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NEW ZEALAND
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14 September 2017

Immigration New Zealand, Refugee Status Branch
Ministry of Business, Innovation and Employment
PO Box 90533
Victoria Street West
Auckland

Attention: Dougal Ellis, Branch Manager

By email: dougal.ellis@mbie.govt.nz

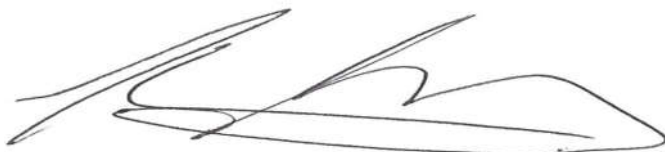
Dear Mr Ellis

Refugee Status Branch: draft Confidentiality Guidelines

1. The New Zealand Law Society welcomes the opportunity to make comments on the proposed draft Confidentiality Guidelines and commends the Refugee Status Branch (RSB) for engaging in this consultation process.
2. The development of guidelines is a positive step that will provide greater clarity and transparency for both claimants and officials.
3. The Law Society's primary submission is that the guidelines would be strengthened by providing a slightly greater level of detail (particularly in the "principles" section, but also in the section summarising the key provisions of the Immigration Act). The Law Society acknowledges that the guidelines are intended to be "principles" and are not intended as operational level guidelines. However, in admirably aiming for brevity the current draft may in some respects provide an incomplete explanation of the permitted use and disclosure of information provided to the RSB.
4. In an effort to assist, the Law Society has marked up the **attached** version of the draft guidelines with suggested changes intended to address that concern. We trust that most of these suggested changes are self-explanatory. But if it would assist, we are happy to discuss these suggestions with you.
5. In addition to the suggested changes shown in the attachment, the Law Society makes the following specific drafting comments:
 - (a) Section 4 (knowledge and consent), second paragraph. The Law Society submits that the fact that there is no likelihood of endangering the safety of any person does not justify not discussing an intended inquiry in advance. We therefore recommend removing these words.
 - (b) Section 6 (inquiry from third parties), second paragraph. It would be useful to include some examples of how this might happen.

- (c) Section 7 (results), second paragraph. The Law Society recommends deleting the second paragraph. We cannot think of a situation where the RSB would be justified in *not* putting adverse information to the claimant. Doing so would be inconsistent with the obligation to comply with the requirements of natural justice.
6. In addition to those drafting comments, the Law Society also recommends that the RSB create a template document to be used to evaluate proposed disclosures that it is considering making without the consent of the claimant. The use of a template as a decision-making tool would help to ensure that all relevant considerations were taken into account, would ensure consistent decisions are made by different RPOs (refugee and protection officers), and would also allow for oversight. Without intending to be exhaustive, the template could:
- (a) require the requesting RPO to identify which of the section 151 exceptions to confidentiality is relied on and the reasons why the requirements are met;
 - (b) require the requesting RPO to identify the purpose that disclosure will serve in the particular case;
 - (c) require the requesting RPO to identify any risk(s) that disclosure will identify the claimant or be likely to endanger the safety of any person;
 - (d) require the requesting RPO to identify and consider the alternatives to requesting disclosure (including identifying why they are insufficient);
 - (e) require the requesting RPO to record the claimant's views; and
 - (f) record the Technical Advisor's reasons for either authorising or declining the disclosure.
7. Any such template document could be referred to in the guidelines as it would provide another helpful way of explaining how information provided to the RSB will be used and disclosed.
8. If you have any queries arising from these submissions, please do not hesitate to contact the Law Society's Immigration and Refugee Law Committee convenor Mark Williams (in the first instance through the Committee secretary, Amanda Frank: amanda.frank@lawsociety.org.nz / 04 463 2962). In the meantime, thank you for the opportunity to comment.

Yours sincerely



Kathryn Beck
President

Encl: tracked-change version of draft Confidentiality Guidelines

Refugee Status Branch: Confidentiality Guidelines

These guidelines are for refugee and protection officers, claimants, refugees and protected persons and their representatives involved in the determination of refugee or protected person status before the Refugee Status Branch in New Zealand. They concern the confidentiality of information provided by claimants, refugees and protected persons, and the grounds and procedures for disclosing such information in the course of an inquiry into the claim or matter.

These guidelines do not apply to biometric checks conducted with New Zealand's Five Country Conference ("FCC") partner countries (Australia, Canada, United Kingdom and United States).¹

These guidelines were developed in 2017.

PRINCIPLES

The fact that a person is a claimant, refugee or a protected person and all information provided by claimants, refugees and protected persons is confidential. The physical safety and protection of claimants, refugees and protected persons as well as that of their families or associates, is a paramount consideration and may be jeopardised if confidentiality is not maintained.

The Immigration Act 2009 imposes an obligation on all persons to maintain that confidentiality at all times during and subsequent to the determination of the claim or other matter.

However, That confidentiality obligation is subject to is limited exceptions, set out in the Immigration Act. The exceptions include disclosure for:

- (a) the purposes of determining the claim or matter, administering the Act, or determining any obligations, requirements, or entitlements of the claimant or other person concerned under any other enactment;
- (b) for the purposes of the maintenance of the law, including for the prevention, investigation, and detection of offences in New Zealand or elsewhere; and
- (c) if, in the circumstances of the particular case, there is no serious possibility that the safety of the claimant or any other person would be endangered by the disclosure of the information, and disclosure of refugee information is permitted in certain circumstances, for example, to determine the claim or maintain the law, except where the disclosure is likely to endanger the safety of any person.

Case law establishes that the right to confidentiality should be modified only to the extent strictly necessary to give effect to the limited disclosure permitted by the Act.

¹ <https://www.immigration.govt.nz/documents/about-us/privacyimpactassessment.pdf>

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In deciding whether to disclose information under one of these exceptions, regard must be had to the purpose that disclosure will serve in the particular case and also any risk that disclosure will identify the claimant or be likely to endanger the safety of any person

If information is disclosed to another person, that person is also bound by the confidentiality obligation in the Act and must be informed of that obligation.

A person who fails to maintain confidentiality commits a criminal offence.

DEFINITIONS

RSB refers to the Refugee Status Branch.

RPO refers to a refugee and protection officer.

Claim refers to an application for refugee and protected person status under the Immigration Act 2009.

Claimant refers to a person who is making a claim.

Claimant information refers to the details of the claim.

INZ refers to Immigration New Zealand.

Manager refers to an Immigration Manager at RSB.

TA refers to a technical advisor at RSB.

Third country refers to a country which is neither New Zealand nor the claimant's country of origin.

Third party refers to a party (person, agency or organisation) outside the New Zealand government and UNHCR.

UNHCR refers to the United Nations High Commissioner for Refugees

1.1 THE IMMIGRATION ACT

The legislative provision regulating confidentiality of refugee claims are sections 151, ~~and 152~~ and 354 of the Immigration Act 2009.

The key legislative provisions are ~~reproduced noted~~ below (with the full text set out in the appendix):

151 Confidentiality to be maintained in respect of claimants, refugees, and protected persons

- (1) Confidentiality as to the fact that a person is a claimant, a refugee, or a protected person, and as to the particulars relating to the person's claim or status, must at all times during and subsequent to the determination of the claim or other matter be maintained by all persons and, in a particular case, may require confidentiality to be maintained as to the very fact or existence of a claim or case, if disclosure of its fact or existence would—

- (a) tend to identify the person concerned; or

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(b) be likely to endanger the safety of any person.

(2) Despite subsection (1), the fact of a claim or particulars relating to a claim may be disclosed—

(a) for the purposes of determining the claim or matter, administering this Act, or determining any obligations, requirements, or entitlements of the claimant or other person concerned under any other enactment; or

(b) for the purposes of the maintenance of the law, including for the prevention, investigation, and detection of offences in New Zealand or elsewhere; or

[...]

(e) if, in the circumstances of the particular case, there is no serious possibility that the safety of the claimant or any other person would be endangered by the disclosure of the information.

...

Section 152(2) of the Immigration Act provides that if information is disclosed, the RPO must:

(a) Inform the other officer or employee of the requirements of confidentiality in section 151; and

~~(a)~~(b) require that officer or employee not to disclose information of the kind described in section 151(1) to any other agency, body, or person, except as provided for in that section.

Section 354 makes it an offence to, without reasonable excuse, contravene section 151(1) or publish information released in contravention of section 151(1). Section 355 provides that the penalty for doing so is imprisonment for a term not exceeding three months, a fine not exceeding \$10,000, or both.

The objective of the confidentiality obligation is to give effect to the requirement in the Convention Relating to the Status of Refugees that refugees are afforded protection by contracting states.²

The right to confidentiality should be modified only to the extent strictly necessary to give effect to the limited disclosure permitted by the Act.³ In deciding whether to disclose information under section 151(2), regard must be had to both:⁴

² *K v Attorney-General* [2016] NZCA 416, [2017] 2 NZLR 167 at [50].

³ *Attorney-General v X* [2008] NZSC 48, [2008] 2 NZLR 579 at [18].

⁴ *K v Attorney-General* [2016] NZCA 416 at [50].

- (a) the purpose that disclosure will serve in the particular case; and
- (b) any risk that disclosure will identify the claimant or be likely to endanger the safety of any person.

If information is disclosed, the RPO should consider reasonable measures that reduce the risk that disclosure will identify the person or place the safety of anyone at risk, including giving appropriate undertakings about how information will be used.⁵

Natural justice may require that the RPO consider giving provisional confidentiality undertakings where the claimant, refugee or protected person says that they are necessary if relevant information is to be tendered in support of the person's position.⁶ In this situation, information is received on a provisional basis to support the assessment being made by the RPO. If, after assessment of the material, the RPO is not prepared to agree to additional protection measures, the information will be returned and not taken into account in the RPO's determination.⁷

RSB is entitled to investigate the truthfulness of statements which it has been asked to take into account in making a decision on a refugee and protection claim or other matter, to the extent it considers this is necessary or possible.⁸

Section 151(2) permits the verification of claimant and refugee information, without which claims may otherwise fail.⁹

2.2 SHARED INQUIRY AND THE BENEFIT OF THE DOUBT

The benefit of the doubt principle applies, and the claimant is not expected to prove his or her claim. The claimant is responsible for establishing his or her claim. It is a shared inquiry and it is incumbent on the RPO and the claimant to use the means at his or her disposal to produce the necessary evidence in relation to the refugee and protected person claim or matter. If the claimant has made a genuine effort to substantiate his or her claim, all available evidence has been obtained and checked and the decision maker is satisfied as to the claimant's general credibility, the claimant should, unless there are good reasons to the contrary, be given the benefit of the doubt.

3.3 SOURCES OF INFORMATION

⁵ *K v Attorney-General* [2016] NZCA 416 at [51].

⁶ *K v Attorney-General* [2016] NZCA 416 at [60].

⁷ *K v Attorney-General* [2016] NZCA 416 at [55(c)].

⁸ *K v Attorney-General* [2015] NZHC 2380 (30 September 2015) at [102].

⁹ *K v Attorney-General* [2016] NZCA 416 (21 September 2016) at [64].

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The claimant has the responsibility of establishing their claim.¹⁰ This responsibility includes providing supporting evidence where this is reasonably available.

The RPO can seek information from any source¹¹. Common sources of information about a claim or claimant, or a person's refugee or protected person status include, but are not limited to:

1. Information provided by the claimant or refugee or protected person
2. Country information and publically available information
3. Information on INZ files
4. Information from other New Zealand government agencies and public authorities¹²
5. Information from FCC partners
6. Information about the person's travel that is provided to INZ

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RPOs may seek **additional information** about a claim or claimant other than what is available through the above sources.

Additional information requests are not made to the agent of persecution, or in circumstances where the agent of persecution may learn of the claim, or its details. There may be exceptions to this where maintenance of the law issues arise. The nature of any such request depends on the circumstances of the case. Inquiries outside of New Zealand are made through a third party, not made directly by the RPO or the RSB.

43 KNOWLEDGE AND CONSENT

The RPO will discuss a proposed inquiry or request for additional information with the claimant, refugee or protected person in advance. This provides an opportunity to comment regarding any concerns the person may have about the inquiry.

In rare circumstances, the RSB may determine not to discuss any intended inquiry in advance. This may happen where the inquiry concerns a criminal matter, ~~or where there is no likelihood of endangering the safety of any person,~~ and discussing the inquiry in advance may jeopardise the integrity of the request.

The final decision whether to make an inquiry or seek additional information is for the RPO, in consultation with a TA or manager.

54 PRIVACY WAIVER

¹⁰ Sections 135, 136(4), 148(b) and 149(1)(h) of the Act state that it is the claimant's responsibility to establish their claim.

¹¹ Section 149(1)(g) Immigration Act 2009

¹² Sections 136(2) and 149(1)(g) of the Act.

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Agencies or organisations from which the RSB is seeking information or inquiring may require a claimant's authorisation to release his or her personal information. For example, the UNHCR or hospitals require authorisation before releasing personal information.

A claimant may be asked to sign a Privacy Waiver which states that the claimant authorises the source of the information to provide the requested information (usually to) INZ. No information about the claim or status is disclosed.

Should the claimant unreasonably refuse to sign a Privacy Waiver when this is required for the release of the information, and the request is reasonable and safe, a negative inference may be drawn.

~~65.~~ INQUIRIES FROM 3RD PARTIES ABOUT A CLAIMANT, REFUGEE OR PROTECTED PERSON

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The RSB and an RPO will not provide any information about a claim, claimant, refugee or protected person to anyone who contacts them unless they are an authorised contact person for that claim/claimant/refugee or protected person or unless they are able to receive the information under section 151(2) (see Appendix).

The RSB or RPO may receive information from a third party about a claimant where there is no requirement to disclose the person's status as a claimant, refugee or protected person, or details of the claim. Any such information received will be disclosed (see section 7 below).

~~75.~~ RESULTS

Should information be received which the RPO intends to take into account when making a decision, the RPO will provide a copy of it to the claimant to allow him or her the opportunity to comment. This reflects the fact that the requirements of natural justice must be followed.¹³

~~If there is a likelihood that providing the information to the claimant might endanger the safety of any individual, prejudice maintenance of the law or raise any other reason for withholding under the law, the RPO, in conjunction with a manager or TA, will review the information and decide if it should be provided to the claimant and in what form.~~

¹³ K v Attorney-General [2016] NZCA 416 at [58].

86 DISCLOSING INFORMATION CONTAINED IN OTHER PEOPLE'S IMMIGRATION FILES

In certain cases particulars relating to another person's refugee and protection claim may be relevant to the claim or matter to be determined. The most common example of this is where a family member has previously made or is making a concurrent claim to refugee and protected person status.

Typically, claimants who are part of a family group are asked to sign privacy waivers allowing their information to be shared with the other family members.

~~Even if~~ no privacy waiver is provided, the RPOs may disclose information provided in support of another person's refugee and protection claim, or other matter, ~~under maintenance of the law requirements or to assist in determining the claim or matter~~ only in accordance with the statutory exceptions to confidentiality found in section 151(2).

APPENDIX 1

Section 151 of the Act sets the parameters for the disclosure of claimant information.

151 Confidentiality to be maintained in respect of claimants, refugees, and protected persons

- (1) Confidentiality as to the fact that a person is a claimant, a refugee, or a protected person, and as to the particulars relating to the person's claim or status, must at all times during and subsequent to the determination of the claim or other matter be maintained by all persons and, in a particular case, may require confidentiality to be maintained as to the very fact or existence of a claim or case, if disclosure of its fact or existence would—
 - (a) tend to identify the person concerned; or
 - (b) be likely to endanger the safety of any person.
- (2) Despite subsection (1), the fact of a claim or particulars relating to a claim may be disclosed—
 - (a) for the purposes of determining the claim or matter, administering this Act, or determining any obligations, requirements, or entitlements of the claimant or other person concerned under any other enactment; or
 - (b) for the purposes of the maintenance of the law, including for the prevention, investigation, and detection of offences in New Zealand or elsewhere; or
 - (c) to the United Nations High Commissioner for Refugees (or a representative of the High Commissioner); or
 - (d) if the particulars relating to a claim are published in a manner that is unlikely to allow identification of the person concerned (whether in a published decision of the Tribunal under clause 19 of Schedule 2 or otherwise); or
 - (e) if, in the circumstances of the particular case, there is no serious possibility that the safety of the claimant or any other person would be endangered by the disclosure of the information.
- (3) In determining whether information may be released under subsection (2)(e), the person considering whether to disclose the information may have regard to the protections that the person, agency, or body to whom the information is disclosed may apply to the information, including—
 - (a) any applicable requirements of the Privacy Act 1993; and
 - (b) any orders of the Tribunal or other court; and
 - (c) any protection mechanisms that the person, agency, or body itself must or may apply.
- (4) If, in relation to a claim or particulars relating to a claim, the test in subsection (2)(e) is satisfied (the person concerned having considered the matters in subsection (3)),—
 - (a) the chief executive may publish the decision of a refugee and protection officer relating to the claim if the chief executive determines that, in the circumstances of the particular case, it is in the public interest to do so;
 - (b) the Attorney-General may, subject to any orders of the Tribunal, publish the decision of the Tribunal relating to the claim if the Attorney-General determines that, in the circumstances of the particular case, it is in the public interest to do so.
- (5) To avoid doubt,—
 - (a) a refugee and protection officer may disclose information under subsection (2)(a) when carrying out his or her functions under section 136(2) or 149(1)(c) or (g);
 - (b) the chief executive may disclose information under subsection (2)(a) when collecting information on behalf of the Tribunal under section 229:

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- (c) the Tribunal may disclose information under subsection (2)(a) when carrying out its functions under section 228 or clause 10(1)(b) and (c) of Schedule 2:
 - (d) for the purposes of determining a claim, or cancelling the recognition of, or ceasing to recognise, a person as a refugee or a protected person, information may be disclosed under subsection (2)(a).
- (6) Nothing in this section prevents the disclosure of the fact that a person is a claimant, a refugee, or a protected person, or disclosure of particulars in relation to a claimant, a refugee, or a protected person, to the extent that the person concerned—
- (a) has expressly waived his or her right to confidentiality under this section; or
 - (b) by his or her words or actions, impliedly waived his or her right to confidentiality under this section.

Section 152 of the Act sets the parameters for the disclosure of claimant information among New Zealand government agencies:

152 Disclosure of information about claimant, refugee, or protected person by government agencies

- (1) An officer or employee of any government agency may, for the purpose of assisting a refugee and protection officer or the Tribunal to determine a claim or investigate a matter involving a claimant or a refugee or a protected person in New Zealand, disclose information about that claimant, refugee, or person to the refugee and protection officer or the Tribunal.
- (2) When requesting the assistance, the refugee and protection officer or the Tribunal must—
 - (a) inform the other officer or employee of the requirements of confidentiality in section 151; and
 - (b) require that officer or employee not to disclose information of the kind described in section 151(1) to any other agency, body, or person, except as provided for in that section.
- (3) To avoid doubt, a refugee and protection officer or the Tribunal does not breach section 151 when requesting the assistance of a person under subsection (1).

Section 354 makes it an offence to contravene section 151:

354 Failure to maintain confidentiality in relation to refugee or protection matters Every person commits an offence who, without reasonable excuse, —
(a) contravenes section 151(1); or
(b) publishes information released in contravention of section 151(1).