

**A Privacy Commissioner
Case Study: Introduction
of a DNA Databank to
New Zealand**

Paper prepared for
the Advanced Surveillance
Technologies II conference,
Ottawa, September 1996



Privacy Commissioner
Te Mana Matapono Matatapu
Auckland, New Zealand

Advanced Surveillance Technologies II

A PRIVACY COMMISSIONER CASE STUDY: INTRODUCTION OF A DNA DATABANK TO NEW ZEALAND

B H Slane
Privacy Commissioner of New Zealand¹

Introduction

Today's conference focuses on cutting edge technological surveillance techniques. The sessions are being addressed mainly by privacy advocates and experts in the technological side of surveillance techniques. Particular emphasis is placed on understanding the effect on individuals and societies. In my remarks I wish to offer a slightly different perspective - that of a Privacy Commissioner. Not all of you will be familiar with the role of Privacy Commissioners, although you probably will be by the end of the week. We have an independent status which is not exactly inside the government "tent" but nor are we exactly outside it either. We perhaps stand under the awning looking in both directions (I prefer this analogy to "sitting on the fence" or to any other allusions to the advantages of carrying out my particular act from within or outside the tent!).

Accordingly, I will present my remarks concerning the introduction of a particular form of a surveillance technology into New Zealand with an emphasis on the role of a Privacy Commissioner. Commissioners perform an important function in preventing or slowing the drift towards surveillance societies. Certainly we cannot stop the drift by ourselves. However, with an informed public, active privacy advocacy groups and privacy enhancing technologies, it may well be that the drift can be slowed, arrested or contained.

Use of DNA profiling in criminal investigations

DNA profiling, although with us for several years, would still be classified as an "advanced" surveillance technology. Like all Western countries DNA testing has infiltrated New Zealand society. There was no "big bang" introduction of the technology to New Zealand. Indeed, in a democracy such as ours, particularly one committed to free trade and deregulation, there would never be any question of preventing such a technology being introduced to the country. Its impact has been felt in the criminal law, intellectual property law, medical treatment and cases involving determination of parentage.

Accordingly, by the time that I considered the subject of this case study, DNA technology had already been used in a variety of circumstances. The law was already grappling with some of the controls on the technology in an ad hoc kind of way. For example, the Courts were already grappling with the evidential value of DNA evidence. Now the Privacy Act provides in New Zealand a framework to deal with collection, storage, access, use and disclosure of genetic information about an identifiable individual.

¹ Notes for an address to the Privacy International Advanced Surveillance Technologies II conference, Ottawa, 16 September 1996.

Taking of samples from suspects in criminal investigations

In the early 1980s the police discovered that DNA analysis could be useful in criminal investigations. However, they would sometimes find that key suspects would not cooperate by providing a sample for testing! Non-cooperation in criminal investigations is, of course, nothing new.

The law responds to non-cooperation in a variety of ways. Sometimes it allows non-cooperation through the "right to remain silent". Sometimes it requires cooperation. To use the example of fingerprinting, a surveillance technology "advanced" in its time and still a mainstay of criminal investigation, the law responded by authorising fingerprints to be taken by force from suspects following arrest.

One starting point for examination of the issue in New Zealand was 1988 when an opposition Member of Parliament introduced a bill to allow body samples to be taken for analysis in criminal investigations.² Following a change of government in 1990 work was commenced on drafting new government-sanctioned legislation. This was work carried out "behind the scenes". In an ideal world I would have been consulted then but it happened, on this occasion, that work got to an advanced stage before I was brought "into the loop". This is a continuing problem for independent Privacy Commissioners. There is no automatic consultation as occurs with the departments of Justice, Courts or Corrections. On this particular occasion it may have had something to do with the timing - the initial work having been commenced before my own legislation, enacted in 1993, was in force and my office fully staffed.

Since then the New Zealand Cabinet Office Manual was changed to require departments to signify to Cabinet before introducing a bill into Parliament that a proposal complied with the information privacy principles contained in the Privacy Act 1993. If a proposal did not comply it was expected that the reasons would be explained and that consultation would have been held with my office. Although governments are, of course, quite free to override privacy in the cause of another public interest (and this happens from time to time), they do not wish to be in the position of not having expressly considered the issue or have the Privacy Commissioner publicly criticise an initiative for lack of consultation or consideration.

DNA databank

Officials did consult me when they started considering establishing a databank of DNA profiles. At this point, it was obvious that information privacy issues were central to the proposal. The questions of how securely the information would be held, who would have access to it, when it could be used, are central information privacy issues.

On this occasion, I saw my role as primarily trying to raise and resolve information privacy issues which otherwise might not have been considered. Other traditional human rights or civil rights issues were already being addressed, such as the right not to incriminate oneself (an

² Criminal Investigations Bill 1988. The issue of the taking of human biological samples for forensic analysis had been examined earlier, pre-DNA analysis technology, by a law reform committee.

issue which does come up with DNA evidence).³ However, many of the information privacy issues are relatively new in the consideration of criminal legislation such as this. I was involved in talking through issues with officials, later with Members of Parliament, and later still, entering into public debate, on such issues as:

- the destruction of blood samples (i.e. whether simply a profile should be retained or the sample as well);
- the ability for people to “voluntarily” add their samples to the police databank (something which has never been allowed in relation to fingerprints);
- whether the law should allow for force to be used in the taking of the sample (or whether ultimately defiance of an order by a High Court to provide a sample should be met only with a penalty);
- the written and oral explanations that suspects are given when asked to voluntarily provide a sample for the purposes of elimination or for adding to the databank.

Outcome of my involvement in this issue

Ultimately, a law was enacted which came into force last month. It provided for the voluntary and compulsory taking of samples of suspects for DNA analysis in investigations of serious crime. It also established a databank of DNA profiles of persons convicted of certain listed offences. The offences in question (mainly serious sexual offences but including burglary) were those for which it was expected that the person might re-offend. If he or she did re-offend, a sample left at the scene of a crime, could be analysed.

My involvement did not prevent the enactment of such legislation and indeed I never sought to oppose the bill. As a Privacy Commissioner I am required to take account of the interests which compete with the privacy and, on this occasion, I supported the basic purpose of the legislation. I could see no grounds to oppose the legislation in principle and it would have been futile in a practical sense to have tried. Indeed, having the legislation in place is, I am convinced, a better privacy outcome than not to have the legislation. For example, if there was no legislation that would not have stopped the police from seeking to obtain DNA samples from suspects - they were already doing it and would undoubtedly continue to do so. However, they were doing it by cooperation and that can only take an investigation to a certain point. Also, a completely unregulated environment would not contain the safeguards built into the bill whereby the High Court oversaw the process and could order an individual to provide a sample in some circumstances.

In relation to the databank, the position is much the same. The absence of the legislation would not have prevented the police from creating a databank from crime scenes and from samples provided voluntarily for the purposes of elimination, but it would not have been subject to the regulation that the bill provided.

Publicity about my position centred on the question of taking samples by force rather than the more important issue of the privacy risks in a large databank of blood samples⁴ and profiles.

³ Departments are required to do a kind of audit on proposed legislation in relation to the requirements of the New Zealand Bill of Rights Act 1990.

⁴ Blood may be retained for 5 years.

Final Thoughts

I have remaining concerns about the legislation and do not, for instance, believe that a case is made out for people to voluntarily add samples to the databank. That in my mind leaves the situation very unsatisfactory for privacy and is open to misinterpretation by individuals as to what their agreement means. It leaves open the possibility of the by police obtaining agreement at a time when many "volunteers" may feel vulnerable to adverse interpretations of a refusal - having "something to hide".

However, a Privacy Commissioner has a long institutional memory. The matter can continue to be revisited at appropriate opportunities. I have, for instance, a complaints jurisdiction, an ability to make a public comment at any time. I report on the operation of legislation affecting privacy in my annual report, and at some stage the relevant legislation will need to be amended and the Privacy Commissioner will in all likelihood be consulted.

Work on this bill raised some interesting scientific changes in position.

- Initially I was informed that the techniques of analysis were very advanced and reliable. Later I was told there would be great advantages in storing samples for 10 years as better techniques and reliability were being developed.
- At first I was informed that venous blood was essential, later that a thumbprick sample (to be taken in this way when force was used) was adequate.
- Initially I was told hair and mouth samples would be unsatisfactory, blood was the only reliable sample. Later, after my report, the Parliamentary select committee was advised to allow the substitution of mouth and hair samples in some circumstances.⁵

Finally, I would also recommend that you bear in mind the cumulative undermining of privacy through surveillance technologies in today's society is not all through the introduction of "advanced surveillance technology". Sometimes it is the extension of well known and long established technologies into more of our activities. One would hardly call the tape-recorder an "advanced" surveillance technology but voice monitoring and covert and overt recording is moving into more and more spheres of life. Perhaps like everybody else Privacy Commissioners are more at ease with technologies they understand.

A Privacy Commissioner can help ensure that consistent standards and approach to new technologies can require a privacy factor to be built into systems, and into legislation or administrative practice.

B H Slane
Privacy Commissioner
August 1996

bs\techII\bhsadd

⁵ Section 16 allows for proceedings to obtain a compulsion order to be adjourned to allow a suspect who objects to providing a blood sample an opportunity to give some other bodily sample for DNA analysis.