

## Practice Note

### Confidentiality of complaint investigation information

#### Releasing information in the course of an investigation and limits on disclosure

This Practice Note covers:

- (a) the disclosure of information by the Office of the Privacy Commissioner (OPC) to parties in the course of an investigation under Part 5, including OPC's duty to act fairly and in accordance with the principles of natural justice to provide the respondent with sufficient information to respond to the investigation and any potential adverse finding;
- (b) party requests to OPC for information OPC holds in relation to the complaint (under the Official Information Act or the Privacy Act); and
- (c) the confidentiality of information about settlements.

This Note does **not** cover:

- (a) disclosures in connection with consultations with other statutory bodies (section 75);
- (b) referral of a matter to another body or to the Director of Human Rights Proceedings;
- (c) the disclosure of information to the Human Rights Review Tribunal in an access appeal under section 108;
- (d) disclosure of investigation information as a regulatory response, such as publicly naming a party. For disclosure in this context, refer to OPC's [naming policy](#).

#### OPC's legal obligations

There is a general obligation of secrecy (section 206) that applies to all OPC staff to protect the confidentiality of the complaints process and the ability for OPC to have oversight and review of information that agencies seek to withhold under Part 4 of the Act. However, the related discretion to release information to give effect to the Privacy Act (section 206(2)) enables the sharing of information as necessary in order to exercise the complaint investigation functions, to give effect to the purpose of the Act.

Section 206 of the Act requires that every person engaged or employed in connection with the work of the Commissioner (including the Commissioner) must maintain secrecy "in respect of all matters that come to their knowledge in the exercise of their functions under this Act." This means that all members of OPC need to maintain confidentiality in all investigation material, unless there is a justified basis for disclosing it, either under the Act or to comply with the requirements of natural justice.<sup>1</sup>

The Privacy Act requires OPC to share relevant complaint information with the parties when conducting investigations. An example of where the disclosure of complaint information is necessary is to meet the requirement under section 80 to inform the respondent about the complaint and to provide a right to respond to the complaint. While this does not entitle the

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<sup>1</sup> Note that the disclosure of information depends on the delegation put in place for the relevant team or staff member and the functions covered by that delegation.

respondent to “disclosure of evidence”<sup>2</sup> (i.e. we do not provide the respondent with a copy of the complaint itself), OPC has a duty to act fairly and to provide the respondent with sufficient information in order to be able to respond to an investigation.

Another example is the OPC’s obligation to use best endeavours to resolve a complaint – this may require the disclosure of information to facilitate a settlement or other form of resolution.

OPC also has natural justice obligations to the respondent, including but not limited to the statutory obligations to give notice of the complaint, an opportunity to respond and have their views taken into account before making a decision that a complaint has substance and prior notice of any adverse comment.<sup>3</sup>

When the Commissioner is going to make an adverse comment about a person, section 210 of the Act requires that the person be given an opportunity to be heard. Adverse comment includes reporting to the parties on the outcome of a complaint investigation (sections 91 and 94) where OPC determines that a complaint has substance, and therefore requires the respondent be given a prior opportunity to respond. This in turn requires disclosure of the reasons on which OPC’s proposed finding is based.

While OPC treats party correspondence as confidential and so does not generally provide copies of investigation correspondence received from one party to another, the discretion in section 206(2) of the Act allows for disclosures that are necessary for giving effect to the Act, including the exercise of investigation functions. The operation of this discretion in the context of complaint investigations is discussed further below.

Note that information demanded under section 87 for the purposes of an IPP 6 investigation and that is privileged, is subject to special restrictions and exceptions under section 89 of the Privacy Act.

### **Sharing information in the course of an investigation**

The Privacy Commissioner’s functions under Part 5 of the Privacy Act are exercised under delegation by the Investigations and Dispute Resolution Team (IDR).

Staff in other OPC teams also have delegations in place enabling exercise of the Commissioner’s Part 5 functions (Compliance and Enforcement, Policy, and Legal) when undertaking the investigation and resolution of complaints.

Complaint investigations are conducted by an inquisitorial process that involves OPC asking questions and gathering information from both parties. The complaint investigation and disputes resolution functions operate efficiently and effectively through sharing relevant information with each party to a complaint.

This process is managed by OPC providing summaries of the information provided by each party, as appropriate, in order to convey the necessary information to the other party to progress the investigation and to encourage resolution, and to meet the requirements of natural justice. By doing so, investigators substantially convey the views of one party to the other, without sharing the parties’ actual correspondence, unless a party consents, or where it is necessary to exercise OPC’s statutory functions or to meet OPC’s legal obligations to the parties.

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<sup>2</sup> *Henderson v The Privacy Commissioner* [2010] NZHC 554 (29 April 2010) at [86].

<sup>3</sup> *Henderson v Privacy Commissioner* [102].

It is important that OPC conveys the necessary information to each party so that the respondent understands the nature of the complaint and can respond to it and so that each party can meaningfully engage with any opportunity to resolve or settle the complaint. However, a party's information and correspondence with OPC is treated as confidential to that party and is not usually directly shared with the other party, unless the relevant party consents, or unless required in the exercise of OPC's functions and duties.

OPC's management of complaint information and the discretion to disclose information to parties in the context of a complaint investigation has been considered by the High Court. This highlighted that the approach to disclosure is not prescriptive and the discretion to release is vested in the Privacy Commissioner and is not to be fettered by the consent of the relevant party to the disclosure.

See Miller J's decision in *Henderson v Privacy Commissioner*.<sup>4</sup>

[86] I am advised that the Commissioner's practice is to filter correspondence and supply the parties with only that information which she thinks relevant. That practice is plainly authorised by s 116<sup>5</sup> and s 73(b),<sup>6</sup> which requires that the respondent be given "details of the complaint", not disclosure of evidence. I note Ms Evans' evidence that the Commissioner discloses to one party correspondence with another only if she has consent. **That practice would seem to fetter the discretion in s 116(2)** which is vested in the Commissioner rather than the parties. There is no suggestion that L resisted disclosure to Dr Henderson however.

### Protecting the confidentiality of the complaints process

To ensure that OPC runs a confidential complaint investigation process that both parties can engage in with confidence, and that promotes confidential dispute resolution, OPC's general practice is to inform the parties at the outset of the complaint investigation process that we are **not** able to provide copies of correspondence from one party to another.

Parties need to be able to communicate freely with OPC so that we can effectively carry out the functions of the Office under the Act. Disclosing confidential information received in the context of a complaint investigation could undermine the ability to carry out these important functions.

Therefore, the general approach is **not** to give:

- complainants the response and supporting information an agency has provided us in response to notification of a complaint; or
- the respondent a copy of the original complaint made to OPC.

Rather than providing copies, the substance of the information is summarised for the other party, while taking care to convey the key aspects of the complaint or the response to inform the relevant party.

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<sup>4</sup> [2010] NZHC 554]. Dr Henderson (the respondent) had brought a review of OPC's complaints process and challenged OPC's decision to refer the matter to the Director of Human Rights Review Proceedings. Miller J found that OPC acted unreasonably when withholding the complainant's settlement proposal from Dr Henderson, contrary to the expectations of the parties and leading the parties to misunderstand their respective positions.

<sup>5</sup> Privacy Act 2020, section 206.

<sup>6</sup> Privacy Act 2020, section 80.

It may be appropriate to consider disclosing information in the following situations (generally with the complainant's consent):

- giving the respondent agency a copy of the original access request made by the complainant or their response to that request if the agency can't locate it; or
- giving a respondent agency a copy of a complainant's statement of the harm experienced as a result of the actions of that agency.

It is also permissible to provide the respondent with the complainant's contact details for the purpose of resolving the complaint with them directly or so the respondent can send them information (with the complainant's prior approval).

However, releasing party information will depend on the circumstances and you will need to consider whether:

- it is possible for the parties to provide information directly to each other;
- releasing the information is necessary to give effect to the Act, and relevant to achieving this purpose;
- OPC could summarise the information in order to meaningfully communicate it to the other party;
- the information may attract any other legal protections; and
- the party or parties' consent to the release of the information.

### ***Absolute protection for the information at issue in IPP 6 complaints***

It is important to note that OPC does **not** release information that is the subject of an access request (even if the respondent asks us to send it to the complainant). This information is provided for OPC review and assessment (often under legal compulsion)<sup>7</sup> and should be held strictly in confidence and never released to a complainant or another party.

If an agency agrees to give access to information to a complainant under IPP 6, the agency needs to provide it directly to the complainant or make its own arrangements for providing access to the information. OPC **does not** provide the information to the complainant on behalf of the agency concerned.

### **Requests for complaint information under IPP 6 or the Official Information Act**

In some cases, OPC receives requests from one or both parties to a complaint for copies of the information we have received from the other party (usually following closure of a file). Requests are sometimes conveyed as Official Information Act (OIA) requests, or from individuals as IPP 6 requests under the Privacy Act.

OPC responds to IPP 6 and OIA requests from individuals so far as practicable to provide them with their respective complaint information. This includes returning any information a party to a complaint has given us while retaining a copy for our records and providing copies

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<sup>7</sup> Privacy Act, section 87.

of our communication with a party to that same party.<sup>8</sup>

Due to the statutory limits on the IPP 6 access right in relation to complaint investigations,<sup>9</sup> however, this is limited to the information the requester has provided to OPC and does not extend to information about them provided by the respondent.

Section 29(1)(b) of the Privacy Act limits the use of IPP 6 to request any correspondence or communication OPC has had with the respondent agency as part of an individual's complaint, even though it includes their personal information.

OPC responds to OIA requests from respondent agencies and Privacy Act requests from respondents who are individuals to provide them with their information.<sup>10</sup> Due to the statutory limits on access to official information in relation to complaint investigations,<sup>11</sup> this is limited to the information that the requester has provided to OPC and does not extend to information provided by the complainant.

### What about the duty to act fairly and natural justice?

The duty to act fairly means that decision makers must give a fair opportunity to be heard or to have their views adequately considered. Those making representations must have adequate information to know the case they have to answer. The duty to act fairly includes ensuring that the procedural requirements of natural justice are met.<sup>12</sup> Natural justice requires us to act fairly and ensure that parties know the case against them and have a chance to be heard.<sup>13</sup> The requirements of natural justice vary with the context.<sup>14</sup>

OPC is required to provide a respondent agency an opportunity to respond to any adverse finding we make and will provide them with the information they need to be able to comment meaningfully on our findings. In order to investigate and resolve complaints under Part 5 of the Privacy Act, responses and comments from one party are summarised to provide to the other party, for example relaying an agency's response to the complainant.

### Settlement process

In facilitating the settlement of complaints OPC has an obligation to pass on to each party any settlement proposal made by the other, although the Commissioner might properly refuse to pass on an unreasonable proposal.<sup>15</sup>

The settlement process and the result of settlements achieved is confidential to the parties. Information cannot be released other than to the parties themselves:

AskUs: [How does the OPC deal with settlement?](#)

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<sup>8</sup> The Privacy Commissioner's delegation to the IDR team includes the discretion under section 206(2) to release this information to a complainant.

<sup>9</sup> Privacy Act, section 29(1)(b).

<sup>10</sup> The Privacy Commissioner's delegation to the IDR team includes the discretion under section 206(2) to release this information to a respondent agency.

<sup>11</sup> Official Information Act, definition of **official information** s 2(1)(j).

<sup>12</sup> Crown Law – [the Judge over your shoulder](#) – a guide to judicial review of administrative decisions.

<sup>13</sup> See NZ Bill of Rights Act 1990 section 27(1). Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

<sup>14</sup> *Henderson v Privacy Commissioner* [84].

<sup>15</sup> *Henderson v Privacy Commissioner* [92].

The decision to make any public statement about a settlement is for the Privacy Commissioner. For example:

<https://privacy.org.nz/publications/statements-media-releases/privacy-commissioner-welcomes-westpac-privacy-breach-settlement/>

### Case Notes

The Privacy Act enables OPC to publish case notes, including on the outcome of complaint investigations.<sup>16</sup>

Where there is value in developing a case note following an investigation, refer to the relevant practice note.<sup>17</sup> Note that one of the functions of a case note is giving guidance on settlements.

But it is important to note that case notes are anonymised to protect the parties. This means that certain details will need to be omitted to protect the privacy of the parties. If an agency is named in a case note or can otherwise be identified, it should be given a prior opportunity to comment, and the comments should be taken into account when finalising the case note. Refer also to OPC's [naming policy](#).

### Conclusion

If you need to disclose a document to progress your investigation, or you are asked by an agency or an individual to disclose a document you have received from another party, consider the circumstances above and the basis for disclosure. You should discuss your proposed approach with a Senior Investigator or with the Manager, Investigations and Dispute Resolution. You can also consult the General Counsel.

If you inadvertently disclose information that should not have been disclosed, you should raise this immediately with a Senior Investigator or with the Manager, Investigations and Dispute Resolution.

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<sup>16</sup> Privacy Act, section 17(2).

<sup>17</sup> Practice Note – Case Notes (May 2014).