



Privacy Commissioner
Te Mana Mātāpono Matatapu

Office of the Privacy Commissioner

Prosecution Policy

Privacy Act 2020

Introduction

1. The Privacy Commissioner, an independent Crown entity, is New Zealand's privacy and data protection regulator under the Privacy Act 2020.
2. The functions of the Privacy Commissioner under the Privacy Act 2020 include the investigation and conciliation of privacy complaints, inquiries into matters affecting the privacy of the individual, and functions incidental or conducive to the performance of these functions. The ability of the Privacy Commissioner to carry out the statutory functions conferred under the Privacy Act efficiently and effectively is central to the statutory purpose of the Privacy Act to promote and protect individual privacy.
3. The Privacy Commissioner's statutory powers include the power to summon persons,¹ and the power to require the provision of information that may be relevant to an investigation.²
4. The Privacy Commissioner has statutory powers to make an access direction³ and the power to issue and enforce a compliance notice.⁴ The Human Rights Review Tribunal is empowered to issue orders upholding or varying an access direction⁵ or compliance notice issued by the Privacy Commissioner.⁶ The Human Rights Review Tribunal is also empowered to grant remedies in respect of an interference with privacy including the making of orders.⁷
5. Failure to comply with an order of the Human Rights Review Tribunal in its Privacy Act jurisdiction is an offence.⁸ This includes failure to comply with an access order⁹ or a compliance order.¹⁰
6. The Privacy Act creates offences under:
 - a) section 118 in relation to an agency failing to notify the Privacy Commissioner of a notifiable privacy breach;
 - b) section 197 in relation to transfer prohibition notices; and
 - c) section 212 in relation to actions that interfere with the Privacy Commissioner's statutory functions, or that interfere with an individual's personal information.

¹ Privacy Act, s 86.

² Privacy Act, s 87.

³ Privacy Act, s 92.

⁴ Privacy Act, Part 6(2).

⁵ Privacy Act, ss 104, 108.

⁶ Privacy Act, s 133.

⁷ Privacy Act, s 102(2).

⁸ Human Rights Act 1993, s 121(2); Privacy Act ss 111, 134.

⁹ Privacy Act, s 104(4). See also Human Rights Act 1993, s 121.

¹⁰ Privacy Act, s 133(3).

7. The purpose of this policy is to set out guidelines for the Privacy Commissioner when considering bringing a prosecution under the Privacy Act. Each case will be considered on its own merits, in light of all the relevant circumstances and with regard to the Solicitor-General's Prosecution Guidelines.
8. The Privacy Commissioner is responsible for the decision, on legal advice, to commence or continue a prosecution under the Privacy Act and the appropriate charge or charges to be laid and will document any such decisions and the reasons for them.
9. Under section 96 of the Privacy Act, the Privacy Commissioner may refer evidence of any significant breach of duty or misconduct to an appropriate authority.
10. Where it is suspected that another more serious offence has been committed, (for example an offence against personal privacy under the Crimes Act),¹¹ this should be referred to the Police for investigation and prosecution.
11. The Privacy Commissioner is not the exclusive prosecuting authority under the Privacy Act and the New Zealand Police may initiate a prosecution independently of the Privacy Commissioner. This policy covers the offences under the Privacy Act where it is likely the Privacy Commissioner may consider bringing a prosecution under the Act.

Offence under Part 6(1) of the Privacy Act

12. Failure to notify the Privacy Commissioner of a notifiable privacy breach under section 118 of the Privacy Act, is an offence, liable on conviction to a fine not exceeding \$10,000.¹²
13. A prosecution may be brought against any agency under section 118(1) in circumstances where the agency, without reasonable excuse, fails to notify the Privacy Commissioner of a notifiable privacy breach.¹³
14. It is not a defence to a charge under section 118 that the agency has taken steps to address the privacy breach;¹⁴ however it is a defence that the agency did not consider the privacy breach to be a notifiable privacy breach, if it was reasonable for the agency to do so.¹⁵
15. Prosecution will be considered where the effectiveness or integrity of the Privacy Commissioner's functions are compromised by an agency's non-

¹¹ Crimes Act 1961, Part 9A.

¹² Privacy Act, s 118(1).

¹³ A "notifiable privacy breach" is defined in the Privacy Act, s 112.

¹⁴ Privacy Act, s 118(2).

¹⁵ Privacy Act, s 118(3).

compliance with its obligation to notify a privacy breach that constitutes an offence under section 118(1).

16. The Privacy Commissioner's primary objectives in bringing any prosecution under this part are to uphold the integrity and effectiveness of the Privacy Commissioner's functions under the Privacy Act, to deter non-compliance with an agency's obligations under the Act, and to hold to account persons who do not comply with those obligations.

Offence under Part 8 of the Privacy Act

17. Failure or refusal to comply with a transfer prohibition notice issued by the Privacy Commissioner under Part 8 of the Act, prohibiting the transfer of personal information from New Zealand to another State, is an offence, liable on conviction to a fine not exceeding \$10,000.¹⁶
18. A prosecution may be brought against any person under section 197 in circumstances where the person, without reasonable excuse, fails or refuses to comply with a transfer prohibition notice that has been issued by the Privacy Commissioner.
19. Prosecution will be considered where the effectiveness or integrity of the Privacy Commissioner's functions are compromised by non-compliance with a transfer prohibition notice that constitutes an offence under section 197.
20. The Privacy Commissioner's primary objectives in bringing any prosecution under this part are to uphold the integrity of enforcement processes under the Privacy Act, to deter non-compliance with the Act's enforcement processes, and to hold persons who do not comply with those processes to account.

Offences under section 212 of the Privacy Act

21. Section 212 of the Privacy Act creates certain offences, liable on conviction to a fine not exceeding \$10,000, for certain actions by any person that interfere with the statutory functions of the Privacy Commissioner or that interfere with an individual's personal information (by impersonating an individual or by destroying personal information). The Privacy Commissioner is not the exclusive prosecuting authority and the New Zealand Police may initiate a prosecution in any appropriate case, independently of the Privacy Commissioner.

¹⁶ Privacy Act, s 197.

22. The Privacy Commissioner's primary objectives in bringing any prosecution under this section are to uphold the integrity of investigation processes under the Privacy Act, to deter non-compliance with the Act's investigation processes, to hold to account persons who do not comply with those processes or who interfere with an individual's personal information.
23. A prosecution may be brought against a person¹⁷ under section 212 in any of the following circumstances:
- a) A person, without reasonable excuse, obstructs, hinders, or resists the Commissioner or any other person in the exercise of their powers under the Act (for example failing to comply with a summons made by the Commissioner under section 86(1) of the Act);
 - b) A person, without reasonable excuse, refuses or fails to comply with any lawful requirement of the Commissioner or any other person under this Act (for example, failing to provide information to the Commissioner required under section 87(1) of the Act);
 - c) A person makes any statement or gives any information to the Commissioner or any other person exercising powers under this Act, knowing that the statement or information is false or misleading (for example, provides false or misleading information under oath or produces false or misleading information in document form);
 - d) A person represents directly or indirectly that he or she holds any authority under this Act when he or she does not hold that authority;
 - e) A person misleads an agency by impersonating an individual or falsely pretending to be an individual or to be acting under the authority of an individual to:
 - i. obtain access to that individual's personal information; or
 - ii. have that individual's personal information used, altered or destroyed;
 - f) A person destroys any document containing personal information, knowing a request has been made for that information under Part 4(1) of the Privacy Act.
24. Prosecution will be considered by the Privacy Commissioner where the effectiveness or integrity of the Privacy Commissioner's functions are compromised by an action in breach of section 212(1) or section 212(2)(a) or (b) or where there is an interference with an individual's personal information by an action in breach of section 212(2)(c) or (d).

¹⁷ The person does not need to be an "agency" for the purposes of the Privacy Act.

Failure to comply with Human Rights Review Tribunal compliance enforcement orders

25. A prosecution may be brought by the Privacy Commissioner against any person under Part 6(2) of the Privacy Act in circumstances where the person, without reasonable excuse, fails or refuses to comply with a Tribunal order under section 133 of the Privacy Act.
26. Prosecution will be considered where the effectiveness or integrity of the Privacy Commissioner's functions are compromised by non-compliance with a Tribunal order under section 133.
27. The Privacy Commissioner's primary objectives in bringing any prosecution under this part are to uphold the integrity and effectiveness of the Privacy Commissioner's functions under the Privacy Act and the integrity of the Act's enforcement processes, to deter non-compliance with an agency's obligations under the Act, and to hold to account persons who do not comply with those obligations.

Solicitor-General's Prosecution Guidelines apply

28. This policy is subject to the [Solicitor-General's Prosecution Guidelines](#). If there is any conflict between this policy and the Solicitor-General's Prosecution Guidelines, those Guidelines take precedence.

Prosecution decisions

29. Privacy Act offences are category 1 offences (punishable only by fine).¹⁸
30. The Privacy Commissioner will apply the Solicitor-General's Prosecution Guidelines when considering whether to bring a prosecution under the Act and will analyse the circumstances of any potential prosecution in the context of the considerations set out in the Guidelines.
31. The test for whether or not to initiate or continue a criminal prosecution is set out in the Guidelines. It has two parts – the evidential test, and the public interest test. The Test for Prosecution is met if:¹⁹

¹⁸ Criminal Procedure Act 2011, s 6(1). A charging document in respect of a category 1 or 2 offence must be filed within **6 months** after the date on which the offence was committed: s 25(3).

¹⁹ Solicitor-General's Prosecution Guidelines at [5.1].

- a) The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and
 - b) Prosecution is required in the public interest – the Public Interest Test.
32. Before deciding to proceed with a prosecution, the Privacy Commissioner must be satisfied that both limbs of this test are satisfied. The Evidential Test must be satisfied before considering whether the Public Interest Test is met.

Evidential test

33. In deciding whether the Evidential Test is met, the Commissioner will analyse and evaluate all the evidence and information in a thorough, critical and impartial manner. A reasonable prospect of conviction exists if:²⁰

... in relation to an identifiable person (whether natural or legal), there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence.

34. Whether the evidential test has been met in any case requires the Commissioner to consider:
- a) there is an **identifiable individual** – the evidence identifies a particular person is responsible;
 - b) there is **credible evidence** – that being evidence which is capable of belief that is available and legally admissible;
 - c) there is an objectively reasonable prospect of conviction on the evidence to the criminal standard **beyond reasonable doubt**;
 - d) the **commission of a criminal offence** with careful analysis of the evidence against each of the ingredients of the particular offence.
35. The practical application of the Evidential Test means the Privacy Commissioner will consider factors such as whether the evidence gathered is sufficient, admissible and reliable, for example:
- a) Does the evidence support the charge;
 - b) Is there other evidence which should be sought which may support or detract from bringing a prosecution;
 - c) Is it likely the evidence could be excluded in court, for example, because of how it was gathered;

²⁰ Solicitor-General's Prosecution Guidelines at [5.3].

- d) If so, whether there is other evidence available which provides a reasonable prospect of conviction;
 - e) Has the defendant provided an explanation for their actions, and is their explanation credible; including a “reasonable excuse” defence where applicable or whether there are other extenuating circumstances;
 - f) Is the evidence generally credible (capable of belief); and
 - g) Do the charges reflect the seriousness of the offending (which will also be considered in the Public Interest Test).
36. The Privacy Commissioner will monitor whether the evidential test is met through the course of any criminal prosecution. If, as a result, the Commissioner determines that another charge is more suitable or the charge should be withdrawn, the Commissioner may seek to amend the charge or withdraw it.

Public interest test

37. If satisfied that there is sufficient evidence to provide a reasonable prospect of conviction, the Privacy Commissioner must consider whether the public interest requires a prosecution. The Commissioner is not required to prosecute all offences for which there is sufficient evidence and will exercise discretion in each case as to whether a criminal prosecution is required in the public interest.
38. The Solicitor-General’s Prosecution Guidelines provide the following as some of the public interest considerations which may be relevant to the decision whether to prosecute:²¹
- a) How serious is the offending (this is the predominant consideration) or conversely, is the offence not of a serious nature;
 - b) Is it likely to be continued or repeated;
 - c) Does the defendant have relevant previous convictions, diversions or cautions;
 - d) Was the offence premeditated;
 - e) Has the offence resulted in serious financial loss to an individual, corporation, trust, person or society;
 - f) Can the loss or harm be described as minor and the result of a single incident, particularly if caused by an error of judgement or a genuine mistake;
 - g) Was the defendant in a position of authority or trust and the offence is an abuse of that position;
 - h) What penalty the court is likely to impose;

²¹ This list is illustrative only.

- i) Has the defendant rectified the loss or harm caused (although defendants should not be able to avoid prosecution simply because they pay compensation);
 - j) Could information be made public that could disproportionately harm sources of information, international relations or national security;
 - k) Are any proper alternatives to prosecution available (including disciplinary or other proceedings).
39. In regulatory prosecutions, there are also other relevant considerations which should be considered when assessing whether the public interest requires prosecution, including the Commissioner's statutory objectives and enforcement priorities.²² In making the decision whether or not to prosecute, the Privacy Commissioner will consider:
- a) The statutory purposes of the Privacy Act;
 - b) The Privacy Commissioner's statutory functions and regulatory compliance objectives;
 - c) The impact of the offence on the Privacy Commissioner's statutory functions; and
 - d) Whether another prosecuting agency has brought or may bring criminal proceedings in respect of the same action or actions.
40. The cost of a prosecution (including the Privacy Commissioner's resources and funding) is a relevant factor the Commissioner will consider when making an overall assessment of the public interest.
41. After weighing the relevant factors, the Privacy Commissioner will decide whether the public interest requires prosecution.

Criminal Disclosure Act 2008

42. The Criminal Disclosure Act 2008 applies to all criminal proceedings conducted in New Zealand, including prosecutions under the Privacy Act, and sets timeframes for disclosure. Under the Criminal Disclosure Act, a 'prosecutor' is the person in charge of a file or files relating to a criminal prosecution. The prosecutor is responsible for disclosure and ensuring that it occurs within statutory timeframes.

Impartiality

43. Prosecutions under the Privacy Act are conducted by qualified in-house legal counsel within the Office of the Privacy Commissioner or may be briefed to Crown Solicitors.

²² Solicitor-General's Prosecution Guidelines at [5.10].

44. The Privacy Commissioner and staff will act fairly, promptly, in accordance with the law, and without any actual or potential conflict of interest. Any staff who are practicing lawyers will adhere to their responsibilities under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
 45. The Privacy Commissioner may decide to use an external prosecutor, taking into account the Privacy Commissioner's resourcing, including whether the Commissioner has available staff who are sufficiently qualified to undertake prosecutorial functions.
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Appeals

46. The Privacy Commissioner may appeal the following decisions of a court:
 - a pre-trial ruling (with the leave of the court)
 - a sentence imposed
 - a ruling by the trial court (on a question of law, with the leave of the court).
 47. In accordance with section 246 of the Criminal Procedure Act 2011, the Privacy Commissioner must obtain the leave of the Solicitor-General to appeal against a sentence imposed. Before seeking leave from the Solicitor-General, the Privacy Commissioner will first review the matter and consider legal advice as to whether an appeal is warranted.
 48. Any decision to appeal must be made by the Privacy Commissioner, following legal advice.
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How will prosecutions be reported on?

49. The Commissioner is required to report at least annually on the activities of the Office. It is likely that the number and type of prosecutions will form part of future reporting by the Commissioner.