



Privacy Commissioner  
Te Mana Matapono Matatapu

## **DRAFTING SUGGESTIONS FOR DEPARTMENTS PREPARING PUBLIC REGISTER PROVISIONS**

When legislation creating a public register of information about identifiable individuals is contemplated or being reviewed the information privacy implications need to be considered. This note discusses how legislative provisions might be drafted to resolve privacy problems. Careful attention must also be given to accompanying administrative or technical controls, which are not discussed in this note.

### **Establishing public registers**

A first issue is whether to establish the register as a “public register” for the purposes of the Privacy Act. Establishing the register as a “public register” by listing the statutory provision in Schedule 2 of the Privacy Act as a “public register provision” means that the public register privacy principles, and other aspects of Part 7 of the Privacy Act, will apply. However, it also means that the “publicly available publication” exceptions to the information privacy principles come into play.

Generally a register of personal information about identifiable individuals established by law, carrying with it a specific public search right, should be created as a “public register”. The relevant provision(s) should be added to Schedule 2 of the Privacy Act by statutory amendment or pursuant to an Order in Council issued under s.65 of the Privacy Act.

### **Nature of access and use controls**

Any proposal to create or continue a statutory register, and to provide a statutory right to search, needs careful consideration from a privacy perspective. The drafting approach makes a considerable difference to whether privacy problems are created or solved. The older approach of establishing a public register by merely stating that certain documents or information are to appear on a public register and be open to public search leads to a host of privacy problems. A bald statutory provision like that makes reconciling the collection and disclosure of personal information with the information privacy principles difficult or impossible. However, a number of new legislative provisions over the last few years demonstrate innovative drafting techniques and legal controls that may resolve the privacy concerns.

There are seven features in a modern public register provision that this office looks for in seeking to resolve privacy concerns. Not all of them would necessarily need to be present in any particular case. They are:

- (a) statements of purposes, both for the register itself and for the public search right
- (b) a list of the permitted search references
- (c) limitation on the register content available for search
- (d) a right to search on a “need to know” basis

- (e) a restriction on the bulk provision of information from the register
- (f) provision for suppression of certain personal details in exceptional cases
- (g) a control on the use of information obtained from the register

These features are described below, with illustrations provided, which may assist in enabling departments to assess which of these features would be compatible with the regime proposed.

**(a) *Statement of purposes***

The legislation governing many existing statutory registers gives no indication as to why Parliament established them. A key privacy desire for any collection of personal information is that it be used only for the purposes for which it was obtained. However, where large databases of personal information are available, people inevitably think up new uses to put the information to. This is a privacy risk.

It is desirable to identify the purposes for any new public register and to state these in the legislation.

There are two ways in which “purpose” is spoken of in this context. The first is the purpose for establishing the register. The second is the purpose for giving a right to search to people other than officials. In some cases it may be unnecessary to provide both explanations. Sometimes the purpose for public search will be quite obvious from the context or can be derived from the statement of purpose set out for establishing the register. Surprisingly, this is not always the case and there are cases where officials maintaining registers are perplexed at the reason why Parliament ever created a right for third parties to search the register.

Examples where laws set out the purpose of a public register in a transparent manner can be found in:

- Local Government Act 1974, s.122ZI(1)
- Animal Products Act 1999, ss.18, 52, 73 and 112
- Chartered Professional Engineers of New Zealand Act 2002, s.16(2)
- Local Government (Rating) Act 2002, s.27(3)
- Wine Act 2003, ss.17(2), 47(2) and 73(2)
- Motor Vehicle Sales Act 2003 ss.53 and 74

Examples of legislation that set out the purpose of the right of public search can be found in:

- Local Government Act 1974, s.122ZI(1)
- Personal Property Securities Act 1999, s.173
- Radiocommunications Act 1989, s.28(1)
- Wine Act 2003, ss.17(2), 47(2) and 73(2)
- Motor Vehicle Sales Act 2003, ss.53 and 74

Careful thought should also be put into devising a meaningful purpose statement if it is to be of any guidance to those that are to administer or access the register. Statements that are so general that significant changes in the use of the register can be made, without changing the purpose statement, may be worthless in

promoting transparency or giving guidance. In fact, a poorly devised purpose statement may even be positively misleading.

**(b) *Content of register available to search***

What personal information is to be contained on a register, and how much of that is to be publicly available, are key questions to answer when determining the risks to privacy and how these risks may be addressed. The content of the register should be set out in the legislation. The information necessary for behind-the-scenes administrative use does not necessarily all need to be made publicly available. This needs to be carefully considered on the basis of what is necessary for the purposes for which the register is set up, and for the right of public search, as well as any risks to privacy.

Examples of legislation that lists the contents of a register and specifies a subset available for public search include:

- Dog Control Act 1996, ss.34 and 35
- Land Transport Act 1998, s.199

People's race or ethnicity is sensitive information and it is generally inappropriate for it to form part of a statutory register. However, the appropriateness of any information may depend upon the purpose and context. For example, in relation to the electoral roll, there is the choice for eligible people to register their Maori descent.

Another issue is the timeliness of the information displayed on a public register. For example, s.18(c)(iii) of the Chartered Professional Engineers of New Zealand Act 2002 states, in relation to a disciplinary matter, that only orders made in the last three years against a registered person may be included on the register.

Residential address is a significant detail that may carry particular privacy risks if released. Several approaches have been tried to address this issue (see also suppression schemes at (f) below). Address details are not, for instance, released from the register of driver licences and such details are available from the dog register in only limited cases.

For example, s.28(3)(a) of the Radiocommunications Act 1989 provides that residential address information of natural persons will only be released with the authorisation of the individual, which is achieved by way of an "opt-out" provision. However, a more privacy respectful, and perfectly workable, approach would be by way of an "opt-in" provision.

Another example is found in s.135(2) of the Social Workers Registration Act 2003, which provides that the published register must not contain the home addresses of registered social workers. In fact, many occupational registers offer the choice of whether a person's home address is to be contained in the register.

Further, listing in the legislation the ability to include "any other particulars" in the register should be avoided unless there is either guidance from the purpose of the register or a protective process (e.g. the other particulars will be issued by regulations, which enables privacy issues to be considered in the Cabinet processes) set out in the legislation.

(c) *Appropriate search references*

Public register privacy principle 1 requires that personal information be made available from a public register only by search references that are consistent with the manner in which the register is indexed or organised.

Search references are essentially required for ease of administration. Registrars will logically order their records which were originally stored in filing cabinets consistent with that ordering. Search references naturally flowed from the subject matter of the register or from the way it was organised. To obtain information from a public register a searcher will normally quote (or electronically enter) a search reference.

The mechanism of search references ensures protection of privacy in a pragmatic, although imperfect, way. Someone who can quote the appropriate search reference might be thought to have some sort of business seeing the relevant information. For example, s.57 of the Motor Vehicle Sales Act 2003 expressly lists the criteria by which the register can be searched and the search references are aimed at only allowing those with a legitimate reason for searching the register to be able to do so.

Settling upon the appropriate search references is an important part of the task of addressing public register privacy issues. It requires consideration of what search references are believed to be appropriate to achieve the purposes of a new register and, for example, whether searches by name should be required or prohibited.

The issue becomes extremely important as we are now in the electronic age whereby public registers may be held on a computer database. Constraints of filing systems no longer apply. Since the physical constraints will not protect privacy, the legal and administrative constraints have heightened importance.

Examples of statutes that expressly set out search references include:

- Local Government Act 1974, s.122ZI(5)
- Radiocommunications Act 1989, s.28(2)
- Personal Property Securities Act 1999, s.172
- Local Government (Rating) Act 2002, s.27(6)
- Motor Vehicle Sales Act 2003, ss.57 and 79

It is desirable that search references be specified in the legislation itself.

If specifying the search reference in the establishing legislation, it may be appropriate to allow for further search references to be added by delegated legislation. Namely, further search references may be able to be added at a later stage by regulations or by a code of practice under the Privacy Act. This is intended to recognise the fact that circumstances can change and new secondary uses may become desirable. The process for allowing change is flexible, but brings transparency and public accountability. These are essential safeguards if the range of search references is to be expanded. If legislation establishing a new public register also sets out its purposes, this can guide the process of evaluating consistency of new search references with the register's primary purpose.

Examples of legislation that allows further search references to be added includes:

- Local Government Act 1974, s.122ZI(5)(c)
- Local Government (Rating) Act 2002, s.27(6)(c)

**(d) Search rights on “need to know” basis**

Most privacy concerns do not arise simply because a person has used a register for the primary purpose for which it was established. Generally, the public interest case for its primary use has been thoroughly gone into. Often there is a consensus as to the need for a register and a right to search (or at least, in the absence of consensus, a determination that the public interest requires a right to search to prevail over competing privacy interests). For the most part, the privacy concerns about open public registers relate to use for *other* purposes. Sometimes these purposes are directly or indirectly related to the primary purpose. Sometimes they have nothing to do with it. On occasion secondary uses are actually incompatible with the primary purpose (e.g. where they discourage registration).

Accordingly, one of the best ways to reconcile privacy interests with privacy concerns is to establish a regime whereby information is channelled from the register to people who have a proper “need to know” the information, so that it will be used for purposes compatible with the register. This approach brings the operation of a public register closer to the approach of the information privacy principles.

At the end of the day, this approach means that the statutory register will not have the full, open and unrestricted nature of many older existing public registers. However, for users with an appropriate need for the information, registers will remain open and accessible.

An example of a public register which was reconstituted on this basis is the dogs register, open to search under s.35 of the Dog Control Act 1996. Briefly, the way that that register operates is that it is:

- open on an unrestricted basis to a list of designated officials and bodies, but
- otherwise information identifying a dog owner’s address is only released to the general public on a search for certain approved purposes.

The permissible purposes are set out in the Act. A mechanism is provided so as to ensure the public searches are for the specified purposes, requiring members of the public to identify themselves and to declare what their search is for. Search forms have been issued by regulation.

When specifying classes of persons who may search a register, this may be the place to set out access by government officials as well (although this is not strictly a public access matter). An example of specifying classes of persons, including officials, who may search a register is to be found in the:

- Dog Control Act 1996, s.35
- Personal Property Securities Act 1999, s.173
- Motor Vehicle Sales Act 2003, ss.58 and 80

Further, s.199 of the Land Transport Act 1998 differentiates between information on the register for official purposes and that available for public search.

(e) *Bulk provision of information*

A notable privacy problem for some registers is requests from businesses for details of many or all entries on a register for commercial use outside the purposes of the register. A typical such secondary use is for direct marketing.

An example of an attempt to address this problem by restricting bulk provision of information from a public register can be found in the Rating Valuations Act 1998, s.52(f). Section 52(f) provides that regulations may be made prescribing limitations or prohibitions on the bulk provision of district valuation roll information for purposes outside the purposes of the Act.

This issue has also been addressed overseas. For example, in Manitoba s.17(6) of the Freedom of Information and Protection of Privacy Act provides:

**“Volume disclosure from a public register**

The head of a public body shall not disclose to an applicant under this Part, personal information in a public registry on a volume or bulk basis.”

See also the discussion at part (g) below on the use of controls, which offers another legal means to tackle problematic bulk secondary uses.

(f) *Suppression of personal details in exceptional cases*

The best approach from a privacy perspective is to establish a new public register with a clearly stated purpose with machinery provisions (such as search references) designed to promote release of information for those reasons and to discourage release for incompatible purposes. However, sometimes there really will be a need for an absolutely open and unrestricted search right, and therefore attention turns to safeguards that will work in that environment. One approach is to recognise that certain people have particular needs to have some of their details, such as residential address, suppressed.

The need for, and workability of, such proposals depends upon the information to be publicly displayed on the register. If the register is intended to include residential addresses then some consideration should be given to allowing individuals to establish a case on certain grounds to have their address, or the entry, suppressed or held on a confidential register.

Examples of suppression mechanisms include:

- Transport (Vehicle and Driver Registration and Licensing) Act 1986, s.19(5)
- Radiocommunications Act 1989, s.28(3)(a)
- Electoral Act 1993 s.115
- Domestic Violence Act 1995, Part 6
- Fisheries Act 1996, ss.102(3), 129(3)
- Social Workers Registration Act 2003, s.135(2).

The ground usually specified for a suppression provision is the personal safety of the person or his or her family. Sometimes other interests such as a fear of

harassment, desire to preserve privacy, or national security, may also be specified.

Residential address is not the only sensitive detail. Section 217 of the Building Act 2004 provides an example of a provision where certain other details may be specially controlled. That provided a restriction on public access to any plan or specification (on a building consent file) that has been marked as being confidential because of the requirements of the building owner relating to the security of the building.

The confidential register provisions are a useful backstop, even if a privacy-friendly regime as described above, is established. It may be that reasonable privacy expectations can be met through options (a) to (e) above, but that persons having special concerns for their safety may still need something extra to guarantee their personal well being. However, confidential register provisions alone are no substitute for the privacy approach mentioned in (a) to (e).

Consideration will need to be given with any new public register as to whether the Domestic Violence (Public Registers) Regulations 1998 should be applied to the register or otherwise amended. If the regulations are applied to the register certain prescribed forms become applicable. The regulations (issued under the Domestic Violence Act, s.121) can also be used for varying suppression periods or setting out circumstances where public disclosure is permissible notwithstanding a suppression direction.

**(g) *Use of information obtained from a register***

The techniques mentioned earlier are directed towards specifying the content of a register, establishing the purposes of public search, and setting controls on who might be able to access personal information on the register. As an alternative to establishing the register on a “need to know basis” (or as a supplement), it is possible to devise a regime that would place special controls on the subsequent use of information so obtained, ensuring that information obtained from the register is not misused in a particular way.

This approach has not generally been adopted in New Zealand public register provisions. However, use controls offer a mechanism that can be reconciled with a general free flow of information. The creation of such controls may link with the articulated purpose for which a register is established or be based on observed or anticipated misuse of register information.

One could draft a provision that indicates the uses to which information from the register is permitted to be used. This is sometimes expressed negatively to the effect that information must not be used except for stated purposes. An alternative approach might be to identify a particular problematic use and to prohibit only that use.

For example, some overseas adoption registers allow release information about birth parents but may prohibit its use for making direct contact, except through approved channels. An example is the Adoption Act 2000 (New South Wales), s.164, under which a person may be required to give a statutory undertaking to

refrain from contacting the birth parent before information from the register is released to them.

Another example where this technique has been utilised in another jurisdiction, is s.177 of the Corporations Act 2001 (Australia) which states:

**“Use of information on registers**

- (1) A person must not:
- (a) use information about a person obtained from a register kept under this Chapter to contact or send material to the person; or
  - (b) to disclose information of that kind knowing that the information is likely to be used to contact or send material to the person.
- (1A) Subsection (1) does not apply if the disclosure of holding of the information is:
- (a) relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to them; or
  - (b) approved by the company or scheme.”

The use control in that section is given effect in three ways:

- First, there is an offence of strict liability: subsection (1B)
- Second, a person who contravenes the provision is liable to compensate anyone who suffers loss or damage because of the contravention: subsection (2)
- Third, anyone who profits from the contravention is liable to account to the company for that profit: subsections (3), (4).

In New Zealand, s.116 of the Electoral Act 1993 provides that certain people who have access to information from the electoral roll on computer tapes commit an offence if the information is used for a purpose other than one authorised in the Act. Similarly, s.200 of the Land Transport Act 1998 limits the purposes for which officials may use photographs from the Driver Licence Register. These are both examples of controls on use by specially approved classes of agency having privileged access to register information that is not generally available to the public.

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