

# Repeal and Replacement of the Telecommunications Information Privacy Code

## Information paper on Changes to Notified Code

On 29 July 2020 the Privacy Commissioner publicly notified his intention to repeal and replace the Telecommunications Information Privacy Code 2003 and invited public submissions. The changes in the notified code are part of a wider project to align the six privacy codes of practice with the Privacy Act 2020. The information paper summarising the Privacy Commissioner's approach to the revocation and replacement of the codes can be found [here](#).

The Commissioner received five submissions, which were broadly supportive of the notified Telecommunications Information Privacy Code. Following consideration of submissions received and a final review of the code, the Commissioner issued the replacement Telecommunications Information Privacy Code 2020 on 28 October 2020. The code comes into force on 1 December 2020. This paper explains the key changes made to the notified Telecommunications Information Privacy Code after receiving submissions.

### Changes to the notified Telecommunications Information Privacy Code

#### **1. New subclause added to the interpretation clause of the code**

We asked submitters whether a new subclause should be added to the codes specifying that terms defined in the Privacy Act that are used but not defined in the code have the same meaning as in the Act.

Only two submitters on this code directly responded to this question and they both supported this change. Accordingly, the Commissioner has added the following new clause 4(2) to the code:

- (2) *A term or expression defined in the Act and used, but not defined, in this code has the same meaning as in the Act.*

This follows drafting practices in regulations (see for instance reg 3(2) of the Privacy Regulations 2020) and will assist those using the codes to find defined terms.

#### **2. References to section 30 authorisations retained in rules 2, 10 – 11 and added to new rule 12**

Section 30 (which is now extended to new principle 12 of the Act) allows agencies to collect, use and disclose information in a way that would otherwise breach the relevant principles, if they have obtained the Commissioner's authorisation. However, section 30 (previously section 54) authorisations are no longer included as express exemptions in information privacy principles 2, 10 and 11.

We asked submitters whether these references to section 30 should be retained in the notified code. All submitters who responded to this question supported retaining references to these authorisations.

Accordingly, these references to section 30 have been reinstated in rules 2(2), 10(1) and 11(1), and have been added to rule 12(1) of the notified code.

### **3. Removal of rule 6(4) of the code**

Section 46(5) of the Privacy Act 1993 stated that a code of practice may not limit or restrict the circumstances in which an individual is entitled to obtain access to their personal information held by a public sector agency under principle 6. Therefore, the rule 6(4) of the Telecommunications Information Privacy Code 2003 permitted network operators that were not public sector agencies to refuse to disclose to a requester linked traffic information which may reveal the identity of another individual or subscriber.

Section 32(5) of the Privacy Act 2020, however, simply states that a code of practice may not limit or restrict the entitlements under information privacy principles 6 and 7, without any carve outs for private sector agencies. Accordingly, the Commissioner no longer has the power to issue rule 6(4) in the replacement code and it has been removed. Telecommunications agencies can still rely on section 53(b) of the Privacy Act 2020, which allows agencies to refuse access to information where it would involve an unwarranted disclosure of the affairs of another individual.

### **4. Minor amendments to new rule 12 to ensure policy intent of the new cross-border disclosure principle is implemented in the code**

Rule 12 is new. It implements information privacy principle 12, which requires agencies to take steps to ensure that personal information disclosed to foreign persons or entities in reliance on listed disclosure exceptions in information privacy principle 11, will be subject to comparable safeguards to New Zealand's privacy laws.

Rule 11(1)(k) of the code, relating to disclosure of telecommunications information that is necessary to enable emergency services to respond to a potential threat to life or health has been added to rule 12(1) and (2). Although such disclosures are unlikely to be made to foreign emergency services, if such disclosures are required, the safeguards required should reflect the policy for disclosures to prevent or lessen a serious threat to the life or health of individuals in new information privacy principle 12.<sup>1</sup> Accordingly, telecommunications agencies should comply with rule 12(1) if disclosing information for this purpose to foreign entities. However, they need not comply with rule 12(1) if it is not reasonably practicable to do so in the circumstances.

Rule 12 of the notified code also required telecommunications agencies to ensure that telecommunications information is protected by "comparable safeguards to those in this code". However, telecommunications agencies are also subject to important new requirements in the Privacy Act 2020 that provide privacy safeguards to individuals, such as mandatory privacy breach notification. While these requirements should also be considered safeguards under the code given that telecommunications agencies must comply with them, for clarity, the Commissioner has amended references to the code in rule 12 to:

*...comparable safeguards to those in the Act, as modified by this code.*

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<sup>1</sup> Note that "emergency services" are defined for the purposes of Schedule 4. Emergency services in that context are New Zealand agencies only so rule 12 does not apply.

Finally, rule 12(3) has been amended to reflect the possibility that a country is prescribed in regulations subject to carve outs, or only for particular sectors. The definition of “prescribed country” in rule 12(3) has been modified to reflect this, and now reads:

***Prescribed country*** means a country specified in regulations made under section 214 of the Act that are made without any qualification or limitation relating to a class of person that includes B, or to a type of information that includes telecommunications information.

## 5. Other matters

The language of the code has been amended to ensure it is gender neutral. Additionally, minor typographical errors have been corrected.

The Commissioner also acknowledges that some submitters suggested more substantive changes that were outside the scope of this code review. However, these submissions have been recorded and may be addressed in later reviews of the code when new policy matters can be considered. The Commissioner thanks submitters for drawing these matters to his attention.

Additionally, some submitters requested that explanatory notes in the Telecommunications Information Privacy Code be retained in the replacement code. The replacement code is intended to be a standalone document. Therefore, explanatory notes without legal force have not been retained. However, explanatory notes included in the 2003 code can still be used as an extrinsic aid to understand the code (for instance, the notes included in schedule 4). The Commissioner also agrees that it is timely to create guidance for this code and will allocate space to do so in the Office’s work programme, once implementation projects relating to the new Privacy Act are complete.