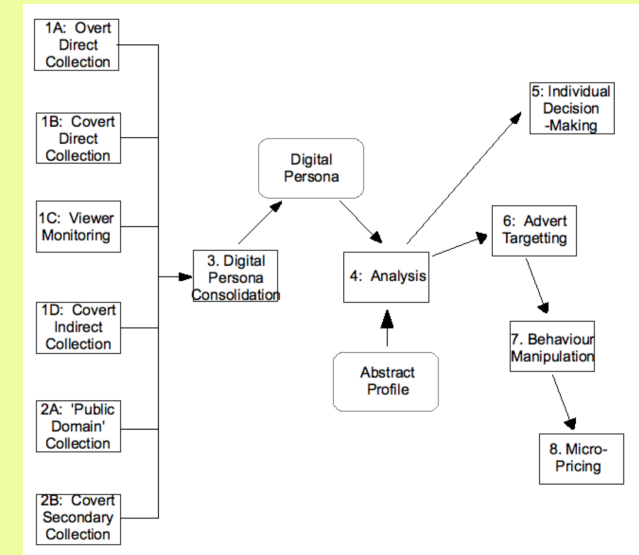
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Business Processes

in the Digital Surveillance Economy



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<http://rogerclarke.com/EC/DSE.html>

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Kinds of Privacy Safeguards

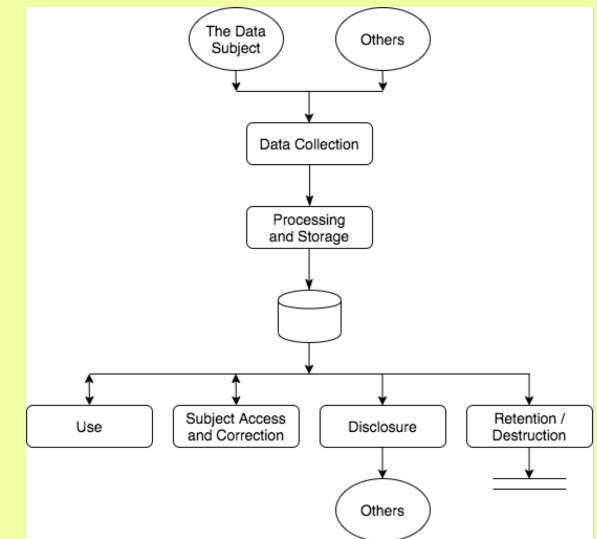
- **Legal, or 'Regulatory'**
 - Laws
 - Codes
 - Standards
 - 'Guidelines'
- **Organisational**
 - Policies, Procedures, Practices
 - Training
 - Incident and Complaints Systems
- **Technical**
 - 'Privacy-Enhancing Technologies' (PETs)

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The Life-Path of Personal Data



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Privacy Act (Cth) and APPs

- The Australian Privacy Principles (APPs)
<https://www.oaic.gov.au/privacy/australian-privacy-principles/australian-privacy-principles-quick-reference>
[And that's the shortened version!]
- The law is full of designed-in loopholes
- The law lacks specific guidance
e.g. OAIC 'Guide to securing personal information' provides limited assistance, and sets no baseline
- The law is largely unenforced

The EU GDPR

- European General Data Protection Regulation (GDPR)

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Exemptions and Exceptions in the Privacy Act as at December 2016

s.6A - Fully Exempted Activities

- archival evaluation
http://www.austlii.edu.au/au/legis/cth/consol_act/pa1988108/s6a.html
- act or practice outside Australia
http://www.austlii.edu.au/au/legis/cth/consol_act/pa1988108/s6a.html
- act of practice required by an applicable law of a foreign country (also s. 13D)
http://www.austlii.edu.au/au/legis/cth/consol_act/pa1988108/s6a.html

s.7 - Fully Exempted Entities

- http://www.austlii.edu.au/au/legis/cth/consol_act/pa1988108/s7.html
- FOI Act Schedule 1 (3 courts)
- FOI Act Schedule 2 Part I Div 1 (9 agencies)
- FOI Act Schedule 2 Part II Div 1 (3 agencies)
- a federal court
- a Minister
- several Commissioners or Commissions
- in relation to a record that has originated with, or has been received from [list of intelligence and similar agencies]

s.7B - Fully Exempted Activities

- http://www.austlii.edu.au/au/legis/cth/consol_act/pa1988108/s7b.html
- Individuals in non-business capacity
- Employee records
- Journalism by a media organisation (minor condition re 'standards')
- Organisation acting under State contract

s.7C - Political Acts and Practices

- Members of a Parliament etc.
- Contractors for political representatives etc.
- Subcontractors ...
- Volunteers ...

s.12A - State banking or insurance within that State

s.13B - disclosures to related bodies corporate

s.13C - transfer of data from a partnership to a successor partnership

s.13D - act of practice required by an applicable law of a foreign country (also s.6A)

s.16 - personal data held for Personal, family or household affairs

s.16A - Substantial Exemption for Permitted General Situations

- emergency: impracticable to gain consent and serious threat to life ...
- protection of own legal interests: reason to suspect that unlawful activity, or misconduct of a serious nature, that relates to the entity's functions or activities
- missing persons: to assist any APP entity, body or person to locate a person who has been reported as missing
- protection of (any entity's?) legal interests: the establishment, exercise or defence of a legal or equitable claim
- resolution processes for (any?) dispute: for the purposes of a confidential alternative dispute resolution process
- diplomatic or consular functions or activities

- for war, peacekeeping or civil emergency outside Australia

s.16B - Substantial Exemption for Permitted Health Situations

- to provide a health service to the individual
- research relevant to public health or public safety
- the compilation or analysis of statistics relevant to public health or public safety
- the management, funding or monitoring of a health service
- third party's genetic data re health of genetic relatives
- patient incapable of giving consent

s.20A - Credit Reporting

- The Australian Privacy Principles do not apply to a credit reporting body ...

s.20C - Credit Reporting

- Authorisation of non-consensual disclosure and use of personal data for credit reporting ...

s.72 - Public Interest Determinations

- the Commissioner is satisfied that the public interest in an act or practice substantially outweighs the public interest in adhering to that code or principle

s.80A - Temporary public interest determinations

- As to s.72 plus the issues require an urgent decision

s.80G - Emergencies (see also ss.80P, 80Q)

- for a purpose that directly relates to the Commonwealth's response to an emergency or disaster in respect of which an emergency declaration is in force, incl.
- identifying individuals injured, missing, dead or involved
- assisting such individuals
- assisting law enforcement
- informing 'responsible persons' for such individuals

s.95 - Medical Research [enormous power granted to the NH&MRC]

s.95A - Health Information [enormous power granted to the NH&MRC]

- research
- the compilation or analysis of statistics, relevant to public health or public safety

s.95AA - Genetic Information [enormous power granted to the NH&MRC]

- lessening or preventing a serious threat to the life, health or safety of an individual who is a genetic relative of the individual to whom the genetic information relates

s.100 - Regulations, incl.

- necessary or convenient for carrying out or giving effect to this Act

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Exceptions and Exemptions in the APPs as at December 2016:

http://www.austlii.edu.au/au/legis/cth/consol_act/pa1988108/sch1.html

APP2.2 - anonymity and pseudonymity

- if the APP entity is required or authorised to deal with individuals who have identified themselves
- if it is impracticable

APP3 - collection of solicited personal information

- consent and reasonably necessary for, or directly related to, one or more of the agency's functions or activities
- consent and reasonably necessary for one or more of the organisation's functions or activities
- required or authorised by law
- a permitted general situation exists
- a permitted health situation exists
- an enforcement body ...
- a non-profit organisation ...

APP6 - use or disclosure of personal information

- [Usual long list similar to APP3]

APP7 - Direct Marketing

- Despite the nominal prohibition, [Authorisation of non-consensual, opt-out use of personal data for direct marketing]
- Despite the nominal prohibition, [Authorisation of non-consensual use of personal data by contracted service providers for a Commonwealth contract]

APP8 - cross-border disclosure of personal information

- [even longer list of loopholes]

APP9 - adoption, use or disclosure of government related identifiers

- [Usual long list similar to APP3]
- any organisation can be authorised by Regulation

APP10 - quality of personal information

- ... such steps (if any) as are reasonable in the circumstances ...

APP11 - security of personal information [and destruction]

- ... such steps (if any) as are reasonable in the circumstances ...

APP12 - access to personal information

- agencies retain the scope to use all FOI and other exemptions
- organisations have a long list of loopholes available
- ... give access to the information in the manner requested by the individual, if it is reasonable and practicable to do so
- organisation may charge a fee

APP13 - correction of personal information

- ... such steps (if any) as are reasonable in the circumstances ...

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https://www.salon.com/2022/10/18/what-is-fog-reveal-police-use-new-app-to-track-people-without-a-warrant_partner/

What is Fog Reveal? Police use new app to track people without a warrant

New tool shows where and when people work and live, with whom they associate and what places they visit

By ANNE TOOMEY MCKENNA

PUBLISHED OCTOBER 18, 2022 4:00AM (EDT)

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Why is so much activity Exempt from Basic Principles??

Pre-Conditions

1. Evaluation
2. Consultation
3. Transparency
4. Justification

Design

5. Proportionality
6. Mitigation
7. Controls

Post-Condition

8. Audit

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<https://privacy.org.au/policies/meta-principles/>

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The Primary Advocacy Organisation

Active since 1987, and with the world's longest track-record



<https://privacy.org.au/policies/>
<https://privacy.org.au/publications/by-date/>

<https://privacy.org.au/media-release-archive/>



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But also CCLs, EFA, DRW, ...

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Some Recent Activities

- Government Disasters



- OAIC's 'Guide to Securing Personal Information' (Way too weak, sets no baseline)



- COVID Contact Tracing App ('COVIDUnSafe')



- Unis' Surveillance of Employees' Social Media



- Online Exam Invigilation / 'Proctoring' / Surveillance



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[{.html,.pdf}](http://rogerclarke.com/DV/SandP-U3A)

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