

# **CODE OF CONDUCT FOR OBTAINING INFORMATION UNDER SECTION 11 SOCIAL SECURITY ACT 1964**

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I, Brendan Boyle, Chief Executive of the department that is, with the authority of the Prime Minister, for the time being responsible for the administration of the Social Security Act 1964, having consulted with the Privacy Commissioner, issue the following Code of Conduct under section 11B of the Social Security Act to take effect on 13 September 2012 and revoke with effect on that date the previous Code issued on 5 September 2012.

Every officer of the department must, on and after 13 September 2012, comply with this Code of Conduct when obtaining information under section 11 of the Social Security Act.

Dated this 12<sup>th</sup> day of September 2012

(Signed)

  
Brendan Boyle  
Chief Executive  
Ministry of Social Development

## **Code of Conduct**

[Note: Terms that are underlined are explained further in Appendix A]

### **1 Interpretation**

In this Code, unless the context requires a different interpretation:

**Act** means the Social Security Act 1964

**beneficiary** for the purposes of this Code means

- a) A person who is receiving, or has received, or made a claim for, a benefit or payment under the Act or under the Social Welfare (Transitional Provisions) Act 1990 or under the New Zealand Superannuation Act 2001 or under Part 6 of the War Pensions Act 1954 or under a welfare programme approved by the Minister under section 124(1)(d) of the Act;
- b) A person who has been issued with, or has made a claim for, an entitlement card under regulations in force under section 132A of the Act;
- c) A person whose financial means are being assessed pursuant to section 69F of the Act; or
- d) A person who is indebted to the Crown under—

- i) the Act; or
- ii) Sections 27I to 27ZI (except section 27X) of, and the Twentieth Schedule to, the Act (as preserved by section 256(1) of the Child Support Act 1991); or
- iii) Section 61CA of the Act.

**benefit** has the meaning in section 3(1) of the Act

**department** means the department that is, with the authority of the Prime Minister, for the time being responsible for the administration of the Act

**officer** means an officer or employee of the department with the delegated authority of the Chief Executive to give a section 11 notice.

**partner**, in the phrase "spouse or partner", means a civil union or de facto partner

**prejudice the maintenance of the law** includes an action that would, or would be likely, to prejudice the prevention, detection, investigation, prosecution or punishment of an offence; or the imposition of a pecuniary penalty;

**reasonable cause** includes:

- a) cause to suspect that the beneficiary has committed an offence under the Act or has obtained by fraud any payment or credit or advance under the Act;
- b) the fact that the beneficiary or the beneficiary's spouse has failed within a reasonable time, or refused, to provide any information or produce any document in accordance with a request for that information made to that person in accordance with clause 4:
- c) where a beneficiary has been identified on the basis of a discrepancy produced by an authorised information matching programme (as those terms are defined in Part X of the Privacy Act 1993) conducted by the department; or
- d) where the officer concerned knows that the beneficiary, does not reside at the address held by the department and cannot be contacted through that address; or
- e) being unable to satisfactorily ascertain the financial circumstances of any beneficiary.

**section 11 notice** means a notice in writing making a requirement for information or documents under section 11 of the Act for the purposes set out in section 11(2) of the Act.

**spouse** means the husband or wife, or a person regarded under section 63 of the Act as the husband or wife, of an applicant or beneficiary, as the context may require.

## **2 Application and scope of Code**

- 2.1 This Code is issued under section 11B of the Act and applies to section 11 notices to produce information or documents for any of the purposes set out in section 11(2) of the Act. (refer to Appendix B)
- 2.2 All section 11 notices must be given in accordance with this Code.
- 2.3 Any person who has received, or who is the subject of, a section 11 notice may complain to the Privacy Commissioner about a breach of this Code and Part VIII of the Privacy Act 1993 applies to such complaints as if this Code were a Code of Practice under Part VI of the Privacy Act 1993.
- 2.4 This Code will be reviewed on 1 January 2008 and thereafter at three yearly intervals.

## **3 Steps to be taken prior to giving a section 11 notice**

- 3.1 When seeking information or documents about a beneficiary and/or any other person, the officer must, –
  - a) first request the information or documents from the beneficiary and/or that other person, and
  - b) give the beneficiary and/or that other person a reasonable time to provide the information or documents and inform the beneficiary and/or that other person of that time –

except where the officer has reasonable grounds to believe that compliance would prejudice the maintenance of the law.

- 3.2 Notwithstanding clause 3.1, an officer may give a section 11 notice to a beneficiary requiring that beneficiary to produce information or documents about that beneficiary.
- 3.3 A request under clause 3.1 must comply with Information Privacy Principle 3 of the Privacy Act.

## **4 Giving of section 11 notices**

- 4.1 **Section 11 notices must be for an authorised purpose**  
Section 11 notices may only be given for one or more of the purposes listed in section 11(2). (refer to Appendix B)
- 4.2 Subject to clauses 5 and 6 of this Code an officer may give a section 11 notice to any person (except to an officer of the Court) if, after having complied with clause 4.1, he or she has reasonable cause;

Provided that, reasonable cause is not required before giving a section 11 notice to any employer or former employer of the beneficiary, financial institution, or law practitioner.

**4.3 Form and content of section 11 notice**

Every section 11 notice must –

- a) be in writing; and
- b) advise of the existence of this Code and notify the person to whom the notice is given how that person can view or obtain a copy
- c) specify that the notice is given under section 11 of the Act; and
- d) specify the information or documents sought; and
- e) specify the date by or period within which the recipient must provide the required information or documents and the form in which they are to be provided; and
- f) notify the recipient of their right to complain to the Privacy Commissioner that the notice breaches the Code; and
- g) comply with information privacy principle 3 of the Privacy Act.

4.4 The date or period specified in clause 4.3(e) must not be less than 5 working days after the notice is given.

**5 Limitations on what may be requested from specified groups**

**5.1 Restriction on type of information sought from employers or former employers**

Any section 11 notice given under clause 4 to an employer or former employer must –

- a) require only information or documents relating to the employment and address of an employee or former employee; and
- b) not require employers or former employers to provide information, documents or any part of a document that relates solely to the marital status of an employee or former employee.

**5.2 Restriction on type of information sought from the Education Sector**

No section 11 notice may be given to any early childhood centre within the meaning of section 308 (1) of the Education Act 1989 (including any kindergarten, crèche, play centre, or kohanga reo), or any school, requiring it or any member of its staff to –

- a) give an opinion about whether a child's parents or caregivers are married or in a relationship in the nature of marriage; or
- b) provide any information concerning any confidential communication made by a beneficiary or any other person to a staff member of any early childhood centre or school in the course of a child's education.

5.3 In clause 5.2(b) **confidential communication** does not include any standard information provided by the beneficiary and required for the purpose of enrolling or re-enrolling a child in any such educational establishment and that is recorded on any form or record.

5.4 **Restriction on type of information sought from the Health and Disability Sector**

No section 11 notice may be given to any hospital, medical clinic, registered medical practitioner, nurse, midwife, or clinical psychologist, or any person that a hospital, clinic, registered medical practitioner, nurse, midwife, or clinical psychologist employs, requiring it or them to –

- a) give an opinion about whether a beneficiary is married or in a relationship in the nature of marriage; or
- b) provide any information concerning any confidential communication made by a beneficiary or any other person to a registered medical practitioner, nurse, midwife, or clinical psychologist for the purpose of diagnosis or treatment.

5.5 In clause 5.4(b) **confidential communication** does not include any standard administrative details provided by the beneficiary and required for the purpose of pre-admission or administration that is recorded on any form.

6 **Further limitations on what may be requested**

6.1 No person is required to provide any information or produce any document that would be privileged in a court of law, except as provided in clause 6.2.

6.2 No person is required to provide any information or to produce any document that is legally professionally privileged:

Provided that this subclause does not apply to information or any document that consists wholly or partly of, or relates wholly or partly to,–

- a) The receipts, payments, income, expenditure, or financial transactions of a specified person (whether a law practitioner, his or her client, or any other person); or
- b) Investment receipts (being receipts arising or accruing from any money lodged at any time with a law practitioner for investment) of any person or persons (whether the law practitioner, his or her clients, or any other person or persons) –

and is contained in, or comprises the whole or part of, any book, account, statement, or other record prepared by or kept in connection with a trust account of the law practitioner.

6.3 Where any person refuses to disclose any information or document on the ground that it is privileged under this clause the department or that person or any other person to whom the information or document relates may apply to a District Court Judge for an order determining whether or not the claim of privilege is

valid; and, for the purposes of determining any such application, the Judge may require the information or document to be produced to the Court:

**7 Enforcing compliance with section 11 notices**

7.1 No enforcement proceedings under section 11(3) of the Act are to be commenced unless the officer has advised the recipient of a section 11 notice that –

- a) no person will be required to provide any information or documents that would be privileged in a Court of law except as provided in clause 6.2 of this Code; and
- b) any person who–
  - i) refuses or fails without reasonable excuse to comply with a section 11 notice to the extent that they are capable of complying with it; or
  - ii) in purported compliance with a section 11 notice knowingly or recklessly furnishes false or misleading information –commits an offence and is liable upon conviction to a fine not exceeding \$2,000.

**8 Application of Information Privacy Principles**

8.1 Except where expressly overridden by this Code or by the Act, the Information Privacy Principles set out in section 6 of the Privacy Act 1993 apply to all information collected stored or used by the department under this Code.

## **APPENDIX A**

### **Explanatory Notes for the Code of Conduct for Obtaining Information Under Section 11 of the Social Security Act 1964**

#### ***Why have a Code?***

Parliament has recognised that the powers given to MSD to compulsorily obtain information can be intrusive and should be balanced with a Code that governs the way in which those powers are to be exercised. The Code provides important safeguards to protect confidential relationships and to ensure fair procedures are followed.

Section 11B of the Act requires the Chief Executive to issue the Code after consultation with the Privacy Commissioner and to publish it in a form that is accessible to the public. Copies can be obtained free of charge from any office of the Ministry of Social Development or from the MSD website at [www.msd.govt.nz](http://www.msd.govt.nz).

#### ***Information collecting powers***

MSD collects personal information about its clients in several different ways and for a variety of purposes. Sometimes the information is collected directly from the client on application forms or during interviews. Sometimes informal inquiries are made of clients or of other people with authorisation from the client. Occasionally it is collected by using statutory powers.

Where MSD is given special statutory powers to obtain information, these powers override the Privacy Act.

Section 11 of the Social Security Act permits authorised staff to require any person to provide information or documents for any of the purposes set out in section 11(2) of the Social Security Act. Section 11(2) is set out in Appendix 1 of the Code.

The Code deals only with the exercise of powers to obtain information under section 11(1). It does not apply to requests for information made under other statutory or non-statutory powers. It does not affect the rights that officers have, like all individuals to ask for information from any person. However 'informal' requests for information, without any statutory backing or sanction for non production of information should not imply that the request is made with statutory authority, or that any penalty will apply if the holder of the information does not comply with the request.

'Informal' requests, like statutory notices must comply with other laws such as Information Privacy Principles 1, 3, and 4 of the Privacy Act.



## **1. Interpretation**

### **“department”**

The department that administers the Social Security Act 1964 and the Code is the Ministry of Social Development (MSD).

### **“prejudice the maintenance of the law”**

The definition of the term “prejudice the maintenance of the law” includes situations where the Ministry believes that asking the individual for their information before going to a third party would prejudice our investigation. This can be on the basis of the delay it would cause, the risk of alterations to documents, or the risk of colluding with other parties.

### **“reasonable cause”**

The definitions of the term “reasonable cause” includes situations where the officer “knows” the person does not reside at their last known address.

“Knowledge” of a state of affairs is a very high threshold to prove. For example it would require more than merely receiving a returned letter marked “Gone – No address” from an earlier attempt at correspondence. The officer relying on this part of the definition would need to be aware of some extrinsic facts before he or she could say they “knew” the person did not reside at, and could not be contacted through the last known address.

## **3. Steps to be taken prior to giving a section 11 notice**

### ***Preliminary requests***

Before giving a section 11 notice to any person other than the beneficiary him or herself, the information or documents must first be sought from the beneficiary personally. If the information or document is about someone other than the beneficiary it must first be sought from the beneficiary, and also from that other person (in compliance with the information privacy principle 2 of the Privacy Act 1993). These steps to obtain the information directly from the subjects themselves must be taken on every occasion, even in cases where it is unlikely that the subject will be able to provide the information, for example where the beneficiary does not have custody or control of the documents, or the information is not “about” the beneficiary. The only exception is when compliance would prejudice the maintenance of the law in which case the section 11 notice may be given without the need for any preliminary requests.

This is an informal process which provides the individual with the opportunity to provide the information themselves rather than having it sought from others. This provides some measure of privacy protection as well as ensuring that they are kept informed about the nature of the enquiries being made about them. There is no legal obligation to comply with this preliminary request and no penalty provisions apply. The request need not be in writing – it can be made in person or by phone and there is no fixed time period for response apart from it being a reasonable time. When the request is made, the department must comply with information privacy principle 3, which requires that the

person from whom the information is being collected is advised of the purpose of the collection, the fact that giving the information is (at this stage) voluntary, the consequences of not providing the information, who will hold it, and that the person has a right to request access to and correction of their information. These matters can only be omitted if the officer believes on reasonable grounds that one of the exceptions to information privacy principle 3 applies. If the beneficiary does not provide the information after a reasonable time, the officer can give a section 11 notice to a third party who holds the information.

#### **4. Giving of section 11 notices**

The purposes for which a section 11 notice may be given are set out in section 11(2) of the Act. Section 11(2) is reproduced in the appendix to the Code.

The term "working days" is defined in the Act, and excludes statutory holidays, weekends, and a day in the period commencing 25 December in any year and ending with the 15<sup>th</sup> day of January of the following year.

Under section 86J of the Act, where a notice is posted, it is deemed to have been received by the addressee on the fourth day after the day on which it is posted. This is when it is "given" for the purposes of the Code.

The time period for complying with a section 11 notice can be extended from the minimum of 5 working days at the discretion of the department having regard to the circumstances of the case, including the volume of information requested and the manner in which it is stored or held.

The notice might specify the manner in which the information is to be produced. For example, it may require copies of documents to be produced, or original documents to be sent or shown to the department.

The Act also contains separate provisions in section 11A which give the Chief Executive power to give a notice under section 11 to obtain information from employers to be used in an information matching programme. In these cases the officer will not have "reasonable cause", and nor will it be possible to seek the information from the beneficiary first, as these requests are in the nature of "fishing expeditions", for the purposes of information matching.

Apart from notices given to beneficiaries themselves, to employers or former employers of the beneficiary, or to financial institutions and law practitioners, no-one can be required to provide information unless there is "reasonable cause" to give a notice.

The circumstances that might give an officer reasonable cause to give a notice cannot be listed exhaustively, although examples such as the fact that the beneficiary has not given the information are specified in the statute and repeated in the interpretation section of the Code.

There may be other statutory prohibitions on the release of information which are relevant in certain circumstances.

**[Note - The Act also contains a separate provision in section 11A which gives the Chief Executive power to give a notice under section 11A(1) to obtain employees' information from an employer once in a 12-month period, in order to be used in an information matching programme. This is an entirely different notice and process to the s11 notice under the Code of Conduct for Obtaining Information]**

#### **5. Limitations on what may be requested from specified groups**

An officer seeking information will not necessarily be aware of the nature of that information, or the circumstances in which it has been obtained. For this reason, it is possible that a request for information, or a section 11 notice might encompass information in respect of which, if sought in court, the holder could claim a privilege to prevent them from disclosing it.

The Act makes it clear that a person who receives a section 11 notice requesting privileged information is not required to provide that information. It is not always clear whether a privilege will apply, and the grounds are quite limited. Some of the privilege grounds are reflected, and enhanced by clause 5 of the Code.

If there is a dispute about whether the information can properly be considered to be privileged, the matter can be decided by a District Court Judge.

Any recipient of a notice who believes that such a privilege might apply to the information that has been required of them should immediately advise the officer concerned of the nature of the privilege they are claiming.

#### **6. Further limitations on what may be requested.**

##### ***Limitations on enforcement of section 11 notices***

As discussed above, the Code imposes a number of restrictions on the types of information and documents that may be required from certain persons. As a general rule no-one is required to provide any information or documents that are legally professionally privileged or would be privileged in a court of law. This includes the privilege against self-incrimination and may include the privilege relating to special relationships of confidence, such as between doctor or psychologist and patient, priest and penitent and others. See Evidence Amendment Act (No 2) 1980.

##### ***What are the safeguards against misuse of the powers?***

Authorised staff may obtain information only where they are permitted to do so by law, and they are obliged to maintain the security and confidentiality of all information that they receive as a result of their duties. Information cannot be disclosed to other agencies except where required or permitted by law and any staff making unauthorised requests or disclosures of information would be subject to disciplinary action and possible criminal prosecution.

Within the Ministry, access to personal information is limited to those staff that need it to carry out their work. Audits are conducted periodically to ensure that access rights are not misused and information is not retained by the Ministry for longer than is necessary.

### ***Complaints***

Complaints about the use of these powers may be made to the manager of the Benefit Control Unit or to the local office manager. Complaints about a breach of the Code may be made to the Privacy Commissioner, who deals with them as if they were complaints about a Code of Practice under Part VI of the Privacy Act. The Code may be amended at any time after consultation with the Privacy Commissioner, and is subject to periodic public review.

## **8. Application of Information Privacy Principles**

The Information Privacy Principles (IPPs) apply to almost all agencies and their handling of personal information. The department must comply with these principles.

This means for example that information must not be collected by unfair or unlawful means (IPP4), must be stored safely and securely (IPP5), must be accurate and up to date (IPP8).

However, some aspects of the code override the information privacy principles. For example, the power to obtain information from a third party overrides IPP 2. The power to seek information from a third party also involves disclosing certain information. For example a request for financial information from a bank will coincidentally disclose that the department may be investigating that person. Such an incidental disclosure will not be in breach of IPP 11, because the department is expressly authorised to take actions that will result in such disclosures.

Nothing in the Code or the Act affects an individual's right to seek access to or correction of personal information held about them by the department in accordance with IPPs 6 and 7.

## **APPENDIX B**

### **PURPOSES FOR WHICH SECTION 11 REQUIREMENTS CAN BE MADE**

Section 11(2) Social Security Act 1964:

The purposes specified in subsection (1) of this section are—

- (a) Determining whether a person who is receiving, or has received, or made a claim for, a benefit or payment under **[[this Act]]** or under the Social Welfare (Transitional Provisions) Act 1990 **[[or Part 6 of the War Pensions Act 1954]]** **[[or under the New Zealand Superannuation Act 2001]]** or under a welfare programme approved by the Minister under section 124(1)(d) of this Act is or was entitled to receive that benefit or that payment; or
- (b) Determining the rate of benefit or payment that is or was applicable to that person; or
- (c) Determining whether a person who has been issued with, or has made a claim for, an entitlement card under regulations in force under section 132A of this Act, is or was entitled to be issued with that card; or
- (d) Determining whether a person whose financial means are being assessed pursuant to section 69F of this Act is able to pay or contribute to the cost of the residential care disability services provided to that person, and whether a person who has been so assessed is entitled to that assessment; or
- [(da) Determining, pursuant to section 69FA, the amount that any person is required to pay towards the cost of the home-based disability support services supplied to that person, and whether a person who has been so assessed is entitled to that assessment; or]]**
- (e) Ascertaining the financial circumstances or whereabouts of any person who is indebted to the Crown under—
  - (i) **[[This Act]]**; or
  - (ii) Sections 27I to 27ZI (except section 27X) of, and the Twentieth Schedule to, this Act (as preserved by section 256(1) of the Child Support Act 1991); or
  - (iii) Section 61CA of this Act; or
- (f) Discharging the **[chief executive]**'s functions under this Act or under any regulations in force under this Act or under the Social Welfare (Transitional Provisions) Act 1990 **[[or Part 6 of the War Pensions Act 1954]]** **[or under the New Zealand Superannuation Act 2001]** or under any welfare programme approved by the Minister under section 124(1)(d) of this Act.

Note that paragraph (d) is replaced on 1 July 2005 with a new paragraph as follows:

- “(d) conducting or reviewing a means assessment under Part 4 (relating to payment for contracted care services as defined in section 136), or determining whether any such means assessment is correct; or”.

The Part 4 referred to in the new paragraph is a new Part 4 of the Social Security Act 1964 that comes into force on 1 July 2005, which replaces sections 69E and 69F under which means assessments were done before that date. For further details see the Social Security (Long-term Residential Care) Amendment Act 2004.

