



Privacy Commissioner  
Te Mana Mātāpono Matatapu

Office of the Privacy Commissioner

# **Access Direction Guidelines**

## Privacy Act 2020

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## Introduction

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1. The Privacy Commissioner, an independent Crown entity, is New Zealand's privacy and data protection regulator under the Privacy Act 2020.
2. Information Privacy Principle 6 (IPP6) creates a right for individuals to access their own personal information. Generally, an organisation must provide access to an individual's personal information if that person asks to see it.
3. In some situations, an organisation may have good reasons to refuse access to the personal information. For example, disclosing information may be an unwarranted disclosure of someone else's privacy or releasing it may endanger someone's safety.
4. Part 4(1) of the Privacy Act sets out the procedural requirements for making and responding to IPP6 requests. Part 4(1) address matters including timeliness, what a decision in response to an IPP6 request should contain and the basis for any decision. Part 4(3) sets out allowable charges for fulfilling an IPP6 request under Part 4.
5. The Commissioner is empowered under Part 5(2) of the Privacy Act to investigate compliance with Part 4(1). Where it is apparent there is non-compliance, the Privacy Commissioner can make a determination and may also issue an access direction to an agency under section 92 of the Privacy Act after a determination that a complaint about access has substance. This is in addition to other regulatory actions available to the Privacy Commissioner under the Privacy Act.<sup>1</sup> For example, a compliance notice is also a potential response by the Privacy Commissioner to a breach of IPP6.
6. Compliance issues with the exercise of IPP6 access rights can arise from a specific incident or from repeated or systemic issues. A systemic privacy issue can be identified from an incident that is brought to the Commissioner's attention, or from multiple complaints of a similar nature about the same agency, industry or sector. A systemic compliance issue can also be identified from other channels such as news media commentary or discussion on social media.

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<sup>1</sup> For example, the Privacy Commissioner may issue a compliance notice as well as investigate a privacy complaint (and ultimately issue an access direction) relating to the same matter.

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## What is an access direction?

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7. An access direction is a written notice from the Privacy Commissioner to an agency to:
  - confirm whether it holds any specified personal information; and/or
  - make a decision whether to disclose personal information; and/or
  - review the Agency's earlier response to an access request and issue a new decision about access to personal information; and/or
  - provide an individual with access to information requested unless the Agency identifies a proper basis under the Privacy Act not to do so; and/or
  - provide an individual access to specified personal information; and/or
  - make specified information available to the individual in a particular way; and/or
  - review a charge levied by the agency for providing access to personal information.
8. The notice will typically require the agency to comply with the access direction within a specified timeframe or without undue delay.

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## What sort of issues could result in an access direction?

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9. An access direction could relate to the following breaches of IPP6:
  - a decision to refuse a request under IPP6 without a proper basis;
  - failing to confirm whether personal information is held by an agency despite a request to do so;
  - failing to properly apply refusal grounds to personal information for which access is sought;
  - a decision to limit access to personal information on incorrect grounds;
  - a failure to comply with the time limits in Part 4 for responding to a request for access to information;
  - undue delay in making information available after granting a request;
  - a decision to impose conditions on access to information;
  - applying excessive charges for access to personal information.

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## What does an access direction include?

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10. An access direction does not have to take any specific form. It will explain what action is required to comply with IPP6. It will inform the parties of their rights, including the extent of the right to appeal the access direction or

enforce it in the Human Rights Review Tribunal.<sup>2</sup> A template access direction is included as an Appendix to these guidelines.

11. The Commissioner can amend or cancel an access decision at any time on the request of the individual or on the Commissioner's own initiative.<sup>3</sup>

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## Who can be issued with an access direction?

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12. The Privacy Commissioner can issue an access direction to any "agency" as defined in the Privacy Act.<sup>4</sup> An agency is any individual, person, entity, organisation or business that the Privacy Act applies to<sup>5</sup> - either a New Zealand agency,<sup>6</sup> or an overseas agency or individual.

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## What is the threshold for issuing an access direction?

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13. The Privacy Commissioner can issue an access direction having determined that a complaint has substance.<sup>7</sup> This will involve investigating a complaint (typically involving notifying the respondent agency and using best endeavours<sup>8</sup> to resolve the complaint).

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## When will the Commissioner issue an access direction?

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14. Not every access complaint investigation will result in the issue of an access direction. The Privacy Commissioner will take certain considerations into account before issuing an access direction – these considerations are set out further below.
15. The Commissioner will act in accordance with the Compliance and Regulatory Action Framework in making decisions about issuing access directions. This means that education and voluntary compliance may be the preferred steps before enforcement action such as an access direction is issued. A typical example is where this is the first time an agency has come to the Commissioner's attention for access issues. However, in

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<sup>2</sup> Privacy Act, ss 98, 104 and 105.

<sup>3</sup> Privacy Act, s 92(3).

<sup>4</sup> Privacy Act, s 7(1).

<sup>5</sup> Privacy Act, s 4(1).

<sup>6</sup> Privacy Act, s 8.

<sup>7</sup> Privacy Act s 91(2).

<sup>8</sup> *Henderson v Privacy Commissioner* [2010] NZHC 554 at [98]. The High Court treated the "best endeavours" standard as being the same as "reasonable endeavours" with what is required in each case depending on the facts.

accordance with the Compliance and Regulatory Action Framework in some circumstances, the Commissioner may issue an access direction promptly following the investigation of a complaint under IPP6. An example is where the complainant has an urgent need for the information or where there is a history of non-compliance.

16. The Privacy Commissioner may (but is not required to) use other means for dealing with a identified breach of IPP6 such as a compliance notice<sup>9</sup>, referring the matter to the Director of Human Rights Proceedings,<sup>10</sup> or taking any other action that the Commissioner considers appropriate. This could include referring the matter to another oversight body such as the Ombudsman,<sup>11</sup> a compliance advice letter, Privacy Commissioner own motion inquiry or investigation, or naming the agency concerned under the Commissioner's naming policy.
17. If the Privacy Commissioner issues an access direction, it can be issued in conjunction with or in addition to exercising other functions or powers, including those identified above.

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## What will the Privacy Commissioner take account of?

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18. The issue of an access direction for a breach of IPP6 is not automatic and will depend on the circumstances. The Privacy Commissioner will consider each identified breach on a case by case basis.
19. As noted above, the Commissioner will act in accordance with the Compliance and Regulatory Action Framework in making decisions about access directions to respond to breaches of IPP6.
20. One of the factors for consideration is the views of any complainant. In this context it is worth noting that the parties to an investigation are the parties to any subsequent Tribunal proceedings brought to enforce or appeal an access direction. The Tribunal could therefore potentially make costs orders against the complainant for seeking to enforce an access direction or in an appeal.<sup>12</sup> However, the Tribunal does not commonly award costs against a complainant acting in good faith.<sup>13</sup> Further, the Commissioner has the right to be heard in the Tribunal on appeals of access directions and may intervene as appropriate to uphold the purpose of the Act.
21. The Privacy Act requires the Commissioner to take account of certain matters when exercising functions under the Privacy Act.<sup>14</sup> These include:
  - cultural perspectives on privacy;

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<sup>9</sup> Privacy Act Part 6(2).

<sup>10</sup> Privacy Act, s 78, 84, 91.

<sup>11</sup> Privacy Act, ss 75-76.

<sup>12</sup> Privacy Act, s 110.

<sup>13</sup> See for example *Watson v Employers Mutual Limited* [2020] NZHRRT 40.

<sup>14</sup> Privacy Act, s 21.

- the desirability of facilitating the free flow of information;
- government and business efficiency in achieving their objectives;
- New Zealand's international obligations.

22. The Commissioner is also required by the Privacy Act to conduct any investigation in a timely manner<sup>15</sup> and, as soon as practicable, to give notice to the parties of the results of an investigation.<sup>16</sup>

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## Privacy Commissioner's powers to obtain information and examine on oath

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23. When investigating an access complaint, the Privacy Commissioner has investigation powers under Part 5 of the Privacy Act.

24. The Commissioner has powers under the Act to summons and examine persons on oath, and to require any person to provide relevant information. To enable the Commissioner to determine whether to issue an access direction, the Commissioner may hear or obtain information from any person considered to have relevant information.<sup>17</sup>

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## Does an agency have the right to comment?

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25. Yes. The Privacy Commissioner must notify an agency of any investigation, which involves providing the agency with an opportunity to provide comment. The Commissioner will determine an appropriate period for comment, taking account of the relevant circumstances.

26. The Commissioner may provide the agency with a written access direction for their comment (a draft access direction). In some cases, this may be provided at the same time as the investigation notification (but does not mean that an access direction will ultimately be issued).

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## How should an agency respond to an access direction?

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27. Unless the agency lodges an appeal, it must comply with the notice – including taking any particular action set out in the notice.

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<sup>15</sup> Privacy Act, s81.

<sup>16</sup> Privacy Act, s91(7).

<sup>17</sup> Privacy Act, s 87.

28. The access direction will likely state a date by which the direction must be complied with (unless that direction is cancelled or amended).
29. If an agency disagrees with the access direction, or part of it, it can appeal the direction in the Human Rights Review Tribunal (within 20 working days of the access direction being issued). The Tribunal may accept an appeal lodged not later than three months after the appeal period if the Tribunal is satisfied exceptional circumstances prevented the appeal from being lodged within the appeal period.
30. While the parties to an appeal of an access direction are the parties to the investigation<sup>18</sup>, the Commissioner has the right to be heard in any appeal.<sup>19</sup>
31. If an appeal is filed, the Tribunal can issue an interim order suspending the access direction pending the outcome of the appeal.<sup>20</sup>

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## Will the access direction be made public?

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32. The Act does not specify when the Commissioner can publish details about an access direction including the identity of the agency concerned. Section 206 requires the Commissioner and staff to maintain secrecy in respect of all matters that come to their knowledge in the exercise of functions under the Act unless the Commissioner considers they ought to be disclosed to give effect to the Act. The Office has a Naming Policy (available on our website) the Commissioner will consider before disclosing the identity of an affected agency.
33. The Commissioner publicly reports on its activities at least annually, and this reporting will likely include information about the number of access directions issued, including identifying agencies that have been the most common recipients of an access direction.

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## Can an access direction be amended or cancelled?

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34. Yes, the Privacy Commissioner has the discretion to amend or cancel an access direction at any time.<sup>21</sup>

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<sup>18</sup> Privacy Act, s105(2).

<sup>19</sup> Privacy Act s108(2).

<sup>20</sup> Privacy Act, s107.

<sup>21</sup> Privacy Act, s 92(3).

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## Can an access direction be appealed?

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35. Yes, the agency may appeal all or any part of an access decision. An appeal must be lodged in the Human Rights Review Tribunal within 20 working days.<sup>22</sup>

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## What is the role of the Privacy Commissioner in an appeal?

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36. The Commissioner has the right to be heard in an appeal of an access direction in the Tribunal (other than an appeal on the papers).<sup>23</sup>

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## What steps can the complainant take after an access direction has been made?

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37. An access direction does not affect the rights of the individual concerned under the Act to apply to the Tribunal for a different access order or additional remedies such as financial compensation (damages).
38. If the individual is not satisfied with the terms of the access direction, the individual may file a statement of claim in the Tribunal to seek a different access order (within 6 months of the Commissioner giving notice to the parties of the access direction).
39. Whether or not the individual is satisfied with the access direction, the individual may file an application with the Tribunal requesting an additional remedy under the Act, such as an award of financial compensation (damages) within 6 months of expiry of the appeal period for the access direction.
40. A complainant does not have a right of appeal. However, if the agency appeals the access direction, then the complainant can either ask for the appeal to be dismissed (if satisfied with the access direction) and ask for the access direction to be enforced by order of the Tribunal, or the complainant can cross-appeal (if not satisfied with the terms of the access direction) and ask for the access direction to be varied by order of the Tribunal.

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<sup>22</sup> Privacy Act, s 106.

<sup>23</sup> Privacy Act, s108(2).



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## How is an access direction enforced?

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41. If an agency does not comply with a direction and does not appeal it, the individual concerned may apply to the Tribunal for an access order to enforce the direction.<sup>24</sup>
42. If the Tribunal grants the application, it must specify the date by which the agency must comply with the access direction.<sup>25</sup>
43. Failure to comply with a Tribunal order without reasonable excuse is an offence, and if prosecuted, the agency could be fined up to \$10,000 for non-compliance.<sup>26</sup>
44. An agency may also incur civil liability for financial compensation (damages) if awarded by the Tribunal in civil proceedings brought by the individual concerned.

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## How will access directions be reported on?

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45. The Commissioner is required to report at least annually on the activities of the Office. It is likely that access issues, including the number of access directions and/or compliance notices issued will form part of future reporting by the Commissioner.

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<sup>24</sup> Privacy Act, s 104.

<sup>25</sup> Privacy Act, s 104(2).

<sup>26</sup> Privacy Act, s 104(4).

## APPENDIX: TEMPLATE ACCESS DIRECTION

### ACCESS DIRECTION

made under section 92 of the Privacy Act 2020

Issued to: [name of agency] (the "Agency")

Notice number:

Service method:

Date:

### COMMISSIONER'S ACCESS DETERMINATION (IPP 6)

File reference:

Complainant (or Aggrieved Individual): [name of individual] (the "Individual")

Nature of IPP 6 access complaint(s):

Nature of personal information requested:

Date complaint notified to Agency:

Agency's response to complaint:

Commissioner's determination of substance of the complaint:

[attach the Commissioner's access determination or provide summary of the access determination including:

1. [Summary of high level facts and nature of the IPP 6 breach]
2. [Nature of investigation by the Privacy Commissioner and information considered]
3. [refer to previous relevant correspondence between the Privacy Commissioner and the Agency]
4. [Commissioner's conclusion on substance of the complaint and relevant factors/circumstances taken into account]

### REQUIREMENTS OF ACCESS DIRECTION

Having determined that the complaint has substance, the Privacy Commissioner directs the Agency to do one or more of the following:

[select or modify one or more of the following directions as relevant]

- (i) confirm whether the Agency holds the personal information requested by the Individual by [specify date]
- (ii) respond to the Individual's access request in accordance with section 44 of the Privacy Act by [specify date]
- (iii) review the Agency's response to the Individual's access request by [specify date] on the following basis [incorrect ground for refusal of the request or other reason(s) for review of the Agency's access decision] and provide the Individual with access to the information requested unless the Agency identifies a proper basis under the Privacy Act not to do so
- (iv) provide the Individual with access to the personal information requested without undue delay/ specify date

- (v) provide the Individual with access to the following personal information [*generic description*] without undue delay/specify date
- (vi) provide the Individual with access to the following personal information [*itemise*] without undue delay/specify date
- (vii) modify the conditions on which access to the personal information requested by the Individual is provided as follows [*outline appropriate condition modifications*]
- (viii) review the charge set by the Agency for providing access to the personal information requested [*or describe personal information*] as follows [*describe reasonable charge*]
- (ix) provide access to the personal information requested [*or describe personal information*] in the following manner [*specify manner such as summary or excerpt of information/ electronic form/ opportunity to view or oral briefing*] /
- (x) [*other form of direction, as applicable*]

This access direction must be complied with by [*specify date*] unless an appeal against this direction (in whole or in part) is filed by the Agency in the Human Rights Review Tribunal within 20 working days of the date of this notice. The Agency shall report to the Privacy Commissioner by [*specify date*] on its compliance with this access direction, including providing supporting evidence [*include any particular reporting requirements*].

ISSUED BY

\_\_\_\_\_  
 John Edwards  
 Privacy Commissioner

\_\_\_\_\_  
 Date

For further information, refer to the attached Information Sheet, including information about the Agency's right of appeal and the Individual's right to enforce this access direction.

**APPENDIX ONE**

*[Attach to the access direction as necessary to include relevant information]*

**Information to be released (if any)**

**Manner of release (if applicable)**

## ACCESS DIRECTION INFORMATION SHEET

### Authority

1. The access direction is a formal direction of the Privacy Commissioner.
2. The Privacy Commissioner issues this access direction to the named Agency under section 92 of the Privacy Act.
3. Under section 92(3) of the Privacy Act, the Privacy Commissioner may amend or cancel this access direction, either on the Commissioner's own initiative or on the request of the Individual.

### Right to appeal or seek enforcement in Tribunal

#### *Agency's right to appeal to Tribunal*

4. Under section 105 of the Privacy Act, the Agency has the right to appeal against this access direction (in whole or in part) to the Human Rights Review Tribunal.
5. The Agency must lodge an appeal with the Tribunal within 20 working days from the date of this access direction ("the Appeal Period"). The Chairperson of the Tribunal may accept an appeal not later than 3 months after the Appeal Period if exceptional circumstances prevented the appeal from being lodged within the Appeal Period.
6. If an appeal is filed, the Tribunal can issue an interim order under section 107 suspending the access direction pending the outcome of the appeal.

#### *Individual's right to enforce access direction and/or commence proceedings in Tribunal*

7. Under section 104 of the Privacy Act, if the Agency does not comply with this access direction by the date specified, or lodge an appeal within the Appeal Period, the Individual may apply to the Tribunal for an access order requiring the named Agency to comply with this access direction.
8. Under section 98 of the Privacy Act, the Individual is entitled to commence proceedings in the Tribunal (within 6 months) should the Individual want the Tribunal to issue an access order (instead of or in addition to the Commissioner's access direction).
9. Whether or not the Individual is satisfied with the terms of this access direction, the Individual is entitled to commence proceedings in the Tribunal (within 6 months) seeking one or more other remedies available under the Privacy Act, including financial compensation (damages).

### Tribunal Proceedings (Appeals)

10. The parties to any appeal in the Tribunal are the parties to the Privacy Commissioner's investigation (the Individual and the Agency). In addition, the Commissioner has a right to be heard at a Tribunal hearing of an appeal (other than an appeal determined on the papers).
11. Under section 108 of the Privacy Act, the Tribunal may confirm, modify or reverse this access direction.
12. Under section 110 of the Privacy Act, the Tribunal may award costs against either party to an appeal, whether or not it makes any other order.

13. An Agency that, without reasonable excuse, fails to comply with an access order issued by the Tribunal commits an offence and is liable on conviction to a fine not exceeding \$10,000.
14. If proceedings are commenced by the Individual seeking further remedies, under section 103 of the Privacy Act, the Tribunal may award financial compensation (damages) to an Individual for an interference with their privacy in respect of pecuniary loss, expenses reasonably incurred, loss of any benefit or humiliation, loss of dignity or injury to the Individual's feelings.

**Contact Information**

15. Privacy Commissioner: [investigations@privacy.org.nz](mailto:investigations@privacy.org.nz)
16. Human Rights Review Tribunal: [hrrt@justice.org.nz](mailto:hrrt@justice.org.nz)