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Sent: Wednesday, 14 October 2020 12:32 pm

To: Janet Dick <Janet.Dick@privacy.org.nz>

Cc: Sharyn Leonard <Sharyn.Leonard@privacy.org.nz>; Privacy Code <Privacy.Code@privacy.org.nz>; WHITE, Lisa (PRD) <Lisa.White@mfat.govt.nz>; ANDREWS, Matthew (CLU) <Matthew.Andrews@mfat.govt.nz>

Subject: RE: Replacement Civil Defence National Emergencies (Information Sharing) Code under the new Privacy Act 2020

[UNCLASSIFIED]

Kia ora Janet

Thanks for getting in touch with us about this.

We agree that the Code needs to modify IPP12. Our experience is that we often need to provide information to foreign entities for “permitted purposes” during an emergency response. This includes, but is not limited to, embassies and consulates.

The Ministry has a coordination and liaison role when emergencies in New Zealand impact on foreign nationals. This role has been significantly tested over the last two years, as the Ministry has run emergency responses to the Christchurch terrorist attack, the Whakaari/White Island disaster and the Covid-19 pandemic. Only the latter was declared a national emergency. However, all three presented significant challenges in terms of the need to share information in order to respond to events, whilst ensuring privacy was protected.

It may be worth noting that the requirements for information sharing in the Christchurch and Whakaari scenarios were much more difficult and pressing than the requirements for sharing in other situations that *were* declared national emergencies – for example flooding on the West Coast at the end of 2019. Our strong view is that the Code is inadequate in its scope.

Across these three emergency situations, we engaged with a range of foreign entities which needed access to personal information to assist with permitted purposes. Embassies and consulates are often a first point of contact in these situations, but we (and other NZ agencies) have also needed to communicate with other foreign entities including governments, non-government organisations (such as overseas health-care providers and medi-vac services), family members who are overseas and private entities such as airlines. This could include, for example, tracking down next-of-kin, arranging health-care transfers, or arranging repatriation services. It was often the case that consent of the individual could not be obtained in the time available either because of the speed of the response, difficulties with communication technologies, or because the person was incapacitated.

Sharing information for consular assistance

The ability to share with embassies and consulates to support their consular functions is of particular importance. Consular functions are defined in art 5 of the Vienna Convention on Consular Relations (VCCR) and relevantly include:

- Helping and assisting nationals, both individual and bodies corporate, of the sending State;
- Safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;

Article 37 of the VCCR provides:

Information in cases of deaths, guardianship or trusteeship, wrecks and air accidents

If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:

- (a) in the case of the death of a national of the sending State, to inform without delay the consular post in whose district the death occurred;
- (b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments;
- (c) if a vessel, having the nationality of the sending State, is wrecked or runs aground in the territorial sea or internal waters of the receiving State, or if an aircraft registered in the sending State suffers an accident on the territory of the receiving State, to inform without delay the consular post nearest to the scene of the occurrence.

In our experience, following an emergency there may be individuals who are incapacitated and where urgent health-care decisions must be made. In these circumstances, it may be appropriate to contact the embassy or consulate to enable the home country to assist with locating relatives, and potentially to exercise the guardianship function recognised in the Vienna Convention – to the extent consistent with New Zealand law.

Article 37 is not incorporated into NZ law (unlike other parts of the VCCR), however, the international law obligation remains. Allowing information sharing with embassies for permitted purposes would ensure that we can comply with this obligation.

Importantly, it also gives us a basis to push for reciprocity where New Zealanders are caught up in emergencies overseas.

Refusing to share information

Although we support the ability to share information with foreign missions and governments, it is worth noting that there are some situations where we would not, or would be very cautious about sharing. This is where we have reason to believe that the individual would not want their government to know that they are in New Zealand. The person may be a refugee, for example, or may have characteristics or connections that suggest caution is required. In some situations, we may be under pressure from the sending State to provide information.

Therefore, for the avoidance of doubt and to assist with decision-making in these stressful situations, we would suggest including in the Code an express statement that an agency must not share personal information if the agency has good reason to believe the person would not want the information shared with the recipient in the circumstances. (This could go in clause 6.)

A final note on this point – domestic inter-agency information is critical to us in these situations, including in emergency situations that have not been declared national emergencies. Where direct communication with the individual is not possible, we can't know someone is a refugee unless MBIE/INZ share that information with us. We often cannot know someone is a foreign national either without INZ input.

Sharing for repatriation

Finally, we suggest that clause 6 allow for information to be shared with an agency that “is directly involved, or is likely to be directly involved, in providing repatriation services.” The reason we suggest this change is that it would

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Sharing for repatriation

Finally, we suggest that clause 6 allow for information to be shared with an agency that "is directly involved, or is likely to be directly involved, in providing repatriation services." The reason we suggest this change is that it would allow information to be shared in circumstances where a foreign state is considering providing repatriation services but needs information about its nationals in New Zealand before deciding whether and how to do so. This may in some cases be identifiable information if there are a small number of citizens in the country.

We'd be happy to discuss further in person if that would be helpful.

Regards
Cat

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