

Repeal and Replacement of the Civil Defence National Emergencies (Information Sharing) Code

Information paper on Changes to Notified Code

On 29 July 2020 the Privacy Commissioner publicly notified his intention to repeal and replace the Civil Defence National Emergencies (Information Sharing) Code 2013 and invited public submissions. The changes in the notified code are part of a wider project to align the six privacy codes of practice with the Privacy Act 2020. The information paper summarising the Privacy Commissioner's approach to the revocation and replacement of the codes can be found here.

The Commissioner received six submissions, which were broadly supportive of the notified Civil Defence National Emergencies (Information Sharing) Code. Following consideration of submissions received and a final review of the code, the Commissioner issued the Civil Defence National Emergencies (Information Sharing) Code 2020 on 28 October 2020. The new code comes into force on 1 December 2020. This paper explains the key changes made to the notified Civil Defence National Emergencies (Information Sharing) Code after receiving submissions.

Changes to the notified Civil Defence National Emergencies (Information Sharing) Code

1. New subclause added to the interpretation clause of the code

We asked submitters whether a new subclause should be added to the codes specifying that terms defined in the Privacy Act that are used but not defined in the code have the same meaning as in the Act.

Three submitters on this code directly responded to this question. Two supported this change, while one submitter thought that cross-references should be kept to a minimum, given that the code is used by people making quick decisions in challenging circumstances. We agree that cross-references should be kept to a minimum given that the code will be used in emergency situations; however, for consistency with the Act, and clarity, we consider this subclause warrants inclusion in the code. Accordingly, the Commissioner has added the following new clause 4(3) to the code:

- (3) *A term or expression defined in the Act and used, but not defined, in this code has the same meaning as in the Act.*

This also follows drafting practices in regulations (see for instance reg 3(2) of the Privacy Regulations 2020) and will assist those using the codes to find defined terms.

2. Disclosures to foreign persons or entities for a permitted purpose are now provided for by the code

We received a submission requesting a new subclause in the code to modify the information privacy principles, and in particular information privacy principle 12, to enable personal

information to be shared with foreign governments and other foreign entities, such as NGOs, that might be involved in an emergency or have citizens impacted by an emergency.

Under the notified code, disclosures can only be made to agencies to which the Privacy Act applies. Other than New Zealand agencies, this includes overseas agencies carrying on business in New Zealand, and non-resident individuals who are present in New Zealand (section 4). Otherwise, the Act does not apply to a foreign person or entity, including an overseas Government or overseas government entity performing public functions (section 9).

To enable disclosures to foreign governments and to other foreign entities for permitted purposes, the code would therefore need to be modified to expand the class of entities to whom disclosures can be made.

If the code is not modified, agencies would need to rely on an exception in information privacy principle 11 of the Act (rather than a permitted purpose under the code). In addition, under information privacy principle 12, agencies would need to ensure that the foreign entity, such as an embassy, is subject to laws which provide comparable safeguards as our Privacy Act, or that the individual has expressly authorised the disclosure in the knowledge that the information may not be subject to such safeguards, or that non-compliance is necessary owing to a serious threat to the life or health of an individual, or to public health or public safety.

While the health and safety exception may be available in some circumstances, this code is intended to facilitate information flows during an emergency, particularly when it may be difficult to obtain individual authorisation. Accordingly, the Commissioner agrees that the notified code should be modified to permit disclosures to relevant foreign persons and entities, such as embassies, for the purposes permitted by the code. However, disclosing agencies need not comply with rule 12(1) if it is not reasonably practicable to do so in the circumstances.

However, there may be some situations where an individual may not want their personal information disclosed to a foreign entity – for instance, if an individual involved in a national emergency is a refugee, they may not want their information passed onto the government of the country they have left. Therefore, the code now provides that information should not be disclosed where the agency has reason to believe that the individual would not want their information to be disclosed in the circumstances.

Accordingly, the Commissioner has amended clause 6(1)(c)(iii) as follows:

- (iii) *an agency, or a foreign person or entity, that is directly involved in providing repatriation services, medical or other treatment, health services or financial or other humanitarian assistance services to individuals involved in the emergency, and the disclosing agency has no reason to believe the individual would not want the information to be disclosed to that other agency, or foreign person or entity, in the circumstances.*

He has also amended clause 6(2) to read:

Subclause (1) modifies the information privacy principles as follows—

- (a) information privacy principles 2, 10 and 11 by providing additional grounds to collect, use or disclose information in the circumstances where subclause (1) applies; and*
- (b) information privacy principle 12(1) applies to a disclosure to a foreign person or entity under clause 6(1)(c)(iii) only to the extent that it is reasonably practicable in the circumstances for the agency to comply with the requirements of that principle.*

3. Other matters

The Commissioner acknowledges that some submitters suggested more substantive changes that were outside the scope of this code review. However, these submissions have been recorded and may be addressed in later reviews of the code, when new policy matters can be considered. The Commissioner thanks submitters for drawing these matters to his attention.