Privacy Commissioner
Te Mana Matapono Matatapu

Privacy Commissioner
Te Mana Mātāpono Matatapu

Office of the Privacy Commissioner

Decision Guide: Investigations and Dispute Resolution

Updated August 2022

Privacy Commissioner
Te Mana Matapono Matatapu

Our investigative function

In general, the Privacy Act doesn't provide detailed procedural requirements for our investigations and dispute resolution function. Instead, there are a relatively small number of key mandatory requirements or legal checkpoints – such as the requirement to notify the parties if the Commissioner intends to investigate the matter. The Act gives the Commissioner and the OPC staff (under delegation) a significant amount of autonomy and discretion in carrying out investigations, choosing to facilitate settlement either with or without investigation as well as a discretionary power to decline to investigate if certain grounds exist.

The impact of our decisions: Legal and practical consequences

Our decision to investigate, attempt to settle or decline to take action affects the legal rights of complainants and respondent agencies. If we decline to investigate a complaint for lack of jurisdiction, or using our section 74 discretion, the complainant will not have access to the Human Rights Review Tribunal ("the Tribunal"). While our decision to decline to investigate can't be taken to the Tribunal it is subject to review by the Ombudsman or to judicial review in the High Court. In this way we have something of a gatekeeper role, directly limiting access to judicial decision-makers who can provide remedies.

The Office has created a Compliance and Regulatory Action Framework, which should be used to inform the decisions we make to investigate, decline to investigate or take some alternative action.[1]

Our complaints role in context: One of a range of tools for addressing non-compliance

Investigators need to bear in mind that investigations of individual complaints is only **one** of the means established by the Privacy Act for addressing breaches of the privacy principles.

If, for example, our assessment of a complaint finds there's been a breach but no harm, but we consider there are issues that warrant some action, there may be other options available to address the matter under our other statutory functions. There are a range of options that are available in these situations, whether that is providing advice to the agency, issuing a case note or guidance document, or contacting an industry body. If an investigation into a complaint by an aggrieved individual is not appropriate, the investigator can also consider referring the matter to the Compliance Team or the Regulatory Alignment Panel, particularly if the breach is serious.

We have a number of other options for addressing systemic or significant privacy problems within a particular agency or type of agency. We might utilise these options before, instead of, after, or during the investigation of a complaint, depending on the circumstances.

[1] https://privacy.org.nz/about-us/transparency-and-accountability/opc-policies/caraf/

Privacy Commissioner
Te Mana Matapono Matatapu

Examples of further action

- A warning or compliance advice letter
- Ongoing monitoring of the agency
- Approach the Chief Executive or the Minister about an underlying systemic issue
- Education for the agency or industry
- Guidance for the agency or industry (eg our Tenancy Guidance, CCTV guidelines)
- Transfer the matter to another investigating agency
- Public comment (media release, *Privacy News*, social media comment)
- Name the respondent: https://www.privacy.org.nz/about-us/transparency-and-accountability/opc-policies/naming-policy/
- Issue a compliance notice

Legal checkpoints: Key statutory and common-law rules

Below are some key legal rules and principles that provide a framework for all actions and decisions in our complaints and investigations role.

Act within the law

- Don't exceed the power given by the Privacy Act or interpret its provisions unreasonably.

Accessibility focused approach

- Don't assume either the complainant or the respondent will have knowledge of our process.
- Don't try and interpret facts in order to fit a Privacy Act complaint.
- Do try and work out what the complainant and respondent are trying to achieve and help direct them the most appropriate place for that.
- Do try and manage expectations about what we can and cannot do.

Natural justice

- Give people a reasonable chance to have a say and listen to them.
- Give clear reasons for our decisions and actions.

- Significant discussions with a party over the telephone may need to be followed up in writing.

Using our discretion

- The processes we follow shouldn't be so rigid that we fetter our discretion under the Act.
- But at the same time be as consistent as possible. Our decisions should be consistent with the Commissioner's earlier interpretations of the law and of established judicial authority – and if we do change our mind, we need to acknowledge the change and carefully justify the change with clear reasons.

Secrecy and privileged information

- Maintain the secrecy of all information and matters that come to your attention during your work, unless we need to disclose the information to fulfil the purposes of the Act *(section 206)*.[2]
- Refer to our practice note on how to exercise our discretion under this section.[3]
- Protect privileged information *(section 90)*. Make sure that privileged information we receive as part of an investigation remains privileged. We can see it, but no-one else should.

Don't copy correspondence from one party to the other

Sometimes we are asked by one party for a copy of correspondence that we've received from the other party. We deny these requests, relying on sections 29 and 206.

You should instead simply summarise the substance of the relevant allegations and arguments from the first party. Here you should be careful about exactly what you relay to the other party. Ensure that you are communicating the information necessary to progress the matter. If the information is particularly sensitive (for example, a complainant's description of their harm) check with the party who provided it first to confirm they are comfortable with your summary.

[2] Add objective reference to secrecy policy.
[3] Add objective reference to practice note.

Other legal rights and interests

Section 21 of the Act requires the Commissioner to take into account other rights and interests, including:

- other human rights and social interests that compete with privacy, such as the general desirability of the free flow of information and the right of government and business to achieve their objectives in an efficient way
- New Zealand's international obligations, and general international guidelines relevant to privacy
- cultural perspectives on privacy
- rights under *Te Tiriti o Waitangi*.

Privacy Commissioner
Te Mana Matapono Matatapu

Complaints

Complaints can be oral

Complaints do **not** have to be in writing. We can't therefore insist to a complainant that they must put their complaint in writing before we can accept it.

However, the Act also says an oral complaint must be put into writing as soon as practicable, and that we have to give the complainant "such reasonable assistance as is necessary in the circumstances" to enable them to put it in writing *(section 72)*. This means it is generally more efficient for a complainant (or their advocate) to put the complaint in writing themselves if this is possible. If you do take a verbal complaint, send the written version to the complainant to confirm you have accurately recorded their concerns before you progress the matter further.

Initial screening:
Is this a complaint we can and should investigate?

When we first receive a communication, we need to:

- establish whether the person intends it to be a complaint under the Privacy Act
- decide whether it's a complaint we have jurisdiction to investigate.

If we do have jurisdiction, we then need to decide what action to take. This includes whether we should decline to investigate it using our discretion under section 74, if one of the grounds in that provision applies.

If it is a complaint, is it one we have jurisdiction to investigate?

People and bodies outside our jurisdiction

We won't have jurisdiction to investigate the complaint if it concerns a person or body that is not an "agency" within the terms of section 8 of the Privacy Act.

Overseas agencies

If an overseas agency is carrying out business in New Zealand, the Privacy Act will apply to the information it collects or holds in the course of carrying out that business. However, the

definition of overseas agency excludes foreign governments, entities carrying out public functions on behalf of any foreign government and news entities.

The Act also applies to an agency that is a foreign individual, but only in respect to information collected by that individual in New Zealand or that is being held by them while that individual is present in New Zealand.[4]

Is it an agency?

The media is excluded – as long as they are regulated (eg BSA, Media Council or overseas equivalent).

There are organisations that don't fall within the definition of "agency" for the purposes of their interactions with the public, but are "agencies" in relation to the personal information they hold on their employees. For example, we can't investigate complaints about courts or tribunals in relation to judicial functions. That exclusion covers judges and court/tribunal officials – but it **doesn't** cover other people in a court or judicial context, such as lawyers or witnesses. For the application of this exclusion to registrars and other courts officials, see *Ministry of Justice v S* (High Court, Wellington, CIV-2005-485-1138, 7 Apr 2006).

You may need to determine whether the respondent body or individual is a "tribunal" under the Act. The term "tribunal" essentially refers to statutory bodies with a judicial function (*Director of Human Rights Proceedings v Catholic Church for New Zealand* [2008] 3 NZLR 216. To determine, however, whether a body is acting judicially as a "tribunal" rather than administratively is not always easy. The key distinction is whether the activity is more judicial than administrative and takes into account a number of factors set out in the leading case, *Trapp v Mackie* [1997] 1 All ER 489 (HL).

Our limited jurisdiction over intelligence organisations

What the Act says: Section 28, "Intelligence organisations"

"Information privacy principles 2, 3, and 4(b) do not apply to information collected by an intelligence and security agency."

Our jurisdiction over intelligence and security agencies – that is, the Security Intelligence Service and the Government Communications Security Bureau – excludes complaints under principles 2, 3, and 4(b). We also cannot issue an access direction or refer the complaint to the Director of Human Rights Proceedings ("the Director").

See also the specific exception in IPP10(2) that allows an intelligence and security agency to use personal information for a secondary purpose and the exception in IPP11(g) that permits the disclosure of personal information by any agency that believes on reasonable

[4] Section 4

grounds that the disclosure is necessary for an intelligence and security agency to perform any of its functions.

If we do investigate an Intelligence agency, the process ends with our Office, the complainant is not able to pursue the matter in the Tribunal (s95).

Parallel jurisdiction with IGIS?

When we do have jurisdiction to investigate a complaint, check if the complaint "more properly" belongs with the Inspector-General of Intelligence and Security. Usually complaints about access and correction "more properly" belong to the Office of the Privacy Commissioner, but other complaints may require consultation with IGIS before deciding where they "properly belong".

For more information see: Intelligence and Security Act amendments to Privacy Act: FAQs[5]

If we have jurisdiction, should we investigate?

Section under which the Commissioner has discretion to decline to investigate	Factors we would consider
S74(1)(a) The complainant has not made reasonable efforts to resolve the complaint directly with the agency concerned	What is reasonable – • Has it been brought to the attention of the privacy officer and/or complaints team? • Has the agency acknowledged receipt of the complaint and/or confirmed it is working on it? • How much time has the individual given the agency to respond? • What is the relationship between the complainant and respondent? • What are the complainant's circumstances? Are they vulnerable and/or is there a significant power imbalance? • Is the complainant represented by a lawyer or advocate?

[5] https://privacy.org.nz/publications/guidance-resources/intelligence-and-security-act-amendments-to-privacy-act-faqs/

	• If it is an allegation of a failure to respond to an access request, has the complainant followed up with the respondent? • Is it a sole trader/small agency and has the relationship broken down?
S74(1)(b) – alternative dispute resolution process because of membership of a particular agency/profession	Examples • Lawyer – Law society • Private Investigator – PSPLA • Medical professional – relevant registration board • Finance company – can search the Register to find out relevant resolution body (note- credit complaints about correction of credit reports, usually can't be addressed by these other bodies) • Bank – Banking Ombudsman • Telecommunications company – TDR • Utility company – Utilities Disputes • Social Workers Registration Board
S74(1)(c) There is an adequate alternate remedy (other than a right to petition House of Representatives/Ombudsman), which it would be reasonable for the complainant to pursue.	It can be difficult to try to facilitate a resolution to a complaint if the respondent is being asked to respond to similar facts in another forum at the same time. Rather than running a parallel process it may be preferable for the complainant to pursue both the privacy and other issues in one forum. While the other forum can't make a ruling on whether the Privacy Act was breached, it may be able to deal with the underlying facts in respect of the legal obligations it does have jurisdiction to determine. Access • If proceedings have been filed in the Employment Relations Authority ("ERA") or the Courts and the individual says they need the information for their proceedings, usually discovery or the ERA's powers to compel information would be an adequate alternate remedy. • Is the information predominantly company information? Is the respondent a lawyer/accountant – would a better remedy be access to client file through their professional association eg NZLS/NZICA? (Could also be s74(1)(b)). Other complaints

	• The facts alleged to be a privacy breach are intertwined with a larger issue that is being or would be better addressed in another forum. • The complainant has a mediation scheduled in another forum (this may resolve the wider issue and even if the privacy concerns are not directly addressed, both parties may be able to move forward). This may be a temporary decline on the basis the complainant can come back if it is not resolved.
S74(1)(d) There is a complaints procedure in a code of practice, which the complainant has not taken reasonable steps to pursue.	Codes of practice with a complaints procedure requirement for agencies: • Credit Reporting Privacy Code – Equifax, illion, Centrix. However, if it is a correction request, it is unlikely to be useful to refer a complainant back to the complaints procedure to ask the credit agency to review its own refusal to correct information. However, it may still be useful true for simple processing errors/failure to respond. • Health Information Privacy Code – this includes Health NZ, DHB's, GP's, ACC, health insurance, HDC etc • Telecommunications Information Privacy Code
74(1)(e) Complainant has known about the breach for more than 12 months	• Have they been trying to resolve it directly with the respondent? If yes, this may be a good reason to accept the complaint despite the delay. • Is it a serious breach? • Is it just outside the 12-month period and are there other factors that make an investigation necessary or desirable (e.g. public interest) • If yes to all of the above, we still need to consider whether an investigation would be practicable/fair to the respondent (e.g. are there good records, are relevant staff still available and likely to recall the circumstances). • Was the delay due to factors outside the complainant's control (e.g. health issues) • Was the delay due to professional advice (or the respondent) misdirecting complainant on whether a complaint to OPC was an option.

74(1)(f) The time that has elapsed is such that a complaint is no longer practicable or desirable.	Under this section the complainant may have only found out about the breach within the last 12 months, so the complaint might not be excluded by 74(1)(e). However, notwithstanding this an investigation may no longer practicable. Examples: • Availability of staff • Records of the breach – (was the breach verbal or written?) • Evidence/witnesses • Likelihood that circumstances can be recalled by individuals involved • Whether complainant made any attempt to address with respondent and if so, how soon after finding out about the breach
74(1)(g) Aggrieved individual does not wish to pursue the complaint	Essentially, the complaint is withdrawn • If the complaint is brought by a representative it may be appropriate to confirm during the investigation that the aggrieved individual still wishes to pursue the matter. • Important to note that a complainant who withdraws in order to pursue a complaint in the Tribunal may not be able to do so. Inform a complainant who seeks to withdraw in these circumstances of the risk their complaint could be struck out and suggest they seek legal advice (see *Gray v Ministry for Children*, Strike out decision).[6]
74(1)(h) The complainant does not have sufficient personal interest in the subject of the complaint	• A complaint from an individual (rather than at the Commissioner's own initiative) would normally need to be brought by or on behalf of an aggrieved individual or individuals. Note that in order to find an interference with privacy the individual who is affected by the breach must be harmed by the breach. • If a complainant does not have a personal interest, consider whether the complaint raises sufficiently serious issues that other action would be warranted. Consider referring to the Regulatory Alignment Panel to assess this.

[6] *Gray v Ministry for Children* (Strike-Out Application) [2018] NZHRRT 13 (11 April 2018).

74(1)(i) The subject of the complaint is trivial	• Refer to the compliance pyramid in the Compliance and Regulatory Action Framework. • Consider whether there is any public interest. • Consider the impact/importance of the issue for the individual concerned.
74(1)(j) The complaint is frivolous, vexatious or not made in good faith	• Consider the conduct of both parties. • Is the complainant genuinely seeking to address a privacy concern? • A complaint may be trivial despite being technically well founded/a breach – e.g. a request for review of withheld information that is trifling/already known to complainant. • Vexatious – for example the complainant has habitually and persistently made numerous complaints or request for reviews against the same agency with the intention to annoy or harass the agency or for some other improper purpose. • Bad faith- is the complaint made for an improper purpose or is it motivated by factors not related to privacy or accountability under the Privacy Act?
74(2) It appears to the Commissioner that having regard to all the circumstances of the case, an investigation is unnecessary.	• Refer to the Compliance and Regulatory Action Framework. • Consider the broader public interest/benefit of an investigation. • Consider the nature of the breach and the seriousness of the harm. *Conduct of the parties* • Has the agency already acknowledged the breach and taken steps to prevent it happening again? • Has the agency provided a fair and reasonable response? • Has the agency already offered what we would consider a reasonable resolution? • Has the complainant provided false or misleading information? *Outcomes* • Is the remedy or outcome expected, or sought by the complainant unrealistic, unachievable, or trivial? (e.g. they want a professional struck off their register or an employee dismissed, which OPC cannot action)

	• Is an investigation unnecessary because OPC will be addressing the issue through an alternative compliance mechanism (e.g. there is an Inquiry underway, or we will issue a compliance notice instead), or it is clear that the information requested is subject to a withholding ground or that the action complained about comes within an exception. *Contact issues* • Complainant has failed to respond after a reasonable number of attempts to make contact or the complainant has failed to advise the OPC of a new address and telephone number and is no longer reasonably contactable. • Complainant does not know or has failed to provide the name of the agency complained about and/or the name of the individual with whom they interacted. *Access Complaints* Have we investigated the same or a similar request for this information previously? Did we review the withheld information/refusal decision? If so, another investigation may not be necessary. However, consider whether the relevant withholding grounds were time sensitive (e.g., a refusal because the information could be sought under the Criminal Disclosure Act, or maintenance of the law due to an open investigation, which may now be closed). Has the information been released? If so, we might only investigate an alleged delay if the delay actually affected the individual. However, we may take other action instead (e.g. send a compliance advice letter to the agency to remind it of its requirement to respond if there was a technical interference). Is it an access request prompted by an underlying privacy issue that it would be better to address directly either through investigation or other compliance activity?

Section 81(3) The Commissioner may decide during the course of an investigation that further action is not necessary or appropriate.	We must have notified the parties we are investigating before we can use this section. This is essentially the same as s71(2) under the Privacy Act 1993 and we would use it in the same way. For example: • Is there a dispute of facts that further investigation is unlikely to resolve? • Does settlement appear possible? • Has the complainant expressed a clear intention to proceed to the Tribunal regardless of the outcome of the investigation? • Has the complainant rejected a reasonable settlement offer or has either party declined to willingly participate in a conciliation process?

Referrals to Ombudsman, Health and Disability Commissioner or IGIS

Section 75

If it looks like the complaint, or part of the complaint, belongs more properly with the Ombudsman, the Health and Disability Commissioner, the Inspector-General of Intelligence and Security, or the Independent Police Conduct Authority, then we **must**:

- consult with the relevant agency without delay
- decide what to do
- refer the complaint, or the relevant part of it, to the other agency without delay if we think it belongs there
- notify the complainant that we've done this.

N.B: Our agreed transfer protocol with the IPCA includes a preliminary step of seeking the complainant's consent to transfer. Note, we do not have this with Ombudsman or HDC.

When will a complaint "more properly" belong with the Ombudsman?

A complaint or part of it will, or may, fall more properly under the Ombudsman's jurisdiction in the following cases:

- **Official information** – it is mainly about official information, rather than personal information (it may be more appropriate for the Ombudsman to initiate the investigation then partially transfer any personal information to OPC if necessary).

- **Administrative action** – it is mainly about the reasonableness of some administrative action by a government body or official – for example, if the complainant is unhappy with the substance of a particular decision or with how they were treated. (Note that the Ombudsman does not have jurisdiction under the Ombudsman Act for Police, unless it is a refusal to release OIA, any Police complaint needs to be transferred to IPCA.)

Sometimes complainants (or their lawyer or advocate) may make a complaint about a decision or process under principle 8 arguments. Assess carefully to determine whether it is a complaint about checking information before use, or a broader complaint about administrative fairness. It may be useful to consult on a possible transfer of such a complaint to the Ombudsman.

In some cases, it may be appropriate for our office and the Ombudsman to run parallel investigations, where we deal with the privacy aspect and they deal with the other aspect, and with the two offices keeping in touch during our investigations.

However, our two investigations will often be working to two different statutory timelines. Further, this will require the complainant to deal with two different investigating agencies.

Usually, however, it will be better for just one agency to deal with the complaint, according to the nature of the complaint and which agency can best address it.

When will a complaint "more properly" belong with the Health and Disability Commissioner?

Examples of where a complaint will or may more properly belong with the HDC include:

- **Physical privacy** – complaints about physical or bodily privacy rather than the privacy of health information. For example, a complainant may be unhappy about a doctor not closing the curtains of a cubicle before a physical examination. It is likely HDC would be better placed to consider a complaint about physical privacy under the Code of Health and Disability Services Consumers' Rights.
- **Ethical obligations & competence** – a complainant alleging a breach of the privacy principles by a doctor or other health professional may be mainly concerned about the health professional's competence in relation to their ethical obligations around patients' privacy and information. If the complainant's concern is not mainly about the consequences of the breach for them, about any harm, but rather with the doctor's ongoing conduct, then it may be more appropriate to have the case dealt with by the Health and Disability Commissioner.

When will a complaint "more properly" belong with IGIS?

The IGIS provides oversight of the activities of the New Zealand Security Intelligence Service ("NZSIS") and the Government Communications Security Bureau ("GCSB"). Those two agencies have wide-ranging powers that can affect the privacy of individuals, and the role of

the IGIS includes ensuring that those powers are used lawfully and appropriately. The IGIS has substantial powers to access documents and information held by the SIS and GCSB.

Privacy complaints to the Privacy Commissioner about the NZSIS and GCSB may therefore be more properly within the IGIS's jurisdiction when they involve broader issues relating to those agencies' surveillance and information-gathering activities.

Referral to IPCA

The Office of the Ombudsman does not have jurisdiction over Police under the Ombudsmen Act, only the OIA. This means the OOTO can review a refusal to provide information under the OIA, but the IPCA needs to consider a "reverse OIA" where a complainant complains about information that Police decided to release under the OIA.

IPCA also considers Police conduct more generally, this could include for example employee browsing, or issues with release of information through Police vetting checks.

Regarding the process, seek the complainant's consent to consult on a transfer first. For further details refer to our agreed transfer protocol.

Referrals to overseas privacy agencies

The Privacy Act reference: section 76

If it looks like the complaint belongs more properly with an "overseas privacy enforcement authority" then:

- we **may** consult with the overseas agency about this
- after any such consultation we **must** decide where the complaint should be dealt with
- if we think it belongs with the overseas agency, and if both the agency and the complainant agree, we **may** refer the complaint, or part of it, to the overseas agency.

If we decide to take action on a complaint, consider whether it can be dealt with as an "Early Resolution" complaint

In order to ensure we are dealing with complaints efficiently we have identified some types of files that will be dealt with through a more streamlined early resolution process.

Generally early resolution complaints can be dealt with as an enquiry.

Early Resolution: No Investigation

The team member on incoming can consider whether we need to open a complaint file or an enquiry file for a complaint that on preliminary assessment we do not intend to investigate. Discuss the proposed approach with the Manager, Investigations & Dispute Resolution ("MIDR"), or a Principal/Senior Investigator. The investigator needs to ensure any relevant legal analysis of the issues is recorded on the file somewhere. This could simply be in the correspondence with the complainant.

Early Resolution

Sometimes we receive a complaint where it appears possible to resolve the matter without formally investigating. For example, a small agency might not understand its obligations under principle 6 and we consider a phone call to explain and give advice might be sufficient to resolve the complaint. Ensure you are clear with the parties whether you are attempting to settle the complaint under s 77, which will open a pathway to the Tribunal, or not. If you are simply making a preliminary enquiry to check whether the agency is open to addressing the issue without further action by the Commissioner, ensure both parties are advised of this. You can file this as an enquiry, but ensure that you are capturing the complaint in the metadata (e.g. declined to investigate reason = unnecessary, outcome = info released/resolved).

Compliance Advice Letter

There will be some complaints where we may not consider investigation necessary, but some action is warranted. For example:

- The complainant wishes to raise issues but does not seek an investigation or facilitated settlement
- The complainant is not personally affected by the issue
- There is a breach, but no harm
- The complainant wishes to remain anonymous and the issue is broad enough the agency can consider it without their identity (e.g. a process/systemic issue, or a camera that is filming in a shared use zone).

It might be appropriate to send a compliance advice letter or to relay our concerns to the agency in these circumstances. It may be appropriate to discuss this approach with the complainant first.

Although we cannot investigate an anonymous complaint as being an interference with privacy, it may be possible to accommodate a request to remain anonymous if we are sending a compliance advice letter. This would depend on whether we consider the agency would be able to act on the issue without knowing the identity of the person who brought it to our attention. If the complainant does not want to be identified or involved in the process, but we consider it is still an issue that warrants our involvement, the compliance advice letter should *not* include the complainant's name.

Easy Access

A complaint about principle 6 will usually not require a detailed review or assessment before notifying. This means the complaint should be notified on receipt by the incoming complaints assessor or investigator. Some files may still need to be assigned for analysis first, or for an investigator to speak with the complainant to clarify the scope or issues, particularly if the individual has raised other privacy principles.

When assessing whether an access request can be notified immediately consider the following:

- There has been a specific, sufficiently detailed request for information (so it is clear what we can notify on).
- There is a copy of the request on file, or a copy of the response from the respondent which makes it clear the request has been made.
- The request was made more than 20 working days ago.
- Adequate contact details for both the complainant and the respondent have been provided.
- There are no “red flags” (e.g. repeat complainant which may require more detailed review of other files to ensure we aren’t doubling up, other principles engaged, obvious mental health issues that mean the complainant would benefit from a phone call or assignment to an investigator prior to notification, or any other matters that would make early notification without first speaking to the complainant/carrying out an assessment, undesirable).

Privacy Commissioner
Te Mana Matapono Matatapu

Promoting conciliation and settlement

Overview

One of our key statutory functions is to try to settle complaints. We are therefore always trying – before, during and after any investigation – to reach a resolution of the complaint through some form of settlement.

OUR SETTLEMENT TARGET:

Our KPI is to settle **40 percent** of all complaints

Conciliation and settlement: Our statutory obligations and powers

Exploring the possibility of settlement and assurance without investigating complaint

When assessing a complaint, consider whether settlement may be possible without first conducting an investigation pursuant to s77.

Consider:

- Has the agency already acknowledged the breach?
- If the reason it has not resolved already is due to a dispute as to harm or quantum, proceeding straight to conciliation may be the most efficient way to resolve the complaint.
- Is there a clear or technical breach that does not appear to require investigation?
- Are the parties open to resolving their dispute in a conciliation?
- Has the agency or another regulator already investigate the matter and produced findings?

If there is a dispute of facts, or the agency does not consider its actions a breach, it is likely that an investigation would be useful before an attempt to settle. It could either assist the parties to have a more productive discussion if we first take some investigative steps, or clarify whether there was in fact an interference that requires resolution.

If we cannot secure settlement, we can at that point either decide to investigate, or decline for either one of the reasons set out in s74, or on the basis that investigation is unnecessary or inappropriate.

Obligation to promote settlement if a complaint has substance

If we do investigate and if we've concluded that the complaint has substance, we **must** use "best endeavours" to try to achieve a settlement.

For access complaints this is set out in s91 and for other investigations, in s94 of the Privacy Act 2020.

What does the "best endeavours" standard require of us?

The High Court has treated the "best endeavours" standard as being the same as "reasonable endeavours" *(see below)*.

> "A best endeavours obligation is a substantial one, reflecting the importance that the legislation attaches to settlement, but it also recognises that there is no single correct approach. There is much room for subjective judgement about how and when to promote settlement, and each case depends on its facts. … I think it appropriate to approach the issue by asking, as [the Commissioner] invited me to do, whether a reasonable Commissioner could have conducted herself as the Commissioner did here. That approach assumes that best endeavours is synonymous with reasonable endeavours, which need not be correct, but the assumption favours the Commissioner and I do not think anything turns on the distinction."
>
> *Henderson v Privacy Commissioner* [2010] NZHC 554 at [98]

The High Court found in that case the Commissioner did not use best endeavours to settle the complaint, and could not have reasonably concluded that she was unable to secure a settlement when it was referred to the Director of Proceedings. The Commissioner had failed to advise the respondent of both an invitation to settle and a substantive settlement offer made by the complainant, and did not consider calling a compulsory conference.

Promoting conciliation from the outset

As the High Court noted in the *Henderson* case, the scheme of the Privacy Act's complaints provisions requires us, from the very beginning of the complaints process, to be proactive in trying to resolve the complaint through conciliation. The Privacy Act 2020 makes it clear we can try to settle without investigating, and the individual will still have a pathway to the Tribunal.

> "… the Commissioner must be alert to the possibility that the parties may be willing to settle at an early stage, before the complaint has been investigated and before the Commissioner is able to offer any guidance on the merits; an obligation to promote conciliation and settlement arises at the outset."
>
> *Henderson v Privacy Commissioner* [2010] NZHC 554 at [101]

In line with that principle, we place a lot of emphasis on early complaint resolution and settlement. Our aim is to settle complaints, if appropriate, after we've made an initial assessment and contacted the parties to clarify the issues.

In particular, a key question the Investigator will need to ask of the complainant very early on is what would resolve the complaint for them.

Tools we can use to try to reach a settlement

There are several tools we can use to promote settlement of a complaint:

1. *First teleconference with the complainant and respondent*
2. *Case management conference*
3. *Power to call compulsory conference*

The Privacy Act gives us the power, under s 85, to call a compulsory conference of the parties, in order to try to resolve the dispute.

We can only invoke this power when we are investigating. We **cannot** use it if we are exploring the possibility of settlement under s77

We do **not** invoke this power when we convene a case conference at the start of an investigation. Case conferences can be held (usually by telephone) to clarify the issues in a dispute and work out a process and timetable for our investigation.

> **What the Act says:** Section 85, "Compulsory conferences"
>
> (1) The Commissioner may call a conference of the parties to a complaint by—
>
> (a) sending each of them a notice requesting their attendance at a time and place specified; or
>
> (b) by any other means agreed by the parties concerned.
>
> (2) The objectives of the conference shall be—
>
> (a) to identify the matters in issue; and

(b) to try to obtain agreement between the parties on the resolution of those matters in order to settle the complaint.

(3) Where a person fails to comply with a request under subsection (1) to attend a conference, the Commissioner may issue a summons requiring the person to attend a conference at a time and place to be specified in the summons.

(4) Section 159 of the Criminal Procedure Act 2011 applies to a summons under this section as if it were a witness summons issued under that section.

Settlements and "party autonomy": It's up to them

It's up to the complainant to decide what will resolve their complaint. We can make suggestions – such as an apology, a change in the respondent's processes, or compensation – but we can't require a complainant, or a respondent, to agree to any particular settlement.

If we conclude that the complaint has substance, we're then required by the Privacy Act to use best endeavours to secure a settlement.

Assessing the potential for a settlement

Complaints tend to be much easier to settle at an early stage and there is often a real willingness to resolve them on the part of both sides.

Some complaints simply won't be amenable to early settlement, even if the complaint itself seems to be a relatively minor matter.

This can depend on various factors, but often the indicators would include:

- a complaint where the parties' views and expectations are at opposite ends of the spectrum
- a complainant with unrealistic expectations about the level of a monetary settlement
- a respondent that is unwilling to accept and recognise a breach.

Giving guidance to the parties and managing expectations

Be clear about whether you are trying to facilitate a settlement under s77, or whether you are investigating with an option of conciliation at any time.

The Investigator's role includes managing the expectations of both sides in order to achieve a resolution that is acceptable to both. This process may include telephone diplomacy and

negotiation, or face-to-face conciliation where the Investigator meets with both parties or meets with each of them separately.

The Investigator should have an overview of what would be a reasonable outcome in the context of the parties' expectations. We're not obliged to support any unreasonable expectations that a party might have.

It's appropriate at all points of the process to provide the parties with reality checks about the effect of the law, the limitations of our process, and the potential consequences if a complaint isn't resolved through our process.

Specific settlement measures

Settlements will often include:

- an apology
- an assurance that the breach won't be repeated
- a promise to take action, like training staff and adopting privacy policies
- money, goods, services or other remediation
- an agreement to release information.

However, although those are common types of settlement outcomes, we've also seen a wide and creative range of measures over the years – for example, flowers, gift baskets and, in one case, an overseas holiday for the complainant and their partner. It's a matter of what will resolve the complaint for the particular complainant and respondent. (See Roth at PVA74.5 of Privacy Law and Practice for examples of settlements.)

The power of an apology

It's hard to overstate the significance that an apology can often have for complainants. If given in good faith and taken by the complainant to be genuine, it can go a very long way to resolving a dispute for them, by demonstrating to the complainant that their problem has been taken seriously and that the respondent agency will take real steps to prevent any repetition.

Giving guidance on financial settlement amounts

Although conciliation usually doesn't involve a financial settlement, we're often asked by the parties what would be an appropriate financial settlement for a particular complaint.

We don't give detailed guidance, as conciliation is about the parties' deciding what will resolve the complaint for them. It's also in the nature of privacy breaches that they vary widely, depending on the particular case, so it's difficult to assign a dollar figure to any particular breach. However, we can give the parties **examples** of specific settlements and the type or level of breach or harm in each case.

Guidance from Tribunal awards

Awards in the Human Right Review Tribunal will give some guidance about appropriate settlement awards.

For a useful discussion of Tribunal awards and relevant principles, see *Hammond v Credit Union Baywide* [2015] NZHRRT 6.

We also have information on our website that you can refer the parties to at any point of the process.

Inviting comment from the parties: When and how

Investigators need to exercise judgement about whether it's necessary to invite a written response from a party on a particular issue. This shouldn't be a standard, reflex step whenever we, for example, first come to a view about whether a complaint has substance.

Instead, you'll need to consider the needs of the particular case, and what the Act and the principles of public-law fairness require in that situation.

Burden of proof

The Act doesn't assign any evidentiary burden to a particular party, and the High Court has held specifically that the respondent does not have the burden of establishing that an exception applies (see *Henderson v Privacy Commissioner* [2010] NZHC 554).

However, if we ask a respondent agency for evidence of their assertion that an exception applies, but they refuse to engage with us or don't give us the information, we're entitled to form a conclusion on the basis of the information we have. If in that case we find that the alleged action or omission *did* occur, but we have insufficient information to conclude that an exception applies, then we are entitled to conclude that there has been a breach.

Key points

In general, you should invite a written response only if:

- you need more information, or

- you've made assumptions and you need to check that these assumptions are correct, or
- you anticipate making an adverse comment about that party.

If we've found that a respondent agency has breached the Privacy Act the statutory "adverse comment" rule will require us to present this to them in writing as a preliminary view and to invite them to respond in writing within a reasonable time.

If we've reached a view that a complaint doesn't have substance, the "adverse comment" rule doesn't apply. However, consider public-law principles of procedural fairness and natural justice mean when assessing whether a complainant requires an opportunity to comment on any view we formed.

The "adverse comment" rule: Its scope and effect

Summary

In the context of our investigations function, the effect of the statutory "adverse comment" provision is that we must give a respondent a reasonable time to respond in writing if, after investigating a complaint, our view is that the respondent has breached a privacy principle or rule.

Usually the "adverse comment" rule **won't** require us to give a complainant a similar opportunity if we've found their complaint doesn't have substance.

What the Act says: Section 210, "Adverse comment"

"The Commissioner shall not, in any report or statement made pursuant to this Act or the Crown Entities Act 2004, make any comment that is adverse to any person unless that person has been given an opportunity to be heard."

Scope of the "adverse comment" rule: What statements does it apply to?

The scope of the adverse comment rule includes notifications of the result of an investigation. This means that an Investigator cannot notify the parties of a finding that the respondent has breached a privacy principle or rule unless the respondent had been given the opportunity to respond to this potential finding.

What makes a comment "adverse"?

A comment will not be "adverse" to someone simply because it goes against their interests or rejects an allegation or legal argument that they've put forward:

- A finding that a respondent agency has breached a privacy principle or rule **is** an adverse comment.

- A finding that a complaint has no substance is **not** of itself an adverse comment against the complainant.
- However, some additional or more specific comment about an unsuccessful complainant **could** be an "adverse comment" – for example, if we told them we believed they had intentionally lied to us.

Discharging our obligation under the "adverse comment" rule

To discharge the "adverse comment" obligation, we should:

- notify the party in writing of our preliminary finding, including giving reasons for it
- invite them to respond in writing
- give them a reasonable time to respond.

Setting a timeframe for a written response

Always ask for responses to be provided by a certain date.

If an agency or an individual cannot respond within the timeframe provided, we may give an extension. Any extension should be for no more than a reasonable time. We can't keep files open indefinitely.

Public-law fairness: What it requires

Public-law principles of procedural fairness or natural justice require that our findings must have a reasonable basis. Our investigation processes must therefore be reasonable, and usually this will require us to inform the relevant party of our findings and the reasons for them, and to give them a chance to comment (see Roth, *Privacy Law and Practice*, at PVA75).

However, those natural justice steps don't have to follow an inflexible format that is formal and time-consuming. Usually formal written correspondence and a set response date won't be necessary – unless the statutory "adverse comment" rule also applies, as it will where we've found a breach (see above). This means that, where we've found that a complaint has no substance, it will usually be sufficient to have a phone conversation with the complainant where we explain our decision and ask if they have any further to add in response. You should also consider whether there a complainant actually has any meaningful ability to comment. For example if we have reviewed withheld information and it's not personal information, it is unlikely a complainant will be able to comment on this as they can't see what has been withheld, nor can we disclose withheld information to them.

This will be a matter for the investigator's discretion. It will depend on the particular complaint and complainant. You'll need to consider whether the process has been fair to both parties and whether the finding you've come to is sound.

Notifying the result of our investigation

What the Act says: Section 98 –

An aggrieved individual must bring a complaint to the Tribunal within six months of being given notice by the Commissioner that we have closed our complaint.

A respondent must file an appeal to an access direction within twenty working days of being given notice.

Our communication to the parties that we will be taking no further action or we have reached the end of our process will impact the complainant's ability to take proceedings in the Tribunal and the Respondent's ability to file an appeal to an access direction.

There are specific legislative time limits, so we need to ensure our records are accurate and our correspondence is clear.

You **must** inform the complainant or the respondent agency (for an access direction) of the timeframe to take proceedings in the Tribunal when you give notice that you are closing the file. (Note, this only applies where we have notified the parties – if we declined to either investigate or try to settle then they have no pathway to the Tribunal.)

You must also ensure you provide the complainant with a "section 98 notice" and in your correspondence with both complainant and respondent advise of the section you are notifying your decision to take no further action under. There is a "section 98" template you can use for this purpose.

The section 98 notice can be sent as an email or a letter. Bear in mind the complainant must submit this notice to the Tribunal when the file. For that reason, it is probably preferable that the notice is separate from your substantive view, particularly if you are discussing sensitive information (e.g. harm, matters not included in the investigation or findings that go against the complainant).

Privacy Commissioner
Te Mana Matapono Matatapu

Referrals to the Director of Human Rights Proceedings

Overview

We may refer a complaint to the Director of Human Rights Proceedings, so that they can decide whether to take action in the Human Rights Review Tribunal.

Failure to settle – a statutory precondition for referral

Sections 78, 84, 91(5)(b), 91(6) and 94(4) and (5) allow us to refer a complaint to the Director with or without investigation **only** if we've been unable to achieve a settlement **or** if the agency has not complied with the terms of a previous settlement or acted in contravention of any term of a previous settlement or assurance (s78(b) and (c)).

Regardless of whether we think it would be desirable for the Tribunal to set a precedent on this issue, we **must** try to achieve a settlement. Only if we're not able to do this (or if the terms of a settlement have not been complied with) can we then refer the complaint to the Director.

Our criteria for referral

We may decide to refer the complaint to the Director if it involves the following factors:

- seriousness of the issue
- continuing harm
- an impact on a larger number of people
- unreasonable conduct by the respondent
- an opportunity to set a precedent in respect of a novel or significant issue of law.

We may decide not to refer the complaint if:

- it involved an information request and the information has now been provided
- there are no systemic issues or major concerns, or any systemic issues or concerns have now been addressed by the agency
- the complainant hasn't suffered a loss for which a remedy is required.

Is the case ready to go to the Director?

We will usually refer a complaint to the Director only if we have already developed the case to an advanced stage. Although we do not have to provide the Director with a complete case,

the Investigator should be confident that there's enough evidence to establish a case in the Tribunal.

Specifically, before we can consider a case for referral the Investigator should have:

- established a clear factual chronology
- established that the evidence the Director will need will be available – the Investigator should know that the necessary witnesses will be available and should know what they'll say.

Case notes on referral

- No 71808 (2006) – local residents and a property developer
- No 89271 (2007) – daughter's photo from school holiday programme
- No 92895 (2008) – court employee disclosed info to the ex-partner of a man who had contacted the court about making an ex parte application
- No 204595 (2009) – couple complained about their accountant

Privacy Commissioner
Te Mana Matapono Matatapu

Initial call checklist

Office of the Privacy Commissioner – Introductory Discussion Checklist

The role of the investigator	Completed
1. The Investigator is **independent**, neutral, not an advocate for either party	☐
2. The Investigator's role is to **communicate between parties** to help them try and reach a resolution	☐
3. The Investigator has no decision-making power in general. However, note that if it is an access complaint we can issue a direction – explain what this means.	☐
4. Investigator cannot **disclose information** it receives from one party to the other party and our communications are not personal information you can request. It is the respondent agency's responsibility to provide information directly to the complainant – we cannot pass information between parties	☐
Complaint process	
5. Explain the process: Eg do we consider an investigation warranted or could this be conciliated? If investigation, advise we would notify but our focus would be on settlement where possible. Discuss other options as relevant – eg compliance advice letter. If it is an access complaint, explain that our approach would be to carry out an independent, impartial review of the information. We will then advise the parties of our view (either release or withhold some or all). If complainant does not accept our view, they could proceed to HRRT. If we find a breach, C will need to provide evidence of harm.	☐
6. The complaint can be **settled at any time** during the process	☐
7. The complainant can **withdraw the complaint** at any stage (although this may have consequences for bringing a complaint in the Tribunal)	☐
8. If the complainant accepts an offer from the respondent, it is in full and final settlement of the complaint	☐
9. Our final views are persuasive but not binding. If the complainant wishes to pursue the matter, they may do so in the HRRT. If we issue an access direction and respondent does not comply complainant can enforce in the HRRT. Note that respondent could appeal an access direction.	☐

Privacy Commissioner
Te Mana Matapono Matatapu

10. Check the complainant has received the **information sheet** (if this hasn't been sent already, send a copy to complainant along with any other relevant information sheets or brochures)	☐
11. The **timeframe** for looking into your complaint can vary. It can depend on the parties willingness to resolve the matter, information needed, whether experts are required, whether a final view is needed. We try to finish most investigations within six months	☐
12. Discuss **confirmation of complaint**	☐
Contact details	
13. Check **contact details** – e.g.: a. Check the spelling of the complainant's name b. Do you have all the necessary contact details? c. Is there a best time or way to contact the complainant? d. Is it ok to leave a message on the phone? *Note: highlight on file if any contact details are to be kept CONFIDENTIAL*	☐
14. Check the complainant is **entitled to bring the complaint**	☐
15. Confirm the complainant has **your name** and **contact details**	☐
16. Tell complainant when you **next plan to be in contact** with them	☐

Privacy Commissioner
Te Mana Matapono Matatapu

Checklists for conciliation and settlements

Preparing for a settlement conference

Be absolutely clear about where we are with the complaint. Have we completed our investigation? Are we satisfied we have all the information we need? Or are we still open minded, and prepared to investigate further? Is the process designed to *elicit* information for our investigation (eg the level and nature of harm).

Here are some other questions for you to consider when you're preparing for a settlement conference:

Process issues

- Does the conference need to be in person, or would by phone be just as good or better?
- Are there any barriers to communication? Do we need an interpreter or other assistance?
- Does the complainant need a support person? Will the numbers on each side of the table be equal?
- Is the venue neutral and mutual? Are there breakout rooms? Will there be tea, coffee, water? Is parking available?
- Have you allowed plenty of time for the meeting? Better to book three hours and finish early than run out of time drafting an agreement.

Preparing the parties for the conference

- Are the parties and you the Investigator all in agreement about what is in dispute? Would it be useful to prepare a statement of agreed facts and details before the conference?
- Do the parties have a shared understanding of the purpose of the meeting?
- Have the parties each been sent an "expectation" letter? (These letters should set out: the date, time and venue for the meeting; who will attend; the purpose of the conference; what will happen at the conference; some ground rules for how it will run, like taking turns to speak and not interrupting.)

- Has the Investigator been through the "Preparation for Conciliation Conference Toolkit"[7] with both parties and sent them a copy to work though on their own before the meeting?
- Does the respondent have authority to settle?
- Is the respondent ready to talk about policies or procedures?
- Do we have an agenda or list of questions that the parties want to work through?
- Does the complainant need to bring evidence of harm?

Preparing yourself

- What approach will you use for the conference? Is one person going to lead the conversation or will you use some alternative model?
- Do you know the file frontwards and backwards?
- Have you looked at similar complaint settlement outcomes?
- Can you use case notes or tribunal decisions to guide the parties towards each other?
- Do you have a draft settlement agreement ready to go?
- Do you have all the evidence needed to make a finding or reach a settlement?

During the investigation

Task	Completed	Date
Ensure parties understand the complaints process and how settlement conference fits within that – explain this at the outset of the investigation or the advice that we are attempting to settle instead of investigating.		
Ensure parties understand how the law applies to the complaint – make it clear what principles/rules are engaged and why. Also ensure parties understand what issues we do not have jurisdiction to consider and why		
Get information from both C and R as to their view of the complaint and attempt resolution without making a determination where possible		
Ensure parties understand OPC current assessment of complaint This may include the following–		

[7] Add OBJ reference

• send a preliminary view and discuss this view with both parties over the phone (where possible) • Ensure that all relevant information about the breach is obtained from R and that C's harm is provided to R in advance • Ensure that C knows R's position on the complaint • Ensure that all parties are aware of what C is seeking to resolve, and that both have realistic expectations about the likely outcome • Review feedback from both parties		

During the investigation (continued)

Review complaint with Investigations Team and consider whether there are any other options for resolution that have not been attempted. If not, get a clear understanding of OPC's position on the complaint (conduct any necessary research and be ready to form a final view if necessary)		
Investigator to review file and decide if settlement conference appropriate (consider facts, parties, likelihood of resolution, resources and whether there are any special requirements of the parties to be aware of e.g. security/panic buttons or two OPC staff for any difficult behaviours)		
Discuss whether both parties are open to the possibility of settlement conference		
Get approval from MIDR/Assistant Commissioner/General Manager for settlement conference if there will be a significant cost		

Before the settlement conference

Task	Completed	Date
Get agreement from parties as to the time, date, location, format, needs and attendees. Advise both parties who will be attending, including a support person for C if desired, any additional OPC staff members (including appropriate support for Investigator if required) and ensure that the appropriate technical experts/levels of delegation from R are attending		

If there will be travel involved (with a cost - flights/rental car), confirm details with MIDR/AC and get assistance from support staff to book meeting rooms and make travel arrangements		
Confirm in writing for both parties once all details finalised. Advise that if for any reason they are unable attend, they must let the Investigator know as soon as possible		
Review the file again with Senior/MIDR and prepare for settlement conference (ensure all of the above steps are properly completed and that we have all of the relevant information, have completed the investigation and have formed a preliminary view)		
Investigator to call both parties separately and ensure they are prepared for the settlement conference and know what to expect		

Before the settlement conference *(continued)*

Provide documents to parties in advance - agenda, relevant law, case notes and case law and allow time to review and comment		
Call both parties separately the day before the settlement conference to ensure understanding of the process and focus on resolution		
Take the file with you (if it can be done securely) and ensure that you have the address and contact details for the venue, and contact details for both parties		
Arrive at the venue early to ensure meeting room is set-up appropriately		

During the settlement conference

Task	Completed	Date
Welcome and introduce parties		
Explain at the outset: • Thank parties for attending, acknowledge it has been done voluntarily, explain the benefits of a voluntary resolution and acknowledge how difficult it may be (especially for C)		

• Acknowledge there may be difficult material discussed and that this should be done with respect, and that anyone can ask for a break at any time • Set out the format for the settlement conference • Encourage content and involvement that will aid resolution (not a forum for testing evidence or credibility) • Encourage constructive communication (no interrupting when others are speaking, no blame etc.) • Encourage a range of possible resolution options that are based on needs and interests • Prepare parties for potential to compromise • Phones off • Confidentiality requirement • Explain how this process differs from OPC making a final determination and what the outcome could be if it is not resolved • Anything else required in introduction that is relevant to the complaint (OPC view of the complaint, summary of relevant principles etc.)		
Ask C to start by explaining the complaint from their perspective and what they are seeking to resolve their complaint		
Clarify issues as required and confirm that C has had an opportunity to express everything they wanted to		
Ask R to continue by responding to C and explaining its view of the complaint		
Clarify issues as required and confirm that R has had an opportunity to express everything it wanted to		
Set out OPC view of any disputed issues (if required or it will assist)		
Allow C a chance to respond		
Move into focusing on resolution (can be done in a variety of ways)		
Take notes of relevant points throughout		
Bring parties together at conclusion, summarise agreed outcomes, thank parties for their participation and agree on next steps		

Draft and complete Settlement Agreement if possible		

After the settlement conference

Task	Completed	Date
Make a detailed file note about the discussions including any agreed outcomes		
Call both parties to debrief and confirm understanding		
If resolved at settlement conference:		
Draft Settlement Agreement for MIDR approval (if not done during settlement conference which is preferable where possible) and finalise any agreed outcomes		
Send Settlement Agreement to R for approval and then send to C for signature (send two copies to C if they also want an original)		
C to send completed Settlement Agreement straight to R. R to sign and send a completed copy to OPC and C, and arrange for implementation of any agreed outcomes		
Review complaint and close file		
If not resolved at settlement conference:		
Debrief with MIDR		
Agree on next steps in the investigation (if any) or advise parties if you decline to investigate further.		