

10 July 2017

Submissions on Amendments to the HIPC, CRPC and TIPC
Office of the Privacy Commissioner
P O Box 10094
Wellington

Re: Proposed amendments to Privacy Codes – intelligence and security disclosures

The New Zealand Law Society welcomes the opportunity to comment on proposed amendments to the Health Information Privacy Code, Telecommunications Information Privacy Code and the Credit Reporting Privacy Code (the HIPC, TIPC and CRPC respectively). The amendments will align the Codes with changes introduced by the Intelligence and Security Act 2017 (the Act) that come into force on 28 September 2017.

Overview

Section 314 of the Act amends principle 11 of the Privacy Act, adding a specific exception for disclosures to the intelligence and security agencies (the NZSIS and GCSB). The amendment to principle 11 requires a revision of the equivalent rule (rule 11) in the HIPC, TIPC and CRPC, providing that a health, telecommunications or credit reporting agency may disclose personal, health, credit or telecommunications information if the agency is satisfied that the disclosure is necessary to enable an intelligence and security agency to perform any of its functions.¹

The Commissioner seeks feedback on whether the proposed amendments require any revision before they are formally made under Part 6 of the Privacy Act, and on the placement of the amendments in the HIPC and the CRPC.

Comments

The Law Society made a submission on the New Zealand Intelligence and Security Bill in 2016, in which it acknowledged the value of adding privacy protections and increased oversight of information disclosures to intelligence agencies:

“The [Bill’s proposed] new exception to principle 11^[1] is arguably unnecessary since the existing exceptions to the principles are broad enough to cover disclosures to the intelligence agencies.

¹ Intelligence and Security Act 2017, ss 10 – 14.

[1] Explanatory Note to the Bill, at p 27: The exception will allow an agency holding personal information to disclose the information if the agency believes on reasonable grounds that the disclosure is necessary to enable an intelligence and security agency to perform a statutory function.

However, if the exception will assist to remove doubt, the Law Society has no objection to it, particularly as it adds some privacy protection when compared with the existing section 57 of the Privacy Act. There is a greater degree of oversight. Also, it removes the blanket exception for disclosing information to an intelligence agency. Instead, the disclosing agency will need to be able to form a reasonable belief that the disclosure fits the exception. This will not be hard, in most instances, but it requires all agencies to turn their minds to making sure the transaction is justifiable.

In line with this position, the Law Society supports the proposed amendments to the three Privacy Codes.

Health Information Privacy Code 1994

The Law Society agrees with the proposed amendment to Rule 11 of the HIPC which inserts sub-clause (2)(da):

“the disclosure of the information is necessary to enable an intelligence and security agency to perform any of its functions.”

The Information Paper accompanying the proposed amendments notes that this HIPC amendment “will mean that a health agency deciding whether to disclose information to an intelligence and security agency must first consider whether it is appropriate for the individual concerned to authorise the disclosure (subclause (1)(b) - seeking consent) unless the health agency believes on reasonable grounds that obtaining authorisation is not desirable or practicable and that the exception under new subclause (2)(da) applies”.

This means an agency will need to consider consent before disclosure. This is an appropriate consideration for health agencies due to the sensitivity of health information, and should not be a significant barrier. The amendment fits within the maintenance of the law exception which is also included under Rule 11(2).

The Law Society also supports the proposed placement of the amendment under Rule 11(2).

Telecommunications Information Privacy Code 2003

The Law Society agrees with the proposed amendment to Rule 11 of the TIPC which inserts sub-clause (1)(ga):

“that the disclosure of the information is necessary to enable an intelligence and security agency to perform any of its functions.”

Credit Reporting Privacy Code 2004

The Law Society agrees with the proposed amendment to Rule 11 of the CRPC which inserts sub-clause 1(ca):

“that the disclosure of the information is necessary to enable an intelligence and security agency to perform any of its functions”

and sub-clause 1(cb):

“in accordance with an access agreement.”

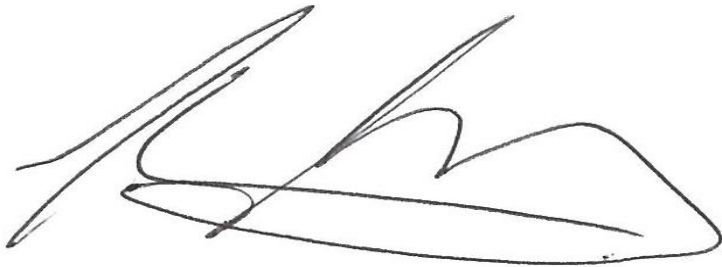
The additional amendment in Schedule 3A to create an access agreement between an intelligence and security agency and a credit reporter, sets out new compliance and review requirements for security clearance assessments. The Law Society supports this additional review procedure. An access agreement

will increase confidence in credit reporters' use of credit information. It will also increase trust and confidence in intelligence and security agencies who are required to submit to systematic reviews.

Conclusion

If you wish to discuss these comments please do not hesitate to contact Dr Andrew Butler, convenor of the Law Society's Human Rights and Privacy Committee, through the committee secretary Angela Williams (angela.williams@lawsociety.org.nz).

Yours faithfully

A handwritten signature in black ink, appearing to be 'Kathryn Beck', written in a cursive style.

Kathryn Beck
President