

Repeal and Replacement of the Health Information Privacy Code

Information paper on Changes to Notified Code

On 15 July 2020 the Privacy Commissioner publicly notified his intention to repeal and replace the Health Information Privacy Code 1994 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 13 submissions, which were broadly supportive of the notified Health Information Privacy Code. Following consideration of submissions received and a final review of the code, the Commissioner issued the Health Information Privacy Code 2020 on 28 October 2020. The code comes into force on 1 December 2020. This paper explains the key changes made to the notified Health Information Privacy Code after receiving submissions.

Changes to the notified Health Information Privacy Code

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

During consultation as part of the wider project to align the privacy codes of practice with the new Privacy Act, 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.

Although this question was not specifically asked of submitters on the proposed Health Information Privacy Code, the general support for this new subclause by submitters on other codes supports its inclusion in this code also. Accordingly, the Commissioner has added the following new clause 3(2) to the code:

- (2) *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 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. *References to section 30 authorisations retained in rules 2, 10 – 11 and added to new rule 12*

Section 30 (which is now extended to include new principle 12 of the Act) allows agencies to collect, use and disclose information in a way that would otherwise breach the relevant principles, if they have obtained the Commissioner's authorisation. However, section 30 (previously section 54) authorisations are no longer included as express exemptions in information privacy principles 2, 10 and 11.

We asked submitters whether these references to section 30 should be retained in the notified code. All submitters who responded to this question supported retaining references to these authorisations.

Accordingly, these references to authorisations under section 30 have been reinstated in rules 2(2), 10(1) and 11(2), as well as being added to rule 12(1) of the notified code.

3. Rule 2(2)(c)(iii) amended to include health as well as safety

The Privacy Act 2020 has added a new exception to allow collection from a source other than the individual where necessary to prevent or lessen a serious threat to the life or health of the individual concerned or any other individual under information privacy principle 2(2)(e)(v).

However, rule 2(2)(c)(iii) of the Health Information Privacy Code includes an exception to collection from a source other than the individual concerned where compliance would “prejudice the safety of any individual”. Accordingly, the notified code did not include the new exception in the Act on the basis rule 2(2)(c)(iii) covered similar ground as information privacy principle 2(2)(e)(v) but is framed in a manner that better fits the health context.

Of the 13 submissions received on the proposed code five agreed with the decision not to include new principle 2(2)(e)(v), two disagreed, two thought rule 2(2)(c)(iii) should be amended or further considered and four did not comment.

In particular, a subscriber noted that, while an individual’s safety under rule 2(2)(c)(iii) will often encompass their health, that might not always be the case. Therefore, it submitted that rule 2(2)(c)(iii) should be amended to specifically refer to the health of the individual, as well as their safety.

The Commissioner agrees that it is appropriate for this exception to expressly encompass an individual’s health. This also more closely aligns rule 2(2)(c)(iii) with information privacy principle 2(2)(e)(v) while still maintaining the flexibility required in the health context. Accordingly, the Commissioner has amended rule 2(2)(c)(iii) to read:

(c) that compliance would—

...

(iii) prejudice the health or safety of any individual.

The Commissioner notes concerns from another subscriber that this exception should be limited by an obligation to collect, process or disclose only the information reasonably necessary to prevent or lessen serious threats. We consider health agencies are already obliged to only collect information that is necessary for their purpose (as required under rule 1) and note that the accuracy of information collected from others should be verified with the individual at a later time if practicable.

4. Minor amendments to new rule 12 to ensure policy intent of the new cross-border disclosure principle is implemented in the code

Rule 12 is new. It implements information privacy principle 12, which requires agencies to take steps to ensure that personal information disclosed to foreign persons or entities in reliance on listed disclosure exceptions in information privacy principle 11, will be subject to comparable safeguards to New Zealand’s privacy laws.

Rule 11(2)(i) of the notified code, relating to disclosure of health information for accreditation, assurance, and risk management, has been added to rule 12(1). Although such services may

not be regularly performed by foreign persons or entities, these are standard business practices that can be planned, and the necessary safeguards put in place, if overseas disclosures are required. Accordingly, health agencies should comply with rule 12 if using foreign entities to provide these services (unless this is not necessary by virtue of section 11(5) of the Privacy Act).

Rule 12 of the notified code also required health agencies to ensure that health information is protected by “comparable safeguards to those in this code”. However, health agencies are also subject to important new requirements in the Privacy Act 2020 that provide privacy safeguards to individuals, such as mandatory privacy breach notification. While these requirements should also be considered safeguards under the code given that health agencies must comply with them, for clarity, the Commissioner has amended references to “the code” in rule 12 to:

...comparable safeguards to those in the Act, as modified by this code.

Finally, rule 12(3) has been amended to reflect the possibility that a country is prescribed in regulations subject to carve outs, or only for particular sectors (such as the health sector). The definition of “prescribed country” in rule 12(3) has been modified to reflect this, and now reads:

Prescribed country means a country specified in regulations made under section 214 of the Act that are made without any qualification or limitation relating to a class of person that includes B, or to a type of information that includes health information.

5. Other matters

The language of the code has been amended to ensure it is gender neutral. Additionally, minor typographical errors have been corrected and unnecessary definitions removed.

The Commissioner also 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.

Additionally, some submitters requested that the guidance on the Health Information Privacy Code be updated. The Commissioner agrees that it is timely to update the Office’s guidance and will allocate space to do so in the Office’s work programme, once implementation projects relating to the new Privacy Act are complete.