



Privacy Commissioner
Te Mana Mātāpono Matatapu

**Periodic Update Report
on
Developments in Data Protection Law
in New Zealand**

(July - December 2022)

**Sixteenth report to the European Commission
by the competent supervisory authority
for the application of the Legal Data Protection Standards
in New Zealand**

30 January 2023

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30 January 2023

Bruno Gencarelli
Head of Unit - Data Protection European Commission
Directorate-General for Justice
Brussels
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Dear Bruno

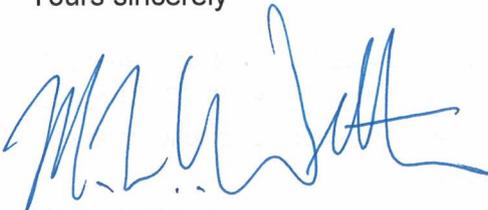
Update report on developments in New Zealand data protection law

I submit this 16th report to update the European Commission in relation to matters bearing upon the legal standards for the protection of personal data in New Zealand for the six months since the last report dated 4 July 2022.¹

I am pleased to report on specific technical amendments to the Privacy Act during this period, as well as the release of the Privacy Commissioner's joint report with the Independent Police Conduct Authority into Police conduct when photographing members of the public, and a recent privacy decision of the Broadcasting Standards Authority.

Otherwise, nothing has changed in the last 6 months. In essence, this report confirms that the level of data protection in New Zealand has not been diminished during the review period. I trust that this is reassuring for the purposes of the Commission's monitoring of the level of data protection under New Zealand law.

Yours sincerely



Michael Webster
Privacy Commissioner
New Zealand

¹ Earlier reports are available from the Privacy Commissioner's website – see "[New Zealand-EU data protection adequacy reporting](https://www.privacy.org.nz)" Office of the Privacy Commissioner <www.privacy.org.nz>.

Background

- 1 On 19 December 2012, the European Commission formally decided that for the purposes of Article 25(2) of Directive 95/46/EC, New Zealand is considered as ensuring an adequate level of protection for personal data transferred from the European Union.² This decision was later amended by a European Commission decision of 16 December 2016 reflecting aspects of the ECJ decision in the first *Schrems* judgment.³
- 2 The European Commission has a responsibility to monitor the functioning of the decision. To assist the European Commission to undertake this monitoring, the New Zealand Privacy Commissioner as “the competent supervisory authority for the application of the legal data protection standards in New Zealand” under the European Commission’s decision, has undertaken periodically to submit update reports on developments in New Zealand data protection law.⁴
- 3 Regulation (EU) 2016/679 of 27 April 2016, or the General Data Protection Regulation (GDPR), came into effect on 25 May 2018 and repealed the 1995 Directive. However, Article 45(9) of the GDPR provides that the decisions adopted by the Commission on the basis of Article 25(6) of Directive 95/46/EC continues in force until amended, replaced or repealed by a Commission decision adopted in accordance with GDPR Article 45(3) or (5). Accordingly, the Commission’s adequacy decision covering New Zealand continued under the new GDPR regime.
- 4 On 22 December 2015, the Privacy Commissioner submitted the [first report](#) that surveyed developments since the commencement of the Commission’s decision in 2013. The Privacy Commissioner submitted subsequent reports dated [2 March 2016](#) (supplement), [30 June 2016](#) and [9 December 2016](#), [26 June 2017](#) and [22 December 2017](#), [9 July 2018](#) and [21 December 2018](#), and [5 July 2019](#) and [19 December 2019](#), [8 July 2020](#), [29 January 2021](#), [9 July 2021](#), [31 January 2022](#) and [4 July 2022](#).
- 5 The Office of the Privacy Commissioner does not, and does not purport to, speak for the New Zealand Government in this report.

Statutory amendments to New Zealand privacy law

- 6 The legal standards for the protection of personal data in New Zealand are primarily set out in the Privacy Act 2020 (**Act**) that came into force on 1 December 2020. The Act covers the entire public and private sectors, with a few specific public interest exemptions that one might expect in a democratic society.

² [2013/65/EU](#): Commission Implementing Decision of 19 December 2012 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data by New Zealand (notified under document C(2012) 9557).

³ See [C/2016/8353 Commission Implementing Decision \(EU\) 2016/2295 of 16 December 2016 amending Decisions 2000/518/EC, 2002/2/EC, 2003/490/EC, 2003/821/EC, 2004/411/EC, 2008/393/EC, 2010/146/EU, 2010/625/EU, 2011/61/EU and Implementing Decisions 2012/484/EU, 2013/65](#).

⁴ 2013/65/EU, above n 2.

- 7 During the period of this report, the Privacy Act was amended by [Part 31 of the Statutes Amendment Act 2022](#) (29 November 2022) and by the [Firearms Prohibition Orders Legislation Act 2022](#) (15 November 2022).
- 8 The Statutes Amendment Act 2022 included the following clarifying amendments to the Privacy Act 2020:
- a clarifying that personal information held by an agency solely for safe custody or processing is treated as being held by the agency on whose behalf the information is stored or for which the information is processed ([section 11](#));
 - b reinstating the Human Rights Review Tribunal's power to make and review interim orders under the Human Rights Act (sections [107\(4\)](#) and [132\(4\)](#));
 - c clarifying that “officers” of an agency are not individually liable for an agency's failure to notify a notifiable privacy breach, consistent with the position of employees, agents and members of agencies (sections [120](#) and [121](#));
 - d including the Independent Police Conduct Authority as a person that the Privacy Commissioner may consult ([section 208](#)).
- 9 The Firearms Prohibition Orders Legislation Act 2022 amended Schedule 4 of the Privacy Act (enabling access to law enforcement information) to provide the Department of Corrections with access to information held by the New Zealand Police relating to firearms prohibition orders made under the Arms Act 1983. Access is for the purpose of managing an offender's sentence, post-sentence conditions or supervision or public safety orders

Codes of Practice

- 10 In the twelfth report to the European Commission, the Privacy Commissioner confirmed that the six codes of practice issued under the Privacy Act 1993 were repealed and replaced under the Act to reflect changes in the new Privacy Act 2020 with effect from 1 December 2020.⁵ Information about the revised Codes of Practice is available on our website [here](#).
- 11 No amendments have been made to the Codes of Practice during the Review Period.

Part 7(1): Approved information sharing agreements

- 12 The first and second reports in this series of periodic updates explained the operation of that part of the Privacy Act (now Part 7, subpart 1) that provides for ‘approved

⁵ Periodic Update Report on Developments in Data Protection Law in New Zealand (July – December 2020): Twelfth Report to the European Commission by the competent supervisory authority for the application of the Legal Data Protection Standards in New Zealand (Privacy Commissioner of New Zealand, 29 January 2021) at 7.

information sharing agreements' (known as **AISAs**) that can be approved by Order in Council from time to time.

- 13 Part 7, subpart 1 of the Act sets out relevant process safeguards to ensure that an AISA does not unreasonably impinge on the privacy of individuals and contains adequate safeguards to protect their privacy. For example, the Act requires agencies to undertake a privacy impact assessment when developing an AISA. The approval process has a number of system checks including consultation with the Privacy Commissioner and relevant groups and stakeholders, ministerial recommendation after taking into account consultation submissions and a set of statutory considerations, authorisation by the Executive, and ongoing reporting and Privacy Commissioner review. You can review the summary details of each AISA in [Schedule 2 to the Act](#).
- 14 No further AISAs have been approved in this period.

Other statutory developments

- 15 There are no other significant statutory developments to draw to your attention in the Review Period.

Significant court cases

- 16 In the New Zealand legislative scheme for privacy and data protection, individuals do not need to use the courts to enforce their rights. Instead, individuals generally bring complaints to the Privacy Commissioner for resolution at no cost to that individual.
- 17 Nonetheless, some parties may still choose to bring relevant privacy cases to the courts. For instance, cases that are not resolved through the Commissioner's processes can be taken to the Human Rights Review Tribunal which is part of New Zealand's system of specialist statutory tribunals. Cases can be appealed from the Tribunal through the court system. Parties may also use the vehicle of judicial review to challenge a public sector agency's decision with respect to personal information.
- 18 There is one proceeding of interest to draw to your attention during this period. This affirms the role and function of the courts in privacy-related matters by providing injunctive relief to protect against the further use and dissemination of compromised data following serious privacy breaches.

Injunction to protect confidential information following serious ransomware attack:

- 19 In December 2022, following a serious ransomware attack on IT service provider Mercury IT by unknown actors resulting in the threat of exfiltration of personal information, Te Whatu Ora Health New Zealand and the Attorney General in respect of the Ministry of Justice obtained an urgent order from the High Court of New Zealand which restrains all "unknown defendants" from accessing or performing any set of

operations on the data illegally obtained as a result of the attack.⁶ Media entities are included within the scope of the orders. In 2023 the court will consider whether the orders will be varied or confirmed following argument from any interested parties.

Other developments

20 There are two other developments of note during this period that I draw to your attention.

Release of joint inquiry report with the Independent Police Conduct Authority

- 21 The Independent Police Conduct Authority and the Office of the Privacy Commissioner released a joint report into Police conduct when photographing members of the public on 8 September 2022.⁷ The report found that a general lack of awareness amongst Police of their obligations under the Privacy Act led to officers routinely taking, using and retaining photographs when it is not lawful for them to do so. It also found that thousands of photographs of members of the public have been kept on the mobile phones of individual officers or, if transferred to the Police computer system, not destroyed after there is no longer a legitimate need for them.
- 22 The Joint Inquiry was initiated in March 2021 after Wairarapa whānau complained that Police officers were photographing their rangatahi in circumstances they felt was unfair or unjustified. Subsequent media coverage led more people to report similar experiences. It became apparent that the issues these incidents raised had much broader application, and the Inquiry considered wider concerns about the way in which photographs or video recordings of members of the public were being taken, used, and retained in a variety of policing contexts.
- 23 The Joint Inquiry made it clear that, while Police will sometimes have lawful and valid reasons to take photographs, this must be done in a privacy-compliant way. Digital photography can be a powerful policing tool, but as sensitive biometric personal information it must also be collected, used, stored and retained lawfully and safely.
- 24 In December 2021 the Deputy Privacy Commissioner issued a compliance notice to Police to stop collecting duplicate photographs and biometric prints from young people and delete unlawfully collected material. Police have been reporting regularly on progress with the compliance notice.
- 25 Police are consulting quarterly with the Office of the Privacy Commissioner on progress with this work and publish progress updates on both the compliance notice and Joint Inquiry recommendations on their website.

⁶ [*Te Whatu Ora Health New Zealand & Attorney General \(In Respect of the\) Ministry of Justice v Unknown Defendants* \[2022\] NZHC 3568 \(20 December 2022\)](#)

⁷ Privacy Commissioner, "Joint IPCA/OPC investigation recommends overhaul of Police privacy practices", [media statement](#) 8 September 2022.

Broadcasting Standards Authority privacy decision following cyber attack

- 26 In our fourteenth report (January 2022), we noted a significant ransomware attack against the Waikato District Health Board.
- 27 Following reporting by state media, the Privacy Commissioner and others complained to the New Zealand Broadcasting Standards Authority (**BSA**) about reporting derived from stolen information from the cyber-attack and the broadcast of sensitive details concerning the unique aspects of a child's care.
- 28 On 14 September 2022, the BSA released its decision which found breaches of the privacy and fairness standards from the broadcast.⁸ The Privacy Commissioner's statement is available [here](#).

Further information and reports

- 29 If you have any further questions or would like further information please contact Joanna Hayward, General Counsel, Office of the Privacy Commissioner at joanna.hayward@privacy.org.nz.
- 30 In due course, we will publish this report on the website of the Office of the Privacy Commissioner at www.privacy.org.nz.
- 31 It is anticipated that the next periodic report will be provided in July 2023.

⁸ [Seven Complainants and Radio New Zealand Ltd – 2021-090 \(14 September 2022\)](#)