

Privacy Commissioner Policy on Advisory Opinions Under Section 17(1)(i) of the Privacy Act 2020

Updated March 2021

1. Summary

The Privacy Commissioner has established a process by which Ministers and agencies may seek an advisory opinion from the Privacy Commissioner concerning the application of the Privacy Act 2020. The process is intended to promote an understanding of the information privacy principles and give greater certainty to Ministers and agencies in relation to the Act's operation in particular circumstances. This document describes the Commissioner's policy by which requests for advisory opinions may be accepted and processed.

The advisory opinion process is intended to provide agencies that are subject to obligations under the Act with guidance to understand how the Commissioner currently views the operation of the Act in particular circumstances and would be likely to approach the matter if it were to be raised in proceedings.

2. The law

Section 17(1)(i) of the Privacy Act (the Act) provides that the Privacy Commissioner's functions include:

to provide advice (with or without a request) to a Minister or agency on any matter relevant to the operation of the Act.

The Act makes no special provision for giving advisory opinions under s.17(1)(i). This policy establishes a clearer path for Ministers and agencies to obtain an advisory opinion from the Commissioner concerning their obligations under the Act.

The process, this policy and the advisory opinions must be understood in relation to the general provisions of the Act and other applicable law. In particular, it needs to be understood that the Privacy Commissioner is not the final interpreter of the law for most cases brought under the Act. Proceedings brought under the Act can be taken to the Human Rights Review Tribunal and on appeal to the courts (s.97 refers).

This is one reason that the Privacy Commissioner will generally not issue advisory opinions for a matter that is already the subject of a complaint to the Privacy Commissioner for which the Commissioner may render an opinion under Part 5 of the Act.

Requesters should also understand that the Commissioner may act upon information revealed in a request for an advisory opinion to perform the Commissioner's

responsibilities under the Act. For example, the Commissioner does not preclude the possibility of initiating an investigation into any action that may appear to be an interference with the privacy of an individual. The Commissioner may also refer any significant breach of duty or misconduct to the appropriate authorities.

3. Public interest considerations

The Privacy Commissioner will be selective in responding to requests to provide an advisory opinion. The Commissioner will take into account public interest considerations as well as resource constraints.

Amongst other matters, the Commissioner will consider the following:

- Whether the opinion will help clarify interpretation of the law: e.g., where an agency has obtained conflicting legal advice as to whether a proposed action is compliant.
- Whether a matter raises matters of public interest: e.g., where an advisory opinion may assist in achieving a public goal in a compliant way.
- Whether a matter raises systemic issues: e.g., where other agencies may face the same issue that is raised by the agency seeking the opinion.
- Whether an opinion can be rendered without undue call on the Commissioner's resources: e.g., by focusing attention only on the essential elements.

The Commissioner will exercise discretion both in agreeing to prepare and issue an advisory opinion and in settling the scope of the opinion.

4. Transparency

In issuing advisory opinions the Commissioner is acting in the public interest and not as a personal adviser to an agency. The process, and the advisory opinion itself, will usually be implemented in a transparent fashion consistent with notions of open government and accountability. The Commissioner is subject to the Official Information Act.

In particular:

- The Minister or agency that requested the advisory opinion will usually be named by the Commissioner in the opinion and associated statements.
- Naming of the Minister or agency that requested the advisory opinion, or any other person, will be undertaken in accordance with the Office's naming policy.
- The opinion will normally be made publicly available, usually at the time it is provided to the Minister or agency that requested the advisory opinion or shortly thereafter.

5. Requesting an advisory opinion

Taking into account the considerations mentioned above, the following policies apply to requests for advisory opinions:

- i. Any Minister or agency may request an advisory opinion. Requests from trade associations and joint approaches from more than one agency are acceptable.

- ii. Requesters should acknowledge in their requests that they understand that:
 - a. The Privacy Commissioner is not the final interpreter of the law for most cases brought under the Act.
 - b. The advisory opinion will likely be made public.
 - c. They will likely be named in the opinion.
- iii. Requesters should confirm that the subject of the requested advisory opinion is not, to their knowledge subject to a complaint to the Privacy Commissioner, proceedings under the Act, a complaint to another complaints body or proceedings before any court or tribunal.
- iv. Requesters should state the facts or circumstances on which the requested opinion would be grounded and state the legal issue on which an opinion is sought. It should be understood that the legal issue will be the subject of discussion with the Office and, with concurrence of the requester, the issue may be recast to ensure that the matter sufficiently touches upon public interest considerations.
- v. The requester should confirm that they have taken their own legal advice and explain why the requester considers the matter remains in doubt. The Office will likely request a copy of legal opinions previously obtained. (The process is intended to be reserved for more important matters – for general practical matters, the Office maintains an enquiries line.)
- vi. The Commissioner may render an advisory opinion when agencies are in dispute over a matter of interpretation of the operation of the Act but in any such case the request for an opinion must be submitted jointly by the agencies concerned.