

GUIDANCE: PRIVACY

This guidance is intended to elaborate on the guidelines set out in the privacy standard. It is not exhaustive and may require elaboration or refinement when applied to a complaint. The specific facts of each complaint are especially important when considering whether an individual's privacy has been breached. The BSA will also have regard to developments relating to privacy law in New Zealand and in other jurisdictions.

This guidance has been numbered for ease of reference.

1. Who can complain?

- 1.1 Privacy complaints may be brought only in relation to individuals who are identifiable in a broadcast. The Authority is able to accept privacy complaints from people other than the individual whose privacy is alleged to have been breached. However, it retains the discretion to decline to determine any complaint if this is warranted in all the circumstances.
- 1.2 Privacy complaints may only relate to living natural people (Privacy Act 1993).

2. Identification required

- 2.1 Privacy will only be breached where the individual whose privacy is at issue is identifiable in the broadcast. Individuals must be identifiable beyond family and close friends who would reasonably be expected to know about the matter dealt with in the broadcast (see BSA decision *Moore and TVWorks Ltd*, 2009-036).
- 2.2 Broadcasters that take steps to mask a person's identity to avoid a privacy breach must take care that the masking is effective. In some cases, where there is a unique combination of identifying features within the broadcast, merely masking the person's face will sometimes be inadequate (for example, see BSA decision *DS and Television New Zealand Ltd*, 2011-144).
- 2.3 In some circumstances, a combination of information inside the broadcast and other readily available material or information from outside the broadcast may enable identification.

3. Reasonable expectations of privacy

- 3.1 A person will usually not have a reasonable expectation of privacy in relation to matters of public record, such as matters that occur in open court or matters that have recently been given widespread media coverage. In some circumstances, there may be a reasonable expectation of privacy in relation to information even though it is in the public domain.
- 3.2 In general, a person will not have a reasonable expectation of privacy in a public place. Public places are places that are generally accessible to, and/or in view of, the public.
- 3.3 In exceptional circumstances a person may still have a reasonable expectation of privacy in a public place. This could include situations where it is obvious from the circumstances that the individual is particularly vulnerable, for example:
 - people who are caught up in emergencies
 - victims of accidents
 - those suffering a personal tragedy
 - those with learning difficulties
 - those with mental health issues
 - the bereaved
 - people with brain damage or forms of dementia
 - people who have been traumatised or who are sick or terminally ill.

4. Public figures

- 4.1 Public figures, particularly those exercising public power, and others who seek publicity, generally have lower reasonable expectations of privacy in relation to matters pertaining to their public roles.

5. Children's privacy

- 5.1 For the purposes of the privacy standard, a child is under the age of 16.
- 5.2 Children, including children of public figures, generally have high reasonable expectations of privacy.
- 5.3 A parent or guardian, or other person aged 18 or over in loco parentis (standing in the shoes of the parent or guardian), can consent on behalf of a child under the age of 16 years to the broadcast of private matters, but the broadcaster must be satisfied that the broadcast is not contrary to the best interests of the child.

6. Highly offensive intrusions and disclosures

- 6.1 The means by which private material is gathered affects the offensiveness of the intrusion or disclosure. For example, it may be highly offensive to broadcast private material gathered by surreptitious, deceptive or dishonest means.
- 6.2 Disclosure of private facts is likely to be highly offensive where:
- it is done for the purpose of encouraging harassment
 - the material is particularly embarrassing, sensitive or traumatic, or has the potential to impact negatively on reputation
 - the person is particularly vulnerable
 - the broadcast is exploitative or gratuitous
 - the person concerned has made efforts to protect his or her privacy, or has not consented to the broadcast.

7. Informed consent

- 7.1 Informed consent is provided where a person identifiable in a broadcast:
- is aware he or she is contributing to the broadcast
 - understands the true context and purpose of the contribution
 - understands the nature of the consent and its duration
 - freely agrees to contribute.
- 7.2 The level of consent required may vary depending on the type of programme and the particular circumstances in each case.
- 7.3 Where there is reason to doubt the person's capacity to understand the consequences of his or her contribution (for example, when the person is mentally impaired or intoxicated), the broadcaster must take particular care to ensure that the person is capable of providing informed consent and understanding the potential ramifications of participating in the broadcast.
- 7.4 Only the person whose privacy is in issue, or in the case of a child, their parent, guardian or person over 18 acting in loco parentis (standing in the shoes of the parent or guardian), can give consent.
- 7.5 In general, consent must be written, recorded, or obvious from the circumstances. What is 'obvious from the circumstances' will be a matter for interpretation and depend on the specific facts of the case.
- 7.6 The greater the invasiveness of the broadcast, the more care the broadcaster must take to ensure informed consent is obtained.

8. Legitimate public interest

- 8.1 A matter of legitimate public interest is a matter of concern to, or having the potential to affect, a significant section of the New Zealand population. It is more than something that merely interests the public.
- 8.2 Matters of legitimate public interest may include matters such as:
- 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 antisocial and harmful conduct
- (see BSA decision *Balfour and Television New Zealand Ltd*, 2005-129).
- 8.3 The degree of public interest in the material broadcast must be proportionate to the gravity of the breach of privacy, in order for the broadcaster to rely on public interest as a defence to the breach (see BSA decision *MA and Television New Zealand Ltd*, 2010-084).
- 8.4 The public interest must relate to the disclosure of the particular information or recording that is alleged to breach privacy (see BSA decision *Russek and Television New Zealand Ltd*, 2007-016). However, the public interest in the programme or series as a whole will also always be considered.

9. Intrusion upon solitude or seclusion

- 9.1 Solitude is the state of being alone. Seclusion is a state of screening or shutting off from outside access or public view. A person does not need to be alone to have an interest in seclusion (see High Court judgment *CanWest TVWorks Ltd v XY*, HC Auckland CIV-2006-485-2633).
- 9.2 A person will usually have an interest in seclusion when at home. They may also have an interest in seclusion in their home or on their property even when they are not there.
- 9.3 Hidden cameras will usually be regarded as intrusive but each case depends on its particular circumstances. The purpose of covert filming will be relevant; a purpose which is strongly in the public interest may justify the use of a hidden camera.