# POI Redaction Guidance

## The Privacy Act

When we apply codes we are referencing the relevant sections of the Privacy Act (2020).

The Privacy Act provides specific reasons why information from someone's personal file might be legitimately redacted. However, as a default position we should be releasing as much as possible to claimants.

In doing so we have to keep in mind other people's privacy, the claimant's right to their own information, and our responsibility as a government agency to be transparent and accountable for our decisions.

### s 53(b) PA – necessary to protect third party privacy

*When releasing this information would be an unwarranted invasion of the privacy of another person.*

Look for:

- information about someone else's mental health or specific physical health
- information about someone else's criminal history or involvement with criminal activity (e.g. specific illegal drugs)
- sensitive information about other people (e.g. siblings, parents' histories)
- names of other young people in care, e.g. others placed in residences

You might consider releasing sensitive information if:

- it is clear from the files that the claimant knows this information
- the information is more relevant to the claimant's life and care than it is private to the other person involved
- other factors prevent the application of this code (e.g. FGC Records and Decisions, newspaper clippings)

### s 53(b) PA – Text too faded to be reproduced accurately

- Use this code when the quality of the file is poor such that you cannot read a section of text, and there is a possibility of it containing private information that you are unable to assess for
- Try to redact the minimum necessary area and leave context for the document

**s 53(d) PA – Legal Privilege**

Used when information comes under legal privilege within the ministry.

- Solicitor-client privilege covers communications between solicitors and other staff in the ministry (either MSD or its predecessors, CYF/DSW) in the context of requesting or providing legal advice or assistance.
- Any communication (whether in the form of a case note, letter, email, handwritten note, etc) between legal staff and other staff within the ministry that does not include external parties, will usually be subject to solicitor-client privilege.
- An attachment to a privileged communication is not necessarily subject to the same privilege and should be assessed on its own merit.

**Litigation Privilege**

This uses the same code and rules but is identified differently.

- Litigation privilege protects any communication that can be considered preparation for court proceedings that are current, upcoming or reasonably apprehended (i.e. litigation is likely to occur).
- Litigation privilege only applies to parties to the proceeding. If MSD (or a predecessor) is not a party to a proceeding, litigation privilege does not apply.
- If a case note or a document mentions both preparation for a court case and general case recording, litigation privilege will apply if the document was written for the dominant purpose of preparing for court. If this is not the dominant purpose (e.g. it's more about the social work and court is just a factor being considered), then litigation privilege does not apply.

**s 24(1)(b) PA – court documents**

'Savings provisions' (s24(1)(b) PA) apply when specific classes of document come under other legislation with its own rules, rather than the Privacy Act, and so can't be released by us in this context. These are usually court documents.

We redact:

- social workers' reports and plans written for the court where the proceeding is in relation to care and protection or Youth Justice proceedings after the charges have been proven
- specialists' reports (e.g. psychological reports) written specifically for the Court
- adoption records *(this is a vague category and requires judgement)*

We can assess as usual to release:

- social workers' reports and plans in regard to Youth Justice prior to the charges being proven
- affidavits, information sheets, statements of consent or covering letters for any matter
- any communication from the Court, judges or registrar

## Out of scope

'Out of scope' does not reference any legislation and has no legal basis. When we apply out of scope codes we are not necessarily saying that the claimant is not entitled to any information in that section. Instead, we are saying that we didn't assess that section closely because it wasn't relevant to the request.

Out of scope is usually applied to whole pages.

When to use out of scope for private information:

Redactions often make it look like we're hiding something from the claimant. If sections of a file are about other people entirely, out of scope helps us to signal more clearly to the reader that these pages aren't information about the claimant that they can't have for some reason – they're just not about them.

Even though using the Privacy Act is more legally robust, out of scope can sometimes make it clearer why we make redactions and what's *actually* private despite its relevance.

**Out of scope – information relates solely to a third party family member**

- Most commonly used for documents about siblings

**Out of scope – information relates to an unrelated third party**

- Used where documents relating to people who have no connection to the claimant are included in the file (often accidentally)

**Out of scope – information relates to the requester as an adult**

- Used where information relates to the claimant after their discharge from care, for example as a parent of their own children

**Out of scope – information is outside the scope of the request**

- A catch all for information that isn't relevant to the claimant's time in care but doesn't fit the above common categories (rarely used)

## Adding information to codes

While we have standard code text, sometimes you may wish to include additional information to clarify what has been redacted or why. You can enter custom text for this.

# Legal Professional Privilege Guide (July 2019)[1]

When it comes to court ordered discovery, the Evidence Act and the High Court Rules govern the approach. For Privacy Act and Official Information Act requests, the legal basis for withholding for privilege is governed by the common law of legal professional privilege. However, the Evidence Act is essentially a codification of the common law so privilege can be approached in the same way in both contexts.

The below guidance and examples are intended to be a guide on the general approach that could be taken to certain types of documentation. Note that each document needs to be considered on a case-by-case basis, so if you consider that there might be some reason that this guidance and its examples might not be appropriate in any particular instance, we suggest discussing with your senior or team leader and then seek legal advice if you are unable to resolve it.

**Solicitor-client privilege**

Solicitor-client privilege covers communications that were intended to be confidential and made in the course of requesting or giving legal advice or assistance. Work related communications between an MSD lawyer and MSD staff can be considered to have been intended to be confidential.

Generally a communication (eg a letter or email) between an MSD lawyer and an MSD staff member/members will usually be subject to solicitor-client privilege. We would not expect many exceptions. An example of an exception may be where an MSD lawyer also carries out non-legal work, for example as a manager, and has sent an email in that role.
Such an email would not attract privilege, not being a communication created in the course of providing professional legal services. If an email contained content created for the purpose of providing legal services, as well as content created in the course of the managerial role, the email may be disclosed with the privileged part redacted. Other examples might be when a lawyer is also providing policy or commercial advice, which would likely be rare in the context of documents you are dealing with.

Otherwise, a document will usually be communicated from a solicitor to a client as a whole and therefore privileged or not privileged as a whole. It is not normally either possible or necessary to divide a communication into its privileged and non-privileged parts. This can generally be the approach taken to communications between solicitor and client, subject to the exceptions above.

An attachment to a communication subject to solicitor-client privilege is not subject to solicitor-client privilege solely due to it being attached. The attachment must itself attract legal professional privilege or be subject to another withholding ground in order to be withheld.

**Litigation privilege**

Litigation privilege protects communications between a lawyer and their client or third parties relating to court proceedings. This protection extends to information compiled or prepared by the party or the party's legal advisor or another person (at the request of the party or their lawyer) (e.g. reports) if the requirements of litigation privilege are met (discussed below).

Litigation privilege only applies to the parties to a proceeding. So where MSD is not a party to a proceeding (e.g. where we just provide a report to the court), litigation privilege will not apply.

[1] Created July 2019, last updated 25 July 2022.

Litigation privilege requires the following:

The document came into existence when litigation was either already underway or was reasonably apprehended or contemplated. Litigation is reasonably apprehended if at the point in time a reasonable person would have considered that litigation was likely. A mere possibility of litigation is not enough.

- The dominant purpose for creating the document must have been preparing for the proceeding or reasonably apprehended proceeding. At common law, the language used was that the dominant purpose must have been to enable the lawyer to either conduct the case or advise the client on the litigation.

In short, when you are considering a document that was created in the context of court proceedings, you will need to consider whether MSD (or a predecessor) was a party. If we were a party, you will then need to consider whether it was created for the dominant purpose of preparing for the proceeding. If so, it is likely that litigation privilege will apply. If we were not a party to the proceeding, you will need to consider whether there are any other reasons for withholding the document (e.g. solicitor-client privilege or court document).

Examples involving proceedings

The below examples are included as a guide on the general approach that could be taken to certain types of documentation:

*Reports from solicitor - social workers and solicitor - solicitor on what occurred in court:*

- If MSD a party – will generally be a proper basis to withhold the whole document under solicitor-client privilege and, in most cases, litigation privilege also.
- If MSD is not a party – will generally be a proper basis to withhold the whole document under solicitor-client privilege.

*Reports from social workers on what occurred in court:*

- If MSD a party – will generally be a proper basis to withhold the whole document under litigation privilege if there are future hearings in the proceeding, or solicitor-client privilege if it is a communication with a solicitor.
- If MSD a party – there may be a basis to withhold the whole document under litigation privilege in the case of a concluded proceeding if further reasonably apprehended proceedings are referred to (e.g. an appeal). This will depend on the dominant purpose for which the document was created (see further guidance below on considering the dominant purpose).
- If MSD is not a party – will generally not likely be privileged unless it is a communication with a solicitor, in which case there will generally be a proper basis to withhold under solicitor-client privilege.

*Documents created for (or in part for) court proceedings (e.g. social workers' file notes):*

1. Consider whether the document was compiled for the dominant purpose of preparing for a proceeding or an apprehended proceeding:
   - If the document was for a dual purpose (e.g. a file note which records enquiries made for a social work report that is to be filed in Court, but is also for general case recording purposes) then litigation privilege will *not* likely attach as it was not prepared for the dominant purpose of litigation.

2. In considering the dominant purpose test, relevant factors may include:
   - Is there an upcoming Court hearing or Court review? Where there is no scheduled or anticipated hearing, litigation privilege is less likely to attach.
   - Is there another record of the child's circumstances at the relevant time? If yes, this may suggest that the document was written for the dominant purpose of preparing for litigation.

- Did the Ministry have on-going social work responsibility for the child? If yes, it is more likely that the document would serve a dual purpose and litigation privilege wouldn't attach. If no, it is more likely the document was written solely for the purpose of preparing for Court and that privilege will attach.

3. Has the Ministry waived privilege already e.g. already shown the claimant the document?

*Handwritten notes:*

- If made by a solicitor and MSD is a party to the proceedings – will generally be a proper basis to withhold under litigation privilege and solicitor-client privilege.
- If made by a solicitor and MSD is not a party to the proceedings – will generally be a proper basis to withhold under solicitor-client privilege.
- If made by a social worker and MSD is a party to the proceedings – may be a basis to withhold under litigation privilege, but see section above 'documents created for (or in part for) court proceedings'.
- If made by a social worker and MSD is not a party to the proceedings – there could be a basis to withhold under solicitor-client privilege if the document was created for the purpose of seeking legal advice.

# Savings Provisions and Court Documents Quick Guide

9(2)(h) OIA

Access to some of the documents in claimants' files is regulated by other Acts which override the Privacy Act. These documents remain under the court's control. For this reason, Historic Claims does not have the ability to release them, and they must be withheld as Court Documents under s 24(1)(b) of the Privacy Act.

In order to determine whether a document needs to be withheld as a Court Document:

- First determine whether the document was submitted to or produced by a court.(If not, the document can be assessed in the usual way.)
- Then determine the **date of the hearing** to which the document relates.
- The categories below list the documents that must be redacted as Court Documents under s24(1)(b)of the Privacy Act.

Note: not all documents submitted to or produced by a court will be required to be withheld as court documents – they need to be reports/plans/review of plans produced under a provision of an Act that regulates access. The relevant section the report/plan/review of plan is made under will not always be listed on the document and may need to be ascertained from the context.

**Hearing from 1 July 2005 to present** (Care of Children Act 2004)

- Reports from chief executive or social worker on applications for guardianship or a parenting order (other than interim parenting order).
- Reports from other persons including cultural, medical and psychiatric reports in relation to application for guardianship or parenting order.

**Hearing from 1 November 1989 to present** (Oranga Tamariki Act 1989 aka Children, Young Persons and their Families Act 1989)

- Plans obtained when a court is considering making a services order, support order, custody order, or guardianship order in a care and protection context.
- A revised plan resulting from a review of any of the plans listed above.
- Medical, psychiatric, psychological, or hospital examination report obtained for care and protection OR youth justice proceedings.
- Social worker's report obtained before a custody, guardianship or special guardianship order is made (after declaration child is in need of care and protection).
- Social worker's report obtained before deciding on the response where a charge against a young person is proved in the youth court.
- Cultural and community reports obtained either in the care and protection OR youth justice contexts.

**Hearing from 1 April 1975 to 31 October 1989** (Children and Young Persons Act 1974)

- Social workers' reports in respect of alleged offence by a child or young person or complaint in relation to any child or young person.
- Social workers' reports within this time period citing or referring to the Children and Young Persons Amendment Act 1977 should also be withheld under savings provision.
- The Children and Young Persons Amendment Act 1977 is an act that amends the Children and Young Persons Act 1974 and is deemed part of it.

**Hearing between 1 January 1970 and 30 June 2005** (Guardianship Act 1968)

- Reports by a Superintendent of Child Welfare which concern guardianship and custody applications.

**Hearing before 1 April 1975** (Child Welfare Act 1925)

- Reports written by a child welfare officer can be assessed in the usual way.

Documents subject to a court order restricting access may also need to be withheld.

**Note:** there may be cases where legal advice is required, for example, where it is not clear a report, plan or review of plan is made under the relevant provision of one of the Acts. Another example where advice may be sought is where "supplementary" reports are included in files – these may need to be withheld as court documents.

**The importance of Information Privacy Principle 6**

IPP 6 is the principle that gives our claimants the right to access their information. The courts have held this to be a strong right and have been reluctant to grant exceptions (like the s29(1)(a) unwarranted disclosure exception) to this right. Consider the below extracts:

> **[47]** We agree with Ms Evans and Mr Hesketh that Principle 6 is the proper starting point for our analysis. It is a cornerstone of the scheme of privacy protection established by the Act. Its significance is reflected in a number of different ways (the list that follows is not intended to be exhaustive):
>
> [a] Effectively two parts of the Act (Parts 4 and 5) are given to setting up an effective procedural framework whereby the Principle 6 rights of access to personal information are given effect;
>
> [b] The Act provides a closed list of grounds for refusing information access requests: see s 30. If there is not a statutory basis for withholding personal information then the 'default' position is that access must be provided;
>
> [c] Principle 3 obliges agencies which collect personal information to take such steps as are reasonable in the circumstances to ensure that individuals concerned are aware of their rights of access to, and correction of, information held by the agency about them — see Principle 3(1)(g);
>
> [d] With respect to public sector agencies (which of course includes the Police), and unlike other Principles in the Act, the right of access to personal information under Principle 6(1) is a legal right and is directly enforceable in Court: see s 11(1) of the Act and Roth, *Privacy Law and Practice* at para 1011.4;
>
> [e] To the extent that reasons for withholding information constitute exceptions to Principle 6, s 87 of the Act makes it clear that the onus of establishing that the exception applies is on the agency seeking to rely upon it.

This comes from *Director of Human Rights Proceedings v Commissioner of Police* [2007] NZHRRT 3405. The court emphasises that the right to personal information is very strong. Note that the default position is to grant access to information, and that the onus is on us to justify the use of an exception.

> **[30]** The Privacy Commissioner submitted that the right of an individual to seek access to their personal information is "the most significant entitlement" under the Act.

Extract from *Taylor v Chief Executive of the Department of Corrections* [2020] NZHC 383, further emphasising the strength of the principle 6 right to information.

**The definition and scope of "personal information"**

The Privacy Commissioner has advocated that "personal information" should be construed widely for the purposes of the Privacy Act. This means we should be somewhat cautious when withholding information on the basis that it is not our claimant's information. Consider the excerpt below:

> **[30]** The Privacy Commissioner submitted that the right of an individual to seek access to their personal information is "the most significant entitlement" under the Act. He advocated a broad definition of personal information, submitting that would align with the text and purpose of the Act, which is a human rights statute. [23] The Commissioner also pointed to the Act being part of New Zealand's freedom of information legislation and open government regime and to the right in s 14 of the New Zealand Bill of Rights Act 1990 to "freedom of expression, including the freedom to seek, receive and impart information" as supporting a broader approach.
>
> **[31]** There were two broad strands to the Commissioner's approach to the definition of personal information. First, whether information is about an individual depends on whether it relates to that individual, in conveying something about them or their rights, obligations and interests, such that there is a sufficient connection in the circumstances between the individual and the information concerned. Whether there is a sufficient connection turns on the character of the information and the degree and amount of insight standing to be conveyed.
>
> **[32]** The second strand makes reference to the reasons why a requester might seek access to the information and the uses to which they might put it, both in ensuring compliance with the Act and in exercising other rights. The Privacy Commissioner explained that "Providing access to an individual to their personal information might explain why a particular action was taken in respect of the individual and acts as an essential precondition to the exercise of complaint rights under the other privacy principles, including the right to correction of personal information, the right to challenge the accuracy of the information, the ongoing retention of the information, the fairness or lawfulness of its collection, and to ensure its lawful use and disclosure within the agency that holds it (ie as a check on unauthorised disclosures amongst employees)." [24]

This again comes from *Taylor v Chief Executive of the Department of Corrections* [2020] NZHC 383. Paragraph [30] advocates for a broad construction of "personal information" and [31] gives a vague test for what should be considered personal information. Note in [32] that the Privacy Commissioner highlights the importance of providing an individual with information that gives context about why a particular action was taken with respect to them, which is often relevant to our files (and already reflected in our process, but nevertheless useful to keep in mind).

**Meaning of "unwarranted disclosure"**

Where the courts have considered the meaning of "unwarranted" they have been very vague, seeming to prioritise the flexible application of the s29(1)(a) exception over having definite rules. Consider the below excerpts:

> **[58]** In *Case No 15513* [1998] NZ PrivCmr 5 the Privacy Commissioner remarked as follows about the general approach to be taken with regard to s 29(1)(a):
>
> > This requires agencies to balance the privacy interests of the person seeking the information against the interests of other people involved. Considerations such as the nature of the information, the purpose for which it was supplied, the purpose for which it was requested and the extent of the requestor's prior knowledge of the information might be relevant.
>
> **[59]** The term "unwarranted" has been defined by the Ombudsman as "unjustified" or "without good and sufficient reason" in accordance with the *Shorter Oxford English Dictionary – Case Nos 194, 202, and 226* (1985) 6 CCNO 111, at p 115 (GR Laking); *Case No 737* (1987) 7 CCNO 59 (J Roberston). The use of the term "unwarranted" imports a weighing of countervailing interests in order to determine whether or not, in the particular circumstances, disclosure would be justified.

This comes from *DS, Re* [2012] NZFLR 799. The definition given is not very helpful but note the last sentence of [58] which says that the requestor's prior knowledge of the information will be relevant to whether a disclosure is unwarranted. Following on from our discussion at forum, this indicates that the claimant's knowledge *is* relevant to what we release.

> **[63]** Again, everything depends on the circumstances.

The above excerpt is from *Director of Human Rights Proceedings v Commissioner of Police* [2007] NZHRRT 3405 again, referring to the application of s 29(1)(a). Though this is a seemingly innocuous statement it has been cited by several of the later cases I read. The consensus among the courts seems to be that s 29(1)(a) should be applied discretionarily. Not super helpful, but perhaps reassuring that discretion is built into the law and that complete consistency is not required.

**Concluding thoughts**

My main insights from these cases were that the right to personal information is very strong, that "personal information" should be defined widely, and that what is an unwarranted disclosure must be decided on a case by case basis. Again, this is nothing super ground-breaking, but I found it useful to see what the courts thought the most important considerations were when deciding tricky issues. In general, I think the direction our approach is going (trending towards the release of more of the claimant's information where possible) is well supported by the case law.