

## ***Giving better effect to the Privacy Act: New Privacy Commissioner 'Naming Policy'***

Discussion document to accompany public release of proposed OPC Naming Policy

From 1 November 2014 the Privacy Commissioner intends to adopt the policy set out below to guide the practice of the Office of the Privacy Commissioner in naming agencies to give effect to the purposes of the Privacy Act 1993.

The Privacy Commissioner welcomes submissions from the public to improve the proposed policy.

Submissions may be made by 30 September 2014 by email to [namingpolicy@privacy.org.nz](mailto:namingpolicy@privacy.org.nz).

### **Background**

The Office of the Privacy Commissioner (OPC) is established by the Privacy Act and is empowered in various ways to promote compliance. For example, the Privacy Commissioner engages in public education programmes, issues codes of practice, investigates complaints and monitors intrusive activities such as information sharing and credit reporting. OPC receives some self-reported notifications of privacy breaches and the Commissioner is often approached by the news media and others to comment on the activities of particular companies and government agencies.

Through these activities and others the Commissioner often forms a view on whether a body or person has complied, or is complying, with the Act. In the past, former Commissioners have rarely publicly named organisations that have breached the law. However, the Commissioner has decided that the time has come to more routinely 'name names' where the case warrants that step. The decision to do so is based on a view that in certain circumstances the objectives of the Act are served by revealing the identity of organisations that have breached the law.

While organisations have occasionally been named in the past, this has been done on an ad hoc basis. By adopting the new policy OPC can ensure that a more consistent approach is taken to the naming of agencies. This should lead to a more effective approach and it is likely that the Commissioner may more frequently name agencies in the future.

## Q&A

The naming policy is set out below. It is intended to be put into effect, possibly in modified form, on 1 November 2014. OPC welcomes feedback to ensure the policy is as clear and effective as possible. To assist people who may wish to make a submission we offer a few Q&A:

*Q1. Will I be named if I ask the Privacy Commissioner to investigate a complaint?*

No – the focus of the policy is on establishing a clear framework to follow in relation to agencies that have statutory obligations under the Privacy Act. Furthermore, if naming an agency would be likely to identify an individual who had made a complaint, it would make it less likely that the agency would be named in that case (refer to part 5 of the policy)

*Q2. I'm concerned that the Privacy Commissioner is going to say something negative about my agency, will I be heard on this?*

Yes - the Privacy Act requires that before the Commissioner makes any report which includes an 'adverse comment' about a person, he give that person an opportunity to be heard (see Privacy Act, s.120). To meet this requirement the policy includes a step of giving such an agency an opportunity to be heard (refer to the decision tree at part 9 of the policy).

*Q3. Isn't the Privacy Commissioner meant to keep things private?*

The Privacy Commissioner and his staff are under a general obligation to 'maintain secrecy' in respect of matters that come to attention in carrying out statutory functions (see Privacy Act, s.116). However, the Commissioner is entitled to disclose matters that 'ought to be disclosed for the purposes of giving effect to the Privacy Act' (see s.116(2)).

There are a number of reasons why it may be necessary to name someone to give effect to the Privacy Act and these are set out in part 2 of the policy.

*Q4. Why name at all? Don't you have other ways to enforce the Privacy Act?*

The Commissioner has a range of tools which can be used for the purposes of promoting and enforcing the Privacy Act such as:

- Conducting investigations;
- Referring proceedings for action in the Human Rights Review Tribunal;
- Reviewing or monitoring an agency's processes;
- Carrying out audits at the request of an agency;
- Undertaking training and providing general guidance;
- Referring matters to the police or to other authorities;
- Drawing practices to the attention of government ministers

The Naming Policy will complement the use of the other enforcement and resolution tools available to the Commissioner. In certain circumstances, naming is thought likely to be more effective as a compliance technique.

**Suggested focus for submissions**

While the Commissioner welcomes submissions on any aspect of the proposed policy, it is suggested that submissions principally be focused on the following questions:

1. From your experience, do you foresee any problems with the proposed policy? If so, please highlight the relevant part of the policy and explain why you take this view.
2. Are there any issues that are inadequately covered by the policy and, if so, how do you believe they should be addressed?
3. Do you think any part of the policy is unclear? If so, do you have any suggestions to improve the expression?

## ***Proposed naming policy***

### **Office of the Privacy Commissioner Policy: Naming agencies in public reports**

*“The Commissioner may from time to time, in the public interest or in the interests of any person or body of persons, publish reports ...”*  
- Privacy Act 1993, section 13(2)

#### **1. Introduction and scope**

This policy records OPC’s willingness publicly to name agencies in appropriate cases. It represents a departure from previous practice where an agency was rarely named in public even where it appeared that the agency had breached the Privacy Act.

In adopting this policy OPC has been particularly mindful of the need to influence agency behaviour to comply with the Privacy Act. Modern views of responsive regulation emphasise the need for an enforcement authority to have a choice of responses to cases of non-compliance and to be able to escalate the regulatory consequences as needed. Naming agencies in particular cases is a responsible regulatory response to take in certain circumstances. The new policy will enable OPC to be a more effective regulator, especially in cases having systemic significance (i.e. affecting more people than just a complainant in a particular case).

The policy will principally affect OPC practice in relation to investigations that reveal agency non-compliance. However, the policy ranges across the activities of the office. For example, OPC might publicly name agencies in relation to matters uncovered in compliance monitoring, a commissioner-initiated inquiry or following self-notification of a breach.

The policy covers the naming of agencies but may helpfully be referred to if OPC contemplates naming any other person (e.g. employees, complainants, officials, foreign companies, etc.).

#### **2. How does naming agencies further the purposes of the Privacy Act?**

The benefits of naming an agency will vary depending upon the circumstances but may serve one of the following purposes:

- encourage compliant behaviour by the agency concerned in future cases as a result of public scrutiny;
- encourage compliant behaviour by other agencies inspired by the example of the named agency;
- encourage agencies promptly and genuinely to engage with the resolution of privacy issues to avoid, or further avoid, adverse publicity;

- associate a reputational cost with non-compliant behaviour thus making compliant behaviour more attractive;
- warn the public and other agencies of the practices of the agency;
- encourage aggrieved individuals to come forward with complaints where they have been affected by the agency's practices;
- increase the likelihood of news media reporting of privacy cases with consequent public debate, education and general scrutiny of agency behaviour.

### **3. Will agencies always be named?**

No. Agencies will only be named where the Commissioner considers that the agency ought to be named for the purpose of giving effect to the Privacy Act. In some cases, no public benefit would accrue from naming an agency.

### **4. What considerations make the naming of an agency more likely?**

Although each case needs to be considered on its merits, the following reasons suggest that an agency ought to be named:

- where the agency's conduct is likely to have affected persons other than a complainant who has already come forward, and the effect cannot be remedied in relation to those other persons by the respondent;
- the agency has been involved in a single very serious breach of the law, or repeated lesser breaches which have been brought to the agency's attention;
- the agency has demonstrated an unwillingness to comply with the law (as distinct from a *bona fide* disagreement over the meaning of the law);
- there has been an exercise of public functions or statutory powers and naming may enhance accountability;
- in all the circumstances the public interest would benefit from identification of the agency, due to its deterrent effect, educative purpose or otherwise.
- in circumstances where a decision not to name the agency in any report from the Commissioner is likely to unfairly impact on other agencies within that specific sector or industry.

### **5. What considerations make the naming of any agency less likely?**

Although each case needs to be considered on its merits, the following reasons may suggest that an agency ought not be named:

- the agency's conduct is likely only to have affected a single complainant and it is not a very serious breach of the law (sometimes in such cases it may nonetheless be useful to issue a public report, but in a way that does not reveal the agency's identity);
- given the special circumstances of the particular agency, the effect of adverse publicity would be substantially disproportionate to the public benefit in naming it;
- there are legislative requirements prohibiting identification in the particular case.

Three other circumstances should also be mentioned.

First, most cases warranting naming will involve agencies that have breached a requirement of the Act or a code. However, in some cases where the Commissioner reaches the opinion that an agency had not breached the law the agency may prefer to be publicly named to offer a public vindication. OPC may consider naming in such cases.

Second, there may be cases where agencies seek to make non-disclosure of their identity a term of the settlement of a complaint. While the Commissioner will take into account the circumstances of a case (which might include the prospect of settlement, the terms of settlement and the views and behaviours of the parties), the decision on whether to name is within the discretion of the Commissioner based on issues of the wider public interest. The Commissioner will not bargain with parties to settlement negotiations over the possibility of naming or refraining from naming.

Third, as already noted this policy is intended to deal with the naming of agencies (and may be applied in relation to persons connected with the named agency, such as officers or employees). However, there may be cases where naming a particular agency will, or is likely to, identify another agency or an individual. This factor may make it less likely that the Commissioner will name an agency although naming remains a possibility where the public interest and other considerations justify that course. Where naming an agency will identify a third party OPC may seek the views of the affected party before making a decision on naming.

## **6. In what manner might an agency be named?**

The most common context in which an agency might be named is where the Commissioner has reached the opinion that an agency's actions (including a failure to act or a policy or practice) have breached the Act. Naming might follow such a finding regardless of whether the Commissioner has formed the further opinion that the agency's actions constituted an interference with privacy in the particular case. Naming in such a case might typically be in a case note which provides an account of the facts, law and Commissioner's opinion. Release of the case note or report, which may be in some detail, might be accompanied by a media release emphasising certain aspects. On occasion the Commissioner might contemplate releasing the text of a final opinion (suitably edited to prevent identification of the complainant).

In addition to routine naming of agencies in published case notes, and associated media releases, naming of agencies might occur in the following circumstances (amongst others):

- on a referral of a matter to the Director of Human Rights Proceedings;

- following Human Rights Review Tribunal judgments;
- upon the self-notification to OPC by an agency of a breach;
- annual reporting (in 'top 10' and similar lists, and short case studies);
- in formal reports to Ministers and Parliamentary committees;
- in speeches and in media statements responding to matters of public controversy;
- as part of submission processes on the issue, amendment or review of codes of practice;
- announcing a commissioner-initiated inquiry;
- publication of open letters calling upon those agencies named in media reports to explain their actions and subsequent publication of their replies;
- in relation to assurances against further breach sought from, refused or given by, an agency found to have breached a principle;
- announcing an application for, or grant of, an exemption;
- in relation to special responsibilities or flexibilities sought or granted under the Act, for instance in relation to information sharing agreements.

The Commissioner may also name agencies in other circumstances. These are merely routine or foreseeable examples.

#### **7. At what stage of proceedings might agencies be named?**

The timing of naming an agency is a matter to be considered case by case. Typically, an agency will only be named after the completion of an investigation. Naming might follow settlement, discontinuance or a decision on referral of a case to the DHRP. Agencies would not typically be named if the Commissioner had not rendered an opinion finding the agency in breach of a principle.

However, in exceptional circumstances naming could be contemplated at an earlier stage. For example, sometimes in cases of public notoriety the fact that OPC is investigating a matter may be public knowledge, perhaps through the actions of one of the parties. In such a case an interim statement may be warranted. There may also be cases of major breaches where the public may need to be warned so that they can take appropriate steps to protect themselves.

#### **8. How does the Privacy Act bear upon such public statements?**

Although the Commissioner and staff will usually maintain secrecy, section 116(2) allows for disclosure such matters as in the Commissioner's opinion ought to be disclosed for the purpose of giving effect to the Act. (The Commissioner may choose to delegate the power to make such disclosures to selected staff.) Before naming an agency the Commissioner will be satisfied that the disclosure is for the purposes of giving effect to the Privacy Act.

Other aspects of the Privacy Act may touch upon the disclosure and this policy affirms that all statutory requirements must be complied with. In particular, care will be taken to ensure that the requirements of sections 80, 94, 116(3) and 120 are considered and complied with.

Section 80 concerns cases where the Commissioner reports evidence of any significant breach of duty or misconduct to the appropriate authority. In such cases, the possibility or timing of a statement naming an agency may have to take account of the possible effect on disciplinary or criminal proceedings.

Under section 116(3) matters that could seriously prejudice certain public interests, or have been obtained in an investigation from an authority subject to an obligation of secrecy, are to be protected. Similarly, under section 94 documents that are normally subject to privilege will not be released. (This note does not go further into such issues since the focus of this policy is simply naming agencies in published reports and not to the content of the report themselves or to release of documents.)

Under s.120 procedures are laid down for cases where an adverse comment is to be made about any person.



## 9. Decision tree

