

**Periodic Update Report
On
Developments in Data Protection Law
In New Zealand**

(July – December 2017)

Sixth Report to the European Commission

By the Competent Supervisory Authority

For the Application of the Legal Data Protection Standards

In New Zealand

22 December 2017



Privacy Commissioner
Te Mana Matapono Matatapu
New Zealand

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22 December 2017

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

Dear Bruno

Update report on developments in New Zealand data protection law

I submit this 6th report¹ 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 6 months since my last report dated 26 June 2017.

I have made one small enhancement to the structure of this report by including a part entitled 'significant court cases'. I trust that separating this material out from the 'other developments' category may be helpful to the Commission on the rare occasions where the intervention of the Courts has particular impact on the level of data protection in New Zealand.

I am aware that the New Zealand Government has separately provided you with a report in response to your request for additional information on the conditions under which New Zealand public sector agencies are able to access personal information. I trust that this brief general overview of developments in the last six months will, together with that other detailed report, assist in your monitoring of the level of data protection under New Zealand law.

Yours sincerely



John Edwards
New Zealand Privacy Commissioner

¹ Earlier reports are available at <https://privacy.org.nz/news-and-publications/reports-to-parliament-and-government/reports-on-new-zealand-adequacy-to-the-european-commission/>

1. Background

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 EU.

The EC has a responsibility to monitor the functioning of the decision. To assist the EC 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’ has undertaken periodically to submit update reports on developments in New Zealand data protection law.

On 22 December 2015 the Privacy Commissioner submitted the [first report](#) that surveyed developments since the commencement of the EC decision in 2013. That initial report was updated by other reports dated [2 March](#) (supplement), [30 June](#) and [9 December](#) 2016 and [June 2017](#). This report covers the period June to December 2017 (inclusive).

Regulation (EU) 2016/679 of 27 April 2016 (known as the General Data Protection Regulation or GDPR) will repeal the 1995 Directive when it comes into effect next year on 25 May 2018. However, GDPR Article 45(9) provides that the decisions adopted by the Commission on the basis of Article 25(6) of Directive 95/46/EC will remain in force until amended, replaced or repealed by a Commission decision adopted in accordance with GDPR Article 45(3) or (5). Accordingly, the EC adequacy decision covering New Zealand will continue in the new GDPR regime.

In this report the Privacy Commissioner does not purport to speak for the New Zealand Government.

2. Statutory amendments to New Zealand privacy law

The legal standards for the protection of personal data in New Zealand are primarily set out in the Privacy Act 1993. The Act covers the entire public and private sectors, with a few specific public interest exemptions that one would expect in a democratic society.

Privacy Act amended by Enhancing Identity Verification and Border Processes Legislation Act 2017

The Enhancing Identity Verification and Border Processes Legislation Act 2017 inserted into the Privacy Act a new Part 10A: Identity Information.² The new Part commenced on 22 August 2017.

The legislation gave effect to recommendations of a government inquiry that examined shortcomings in government processes, particularly in relation to the use of aliases and information sharing, which had contributed to the escape of a notorious criminal and his flight to Brazil.³

The purpose of Part 10A is to authorise certain public bodies (termed ‘accessing agencies’ for the purpose of the Part and the associated Schedule 4A), when carrying out certain specified functions, to verify the identity of an individual by accessing identify information held about the individual by other specified public bodies (termed ‘holder agencies’).

The new Part of the Act provides, in the public interest, express statutory authority to use and disclosure identified classes personal information already held by named government agencies for

² The Act also amended 8 other statutes and several statutory instruments.

³ Government Inquiry into Matters Concerning the Escape of Phillip John Smith/Traynor, 25 August 2015.

certain carefully defined purposes. Although the Part is new, and explicit, it does not alter the level of data protection in New Zealand law but rather should properly be seen as an amplification of the arrangements already set out in the Privacy Act in section 7 (which saves the effect of provisions in legislation authorising the use of information) and the exceptions to the information privacy principles allowing for disclosures necessary for the maintenance of the law.

Part 9A Authorised Information Sharing Agreements

The first and second reports in this series of periodic updates explained the operation of Part 9A inserted into the Privacy Act in 2013. As mentioned in that material, new 'approved information sharing agreements' can be approved by Order in Council from time to time

Recently issued Orders include:

- Privacy (Information Sharing Agreement between Ministry of Justice and Statistics New Zealand) Order 2017 – issued 27 March 2017.⁴
- Privacy (Information Sharing Agreement between Inland Revenue and Ministry of Social Development) Order 2017 – issued 31 July 2017.
- Privacy (Information Sharing Agreement between Ministry of Justice and Crown Law Office) Order 2017 – issued 14 August 2017.

As explained on an earlier occasion, approved information sharing agreements authorise exemptions from or modifications to information privacy principles. This can be explained by the fact that they are approved by Order in Council and thus have the status of regulations. The Privacy Act has always provided that other enactments, including regulations, prevail over the information privacy principles. Accordingly, the issue of additional approved information sharing agreements does not constitute a weakening of privacy protections but a continuation of a constitutional balance struck in 1993.

Privacy Act amended by Intelligence and Security Act 2017

The previous periodic update fully reported on the amendments to the Act made in March 2017 by the Intelligence and Security Act 2017. For the sake of completeness it may be noted that these commenced on 28 September.

3. Other statutory developments

There are no other significant statutory developments to draw to your attention in this period.

4. Significant court cases

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.

Nonetheless Privacy Act cases can come before the courts through a variety of channels. For instance, cases that are not resolved through the Commissioner's processes can be taken to the

⁴ This related to an earlier period but is listed for the sake of completeness as it was not mentioned in the previous periodic report.

Human Rights Review Tribunal which is part of New Zealand's system of specialist statutory tribunals. Cases can be appealed from the Tribunal to the District Court and upward through the courts systems to the High Court and, ultimately, the Supreme Court. Matters may also arrive in the court system through judicial review of the actions of the Privacy Commissioner. Finally, courts may occasionally provide interpretations of the Privacy Act in general civil litigation or criminal proceedings where the Act is relevant to the matters in issue (such as the judgment in criminal proceedings mentioned below).

In addition the courts might rule on matters generally affecting privacy and data protection outside the scope of the Privacy Act. It is not possible to offer a finite list of such proceedings but two examples may suffice. First would be where an individual sues under the common law tort of invasion of privacy. Second, would be civil or criminal proceedings having a privacy character taken under another statutory scheme such as the Harmful Digital Communications Act.

There were a number of routine Tribunal decisions during the period and one High Court judgment resulting from a judicial review of the actions of the Privacy Commissioner. These are not significant for the purposes of this report.

However, the Supreme Court, New Zealand's highest court, issued one decision of note⁵ related to the disclosure of personal information to law enforcement agencies on request. The Privacy Act permits personal information to be disclosed to law enforcement agencies under exceptions to information privacy principle 11, including where necessary to avoid prejudice to the maintenance of the law or to prevent or lessen a serious threat to health or safety.

The judgment has clarified the law in relation to the obligations and responsibilities on both law enforcement agencies and the agencies from whom disclosure is sought. The decision affirms the importance and policy of the Privacy Act, and its relationship with the Search and Surveillance Act 2012 and the constitutional protection from unreasonable searches under the New Zealand Bill of Rights Act 1990. Depending on the nature of the information and whether there is a reasonable expectation of privacy in the circumstances, obtaining personal information by law enforcement request may be a 'search' and require the judicially authorised production order process to be lawful.

5. Other developments

There are no other developments of significance to report.

6. Further information and reports

Further information about any aspect of this report may be requested from Blair Stewart, Assistant Commissioner (Auckland), Office of the Privacy Commissioner at blair.stewart@privacy.org.nz.

In due course, this report will be published on the website of the Office of the Privacy Commissioner.

It is anticipated that the next periodic report will be provided in June 2018 or thereabouts.

⁵ R v A [2017] NZSC 42.