

Peek at You: Pokémon GO and Capturing Player Data

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TAKEAWAY POINTS

- mobile game developers should “obtain meaningful consent despite the small screen challenge” in accordance with the Office of the Australian Information Commissioner (OAIC) guidelines.
- personal data should only be collected if reasonably necessary for the mobile game to function, in accordance with APP 3.
- metadata should be treated as personal information at least until the final outcome of the *Grubb* proceedings is known.

The release of Pokémon GO caused ripples in Australia and overseas recently when it was discovered that Pokémon GO on iOS requested and was given full access permission to the user’s Google account.¹ The controversy prompted the OAIC to issue a statement that it had made enquiries.²

The developer of Pokémon GO, Niantic, Inc., responded with an update that limited access permission to basic Google profile information, together with an assurance that no other account information had been accessed.³

The incident raises a number of privacy issues. The collection, use and disclosure of player data can be critical to the success of a mobile game, not only in terms of gameplay, troubleshooting and further development, but also in terms of commercialisation through sharing the data with third parties. If the underlying data practices are not compliant with Australian privacy laws, the impact on the valuation of the client’s business may be significant.

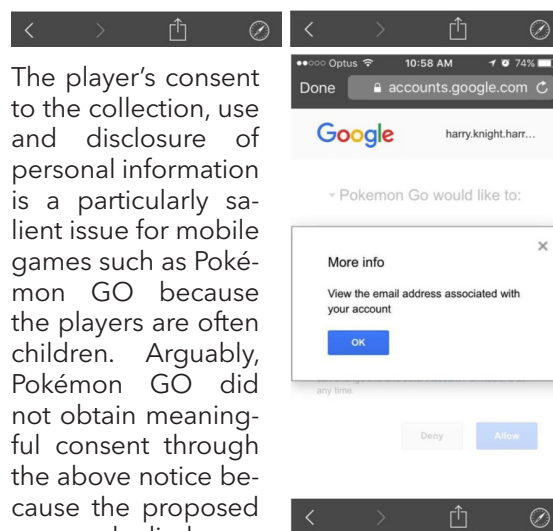
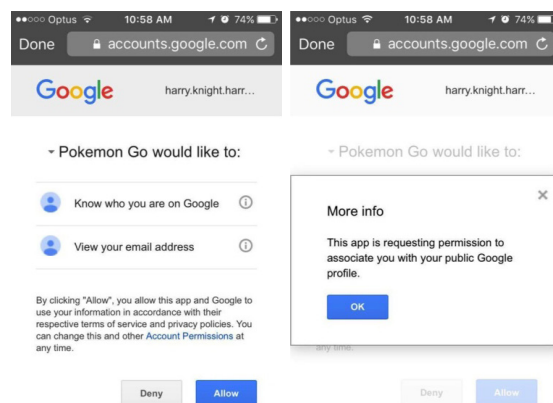
This article will identify and address common privacy issues in the context of big data that Australian practitioners should bear in mind when advising mobile game developer clients.

MEANINGFUL CONSENT

The OAIC released a guide in 2014 entitled *Mobile privacy: a better practice guide for mobile app developers*.⁴ The guide is an important resource in advising mobile game developers. In particular, there is guidance on obtaining meaningful consent from players despite the small screen of the mobile device.

The guidance is that mobile games should, amongst other things, use short form notices that summarise the type of personal information that will be collected and the proposed use and disclosure of that information. The guidance in particular mentions that the notice should disclose any third party data sharing practices.

Following the Pokémon GO update, Niantic, Inc. used the below short form notice to obtain player’s consent to the collection and use of basic Google profile information.



The player’s consent to the collection, use and disclosure of personal information is a particularly salient issue for mobile games such as Pokémon GO because the players are often children. Arguably, Pokémon GO did not obtain meaningful consent through the above notice because the proposed use and disclosure of the information has not been summarised.

REASONABLY NECESSARY COLLECTION

APP 3 prohibits the collection of personal information that is not reasonably necessary for an organisation’s functions or activities.⁵ According to the OAIC’s APP guidelines, an organisation’s functions or activities include proposed functions or activities for which the organisation has established plans.⁶

Of course, an “organisation” within the meaning of the APPs does not include entities with

1 e.g. <https://www.theguardian.com/technology/2016/jul/11/pokemon-go-privacy-security-full-access-google-account>

2 <https://www.oaic.gov.au/media-and-speeches/statements/pokemon-go>

3 <https://support.pokemongo.nianticlabs.com/hc/en-us/articles/222648408-Permissions-update>

4 <https://www.oaic.gov.au/agencies-and-organisations/guides/guide-for-mobile-app-developers>

5 *Privacy Act 1988*, Schedule 1, principle 3.2

6 <https://www.oaic.gov.au/agencies-and-organisations/app-guidelines/chapter-3-app-3-collection-of-solicited-personal-information>

an annual turnover of \$3 million or less. This financial threshold would exclude many mobile game developers from the need to comply with the APPs.

The functions or activities of a mobile game developer, including any proposed functions or activities, typically would be the gameplay, troubleshooting and further development of the mobile game. The personal information that is reasonably necessary for such functions and activities would vary. For example, while the player's location is necessary for Pokémon GO gameplay, it would not be necessary for, say, Candy Crush Saga.⁷

According to the Pokémon GO privacy policy, the following information is collected (without limitation)⁸:

- the player's basic Google or Facebook profile information;
- the player's username and the content of messages to other players;
- the player's country and language;
- the player's user settings; and
- the player's location.

This information appears to be reasonably necessary for the functions and activities associated with Pokémon GO. However, the following player information may also be collected:

Internet Protocol (IP) address, user agent, browser type, operating system, the web page that a User was visiting before accessing our Services, the pages or features of our Services to which a User browsed and the time spent on those pages or features, search terms, the links on our Services that a User clicked on, and other statistics.⁹

Not all of this information appears to be reasonably necessary for the developer's functions or activities. In fact, the information appears to be collected as part of the developer's third party sharing practices, which is disclosed in Niantic, Inc.'s privacy policy as follows:

We may share aggregated information and non-identifying information with third parties for research and analysis, demographic profiling, and other similar purposes. This information will not include your (or your authorized child's) [personal information].¹⁰

Clearly, the Pokémon GO business model includes (or is intended to include) a revenue stream based on sharing data with third parties. This revenue stream may be more important than the revenue stream based on "in-app purchases", or any proposed revenue stream based on "in-app advertising" (which the game currently does not feature).

The question is whether such information is personal information for the purpose of Australian privacy laws.

METADATA

In the Grubb proceedings,¹¹ the Administrative Appeals Tribunal found that mobile network data in relation to Mr Ben Grubb requested from Telstra was not personal information within the meaning of the then Australian privacy laws.

The Deputy President made the following observation at [112]-[113]:

[112] Had Mr Grubb not made the calls or sent the messages he did on his mobile device, Telstra would not have generated certain mobile network data. It generated that data in order to transmit his calls and his messages. Once his call or message was transmitted from the first cell that received it from his mobile device, the data that was generated was directed to delivering the call or message to its intended recipient. That data is no longer about Mr Grubb or the fact that he made a call or sent a message or about the number or address to which he sent it. It is not about the content of the call or the message. [...]

[113] I have considered also the IP address allocated to the mobile device which Mr Grubb used. [...] I am satisfied that an IP address is not information about an individual. Certainly, it is allocated to an individual's mobile device so that a particular communication on the internet can be delivered by the Internet Service Provider to that particular mobile device but, I find, an IP address is not allocated exclusively to a particular mobile device and a particular mobile device is not allocated a single IP address over the course of its working life. It changes and may change frequently in the course of a communication. The connection between the person using a mobile device and an IP address is, therefore, ephemeral. [...]

Applying this reasoning to the Pokémon GO scenario, the metadata collected by Niantic, Inc. is unlikely to constitute personal information for the purpose of the APPs.

That said, the decision is currently on appeal to the Full Federal Court. It may therefore be prudent to advise mobile game developers to treat player metadata as personal information until the final outcome of the Grubb proceedings is known. This means that, amongst other things, any player metadata shared with third parties should be aggregated and properly de-identified.

CONCLUSION

Pokémon GO raises common privacy issues in relation to the collection, use and disclosure of personal information. These issues include obtaining meaningful consent, only collecting personal information that is reasonably necessary, and treating player metadata as personal information (at least for the time being). The growing importance of data collection and third party sharing for the monetisation of mobile games means that legal practitioners should be prepared to address these issues when advising mobile game developers.

7 of course, player location may not be "personal information" within the meaning of the APPs - see the section on metadata below.

8 <https://www.nianticlabs.com/privacy/pokemongo/en>

9 clause 2(c) - Information Related to Use of the Services.

10 clause 3(c) - Information Shared with Third Parties.

11 *Telstra Corporation Limited v Privacy Commissioner* [2015] AATA 991