

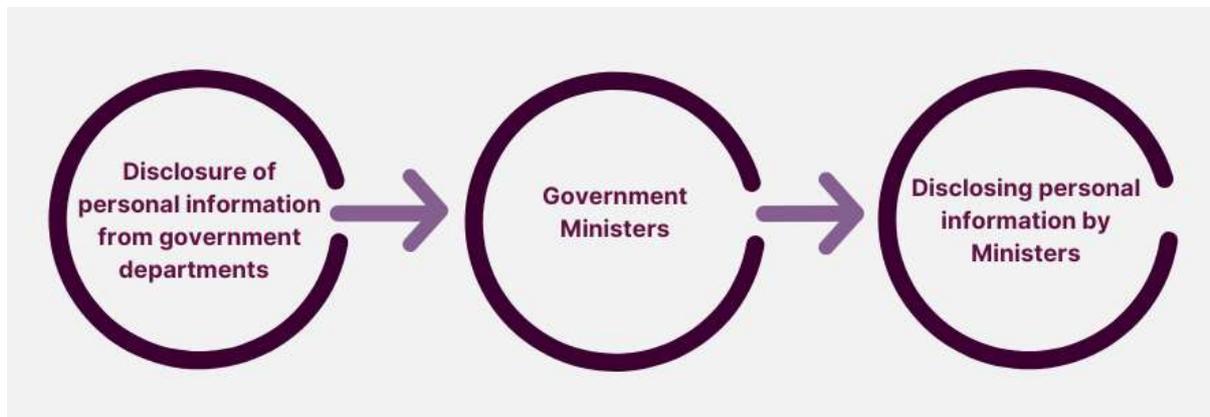
Departmental disclosure of personal information to Ministers and further disclosure of such information by Ministers: Privacy Act considerations

Note: this guidance was updated in 2024 to amend out of date footnotes following issuance of the Cabinet Manual (2023).

1. Introduction

In the course of their duties, Ministers may be provided with, or request, personal information held by the departments that they're responsible for. On occasion, Ministers may also wish to disclose personal information received from their departments.

This document provides guidance about the disclosure of personal information from government departments to Ministers and disclosure of such personal information by Ministers.



It is intended to help departments and Ministers to negotiate the interface between the requirements of the Privacy Act and the need to share information so Ministers can fulfil their portfolio responsibilities.

This guidance has been prepared by the Office of the Privacy Commissioner in conjunction with the Crown Law Office. The Cabinet Office, the Public Service Commission, and the Office of the Clerk of the House of Representatives have also been consulted about the contents of the guidance.

1.1 The Privacy Act applies to departments and Ministers

The Privacy Act deals with the collection, storage, use and disclosure of personal information by agencies. Ministers and departments are separate agencies for the purposes of the Privacy Act, so both must comply with the Act.¹

However, while Ministers are covered by the Privacy Act in relation to their ministerial duties and responsibilities, **they are not covered by the Act when acting in their capacities as members of Parliament.** The definition of ‘agency’ in the Privacy Act excludes members of Parliament in their official capacities.

Departments and Ministers must handle personal information in accordance with the information privacy principles in the Privacy Act. Of greatest relevance for this guidance is privacy principle 11, which limits the circumstances in which personal information can be disclosed. Under principle 11, an agency that holds personal information must not disclose that information unless one of several specified exceptions applies.

1.2 Scope of this guidance

This guidance assists departments and Ministers with working through Privacy Act considerations when deciding whether and how to disclose personal information. It covers **personal information held by departments**, and deals with:

- the **disclosure** of such information **to Ministers**
- the further **disclosure** of such information **by Ministers.**

It situates such disclosures in relation to the respective roles of departments and Ministers, and the relationships between these agencies. As discussed further below, the most relevant principles under the Privacy Act in this context are privacy principles 1 and 11. These principles deal with the purpose of collection of personal information and with disclosure of personal information respectively.

This document does not provide guidance about:

¹ The Privacy Act 2020 came into force on 1 December 2020, replacing the Privacy Act 1993. Some types of personal information (such as health information) may be covered by a code of practice made under the Privacy Act. A code can modify the application of the privacy principles to the type of information covered by the code.

- statutory frameworks other than the Privacy Act that govern the disclosure of personal information in some cases
- the tort of privacy
- disclosure of personal information received by Ministers from sources other than departments
- Ministers acting in their official capacities as members of Parliament.

The guidance in this document supplements other sources of guidance, including the Cabinet Manual, the Code of Conduct for the State Services and guidance on the ‘no surprises’ principle issued by the Solicitor-General.² Other sources of guidance note that information should only be disclosed to a Minister if it is lawful to do so. The guidance in this document assists with deciding whether a disclosure is lawful under the Privacy Act. The Office of the Privacy Commissioner is available to provide further advice and guidance to departments and Ministers on disclosure of personal information.

2. Ministers are provided with personal information for several reasons

The role of Ministers includes:

- being accountable to the House of Representatives for all matters within their portfolios, including operational decisions within their portfolio departments
- determining government policy collectively through the Cabinet process
- setting policy directions and priorities for departments for which they are responsible
- having responsibility for spending from appropriations administered by their departments
- exercising statutory functions and powers within their portfolios.

Officials support Ministers in carrying out their ministerial functions. One important way in which officials support Ministers is by providing them with information required to make decisions or to meet accountability responsibilities.

The relationship between officials and Ministers is central to the effective operation of Executive Government, and is based on a mixture of statute, convention, and practice. It is a

² Solicitor-General, ‘Chief Executives and the “No Surprises” Principle’, issued 13 September 2016.

complex and subtle relationship that cannot easily be reduced to definitive rules. In particular, decisions by officials to provide information to Ministers require judgement and discretion and are finely tuned to particular circumstances.

Some types of disclosure of personal information are routine and clearly authorised, such as when the Minister requires personal information to:

- exercise statutory functions
- respond to individuals who seek the Minister's assistance with their cases.

Others involve a case-by-case assessment of whether personal information can be disclosed in connection with a Minister's general portfolio responsibilities and accountability to the House. This guidance is focused primarily on these less-routine disclosures, in which the lawfulness of the disclosure will depend on the specific situation.

In 2023, the Cabinet Manual was updated and now includes content about Ministers' and agencies' obligations under the Privacy Act that was based on advice contained in an earlier version of this guidance. This guidance expands on the advice in the Cabinet Manual.

2.1 Disclosures with statutory or individual authorisation

Exercising statutory functions

In some portfolios, Ministers require personal information in order to exercise statutory functions to make decisions about individuals. Examples include the Immigration Act 2009, the Citizenship Act 1977, and the Intelligence and Security Act 2017.³ Because such disclosures to Ministers are authorised by statute, they override the Privacy Act's restrictions on disclosure of personal information.

Responding to complaints or inquiries from the public

Ministers receive correspondence from members of the public seeking assistance with matters within the Minister's portfolio responsibilities. In such cases, Ministers will usually request information from their departments about the individual's case. As discussed below, such disclosures will generally be permitted under the Privacy Act on the basis that they are authorised by the individual concerned.

³ Immigration Act 2009, e.g. ss 20, 172, 182; Citizenship Act 1977, e.g. ss 8, 9; Intelligence and Security Act 2017, ss 55-62.

2.2 Disclosures for general portfolio and accountability reasons

The convention of ministerial accountability

The chief executive of a department is immediately responsible for operational matters.⁴ However, under the constitutional convention of ministerial accountability, Ministers are individually accountable to Parliament for their departments' actions and performance.⁵ Ministers will sometimes require personal information in order to meet their accountability responsibilities.

Ministers can be questioned in the House about issues over which they have no day-to-day control. Ministers are subject to Parliamentary privilege when answering questions in the House about their departments or issues for which they are responsible.

Briefings by departments to Ministers, including under the 'no surprises' principle

Ministers are regularly briefed by departments on matters within the Minister's portfolio. The approach taken to briefing a Minister will be influenced by a range of factors, including the importance, urgency, and sensitivity of the information. Ministers' expectations regarding their relationship with a department and the way in which they will be briefed are also relevant. The decision on when and over what matters to brief a Minister will always involve a question of judgement.

Briefings on an issue that the Minister has not requested information about will sometimes be what is referred to as a 'no surprises' briefing. The purpose of a 'no surprises' briefing is to ensure that a Minister is aware of significant matters that may be controversial or may become the subject of public debate, and that are within the portfolio the Minister is accountable for.⁶

The Cabinet Manual notes that 'The style of the relationship and frequency of contact between Minister and agency will develop according to the Minister's personal preference.' It provides the following guidance:⁷

⁴ Public Service Act 2020, ss 52, 54.

⁵ Cabinet Manual, para 3.31.

⁶ For more information on the 'No Surprises' principle, see the Solicitor-General's guidance "Chief Executives and the No Surprises Principle", updated 12 October 2023, available via <https://www.crownlaw.govt.nz/assets/Uploads/GuidelinesProtocolsArticles/No-Surprises-Guidance-updated-Oct-2023.pdf>

⁷ Cabinet Manual, para 3.26(a).

In their relationship with Ministers, officials should be guided by the ‘no surprises’ principle. As a general rule, they should inform Ministers promptly of matters of

significance within their portfolio responsibilities, particularly where these matters may be controversial or may become the subject of public debate. This principle does not override the requirements for disclosing information under the Privacy Act 2020 and the Official Information Act 1982 (or other statutory restrictions).

The Public Service Commission guidance on the code of conduct for state servants also refers to the ‘no surprises’ principle:⁸

Maintaining confidence means not only keeping Ministers informed of issues relating to our organisation but ensuring there are ‘no surprises’ regarding policy implementation and delivery. We are expected to advise Ministers in advance of circumstances likely to impinge on the Government’s responsibilities, any major strategic initiatives, and issues that may attract public interest or political comment.

A ‘no surprises’ way of working does not interfere with an organisation’s independent decision-making role or its operational responsibilities but reflects the part all organisations play in executive government.

Departments will sometimes consider that personal information is relevant to matters of significance within a Minister’s portfolio and should be provided to a Minister in accordance with the ‘no surprises’ principle.

3. Disclosure of personal information to and by Ministers must comply with the Privacy Act

3.1 Disclosure of personal information from departments to Ministers

Departments need to have a clear understanding of the lawful basis on which they are able to disclose personal information to Ministers, and to ensure that any such disclosures comply with the Privacy Act. The convention of ministerial accountability and the ‘no surprises’ principle have no statutory basis and do not override the Privacy Act’s disclosure

⁸ State Services Commission (now Public Service Commission), *Understanding the Code of Conduct: Guidance for State Servants* (2010), p 16.

principle.⁹ Therefore, before disclosing personal information to a Minister, a department must be satisfied that the disclosure is consistent with principle 11 of the Privacy Act or a statutory override. In addition, under the Privacy Act, the Minister may be ‘collecting’ personal

information disclosed by the department. If so, the collection of personal information by a Minister will need to comply with privacy principle 1. To comply with principle 1, the collection must be necessary for a lawful purpose connected with the Minister’s functions.

To ensure a disclosure is lawful under principles 1 and 11, best practice is for the department to consider whether personal details need to be disclosed to adequately inform the Minister, including:

- whether the Minister needs to be briefed on an issue
- if a briefing is needed, whether it needs to include information about identifiable individuals
- if it is necessary to provide personal information, how much information is required and whether some personal details are irrelevant or unnecessary for the briefing.

If a department discloses more personal information than the Minister needs to be adequately briefed, this creates legal risks not only for the department but also for the Minister. First, there is a risk that the Minister may have collected personal information unnecessarily, in breach of privacy principle 1. Second, if the Minister further discloses the personal information received from the department, this could be a breach of privacy principle 11. Whether there is a breach of either principle will depend on the particular facts, but minimising the amount of personal information disclosed to Ministers is a way of mitigating these risks.

When departments disclose personal information to Ministers, it is also good practice to state the purpose for which the information is provided.

See Appendix 1 for some questions departments should consider when deciding whether to disclose personal information to a Minister. The texts of privacy principle 1 (purpose of collection) and principle 11 (disclosure) from the Privacy Act 2020 are attached as Appendix 2 to this guidance.

⁹ Privacy Act 2020, s 24(1). However, Ministerial statements in the House are protected by Parliamentary privilege, which does have a statutory basis (see section 3.2 below).

The disclosure must be consistent with privacy principle 11 or a statutory override

Disclosure for the purpose of collection or a related purpose

Where the department believes, on reasonable grounds, that disclosure of personal information to a Minister is one of the purposes for which the information was collected, or is directly related to one of those purposes, the disclosure will not be a breach of principle 11.

Most of the purposes for which a department collects personal information are evident to the individual concerned. For example, it is clear that the department needs personal information to establish eligibility for a benefit or to approve an application. Personal information collected by departments for operational purposes will not usually have been collected for the purpose of informing the Minister.

However, in some cases, disclosure of personal information to a Minister may be lawful as being for a purpose directly related to the department's purposes of collection. There are several ancillary purposes for collection of personal information, associated with the proper administration of the department. These include assurance of the quality, probity, integrity and competent administration of the department's operations. There will be occasions when providing personal information to the Minister, who holds overall accountability for the actions of the department, can be seen as directly related to the purpose of collection.

A department assessing whether it can provide personal information to a Minister based on the purpose of collection or a directly related purpose should consider these questions:

- What was the purpose for which the information was collected?
- What is the purpose for which the department proposes to provide the information to the Minister?
- Is there a reasonable connection between the purpose of collection and the purpose of the proposed disclosure to the Minister?
- How much of the personal information is it necessary to disclose for the purpose to be fulfilled?

The department should bear in mind that the answers to these questions may not be the same for all personal information that relates to a particular case. It may be lawful to disclose some personal information, while other personal information cannot be disclosed.

Disclosure in which the individual is not identified

Disclosure of information that does not relate to identifiable individuals (for example, aggregated data about large numbers of people) will not breach the Privacy Act. Similarly, disclosure of information about an individual will be allowed if that individual is not identified in the information disclosed. However, it is important to be aware that individuals may

sometimes be identifiable from the details of their circumstances, even if their names or other obvious identifying information are not disclosed.

Disclosure authorised by the individual concerned

Disclosure of personal information will be allowed if the person to whom the information relates has authorised the disclosure. For example, if a member of the public contacts the Minister seeking the Minister's assistance, the individual clearly intends the Minister to make inquiries into the case. Consequently, the department will probably have reasonable grounds for belief that the individual has authorised the disclosure of their personal information to the Minister, and that the disclosure is therefore lawful under privacy principle 11. However, best practice is to inform the individual that, to provide assistance, the Minister may seek information about them from the department.

Other exceptions

Other exceptions to principle 11 that could, in specific circumstances, justify disclosure of personal information to a Minister include:

- the information concerned is already publicly available
- the disclosure is necessary to prevent or lessen a serious threat to public health or safety, or to the life or health of an individual.

Disclosures authorised under statute

Disclosure of personal information to a Minister will be authorised under statute in some contexts.¹⁰ Specific statutory authorisation overrides the restrictions on disclosure in the

¹⁰ For example, some statutes provide Ministers with powers to require certain state sector agencies to provide the Minister with information (which could include personal information): e.g. Health Act 1956, s 22D; Crown Entities Act 2004, s 133. As noted above, some Ministers also receive personal information in order to exercise statutory functions to make decisions about individual cases.

Privacy Act. However, it may still be necessary or appropriate to consider personal privacy before disclosing personal information under a separate statutory framework.

Personal information collected by a Minister must be necessary for a lawful purpose

Under privacy principle 1, an agency must not collect personal information unless it has a lawful purpose, connected with the agency's functions, for collecting the information. The information must also be necessary for that purpose. If an individual's identifying information is not needed for the agency's lawful purpose, the agency may not require identifying information to be provided. 'Collect' is defined in the Privacy Act 2020 as taking 'any step to seek or obtain' personal information, 'but does not include receipt of unsolicited information'.¹¹

If a Minister requests particular personal information from a department, under the Privacy Act the Minister will be collecting that information. The Minister will therefore need to comply with principle 1, by having a lawful purpose related to the Minister's functions for collecting the information and collecting no more personal information than is necessary for that purpose.

A Minister might sometimes set a general expectation that the department will provide the Minister with certain types of personal information. Such an expectation could create a framework or process for obtaining personal information and result in the Minister collecting personal information provided by the department. This could create a risk of the Minister collecting too much personal information, in breach of principle 1, if the information is not necessary for the Minister's lawful purpose. When setting expectations of the provision of personal information by a department, a Minister should consider the requirements of principle 1 and be clear about the purpose for which the department is to provide the information.

3.2 Ministers' disclosure of personal information onwards

Ministerial statements in the House

Ministerial statements made in the House (including answers to Parliamentary questions) are a special case because they are subject to Parliamentary privilege. Parliamentary privilege has a statutory basis and therefore overrides privacy principle 11. Article 9 of the Bill of Rights 1688 protects the freedom of speech, debate and proceedings in Parliament

¹¹ Privacy Act 2020, s 7(1).

from being questioned or impeached in any court or place outside Parliament. Ministers who disclose personal information obtained from their departments during Parliamentary proceedings cannot be held legally liable for that disclosure.

When departments need to disclose personal information so a Minister can answer questions in the House, they can consider whether the Parliamentary Privilege Act 2014 provides them with absolute immunity.¹²

However, departments and Ministers should still consider whether the disclosure of personal information in the House is necessary (for example, whether Parliamentary questions can be answered without identifying an individual). Standing Orders state that the names of persons should not be used in questions unless they are strictly necessary to render the question intelligible. The House expects all members and Ministers to consider whether the use of an identifiable individual's personal information is strictly necessary when conducting business protected by Parliamentary privilege.

It should be noted that a person who is not a member of Parliament, who has been named or otherwise identified in the House, and who claims to have been adversely affected or suffered damage to their reputation, may apply to the Speaker for a response to be included in the Parliamentary record.

While disclosure of personal information in the House is subject to Parliamentary privilege, and Ministers can confirm or stand by an answer when subsequently questioned outside the House, the disclosure of the same information by Ministers outside the House will not be protected by privilege.

Other disclosures by Ministers

It should usually be possible for Ministers to fulfill their duties and meet accountability requirements without disclosing information that identifies individuals. Ministers should bear in mind that individuals can sometimes be identified from information about people's circumstances, even if their names are not disclosed.

¹² See Parliamentary Privilege Act 2014, s 10, which defines 'proceedings in Parliament' for the purpose of Parliamentary privilege, and in particular s 10(2)(c).

Ministers need to ensure that they have a lawful basis for disclosure before further disclosing personal information obtained from their departments. A Minister can only disclose personal information if an exception to privacy principle 11 or a statutory override applies. As a matter of good practice, the Minister should also consider whether some personal information is not relevant to disclose.

For example, sometimes members of the public will discuss their personal situation in the media, alleging that they have been adversely affected by government actions or omissions. A Minister may wish to respond to such media coverage, including by making public information about the individual that the Minister believes is relevant to understanding the allegations. However, the fact that an individual has spoken to the media about their situation does not provide authorisation for the Minister to disclose

additional personal information about the individual. The Minister should only release the individual's personal information if the individual has clearly authorised such disclosure, or if another exception to privacy principle 11 applies.

Appendix 1: Questions for consideration by departments when deciding whether personal information can be disclosed to a Minister

As a matter of good privacy practice, a department should consider whether the disclosure of personal information is reasonably necessary before providing that information to a Minister. The department should consider what personal information, if any, needs to be provided to the Minister for the Minister to be adequately informed.

Specifically:

- **Does the Minister need to know personal information** (information about identifiable individuals) in order to fulfil the Minister's functions or accountability responsibilities in relation to a particular issue?
- If the Minister does need to know personal information, **which personal details can be withheld from information provided to the Minister?** In particular, can information be provided in such a way that an individual is not identified?

The department must also assess whether the disclosure of personal information to the Minister is lawful under the Privacy Act. The following questions will assist in making that assessment. In all cases, the department must have reasonable grounds for belief that a particular ground for disclosure under the Privacy Act applies. The lawfulness of any disclosure of personal information will depend in part on the nature of the information and the context of the specific case.

- **Is the disclosure authorised under statute?** If so, the statutory authorisation will override the Privacy Act, and the disclosure will be permitted.
- **Is the information provided to the Minister in a form in which the individual concerned is not identified?** If so, the disclosure is likely to be permitted. However, it is important to note that it may be possible to identify an individual even if the individual is not named in the information provided.
- **Has the disclosure been authorised by the individual to whom the information relates?** If so, the disclosure is likely to be permitted. However, the department should be cautious about relying on anything other than express authorisation by the individual. The department should consider whether any additional actions (such as notification to the individual) are required if authorisation is only inferred.
- **Is the disclosure for one of the purposes for which the information was originally collected, or a directly related purpose?** If so, the disclosure is likely to

be permitted. In most cases, the purposes of collection will have been notified at the time of collection to the individual to whom the information relates. However, some directly related purposes (such as assurance of the quality and probity of departmental systems and processes) may not have been expressly recorded.

- **Does another exception to privacy principle 11 apply?** For example, disclosure will be permitted if the information in question is already publicly available. Relatively rarely, disclosure of personal information to a Minister might be permitted for reasons such as law enforcement, health or safety of the public or an individual, or protection of public revenue.

Appendix 2: Information privacy principles 1 and 11, from Privacy Act 2020, section 22

Information privacy principle 1

Purpose of collection of personal information

- (1) Personal information must not be collected by an agency unless—
 - (a) the information is collected for a lawful purpose connected with a function or an activity of the agency; and
 - (b) the collection of the information is necessary for that purpose.
- (2) If the lawful purpose for which personal information about an individual is collected does not require the collection of an individual's identifying information, the agency may not require the individual's identifying information.

Information privacy principle 11

Limits on disclosure of personal information

- (1) An agency that holds personal information must not disclose the information to any other agency or to any person unless the agency believes, on reasonable grounds, —
 - (a) that the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained; or
 - (b) that the disclosure is to the individual concerned; or
 - (c) that the disclosure is authorised by the individual concerned; or
 - (d) that the source of the information is a publicly available publication and that, in the circumstances of the case, it would not be unfair or unreasonable to disclose the information; or
 - (e) that the disclosure of the information is necessary—
 - (i) to avoid prejudice to the maintenance of the law by any public sector agency, including prejudice to the prevention, detection, investigation, prosecution, and punishment of offences; or
 - (ii) for the enforcement of a law that imposes a pecuniary penalty; or
 - (iii) for the protection of public revenue; or
 - (iv) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or

- (f) that the disclosure of the information is necessary to prevent or lessen a serious threat to—
 - (i) public health or public safety; or
 - (ii) the life or health of the individual concerned or another individual; or
 - (g) that the disclosure of the information is necessary to enable an intelligence and security agency to perform any of its functions; or
 - (h) that the information—
 - (i) is to be used in a form in which the individual concerned is not identified; or
 - (ii) is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or
 - (i) that the disclosure of the information is necessary to facilitate the sale or other disposition of a business as a going concern.
- (2) This IPP is subject to IPP 12.