

5 December 2011

Mr P Goulter  
National Secretary  
NZEI Te Riu Roa  
178 Willis Street  
Te Aro  
WELLINGTON 6011

Dear Mr Goulter,

### **Applying National Administration Guideline 2A: Privacy Issues**

You have asked for some guidance for School Boards of Trustees ('Boards') in the application of National Administration Guideline 2A.

As you know, NAG2A obliges Boards to include information in their annual reports about the numbers of students in schools who are at, above, below or well below the National Educational Standards. There is an explicit obligation to report this kind of information by Maori, Pasifika and gender groupings. NAG2A(c) makes it clear, however, that this must be done only where the reporting does not breach an individual's privacy.

It is to be inferred from the way NAG2A is worded that the individual privacy rights which are protected at least include the rights established by the Privacy Act 1993. The difficult practical question that Boards may have to deal with, therefore, is as to whether and in what circumstances information that would otherwise have to be reported under NAG2A ought in fact not to be reported.

The Privacy Act 1993 sets up twelve principles that apply to the collection, storage, use and disclosure of information about identifiable individuals. Of particular relevance here, Information Privacy Principle 11 provides:

*"An agency that holds personal information shall not disclose the information to a person or body unless the agency believes, on reasonable grounds- ...*

*(h) that the information*

- (i) is to be used in a form in which the individual concerned is not identified*
- (ii) is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned."*

There is no doubt that Boards are ‘agencies’ to which these privacy principles apply. It follows that when information is disclosed by inclusion in an annual report (or indeed in any other way) a Board will be in breach of IPP 11 unless it believes, on reasonable grounds, that the information being disclosed is not in a form that could reasonably be expected to identify individuals. If there is a breach of the principle and any individual whose information is disclosed suffers any loss or harm (including humiliation, loss of dignity or injury to feelings) as a result, then the Board may be liable to pay compensation to the person or persons in question. This is true even if the disclosure of personal information was not intentional.

Obviously to report (say) that the subset of boys in a given group has achieved such and such an educational outcome will effectively identify an individual’s result if there is in fact only one boy in the group. Nor is it difficult to imagine situations in which the outcome would be the same, even if there were more than one boy in the group. Of course, as the number of boys in the group being considered increases relative to the total number in the group, so the risk that personal information about any individual boy might be disclosed reduces. But even in the case of larger groups, if all the students in the group happened to have the same outcome then to report that result would effectively be to report the individual outcomes for each student in the group.

Everything will depend on the particular context, but in my view there are dangers if one approaches the problem on the basis that there is any sort of minimum ‘safe’ threshold for reporting of small numbers, beyond which Boards need not be concerned.

In the end, I suggest that before a report is submitted a Board should look at the data that is proposed to be provided and ask itself: in the circumstances of these sets of students and this information, do we have reasonable grounds to believe that providing this information will not disclose information about any individual student(s)?

If the data does not raise any reasonable concern about that possibility, then it must be included in the Board’s annual report under NAG2A.

On the other hand, if there are reasonable grounds for concern that individual student(s) might be able to be identified from the data, then the effect of both the Privacy Act and NAG2A(c) is that the information should **not** be included. In this respect I agree with the Ministry of Education guidance<sup>1</sup> which encourages Boards to err on the side of caution. Furthermore, in case of doubt, I would recommend that Boards look for appropriate advice to deal with the particular circumstances in issue.

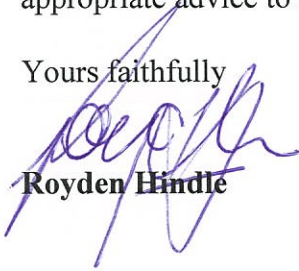
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<sup>1</sup> <http://assessment.tki.org.nz/Overall-teacher-judgment/Responses-to-National-Standards-queries-from-schools>. That said, I note that the MoE approach is that where this is an issue Boards should report to the effect that information (say) in respect of Maori or Pasifika has not been included for a set of students because to do so ‘would’ result in a breach of individual privacy. In my view the test is not whether there ‘would’ be a breach of privacy. The test is whether the Board has reasonable grounds to believe that reporting the information might identify individuals.

You have asked me to consider the possible application of the Official Information Act 1982 as well. However as long as the data that has been disclosed by Boards to the MoE under NAG2A complies with the requirement to protect individual privacy, then it is difficult to see how subsequent access by third parties to that data in the MoE's hands could give rise to issues about protecting individual privacy in respect of that data. In any event, at that point it would be an issue for the MoE to deal with, rather than the Boards who have supplied the information.

If a Board were to receive a request under the Official Information Act direct from a third party, then that is not really a question about complying with NAG2A and so is outside the scope of my brief in this matter. No doubt a Board in that situation would be looking to take appropriate advice to meet the particular circumstances.

Yours faithfully



**Royden Hindle**