

Part VI

VI

Codes of Practice and Exemptions from Information Privacy Principles

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“We endorse the mechanism of privacy codes of practice. Although not widely used, its existence is extremely important in maintaining a credible, sustainable privacy regime.”

- NZ Law Society Privacy Working Group, submission N16

“The Health Information Privacy Code is a very accessible tool.”

- NZ College of Midwives, submission N9

“The provision of codes where specific needs arise is one of the more useful pieces of flexibility available to affected industries or activities under the Act. We note, however, the wide powers of the Privacy Commissioner in drafting, accepting and amending codes of practice. There are significant constitutional issues in giving unelected officials such as the Privacy Commissioner the right to put in place codes which are potentially more restrictive than the law itself.”

- Commonwealth Press Union, submission N13

“The lack of resources and resulting inability of the Commissioner’s Office to review and issue codes of practice in a timely manner negates the benefits of offering such a specialised mechanism within the Act.”

- NZ Law Society Privacy Working Group, submission N16

“If there are to be separate intelligence organisations, then in no respect should they be above or exempted from the laws of the land and in particular fundamental human rights laws such as the law protecting individual privacy. We favour the applicability of all of the privacy principles to intelligence organisations.”

- Auckland Council for Civil Liberties, submission O2

6.1 INTRODUCTION

Codes and exemptions

6.1.1 Part VI deals with codes of practice and specific exemptions. Twenty-one submissions were received on the discussion paper and a further 25 in response to a discussion paper on intelligence organisations.

6.1.2 Section 46 sets out what a code of practice is and what it may, and may not,

include. Section 53 explains the effect of a code, while sections 47 to 52 set out the processes for receiving, considering, and issuing, codes of practice. Sections 54 to 57 establish certain specific exemptions.

- 6.1.3 The following codes of practice have been issued:
- *Health Information Privacy Code 1993 (Temporary)* - section 52 allowed for the urgent issue of this temporary code, which has now expired;
 - *Health Information Privacy Code 1994* - the permanent replacement of that temporary code applying to the health and disabilities sector;
 - *GCS Information Privacy Code 1994* - which applied to a particular Government agency which was privatised, the code has now expired;
 - *Superannuation Schemes Unique Identifier Code 1995* - which modified principle 12 in the circumstances to which it applied;
 - *EDS Information Privacy Code 1997* - which replaced the GCS code;
 - *Justice Sector Unique Identifier Code 1998* - which modified principle 12 as it applied to certain justice sector agencies.

- 6.1.4 Very few specific exemptions have been granted under section 54 and generally between one and three have been granted each year.¹ In each case, the authorisation was granted to permit, in the public interest or for the benefit of the individuals concerned, a disclosure which would otherwise be a breach of principle 11.

- 6.1.5 The Act provides three other specific exemptions:
- section 55 excludes the application of the access and the correction principles from five classes of personal information;
 - section 56 provides an exemption relating to domestic affairs; and
 - section 57 exempts intelligence organisations from some of the principles.

Legislative history

- 6.1.6 The present provisions for codes of practice and exemptions differ significantly from what had been provided in the Privacy of Information Bill. The bill provided for “general exemptions” and “specific exemptions”. The specific exemptions in the bill were carried forward in similar form in sections 54 to 57.²
- 6.1.7 The Privacy of Information Bill would have enabled the Tribunal to grant general exemptions from all or any of the information privacy principles where satisfied that this was clearly in the public interest. The bill set limits on the granting of exemptions, and specified who might apply for them. If the Tribunal were to decide to grant an exemption it might itself formulate the exemption or, where it considered that the exemption should take the form of a code, refer the matter to the Commissioner for the purpose of preparing that code of practice. On finalising such a code the Commissioner would submit it to the Tribunal which would approve the code as an exemption, refuse to approve the code, or make modifications.
- 6.1.8 The Select Committee decided to remove the Tribunal from involvement in promulgating codes of practice. Instead, it placed with the Privacy Commissioner the functions of:
- issuing codes of practice (sections 46-53); and
 - granting specific exemptions (albeit in more restricted circumstances than were proposed for the Tribunal).³

¹ In 1996/97 I granted 25 authorisations but since 23 of these were in identical terms in respect of individual Crown Health Enterprises, it may be more meaningful to categorise these as amounting to just three authorisations.

² With the omission of one for “small clubs” which was dropped by the Select Committee.

³ Whereas the Tribunal would have been able to grant exemptions from any of the principles the Commissioner can, under section 54, exempt actions from only principles 2, 10 and 11.

6.1.9 One of the reasons for the Select Committee’s change was the near impossibility of adequately dealing with such issues in an adversarial hearing with multiple parties. Although the bill did provide that the Privacy Commissioner could have undertaken drafting at the request of the Tribunal the arrangements in the bill still appeared to be problematic. It also appeared inappropriate to have the body with final adjudicative powers on complaints, the Tribunal, also having the legislative role of producing codes of practice. The arrangements adopted by the Select Committee solved these problems and seem to bring other advantages into the process as well.

Why codes of practice?

6.1.10 The establishment of codes of practice under the Privacy Act is essentially a rule making exercise and the resultant codes are “secondary” or “delegated” legislation. Provision was made for delegated legislation codes of practice because dealing with everything by primary legislation, particularly “changing the rules”, is problematic. In particular:

- the process of promoting or changing Acts of Parliament is expensive, intricate and generally very slow;
- statutes are good for providing the broad outline of law but usually do not provide an appropriate vehicle for the detail of rule making due.

6.1.11 Codes of practice have been chosen by Parliament for delegated rule-making in a variety of circumstances in recent years. They are used in relation to building standards, workplace safety, health and disability services, and broadcasting standards amongst others. Advantages advanced for codes of practice over traditional regulations have included:

- the involvement of industry and the public in consultation and development of rules, sometimes a measure of self-regulation;
- a greater degree of flexibility than other methods of delegated or primary legislation.

6.1.12 However, codes of practice are not universally welcomed. Overseas critics have suggested:

- codes can lessen Parliament’s control over the setting of legal standards;
- codes create a risk that regulation will not be cost-effective;
- codes may not be as readily available to the public as Acts and regulations;
- the status and precise effects of codes are sometimes left unclear;
- codes can take a very long time to develop;
- codes can be used to avoid stronger laws which would better protect public or individual interests
- codes may not provide adequate remedies for complainants.

These criticisms have generally been made where the codes do not have the backing of legislation and where they have been produced to avoid regulation.

6.1.13 In conducting my review I have been careful to consider the merits and potential demerits of codes, as against other forms of rule-making. I have, for instance, borne in mind the potential for imposing compliance costs through codes of practice. However, the mechanism also has some potential for *reducing* compliance costs where appropriately used and it may be the aim of some codes to do so. The Act itself is already carefully structured to avoid some of the shortcomings of early codes of practice models - for example, the Act requires the code to be published and made available for purchase.

Role and placement of exemptions and exceptions

6.1.14 In considering the case to retain, limit or expand, the range of existing exemptions I have needed to carefully consider the role of exemptions and exceptions in a privacy law.

- 6.1.15 One of the prime features of the Privacy Act is its seamless application across public and private sectors. Where there are limits on its coverage, these are relatively constrained and do not create major anomalies. I am loathe to undermine this feature in any significant way - especially, of course, where that would detrimentally affect privacy. However, I have held myself open to be persuaded about cases for exemption since I would not wish the privacy law to be undermined, or made vastly more complicated, through its application to an inappropriate set of circumstances. This has been a consideration in my proposal for limiting the existing intelligence organisation exemption rather than eliminating it entirely.⁴ I consider that the application of the information privacy principles directly to the news media is inappropriate, in part for the same reason, although that issue arises under section 2 and not these provisions.⁵
- 6.1.16 The *location* of exemptions or exceptions can confuse users of the Act as we have:
- exceptions located in the privacy principles;⁶
 - exceptions located elsewhere in the Act or by reference to other legislation;⁷
 - provision for authorisation or exemption under section 54;
 - exemptions elsewhere in the Act;⁸
 - exemptions in codes of practice.⁹
- Accordingly, one matter I have considered is whether the exceptions and exemptions are appropriately located. A particular consideration in this regard is the need to make the Act more “user friendly” for the wide range of agencies to which the law applies. Elsewhere, I have, for instance, recommended that certain features of section 7 be relocated as exceptions directly into the relevant principles.¹⁰
- 6.1.17 I have also had to consider in this review whether *the Act* provides a suitable place to locate exemptions which could otherwise be issued by code of practice. I have concluded that amendment to the Act to provide for exemptions, notwithstanding the code provisions, is appropriate where:
- Parliamentary time will be engaged upon amendment to the Privacy Act in any case - as is likely to be the case with this review;
 - the subject matter is appropriately dealt with by primary legislation which, in a democracy, has the greatest status and legitimacy - I have in mind, for instance, that any exemptions would reduce citizens’ existing rights.¹¹
- However, some types of exemption would be unsuitable for including in the primary legislation. For example, if there would need to be a constant amendment of the provision, the Act may be the wrong place.¹²
- 6.1.18 Through certain other suggested amendments, such as recommendation 28 in relation to principle 12, I believe that any need for exemptions is diminished. For example, the exemptions provided in one code of practice will be rendered unnecessary if the changes to principle 12 are adopted.¹³

⁴ See paragraph 6.13 and recommendation 83.

⁵ See paragraphs 1.4.49 - 1.4.62.

⁶ See information privacy principles 2, 3, 10 and 11.

⁷ See sections 7 and 60. I make several recommendations for relocating the exemptions or exceptions in section 7 - see recommendations 30, 31, 32 and 33.

⁸ See sections 55-57.

⁹ See section 46.

¹⁰ See recommendations 30, 31 and 33.

¹¹ Indeed, section 46(5) expressly provides the code cannot reduce rights of access to personal information held in the public sector - as that was a right that existed prior to the Privacy Act and Parliament made it clear that it did not wish a Commissioner to limit those rights.

¹² Rules which might need to be constantly revisited, and amended, or containing very complicated administrative matters not carrying with them issues of high public policy, would seem unsuitable for direct amendment of the Act and might be left for codes.

¹³ See Superannuation Schemes Unique Identifier Code 1995.

SECTION BY SECTION DISCUSSION - Codes of practice

6.2 SECTION 46 - Codes of practice

6.2.1 Section 46 provides for the Commissioner to issue codes of practice. A code may modify the application of the information privacy principles by prescribing standards that may vary from those prescribed by the principles or by exempting particular actions from the principles. A code of practice may also prescribe how the principles are to be applied or complied with.

6.2.2 A code of practice may apply to:

- any specified information or class of information;
- any agency or class of agency;
- any activity or class of activity;
- any industry, profession, or calling, or class of industry, profession or calling.
- It may also regulate information matching in the private sector, set guidelines in respect of charges, and provide for various administrative and mechanical aspects of the code.

In connection with personal information held by public sector agencies, a code of practice may not limit or restrict the circumstances in which individuals may exercise their entitlements under principles 6 and 7.

6.2.3 Since 1993 I have issued six codes. Four of these remain in force (the other two having expired). Only one major sectoral code has been issued, the Health Information Privacy Code, with the others being modest, addressing quite particular issues. Two proposals for major codes remain before me relating to telecommunications network operators and credit reporting agencies.

6.2.4 The need for codes of practice has, with experience, proved to be less than some had expected. For example, when the bill was being enacted there was talk of codes of practice being necessary in relation to both the banking and insurance sectors. This has not proved to be the case.

6.2.5 There are a number of reasons which may explain why fewer codes have been issued than might have been expected:

- the perceived problems or issues which might have led some people to expect codes were ill-founded or have not been borne out by experience;
- the anticipated problems did exist but were adequately dealt with by amendments made to the Privacy of Information Bill by the Select Committee;
- the anticipated problems did exist but were of a relatively minor nature and have been resolved through agencies changing their practices to bring them into conformity with the principles;
- the perceived need for codes might have been based upon a fear that the principles might be interpreted in a particularly restrictive way. This has not been borne out in practice through the opinions rendered by the Privacy Commissioner, or the decisions of the Tribunal, or has yet to be tested through a real complaint;
- there may remain a case for a code of practice but it has not been possible to bring it to fruition perhaps through resourcing reasons either with the industry body or at the Commissioner's office;¹⁴
- a desire for a code exists but the legal authority to issue it in the form desired by the promoters does not exist.¹⁵

¹⁴ Certainly more progress would have been possible on the proposed credit reporting code, and the proposed telecommunications code, if the Commissioner's office had had the resource to devote to these two major projects. Progress on both has been stalled while resource is applied to this review.

¹⁵ An example would be the desire of the Accounting Standards Review Board to have their financial reporting standards prevail over information privacy principle 11. A code of practice was proposed as the vehicle to achieve this. However, this does not seem to be appropriate and consideration has instead been devoted to addressing the matter legislatively.

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“A huge amount of work, time and resources goes into developing a code of practice. The effect of this expense is seen in the small number of codes that have been drafted. Industries perceive minimal benefits to their consumers, the costs of drafting a code appear to outweigh the benefits. The result is an inaccessible and ineffective code mechanism.”

- NZ LAW SOCIETY PRIVACY

WORKING GROUP, SUBMISSION N16

“The lack of resources and resulting inability of the Commissioner’s Office to review and issue codes of practice in a timely manner negates the benefits of offering such a specialised mechanism within the Act.”

- NZ LAW SOCIETY
PRIVACY WORKING GROUP,
SUBMISSION N16

- 6.2.6 Section 46(2) is quite precise as to what a code of practice may do. Some people who have tried to develop a code for consideration by the Commissioner have been frustrated by the fact that this puts them into something of a “legal straitjacket”. Some have thought that a very simple document, presented in the form of a glossy leaflet and running to just a couple of pages, might “do the trick” for a code of practice. However, it has been essential for people who have wanted a code of practice to understand that the resultant code is *delegated legislation*. In other contexts codes of practice are used to simply:
- explain legal obligations; or
 - show a company’s policy on the matter under consideration; or
 - show a company’s commitment to something, such as privacy.
- There may be a good case to develop such documents. However, such documents are not the stuff of Privacy Act codes of practice. A privacy code alters the legal obligations imposed under statute and therefore must be issued with the precision one expects of legislation and remaining within the powers conferred by the Act on the Commissioner.
- 6.2.7 On legal advice I have developed a structure for codes of practice which meets the requirements of the section and is standardised for whatever code is issued. I have issued a guidance note which directs people who must prepare preliminary drafts to my requirements.¹⁶
- 6.2.8 I have a few recommendations for amendment to section 46 which mainly take account of amendments to the section, and to other statutes, since 1993. They are also directed towards ensuring codes can do the multitude of things that may be expected of them. The changes in particular are to:
- tidy up section 46(2)(aa) inserted in 1994;
 - permit a code of practice to do certain other specific things under subsection (4);
 - provide a somewhat more flexible subsection (6), noting in particular that a Health Information Privacy Code has now been issued.
- Section 46(2)(aa)*
- 6.2.9 The Privacy Amendment Act 1994 inserted paragraph (aa) in subsection (2). This provides that a code of practice may:
- “apply any one or more of the information privacy principles (but not all of those principles) without modification.”
- 6.2.10 The first code of practice, issued in 1993, modified various principles by prescribing standards that were more, or less, stringent than the existing principles and exempting some actions from the principles. I adopted the practice of issuing a code with twelve rules corresponding with the twelve information privacy principles. In some cases the rules simply repeated, with minor stylistic changes, the relevant information privacy principles. I took the view that for this sectoral code to be satisfactory it needed to contain all twelve of the principles so as to avoid a complicated situation whereby the operative provision might be the unmodified principle in the Act in some cases and the modified rule in the code in others. It was later suggested to me that there was a problem in including an unmodified principle in the code. Although the possibility of an agency taking that rather fanciful point seemed remote it could not be ignored since during the first three years remedies for interference with the privacy of an individual arising from a breach of certain of the principles were not available unless those breaches constituted a breach of a code of practice.¹⁷
- 6.2.11 Accordingly, section 46 was amended to include paragraph (aa) which made it

¹⁶ See Privacy Commissioner, Guidance Note on Drafting Codes of Practice under Part VI of the Privacy Act, 12 May 1997.

¹⁷ See section 79(3).

clear that a code could apply any one or more of the information privacy principles without modification. However, the Department of Justice insisted upon including within the provision the parenthetical phrase “but not all of those principles”. I did not support the inclusion of that phrase because it was premised on the unfounded notion that the Commissioner might issue codes containing 12 unmodified principles simply in order to ensure that remedies were available during the transitional phase during the Act’s first three years. From my point of view, this was never in prospect and, of course, it did not eventuate. However, now that the transitional provisions are over and there would be no point in issuing a code containing 12 unmodified principles, I recommend the deletion of the words in parentheses as unnecessary “clutter” which is now not needed, if it ever was. Leaving the words there simply means that anyone considering the section has to try to fathom the reasoning for such words, which is not apparent unless one also notes the relevance of section 79 which touches upon breaches of certain principles occurring before 1 July 1996.



RECOMMENDATION 73

Section 46(2)(aa) should be amended by deleting all of those words in parentheses, that is “but not all of those principles”.

Section 46(4)

- 6.2.12 Subsection (2) sets out in general the main things that a code of practice may do. Subsection (4) supplements this by listing further specific things that a code might also do. These essentially are to:
- (a) impose controls in relation to private sector information matching;
 - (b) set guidelines for making charges for giving access or to prescribe circumstances in which no charge may be imposed;
 - (c) describe procedures for dealing with complaints;
 - (d) provide for the expiry of a code.
- 6.2.13 So far the provisions in (a) and (b)(i) have not been utilised. In the Health Information Privacy Code I did exercise the power in (b)(ii) to prescribe circumstances in which no charge may be imposed.¹⁸ There is a limit to the use that may be made of the provision prescribing complaints procedures provided for in paragraph (c). The power is tightly circumscribed as such provisions may not limit or restrict the provisions of Part VIII or Part IX of the Act. However, in the Health Information Privacy Code 1994 I included a clause providing that a health agency may designate a person or persons to deal with complaints alleging a breach of the code.¹⁹ Under paragraph (d) in the Health Information Privacy Code I provided for a review of that code - scheduled for next year.²⁰ In three codes I have included an expiry clause as provided for in paragraph (e).²¹
- 6.2.14 Some unrealistic expectations exist amongst agencies or organisations who have approached me to discuss the possibility of codes of practice. Some have thought that if there is a privacy problem, or a compliance problem, that I have a straightforward power to change any aspect of the law by code of practice. Clearly that is not the case and subsections (2) and (4) are restricted in what may be done by code of practice - and it is appropriate that this should be the case. Codes of practice will not be a panacea for all privacy or compliance issues.

¹⁸ See Health Information Privacy Code 1994 clause 6.

¹⁹ Health Information Privacy Code 1994, clause 8. That clause was accompanied by a commentary explaining features of complaints under the Privacy Act and the characteristics of a satisfactory internal complaints process. I am not confident that the clause has made much difference to the question of whether agencies are geared up to handle complaints. A standard model for internal complaints handling, or external industry complaints handling, is not possible because of the diversity of disciplines and agency type of the health sector.

²⁰ See Health Information Privacy Code, 1994, clause 2(2).

²¹ Both the Health Information Privacy Code 1993 (Temporary) and the GCS Information Privacy Code 1994 have expired. The EDS Information Privacy Code 1997 will expire on 30 June 2000.

“Existing codes follow the format and wording of the existing information privacy principles wherever possible. Given the convoluted nature of the existing principles, this makes the codes very difficult to understand for the average person. Lengthy explanatory notes do not assist. It would be preferable if codes were worded as simply as possible.”

- TELECOM NEW ZEALAND,
SUBMISSION N7

- 6.2.15 In some specific legislation it has been found desirable to permit certain explicit things to be done by a Privacy Act code of practice. Appendix G describes the provisions found in the Local Government Act 1974, Domestic Violence Act 1995 and Dog Control Act 1996. It so happens that each of those provisions touch upon *public register* codes of practice and I will deal with those elsewhere²² but it is possible that another statute could confer additional powers in relation to a section 46 code as well. It may be desirable to link section 46(4) to those other powers by a formulation indicating that a code may do anything authorised by another enactment.



RECOMMENDATION 74

Section 46(4) should be amended by adding a paragraph acknowledging that a code may provide for such other matters as specified in any other Act.

- 6.2.16 I suggest elsewhere in this report that certain other matters be dealt with by code of practice. These would probably be implemented by amending section 46(4).²³

Section 46(6) and (7)

- 6.2.17 Generally the information privacy principles apply only to information about *living* individuals. This is achieved through the definitions of “personal information” and “individual” in section 2. In particular, “individual” is defined to mean “a natural person, other than a deceased natural person.” However, the select committee studying the Privacy of Information Bill concluded that it would be necessary to make some protection in relation to medical records of deceased persons. There are undoubted sensitivities in the area and notions of medical confidentiality had always extended beyond a patient’s death.

- 6.2.18 It was decided that the general application of the principles should remain limited to personal information about living natural persons but that, in the event of a code of practice being issued in relation to health information, the law should extend to information about deceased persons. The select committee knew that it was my intention to develop a code of practice for the health sector as one of my first priorities. At the same time as the latter part of the committee’s study of the Privacy of Information Bill, there was also study by the Social Services Committee of amendments to the Health Act 1956 as part of the major health reforms. There was some co-ordination between the two legislative initiatives and, for instance, subsection (7) takes the same meaning of “health information” as had been devised for section 22B of the Health Act 1956.

- 6.12.19 The Health Information Privacy Code 1994 is now an established feature of the legislative landscape for dealing with health information in the health and disabilities sector. Subsections (6) and (7) necessarily speak in the abstract of the “issuing under the section of any code of practice relating to health information” that makes it clear that it “shall be read as if it applies in respect of health information about any individual, whether living or deceased.” In my view, the provision should now be revisited so as to narrow its effect and to recast it as a power which the Commissioner may exercise rather than an automatic effect.

- 6.2.20 At present, if I issue a code of practice relating to “health information”, as defined in section 22B of the Health Act, that code is to be read as if it applies to information about deceased persons. I foresee several problems with this if it is taken to its logical conclusion:

- section 46(6) is not limited to health information *held by health agencies* (whereas this is the application of the Health Information Privacy Code and the primary application of Health Act itself);
- the code is to be read as if it applies to deceased persons whatever the code

²² See paragraph 7.12.

²³ See recommendations 18, 27 and 35(b).



Bruce Slane and Blair Stewart:
the Privacy Commissioner and
Manager, Codes and
Legislation, confer over the
issue of the Health Information
Privacy Code 1994.

PHOTO: OFFICE OF THE PRIVACY
COMMISSIONER

otherwise says (and therefore the provision in the code that purports to limit rule twelve to health information for twenty years after death may not be effective);

- any other code which relates to “health information” will extend to such information about deceased persons.²⁴

- 6.2.21 It seems to me desirable that subsections (6) and (7) be changed so that a more flexible provision, potentially applying to a far more limited class of cases, is created. The essential feature is that it should be clear that a code of practice *may* apply principle 11 to “health information” about deceased persons. I tried to strike a balance by applying the Health Information Privacy Code to information about deceased persons for up to twenty years beyond their death only (although as noted that may be ineffective). Accordingly, I suggest that the Commissioner should be able to provide that a code may apply principle 11 to health information about deceased persons for such period beyond the person’s death as prescribed in that code of practice. If this were to be adopted I would schedule an amendment to the Health Information Privacy Code 1994 to align the code with the new provision in the Act.



RECOMMENDATION 75

Section 46(6) should be replaced with a provision which empowers the Privacy Commissioner to include in a code of practice a provision applying principle 11 to an agency, or a class of agencies, to health information about any deceased person for a period specified in the code beyond any such person’s death.

6.3 SECTION 47 - Proposal for issuing code of practice

- 6.3.1 Section 47 provides that I am empowered to issue a code of practice on my own initiative or on the application of any person. An application for a code may only be made by a person that has the function of representing the interests of any class or classes of agency, or of any industry, profession, or calling, and where the code sought is intended to apply in respect of the entities represented by that body. Where any such application is made, I am required to give public notice that the details of the code sought may be obtained from the Commissioner and that written submissions may be made within the period specified in the notice.

Representative body applications

- 6.3.2 To date no codes of practice have been processed on the basis of an application to the Commissioner by a “representative body”. Although many of the codes have had a promoter who has undertaken some drafting, facilitated some preliminary non-statutory consultation, and produced the draft to me, none has formally applied under section 47(2). Each has been content to provide a draft code and encourage me to initiate the process under section 48.
- 6.3.3 For example, the (then) Department of Health undertook some preliminary work on the proposed Health Information Privacy Code, but the draft code produced was not given to me in the capacity as a “representative body”. The Association of Superannuation Funds of New Zealand (ASFONZ) played a leading role in promoting the need for a code of practice which eventuated as the Superannuation Schemes Unique Identifier Code 1995. However, in that case my own office undertook the drafting. In respect of the Justice Sector Unique Identifier Code 1998 the Ministry of Justice, as part of its co-ordination role for the Justice Sector Information Committee, produced to me a draft which developed as a Commissioner-initiated code. With respect to proposed codes in the credit reporting and

“Given the time and resource constraints on the Commissioner’s Office, and the inordinate delays this produces in the issuing of codes, section 46 should be amended to permit agencies to issue codes of practice subject to a public notification procedure. The Commissioner should then have the ability to amend such codes (again through a public notification procedure) within a period prescribed under the Act.”

- TELECOM NEW ZEALAND,
SUBMISSION N7

²⁴ An example would be a code of practice applying to all personal information in the hands of a class of agencies. If that included, say, medical reports that might be held by an employer or insurance company, this might mean that principle 11 would have to read as applying to both living and deceased persons.

telecommunications areas I have had drafts presented to me by, respectively, an industry group of credit reporting agencies, a major credit reporting agency, and a working group of three major telecommunications network operators. None has claimed “representative body” status.

- 6.3.4 In each of the cases where codes have been issued so far the process has worked satisfactorily. The resultant status of a code is unaffected by whether it is initiated by the Commissioner or a representative body. However, it may be that the restrictions upon representative body applications limit the potential of the process. At present, I have no direct experience to draw upon because none of the relevant bodies has put the matter to the test. However, if we take the case of the proposed credit reporting and telecommunications codes, the fact is that I received draft codes some considerable time ago and have not myself initiated the statutory processes as yet. My decision has been based on a variety of matters including my own priorities and resources. On the other hand, the industries concerned might feel that they would have preferred to have had their draft code publicly notified by now (notwithstanding that I would not be bound, regardless of the outcome of the section 47(2) process, to issue the code).
- 6.3.5 Accordingly, I have considered whether it might be possible to relax some of the constraints provided for in subsection (3).
- 6.3.6 There are few bodies in New Zealand which could truly be said to represent *all* of a particular class of agency or of any industry, profession or calling. Probably the only bodies which could sustain such a claim represent regulated professions whereby to practice a person must be a member of the body. However, although the matter has not been tested, it should not be assumed that section 47(3) is intended to be read so restrictively. The key test is that the applicant body must have the purpose, either alone or with other purposes, of representing the interests of a class or classes of agency or an industry, profession or calling. On this approach it would probably be the case that in the examples quoted above that ASFONZ would likely fall within the ambit of section 47(3) but that the individual credit reporting agency, telecommunications working group and the Ministry of Health would not.
- 6.3.7 It would be possible to put the matter beyond doubt by adding the words “or a substantial section of” to line two of section 47(3)(a). I simply make this as a suggestion for consideration since I have not yet had the opportunity to consider the matter in a real case. However, the important thing is that subsection (3) must not be too rigid if it is to achieve its original objective (notwithstanding that reliance upon Commissioner-initiated codes has largely worked satisfactorily for industry groups to date).
- 6.3.8 Section 47(2) was never geared to applications by public sector agencies. Although not expressly excluded, such bodies would rarely if ever have the necessary representative status. Although two public sector agencies promoted two codes to me, which were eventually issued, I received no submissions suggesting that section 47(3) should be redrafted to encompass departments or other public sector agencies.²⁵ I see no particular need for change in this respect since the Commissioner-initiated route has appeared satisfactory to date.



RECOMMENDATION 76

Consideration should be given to amending section 47(3) to make it clear that a body can apply for a code whether it represents the whole of a class of agencies, industry, profession etc or just a substantial section.

²⁵ The Health Department, as it then was, did some initial drafting and consultation on the Health Information Privacy Code 1994 and the Ministry of Justice promoted what became the Justice Sector Unique Identifier Code 1998.

“Section 47(3) should be revoked. If section 47(3) is retained then it should be made clear that where some major players in an industry have been given the opportunity to participate in the preparation of a code, but have declined to do so, this should not prevent the remaining majority of players from being treated as representative of that industry.”

- TELECOM NEW ZEALAND,
SUBMISSION N7

Costs of section 47(2) applications

- 6.3.9 There are many calls on the resources of my office. Other than the Health Information Privacy Code, a major sectoral code, the codes of practice issued so far have not been a big cost item although two codes in prospect, relating to credit reporting and telecommunications, will be significant initiatives when they are taken forward. Nonetheless, there is a basic cost in publicly notifying any application.
- 6.3.10 I have also found that some sectors bring forward proposals which “jump the queue” and upset priorities that I have myself established. An example is the Justice Sector Unique Identifier Code 1998 which was an initiative from the law enforcement sector being driven by the needs of those agencies and the timing for their migration off the Wanganui computer system. I consider that there is a case to be made for an application fee, or a cost recovery process, for such code proposals.
- 6.3.11 It would be possible for the Commissioner to negotiate with an applicant for a contribution to costs. Such arrangements are informal and voluntary. They remain open to criticism of the Commissioner, pressure on the Commissioner to approve a code in the form designed by an applicant, and allegations of unfairness as between the treatment of different applicants. For example, a request for a voluntary monetary contribution in cases of urgency skews the process. What the applicant considers urgent may not in fact be so. Priorities should normally be determined having regard to the urgency of all matters before the Commissioner, viewed objectively. I might add, by way of illustration, that I did seek a contribution from the Ministry of Justice towards the costs of processing the Justice Sector Unique Identifier Code for which urgency was claimed. My intention had been for such contribution to meet the costs of public notices and purchase legal resource from a barrister to replace staff-time diverted to the project. No contribution was forthcoming.
- 6.3.12 Provision should be made to at least defray the costs of notifying a section 47(4) application. Public notification costs for a code typically run to about \$600-\$800. I suggest that the Act should provide that the Commissioner may require the applicant itself to publicly notify the application in terms directed by the Commissioner.

**RECOMMENDATION 77**

There should be provision for the Commissioner to require a representative body applicant to undertake notification under section 47(4) in terms directed by the Commissioner.

Section 47(5)

- 6.3.13 I suggest that section 47(5) be repealed. Presently this provides that the publication of a notice under section 47(4), concerning a representative body application, is sufficient compliance with the requirements of section 48(1)(a), concerning notification of the Commissioner’s intention to issue a code. In my view, it may be better for representative body applications to be notified, together with consultation on the representative body’s proposal, and *then* for that to be followed, if the proposal warrants it, with section 48 notification of the Commissioner’s intention to issue a code. It is highly unlikely that the proposed code put before the Commissioner by a representative body will be satisfactory to the Commissioner in all respects. A change of some sort is inevitable and, if experience of the first few years of operation of the Act is to be repeated, then the draft codes brought to the Commissioner will generally require substantial - even fundamental - change to be satisfactory.
- 6.3.14 If there is to be substantial change to the codes submitted by the representative body then it may be unsatisfactory to finally issue a revised version without

further notification. While any redrafted code would be the subject of further discussion with the representative body this would not necessarily bring the changes to the attention of all others who may have an interest and who would like to be consulted (although section 48(1)(b) also imposes some further steps to be taken in that regard). The problem I foresee is similar to that experienced occasionally by select committees. When bills are reported back in a hugely changed form, criticism can be made that the bill is no longer the one that interested persons had a chance to consider and make submissions on.

- 6.3.15 It should also be borne in mind that a considerable time can elapse between a representative body proposal being received by the Commissioner and publicly notified and the time at which the Commissioner eventually issues a code. New players may enter the scene in the meantime. Regardless of whether significant substantive change has been made to the draft in the meantime it is probably undesirable for a new code to arrive unheralded by a public notice showing the Commissioner's intention to proceed with the issuing of the code.
- 6.3.16 It is wrong to suppose that the public notification of a representative body proposal should be sufficient as a section 48(1)(a) notice. Notification under section 47(4) is, to my mind, an entirely neutral process whereby the Commissioner simply indicates that an application has been received. It expresses no view on the merits of the proposal and indeed it is conceivable that the draft code before the Commissioner has never previously been seen or considered by him. On the other hand, a section 48(1)(a) notice gives interested persons an indication that the Commissioner *intends to issue* the code. That is, that the Commissioner has in general terms taken a preliminary position on the broad matter (although, of course, he will be willing to be persuaded on the detail).
- 6.3.17 My solution is simply to repeal section 47(5). No other change is necessary. The result will be that with a successful representative body application there will be two public notices. The first indicating that an application has been received and that the draft code prepared by the representative body is available for consideration and for submission. The second notice will indicate that a proposed code is available, quite possibly different from the representative body's, and commencing full scale consultation.



RECOMMENDATION 78

Section 47(5) should be repealed.

6.4 SECTION 48 - Notification of intention to issue code

- 6.4.1 This provision makes it clear that I must not issue a code of practice unless I have:
- given public notice of my intention to issue the code;
 - done everything reasonably possible to advise all affected persons, or representatives of those persons, in relation to the proposed code, and invited submissions.
- 6.4.2 The emphasis of the section is to reach out to find affected persons, make them aware of the proposed code, and seek their views. It is clear that Parliament does not expect the Commissioner to place a couple of public notices and leave matters there. It enjoins him to “do everything possible to advise all persons who will be affected” and subsection (3) notes that nothing in subsection (1) prevents the Commissioner from adopting any *additional* means of publicising the proposal.
- 6.4.3 In addition to placing public notices in newspapers in four or five main centres, I typically take the following steps in relation to a proposed code:
- issue a media release;

- refer to the proposal in my own regular newsletter *Private Word*;
- develop a mailing list and send copies of an explanatory statement and a copy of the proposed code to persons who might be affected or interested;
- ask the promoter of any code proposal to contribute suggestions as to persons to consult with;
- encourage the matter to be reported in appropriate trade journals.²⁶

6.4.4 I have adopted the practice in public notices of including the freephone number of the Privacy hotline from which copies of the proposed code may be obtained. Copies are also available by mail or fax or can be requested by e-mail. My web site is also available for dissemination.

6.4.5 The period allowed for consultation will depend upon the urgency of the matter and the numbers of persons likely to be interested or affected. The period normally ranges from one to two months.

6.4.6 The submissions are acknowledged and then compiled for my information and that of staff working on the code proposal. Where there are a significant number of submissions, an analysis may be prepared to assist with considering the points raised. With the larger code consultations I have held consultation meetings. In respect of the Superannuation Schemes Unique Identifier Code 1995 I held a meeting in Wellington. In respect of the Health Information Privacy Code 1994 I held a number of consultation meetings in the four main centres.

6.4.7 Frequently where submissions raise important points which require further elaboration or clarification, my staff will write to the person making the submission seeking a supplementary submission. Sometimes matters are simply clarified on the telephone. I have also adopted a practice of canvassing certain well informed “stakeholders” on proposals for inclusion in codes both before a code is released for public consultation and during that process. After the code has been issued I have always encouraged affected persons to let me know if the code is causing any difficulties in operation. Sometimes the printed code includes a statement to this effect.

6.4.8 Undoubtedly consultation is at the heart of the code of practice provisions. This is formally initiated by public notification and therefore section 48 is a key provision. I consider the section to have operated satisfactorily and recommend no change.

6.5 SECTION 49 - Notification, availability and commencement of code

6.5.1 This section provides that where the Commissioner issues a code of practice, a notice, to the effect that the code is in place and stating that copies are available, must be published in the *Gazette* as soon as practicable. The Commissioner must ensure that copies of the code are available for inspection and purchase at a reasonable price for so long as the code remains in force. A code may not come into force earlier than the 28th day after its notification in the *Gazette*.

6.5.2 As earlier noted, statutory codes of practice are a relatively modern creation and represent a departure from the traditional forms of delegated legislation such as regulations or by-laws. Adequate access to all forms of law is essential if citizens are to know the legal rules by which they are bound. One of the criticisms that has been levelled overseas at codes of practice is that people sometimes do not hear of the fact that they have been issued and that they can be hard to obtain.

²⁶ In relation to the recent Justice Sector Unique Identifier Code the matter was, for example, reported in the newsletter of the NZ Police, *Ten-One*.

I do not believe that this has been the case in relation to codes of practice issued under the Privacy Act and section 49 is a key provision to ensure that that does not happen in the future.

- 6.5.3 Following notification in the *Gazette* I typically take some or all of the following steps to make the code available:
- send a copy to anyone who made a submission on the proposed code;
 - issue a media release;
 - post the code onto my Internet site;
 - make the code available for purchase from my office, and from Bennett’s GP Bookstores, at a reasonable price;
 - made the code available for inspection at my office;
 - deposit copies in the National Library;
 - distribute copies to the depository libraries;
 - notify key stakeholders of the issue of the code;
 - note the issue of the code in *Private Word*;
 - co-operate with commercial publishers in relation to their plans for republishing the code in practitioner texts.

- 6.5.4 In 1996 the Regulations Review Committee of Parliament reported on the results of an investigation into access to regulations. The focus of the Committee’s recommendations was the public availability of delegated legislation which are “regulations” in terms of the Regulations (Disallowance) Act 1989 but which are not published in the traditional “SR” (Statutory Regulations) series. This includes certain types of regulations such as Ministerial “rules” and accounting standards and, in this context, codes of practice under the Privacy Act.

- 6.5.5 The Committee was keen that steps be taken to make the less traditional forms of delegated legislation easily available to the public. I am pleased that a Parliamentary committee has taken an interest in the matter since undoubtedly access to certain official publications has become more complicated with the various public sector restructurings, the privatisation of the Government printing office and the closure of the Link Centres. Nonetheless, some of the difficulties in obtaining other types of delegated legislation do not, in my opinion, apply in respect of codes of practice under the Privacy Act. I am not aware of any amendments that could be made to section 49 to enhance availability of codes since the provision would seem to adequately achieve the job as it is.

6.6 SECTION 50 - Codes deemed to be regulations for purposes of disallowance

- 6.6.1 Codes of practice issued under section 46 are deemed to be regulations for the purposes of the Regulations (Disallowance) Act 1989 but not for the purposes of the Acts and Regulations Publication Act 1989.

- 6.6.2 Section 4 of the Regulations (Disallowance) Act 1989 requires that codes of practice be laid before the House of Representatives within the sixteenth sitting day after the day on which they are issued. The House has the power to disallow any code of practice or provision thereof by resolution under section 5 of the 1989 Act. The codes have been laid before Parliament but there has been no disallowance as yet.

- 6.6.3 The existence of disallowance processes is probably of greater benefit to agencies than to individuals. Should they be dissatisfied at stricter controls, or at a failure to exempt some action, in a code they can approach any MP to take up the issue.

- 6.6.4 The Regulations (Disallowance) Act complements the functions of the Regulations Review Committee which presently operates under Standing Orders 195-198.²⁷ In addition to providing copies of codes for tabling I have taken it upon

“The Committee commends the Office of the Privacy Commissioner on the plain language drafting of the Code and on your comprehensive response to the Committee’s enquiries.”

- RT HON JONATHAN HUNT,
CHAIRMAN REGULATIONS REVIEW
COMMITTEE, ON A REVIEW OF THE
JUSTICE SECTOR UNIQUE IDENTIFIER
CODE 1998, JUNE 1998

myself to send copies directly to the Chairman of the Regulations Review Committee.

- 6.6.5 At present it is doubtful that the Acts Interpretation Act 1924 applies to codes of practice. This will change when the Interpretation Bill, presently before Parliament, is enacted. As codes are, by virtue of section 50, “regulations” for the purposes of the Regulation (Disallowance) Act, they will also be “regulations”, and hence “enactments”, for the purposes of the new Interpretation Act. This change would be of positive benefit for consistent interpretation of various codes and the Act.²⁸

6.7 SECTION 51 - Amendment and revocation of codes

- 6.7.1 Section 51 provides the Commissioner may amend or revoke a code practice issued under section 46, in which case the notice, publication and other requirements of sections 47-50 will apply. I have utilised this provision in making several amendments to the Health Information Privacy Code 1993 (Temporary) and later the Health Information Privacy Code 1994. None of the other codes have been amended and I have not, as yet, exercised the revocation power.

6.8 SECTION 52 - Urgent issue of code

- 6.8.1 This provision allows for the issuing, amendment, and revocation of codes where the Commissioner considers that following the notification procedure set out in section 46 would be impracticable because it is necessary to take action urgently. This involves a departure from the notice and consultation processes that would normally be expected. Therefore, as a safeguard, the code may remain in force for no longer than one year.
- 6.8.2 The only code issued under the urgency provisions was the Health Information Privacy Code 1993 (Temporary). This code was issued on 30 July 1993 within a month of the Act coming into force. Consultations with officials and others in the health sector in the lead up to the enactment of the Privacy Act had convinced me that health information privacy issues would need to be a priority and that a code would be warranted. I confirmed this after the Act was passed and determined that a code needed to be urgently finalised and issued. The code was initially intended to expire 11 months later but in 1994 I extended its duration, again using the urgency provisions, for a further month to enable completion of work on the Health Information Privacy Code 1994.
- 6.8.3 The period of operation of the temporary code provided good opportunity for a review to be carried out of its operation and for extensive consultation to be engaged in relation to its replacement, the Health Information Privacy Code 1994. The urgency provisions were found to be entirely satisfactory in these processes.
- 6.8.4 There was one other set of circumstances in which I considered using the urgency provisions. New Zealand’s first major piece of privacy legislation was the Wanganui Computer Centre Act 1976. It was directed towards “big brother” concerns arising from the operation of a law enforcement computer system. The aim of the 1976 Act was to ensure that the computer-based information system made no unwarranted intrusion upon the privacy of individuals. That Act was repealed with the Privacy Act 1993 and I have had some continuing interest and responsibilities in relation to it.²⁹

²⁷ *Standing Orders of the House of Representatives*, September 1996.

²⁸ See Report of the Privacy Commissioner to the Minister of Justice on the Interpretation Bill, December 1997.

²⁹ Aspects of the Wanganui system, the 1976 legislation and the issues arising from its repeal, are discussed in relation to Parts XI and XII of the Act. See paragraphs 11.1 - 11.6, 12.18.6 - 12.18.13 and 12.19 - 12.21. See also paragraph 10.1.18.

6.8.5 Once the Privacy Act was passed there was no need for a specific stand-alone piece of privacy legislation relating solely to one computer facility. However, that is not to say that privacy concerns in relation to the law enforcement database had diminished or disappeared. In recent years the Wanganui computer system had been operated by a state-owned company, GCS Limited. It also provided other computer processing to government agencies such as IRD.

6.8.6 With the enactment of comprehensive privacy legislation the government looked at selling its shareholding in GCS, a step that it had earlier considered but chosen not to pursue until privacy legislation was enacted. In mid-1994 the government announced its intention to privatise the company. In light of the historical concern shown in relation to the Wanganui computer centre, and the sensitivity of the information processed there and elsewhere by GCS, I announced my intention to issue a code of practice in relation to the company. The main purpose of the code was to ensure that there would be remedies for any breaches of the privacy principles - breach of some of which would carry no remedies, in the absence of a code, during the transitional phase of the Act. I also wished to ensure some privacy protection in the event that any of the information was to be transferred off-shore for processing. A tight time frame was in prospect because of the “due diligence” and sales processes.

6.8.7 Despite the tight time frames I am pleased to say that the code was developed and issued ahead of schedule and following full consultation. There was no need, in that instance, to rely upon the urgency provisions which would have diminished public notice or consultation.

6.8.8 The provisions for the urgent issue of a temporary code are an essential feature of the codes provisions. I believe the provision has worked well, adequately protects the interests of the public and agencies and does not need amendment.

6.9 SECTION 53 - Effect of code

6.9.1 Section 53 sets out the two main legal effects of a code of practice. First, any “action” (which also includes policies or practices) which would otherwise breach an information privacy principle is deemed not to breach that principle if done in accordance with that code. Second, failure to comply with the code, even if not otherwise a breach of a principle, is deemed to be a breach of a principle.

6.9.2 The effect of section 54 seems plain enough. Through reliance upon section 53 it has been unnecessary in section 66 to mention a breach of a code of practice issued under section 46 as constituting part of an “interference with the privacy of an individual” - the deeming provision means it is already there in the reference to any breach of an information privacy principle.

SECTION BY SECTION DISCUSSION - Specific exemptions

6.10 SECTION 54 - Commissioner may authorise collection, use, or disclosure of personal information

6.10.1 Section 54 is the first of 4 sections which set out certain specific exemptions. These include:

- *section 54*, which empowers the Commissioner to authorise the collection, use or disclosure of personal information which would otherwise be in breach of principles 2, 10 or 11, in the public interest or the interest of the individual concerned;
- *section 55*, which provides that nothing in principles 6 or 7 apply in respect of certain specified personal information;
- *section 56*, which provides an exception from the principles where the agency concerned is an individual and the relevant information is collected or held

“I express my thanks for the efficient and co-operative way in which the whole matter (authorisation) was handled. To the extent that conditions were imposed on what we were asking for, they were, to my eye, common-sense provisions which would ensure that the dissemination of personal information was kept to a minimum to achieve the Trustee’s purpose.”

- BUDDLE FINDLAY,
SUBMISSION N5

for the purposes of, or in connection with, that individual’s personal, family or household affairs;

- *section 57*, which exempts intelligence organisations from principles 1 to 5 and 8 to 11.

Section 54

- 6.10.2 Section 54 allows the Privacy Commissioner to specifically authorise an agency to collect, use, or disclose, personal information where it would otherwise constitute a breach of principles 2, 10 or 11. However, the Commissioner must first be satisfied that, in the special circumstances of the case, there is either a countervailing public interest, or else a clear benefit to the individual concerned, that outweighs any interference with privacy that could result from the breach of the relevant principle. The Commissioner may not grant such an authorisation if the individual concerned has refused to authorise the relevant collection, use or disclosure.
- 6.10.3 Occasionally allegations are made that the Privacy Act has prevented something which may have been desirable “in the public interest”. Section 54 exemptions are available to avoid this. I have released a guidance note to help agencies frame applications under the provision.³⁰ So far, few applications under section 54 have been received.
- 6.10.4 The section has an importance in that it provides a “safety valve” for exceptional cases. The exemption power is complementary to the code of practice power since it will not be feasible or desirable to issue an entire code of practice for “one-off” situations. It also has a role in easing compliance costs since in those circumstances where an exemption is justified it may save an agency from unattractive or costly alternatives such as foregoing a particular opportunity, obtaining specific statutory authorisation or pursuing a code of practice.
- 6.10.5 The power for the Commissioner to grant exemptions under section 54 is circumscribed. One issue therefore is whether the exemption power might usefully be broadened. Although the Commissioner may only give exemptions from principles 2, 10 and 11, it is interesting to note that the Australian Privacy Commissioner has powers to grant exemptions (referred to as “public interest determinations”) from *all* of the Australian information privacy principles.³¹ On the other hand, the Australian Commissioner has no power to issue codes of practice and it may be that the broad exemption power is intended to cover situations which codes of practice might address under our Act.
- 6.10.6 No application has yet been refused on the grounds of the weighting to be given to the public interest. I received one submission calling for greater weight to be given to the public interest in section 54 (submission N13). However, I believe the balance is correctly struck. In circumstances where it is appropriate for the public interest to prevail over the expressed wishes of the individuals concerned, I think a specific law, or a code of practice, are the appropriate means to achieve that and not an exemption granted by the Commissioner.

Extension to principle 9

- 6.10.7 In my view, there is a good case to extend the section 54 exemption power to authorise, in certain circumstances, departures from principle 9. Provision for exemption in these circumstances may contribute to resolving one-off compliance difficulties without the need to pursue codes of practice.
- 6.10.8 I see little difficulty in including reference to principle 9 in section 54 and do

³⁰ Office of the Privacy Commissioner, Guidance note to applicants seeking exemption under section 54 of the Privacy Act 1993, 12 May 1997.

³¹ Privacy Act 1988 (Australia), Part VI.

“Section 54(a) requires that the public interest outweigh ‘to a substantial degree’ any interference with the privacy of individuals and section 54(b) goes on to state that disclosure must involve ‘a clear benefit to the individual concerned’ that outweighs any interference with the privacy of the individual. This balance is drawn too close to the interests of privacy rather than those related to the interests of disclosure which might go some way to explaining why exemptions have been granted so rarely. If the public interest outweighs the interest of privacy then exemptions should automatically follow without any further reference to the weighing of the two competing interests.”

- COMMONWEALTH PRESS UNION,
SUBMISSION N13

not believe that the various tests and restrictions need be altered. One circumstance in which it might be useful is where certain personal information which is not available for further lawful use is mixed with, or attached to, other personal or non-personal information which can be used, and it is not feasible to detach the information.



RECOMMENDATION 79

Section 54(1) should be amended to enable the Commissioner to grant an exemption to enable information to be kept notwithstanding that this would otherwise be in breach of principle 9.

Public notification costs

- 6.10.9 A number of exemptions granted so far have included a condition that the applicant undertake public notification to make affected individuals aware of the exemption or the unusual collection, use or disclosure of personal information. This public notification has been undertaken by, and at the cost of, the applicant. This is simply achieved by the Commissioner imposing conditions provided for in section 54(2).
- 6.10.10 So far, I have not undertaken public notification of an application for an exemption although I anticipate that this would be appropriate in certain circumstances particularly where the exemption would affect a large class of individuals. I note that the Australian Privacy Commissioner is obliged to give public notice of all applications for public interest determinations that are received.³² I see no need to alter the New Zealand procedure to require publication in every case since often public notice will not be warranted. However, I suggest that in appropriate cases I should be empowered to require the applicant to publicly notify an application. This may especially be relevant with the extension of the exemption power to principle 9 since such application could involve retaining holdings of information in respect of whole classes of individuals.



RECOMMENDATION 80

Section 54 should provide that the Commissioner may require the applicant to publicly notify an application in appropriate terms.

6.11 SECTION 55 - Certain personal information excluded

- 6.11.1 Section 55 provides that nothing in principles 6 or 7 applies in respect of certain classes of listed information. If information falls within one of those classes an individual cannot exercise any rights of access or correction in respect of that information.
- 6.11.2 The first class of information excluded is personal information in the course of transmission by post, telegram, fax, electronic mail, etc. It would seem self-evidently undesirable to permit access or correction requests in respect of information in the course of transmission. In the absence of such an exclusion it would have been necessary to interpret other concepts in the Act to ensure the same result - for instance, by concluding that a postal operator does not really “hold” personal information contained in the letters that it carries.
- 6.11.3 The second and third categories of information excluded relate to evidence given, or submissions made, to royal commissions, commissions of inquiry and certain other inquiries. These exemptions are a little more controversial than the others since they do something that the Official Information Act and Privacy Act usually avoid, which is to declare an entire class of document “off limits” to access without taking a case by case approach.

“The power to grant exemptions should be extended to cover any of the principles. The power to issue codes does not remove the need for an ability to grant exemptions. Exemptions should be used as an alternative to the cumbersome procedure to issue a code of practice where the exemption is unlikely to affect anyone’s interests adversely.”

- TELECOM NEW ZEALAND,
SUBMISSION N7

³² Privacy Act 1988 (Australia), section 74(1).

- 6.11.4 The fourth and fifth exceptions are directed towards ensuring that investigations by the Privacy Commissioner (and the equivalent investigations which were formerly carried out by the Ombudsmen under the Official Information Act) can be conducted satisfactorily. This ensures that correspondence between the Commissioner and an agency whose decision is being reviewed is not itself the subject of access and correction rights.
- 6.11.5 It would be possible to amend section 55 by narrowing any of the existing exemptions. Alternatively, a case might be made to include new classes of information. A very good case would need to be made to include new exemptions since this would narrow rights that individuals presently enjoy. A particularly strong case would need to be made to exclude further information held in the public sector since such a provision would narrow access rights that had existed for up to fourteen years (and furthermore it would be somewhat pointless to exclude information from personal access under principle 6 if information could nonetheless be accessed by other people under the Official Information Act).
- Royal Commissions and commissions of inquiry*
- 6.11.6 Most people making submissions were content that the current exemptions be left as they are. However, several did express concern in relation to the breadth of exclusion (b) which concerns evidence given or submissions made to:
- a Royal Commission; or
 - a commission of inquiry.
- For example, submission N8 suggested that the exclusions should not be applicable if the evidence or submissions have been given in hearings open to the public.
- 6.11.7 These exclusions are derived from exceptions to the definition of “official information” in the Official Information Act 1982³³ which in turn is derived from the draft bill prepared by the “Danks Committee”.³⁴ However, the Danks Committee regarded the question of access to information held by Courts and judicial bodies (including commissions of inquiry) and local authorities to be outside its terms of reference and it expressly noted that it had not given any consideration to the matter.
- 6.11.8 The exceptions relating to Royal Commissions and commissions of inquiry apply only:
- “at any time before the report of the Royal Commission or commission of inquiry has been published or, in the case of evidence of submissions given or made in the course of a sitting open to the public, at any time before the Royal Commission or commission of inquiry has reported to the Governor-General.”³⁵
- 6.11.9 Therefore the individual concerned can seek access to evidence or submissions about him or her after that time - this is a right not afforded to other third parties under the Official Information Act generally.³⁶
- 6.11.10 I consider it important that individuals should be able to access evidence given, or submissions made, to inquiries which is personal information about them, and the Act allows for this - albeit after a commission has reported. It may be possible to consider a narrowing of the exception so as to enable access to be

³³ Official Information Act 1982, section 2 (definition of “official information”, paragraph (h)).

³⁴ Committee on Official Information, *Towards Open Government: Supplementary Report*, 1981, pages 63-64.

³⁵ See section 55(b).

³⁶ See Official Information Act 1982, section 2, definition of “official information”, paragraph (h).

sought to evidence given, or submissions made, in a public hearing notwithstanding that the inquiry had not yet reported.³⁷ This may be at some inconvenience to a Royal Commission or commission of inquiry but may be seen as consistent with other moves over recent years to enhance rights of natural justice. I recommend that narrowing the exception should be considered.



RECOMMENDATION 81

Consideration should be given to the desirability of narrowing section 55(b) so as to enable access requests by the individual concerned to evidence given, or submissions made, to a Royal Commission prior to the report to the Governor-General where that evidence was given, or the submissions made, in open public hearing.

6.12 SECTION 56 - Personal information relating to domestic affairs

6.12.1 Section 56 establishes an exemption in respect of personal information that is collected or held by an agency that is an individual where the information selected is held by that individual “solely or principally for the purposes of, or in connection with, that individual’s personal, family, or household affairs”.

6.12.2 This provision is based upon an exemption in the Data Protection Act 1984 (UK). However, section 56 is broader than the UK exemption since it relates to information “solely or principally” held in connection with an individual’s personal, family, or household affairs. The UK exemption applies to data concerned “only” with the “management of” such affairs.

6.12.3 The Hong Kong privacy law has adopted an exemption based upon the UK model but in addition to “personal, family, or household affairs” the Hong Kong provision exempts personal data held by an individual only for “recreational purposes”.³⁸ The UK has drawn upon the Hong Kong provision in the domestic purposes exemption in its new bill which provides:

“Personal data processed by an individual only for the purposes of that individual’s personal, family or household affairs (including recreational purposes) are exempt from the data protection principles and the provisions of Part II and III.”³⁹

6.12.4 I have considered the new Hong Kong and UK provisions but do not recommend change at this time. The absence of an express reference to an individual’s “recreational” purposes has not caused any difficulties in New Zealand, to my knowledge. As already observed, the New Zealand provision is already broader than the UK or Hong Kong models since the exemption in section 56 refers to “solely or principally” rather than “only”. I do not see any present case for broadening it further.

6.12.5 Some problems have been encountered where members of a family or household engage in misleading conduct. The most common example is where an estranged spouse or partner misrepresents to an agency that he or she is entitled to have access to personal information held about the other spouse or partner. In other cases, individuals have impersonated other family members to agencies.

6.12.6 In the discussion paper I questioned whether it is appropriate to allow individuals to rely on an exemption when they are engaging in misleading conduct with outside agencies to the detriment to the privacy of other family members. Nineteen submissions were received which all broadly disapproved of individu-

³⁷ This would also require an amendment to paragraphs (x) and (xi) of the definition of “agency”.

³⁸ Personal Data (Privacy) Ordinance 1995 (Hong Kong), section 52.

³⁹ Data Protection Bill [HL] (UK), 4 June 1998 version, clause 36.



“We consider it very important to ensure that there is a bona fide reason for family members to obtain information about each other and that legal separations should be recognised and give good grounds for refusing access to the other partner’s information.”

- BAYNET CRA LIMITED,
SUBMISSION N12

als being able to rely on the domestic affairs exemption in this way. However, suggestions as to how to address the problem varied. Responses included amending section 56 to prevent the use of this exemption in such circumstances, requiring authorisation for such disclosure, and making this an offence, among other suggestions.

- 6.12.7 This issue is a subset of a wider problem relating to individuals who mislead agencies so as to obtain information to which they are not entitled or to improperly procure the disclosure of information to third parties or the alteration of records. I have proposed in recommendation 148 that a new offence be created relating to the broader issue. However, the issue remains as to how appropriate this exemption is when it is relied upon in such circumstances.
- 6.12.8 I believe it would be desirable to exclude reliance upon this exemption where an individual has misled an agency to release information to which that individual was not entitled. I remain of the view that a number of personal, family and household matters, are best resolved elsewhere than under the Act. I do not want the basic approach to be changed with a series of “domestic squabbles” being brought to the Commissioner. The limits I propose be placed on section 56 will still ensure that only a very precise subset of personal, family or household matters might be the subject of complaint - those involving an individual going outside the family or household to mislead an agency to enable information to be wrongly disclosed. Two other filters should be noted at this stage which should keep the change in proportion:
- the affected individual will need to feel sufficiently aggrieved, and wish to bring an outside agency into the complaint before the matter is handled by my office - many individuals will, even in such situations, wish to deal with the matter directly or within the family or household;
 - to constitute an “interference with the privacy of an individual” there will need to be some sort of harm or detriment of the type outlined in section 66(1)(b).
- 6.12.9 The main problem that has manifested itself is the individual misleading an external agency to obtain information improperly. That is the issue that I propose to address. The breadth of the personal affairs exemption means that other problems also exist, for example:
- an individual pretending to an agency that they are authorised by a family member to request correction or deletion of information or to have it disclosed elsewhere;
 - the individual disclosing the information that has been improperly obtained to further harm the privacy interests of the individual.

However, my proposed change does not seek to tackle those problems since they are not the ones that have primarily manifested themselves in the period under review. Furthermore, if the exemption is lifted too far I have some concern that the law will be drawn into matters which are better attempted to be sorted out within families or households. Accordingly, the changes are solely limited to those in which the individual misleads an agency to obtain information. These are complaints which I presently would investigate because they involve disclosure by an agency in breach of principle 11.

- 6.12.10 Section 56 should be amended so as to make it clear than an individual cannot rely upon the exemption provided for in section 56 where the complaint involves an allegation that the individual has collected personal information from an agency by falsely representing that the individual has the authorisation of the individual concerned, or is the individual concerned. This encompasses principle 1, 2 and 4 complaints. Accordingly, in those complaints the investigation would look at the actions not only of the agency but also of the person who procured the disclosure.

“A significant number of complaints against banks involve inadvertent release of information to third parties, such as former spouses, who have misled the banks in deliberately seeking such information. The Association supports amending section 56 such that persons making deliberate misrepresentations may be held liable.”

- NZ BANKERS' ASSOCIATION,
SUBMISSION N10

- 6.12.11 The tendency would be for the primary scrutiny of the agency to be in relation to principle 5, that is, whether it took reasonable security safeguards, and of the member of the family or household in relation to principles 1, 2 and 4. In reaching a settlement through my complaints processes it would seem appropriate to involve the person who caused the interference with privacy. In a negotiated settlement the person might, for example, offer an apology, undertake not to do the same again, or contribute to any compensation for harm caused. If the matter could not be settled and proceeded to Tribunal proceedings it would be possible for the Tribunal to apportion any compensation to be paid between the agency and the person. At present if such a matter proceeded to the Tribunal the only defendant would be the agency which has been duped into releasing information.



RECOMMENDATION 82

Section 56 should be amended so that an individual cannot rely upon the domestic affairs exemption where that individual has collected personal information from an agency by falsely representing that he or she has the authorisation of the individual concerned or is the individual concerned.

6.13 SECTION 57 - Intelligence organisations

Introduction

- 6.13.1 New Zealand, like other free and democratic societies, has accepted the need for state surveillance to guard against those who would undermine democratic structures. However all democratic societies struggle to find appropriate legal and administrative controls to ensure that any secret services remain accountable to democratic institutions and do not go beyond what is reasonable to achieve their assigned mandate. In New Zealand the limited brief of the former Commissioner of Security Appeals has recently been replaced by an Inspector-General of Intelligence and Security with a wider mandate and greater powers. It is timely to examine the appropriate Privacy Act controls.

- 6.13.2 Secret surveillance and intelligence gathering creates privacy risks for the individuals affected and society at large. To constrain the risks I have taken the view that:

- the role of intelligence organisations should be kept to a tight brief and not be allowed to stray into areas which can be appropriately managed by normal and open governmental and policing activities;
- while the organisations will need to conduct a proportion of their work in secret there will be areas in which some information can be disclosed publicly, to the individuals affected or to oversight bodies, and the greatest degree of openness and disclosure should be promoted;⁴⁰
- as far as possible similar accountability mechanisms as apply to other bodies should apply to the organisations (perhaps in a modified manner) unless there is a good reason for that not to occur; and
- there should be redress for actions of intelligence organisations which breach individual rights without justification, including the right to privacy.

To a significant measure, the laws enacted in 1996 enhance accountability along these lines.⁴¹

Existing position of intelligence organisations

- 6.13.3 Section 57 of the Privacy Act provides:

“Intelligence organisations - Nothing in principles 1 to 5

⁴⁰ For instance vetting is an activity carried out by the NZSIS with the knowledge and assistance of the individual concerned and subject to a complaint appeal procedure. I am also pleased that the NZSIS has taken a further step towards openness, and dispelling misconceptions about the Service's role, by publishing *Security in New Zealand Today*, April 1998.

⁴¹ See Inspector-General of Intelligence and Security Act 1996 and Intelligence and Security Committee Act 1996.

or principles 8 to 11 applies in relation to information collected, obtained, held, used, or disclosed by, or disclosed to, an intelligence organisation.”

- 6.13.4 “Intelligence organisation” is defined in section 2 to mean the New Zealand Security Intelligence Service and the Government Communications Security Bureau (hereafter referred to as the NZSIS and GCSB).
- 6.13.5 Only the principles dealing with access to personal information (principle 6), correction of personal information (principle 7) and unique identifiers (principle 12) at present apply in relation to intelligence organisations.
- 6.13.6 I released a discussion paper which questioned whether the exemption in section 57 should be narrowed so as to apply further information privacy principles to intelligence organisations. I had previously considered the matter in my report to the Minister of Justice on the Intelligence and Security Agencies Bill in February 1996. In the rest of this part of the report I outline the existing position of intelligence organisations under the Act and canvass some of the issues which arise from the proposal to apply information privacy principles 1, 5, 8 and 9 to intelligence organisations.
- 6.13.7 There is a special procedure set out in section 81 for investigations into alleged breaches by an intelligence organisation of principles 6, 7 or 12. Most of the complaints against intelligence organisations received by the Commissioner are against the NZSIS and seek a review of a decision to refuse access to information or to refuse to confirm or deny that it holds any information. The special procedure that applies under section 81 means that neither the Commissioner nor the complainant may refer a complaint to the Complaints Review Tribunal for determination. Rather the procedure anticipates the Commissioner conducting an investigation, forming an opinion, and if the complaint cannot be resolved making a recommendation to the intelligence organisation and awaiting the organisation’s response. If no response is made within a reasonable time or, after considering any comments made by the intelligence organisation, the Commissioner may send a copy of his report and recommendations to the Prime Minister. In turn the Prime Minister may lay a copy of all or part of the report before Parliament. No reports to the Prime Minister have yet been made.
- Extension of other principles to intelligence organisations*
- 6.13.8 There is always a concern in free and democratic societies as to the potentially intrusive intelligence gathering activities of the state. It is not possible for a concerned citizen to know whether such activities, being carried out on his or her behalf, are excessive or are being properly kept in check. The secrecy under which the activities are carried out, the various laws limiting public scrutiny for reasons of national security, and the limited public reporting by oversight bodies, all give rise to anxieties as to whether intelligence organisations are overstepping the mark between prudent intelligence gathering to safeguard society and a more sinister “surveillance state”. The various scandals that surface from time to time with overseas intelligence organisations heighten public concerns.
- 6.13.9 It is desirable that intelligence organisations adhere to the laws that the rest of society lives by, particularly those relating to respect for human rights and accountability to democratic institutions, to the greatest extent possible consistent with the tasks that these agencies are called upon to perform. At the time that the Privacy Act was enacted in 1993 the Government applied information privacy principles 6 and 7 to intelligence organisations (although the special complaints procedure was not as robust or as open as with other agencies). This was a continuation of the access and correction rights which existed under the Official Information Act 1982. However, the Government also applied information privacy principle 12 to intelligence organisations.

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“The ACCL has questioned the need for this country to have stand-alone intelligence organisations and in particular the Security Intelligence Service. If there is to be separate intelligence organisations, then in no respect should they be above or exempted from the laws of the land and in particular fundamental human rights laws such as the law protecting individual privacy. We favour the applicability of all of the privacy principles to intelligence organisations.”

- AUCKLAND COUNCIL FOR CIVIL LIBERTIES, SUBMISSION 02

- 6.13.10 It is now the time to apply some of the remaining principles to intelligence organisations (subject to the special investigation procedure which safeguards any reasonable need for secrecy in relation to complaints investigation and determination). I believe that the need is made more urgent by the recent expansion of the mandate of the NZSIS into new areas concerning the security of New Zealand’s economic wellbeing.
- 6.13.11 I take the view that information privacy principles 1, 5, 8 and 9 provide a sound basis for fair information handling and have clear relevance to intelligence organisations. The NZSIS agrees. These principles take account of the purposes of the organisations concerned, apply standards that are reasonable in the circumstances, and would not need to be amended to establish any national security exception.

Principle 1

- 6.13.12 Information privacy principle 1 emphasises the purpose of collection of personal information. In the context of the NZSIS the lawful purpose will be linked to the definition of “security” as set out in the New Zealand Security Intelligence Service Act 1969.
- 6.13.13 I have concluded that principle 1 ought to be applied to intelligence organisations. I am heartened by the fact that no opposition was taken to this proposal (or indeed the ones I suggest below) by either the NZSIS or GCSB.⁴² The NZSIS stated in its submission that:

“Clearly the Service has no authority or wish to collect information that does not meet the criteria in ipp 1 part (a). My interpretation of part (b) is that information is ‘necessary’ if it is required to fully and effectively carry out an organisation’s lawful functions; (ie, if it is evident that it will add nothing in that process then it is not ‘necessary’, but if there is a reasonable expectation that it may, then the requirement of being ‘necessary’ is met). If this view is accepted then ipp 1 presents no concerns to me.”⁴³

- 6.13.14 Both the NZSIS and GCSB made overall comments in relation to the issue in their submissions and made it clear that they did not, for example, necessarily accept the observations made in the discussion paper notwithstanding acceptance of the proposal that additional principles should be applied to the two organisations. GCSB commented that subject to the general observations made, and to “certain caveats” the GCSB would have no difficulty with the proposition that principles 1, 5, 8 and 9 should apply to the Bureau.⁴⁴ The GCSB’s first caveat related to the possible use of the Inspector-General of Intelligence and Security as an appropriate “independent oversight body”. I too believe that it would be valuable to ascribe a role in the context to the Inspector-General and I suggest below that this can be achieved without any change to the statute under which he operates. The GCSB’s second caveat related to principle 9 which is referred to at paragraph 6.13.23.

Principle 5

- 6.13.15 Of all the information privacy principles, principle 5 (storage and security of personal information) would seem to cause least difficulty for intelligence organisations given their emphasis on security of information held and controls on its disclosure. However, in some circumstances there may be information

⁴² Furthermore, all 19 submissions received directly on the point agreed with applying principle 1 to intelligence organisations (see submissions O2-O12, O14-O15, O17, S5, S30, S36, S42 and S52).

⁴³ NZ Security Intelligence Service, submission O14, paragraphs 8 and 9.

⁴⁴ Government Communications Security Bureau, submission S30, page 2.

about an individual which the intelligence organisation has a proper reason to hold but which, through a lapse in reasonable security safeguards or otherwise, is disclosed publicly or to another agency that has no purpose in receiving the information, thereby harming the individual. An example might concern material uncovered in the vetting process.

- 6.13.16 The NZSIS commented in relation to the proposed application of principle 5 to the organisation:

“This principle causes little difficulty for the Service. High standards of physical and personnel security are applied to personal information held by the Service, most of which is both sensitive and classified.”⁴⁵

Nineteen submissions supported applying principle 5 to intelligence organisations.⁴⁶ None were opposed.

Principle 8

- 6.13.17 It might be thought that some small piece of intelligence may seem of little importance at the time it is gathered or shortly thereafter and yet, when accumulated with various other data, achieves a significance weeks, months or years later. However, at the time that the information actually is to be put to use, particularly where a decision based upon it will affect the interests of an individual, it seems reasonable to apply the standards of principle 8, which require that, having regard to the purpose for which the information is proposed to be used, reasonable steps (if any) be taken to ensure the information is accurate, up to date, and so forth. It may be that in the circumstances no checks are feasible and therefore no breach of the principle would be possible. However, where some reasonable step to check information which is to be used in such a way as to affect an individual could be checked this ought to be done.
- 6.13.18 The NZSIS was in agreement with the points made in respect of principle 8 in the discussion paper and offered no objection to the application of the principle to the Service.⁴⁷ Twenty submissions were in favour of applying principle 8 to the intelligence organisations.⁴⁸ None were opposed.

Principle 9

- 6.13.19 If intelligence organisations open files on individuals, which turn out not to be necessary, maintain vast numbers of files on individuals, or retain personal information long beyond when it is properly relevant and useful, there are risks to privacy. Principle 9 would oblige intelligence organisation to have policies on the retention of personal information about individuals so that it is held for no longer than is required for the purposes for which it may lawfully be used. These policies would be linked to the usefulness of the data for an agency’s purposes and, for instance, to the statute under which the NZSIS operates.
- 6.13.20 It would better serve individual privacy if some information was not kept overly long with the dangers that it will paint an inaccurate picture, be out of date, or be misleading. That is not to say that intelligence of a particular nature might nonetheless be held for a long period where it is reasonable to do so. The importance is that intelligence organisations consider the principle and apply it as relevant for their purposes.

- 6.13.21 In respect of principle 9 the NZSIS submitted:

⁴⁵ Submission O14, paragraph 10.

⁴⁶ See submissions O2-O12, O14, O15, O17, S5, S30, S36, S42 and S52.

⁴⁷ Submission O14, paragraph 11.

⁴⁸ See submissions O2-O12, O14, L15, L17, S5, S30, S36, S42, S52 and S54.

“Because of the secrecy of the intelligence agencies, their potential intrusions into New Zealanders lives and the weakness of the oversight and controls on them, it really matters that the Privacy Act is effective. While I think that principles 1, 5, 8 and particularly 9 should indeed be applied to intelligence agencies, and it is hard to see why it mattered to them to want an exemption in the first place, I think the heart of the problem of ensuring reasonable privacy is section 27. The effect of this wording in the Privacy Act is that virtually all information relevant to privacy that is sought from intelligence agencies can be withheld, with the result that privacy principles 6 and 7 appear to be rendered useless.”

- NICKY HAGER, SUBMISSION O8

“What may be considered a reasonable length of time for the retention of information will clearly differ amongst agencies. Intelligence may be gathered in such a way that pieces of information gathered individually and over time in the end present an accurate picture of a security issue. The Service has procedures in place to purge information which is no longer required. It is neither in the Service’s interest nor the public’s to retain outdated information which can serve no relevant purpose any longer. However, it requires a careful judgement to determine when such point is reached in the case of some personal information despite the passage of a substantial period of time since its acquisition.

“Subject to the caveat that security information may need to be retained for a future contingent requirement (eg. an individual may in the future require a security clearance for government employment involving access to classified information) I agree ipp 9 can be extended to the Service.”⁴⁹

- 6.13.22 The GCSB expressed the view in its submission that the intelligence organisation principally concerned with issues relating to the operation of the Privacy Act is the NZSIS. It explained:

“The GCSB is a foreign intelligence organisation and, by definition, our activities have little or no impact on the privacy of New Zealanders.”⁵⁰

- 6.13.23 I am not sure that I agree with that proposition since the privacy principles apply to personal information held by New Zealand agencies whether it is about New Zealanders or foreigners. However, the principal point to note in this regard is that it is not the purpose of the GCSB to engage in gathering information on New Zealanders. This feature came through in the GCSB’s second “caveat” which specifically concerned the possible application of principle 9 to the organisation. Its submission stated that:

“While the Bureau (being, as previously emphasised, a **foreign** intelligence organisation) does not maintain files on New Zealanders, the special nature of the intelligence task does mean that in many cases information acquired and relevant today will still be relevant - perhaps in quite a different context - far into the future. For this reason, it seems to us that, in the application of ipp 9 to the intelligence organisations, there should be some recognition of the special position of information held for intelligence and security purposes.”⁵¹ [emphasis in original]

- 6.13.24 Subject to these caveats the GCSB had expressed the view that it would have no difficulty with the proposition that principle 9 should apply to the Bureau. Nineteen submissions in total supported the application of principle 9 to intelligence organisation⁵² while 1 submission was opposed.⁵³ Two other submissions reserved their position.⁵⁴

⁴⁹ Submission O14, paragraphs 12-13.

⁵⁰ Submission S30, page 2.

⁵¹ Submission S30.

⁵² See submissions O2, O3, L5-O12, L14, L15, S5, S30, S36, S42, S52 and S54.

⁵³ See submission O17.

⁵⁴ See submissions O1 and O16.

**RECOMMENDATION 83**

The exemption for intelligence organisations in section 57 should be narrowed so that principles 1, 5, 8 and 9 apply to information collected, obtained, held, or used, by an intelligence organisation.

Inspector-General of Intelligence and Security

6.13.25 I canvassed in the discussion paper whether it would be desirable to provide a role for the Inspector-General of Intelligence and Security in respect of privacy issues. The secret activities of intelligence organisations means that reliance simply upon complaints may be less than satisfactory and the recently created position of Inspector-General seemed to offer a promising oversight agency. Were there to be a suitable role for the Inspector-General it might fall within one or more of the following categories:

- complaints investigation or inquiries;
- compliance or oversight in respect of information privacy principles relevant to intelligence organisations.

6.13.26 In proceeding to consider the appropriate options for the possible involvement of the Inspector-General I have needed to take into account several matters. The first is the statutory scheme of the Privacy Act. For example, I have not seen as compatible with the structure of the Act the devolving of my responsibility of rendering opinions on whether a matter constitutes an “interference with privacy” - although I contemplate that the carrying out of investigations could be a role that is shared through the transfer of complaints. Another is the statutory constraint of the Inspector-General of Intelligence and Security Act 1996. I have presumed that that Act is not to be amended. Third, are the views of the Inspector-General as to the role that may be appropriate for him to play. In that respect, I have been assisted by a submission by the Inspector-General and have taken the opportunity to canvass my proposals with him. There would be little point in proposing a role for the Inspector-General that was seen by the holder of that position as inappropriate.

6.13.27 The object of the Inspector-General of Intelligence and Security Act 1996 is, as stated in section 4, to assist the Prime Minister in the oversight and review of the SIS and GCSB. Two particular functions are to ensure that the activities of the agencies comply with the law and the complaints relating to them are independently investigated. The Inspector-General has quite a wide mandate on general inquiry into propriety of particular activities of an intelligence organisation and also has a special function, of interest in a privacy sense, in relation to compliance with the issue and execution of interception warrants. Moreover, the Inspector-General is required to prepare and carry out programmes for the general oversight and review of the two organisations in relation to compliance with the law of New Zealand and the propriety of any of their particular activities.

6.13.28 It seems to me that with no further need to amend either statute that there is scope for co-operation, and an appropriate role, for the Inspector-General in relation to privacy matters. For example, in respect of the Inspector-General’s mandate to develop general oversight and review programmes it is possible that checks for compliance with the applicable information privacy principles could easily be built in. In doing this it would be possible for the Inspector-General to consult the Privacy Commissioner on privacy-related matters. No special provision would need to be made in that regard as consultation provisions already exist in both statutes.

6.13.29 With respect to investigation of complaints the consultation are also relevant.⁵⁵ In some cases the matter of a complaint could be taken under the provisions of

⁵⁵ See, for example, sections 72B and 117B of the Act.

“We consider it wrong in principle to exempt intelligence organisations from the enforcement mechanisms otherwise provided by the Privacy Act, in particular Complaints Review Tribunal determination (including the availability of damages). The rule of law requires all Government agencies to comply with basic human rights such as the right to privacy.”

- AUCKLAND COUNCIL FOR CIVIL LIBERTIES, SUBMISSION 02

the Privacy Act or an Inspector-General inquiry. These provisions help ensure that the complaints are placed with the most appropriate body. Where transfer is not appropriate there can nonetheless be a degree of cooperation to try to ensure that duplication of investigations is minimised.

- 6.13.30 The compliance programmes that the Inspector-General is empowered to carry out hold particular promise for certain of the privacy principles that I recommend be applied to intelligence organisations. Indeed, compliance programmes will be a far more suitable way of achieving benefits for privacy than simply awaiting complaints. For example, it will be more satisfactory for retention issues under principle 9 to be gone into as part of a compliance programme, than simply to await an individual to lodge a complaint alleging that information about him or her has been retained where there is no lawful use for that information.