

Review of Broadcasting Standards in New Zealand: Codebook

**Submission by the Privacy Commissioner
to the Broadcasting Standards Authority**

31 August 2015

1. Introduction

- 1.1. Thank you for this opportunity to comment on the Broadcasting Standards Authority's (BSA) draft codebook, *Broadcasting Standards in New Zealand: Codebook* (the draft codebook).
- 1.2. The draft codebook has been produced as part of the BSA's regular review of the Broadcasting Standards. These standards apply to all television and radio broadcasters, and regulate their behaviour when broadcasting material.
- 1.3. My functions under the Privacy Act 1993 include to the obligation to promote and protect individual privacy and to "consult and co-operate with other persons and bodies concerned with the privacy of the individual".¹ The standards contained in the draft codebook cover a wide range of issues, many of which do not raise privacy concerns. However, standard 10 – which deals with privacy – is obviously directly relevant.
- 1.4. The close relationship between privacy protections contained in the Privacy Act and standard 10 is illustrated by two recent cases investigated by our respective offices. The first case, investigated by the BSA, related to an individual who was filmed on his boat in a state of partial undress, as part of the filming of a reality TV series.²
- 1.5. The second case, investigated separately by the BSA and my Office, related to an individual who complained he had been filmed in his property by Sky TV while it was using a drone with a camera to film a nearby cricket match.³ In both of these cases there is a clear overlap between my role to promote and protect individual privacy and the BSA's role in regulating the behaviour of broadcasters.

2. General comments on *Broadcasting Standards in New Zealand: Codebook*

- 2.1. In light of the close relationship between our jurisdictions, the proposed changes to the Broadcasting Standards are of potential concern to my Office. However any concerns have been largely mitigated by the fact that my Office has been able to discuss the proposed changes and provide feedback, which has now been incorporated into the draft handbook.
- 2.2. I am pleased to now publicly confirm my general support for the changes proposed in the draft codebook, insofar as they relate to individual privacy.

¹ Section 13(1)(j) of the Privacy Act 1993

² PG and Television New Zealand Ltd – 2014-090

³ Case Note 267458 [2015] NZ PrivCmr 6: Man objects to drone filming near his apartment

- 2.3. In particular, I believe the steps taken by the BSA to provide greater transparency by clarifying the matters it will take into account when applying the privacy standard – as contained in the standard itself as well as the new accompanying privacy guidance – are positive and protective of individual privacy.
- 2.4. However, I believe there are some minor matters within the privacy standard which could benefit from further discussion and I address these in turn below.
- 2.5. I note that, as the privacy standard is exactly the same for each of the specific code contained in the draft codebook (the Radio Code, Free-to-air Television Code and Pay Television Code), my comments will refer generally to the ‘privacy standard’.

3. Specific comments on the Privacy Standard

- 3.1. A significant change between the current privacy standard and the proposed privacy standard is that the distinction previously drawn between ‘private facts’ and ‘public facts’ has been replaced with a test which instead considers whether there is a ‘reasonable expectation of privacy’ in the information concerned.⁴ This change is in line with earlier discussions between my Office and the BSA.
- 3.2. The distinction between ‘private facts’ and ‘public facts’ is currently used by broadcasters to determine what degree of privacy protection is required.⁵
- 3.3. However attempts to draw a distinction between ‘private facts’ and ‘public facts’ are becoming increasingly complicated. For example, if a broadcaster were to show or report on footage obtained from an individual’s Facebook page, would this material be a private fact or a public one? Does it make a difference if the individual’s page is public or private? If they have 10 Facebook ‘friends’ or 1000? It is increasingly apparent that the days of considering public and private as being binary positions are behind us.
- 3.4. It is therefore positive to see BSA has engaged with this increased complexity by introducing a more nuanced test – a consideration of whether an individual concerned has a reasonable expectation of privacy with respect to the relevant information.

⁴ Guideline 10c of the proposed privacy standard.

⁵ The privacy principles currently applied by the BSA state “it is inconsistent with an individual’s privacy to allow the public disclosure of private facts, where the disclosure is highly offensive an objective reasonable person”. Public facts generally do not attract the same degree of protection (although there are limited circumstances where a fact which has been public may, in effect, become private again – for instance due to the passage of time).

- 3.5. However, there is one point where I think the standard could benefit from some further clarification. Guideline 10d says that usually people will not have a reasonable expectation of privacy in relation to matters in the public domain, but that there may be some circumstances where this will not be the case. Exactly what these circumstances may be is not discussed in the standard itself.
- 3.6. The privacy guidance provided with the draft codebook expands on what it means to have a reasonable expectation of privacy. The guidance notes that individuals will not usually have a reasonable expectation of privacy in relation to matters of 'public record' or in the 'public domain', while acknowledging that information in the public domain can become private again through the passage of time.
- 3.7. Difficulties can often arise when determining the extent to which information has been, or remains, a matter of public record or in the public domain. I therefore consider this provision could benefit from further clarification. For instance, it would be desirable to have guidance on the circumstances where material made available online may still attract a reasonable expectation of privacy.
- 3.8. I also note that, until recently, the Privacy Act principles dealing with the use and disclosure of personal information,⁶ contained an exception which permitted agencies to use and disclose personal information if they had initially obtained that information from a publicly available publication.
- 3.9. However, the recently passed Harmful Digital Communications Act 2015 amended these exceptions to limit this exception. Agencies may now only use or disclose personal information obtained from a publicly available publication where, in the circumstances of the case, it would not be unfair or unreasonable to do so.
- 3.10. Finally, I note that the proposed privacy standard has introduced a limit to the 'public interest' defence.⁷ This provision currently says that where a matter has been disclosed in the 'public interest' this will be a defence to a privacy complaint under the standard. The draft codebook has proposed to limit this defence by introducing a requirement that the level of public interest must be proportionate to the seriousness of the breach of privacy in order for the defence to apply.⁸

6 Principles 10 and 11 respectively.

7 BSA privacy principles 8 - 'public interest' is defined as being of legitimate concern or interest to the public.

8 Standard 10 - guideline 10f.

3.11. The introduction of a proportionality test to this defence is in line with guidance my staff has previously provided to the BSA. While I recognise the importance of freedom of expression, as provided for by section 14 of the Bill of Rights Act,⁹ I consider that considering the limitation proposed here strikes an appropriate balance.

4. Conclusion

4.1. While I believe the draft codebook could benefit from minor clarifications, as set out above, I am generally supportive of the proposed codebook.

4.2. I look forward to engaging with the Broadcasting Standards Authority as it further considers the challenge of ensuring broadcasters take appropriate measure to protect privacy and would welcome the opportunity to comment further if that would be of assistance.

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a series of loops and a final flourish.

John Edwards
Privacy Commissioner

31 August 2015

⁹ Section 14 of the Privacy Act also requires that, in the performance of my duties and functions, that I give due regard to the protection of important human rights and social interests that complete with privacy.