

PRIVACY AS A BROADCASTING STANDARD: JUNE 2010

Background

Under section 21(1)(e)(vii) of the Broadcasting Act 1989, the BSA is required to encourage the development and observance by broadcasters of codes of broadcasting practice in relation to the privacy of the individual. The duty of the broadcaster in this respect is reflected in section 4(1)(c) which states that every broadcaster is responsible for maintaining in its programmes and their presentation, standards that are consistent with the privacy of the individual. These requirements are included in the three main broadcasting codes as follows:

Free-to-Air Television Code

Standard 3 Privacy

Broadcasters should maintain standards consistent with the privacy of the individual.

Guideline

- 3a When determining privacy complaints broadcasters shall apply the privacy principles developed by the Broadcasting Standards Authority (see Appendix).

Radio Code

Standard 3 Privacy

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Pay Television Code

Standard P9 Privacy

Content should conform to the Privacy Principles outlined in Appendix 1.

All three standards operate in conjunction with the BSA's eight Privacy Principles which are contained in each code as follows:

1. It is inconsistent with an individual's privacy to allow the public disclosure of private facts, where the disclosure is highly offensive to an objective reasonable person.
2. It is inconsistent with an individual's privacy to allow the public disclosure of some kinds of public facts. The 'public' facts contemplated concern events (such as criminal behaviour) which have, in effect, become private again, for example through the passage of time. Nevertheless, the public disclosure of public facts will have to be highly offensive to an objective reasonable person.
3. (a) It is inconsistent with an individual's privacy to allow the public disclosure of material obtained by intentionally interfering, in the nature of prying, with that individual's interest in solitude or seclusion. The intrusion must be highly offensive to an objective reasonable person.

(b) In general, an individual's interest in solitude or seclusion does not prohibit recording, filming, or photographing that individual in a public place ('the public place exemption').

(c) The public place exemption does not apply when the individual whose privacy has allegedly been infringed was particularly vulnerable, and where the disclosure is highly offensive to an objective reasonable person.

4. The protection of privacy includes the protection against the disclosure by the broadcaster, without consent, of the name and/or address and/or telephone number of an identifiable individual, in circumstances where the disclosure is highly offensive to an objective reasonable person.
5. It is a defence to a privacy complaint that the individual whose privacy is allegedly infringed by the disclosure complained about gave his or her informed consent to the disclosure. A guardian of a child can consent on behalf of that child.
6. Children's vulnerability must be a prime concern to broadcasters, even when informed consent has been obtained. Where a broadcast breaches a child's privacy, broadcasters shall satisfy themselves that the broadcast is in the child's best interests, regardless of whether consent has been obtained.
7. For the purpose of these Principles only, a 'child' is defined as someone under the age of 16 years. An individual aged 16 years or over can consent to broadcasts that would otherwise breach their privacy.
8. Disclosing the matter in the 'public interest', defined as of legitimate concern or interest to the public, is a defence to a privacy complaint.

Note:

- These principles are not necessarily the only privacy principles that the Authority will apply
- The principles may well require elaboration and refinement when applied to a complaint
- The specific facts of each complaint are especially important when privacy is an issue.

The purpose of this Practice Note is to provide guidance to complainants and broadcasters about the usual way the privacy standard is interpreted by the BSA.

Comment

Privacy is an area of law that is evolving. Its scope has been challenged in recent years by changes in both the means of conveying information to the public and the nature of the information being conveyed. In the broadcasting context, the trend towards 'reality TV' and broadcasting 'real-life' events is becoming more and more prevalent, and some programmes are pushing the boundaries of individuals' rights to privacy.

Privacy is recognised in broadcasting standards as being a special and important right. First, it is the only standard for which the Authority can receive complaints directly, without the

broadcaster having the right of first reply.¹ Second, Parliament gave the BSA the power to award compensation for breaches of privacy, but for no other standard.²

It should also be noted that the privacy standard does not apply to deceased individuals. Section 4(1)(c) of the Broadcasting Act 1989 requires every broadcaster to maintain in its programmes and their presentation, standards which are consistent with the privacy of the individual. "Individual" is defined in the Broadcasting Amendment Act 2000 as having the same meaning as in the Privacy Act 1993. Section 2 of that Act interprets "individual" as meaning a natural person, other than a deceased person. Not being an individual within the meaning of the Act, a deceased person therefore does not have a legal right to privacy.

BSA Decisions

The following summaries explain the BSA's approach in its decisions on each of the privacy principles released between 2004 and 2010.³

Privacy Principle 1: The public disclosure of private facts

Privacy principle 1 is the most often used of the eight principles as it has the widest application to alleged breaches of privacy. It governs situations where a broadcast has disclosed private facts about an identifiable individual in a manner that would be highly offensive to an objective reasonable person. Three criteria must be satisfied before the BSA will consider upholding a breach of privacy under this principle.

Identification

First, the person whose privacy has allegedly been interfered with must be "identifiable" in the broadcast. In some cases, for example where a person is named and their image is shown,⁴ or conversely, if the person was not named and there were few identifying features,⁵ it will be clear whether the person would have been identifiable to viewers.

In other cases, where it is not so clear, the BSA's test is whether the person would have been "identifiable beyond family and close friends who would reasonably be expected to know about the matter dealt with in the broadcast".⁶ The question is not simply whether the individual was identifiable to family and close friends, but whether that group of people could "reasonably be expected" to know the personal information discussed in the item – for example, details of an individual's drug use might be something that is hidden from even the closest family and friends.⁷ Even though a person was not named, the BSA may conclude they were identifiable due to other identifying features contained in the broadcast, for example, distinctive clothing or full length body shots (*Rae et al and TVNZ*, 2010-007; *HDC and TVWorks*, 2009-088), or their place of work (*Broughton and RadioWorks*, 2009-144).

¹ Section 8(1A) of the Broadcasting Act

² Section 13(1)(d) of the Broadcasting Act

³ Cited by name and decision number. All decisions are available on the BSA's website www.bsa.govt.nz

⁴ For example, *Johnsson and TVWorks* (2010-013), *Galbraith and TVNZ* (2009-114), *LK and TVNZ* (2009-090).

⁵ For example, *Nyhane and TVWorks* (2010-006), *de Villiers and RadioWorks* (2010-004),

⁶ See *Hastings District Council and TVWorks* (2009-088), *Moore and TVWorks* (2009-036), *Pacifica Shipping and CanWest* (2005-026), *BA and TVNZ* (2004-070)

⁷ See, for example, *Anon and TVNZ* (2004-106)

Private facts

Once the BSA has determined whether the person was identifiable, the next step is to consider whether any private facts about that person were disclosed in the broadcast. Private facts are usually things which a person would reasonably expect to remain private, as opposed to information that is on public record or already in the public domain. For example:

The following were considered private facts:

- Participation in illegal activities (*HDC and TVWorks*, 2009-088)
- HIV-positive status (*Walter and TVNZ*, 2009-073)
- Breast augmentation surgery (*LM and TVNZ*, 2007-138)
- A person's mental health status (*Galbraith and TVNZ*, 2009-114)
- Images or information subject to a court suppression order (*WP and TVNZ*, 2009-092).

The following were not considered private facts:

- Fines from fisheries officers (*QM and TVNZ*, 2009-083; *Lewis and TVNZ*, 2007-109)
- Involvement in a person's medical treatment (*Saxe and TVNZ*, 2009-165; *Morton and TVNZ*, 2008-131; *The Order of St John and TVNZ*, 2009-025)
- Separation from spouse (*White and RadioWorks*, 2009-008)
- Criminal convictions (*Reekie and TVNZ*, 2009-026)
- Sex change surgery already reported in other media (*Johnsson and TVWorks*, 2010-013)
- Relationship to convicted murderer already in public domain (*LK and TVNZ*, 2009-090)
- Name of witness in court trial widely reported with no suppression orders (*Harris and RadioWorks*, 2008-093)
- Using antidepressants, already disclosed on radio (*QW and TVNZ*, 2007-089).

Highly offensive disclosure

Before the BSA upholds a privacy complaint under principle 1, it must be satisfied that an objective reasonable person would have found the disclosure of the private facts to be highly offensive. It should be noted that the wording of the principle requires that the "disclosure" must be highly offensive, rather than the particular facts. High Court decisions concerning the tort of invasion of privacy suggest that the "objective reasonable person" should be viewed as being in the shoes of the person whose privacy has allegedly been infringed.⁸

Disclosures the Authority has found to be highly offensive include:

- Disclosure of involvement in gangs and crime where individuals believed they would not be identified (*HDC and TVWorks*, 2009-088)
- Disclosure of personal and confidential medical consultations and procedures without patient's informed consent (*LM and TVNZ*, 2007-138; *EF and RadioWorks*, 2006-112)
- Child's involvement in a custody dispute (*JB and TVNZ*, 2006-090)

⁸ E.g. *Andrews v TVNZ* CIV 2004-404-3536

Disclosures found not highly offensive include:

- Role of interpreter in a murder trial (*WP and TVNZ*, 2009-092)
- Disclosure of paramedic's name and the fact he responded to an emergency at a prison (*The Order of St John and TVNZ*, 2009-025)
- Radio host's disclosure of separation from his wife (*White and RadioWorks*, 2009-008)
- Disclosure that doctor was under investigation along with comments he was highly skilled (*Morton and TVNZ*, 2008-131).

Privacy Principle 2: The public disclosure of 'public' facts

Privacy principle 2 is usually considered in relation to the disclosure of criminal convictions which are a matter of public record, but which the standards recognise may become private after, for example, the passage of time. As with principle 1, the disclosure must be highly offensive before the BSA will uphold a breach of privacy. To date, the BSA has not upheld a complaint under this principle, but some examples of decisions considering principle 2 include:

- *Reekie and TVNZ*, 2009-026. Mr Reekie was convicted of extremely serious offences 6 years before the programme, and was still serving his sentence. The BSA concluded that the convictions could not have become private merely by the passage of six years.
- *Walden and TVNZ*, 2006-061. A man was shown intoxicated and being ejected from a stadium during a rugby match. The incident had occurred 13 months before the broadcast, which the BSA concluded was insufficient time for the fact to become private.
- *Arthur and TVNZ*, 2006-115. A high school teacher had been convicted of supplying 'P' to students 3 years before the broadcast. The BSA considered that insufficient time had passed for the fact to become private, because the teacher's case had attracted considerable publicity and he had been convicted of a serious offence.

Privacy Principle 3: Intrusion into solitude and seclusion

Historically, principle 3 has normally been applied to the broadcast of hidden camera footage, but can be considered in relation to any intrusion or prying into a situation where an individual has a reasonable expectation of solitude or seclusion. Principle 3 has three sub-principles.

Principle 3(a): Intentionally interfering with an individual's interest in solitude or seclusion

Solitude or seclusion

Solitude is defined as "the state of being alone",⁹ which has not been satisfied, in isolation from an interest in seclusion, in any decision to date, because the individuals have always been with, or near, other people (e.g. *O'Connell and TVNZ*, 2007-067; *Tashkoff and TVNZ*, 2009-095). In some decisions, the Authority has simply accepted that the individual had an interest in both (e.g. *Hood and TVNZ*, 2007-028: in a person's home and car; and *NM and TVNZ*, 2007-023: in a person's bedroom).

⁹ *CanWest TVWorks Ltd v XY* [2008] NZAR 1 at paragraph [40]; *TVNZ v KW* (CIV-2007-485-001609) at paragraph [56].

Seclusion is a broader concept, defined as a “state of screening or shutting off from outside access or public view”, or a “zone of sensory or physical privacy”, which “extends to a situation where the complainant is accompanied”.¹⁰ This test was satisfied in *O’Connell and TVNZ* (2007-067) where caregivers were not alone as the person they were caring for was also present, but they were in a house which was not accessible by the general public. The Authority also accepted in *Hood and TVNZ* (2007-028) that the individual had an interest in seclusion while inside his home and car.

Interference in the nature of prying

To date, the Authority has not found that an individual had an interest in solitude or seclusion without also establishing that there was an interference with that interest. As already stated, this generally involves the use of a hidden camera (for example, *Hood and TVNZ*, 2007-028). However, in *Rae, Schaare and Turley and TVNZ* (2010-007), the Authority considered that openly filming a family grieving over a loved one who had just drowned, and broadcasting prolonged and close up footage of them, amounted to an intentional interference in a private moment in the nature of prying. In another case, the Authority found that principle 3 could extend to situations where a broadcaster entered onto a person’s land, and pried into private matters, irrespective of whether the occupier was present or shown in the broadcast (*Balfour and TVNZ*, 2005-129).

Principle 3(b): Public place exemption

Principle 3(b) states that, generally, an individual’s interest in solitude or seclusion does not prohibit filming or photographing them in a public place. The following have been found to come under the public place exemption:

- footage of a man gathering scallops on a public waterway (*Davies and TVNZ*, 2005-017)
- footage of a family in a police car on a public road (*McDonald and TVNZ*, 2008-109)
- footage of a confrontation on a public road (*DY and TVNZ*, 2008-088)
- footage of actor and airport employee at airport check-in (*Young and CanWest TVWorks*, 2006-084).

Principle 3(c): Vulnerability

Principle 3(c) states that the public place exemption does not apply where the individual whose privacy has allegedly been infringed was particularly vulnerable, and the disclosure would be highly offensive to an objective reasonable person. The Authority has acknowledged that people who have lost a loved one are in a highly vulnerable and distressing situation (e.g. *Rae et al and TVNZ*, 2010-007; *McDonald and TVNZ*, 2008-109). Conversely, the Authority did not consider that a man who was involved in an emotional confrontation on a public road was in a state of vulnerability as envisaged by the principle (*DY and TVNZ*, 2008-088).

Highly offensive disclosure

As with privacy principle 1, for the Authority to find a breach of principle 3, the intrusion into an individual’s interest in solitude or seclusion, or the disclosure of footage of a particularly

¹⁰ *CanWest v XY* at paragraph [42]

vulnerable individual, must be considered highly offensive by an objective reasonable person. In most cases, if the Authority finds that there was an intentional intrusion, or a disclosure in relation to a vulnerable individual, it will also conclude that the broadcast would be highly offensive to an objective reasonable person (e.g. *Hood and TVNZ*, 2007-028; *Russek and TVNZ*, 2007-016; *NM and TVNZ*, 2007-023). However there have been exceptions, for example where the footage of the individuals was brief and from a respectful distance (*McDonald and TVNZ*, 2008-109).

Privacy Principle 4: Disclosure for the purpose of encouraging harassment

Principle 4 relates to the disclosure of a person's name, address or phone number in a manner which is highly offensive. This principle was developed to prevent the broadcast of a person's details in circumstances where they are disclosed for the purposes of encouraging harassment of the person by members of the public.

In *Spring and TRN* (2007-108), a radio host said he was upset about Mr Spring's appearance on a TV programme in which he described how he drowns cats. The host told listeners where they could find Mr Spring's listing in the White Pages and suggested that they "send something to him", adding that he thought Mr Spring was "the cat Hitler, is a cruel, cowardly, disgusting, sickening, shit bag with bad shoes and I'd really love to see him in a cage and immersed too..."

The BSA considered that the host's disclosure of Mr Spring's details, along with his vitriolic comments about him, was obviously designed to encourage listeners to harass the complainant. It upheld the privacy complaint and ordered \$1500 compensation for the breach of his privacy.¹¹

In *South Pacific Pictures and RadioWorks* (2008-017), a radio host disclosed the address of the house where the TV programme *Outrageous Fortune* was filmed. The BSA considered that the address was disclosed to encourage people to "pay homage" to the house, rather than to harass the person who lived there.

The BSA has determined that principle 4 does not apply to the disclosure of email addresses, because it does not result in the same "potential harassment or physical threats at their place of residence" (see *Kirk and TVWorks*, 2007-088).

Privacy Principle 5: Informed consent

Principle 5 states that informed consent is a defence to a privacy complaint. The consent must be given by the person whose privacy has been allegedly infringed, or by a guardian on behalf of a child (under 16 years of age: privacy principle 7).

A broadcaster cannot infer consent.¹² In *O'Connell and TVWorks* (2007-067), consumer programme *Target* considered that an employer's consent on behalf of an employee was sufficient. As principle 5 makes it clear that only the "individual whose privacy is allegedly infringed" can give consent to the disclosure, and the individuals featured on *Target* were not

¹¹ See also *RW and RadioWorks*, 2008-111, in which radio hosts broadcast the complainant's cell phone number.

¹² In *TVWorks v Du Fresne* [2008] NZAR 382 the High Court held that, in an interview situation, a broadcaster would have to show that the participant had "an awareness of being interviewed, or knowing the true context of the interview, and [an awareness]... of the purpose to which the interview is to be put. In other words, what use is planned for it." However, it does not require an "appreciation of the consequences of giving an interview".

contacted, the Authority concluded that the defence of informed consent did not apply and their privacy had been breached.

In *LM and TVNZ* (2007-138), LM withheld consent to participating in the broadcast on the condition that she would view and approve footage of her before it went to air. The broadcaster considered that she had “impliedly” given consent because she never responded to an invitation to view the footage. The Authority concluded that LM’s consent was not obtained, and upheld her privacy complaint.

In *HDC and TVWorks* (2009-088), a participant over 16 years of age had given informed consent on the condition that she would not be identified (participants under 16 are discussed below in relation to principles 6 and 7). However, the broadcaster failed to adequately mask her identity, and the Authority therefore found that the girl had not consented to the disclosure of private facts about her.

In some cases it will be clear that informed consent has been given. For example, in *MD and TVNZ* (2004-004), the programme participant had signed a consent form at the time of filming, and in *Galbraith and TVNZ* (2009-114), while the facts revealed would be considered private, the subject had consented to an interview and willingly disclosed those facts himself.

Privacy Principles 6 and 7: Children

Principle 6 recognises the importance of protecting children’s interests. As stated above, children over 16 are able to consent to a breach of their privacy, and a guardian may consent on behalf of a child under 16, but principle 6 dictates that broadcasters must be satisfied that the broadcast is in the child’s best interests, regardless of whether consent has been obtained. This recognises that it is important to consider the interests of children independent of the claims of their parents or guardians, who may be using the child to promote their own interests.

In *JB and TVNZ* (2006-090), the Authority considered a programme in which a father was interviewed about his custody dispute. He had consented to the inclusion of images of his eight-year-old daughter in the programme. The Authority was of the view that the broadcaster had failed to recognise that the girl’s well-being could be seriously compromised by publicly disclosing personal facts about her situation. It concluded that it was not “in [the child’s] best interests to disclose her identity and the fact that she was at the centre of a custody battle, especially as the dispute between the parents was ongoing and bitterly contested, and the footage was used only to support the father’s campaign against the Family Court.”

Similarly, in *Anon and TVNZ* (2004-106), a father involved in a custody dispute consented to the inclusion of images of his baby in an interview on *Holmes*. The Authority found that it was not in the child’s best interests to broadcast unproven allegations of drug abuse against her mother.

In *HDC and TVWorks* (2009-088), even though the broadcaster believed the girls interviewed had given consent, the Authority considered that it was not in their best interests to have disclosed their involvement in gangs and illegal activities, which was likely to have an impact on their lives in later years.

Privacy Principle 8: Public interest defence

Privacy principle 8 provides a defence to a privacy complaint if the disclosure of information or images was justified in the public interest, defined as being of legitimate concern to the public, rather than being a matter of general interest or curiosity on a human level.¹³

In *Balfour and TVNZ* (2005-129), the Authority identified a number of matters that might be in the public interest, including:

- criminal matters, including exposing or detecting crime
- issues of public health or safety
- matters of politics, government, or public administration
- matters relating to the conduct of organisations which impact on the public
- exposing misleading claims made by individuals or organisations
- exposing seriously anti-social and harmful conduct.

The Authority has also said that more serious breaches of privacy will require a greater level of public interest for the public interest defence to apply (e.g. *O'Connell and TVWorks*, 2007-067). Further, the public interest must relate to the disclosure of the particular information or footage which is alleged to be a breach of privacy, rather than to the entire programme or the subject matter (see, for example, *Russek and TVNZ*, 2007-016).

Some scenarios which have been found to be justified in the public interest include:

- the disclosure of hidden camera footage of a shop owner willingly assisting the manufacture of 'P' by supplying the necessary ingredients and equipment (*Lewes and TVNZ*, 2008-085)
- the disclosure of the HIV-positive status of a man being investigated for knowingly infecting people with HIV (*Walter and TVNZ*, 2009-073)
- the disclosure of allegations of sexual abuse against a former church worker (*Wilton and TVNZ*, 2004-117)
- the disclosure of footage of a man being held hostage by terrorists in Iraq (Copland and TVWorks, 2004-209).

Some examples of broadcasts found not to be in the public interest include:

- the disclosure of details about a woman's breast augmentation surgery (*LM and TVNZ*, 2007-138)
- the disclosure of hidden camera footage of a man who had been acquitted of sex crimes but was assisting with a similar case (*Hood and TVNZ*, 2007-028)
- the disclosure of hidden camera footage of caregivers which demonstrated serious breaches of privacy not outweighed by public interest (*O'Connell and TVWorks*, 2007-067)
- the disclosure of hidden camera footage of a man on his private property, alleged to have been harbouring a kidnapped boy (*Russek and TVNZ*, 2007-016).

Recommended further reading:

¹³ *Hosking v Runting* [2005] 1 NZLR 1 (CA), paragraph [30]; *CanWest TVWorks v XY* [2008] NZAR 1, paragraph [57]

For further discussion of privacy as a broadcasting standard, see Dr Nicole Moreham, *Private Matters: A Review of the Privacy Decisions of the Broadcasting Standards Authority* (December 2009) at www.bsa.govt.nz

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Disclaimer: Nothing in this Practice Note binds the BSA in determining the outcome of any future complaint. Each complaint is determined on the particular facts surrounding a broadcast.