

25 September 2020

Budapest Convention Public Consultation
Ministry of Justice

By email: budapest@justice.govt.nz

Tēnā koutou katoa

Privacy Commissioner's submission on New Zealand accession to the Budapest Convention on Cybercrime (Our Ref: P/2084)

Thank you for the opportunity to provide a submission on the public consultation regarding New Zealand's accession to the Budapest Convention on Cybercrime. The Budapest Convention provides an international framework to address cybercrime and criminal evidence stored electronically.

I understand New Zealand seeks to accede to the convention due to the ever-increasing impact that cybercrime has on New Zealanders. The Convention works to promote and support effective investigations and interventions through aligning nations' laws, facilitating information sharing on existing threats and best practice, and fostering cooperation.

The Privacy Act 1993 is New Zealand's main privacy law. It governs the collection, use, storage and disclosure of personal information and provides a mandate for my Office to consider wider developments or actions that affect personal privacy. The functions of the Privacy Commissioner include making public statements in relation to any matter affecting the privacy of individuals. The Commissioner also has a role in considering the transfer of personal information outside New Zealand under Part 11A of the Privacy Act.

Central to my examination of any proposed international agreement is the principle that personal information should be afforded equivalent privacy protections to those in New Zealand and that any conventions should be consistent with privacy rights unless there is very good reason (and evidence) to override those rights.

If New Zealand was to accede to the Convention, implementing the obligations imposed on New Zealand would include making legislative amendments. In particular this would include:

- the ability to make data preservation orders;
- the ability to issue third party confidentiality orders in regard to a warrant or preservation order; and
- extending the mutual assistance regime to allow surveillance device warrants to be included in the powers New Zealand can offer as part of any foreign assistance request.

Data Preservation Orders

Data preservation orders are required to be added to New Zealand law as part of acceding to the Convention. If enacted the orders would be included into the Search and Surveillance Act 2012.

An order would require agencies to preserve information temporarily while a production order is obtained. Preservation orders would only apply to information an agency ordinarily collects and would not require an agency to collect information outside of their normal business practices.

In the case of mutual assistance, I understand preservation orders are particularly helpful as they allow data to be preserved when it might otherwise be lost while assistance assessments are undertaken.

Application process

I understand the Ministry intends to align the conditions for a preservation order with those for a production order. These conditions are that:

- there are reasonable grounds to suspect that an offence has been committed, is being committed or will be committed, and
- that there are reasonable grounds to believe the information sought to be preserved constitutes evidential material and are in the possession or under the control of the person against whom the order is sought.

I do not support the proposal to provide the Chief Executive of the relevant enforcement agency the ability to make such an order. Delegation of the preservation order power to relevant Chief Executives is an inappropriate delegation of a power to override New Zealanders' privacy rights. Such an authority more appropriately sits with the judiciary.

I recommend that the conditions for a preservation order are aligned with those for a production order. To obtain a production order, enforcement officers may make an application to an Issuing Officer, such as a Judge or a person authorised by the Attorney-General to act as an issuing officer (for example, a Registrar or Justice of the Peace).

Retention of information through extension

I do not support the proposal to provide for indefinite extensions to preservation orders. I recommend a limited number of extensions being provided before an order is discontinued.

Preservation orders should be closely followed by a production order or a notice of discontinuation. The Privacy Act requires that agencies only hold information for as long as it is required for the purposes for which the information may lawfully be used. Preservation orders temporarily override this requirement by requiring agencies to store information. Providing the ability to preserve data should be limited and timebound, with agencies not required to hold or preserve data for longer than is strictly necessary.

I also recommend requiring that the agency subject to the order proactively destroys the preserved information at the expiry of the order or after a notice of discontinuation, if this is information they would not otherwise keep.

Third Party Confidentiality Orders

Third party confidentiality orders would also be required to be added to New Zealand's law as part of accession. If enacted, the orders would also be included into the Search and Surveillance Act 2012.

These orders would require those receiving a surveillance device warrant or a preservation order to keep the fact of this confidential. The orders are proposed to only be in force for the length of any investigation and only if disclosure to the relevant party/individual would jeopardise the investigation.

In my view confidentiality orders could be adequately managed within the current Privacy Act regime, in a manner similar to how production orders are managed. An agency responding to a request for personal information from an individual under the Privacy Act is required to either provide the information requested or apply one of the available withholding grounds. These withholding grounds protect interests other than privacy, such as national security or foreign relations. I understand that requests for personal information that cover the fact an agency has received a production order are currently managed within this Privacy Act regime. I also understand that agencies are asked not to disclose the fact of a production order, but this is not legislated for.

I also recommend including a responsibility for agencies to notify affected individuals either at the conclusion of the investigation or the expiry of a preservation order. This responsibility could be subject to an exception which provided that agencies would not be required to notify the individual if to do so would prejudice the maintenance of the law. This notification would have the advantage of ensuring that individuals can exercise their rights of redress in regard to any wrongful or erroneous collection of their personal information.

I consider that confidentiality orders can be drafted in such a way to protect the existing Privacy Act regime while strengthening the responsibility of agencies to keep the fact of orders confidential. I would be interested in receiving further information from officials about whether they consider the withholding grounds in the Privacy Act to be sufficient.

Extension of Surveillance Device Warrants to foreign mutual assistance partners

I understand that New Zealand's mutual assistance law would also be amended to allow surveillance device warrants to be used to obtain information necessary to an overseas investigation. This is a reciprocal obligation on other Convention members. The proposal does not expand the nature or scope of the current surveillance device power, only the ability for it to be used in mutual assistance matters.

There is also a proposal to provide the ability to delay notifying the affected individual or individuals subject to a warrant issued under mutual assistance if this would jeopardise the investigation. The proposal does not cover how this delayed notification aligns with current practice or the third-party confidentiality orders. I am therefore interested in hearing more about this proposal.

The consultation paper states that neither the proposal nor the Convention require amendment to the current mutual assistance process. Specifically, requests would still be sent through and assessed by Crown Law, meaning domestic agencies would not field these requests or conduct assessments themselves. I consider Crown Law's involvement to be an important safeguard in ensuring that any requests comply with New Zealand law and human rights obligations.

I also understand that any international partner seeking to obtain New Zealand assistance in investigating cybercrime would be subject to the same oversight and authorisation process as New Zealand agencies. This would mean there is New Zealand judicial authorisation for search warrants and consideration of human rights implications prior to agreeing to offer assistance.

Transparency measures

The Ministry of Justice estimates that between 10-15 preservation orders will be issued a year. This estimate is based on the assumption that data preservation orders will not need to be used by domestic law enforcement agencies and will only be used in mutual assistance cases (page 15 of the consultation document). It is not clear from the paper whether that assumption is based on feedback from industry, however actual corporate behaviours in the face of a power to compel cooperation might well change, despite present voluntary compliance and assurances about future conduct.

Further, Appendix B of the consultation document notes that annual reporting to Parliament will be required for any domestic agency that makes over 100 preservation orders. Given these varying estimates, and to promote transparency, I recommend requiring all domestic agencies to report in their annual reports and to Parliament the number of preservation orders issued and the types of agencies these were issued to (for example telecommunications, social media, etc). I also recommend implementing similar transparency measures for search warrants, production orders and other information requests. In 2015 and 2016 my Office ran a transparency reporting trial, a report on which can be found on our website.¹ Transparency reporting is an important privacy enhancing measure that allows individuals better oversight over how information is used and disclosed.

Consultation

It is unclear from the consultation paper what Māori organisations and groups have been engaged in consultation regarding the impacts of the proposal to accede. I note that my Office must take account under the Privacy Act 2020 cultural perspectives on privacy. I would encourage the Ministry of Justice to undertake consultation with Māori on this proposal.

I would appreciate any insights the Ministry gains from consulting with Māori. As the Ministry has noted in its consultation document Māori are disproportionately represented in the criminal justice system, both as victims and perpetrators it is therefore critical to understand the impacts acceding to the Convention may have on the Crown's obligations to Māori as treaty partners.

The consultation paper states negotiations are underway between parties to the Convention regarding an additional protocol on evidence in the cloud. I would expect that if New Zealand planned on acceding to this additional protocol that further consultation would be undertaken including with the public, iwi, agencies affected and my Office.

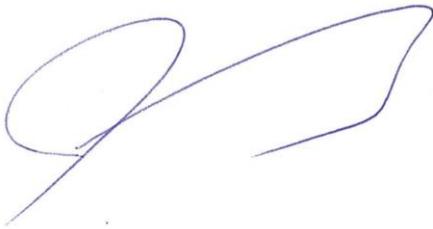
¹ <https://privacy.org.nz/assets/Files/Reports/OPC-Transparency-report-April-June-2016-Supplementary-report.pdf> + <https://privacy.org.nz/assets/Files/Reports/OPC-Transparency-Reporting-report-18-Feb-2016.pdf>

Conclusion

I note also that the consultation document says my Office will be further consulted on the drafting and policy work to implement the Convention and I look forward to this consultation. I hope the above submission is of use to officials in their considerations regarding accession.

Should the Ministry wish to discuss any of the points above please contact Michael Harrison (Manager, Policy) at michael.harrison@privacy.org.nz

Nāku iti noa,

A handwritten signature in blue ink, consisting of a large, stylized 'J' followed by a long, sweeping horizontal stroke that ends in a small hook.

nā John Edwards
Privacy Commissioner