



Privacy Commissioner
Te Mana Matapono Matatapu

CONSULTATION ON PROPOSED AMENDMENT NO 3 TO TELECOMMUNICATIONS INFORMATION PRIVACY CODE 2003

INFORMATION PAPER

The proposed amendment to the code includes within it a number of explanatory notes relating to particular provisions. This paper is intended to complement those notes by providing a broader picture and drawing out some overall points.

Telecommunications Information Privacy Code 2003

The amendment needs to be read with the Telecommunications Information Privacy Code 2003 itself. That code is available on the Privacy Commissioner's website or by telephoning the Privacy Commissioner's enquiries line:

- www.privacy.org.nz
- 0800 803 909 (or 302 8655 in Auckland)

Clause 1 of the amendment

Clause 1 gives the title of the amendment.

Clauses 2 and 3

The amendment revokes, and replaces, the earlier Amendment No 2 (Temporary). That amendment covered much of the same ground but, as it was issued with urgency, the normal pre-issue notification and consultation processes were waived. Accordingly the earlier amendment had a limited life span and needed to be replaced with this permanent amendment.¹

This amendment will likely come into force on 1 August 2004. However, if the process is unexpectedly delayed, for instance if unanticipated and complex issues requiring further study were to be raised in submissions, there is some flexibility to delay commencement. To ensure smooth operation of the code it will be necessary for the amendment to come into effect before Amendment No 2 (Temporary) is due to expire on 24 September.

Clause 4

Clause 4 corrects an error in the code's title.

¹ Refer Privacy Act 1993, s.52, concerning the urgent issue of temporary amendments.

Clauses 5, 6, 7 and 8

The code introduced an exception to each of rules 2, 3, 10 and 11 relating to “foreign law enforcement authorities” and “foreign telecommunications laws”. Following reconsideration of the matter after the issue of the code, but before it came into effect, these exceptions were dropped by Amendment No 2 (Temporary). This amendment proposes to make permanent the changes made by that earlier amendment and omit the exceptions.

Clause 5 drops the definition of “foreign telecommunications law” which was used in the four exceptions but is no longer needed once those exceptions are dropped.²

Clause 6 drops the exception which allowed a telecommunications agency to collect information from a source other than the individual where necessary:

“to assist a foreign law enforcement authority in prevention, detection, investigation and prosecution of a breach of a foreign telecommunications law.”

Clause 7 omits a similar exception to rule 3 which had allowed a telecommunications agency to dispense with the requirement to provide certain explanations where collecting information directly from the individual where necessary:

“to avoid prejudice to the investigation and prosecution by a foreign law enforcement authority of a breach of a foreign telecommunications law.”

Clause 8 correspondingly omits the exception to rule 10 which allowed a telecommunications agency to use information obtained for one purpose for another purpose where necessary:

“to avoid prejudice to the prevention, detection, investigation and prosecution by a foreign law enforcement authority of any offence under, or breach of, a foreign telecommunications law.”

Finally, clause 9 omits an exception to rule 11 which permitted a telecommunications agency to disclose telecommunications information it holds where necessary:

“to assist in the prevention, detection, investigation or prosecution by a foreign law enforcement authority of any offence under, or breach of, a foreign telecommunications law.”

The exceptions had their origins in a draft code that was jointly prepared by the then principal network operators in 1997 (“the industry draft”). In submissions on the proposed code, the network operators supported the inclusion of such exceptions. After issue of the code some concerns were raised by the Regulations Review Committee. The Committee’s concerns focused on disclosure of information but the Office of the Privacy Commissioner (OPC) reassessed the justification for all four exceptions as a result. As part of that reassessment the OPC discussed the issues in

² The definition being dropped provided that “**foreign telecommunications law** means a law (other than a New Zealand law) which:

- (a) regulates the operation and use of a network; or
- (b) prescribes offences for misuse of, or interference with, a network.”

general terms with some industry players. It was concluded that the exceptions to rules 2, 3 and 10 were not needed.

A stronger case seemed to exist for the exception to rule 11. On the other hand, the risks that concerned the Committee were stronger in relation to disclosure as against collection and use. The OPC explored various ways to rewrite the exception so that it might meet such concerns while allowing a residual discretion to disclose in appropriate cases.

After careful consideration of the alternatives, it was decided to drop the exception altogether. One significant reason for not rewriting the exception in a more limited form was the fact that the industry players contacted informally did not seem to be able to make a very strong case for needing it.

The Commissioner welcomes submissions on any of the exceptions being dropped. She is particularly interested to hear if there are any aspects of cooperation between telecommunications agencies and overseas law enforcement agencies or regulatory bodies that might be compromised by the lack of a clear discretion to disclose information.

At some future point the matter may need to be revisited given the need for cross-border cooperation between network operators and enforcement authorities. An example might be in relation to spam which is a problem that cannot be solved in one jurisdiction in isolation. Some spam laws explicitly anticipate a role for enforcement by telecommunications agencies rather than leaving matters solely to statutory bodies.

Clause 10

Clause 10 amends provisions of Schedule 2 dealing with electronic directories:

- Subclause (1) changes the controls on electronic directories of subscribers so that searches may be made by reference to name alone.
- Subclause (2) clarifies an ambiguity in clause 6 of Schedule 2.
- Subclause (3) requires, in relation to those electronic directories placed on the Internet, greater transparency as to agency practice and requires prompt action on opt-out requests following withdrawal of individual authorisation.

Schedule 2 of the code brings together provisions concerning directories and directory enquiry services. Clause 3(a) of Schedule 2, as issued, provided that:

“Unless the subscriber concerned explicitly authorises to the contrary, a directory publisher or directory enquiry agency must arrange a directory or operate a directory enquiry service so that:

- (a) the search for a subscriber’s telephone number using an electronic directory or a directory enquiry service, an enquirer is required to provide both the approximate name and the approximate address of the subscriber being sought.”

Following issue of the code, but before its commencement, concerns about the clause were raised by the Regulations Review Committee. These concerns focused upon changes required by the clause to the way in which Telecom’s Internet White Pages (IWP) were to be operated. Essentially, the practice immediately before the code was to

allow searchers to type a name into the electronic search facility and be presented with any subscriber details that related to such a name. The code, on the other hand, required the searcher also to specify an approximate address. The Committee was concerned at the diminished usefulness to users of the residential address search facility with this new requirement.

The provision was modelled upon a data protection code applying to telecommunications directories in the UK.³ As a result of the Committee's concerns, the OPC re-examined the issue and the Privacy Commissioner made an urgent amendment. This altered the provision so that it provided:

“Unless the subscriber concerned explicitly authorises to the contrary, a directory publisher or directory enquiry agency must arrange a directory or operate a directory enquiries service so that:

- (a) the search for a subscriber's telephone number using an electronic directory or a directory enquiries service, an enquirer is required to provide both the approximate name and the approximate address of the subscriber being sought (*or, in the case of an electronic directory, the approximate name and the region*).”
[change highlighted]

This change enabled Telecom to comply with the code by allowing IWP searchers to use the drop down menu of regions corresponding with telephone book districts. The searcher need not type in an approximate address but could use the broader regional description. A similar arrangement operates in Australia where a searcher must enter both the name and the state (together with an indication as to whether the person is a metropolitan or country resident).

There are a number of sensitivities with respect to directories placed on the Internet, particularly those of nationwide utilities such as residential telephone connections. The older practice with telephone directories was to require subscribers to be published in the telephone book unless they paid for the privilege of having their personal details withheld. This practice ended with the enactment of the Privacy Act. However, explicit authorisation of existing subscribers was not sought when this Internet directory was introduced nor did the authorisation for new subscribers distinguish between the traditional telephone book and the on-line directory. Instead of requiring directory publishers to go back to existing subscribers to obtain explicit consent to be in the IWP, the code instead required the search facilities to be more closely aligned to the telephone book.

Following Amendment No 2 (Temporary) the OPC continued to study the matter with a view to identifying options that might better meet the Committee's wish that user access to the IWP be restored more closely to the earlier practice. This amendment moves in that direction by permitting name-only searches.⁴

Balancing this is a new requirement that publishers of directories of subscribers that are placed on the Internet must take more steps to make their subscribers aware of this publication practice.⁵ Coupled with this is an explicit entitlement enabling subscribers to

³ Code of Practice on Telecommunications Directories Covering the Fair Processing of Personal Data (UK), clause 13.

⁴ See clause 10(1) of the amendment

⁵ See clause 10(3) of the amendment, inserting a new clause 10(a) into Schedule 2 of the code.

opt-out of the Internet directory.⁶ It might be anticipated that a telecommunications agency will permit an individual to opt-out of being in an Internet version of a directory while remaining in the more traditional hard copy form if there is one (although precise practice in this respect will be up to the directory publisher).

The Commissioner welcomes submissions on the proposed requirements relating to electronic directories.

Submissions on the amendment

Submissions on the proposed amendment may be made in writing by 31 May 2004 to:

Assistant Commissioner
Office of the Privacy Commissioner
P O Box 466
Auckland

Fax: 09-302 2305
Email: code@privacy.org.nz

⁶ See clause 10(3) of the amendment inserting a new clause 10(b) into Schedule 2.