

Privacy Commissioner's submission on the Earthquake Commission Amendment Bill

Executive Summary

1. One of my functions under the Privacy Act 1993 is to examine legislation before Parliament and to consider any matters affecting individuals' privacy. The Privacy Act is New Zealand's main privacy law. It governs the collection, use, storage and disclosure of personal information and provides a mandate for my Office to consider wider developments or actions that affect personal privacy.
2. The Earthquake Commission Amendment Bill (the Bill) makes a number of changes to the Earthquake Commission Act 1993 (EQC Act) to "simplify and speed up" the Earthquake Commission's (EQC's) handling of claims for natural disaster damage.
3. My comments on the Bill relate solely to clause 31A, which provides for EQC to release and publish information. Officials consulted my Office as part of the policy development for the Bill, but I did not have an opportunity to review the Bill prior to introduction.
4. I agree with the policy intent to provide greater certainty for EQC as to when it can release information to settle insurance claims and facilitate wider public purposes. However, I consider the approach taken in this Bill could have unintended consequences for privacy and lead to greater complexity for EQC.
5. I propose an alternative, simpler approach to achieve the policy intent. I **recommend** the Committee removes clause 31A as currently drafted and amends the Bill to provide for routine purposes for which EQC collects information. This will allow EQC to disclose information with greater certainty, including personal information within the rights and protections provided by the Privacy Act. I provide potential drafting in my submission.
6. Should the Committee not accept my alternative approach, I **recommend** clause 31A(4) is removed from the Bill as it interferes with the definition of personal information under the Privacy Act and will create confusion.
7. EQC can already disclose personal information to prevent or lessen a serious threat to public health or safety under Information Privacy Principle (IPP) 11(f) of the Privacy Act. If EQC is only concerned about privacy constraints on disclosing personal information, I consider that an exception for public health and safety, as proposed in clause 31A(1) is unnecessary in this Bill.

8. However, if EQC is also concerned about other, non-privacy constraints on disclosing non-personal information, then regardless of whether clause 31A is retained or not, I **recommend** a provision for EQC to disclose information that is consistent with the “serious threat” exception provided by IPP 11(f).

This Bill intends to address uncertainty as to when EQC can disclose information

9. Clause 31A of the Bill seeks to address a problem with EQC not disclosing information when it is necessary to settle claims or when there is a public interest in doing so. Officials advise this is because of perceived privacy constraints and the potential for property owners to object to information about their properties being released¹.
10. Whereas private sector agencies can negotiate information rights and protections with their customers, EQC’s relationship with its claimants is governed by statute. Without clear guidance in the EQC Act I understand EQC is uncertain about when it can disclose information, including personal information.
11. I agree information EQC holds should be available to others when it is necessary to settle claims or to facilitate wider public purposes, such as those set out in the Bill.

Clause 31A creates a statutory authority for EQC to disclose information

12. Clause 31A of the Bill provides EQC with a statutory authority to release and publish information. Clause 31A sets out the purposes for which EQC will be able to release information and further tests it will need to apply. EQC will be able to release information for the purposes of:
- i. preventing or lessening a threat to public health or safety, or to the life or health of any individual
 - ii. administration of the EQC Act or performance of its functions
 - iii. facilitating natural disaster preparedness, response and recovery including settlement of insurance claims, and
 - iv. making property-related information publicly available (defined under clause 31A(6) as “information about property...not including information about any claimant personally”).
13. Clause 31A establishes further legal tests that must be met before information can be shared. For example, if relying on the natural disaster or public release grounds, EQC must also be satisfied that release is in the public interest. If personal information is being released under the first three grounds (i.e. excluding information being made publicly available), EQC must further satisfy itself that “appropriate protections are or will be in place to maintain the confidentiality of the information”.

¹ The Treasury, Regulatory Impact Assessment Earthquake Commission Amendment Bill, 22 March 2018 - The Treasury

This approach is likely to lead to unintended consequences for privacy and more uncertainty for EQC

Clause 31A(4) interferes with the Privacy Act

14. The Privacy Act deals with personal information, defined as “information about an identifiable individual”.
15. EQC holds information about properties that are subject to EQC claims. The extent to which this information is “personal information” under the Privacy Act depends on context². Property information can be personal – information about damage to a property, for example, can be information about the property’s owner because of its direct implications for the owner’s situation³.
16. Clause 31A(6) of the Bill distinguishes between several categories of information. These include “property-related information”, defined as information about property “not including information about any claimant personally”. Clause 31A(4) excludes property-related information from the definition of “personal information” in the Privacy Act.
17. I do not support clause 31A(4) as it departs from the definition of personal information in the Privacy Act. The concept of personal information can be found across the statute book. Creating a bespoke definition for EQC’s specific circumstances is unnecessary and will cause confusion. In particular I am concerned about potential interference with individuals’ wider privacy rights, such as their rights to access and correct their personal information.

The legal tests in clause 31A will create uncertainty

18. Clause 31A contains a number of new legal tests EQC will have to apply when it wants to release information. Contrary to the policy intent, I do not consider that these tests will reduce uncertainty or legal risk. In fact, they are likely to introduce complexity that is not currently present under the Privacy Act.
19. In addition to applying the purpose grounds under clause 31A(1) and distinguishing between different types of information under clause 31A(6) EQC will also need to consider the public interest and future confidentiality of the information under clause 31A(2).
20. The requirement for EQC to be satisfied that information will be treated confidentially after it has been shared seems particularly unworkable in practice. For example, when applied to the purpose under 31(A)(1)(a) where EQC may share information for public safety, information may well need to be on-shared to prevent or lessen a threat. There are no comparable confidentiality requirements on top of the health and safety exception in IPP 11(f) of the Privacy Act, or other Privacy Act exceptions that could apply to EQC.

² *Sievwrights v Apostolakis* HC Wn CIV 2005 485 527 [17 December 2007]

³ See Case Note 228045 [2012] NZ PrivCmr 8: *Woman requests geotechnical property report from a council's insurance company*

The public safety threshold in clause 31A(1) is inconsistent with the Privacy Act

21. Clause 31A(1)(a) provides EQC with authority to release information for the purpose of “preventing or lessening a threat to public health or public safety or to the life or health of any individual”.
22. I understand there have been situations where EQC has considered it is constrained from disclosing information when there is a threat to public health and safety. Officials advise this is due to privacy concerns regarding disclosing personal information.
23. Clause 31A(1)(a) is not consistent with the current health and safety exception under IPP 11(f) of the Privacy Act. IPP 11(f) requires a “serious” threat. The “serious threat” threshold requires an agency to take into account the likelihood of the threat being realised and severity of the consequences⁴.
24. I have not seen a policy justification for a lower threshold in this Bill, and I consider EQC should be subject to the serious threat threshold in the Privacy Act.
25. My concerns with clause 31A as currently drafted would be addressed by recommendations I set out below.

Establishing statutory purposes for EQC to collect information would provide a simpler method to achieve the intended outcome

26. A simpler solution that would avoid much of the complexity I have identified is to include in the EQC Act a set of routine purposes for which EQC collects information. These purposes would support EQC’s disclosure of information, including personal information within the Privacy Act framework. IPP 11 provides a number of circumstances within which an agency may disclose personal information, and these include when the agency reasonably believes the disclosure is one of the purposes, or is related to the purpose for which it collected the information.
27. This approach would not require new safeguards for personal information in the EQC Act. EQC could handle personal information within the normal rights and protections in the Privacy Act. IPPs 1 and 3 require EQC to only collect information necessary to fulfil its lawful purposes, and communicate what it may do with individuals’ information at the time of collection.

⁴ Section 2, Privacy Act 1993

28. The statutory purposes should broadly cover the purposes for which Government intends EQC to use and disclose information. I **recommend** the Committee removes clause 31A as currently drafted and inserts a set of statutory purposes, that could be drafted as follows:

Purposes for which Commission may collect information

(1) The purposes for which the Commission may collect information include:

- (a) the administration of this Act and the performance by the Commission of its functions
- (b) facilitating natural disaster preparedness, response, or recovery (including settlement of insurance claims by insurance companies)
- (c) making information about a property available, including publicly available, to facilitate access by any person with a legitimate purpose for access.

If the Committee does not accept my proposed alternative, this Bill should not interfere with the definition of personal information under the Privacy Act

29. My recommended approach would provide EQC with greater certainty for releasing information under the Privacy Act, including personal information. If the Committee does not accept my previous recommendation, it should remove clause 31A(4), which interferes with the definition of personal information under the Privacy Act, from the Bill. This amendment will avoid confusion and potential interference with individuals' wider privacy rights.

30. I **recommend** clause 31A(4) is removed from the Bill.

Under either approach, EQC should be able to disclose information to prevent or lessen serious threats

31. EQC should be permitted to disclose information it holds when it is necessary to prevent or lessen a serious threat to public safety. My understanding is that EQC intends to provide this information by exception, rather than systematically. It wants to be able to disclose information if it happens to identify a threat to safety.

32. If this information is personal information, EQC should already be able to disclose it under IPP 11(f), the relevant exception within the Privacy Act. Therefore, if EQC is only concerned about privacy constraints on disclosing personal information, I consider an exception for public health and safety is unnecessary in this Bill.

33. EQC may also be concerned about other, non-privacy constraints on disclosing non-personal information. If this is the case then regardless of whether clause 31A is retained or not, I **recommend** that EQC should be provided with a power to disclose information that aligns with the relevant exception in the Privacy Act as follows:

The Commission may release information held by the Commission if it believes, on reasonable grounds, that disclosure is necessary to prevent or lessen a serious threat (as defined in section 2(1) of the Privacy Act 1993) to –

- a) public health or public safety; or
- b) the life or health of the individual concerned or another individual

Conclusion

34. I support this Bill's intention to provide EQC with a workable solution to the uncertainty it currently faces in disclosing information. The alternative approach I have proposed in my submission would achieve the policy intent in a privacy-protective way.
35. For the reasons given in my submission I **recommend** the Committee removes clause 31A as currently drafted and amends the Bill to provide for routine purposes for which EQC collects information.
36. Should the Committee not accept my alternative approach, I **recommend** clause 31A(4) is removed from the Bill as it interferes with the definition of personal information under the Privacy Act and will create confusion.
37. I note EQC can already disclose personal information to prevent or lessen a serious threat to public health or safety under IPP 11(f) of the Privacy Act. If EQC is also concerned about constraints on disclosing non-personal information I **recommend** a provision for EQC to disclose information that is consistent with the "serious threat" exception provided by IPP 11(f).
38. I trust my comments are of use to the Committee in its consideration of the Bill. I do not seek to be heard on my submission but am happy to appear before the Committee if that would assist the Committee.

Yours sincerely,

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a long, sweeping horizontal stroke that ends in a small loop.

John Edwards
Privacy Commissioner