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The privacy act and schools[1]

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ABSTRACT
This paper explains the background and philosophy of the New Zealand Privacy Act 1993. I show why the Act should be regarded as a set of guiding principles rather than a set of rigid rules. I examine and correct some of the common misconceptions and difficulties of interpretation that arise in connection with the Act. I consider some specific examples relevant to the education sector.

Tomorrow's Schools was a radical change in policy. It involved a devolution of functions to a local level. Some elements of central organisation or control remain - Teacher Registration Board is an example. Many of the tasks involved in the efficient management of schools have been devolved to community-based boards of trustees. Some board members felt overwhelmed by the numerous laws that they were obliged to comply with.

The Privacy Act was added to the list in July 1993. Since then most schools appear to have coped well. Others saw not a piece of legislation aimed at the promotion and protection of individual privacy, but a complicated set of rules that would fundamentally alter the way schools operated. Negative assumptions were made about the Act which I will refer to later.

I would like to explain the background to and the philosophy of the Privacy Act, rather than the letter of the law: to give some examples of issues in the education sector which I have been asked to investigate, some examples of problems that have been perhaps too hastily attributed to the Act, and to comment on some recent development in the sector which have implications for information privacy.

The basic philosophy underlying the Privacy Act is that of respect for an individual's right to know what personal information about her or him is held by other organisation and what this information will be used for.

The Act uses principles rather than rules. To provide a set of rules which will take account for all the possible situations would be difficult if not impossible, and the size of the Act would be vast. Instead the Act contains a set of principles which can apply to a wide variety of situations in a commonsense manner to achieve the sensible and sensitive management of personal information.

One of my roles is as privacy advocate, commenting on legislative and policy administrative proposals which have some impact on the privacy of the individual or classes of individuals. I believe my contribution should be helpful rather than destructive, innovative rather than reactionary, practical rather than theoretical. Many of the recommendations I have made have been adopted by government departments, cabinet committees or by select committees in the course of their consideration of policy and legislative proposals.

The privacy act

The long title of the Privacy Act begins with a statement that the Act is "to promote and protect individual privacy...".

There are many aspects to personal privacy. The Privacy Act is concerned primarily with information privacy, as opposed to physical privacy. The Act was passed to bring New Zealand up to the standard recommended by the OECD, in recognition of the fact that, in an information and technological age, privacy was under threat; and that without some control over what information is collected and disseminated about us, we are disempowered and thus lose autonomy and a sense of individuality which defines each of us.

This aim is partly given effect by the information privacy principles, a set of twelve principles which apply to the collection, storage, use and disclosure of personal information; and which provide a right of access to and correction of personal information by the individual concerned.

The key to understanding and applying the principles is the concept of purpose. Do I have a lawful purpose for collecting personal information? What is it? By focusing on my purpose many of the perceived problems with the Privacy Act fall away since the Act permits me to hold, use, and disclose personal information for the purpose for which I obtained it.

As I said, I do not wish to go into the letter of the law. Nor do I think it is necessary for every member of a school, and entire boards of trustees, to be completely familiar with every section of the Act. However, I recommend a reading of the twelve information privacy principles, as these principles will provide an understanding of what the act is about in a broad sense.

Privacy officers

The Act requires that every agency appoint a privacy officer, a person whose duties include:

- the encouragement of compliance, by the agency, with the information privacy principles
- dealing with requests made to the agency under the Privacy Act
- working with the Commissioner in investigations under the Act
- otherwise ensuring compliance with the Act

Privacy officers can act as advisers in the school, and as a conduit for information from my office to other staff if a query arises about a particular activity or issue.

The disclosure of personal information

The area that agencies seem to have the greatest difficulty with is that of disclosure of personal information.

Information privacy principle eleven says that an agency that holds personal information shall not disclose that information to anyone unless certain conditions apply. Information can be disclosed, for example, to avoid prejudice to the maintenance of the law, to prevent or lessen a serious or imminent threat to someone's life or health. Of course, information may be disclosed with the authority of the individual.

Of all the exceptions to the principle, the one most often focused on, is that of authorisation. This principle is often interpreted to mean "personal information may not be disclosed without consent". This is an incorrect interpretation.

You may recall the media attention that focused on the case of a South Island secondary school. A newspaper reported:

> Children are being offered the choice of keeping school reports secret from their parents as teachers struggle to understand privacy laws ... A Dunedin school has asked students to sign a consent form before sending out reports to avoid running foul of the Privacy Act.[2]

In fact the 'choice' the newspaper referred to was never given. When enrolling third formers for the following year, a girls' secondary had them sign a document agreeing that the school reports would be sent to parents. No girl refused to sign. It was pleasing to see that the school was making its policy known, but *the signing was not necessary under the Privacy Act.*

On the basis of the newspaper report, Members of Parliament, callers to talkback radio and even some teachers commented on the absurdity of such a proposition and criticised the Act for such a silly requirement. Relatively few people covering, or commenting on, the story seemed to have had a good look at what the Act actually says. It allows for an exception to the rule prohibiting disclosure of personal information in cases where "disclosure of the information is one of the purposes in connection with which the information was obtained, or is directly related to the purposes for which the information was obtained".

I was asked to give a 'ruling' on the matter, which, to the great frustration of some reporters, I cannot do. I did point out the exception that I have just mentioned, and commended those interested to have a look at it, and to think about how it might apply to the issue of sending school reports home.

Certain information is collected about each student for the purpose of monitoring progress and reporting on it to both pupils and to those who have a need to know, be they a parent, or a school to which a student has transferred.

Many of the decisions about what information may pe disclosed (and to whom) - such as the principle and the exception just mentioned - can be made with a basic knowledge of the law, and by exercising common sense. There is no need to strive for more legalistic interpretations.

The focus on consent in that case was unnecessary, given the "purpose/directly related purpose" exception, but it raises some other misconceptions. For instance, I hear a great deal about the need for consent (or written consent) in discussions of the Privacy Act. However, the words of the Act do not actually mention consent. Rather, the Act says that an action will not be a breach of a principle where the agency believes, on reasonable grounds, that the action is authorised by the individual concerned.

In the case of the school reports, then, -it seems clear that much of the debate was ill-informed, and that consent, or authorisation, of parents and students was not really the issue.

This examples raises two further questions: Firstly, what information can, or should, be passed on? Secondly, what does the subject of the information know about who is getting the information?

In the majority of cases there will be no problem with disclosing the contents of a school report to a parent. It is one of the purposes for which the information is collected and compiled. However, one would think twice about disclosing the contents of a record of a student's discussions with a guidance counselor, or certain items of health information that had been obtained in confidence. The Privacy Act is information-based not document-based. Therefore it is incorrect to say that school reports can be disclosed to parents, without looking at what information the particular report contains.

Things are not always simple, and we need to keep some flexibility in how these principles are applied, to take into account the circumstances of particular cases.

This point may be illustrated quite neatly by an example of a case I was asked to consider. A young woman had become estranged from one of her parents. She had gone to some lengths to

ensure that that parent's influence on her life was reduced to a bare minimum. She no longer lived with that parent, who had no legal access. She told her school that she did not want her school reports routinely sent to that parent, as it had done in the past. She did not feel that she should have to explain the reasons - to do so would be an invasion of her privacy.

When the parent asked for the reports, the school refused to disclose them on the grounds that withholding the information was necessary to protect the student's privacy. In that case, it was necessary for the school to consider the student's view, and the obligations on the school under both the Official Information Act and the Education Act.

The Official Information Act has an underlying principle that information should be made available unless there is good reason to withhold it. Under s.77 of the Education Act (1989), the principal of a school is under a duty to ensure that parents are informed of matters that are preventing or slowing the student's progress in the school, or harming the student's relationships with other students or staff.

The student's views were quite clear. In my view, it was possible for the school to reconcile the competing interests. In accordance with its obligations under the Education Act, the school could advise the parent that the student 'was doing well', or some other such general comment. However, access to the actual reports, and specific information was quite properly denied.

This example illustrates that parents' wishes may not in every situation prevail over a child's clearly expressed contrary view, and the dangers of inflexible rules which do not permit the special circumstances of a particular case to be taken into account.

Faced with any such request for information, a school must determine what information (not document) must, or may be, disclosed.

These issues are not new. Principals were faced with them long before the Privacy Act, and they should not be inhibited from exercising their judgment by the incorrect perception that the privacy act introduces a new set of inflexible rules.

A student transferring to another school might expect that a record of attendance, and courses completed, might follow him to the next school, but could the same be said of the records of counseling he received, a record of each instance in which he was disciplined, or records of family circumstances which justified a period of absence from the school some years ago? What information does the other school need to receive? What are they entitled to receive? This example leads to the second point I have mentioned: the need to ensure that wherever possible, students, and their parents, are informed of the purpose of collection of personal information and of the intended recipients.

Tell the student what information will be disclosed, and to whom.

Schools, like every agency that collects personal information, are obliged to take reasonable steps to ensure that a person from whom personal information is collected is made aware of the fact that information is to be collected, the purpose of collection, the intended recipients of the information, that person's rights of access to and correction of the information. For the full list of matters to be covered and the exceptions to the principle, I refer you to information privacy principle three of the Act, a copy of which is attached.

This means that at enrolment schools should take the opportunity to advise students of their information handling policies and practices. This enables student or parents to be aware of what will happen to the information, and gives an opportunity for students to make the school aware of particular circumstances which may suggest a departure from the practice, such as in the case of the young woman I have just mentioned.

However, this does not necessarily mean that at enrolment, the authorisation, or consent, of the parent and/or student must be obtained for the collection of the information on these terms. The principle refers to the need to *inform* the person of these things. This is the means by which students and parents are able to draw to a school's attention to special circumstances, such as in the earlier example, or to influence its information policies and practices if they consider them unreasonable.

The transferring of student records

As I have shown, there is a misapprehension in the community that the person must consent to the release of personal information as the only way around the 'problem' of non-disclosure of personal information. This misapprehension is not limited to schools, or boards of trustees. The report of the Education and Science Select Committee Inquiry into Children in Education at Risk Through Truancy and Behavioural Problems contains the recommendation that

> schools should establish enrollment procedures that elicit parent/caregiver consent to the subsequent transfer of school records. Should the obtaining of consent be unworkable the committee would recommend that the Government consider amending the Privacy Act 1993 to allow this to occur. (1995: 9)

I find this an odd recommendation, not because the Committee did not ask my office for advice on the issue, but because it omitted reference to the 'purpose/directly related purpose' exception - .viz, that information may be disclosed in cases where "disclosure of the information is one of the purposes in connection with which the information was obtained, or is directly related to the purposes for which the information was obtained".

It is also important to note in this context that the Act refers to the authorisation of the 'individual concerned'. Parental consent has been discussed as if it were part of the Privacy Act. It is not, and, although parents can, in law, consent to things on behalf of their children, this idea has very little to do with privacy.

There is no provision in the Act for consent to an action to be granted by one person on behalf of another. The Act does not contemplate a parent being able to consent on behalf of a child. If a parent makes a decision about the school the child is next to attend, the information flows follow that decision naturally and in accordance with the purpose concept.

It seems to me that transferring necessary records to another school is a purpose likely to be directly related to that for which the information was collected. Rather than seeking parent/caregiver consent (which as I have said the Act does not provide for), the school is under a duty to *inform* the student and parents of the recipients of the information.

Databases

The Committee also recommended the establishment of a national database to collect enrollment, attendance, attrition, exemption, suspension, expulsion and truancy data. The database would be integrated with data from the Immigration Service, and Departments of Social Welfare, Justice and Statistics.

While it is clear from the Committee's findings that some means of tracking students is desirable in that it would facilitate the delivery of education as prescribed in the Education Act, I am concerned at the possible scope and effect of such a proposal.

Given the fact that school is compulsory for every young person in New Zealand aged 6 to 16 (except in certain circumstances), such a database could soon resemble a population database, integrating information collected from a variety of sources collected for a range of different purposes and identifying families and relationships.

I urge caution in the development of such a far-reaching response to the specific problems of truancy and education. Once established such a database would be extremely tempting for a range of other agencies to use. It could potentially become a very rich source of information about the people of this country. Parliamentarians may be easily persuaded later to find new uses for listing databases under 'information sharing' initiatives. Further risks may be created by technological advances and the ease of manipulating information using computers. Once established such databases may later be accessed legally for completely different purposes and for what will seem a good idea at the time. New Zealand's traditions and culture seem to me to be inconsistent with all-embracing databases to track individuals. Alternatives should be examined that are less privacy - intrusive yet which are successful in reducing truancy problems.

Teacher registration

Another issue of contemporary relevance to education is that of teacher registration, or, more to the point, de-registration. The Teacher Registration Board is responsible for ensuring that registered teachers are of good character and that teachers of less than good character are not registered.

It is for this reason that teachers applying for registration are asked to declare that they have no criminal convictions, and to authorise the Board to receive confirmatory printouts from the Wanganui Computer.

According to press reports, the Board now wants mandatory reporting of all teachers convicted of criminal offences, but negotiations to facilitate this had to be dropped because it was banned under the Privacy Act (1993).[3] The report of the Board' s submission to the Committee stated that "The prevalence of name suppression and trial delays meant it was possible the Board was failing to catch convicted criminals". This problem has been attributed to the Privacy Act.

Another problem is that the police and courts may not in all cases know that a defendant is a teacher. The defendant may not have disclosed the registration on arrest and may have been working in some other occupation which would appear in court records.[4]

Teachers must be of good character but they are also human. They should not have past mistakes, or current, minor ones haunt them for the rest of their lives if they do not bear on future responsibilities for the welfare of children.

In my view, rather than seeking to amend the Privacy Act, or the Education Act, to improve the automatic flow of information from the police to the Board, we need to assess the problem properly, analyse its causes, and pursue sensible solutions.

What offences are, on their face, incompatible with the role of a teacher? It is likely that an assessment would conclude that all sexual and indecency offences, no matter when they were committed would have to be notified; but can the same be said for *all* offences? It is simplistic to say that criminal convictions equate to a character incompatible with that required of a teacher, and then to seek the automatic reporting of every offence of every nature. Must a 20 year old conviction arising from a political protest dog a teacher for the rest of his or her life? Can a conviction for possession of marijuana, or for drinking on a train while going to a University tournament, 20 years ago really provide an insight into character?

These questions - what information is required? how will it be used? to whom will it be supplied? - need to be asked at the outset of any policy making process, to ensure that the legitimate need actually exists.

I raise these issues not to criticise the concerns of the Teachers' Registration Board. They have serious responsibilities. It is rather my intention to point to the need for thoughtful discussion and working through of problems rather than trying to fasten on to technological solutions which might threaten primary protection.[5]

Conclusion

My aim was to inform you of some of the privacy issues that arise in the education sector, and rather than give answers, to explain some of the means of resolving some of the problems.

The aim of the legislation is really to foster respect for the individual, not make your job harder, or to tie you up in bureaucracy. The Act provides remedies for those who have suffered harm or indignity as a result of a breach of a principle, but is not an inflexible set of rules that will land you in court for an innocent mistake which harmed nobody.

Further assistance may be found in the fact sheets and issues papers that are available from my office. If faced with a problem with the Act, I encourage you to bring it to the attention of my office.[6]

Notes

1. This paper is based on notes for an address by Bruce Slane, Privacy Commissioner, to the eighth annual secondary principal's association of New Zealand, Auckland 25 March 1995.
2. Jan Clifton, Sunday Star-Times 4 December 1994.
3. I understand this report arose from a spontaneous discussion at a select committee.
4. There are a number of reasons for the difficulties being experienced by the board that have nothing to do with the Privacy Act. Name suppression and trial delays are not Privacy Act problems. If that is a problem, it is a matter that needs to be taken up by the Board with crown prosecutors, and with the court system.
5. At the end of 1994 the following remarks were reported:

   > The Director of the Teacher Registration Board suggests that "principals often [tell] the Board of their suspicions about former teachers, but the Privacy Act prevented the Board keeping any kind of record". (This is a quotation from the article - the article itself does not attribute this as a direct quote from Mr. Barlow, the Director of the Teacher Registration Board.)

   This is not an accurate representation of the effect of the Privacy Act.

   If the information privacy principles cause the Board difficulty in carrying out its functions it may seek from me a code of practice which can modify the principles in respect of the Board.

   In March 1995 I wrote to the Teacher Registration Board telling them that it would be possible for the Board to seek a code of practice under the Privacy Act in relation to the teacher registration process if it felt that would be necessary. I have had no approach for a code.

   If there is a problem it may be that principals are not willing to back up allegations with a request for deregistration by which the teacher concerned would have a chance to be heard and refute accusations.

   The Board's policy not to retain 'suspicions' on file may be because it is outside its statutory mandate to hold such data on teachers where a formal complaint is not being made or because that information does not warrant action by the Board or is not relevant to its functions. This would be the case regardless of the Privacy Act.

   Indeed I understand its policy has not changed in this regard since the passing of the Privacy Act.

   The article itself indicates that the Education Department discontinued a previous practice of maintaining a dubious 'yellow list' because it did not accord with another law, the Human Rights Act. The Board's decision not to record such information is a result of the Board's own policy, guided by its particular statutory functions, not as a response to a new requirement or the Privacy Act.

   If another piece of legislation require certain information to be disclosed or affects access rights, that provision will prevail over the Privacy Act. So that in section 77 of the Education Act which places a duty on the principal to inform parents in certain circumstances of matters preventing or slowing a

student's progress this prevails over the students' rights under the Privacy Act. However, it does not mean that the student should not be told of the disclosure and the reason why the disclosure occurs.

6. Enquiries officers are available on Auckland 302 8655 and toll free on 0800 803 909. The Privacy Commissioner also has a presence on the world wide web at http://www.knowedge-basket.co.nz/privacy/welcome.htm at Written enquiries to Box 466 Auckland are also encouraged - but please first have a look the materials available to you. Resources are not unlimited!

References

Education and Science Committee (1995) *Inquiry into Children in Education at Risk through Truancy and Behavioural Problems.* Wellington: Government Printers.
The Education Act (1989) Wellington: Government Printers.
The Privacy Act (1993). Wellington: Government Printers.

Appendix

Information Privacy Principle 3 provides:

1. the agency shall take such steps (if any) as are, in the circumstances, reasonable to ensure that the individual concerned is aware of –
    a. The fact that the information is being collected; and
    b. The purpose for which the information is being collected; and
    c. The intended recipients of the information; and
    d. The name and address of –
        i. The agency that is collecting the information; and
        ii. The agency that will hold the information; and
    e. If the collection of the information is authorised or required by or under law –
        i. The particular law by or under which the collection of the information is so authorised or required; and
        ii. Whether or not the supply of the information by that individual is voluntary or mandatory; and
    f. The consequences (if any) for that individual if all or any part of the requested information is not provided; and
    g. The rights of access to, and correction of, personal information provided by these principles.
2. The steps referred to in subclause (1) of this principle shall be taken before the information is collected or, if that is not practicable, as soon as practicable after the information is collected.
3. An agency is not required to take the steps referred to in subclause (1) of this principle in relation to the collection of information from an individual if that agency has taken those steps in relation to the collection, from that individual, of the same information or information of the same kind, on a recent previous occasion.
4. It is not necessary for an agency to comply with subclause (1) of this principle if the agency believes, on reasonable grounds –
    a. That non-compliance is authorised by the individual concerned; or
    b. That non-compliance would not prejudice the interests of the individual concerned; or
    c. That non-compliance is necessary –
        i. To avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or

ii. For the enforcement of a law imposing a pecuniary penalty; or

iii. For the protection of the public revenue; or

iv. For the conduct of proceedings before any court or Tribunal being proceedings that have been commenced or are reasonably in contemplation; or

d. That compliance would prejudice the purposes of the collection; or

e. That compliance is not reasonably practicable in the circumstances of the particular case; or

f. That the information –

i. Will not be used in a form in which the individual concerned is identified; or

ii. Will be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned.