

1 February 2023

Hon Kiritapu Allan  
Minister of Justice  
Parliament Buildings  
WELLINGTON

Dear Minister

## **QUARTERLY REPORT OF THE PRIVACY COMMISSIONER FOR THE PERIOD 1 OCTOBER 2022 TO 31 DECEMBER 2022**

### **Highlights**

December 2022 marked two years since the commencement of the Privacy Act 2020. Our experience during this time has been that non-compliance with Privacy Act requirements has been higher than what was expected in 2014 (at the time of policy approval for the Privacy Bill) or when Parliament passed the Privacy Bill. Looking forward, there are reasons to expect privacy risks will continue to increase, given the rapid adoption of new technologies (such as biometrics) that will have a significant impact on our society.

As privacy risks increase we can expect the volume and severity of privacy breaches to increase. During this reporting period, the number of privacy breaches stayed high and for the first time a majority of the notified privacy breaches were caused by intentional or malicious activity (such as cyber security attacks). One of these privacy breaches was the Mercury IT ransomware attack, which has affected a range of agencies including Te Whatu Ora and the Ministry of Justice. The High Court has granted injunctive orders to limit access to the compromised information, and we are prioritising a compliance investigation into this privacy breach.

In 2023 we will be prioritising our ongoing evolution towards being a proactive, risk-based privacy regulator. We will implement our new strategy of addressing privacy risks and regulatory failure in the privacy system, through making privacy a core focus of agencies. While our resources are currently limited, our focus will be on promptly using our compliance tools and statutory powers to address serious privacy harm, setting clearer expectations to provide agencies with greater certainty about their responsibilities, and engaging and empowering people and communities who are more vulnerable to serious harm.

## **The adoption and regulation of biometric technologies in New Zealand**

The use of biometric technologies, including facial recognition technology, is becoming increasingly widespread in New Zealand. While these technologies can deliver significant benefits for agencies and individuals, they can also lead to privacy risks relating to accuracy, surveillance and profiling, transparency and discrimination.

Biometrics attracted significant media interest this quarter, including considerable attention on a proposed use of a facial recognition system by the Foodstuffs supermarket chain. The widespread rollout of such a system across so many stores could have a large impact on citizens and the use of their identifiers. We have engaged with Foodstuffs on its proposed trial of facial recognition technology. We will be assessing whether there is adequate evidence from the trial that facial recognition technology is an effective tool to respond to safety concerns about customer behaviour in supermarkets, and that using it to collect customers' biometric information is a reasonable response to the identified problems that the technology is proposed to address and is compliant with the Privacy Act.

Setting clear expectations across the economy for how the Privacy Act regulates biometrics continues to be a priority for us. In October 2021 we issued a position paper setting out how the information privacy principles apply to biometrics. In August 2022 we issued the consultation paper 'Privacy regulation of biometrics in Aotearoa New Zealand'. This paper sought the view of stakeholders, Māori Tiriti partners and the public about how biometrics (including facial recognition technology) should be regulated and whether additional measures are now required. As a part of this public consultation, in October we held a hui on the impacts and implications of biometrics for Māori, with attendees including academics from the University of Waikato and Te Mana Raraunga.

In total we received and analysed 100 submissions on our consultation paper. In December 2022, the Privacy Commissioner announced that he intends to explore the option of issuing a Code of Practice under the Privacy Act for biometrics and will be undertaking targeted consultation on this option.

## **Other activities of our Office**

### *Policy and international related activities*

This reporting period was the first time the Privacy Commissioner attended international meetings and processes in person since 2019. The Commissioner attended the Global Privacy Assembly, the Asia Pacific Privacy Authorities Forum and the International Association of Privacy Professionals Australia New Zealand Summit. These meetings are an important opportunity to build relationships with our international peer privacy regulators and to share experience and regulatory approaches. As a relatively small jurisdiction it is of real benefit to be informed of the work of larger privacy regulators so that we can identify opportunities for responding to privacy issues that similarly affect our citizens.

We made the following submissions to Parliamentary select committees on the:

- Criminal Activity Intervention Legislation Bill, where the Deputy Commissioner presented to the Select Committee in person
- Charities Bill
- Customs and Excise (Arrival Information) Amendment Bill, and
- Credit Contracts and Consumer Finance Amendment Regulations 2022.

We also made submissions on the:

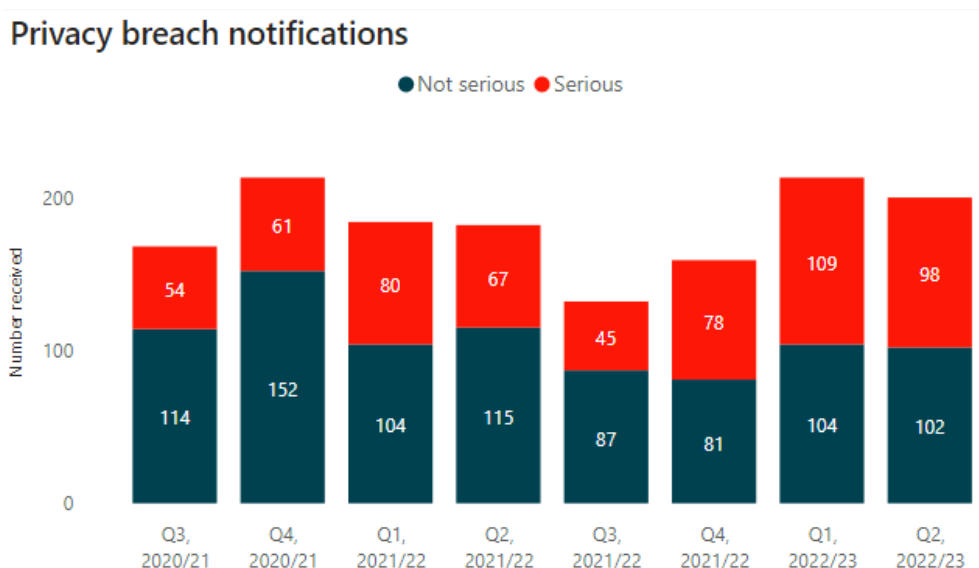
- Department of Internal Affairs Approved Information Sharing Agreement for the sharing of death information, and
- Changes to the Inland Revenue – Ministry of Social Development Approved Information Sharing Agreement relating to the eligibility for benefits and subsidies.

We continued to work with the Ministry of Justice on the development of a Privacy Amendment Bill to broaden the Privacy Act’s notification requirements.

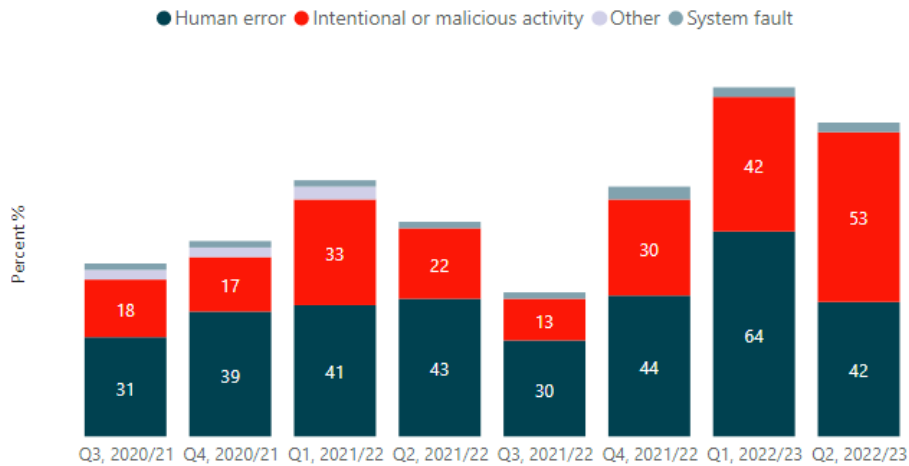
### *Compliance and enforcement*

As a part of our September 2022 ‘Joint Inquiry into Police conduct when photographing members of the public’, we had issued a compliance notice under the Privacy Act in December 2021 that required Police to cease the practice of collecting voluntary photographs and prints from youth, develop appropriate procedures and implement training relating to such photographing. During this quarter New Zealand Police reported on their progress towards fulfilling the compliance notice, although we note that full compliance will not be achieved for some time. We also briefed the Minister of Police on the Inquiry and provided Ministers with additional information on matters related to the Inquiry.

The charts below demonstrate that the number of privacy breaches notified to us has remained high and that for the first time the majority of serious privacy breaches were caused by intentional or malicious activity.



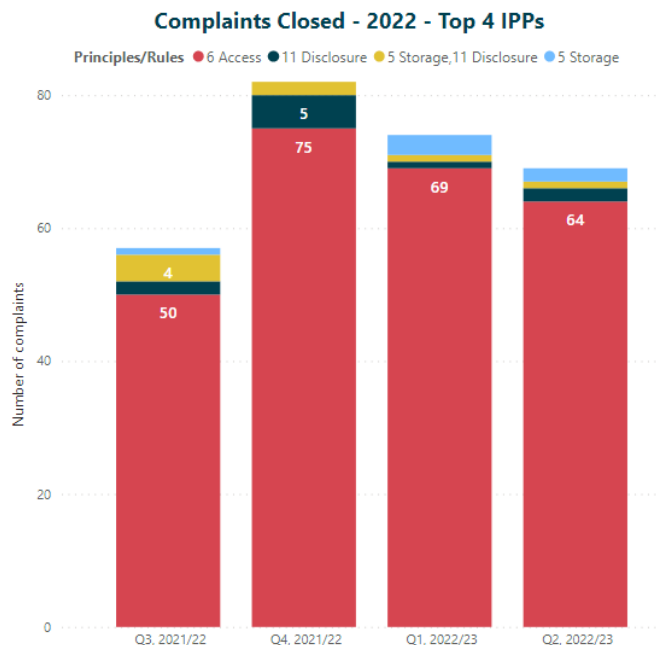
### Primary cause for serious privacy breach notifications



### Investigations and dispute resolution

Privacy complaints and public enquiries have continued to be high in number relative to a year ago. Despite these high volumes, our Investigations and Dispute Resolution team has made progress in reducing the average time to close a complaint from 192 to 158 days, and 87 percent of complaints were closed with either a positive outcome or resolution of the issue raised<sup>1</sup>.

The mix of privacy complaints that were closed remained consistent over the calendar year, with the bulk of privacy complaints relating to the issues with individuals accessing their personal information held by agencies.



<sup>1</sup> Note that this 87% statistic is distinct from the key performance indicators contained in the appendices of this report. The 87% includes those complaints that were resolved quickly prior to formal investigation.

### *Communication and education*

During this period we continued to revise the content on our website, streamlining information on how individuals can protect themselves from a privacy breach, and privacy issues related to health information. A privacy complaint Case Note was also published regarding a woman seeking a review of a health agency's decision to withhold the names of employees who had accessed her health information. Our final view was that the agency had a proper basis to refuse providing employee names as it believed that disclosing the individuals' names would create a significant likelihood of serious harassment.

We marked the international 'Right to Know Day' on September 28 with an opinion piece on Stuff.co.nz and a media release that received good coverage, particularly on Māori media. We noted that our research has found that only half of New Zealanders are aware that they have a right to access the personal information that organisations hold about them. At the same time, more than 80% of the privacy complaints that we receive concern accessing personal information, such as delays or information being withheld from individuals.

We finished the year with a joint webinar with the Privacy Foundation and Victoria University of Wellington on genetic privacy. The webinar discussed direct-to-consumer genetic testing for health and ancestry and the impact on genetic privacy and the findings of a 2022 survey of 1000 New Zealanders (20% Māori) and 1000 Australians (20% Aboriginal and Torres Strait Islanders) on attitudes towards genetic privacy. The survey explored a range of privacy issues including levels of comfort with sharing genomic data, who should benefit from using it, who should have control over its use, and who should have access (including law enforcement).

### **Financial report**

Financial information and performance against our Statements of Performance Expectations are appended to this report. The Office has continued to report a surplus in excess of its quarter 2 budget mainly as a result of various staff vacancies (like many agencies, we are facing high staff turnover, but are also actively working to fill vacancies), lower contract services' costs and reduced travel.

Yours sincerely



Michael Webster  
**Privacy Commissioner**

Encl:   Appendix A:   Q2 KPI Trend Report – December 2022  
      Appendix B:   Financials for period ending 30 December 2022  
      Appendix C:   Performance against Statement of Performance Expectations - Year to Date