Privacy Commissioner
Te Mana Matapono Matatapu

Privacy Commissioner's Commentary on *R v Alsford* : voluntary requests for personal information by law enforcement agencies

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Supreme Court affirms the role of the Privacy Act

R v Alsford is an important privacy decision. The Supreme Court has clarified the law in relation to voluntary requests for personal information by law enforcement agencies, and affirms the obligations and responsibilities of both the law enforcement requester and the responding agency. The decision affirms the importance and policy of the Privacy Act 1993, and its relationship with other relevant statutes, including the production order regime in the Search and Surveillance Act 2012, the test for the admissibility of evidence under section 30 of the Evidence Act 2006 and the test for an unreasonable search under section 21 of the New Zealand Bill of Rights Act 1990.

The Privacy Commissioner's transparency reporting trial revealed confusion in the private sector about the lawful basis for law enforcement requests for personal information. *Alsford*, a criminal pre-trial matter, presented an opportunity for judicial clarification and the Privacy Commissioner was granted leave to be heard on the privacy issue. The Court's decision was released in March 2017, subject to non-publication orders that have now been lifted.

The Court considered whether a production order should have been used to obtain power consumption data from electricity providers in an investigation of suspected cannabis cultivation, and whether the power consumption data was obtained in breach of privacy principle 11(e)(i) of the Privacy Act.

The Police made requests to three electricity providers for power consumption data from the defendant's properties. All three companies disclosed the information sought under privacy principle 11(e)(i) of the Privacy Act. This manner of obtaining the power consumption information and its use to support subsequent production order and search warrant applications to uncover evidence of offending was one of the grounds of appeal.

The majority of the Supreme Court (4:1) affirms the Police's ability, in the circumstances and in the absence of a production order, to ask for power consumption information in the form of monthly aggregated data, despite finding that one of the three requests did not provide sufficient information to justify the resulting disclosure. That particular disclosure was therefore not justified in terms of principle 11(e)(i) and, to that extent, there was a breach of the Privacy Act.

The decision also affirms that where the Police obtain information from service providers about customers on a voluntary basis, they must not infringe section 21 of the New Zealand Bill of Rights Act (the right to be secure against unreasonable search and seizure).

The appeal involved assessing the inter-relationships between four different statutes:

1. The Privacy Act and the "maintenance of the law" disclosure exception (privacy principle 11(e)(i)) – what is the nature and scope of this exception and what are the respective obligations on the law enforcement requester and the responding service provider?

2. The Evidence Act - was the information obtained admissible under section 30 (even if there was a breach of the Privacy Act)?

3. The Search and Surveillance Act – when should a production order be used to obtain personal information from service providers?

4. The New Zealand Bill of Rights Act - was there a reasonable expectation of privacy in the information that made the disclosure a "search" under section 21, and if so, was it unreasonable?

The *Alsford* decision is significant in formulating an approach that reconciles the different statutes and clarifies the role of the Privacy Act. One of the fundamental considerations is a proper characterisation of the maintenance of the law exception – it is not an empowering provision for law enforcement agencies to request information, but rather a disclosure provision enabling information holding agencies to respond to law enforcement requests in appropriate circumstances.

Earlier judicial authority (predating the Search and Surveillance Act) held that limited disclosure for law enforcement purposes and the use of that information in seeking a search warrant came squarely within privacy principle 11(e)(i), in circumstances where section 21 of the New Zealand Bill of Rights Act had not been engaged. The Supreme Court majority decision affirms this position, and the limits on obtaining personal information by voluntary request if it would amount to a search.

Maintenance of the law – clarifying the scope of the Privacy Act's principle 11(e)(i) exception

The Privacy Act allows for the disclosure of personal information where necessary to avoid prejudice to the "maintenance of the law" (principle 11(e)(i)).

How far this exception allows for disclosures to law enforcement by voluntary request is an important question for the Police. Requiring a production order could raise issues where an investigation is at such a preliminary stage that there is an insufficient basis for obtaining a mandatory order, potentially inhibiting the effective investigation of suspected offending.

Alsford affirms it is open for law enforcement agencies to seek personal information from service providers on a voluntary basis, subject to making a lawfulness assessment. Depending on the nature of the information and other factors, obtaining personal information by a voluntary request may be a "search" and require the judicially authorised production order process to be lawful.

The Supreme Court provides helpful guidance on the nature of the Police's obligation when making a voluntary request for disclosure under principle 11(e)(i). In short, what is required is an indication of why the Police are requesting the information. However, the Police do not have to outline in detail the course of their investigation to justify a request for information. Too much detail may compromise the investigation or reveal personal information about the investigation target. At an early stage of an investigation, the Police may not be able to say much more than a particular offence is being investigated and the information requested is relevant to that offence, with some indication of why it is relevant.

When does a request result in a search?

The decisive issue for the majority of the Supreme Court was whether the electricity consumption records were obtained as a result of an unreasonable search, contrary to section 21 of the New Zealand Bill of Rights Act (NZBORA).

The majority decision affirms that whether section 21 of NZBORA is infringed depends on whether there is a "search" i.e. whether the individual has a reasonable expectation of privacy in the information sought. This overrules the approach suggested in *R v R*[1] that obtaining information consistently with the privacy principles means there will be no "search" for the purposes of section 21.

Approaching this question requires an appreciation of the difference between the privacy right embodied in section 21 of NZBORA that turns on "reasonable expectations of privacy" and the much broader protection of personal information under the Privacy Act. Compliance with the privacy principles can inform but is not necessarily determinative of whether there is an unlawful search and therefore whether a production order should have been sought. These are different tests and should not be confused.

In this case, the majority of the Court considered the defendant did not have a reasonable expectation of privacy in the power consumption data obtained by the Police. The data did not tend to reveal intimate details of his lifestyle and personal choices. However, the majority noted that in different circumstances, the use of smart meters, for example, could enable power consumption data to reveal intimate details about an individual. In that case, obtaining such information from service providers could amount to a search, giving rise to the need for a production order.

Is a breach of the Privacy Act relevant to the admissibility of the information as evidence?

A further question was how compliance or non-compliance with the privacy principles might be relevant to whether the evidence obtained is admissible under section 30 of the Evidence Act.

Section 11 of the Privacy Act provides that the privacy principles do not generally confer legally enforceable rights (apart from the right to access one's own personal information held by public sector agencies). However, the courts can in some circumstances take notice of the privacy principles. The majority of the Supreme Court affirms that compliance with the privacy principles could potentially be relevant in assessing whether evidence has been obtained unfairly, however breach of the privacy principles will not very often be determinative.

The Chief Justice and the importance of privacy in the digital age

The minority judgment (Elias CJ) is notable for the importance placed on the Privacy Act. Her Honour would have gone further than the majority in recognising and protecting the

[1] [2015] NZHC 713; [2015] NZCA 165.

individual's privacy interest in these circumstances, and gave greater prominence to the role of the privacy principles, noting the following:

> *Today, electronic capture and storage of such information and the ease with which it can be shared may greatly extend what is reasonably to be expected in the original sharing of information. Such extended disclosure is potentially destructive of the values of human dignity and autonomy protected by the concept of privacy. Since the concept of privacy is contextual, information which may not appear to be personal or intrusive in the context in which it is supplied or obtained may well be so in another context. Such considerations are behind the protections on collection and disclosure under the Privacy Act. Behind the legislation lies international recognition, found in instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, that privacy is a human right.*

The Chief Justice considered that the power records were obtained unlawfully in breach of the Privacy Act. Her Honour did not accept the request by the Police to the power companies fell within the Privacy Act disclosure exception. This was because no basis was given as to why this disclosure route was necessary when viewed in light of the compulsory disclosure mechanisms in the Search and Surveillance Act. Her Honour considered the power records were thereby unlawfully obtained for the purposes of section 30 of the Evidence Act and as a result she would have excluded the evidence as she considered exclusion would be proportionate to the impropriety involved in collection.

Her Honour also expressed reservations about restricting a "search" to conduct that invades a reasonable expectation of privacy. Her provisional view was that the Police request was an unreasonable search and seizure when considered in the context of the Privacy Act prohibitions on disclosure and unfair collection of personal information, as well as the context provided by the Search and Surveillance Act.

While the views expressed by the Chief Justice are attractive in their affirmation of the importance of the right to privacy, the Court's majority decision nevertheless provides a practical accommodation of the different statutory frameworks. The majority decision offers a workable approach while recognising the importance and role of the Privacy Act and the constitutional boundaries that operate when State agencies obtain personal information for law enforcement purposes.

Applying the decision in the privacy complaints jurisdiction

The Supreme Court's decision is welcome for the clarity it provides about the nature and scope of the maintenance of the law disclosure exception, in light of the New Zealand Bill of Rights Act.

The decision provides useful guidance for the privacy complaints jurisdiction in cases that challenge law enforcement agencies obtaining personal information from third party service providers on a voluntary basis and/or disclosures of personal information that respond to law enforcement requests.

It is also instructive for the Privacy Commissioner's policy functions and informs analysis of law enforcement powers to obtain personal information and the appropriate processes for doing so, depending on the circumstances, as well as upholding the policy and importance of the Privacy Act.

Summary of the main findings

In summary, the majority decision affirms that:

- The privacy principles do not confer a power on the Police to obtain personal information. Compliance with a law enforcement request for personal information is voluntary, not compulsory.

- The creation of the production order regime in the Search and Surveillance Act does not mean that the Police can no longer make voluntary requests for information such as power consumptions records (answering the question posed by the Court of Appeal).[2]

- The agency disclosing has the responsibility for ensuring there are adequate grounds to disclose. The disclosure threshold (reasonable grounds to believe the disclosure is necessary to avoid prejudice to an investigation) is a meaningful one - an agency responding to a law enforcement request may legitimately provide some customer information to law enforcement in response to a request for it, but the request must be justified under the relevant privacy principle 11 disclosure exception.

- Any voluntary law enforcement request needs to contain sufficient information to enable the agency holding the information to form a view about whether there is a proper basis for disclosure:

    - Simply asserting that the information is needed for a Police investigation is not enough without giving an indication of why it is needed.

    - An indication of why the Police are requesting the information is required and why the information sought is relevant to the offence being investigated.

    - The Police do not have to outline in detail the course of their investigation. At an early stage the Police may not be able to provide much information other than some indication of the relevance of the information sought to the offence being investigated. The Police do not have to meet the same standard as for a production order or search warrant.

    - The Police do not have to explain why the information is being sought informally (on a voluntary basis invoking the exception to the privacy principle), rather than by a formal mandatory process such as a production order.

- Where the Police obtain information from service providers on a voluntary basis, they must not infringe section 21 of the Bill of Rights Act. This affirms that there are

[2] [2015] NZCA 628.

constitutionally prescribed limits to the use of voluntary requests for obtaining personal information.

  - Whether section 21 has been infringed turns on whether the information was obtained as a result of a "search" (which depends on whether the person in fact had a reasonable expectation of privacy in relation to the information), and whether that search was unreasonable.

  - Whether a person has a reasonable expectation of privacy in particular information is not determined by reference to the Privacy Act.

  - A reasonable expectation of privacy is directed at protecting "a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination by the state" and includes information "which tends to reveal intimate details of the lifestyle and personal choices of the individual." This depends on considering contextual factors such as the nature of the information at issue, the nature of the relationships between the parties, the place where the information was obtained and the manner in which it was obtained.

- Contractual terms and conditions with customers may be relevant to whether there is a reasonable expectation of privacy but these are not necessarily determinative.

- In urgent circumstances a search by a voluntary request may be reasonable, but if there is time to obtain a production order or search warrant, the search may well be unreasonable.

- The obligation to comply with section 21 and to seek a production order where necessary falls squarely on the Police. The disclosing agency is not in a position to make a sensible assessment about why the Police have chosen one investigatory mechanism (such as a voluntary request) over another (such as a production order).

- Mr Alsford did not have a reasonable expectation of privacy in the power records in the form of aggregate monthly power usage data, and so obtaining that information from the electricity companies did not amount to a search for the purposes of section 21 of the Bill of Rights Act.

- In other circumstances there may be a reasonable expectation of privacy in power consumption records that reveal intimate details about an individual's lifestyle and personal choices and activities in their home, for example, from data generated by smart meters.

Resources

- Privacy Commissioner's Transparency Reporting Summary Report (Oct 2017)
- Releasing personal information to Police and law enforcements agencies (Oct 2017)
- Our blog on Hager and Westpac
- Our statement clarifying M Bradbury's complaint