

DRAFT

Kantara Initiative Privacy and Public Policy Work Group Final Report

Response from the Kantara Initiative Privacy and Public Policy Work Group

to The Public Voice

on the Madrid Privacy Declaration

We note the continuing interest (since the International Meeting of Privacy and Data Protection Commissioners in Madrid in November 2009) in the Declaration proposed by The Public Voice – and also agree that on the 28th January 2010, International Privacy Day will provide the opportunity for a renewed global focus on this topic.

Having considered the Declaration before the Madrid conference, Kantara's Privacy and Public Policy Work Group (P3WG) took the collective decision not to endorse the declaration at that time, for three principal reasons. However, members also noted that there was much in the Declaration which was well aligned with P3WG's views and strategy. We therefore wanted to write setting out the reasons for our original reluctance, and expressing our interest in future engagement between our respective communities.

First – our reluctance to endorse the Declaration stemmed from three principal factors.

1. The Declaration covers a broad and extensive range of topics, and expresses a correspondingly wide range of views – some of which we concur with wholeheartedly, and others of which we, generally, found harder to support. Unfortunately, there appeared to be no mechanism for expressing such misgivings, or offering a qualified endorsement of the Declaration as a whole. We took the view that it was more appropriate to abstain than to appear to be agreeing, by default, with propositions which the group as a whole did not support.

Two recommendations in particular made it hard for members to express their support for the Declaration as a whole. These were:

2. Recommendation (7):

(7) Urge countries to ensure that individuals are promptly notified when their personal information is improperly disclosed or used in a manner inconsistent with its collection;

3. Recommendation (9):

(9) Call for a moratorium on the development or implementation of new systems of mass surveillance, including facial recognition, whole body imaging, biometric identifiers, and embedded RFID tags, subject to a full and transparent evaluation by independent authorities and democratic debate;

While we appreciated the general sentiment behind these two recommendations, we were concerned as to whether they were either realistic or practical – and therefore felt that expressing implicit support for them risked damaging the credibility of the other laudable recommendations.

For example:

(7): a data controller (organisation) is quite likely not even be able to audit whether all uses of personal data, internally, satisfy the requirement for "purpose of use" to match "purpose of collection". Requiring a country to legislate that individuals be notified in cases of inappropriate use raises significant practical enforcement problems. There are also national (and, in the US, state-level) differences in the legislative approach to breach notification, which is still very much an evolving area, and the early experience suggests that first attempts at a breach notification law have had to be revised, or risk introducing undesired consequences (such as “notification fatigue”).

While we felt that recommendation (7), as stated, was impractical, we believe that there is much useful work to be done in assessing what forms of breach notification law work best in what circumstances, and what additional factors (enforcement powers, data custodianship guidelines, user education) result in the best privacy and data governance outcomes.

(9): Again, was not clear to P3WG that this is a realistic objective, given that the audience for this Declaration (member state policy-makers) all have a strong economic interest in the development of such technology. That is a separate issue from the question of ensuring that appropriate governance is applied to the subsequent deployment of technologies – and we felt that this was a much more appropriate and promising avenue for the Declaration to pursue.

Second - with all those comments made, it is also fair to say that members felt there is much to commend in the rest of the Declaration, and that it is underpinned by a clear and admirable desire for better privacy outcomes.

We further feel that the European Commission's stated wish to review and revise the Data Protection Directive offers a further opportunity to influence policy, legislation and regulation in this area, and that because that work will be done within the Directorate General for Justice, Fundamental Rights and Citizenship, there is a corresponding opportunity to base it on principles which balance the relevant political, economic and social factors.

We would welcome the opportunity for future engagement between our respective groups, and look forward to a positive and constructive dialogue.

Kantara Initiative Privacy and Public Policy Work Group

December 2009