

PRIVACY PRINCIPLE 1: THE PUBLIC DISCLOSURE OF PRIVATE FACTS: JUNE 2011

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. Each of the main broadcasting codes (Free-to-Air Television, Pay Television and Radio) contains a privacy standard, which operates in conjunction with the BSA's eight privacy principles.¹ The purpose of this Practice Note is to provide guidance to complainants and broadcasters about the usual way privacy principle 1 is interpreted by the BSA. Privacy principle 1 states:

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.

Comment

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 in the broadcast of the individual whose privacy has allegedly been breached, the disclosure of private facts about that individual, and that disclosure being considered highly offensive by an objective reasonable person.

BSA Decisions

The following summaries explain the BSA's approach in its decisions on privacy principle 1, with regard to the three criteria, released between 2004 and 2011.²

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,³ or conversely, if the person was not named and there were few identifying features,⁴ 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".⁵ 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

¹ The Codes and the privacy principles can be viewed on the BSA's website, www.bsa.govt.nz

² Cited by name and decision number. All decisions are available on the BSA's website, www.bsa.govt.nz

³ For example, *Smyth and TVNZ* (2010-059), *Ross and TVNZ* (2010-060), *Johnsson and TVWorks* (2010-013), *Galbraith and TVNZ* (2009-114), *LK and TVNZ* (2009-090)

⁴ For example, *Nyhane and TVWorks* (2010-006), *de Villiers and RadioWorks* (2010-004)

⁵ See *MA and TVNZ* (2010-084), *Hastings District Council and TVWorks* (2009-088), *Moore and TVWorks* (2009-036), *Pacifica Shipping and CanWest* (2005-026), *BA and TVNZ* (2004-070)

friends.⁶ 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; *MA and TVNZ*, 2010-084), or their place of work (*Broughton and RadioWorks*, 2009-144).

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)
- An individual's personal email address (*Marshall and RadioWorks*, 2010-146).

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 (*MA and TVNZ*, 2010-084; *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; *Ross and TVNZ*, 2010-060)
- 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)
- Involvement in Air Force helicopter crash on ANZAC Day (*Smyth and TVNZ*, 2010-059)
- Attendance at a karakia for students who had self-harmed (*Cox and TVNZ*, 2010-161)
- Allegations and resulting investigation of embezzlement (*Manahi and TVNZ*, 2010-028).

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

⁶ See, for example, *Anon and TVNZ* (2004-106)

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.⁷

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 the 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).

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)
- Disclosure of school pupils’ and teachers’ attendance at a karakia for students who had self-harmed (*Cox and TVNZ*, 2010-161)
- Disclosure of a listener’s email address by a radio talkback host (*Marshall and RadioWorks*, 2010-146).

For further discussion of privacy as a broadcasting standard, see the BSA’s Practice Note, *Privacy as a Broadcasting Standard* (June 2010), and 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.

⁷ E.g. *Andrews v TVNZ CIV 2004-404-3536*