Student Loan Scheme Amendment Bill (No 2)

Report by the Privacy Commissioner to the Minister of Justice in relation to an information matching programme proposed to be authorised by new section 280H of the Customs and Excise Act 1996 and new section 62A of the Student Loan Scheme Act 1992

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28 February 2007

Privacy Commissioner
Te Mana Matapono Matatapu

STUDENT LOAN SCHEME AMENDMENT BILL (No 2)

1. This Bill[1] will authorise the disclosure of information between the Inland Revenue Department (IRD) and the New Zealand Customs Service (Customs) for use in an authorised information matching programme. It aims to ensure that only those borrowers entitled to interest-free student loans receive them. In addition, IRD will use information obtained from the data match to determine which repayment rules borrowers are subject to.

2. IRD proposes to disclose student loan borrower information to Customs. Customs will store the borrower information in a register and match it against each individual who crosses the border, either arriving in or departing from New Zealand. Where a match occurs, Customs will disclose the arrival or departure information to IRD. IRD's objectives are to verify:

   - whether a borrower is entitled to a full interest write-off under section 38AA of the Student Loan Scheme Act 1992;
   - whether a borrower is New Zealand-based or overseas-based for the purposes of that Act; and
   - whether a borrower is resident or non-resident for the purposes of that Act[2].

   As soon as a borrower is no longer of interest to IRD, Customs will be notified and the borrower's details will be removed from the register.

3. The programme aims to achieve those objectives by:

   - minimising the number of instances of ineligible borrowers receiving an interest write-off;
   - detecting student loan borrowers who have failed to advise IRD about their absences from New Zealand;
   - detecting previously ineligible borrowers who have returned to New Zealand and have become eligible for the interest write-off.

4. I have examined the proposed programme drawing upon an Information Matching Privacy Impact Assessment report prepared by IRD in which the department describes the proposed programme and its objectives and how it will comply with the Privacy Act. The examination[3] addressed the proposed programme in terms of the information matching guidelines (s.98) and the other requirements contained in Part 10 (s.97, s.99-109) of the Privacy Act 1993.

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[1] The relevant clauses of the Bill are included as Appendix C.

[2] Information Matching Privacy Impact Assessment: For the proposal between the New Zealand Customs Service and the Inland Revenue Department relating to the information supply for student loan interest administration, August 2006 (hereafter referred to as "the IMPIA"), page 13

[3] Attached as Appendix A.

5. An analysis of the match in terms of the information matching guidelines concluded that the programme meets the tests of s.98 being that the purpose of the match is a matter of significant public importance that being support of the integrity of the student loan scheme; that it will have expected savings in 2007-08 fiscal year of $9 million and higher amounts in future years; that the match is the most cost effective means of achieving the goal identified for it; that the public interest in allowing the programme to proceed outweighs the public interest in adhering to the privacy principles that would otherwise be contravened; and that the scale of the match is not excessive. No area of non-compliance with the Information Matching Rules has been identified.

6. However, IRD believe that they are unable to comply fully with the requirement to send notices of adverse action under s.103[4] of the Privacy Act.

Notice of Adverse Action

7. S.103 is a fundamental protection for individuals whose information is used in authorised information matching programmes. It prevents people from being "presumed guilty", solely on the basis of inferences that may not be correct. The department must serve written notice on individuals before taking adverse action against them. That notice must give the details of the discrepancy and the proposed adverse action. It allows individuals to challenge the data before adverse action is taken rather than leave them to contend with the results of subsequent administrative actions.

8. When IRD receive information from Customs that suggests that a borrower has left New Zealand, they will annotate the borrower's record with that information. If after 140 days, there is no subsequent information received from Customs showing that person's return to New Zealand, IRD will generate and mail a notice of adverse action, unless the borrower record has a flag warning of an invalid address. It is IRD administrative policy to withhold mail from invalid addresses.

9. IRD advise that they have standard processes in place to respond to telephone calls advising of an invalid address or returned mail. Those include attempts to contact the individual by phone, through any other address IRD may have on their records, through an employer, through public directories such as telephone directories, and careful review of the information for data entry errors. They also "regularly" review taxpayer records with invalid address flags and attempt to find a valid address.

10. IRD estimates that it has invalid (outdated) contact information for upwards of 55,000 of the estimated 500,000 individuals who may be subject to the proposed match, some still resident in New Zealand and some (approximately 25,000) probably not resident.

11. IRD believes it is caught between its obligation under s.103 to provide a notice of adverse action and its obligation to maintain secrecy of tax matters under s.81 of the Tax Administration Act 1994. It believes that if it were to send a notice of adverse action to an address that it has recorded as invalid, it could be construed as knowingly disclosing tax information to someone other than the taxpayer.

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[4] Attached as Appendix B

12. I recognise the practical problem that IRD faces in meeting its obligations under s.103 because of the existence of invalid addresses in their records. I agree that a solution needs to be found. However, I do not believe that s.81 prevents s.103 from operating in the usual way. Section 103 provides that a notice is validly given if posted to an address that the individual has furnished to IRD for that purpose. Provided that this has been done then, after waiting the prescribed number of days to allow for any response from the individual, IRD is free to take the adverse action. IRD already minimises the chance of other people seeing the notice by printing instructions on the envelope on how to return it to IRD unopened if the addressee is no longer contactable through that address.

13. IRD argues that s.103 effectively allows for adverse action to be taken without first giving notice if the IRD has "proof" that the address it holds for the individual is invalid. I disagree that this is what s.103 means. It is my understanding that the words "in the absence of proof to the contrary" in s.103(4) relate only to the *deemed* timing of delivery of a posted notice, rather than to the question of whether or not the notice was in fact received. In my view, s.103 sufficiently sets out the steps that are necessary to "give" an effective notice, and does so without reference to the question of actual receipt by the individual addressee. IRD can comply with the requirement to give notice to the individual simply by using one of the means set out in s.103(3), and not by having "proof" that the notice will not be received by the relevant individual at the address IRD has.

14. Given the Department's interpretation of s.103, a difficulty arises. If IRD's view of the situation is that posting a notice to an address it believes outdated, or leaving the notice at that address, would be a breach of its own secrecy provision, then IRD will presumably not give a s.103 notice in those circumstances. If IRD proceeds to take adverse action on the basis of this information matching programme without giving any notice under s.103, then my differing interpretation of the provision means that I will probably form the view that its actions are in breach of the Privacy Act. Of course, the consequences, if any, of a breach would depend on the circumstances.

15. There are several possible responses to the practical problem:

    a) IRD can simply send out the notices of adverse action, despite its misgivings; or

    b) Section 81 of the Tax Administration Act could be modified to make it clear to IRD's satisfaction that nothing in that section prohibits IRD from sending out a notice under s.103 of the Privacy Act; or

    c) IRD can refrain from taking adverse action in any case where it chooses not to send out a s.103; or

    d) Section 103 could be modified to exempt this match altogether from the requirements of that section; or

    e) Section 103 could be modified to exempt IRD from giving notice where IRD can (clearly) establish that the best address it has is invalid; or

    f) The Tax Administration Act could be modified to exempt IRD from sending a notice under s.103 of the Privacy Act where IRD can (clearly) establish that the best address it has is invalid; or

g) Section 103 could be modified to empower the Privacy Commissioner (in accordance with guidelines to be inserted in s.103) to dispense with the giving of notice in relation to particular cases or particular entire information matching programmes.

16. I do not regard option (d) as acceptable from a privacy perspective. It would altogether deprive people of the fundamental protection outlined in paragraph 7 above. Options (e) and (f) also create some difficulties from the privacy perspective in that there would be no external check on whether IRD could clearly establish that the best address it has is invalid. We also recognise that there may be varying degrees of difficulty with the options outlined, particularly with options (a)-(c).

17. In my view, further detailed work would be required to determine the most appropriate option to address the s.103 issue. This may not be possible in the timeframe of this Bill. I note also that practical issues with notices of adverse action arise in a number of contexts. I therefore recommend that officials of IRD, Justice and OPC continue to work on arriving at a more generally applicable solution.

Marie Shroff
Privacy Commissioner
28 February 2007

APPENDIX A

ANALYSIS OF THE PROPOSED PROGRAMME IN TERMS OF THE INFORMATION MATCHING GUIDELINES (PRIVACY ACT, S.98)

A. Whether or not the objective of the programme relates to a matter of significant public importance

Proposed s.280H provides that the purpose of the information matching provision is to verify:

- borrower's entitlements to the full interest write-off under section 38AA of the Student Loan Scheme Act 1992:
- whether borrowers are New Zealand based or overseas based for the purposes of that Act:
- whether borrowers are resident or non-resident for the purposes of that Act[5].

IRD elaborates by characterising the objectives of the programme in the IMPIA[5]. Those objectives are to:

- ensure that only those borrowers who are eligible, receive interest free loans
- ensure that borrowers returning to New Zealand are identified and given their correct entitlements
- avoid imposing burdensome annual application procedures on the majority of student loan borrowers who remain eligible under the interest free regime for the sake of the minority who do not comply.

Conclusion

Very large sums of student loan interest will be written off annually by IRD in delivering the proposed student loan interest free policy. We readily accept that IRD's objectives, which seek to ensure that only eligible individuals receive the full interest write-off relate to matters of significant public importance.

B. Whether or not the use of the programme to achieve that objective will result in monetary savings that are both significant and quantifiable, or in other comparable benefits to society

IRD report that the use of the programme will prevent the incidence of incorrectly assessed interest write-offs, estimated at $9 million in the 2007/08 fiscal year, rising to $24 million in 2008/09 and out years[6]. IRD base their calculations on the following assumptions[7]:

- without data matching the estimated 40,000 borrowers overseas who currently fail to advise IRD of their absence will not change
- with data matching the estimated number of borrowers who fail to advise IRD of their absence will fall to 5,000 in 2009 and later years
- an interest rate of 7% per annum
- an average loan balance of $21,753

Previously, I have commented that "To establish 'savings', the department would need to show that the recoveries (plus savings through deterrence) exceed the costs of the

[5] IMPIA, page 13
[6] IMPIA, page 13
[7] IMPIA, page 20

programme."[8] However, IRD have not attempted to establish recoveries or savings as such, merely estimated the amount of monies that will not be incorrectly written-off. Until the borrowers involved pay off those accrued additional debts there will be no savings at all.

Conclusion
I am of the opinion that the use of the programme will reduce the number of interest write-offs given incorrectly by IRD. Any estimate of true 'savings' resulting from the match will not become evident until after the match has operated for some time and actual recoveries of correctly attributed interest charges can be made. I am therefore unable to provide an opinion on whether the 'savings" resulting from the match will be significant.

C. Whether or not the use of an alternative means of achieving that objective would give either of the results referred to in paragraph (b)

IRD identify two alternative means to enable the delivery of the interest- free student loan policy[9].

Utilise existing administrative arrangement
IRD currently send manual requests for information to Customs under Section 17 of the Tax Administration Act 1994. IRD consider that using this process to administer the interest-free student loan policy would be labour intensive, impose additional resource requirements on both IRD and Customs and be less effective than the proposed programme[9].

Require students to apply
An alternative to proactively applying student interest write-offs would be to require every borrower to make an application for the write-off. With approximately 500,000 applications for write-offs expected to be processed, IRD state in their IMPIA that this would be an inefficient use of public revenue[9].

Conclusion
IRD have limited alternative means of achieving the objectives of the proposed match. Using existing administrative arrangements or requiring students to apply for the interest-free write off would both impose a significant administrative burden on IRD. The net monetary savings from either alternative suggested is likely to achieve only a portion of the monetary savings predicted to result from the proposed matching programme.

D. Whether or not the public interest in allowing the programme to proceed outweighs the public interest in adhering to the information privacy principles that the programme would otherwise contravene

Without legislative authorisation, the collection, use and disclosure of personal information between Customs and IRD would likely contravene information privacy principles 2, 10 and 11[10]. We nonetheless accept that the programme is justified in the public interest.

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[8] A report of the Privacy Commissioner to the Minister of Justice in relation to the proposed information matching provision contained in clause 71 of the Tax Reduction and Social Policy Bill (the ACC/IRD match), 26 April 1996, paragraph 3.2.2.
[9] IMPIA, page 37
[10] Information privacy principle 11 would be breached unless IRD exercised its statutory power under section 17 of the Tax Administration Act 1994.

E. Whether or not the programme involves information matching on a scale that is excessive, having regard to the number of agencies that will be involved and the amount of detail about an individual that will be matched

As only two agencies are involved in the match, the number of participating agencies is not excessive. IRD intend to limit the number of students who could be affected in the ongoing information matching programme by excluding borrowers with low loan balances[11].

IRD will supply name, date of birth, and tax file number information to Customs. For any borrower who arrives or departs New Zealand, Customs will supply to IRD the borrowers name, date of birth, tax file number, and the time and date of departure or arrival. The amount of information exchanged for this match appears to be least amount required in order for IRD to administer the student interest write-offs.

Conclusion
Based on our understanding of how the match will operate, we conclude that it will not be on a scale that is excessive.

F. Whether or not the programme will comply with the information matching rules

IRD expect to be able to comply with all the information matching rules and we have not identified any particular aspects of the proposed match which suggests that compliance will be an issue.

Overall conclusion

While we have considered the proposed programme and conclude that it accords with the information matching guidelines this is not the case in respect of compliance with the Part 10 provision (section 103) requiring that agencies send a notice of adverse action to matched individuals before taking that proposed action.

[11] IMPIA, page 15

APPENDIX B

PRIVACY ACT 1993, SECTION 103: NOTICE OF ADVERSE ACTION PROPOSED

(1) Subject to subsections (1A) to (2A) of this section, a specified agency shall not take adverse action against any individual on the basis (whether wholly or in part) of a discrepancy produced by an authorised information matching programme—

(a) unless that agency has given that individual written notice—

(i) specifying particulars of the discrepancy and of the adverse action that it proposes to take; and

(ii) stating that the individual has 5 working days from the receipt of the notice in which to show cause why the action should not be taken; and

(b) until the expiration of those 5 working days.

(1A) Nothing in subsection (1) of this section shall prevent the department for the time being responsible for the administration of the Social Security Act 1964 from immediately suspending a sickness, training, unemployment, independent youth, or emergency benefit, or a job search allowance, paid to an individual where the discrepancy arises in respect of departure information supplied to that Department pursuant to section 280 of the Customs and Excise Act 1996, and where, before or immediately after the decision to suspend, the Department gives the individual written notice—

(a) specifying particulars of the discrepancy and the suspension of benefit, and any other adverse action the Department proposes to take; and

(b) stating that the individual has 5 working days from the receipt of the notice to show cause why the benefit ought not to have been suspended or why the adverse action should not be taken, or both—

and the adverse action shall not be taken until the expiration of those 5 working days.

(1B) Nothing in subsection (1) prevents the Commissioner of Inland Revenue from immediately suspending payment to an individual of all or part of an interim instalment of a credit of tax under subpart KD of the Income Tax Act 2004 when a discrepancy is identified in information supplied to the Commissioner under section 85G of the Tax Administration Act 1994 if, before or immediately after the decision to suspend, the Commissioner gives a written notice to the individual that—

(a) provides details of the discrepancy and the suspension of payment of the credit of tax and any other adverse action which the Commissioner proposes to take; and

(b) states that the individual has 5 working days from the receipt of the notice to show cause why payment of the credit of tax ought not to have been suspended or why the adverse action should not be taken, or both—

and the other adverse action must not be taken until expiration of those 5 working days.

(2) Nothing in subsection (1) or subsection (1A) or subsection (1B) of this section prevents an agency from taking adverse action against an individual if compliance with the requirements of that subsection would prejudice any investigation into the commission of an offence or the possible commission of an offence.

(2A) Nothing in subsection (1) prevents any sworn member of the police or any bailiff from immediately executing a warrant to arrest an individual in respect of the non-

payment of the whole or any part of a fine if the discrepancy arises in respect of arrival and departure information supplied under section 280D of the Customs and Excise Act 1996 and if, before executing the warrant, the individual concerned is—

(a) informed of the intention to execute the warrant; and

(b) given an opportunity to confirm—

(i) whether or not he or she is the individual named in the warrant; and

(ii) that neither of the following circumstances applies:

(A) the fine has been paid:

(B) an arrangement to pay the fine over time has been entered into.

(3) Every notice required to be given to any individual under subsection (1) or subsection (1A) or subsection (1B) of this section may be given by delivering it to that individual, and may be delivered—

(a) personally; or

(b) by leaving it at that individual's usual or last known place of residence or business or at the address specified by that individual in any application or other document received from that individual; or

(c) by posting it in a letter addressed to that individual at that place of residence or business or at that address.

(4) If any such notice is sent to any individual by post, then in the absence of proof to the contrary, the notice shall be deemed to have been delivered to that individual on the fourth day after the day on which it was posted, and in proving the delivery it shall be sufficient to prove that the letter was properly addressed and posted.

(5) In this section,—

bailiff means a bailiff of the District Court or of the High Court

fine means—

(a) a fine within the meaning of section 79 of the Summary Proceedings Act 1957 or an amount of reparation:

(b) a fine or other sum of money to which any of sections 19 to 19E of the Crimes Act 1961 applies:

(c) a fine to which any of sections 43 to 46 of the Misuse of Drugs Amendment Act 1978 applies

reparation means—

(a) any amount that is required to be paid under a sentence of reparation; or

(b) any amount that is required to be paid under any order of reparation as defined in section 145D of the Sentencing Act 2002.

APPENDIX C

STUDENT LOAN SCHEME AMENDMENT BILL (NO2)

28 New sections 62A and 62B inserted

The following sections are inserted after section 62:

"62A Disclosure of information for information matching purposes

"(1) The purpose of this section is to facilitate the exchange of information between the Department and the New Zealand Customs Service for the purpose of establishing an information matching programme to assist the Commissioner to verify-

"(a) borrowers' entitlements to a full interest write-off under section 38AA:

"(b) whether borrowers are New Zealand based or overseas based for the purposes of this Act:

"(c) whether borrowers are resident or non-resident for the purposes of this Act.

"(2) For the purpose of this section, the Commissioner may provide to the chief executive of the New Zealand Customs Service any of the following information that is held by the Department:

"(a) a borrower's name or any other name by which a borrower is known:

"(b) a borrower's date of birth

"(c) a borrower's tax file number.

"(3) The Commissioner and the chief executive of the New Zealand Customs Service may, for the purpose of this section, determine by written agreement between them-

"(a) the frequency with which information may be supplied; and

"(b) the form in which information may be supplied; and

"(c) the method by which information may be supplied.

"(4) **Subsection (2)** applies despite any obligation as to secrecy of other restriction imposed by any enactment or otherwise on the disclosure of information.

"62B Power of Commissioner to access arrival and departure information

In accordance with, and for the purpose set out in, section 280I of the Customs and Excise Act 1996, the Commissioner may access any information recording system used by the New Zealand Customs Service to store arrival or departure information."

36 Customs and Excise Act 1996 amended

The Customs and Excise Act 1996 is amended by inserting the following sections after section 280F:

"280G Defined terms for sections 280H and 280I

In **sections 280H and 280I,** unless the context otherwise requires,-

"borrower has the meaning given to it by section 2 of the Student Loan Scheme Act 1992

"Commissioner means the Commissioner of Inland Revenue as defined in section 3(1) of the Tax Administration Act 1994

"Department means the Inland Revenue Department

"identifying information means the information set out in **section 62A(2)** of the Student Loan Scheme Act 1992 that identifies a borrower

"officer of the Department has the meaning given to it by section 3(1) of the Tax Administration Act 1994.

"280H Disclosure of arrival and departure information for purposes of Student Loan Scheme Act 1992

"(1) The purpose of this section is to facilitate the exchange of information between the Customs and the Department for the purpose of assisting the Commissioner to verify-

"(a) borrowers' entitlements to a full interest write-off under section 38AA of the Student Loan Scheme Act 1992:

"(b) whether borrowers are New Zealand based or overseas based for the purposes of that Act:

"(c) whether borrowers are resident or non-resident for the purposes of that Act.

"(2) For the purpose of this section, the Commissioner may supply any identifying information to the Chief Executive.

"(3) If, in relation to any borrower, identifying information is supplied in accordance with **subsection(2),** the Chief Executive may compare that information with any arrival and departure information held by the Customs that relates to that borrower.

"(4) If the Customs has arrival or departure information relating to a borrower, the Chief Executive may, for the purpose of this section, supply to the Commissioner any of the following information held by the Customs:

"(a) the borrower's name:

"(b) the borrower's date of birth:

"(c) the borrower's tax file number

"(d) the time and date on which the borrower arrived in, or, as the case may be, departed from, New Zealand.

"(5) The Chief Executive and the Commissioner may, for the purpose of this section, determine by written agreement between them-

"(a) the frequency with which information may be supplied; and

"(b) the form in which information may be supplied; and

"(c) the method by which information may be supplied.

"280I Direct access to arrival and departure information for purposes of Student Loan Scheme Act 1992

"(1) The purpose of this section is to facilitate the Department's access to information stored in a database for the purpose of assisting the Commissioner to verify-

"(a) borrower's entitlements to a full interest write-off under section 38AA of the Student Loan Scheme Act 1992:

"(b) whether borrowers are New Zealand based or overseas based for the purpose of that Act:

"(c) whether borrowers are resident or non-resident for the purpose of that Act:

"(d) for the purposes of that Act, whether borrowers are in New Zealand

"(2) The Chief Executive may, for the purpose of this section, allow the Commissioner to access a database in accordance with a written agreement entered into by the Chief Executive and the Commissioner.

"(3) In accessing a database for the purpose of this section, the Commissioner-

"(a) may only search for arrival or departure information relating to pre-selected borrowers who are of interest to the Commissioner; and

"(b) must not search for –

"(i) any information other than arrival or departure information; or

"(ii) any information about a person who is not a borrower.

"(4) The Commissioner must take all reasonable steps to ensure that-

"(a) only persons who had appropriate powers delegated to them by the Commissioner-

"(i) have access to the database; and

"(ii) use the database; and

"(b) a record is kept of –

"(i) every occasion on which persons access a database; and

"(ii) the reason for accessing the database; and

"(iii) the identity of the person who accessed the database; and

"(c) every person who accesses a database for the purpose of this section complies with **subsection (3).**

"(5) In this section,-

"access a database includes remote access to a database

"database means any information recording system used by the Customs to store arrival or departure information."