

Refugee Status Branch: Confidentiality Guidelines

The purpose of these Guidelines is to assist refugee and protection officers in ensuring information provided by claimants, refugees and protected persons is treated confidentially. They also set out the grounds and procedures for disclosing such information or obtaining additional information in the course of an inquiry into a person's refugee claim or refugee or protected person status.

The Guidelines also inform a person whose refugee claim or refugee or protected person status is being considered, representatives of such persons and interested groups as to how the Refugee Status Branch will manage a person's confidential information. They outline the sources of information typically considered in the determination process; the principles of a shared inquiry and the benefit of the doubt; and the person's rights and obligations with respect to the process of obtaining information relevant to their claim or status.

The Guidelines do not apply to biometric checks conducted with New Zealand's partner countries (Australia, Canada, United Kingdom and United States), which process has a separate privacy regime.¹

These Guidelines were developed in 2017 in consultation with the UNHCR, New Zealand government agencies, refugee lawyers, refugee and asylum advocacy and support groups and other stakeholders.

1. PRINCIPLES

The fact that a person is a claimant, a refugee or a protected person and information they provide about their claim is confidential. The physical safety and protection of claimants, refugees and protected persons, as well as that of their families or associates, is a paramount consideration.

There are exceptions to confidentiality, and disclosure of refugee information is permitted in certain circumstances, for example, to determine the claim or maintain the law.

The objective of the confidentiality obligation is to give effect to the requirement in the Refugee Convention that refugees are afforded protection by contracting states.²

¹ Bulk data sharing of claimant and refugee information under the biometric programme is nevertheless consistent with the confidentiality provisions of the Act. See <https://www.immigration.govt.nz/documents/about-us/privacyimpactassessment.pdf>.

² *K v Attorney-General* [2016] NZCA 416, [2017] 2 NZLR 167 at [50].

2. DEFINITIONS

Act refers to the Immigration Act 2009.

Claim refers to a claim for refugee and protected person status under the Act.

Claimant refers to a person who is making a claim.

Claimant information refers to the details of the claim.

INZ refers to Immigration New Zealand.

Manager refers to an Immigration Manager at RSB.

Matter refers to proceedings and decisions on a person's refugee or protected person status such as cancellation, cessation or deportation.

RSB refers to the Refugee Status Branch.

RPO refers to a refugee and protection officer.

TA refers to a technical advisor at RSB.

UNHCR refers to the United Nations High Commissioner for Refugees.

3. THE IMMIGRATION ACT 2009 AND OTHER LAWS

The legislative provisions regulating confidentiality of refugee claims are sections 151 and 152 of the Act. In addition, sections 354 and 355 make it an offence to breach sections 151 and 152.

Section 151 Confidentiality to be maintained in respect of claimants, refugees, and protected persons

- (1) Confidentiality as to the fact that a person is a claimant, a refugee, or a protected person, and as to the particulars relating to the person's claim or status, must at all times during and subsequent to the determination of the claim or other matter be maintained by all persons and, in a particular case, may require confidentiality to be maintained as to the very fact or existence of a claim or case, if disclosure of its fact or existence would—
 - (a) tend to identify the person concerned; or
 - (b) be likely to endanger the safety of any person.
- (2) Despite subsection (1), the fact of a claim or particulars relating to a claim may be disclosed—
 - (a) for the purposes of determining the claim or matter, administering this Act, or determining any obligations, requirements, or entitlements of the claimant or other person concerned under any other enactment; or
 - (b) for the purposes of the maintenance of the law, including for the prevention, investigation, and detection of offences in New Zealand or elsewhere; or

[...]

(e) if, in the circumstances of the particular case, there is no serious possibility that the safety of the claimant or any other person would be endangered by the disclosure of the information.

Section 152

Section 152(2) of the Act provides that if information is disclosed, the RPO must:

- (a) Inform the other officer or employee of the requirements of confidentiality in section 151; and
- (b) require that officer or employee not to disclose information of the kind described in section 151(1) to any other agency, body, or person, except as provided for in that section.

Section 354 makes it an offence to, without reasonable excuse, contravene section 151(1) or publish information released in contravention of section 151(1). Section 355 provides that the penalty for doing so is imprisonment for a term not exceeding three months, a fine not exceeding \$10,000, or both.

Case law

New Zealand courts have provided guidance as to how the legislative provisions on confidentiality should be interpreted and applied.

The right to confidentiality should be modified only to the extent strictly necessary to give effect to the limited disclosure permitted by the Act.³ In deciding whether to disclose information under section 151(2), regard must be had to both:

- (a) the purpose that disclosure will serve in the particular case; and
- (b) any risk that disclosure will identify the claimant or be likely to endanger the safety of any person.⁴

The RSB is entitled to investigate the truthfulness of statements that it has been asked to take into account in making a decision on a refugee and protection claim or matter to the extent it considers this is necessary or possible.⁵

Section 151(2) permits the verification of claimant and refugee information, without which claims may otherwise fail.⁶

If information is disclosed, the RPO should consider reasonable measures that reduce the risk that disclosure will identify the person or place the safety of anyone at risk.⁷

³ *Attorney-General v X* [2008] NZSC 48, [2008] 2 NZLR 579 at [18].

⁴ *K v Attorney-General* [2016] NZCA 416 at [50].

⁵ *K v Attorney-General* [2015] NZHC 2380 (30 September 2015) at [102].

⁶ *K v Attorney-General* [2016] NZCA 416 (21 September 2016) at [64].

⁷ *K v Attorney-General* [2016] NZCA 416 at [51].

Application of Privacy Principles

While personal information about claimants, refugees and protected persons is collected, used and held in accordance with relevant provisions of the Act, the privacy principles in the Privacy Act 1993 will operate to the extent that these matters are not covered by the Act.

4. SHARED INQUIRY AND THE BENEFIT OF THE DOUBT

The claimant is responsible for establishing their claim.⁸ The requirement for independent evidence is not strictly applied in view of the difficulty of obtaining proof inherent in the refugee context. It is a shared inquiry and it is incumbent on the RPO and the claimant to use the means at their disposal to produce the necessary evidence in relation to the claim or matter. If the claimant has made a genuine effort to substantiate their claim, all available evidence has been obtained and checked and the decision maker is satisfied as to the claimant's general credibility, the claimant should, unless there are good reasons to the contrary, be given the benefit of the doubt.⁹

5. SOURCES OF INFORMATION

The claimant's responsibility to establish their claim includes providing supporting evidence where this is reasonably available.

The RPO can seek information from any source.¹⁰ Common sources of information about a claim or a person's refugee or protected person status include, but are not limited to:

- Information provided by the claimant or refugee or protected person;
- Country information and publicly available information;
- Information on INZ files;
- Information from other New Zealand government agencies and public authorities;¹¹
- Information from partner countries in the biometric-matching arrangement; and
- Information about the person's travel that is provided to INZ through agreements with airlines.

RPOs may seek **additional information** about a claim or matter beyond what is available through the above sources.

Additional information requests are not made to the agent of persecution, or in circumstances where the agent of persecution may learn of the claim or its details. There may be exceptions to this where maintenance of the law issues arise. The nature of any such request depends on

⁸ Sections 135, 136(4), 148(b) and 149(1)(h) of the Act.

⁹ UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (December 2011) at "Establishing the Facts", <http://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>.

¹⁰ Section 149(1)(g) of the Act.

¹¹ Sections 136(2) and 149(1)(g) of the Act.

the circumstances of the case. Inquiries outside of New Zealand are usually made through a third party, not directly by the RPO or the RSB.

Attached to these guidelines is an “RSB - Additional Information Risk Assessment Form” that the RPO will complete if they intend to make an inquiry about a claimant or refugee or protected person outside New Zealand to a third party (excluding offshore New Zealand government agencies, UNHCR and the biometric-matching partner countries).

6. KNOWLEDGE AND CONSENT

The RPO will ordinarily discuss a proposed inquiry or request for additional information with the claimant, refugee or protected person in advance. This provides an opportunity to comment regarding any concerns the person may have about the inquiry.

In rare circumstances, the RSB may determine not to discuss an intended inquiry in advance. This may happen where the inquiry concerns criminality or maintenance of the law, or where there is no likelihood of endangering the safety of any person, and discussing the inquiry in advance may jeopardise the integrity of the request.

The final decision whether to make an inquiry or seek additional information is for the RPO, in consultation with a TA or manager.

7. PRIVACY WAIVER

The RPO may ask a person who is a claimant or refugee or protected person to authorise release of personal information that is held by another person or organisation. For example, the UNHCR or hospitals require authorisation before releasing personal information.

Typically, the RPO will provide a Privacy Waiver for the person to sign. The privacy waiver (in general) states that the person authorises the person or organisation holding their personal information to provide it to “Immigration New Zealand”. Typically, requests to non-New-Zealand government organisations will not name the RSB or the RPO as the requestor, and no information about the person’s status as a claimant or refugee or protected person or details of the claim are disclosed.

Should the person refuse to sign a Privacy Waiver when this is required for the release of the information, and the request is reasonable and safe, a negative inference may be drawn.

8. INQUIRIES FROM THIRD PARTIES

The RSB and an RPO will not provide any information about a claim, a claimant, or a refugee or protected person to anyone who contacts them unless they are an authorised contact person for that claim/claimant/refugee or protected person or they are able to receive the information under section 151(2) (see Appendix).

The RSB or RPO may receive information from a third party about a claimant or refugee or protected person where there is no requirement to disclose the person's status or details of the claim or matter.

9. RESULTS

Should information be received that the RPO intends to take into account when making a decision, the RPO will ordinarily provide a copy of it to the person concerned to allow them the opportunity to comment.

If there is a likelihood that providing the information to the person might endanger the safety of any individual, prejudice maintenance of the law or raise any other reason for withholding under the law, the RPO, in conjunction with a manager or TA, will review the information and decide whether it should be provided to the person and if so, in what form.

10. DISCLOSING OTHERS' INFORMATION

In certain cases, particulars relating to another person's refugee and protection claim may be relevant to the claim or matter to be determined. This occurs most commonly where a family member has previously made or is making a claim to refugee and protected person status.

Typically, claimants who are part of a family group are asked to sign privacy waivers allowing their information to be shared with other family members.

Even if no privacy waiver is provided, an RPO may disclose information provided in support of another person's refugee and protection claim or matter in accordance with the statutory exceptions to confidentiality found in section 151(2).

APPENDIX 1 – IMMIGRATION ACT 2009

Section 151 of the Act sets the parameters for the disclosure of claimant information.

151 Confidentiality to be maintained in respect of claimants, refugees, and protected persons

- (1) Confidentiality as to the fact that a person is a claimant, a refugee, or a protected person, and as to the particulars relating to the person's claim or status, must at all times during and subsequent to the determination of the claim or other matter be maintained by all persons and, in a particular case, may require confidentiality to be maintained as to the very fact or existence of a claim or case, if disclosure of its fact or existence would—
 - (a) tend to identify the person concerned; or
 - (b) be likely to endanger the safety of any person.
- (2) Despite subsection (1), the fact of a claim or particulars relating to a claim may be disclosed—
 - (a) for the purposes of determining the claim or matter, administering this Act, or determining any obligations, requirements, or entitlements of the claimant or other person concerned under any other enactment; or
 - (b) for the purposes of the maintenance of the law, including for the prevention, investigation, and detection of offences in New Zealand or elsewhere; or
 - (c) to the United Nations High Commissioner for Refugees (or a representative of the High Commissioner); or
 - (d) if the particulars relating to a claim are published in a manner that is unlikely to allow identification of the person concerned (whether in a published decision of the Tribunal under clause 19 of Schedule 2 or otherwise); or
 - (e) if, in the circumstances of the particular case, there is no serious possibility that the safety of the claimant or any other person would be endangered by the disclosure of the information.
- (3) In determining whether information may be released under subsection (2)(e), the person considering whether to disclose the information may have regard to the protections that the person, agency, or body to whom the information is disclosed may apply to the information, including—
 - (a) any applicable requirements of the Privacy Act 1993; and
 - (b) any orders of the Tribunal or other court; and
 - (c) any protection mechanisms that the person, agency, or body itself must or may apply.
- (4) If, in relation to a claim or particulars relating to a claim, the test in subsection (2)(e) is satisfied (the person concerned having considered the matters in subsection (3)),—
 - (a) the chief executive may publish the decision of a refugee and protection officer relating to the claim if the chief executive determines that, in the circumstances of the particular case, it is in the public interest to do so;
 - (b) the Attorney-General may, subject to any orders of the Tribunal, publish the decision of the Tribunal relating to the claim if the Attorney-General determines that, in the circumstances of the particular case, it is in the public interest to do so.
- (5) To avoid doubt,—
 - (a) a refugee and protection officer may disclose information under subsection (2)(a) when carrying out his or her functions under section 136(2) or 149(1)(c) or (g):

- (b) the chief executive may disclose information under subsection (2)(a) when collecting information on behalf of the Tribunal under section 229:
 - (c) the Tribunal may disclose information under subsection (2)(a) when carrying out its functions under section 228 or clause 10(1)(b) and (c) of Schedule 2:
 - (d) for the purposes of determining a claim, or cancelling the recognition of, or ceasing to recognise, a person as a refugee or a protected person, information may be disclosed under subsection (2)(a).
- (6) Nothing in this section prevents the disclosure of the fact that a person is a claimant, a refugee, or a protected person, or disclosure of particulars in relation to a claimant, a refugee, or a protected person, to the extent that the person concerned—
- (a) has expressly waived his or her right to confidentiality under this section; or
 - (b) by his or her words or actions, impliedly waived his or her right to confidentiality under this section.

Section 152 of the Act sets the parameters for the disclosure of claimant information among New Zealand government agencies.

152 Disclosure of information about claimant, refugee, or protected person by government agencies

- (1) An officer or employee of any government agency may, for the purpose of assisting a refugee and protection officer or the Tribunal to determine a claim or investigate a matter involving a claimant or a refugee or a protected person in New Zealand, disclose information about that claimant, refugee, or person to the refugee and protection officer or the Tribunal.
- (2) When requesting the assistance, the refugee and protection officer or the Tribunal must—
 - (a) inform the other officer or employee of the requirements of confidentiality in section 151; and
 - (b) require that officer or employee not to disclose information of the kind described in section 151(1) to any other agency, body, or person, except as provided for in that section.
- (3) To avoid doubt, a refugee and protection officer or the Tribunal does not breach section 151 when requesting the assistance of a person under subsection (1).

**APPENDIX 2 – RSB - ADDITIONAL INFORMATION RISK ASSESSMENT
FORM**



RSB - Additional Information Risk Assessment Form

Claimant's name: _____

CN: _____ AN: _____

What information is being sought and why?	
Is the claimant's identity being disclosed? Are details of the claim being disclosed?	Y / N Y / N
If Yes to either – why?	
Country of alleged persecution	
Agent(s) of persecution	
Country where information sought	
Source of the information sought	
Method of investigation (who will do the investigation & how?)	
Is there a cost involved?	Y / N
Has the proposed investigation been discussed with the claimant or their representative?	Y/N
Claimant's views on the proposed inquiry	
Privacy waiver obtained	Y / N
Possible risks and mitigation (Is the inquiry likely to endanger the claimant or anyone else?)	

RPO:

TA/Manager :

Proceed Y/N

Date

