



**Periodic Update Report
on
Developments in Data Protection Law
in New Zealand**

(July - December 2021)

**Fourteenth report to the European Commission
by the competent supervisory authority
for the application of the Legal Data Protection Standards
in New Zealand**

31 January 2022

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31 January 2022

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Dear Bruno

Update report on developments in New Zealand data protection law

I submit this 14th report to update the European Commission in relation to matters bearing upon the legal standards for the protection of personal data in New Zealand for the six months since my last report dated 9 July 2021.¹

I am pleased to report that essentially nothing has changed in the last 6 months. While minor technical amendments have been made to update the Privacy Act 2020 as a consequence of the Legislation Act 2019, these amendments do not affect legal standards for the protection of personal data.

In other developments, I report on an amendment to a current approved information sharing agreement, privacy-related High Court decisions during this period, the issue of Privacy Commissioner guidance on sensitive information and a position paper on biometrics, the issue of the first compliance notice under the Privacy Act, my appointment as Deputy Privacy Commissioner and the departure of the Privacy Commissioner John Edwards to the United Kingdom.

In essence, this report simply confirms that the level of data protection in New Zealand has not been diminished during this period. I trust that this is reassuring for the purposes of the Commission's monitoring of the level of data protection under New Zealand law.

Yours sincerely



Liz MacPherson
Deputy Privacy Commissioner
New Zealand

¹ You can view previous reports on the Privacy Commissioner's website – see "[New Zealand-EU data protection adequacy reporting](https://www.privacy.org.nz)" Office of the Privacy Commissioner <www.privacy.org.nz>.

Background

- 1 On 19 December 2012, the European Commission formally decided that for the purposes of Article 25(2) of Directive 95/46/EC, New Zealand is considered as ensuring an adequate level of protection for personal data transferred from the European Union.² This decision was later amended by a European Commission decision of 16 December 2016 reflecting aspects of the ECJ decision in the first *Schrems* judgment.³
- 2 The European Commission has a responsibility to monitor the functioning of the decision. To assist the European Commission to undertake this monitoring, the New Zealand Privacy Commissioner as “the competent supervisory authority for the application of the legal data protection standards in New Zealand” under the European Commission’s decision, has undertaken periodically to submit update reports on developments in New Zealand data protection law.⁴
- 3 Regulation (EU) 2016/679 of 27 April 2016, or the General Data Protection Regulation (**GDPR**), came into effect on 25 May 2018 and repealed the 1995 Directive. However, Article 45(9) of the GDPR provides that the decisions adopted by the Commission on the basis of Article 25(6) of Directive 95/46/EC continues in force until amended, replaced or repealed by a Commission decision adopted in accordance with GDPR Article 45(3) or (5). Accordingly, the Commission’s adequacy decision covering New Zealand continued under the new GDPR regime.
- 4 On 22 December 2015, the Privacy Commissioner submitted the [first report](#) that surveyed developments since the commencement of the Commission’s decision in 2013. The Privacy Commissioner submitted subsequent reports dated [2 March 2016](#) (supplement), [30 June 2016](#) and [9 December 2016](#), [26 June 2017](#) and [22 December 2017](#), [9 July 2018](#) and [21 December 2018](#), and [5 July 2019](#) and [19 December 2019](#), [8 July 2020](#), [29 January 2021](#) and [9 July 2021](#).
- 5 This report covers the period 1 July to 31 December 2021 (inclusive). The Office of the Privacy Commissioner does not, and does not purport to, speak for the New Zealand Government in this report.

Statutory amendments to New Zealand privacy law

- 6 The legal standards for the protection of personal data in New Zealand are primarily set out in the Privacy Act 2020 (**Act**) that came into force on 1 December 2020. The

² [2013/65/EU](#): Commission Implementing Decision of 19 December 2012 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data by New Zealand (notified under document C(2012) 9557).

³ See [C/2016/8353 Commission Implementing Decision \(EU\) 2016/2295 of 16 December 2016 amending Decisions 2000/518/EC, 2002/2/EC, 2003/490/EC, 2003/821/EC, 2004/411/EC, 2008/393/EC, 2010/146/EU, 2010/625/EU, 2011/61/EU and Implementing Decisions 2012/484/EU, 2013/65](#).

⁴ 2013/65/EU, above n 2.

Act covers the entire public and private sectors, with a few specific public interest exemptions that one might expect in a democratic society.

- 7 On 28 October 2021, the Secondary Legislation Act 2021 made technical amendments to update the Privacy Act 2020, as a consequence of the Legislation Act 2019 coming into force. These amendments in [Schedule 16 of the Secondary Legislation Act 2021](#)⁵ standardise the publication requirements for secondary legislation including codes of practice and Orders in Council made under the Privacy Act.
- 8 Section 36 of the Privacy Act has been replaced as a result of these amendments and the status of the codes of practice is confirmed as being secondary legislation in accordance with the Legislation Act 2019.
- 9 The Commissioner's power to make codes of practice, and powers in the Privacy Act to make Orders in Council are not affected by the amendments.

Codes of Practice

- 10 In the twelfth report to the European Commission, we confirmed that the six codes of practice issued under the Privacy Act 1993 were repealed and replaced under the Act to reflect changes in the new Privacy Act 2020 with effect from 1 December 2020.⁶ You can view more information about the revised Codes of Practice on our website [here](#).
- 11 No amendments have been made to the Codes of Practice during the Review Period.

Part 7(1): Approved information sharing agreements

- 12 The first and second reports in this series of periodic updates explained the operation of that part of the Privacy Act (now Part 7, subpart 1) that provides for 'approved information sharing agreements' (known as **AISAs**) that can be approved by Order in Council from time to time.
- 13 Part 7, subpart 1 of the Act sets out relevant process safeguards to ensure that an AISA does not unreasonably impinge on the privacy of individuals and contains adequate safeguards to protect their privacy. For example, the Act requires agencies to undertake a privacy impact assessment when developing an AISA. The approval process has a number of system checks including consultation with the Privacy Commissioner and relevant groups and stakeholders, ministerial recommendation after taking into account consultation submissions and a set of statutory considerations, authorisation by the Executive, and ongoing reporting and Privacy

⁵ Secondary Legislation Act 2021, sch 16. See also Legislation Act 2019 and Secondary Legislation Act Commencement Order 2021.

⁶ *Periodic Update Report on Developments in Data Protection Law in New Zealand (July – December 2020): Twelfth Report to the European Commission by the competent supervisory authority for the application of the Legal Data Protection Standards in New Zealand* (Privacy Commissioner of New Zealand, 29 January 2021) at 7.

Commissioner review. You can review the summary details of each AISA in [Schedule 2 to the Act](#).

- 14 No further AISAs have been approved in this period.
- 15 The AISA between Inland Revenue and the Ministry of Social Development enabling information sharing for the purposes of assessing eligibility for social welfare benefits, enforcing obligations related to benefits and assessing tax obligations has been amended. The additional public service purpose to be facilitated by the AISA (the development of public policy using personal information to assess the potential costs to the Crown and the impacts on individuals who may be affected) is reflected in a corresponding amendment in Schedule 2 of the Act.
- 16 In short, the AISA (and the corresponding order) now:⁷
 - a allows IR and MSD to share personal information for use in policy development;
 - b provides that personal information shared solely for policy development purposes may not be used for enforcement or any other purpose for which information may be shared; and
 - c allows information used for enforcement or other purposes to be used for policy development purposes.

Other statutory developments

- 17 There are no other significant statutory developments to draw to your attention in this period.

Significant court cases

- 18 In the New Zealand legislative scheme for privacy and data protection, individuals do not need to use the courts to enforce their rights. Instead, individuals generally bring complaints to the Privacy Commissioner for resolution at no cost to that individual.
- 19 Nonetheless, some parties may still choose to bring relevant privacy cases to the courts. For instance, cases that are not resolved through the Commissioner's processes can be taken to the Human Rights Review Tribunal which is part of New Zealand's system of specialist statutory tribunals. Cases can be appealed from the Tribunal through the court system. Parties may also use the vehicle of judicial review to challenge a public sector agency's decision with respect to personal information.
- 20 There are two proceedings of interest to draw to your attention during this period. These affirm the role and function of the courts in privacy related matters by facilitating

⁷ See [Information Sharing Agreement between Ministry of Social Development and Inland Revenue Department](#) (September 2018); and Privacy (Information Sharing Agreement between Inland Revenue and Ministry of Social Development) Amendment Order 2021.

the judicial review of agency decisions that relate to the control of personal data,⁸ and providing injunctive relief to protect against the further use and dissemination of compromised data following serious privacy breaches.⁹

Disclosure of Māori vaccination information: Te Pou Matakana Limited v Attorney-General

- 21 In late 2021, the Privacy Commissioner intervened in judicial review proceedings in relation to the disclosure of Māori vaccination information.¹⁰ This proceeding was concerned with the use of Māori data by the Ministry of Health and the interpretation of the serious threat to public health exception in rule 11(2)(d) of the Health Information Privacy Code during the COVID-19 pandemic.
- 22 The Commissioner's submissions were cited with approval by the Court in two decisions. Information about this proceeding and the Commissioner's submissions are available [here](#).

Injunction to protect confidential information following ransomware attack: Waikato District Health Board and Radio New Zealand

- 23 In August 2021, following a serious ransomware attack on the Waikato District Health Board (**WDHB**) by unknown criminals resulting in the exfiltration of patient data to the dark web and personal information being sent to a number of media organisations, the WDHB successfully obtained an order from the High Court of New Zealand which restrains a state broadcaster and all "unknown defendants" from accessing or using any information from the stolen dataset without WDHB's consent.¹¹

Other developments

Privacy Commissioner's position paper on biometric information

- 24 The Privacy Commissioner has published a position paper on how the Privacy Act applies to biometric information to inform decision-making about biometrics by agencies covered by the Act, in both the public and private sectors.
- 25 The position paper, a summary of key issues, and a background post are available on our website.¹² The Office will revisit this position paper six months after the date of publication in consultation with key stakeholders to assess its impact.

⁸ *Te Pou Matakana Limited v Attorney-General (No 1)* [2021] NZHC 2942; and *Te Pou Matakana Limited v Attorney-General (No 2)* [2021] NZHC 3319.

⁹ *Waikato District Health Board v Radio New Zealand and Unknown Defendants* [2021] NZHC 2002.

¹⁰ *Te Pou Matakana Limited v Attorney-General (No 1)* and *(No 2)*, above n 8.

¹¹ *Waikato District Health Board v Radio New Zealand Limited and Unknown Defendants*, above n 9.

¹² "[Biometrics and Privacy](#)" (7 October 2021) Office of the Privacy Commissioner <www.privacy.org.nz>.

Privacy Commissioner's guidance note on sensitive information

- 26 The Privacy Commissioner has published a guidance note on how the Privacy Act applies to sensitive personal information.
- 27 The guidance note is available on our website.¹³

Appointment of Deputy Privacy Commissioner and departure of Privacy Commissioner

- 28 On 24 November 2021 I was appointed as New Zealand's first Deputy Privacy Commissioner for a term of one year.¹⁴ The Deputy Privacy Commissioner is a statutory role set out in the Act. The Deputy Privacy Commissioner may perform or exercise all the functions, duties, and powers of, and is entitled to all the protections, privileges, and immunities of, the Privacy Commissioner.
- 29 Privacy Commissioner John Edwards completed his term as New Zealand's Privacy Commissioner at the end of 2021 to take up the role of United Kingdom's Information Commissioner commencing 3 January 2022.¹⁵

First compliance notice issued under the Privacy Act 2020

- 30 In September 2021, the Privacy Commissioner issued a compliance notice to the Reserve Bank of New Zealand following a cyber attack. The compliance notice related to a weakness in one of its third-party systems and some of its processes. The compliance notice targets specific steps to be taken within identified timeframes and such progress will be monitored.¹⁶
- 31 This compliance notice is the first such notice issued by the Privacy Commissioner under the Act.

Further information and reports

- 32 If you have any further questions or would like further information please contact Joanna Hayward, General Counsel, Office of the Privacy Commissioner at joanna.hayward@privacy.org.nz.
- 33 In due course, we will publish this report on the website of the Office of the Privacy Commissioner at www.privacy.org.nz.
- 34 We anticipate that we will provide you the next periodic report in July 2022 or thereabouts.

¹³www.privacy.org.nz "Working with Sensitive Information" (16 December 2021) Office of the Privacy Commissioner <www.privacy.org.nz>.

¹⁴www.privacy.org.nz "Appointment of Deputy Privacy Commissioner" (24 November 2021) *New Zealand Gazette* No 2021-go5166.

¹⁵United Kingdom Department for Digital, Culture, Media & Sport "John Edwards is confirmed as the new Information Commissioner" (press release, 21 December 2021).

¹⁶Office of the Privacy Commissioner "Compliance Notice issued to Reserve Bank of New Zealand following cyber attack" (press release, 15 September 2021).