



## What is a data preservation scheme?

In order to join the Budapest Convention, New Zealand would need to legislate to introduce a data preservation scheme.

A data preservation scheme would reduce the risk that evidence for criminal investigations is deleted before the information-holder can be formally required to provide it.

This is likely to be most valuable to support international criminal investigations, where the legal process can take 6-18 months.

**A data preservation scheme would need to be introduced in New Zealand in order to join the Budapest Convention. Data preservation would add to the tools that law enforcement can use to secure electronic evidence for use in investigations. Lawful access to electronic evidence is important for criminal investigations, and plays a vital role in law enforcement.**

## What is a data preservation order?

Law enforcement agencies in New Zealand can apply for a production order under the Search and Surveillance Act 2012. A production order requires a person to produce specific information for use as evidence in a specific criminal investigation. Production orders are issued by an issuing officer, meaning a Judge or another authorised person such as a Justice of the Peace, Community Magistrate or Registrar.

A data preservation order would require a person with possession or control of specific information relevant to a specific criminal investigation to preserve that information temporarily on their systems, ahead of a production order being sought for the information to be provided.

Data preservation is different from 'data retention'. Data preservation orders are issued for specific data for a specific investigation. Some countries have 'data retention' schemes in legislation, in which communications providers or other information-holders are required to retain all data of a certain type for a specified period of time. This means that all that information can be available at a later date, for investigations of criminal activities if required. A data retention scheme is not a

necessary prerequisite to accede to the Budapest Convention.

### WHEN WOULD DATA PRESERVATION ORDERS BE USED?

Data preservation orders would be used in cases where overseas law enforcement agencies become aware of data stored in New Zealand relevant to specific investigations they are pursuing. In such cases, there is a relatively lengthy mutual assistance process that needs to be completed before the evidence in question can be provided to the overseas counterpart (6-18 months). This process ensures that all relevant domestic legal and human rights issues can be considered appropriately before a court order is sought to obtain the information. However it creates a risk that the data could be modified, lost or deleted in the intervening period. A preservation order would eliminate that risk.

Preservation orders would also be available for use in domestic investigations under the proposed scheme. However they are unlikely to be used for those investigations, because production orders can normally be secured very quickly in New Zealand. Information may also be disclosed by providers to law enforcement agencies on request in appropriate circumstances, in line with the New Zealand Privacy Principles.

The orders could be issued to any person that holds computer data, but under the proposed scheme they are most likely to be issued to telecommunications companies and data storage providers. This is because communications data (such as phone records) and user-generated data stored online (such as images), often contain evidence that can be vital for criminal investigations and prosecutions, and is vulnerable to the risk of loss or modification.

## WHAT MIGHT A TYPICAL PRESERVATION ORDER LOOK LIKE?

Two hypothetical cases are provided below to illustrate the type of information that might be requested from an entity using a preservation order and how the process would work.

*Example 1: Preservation order issued to a telecommunications company to support a request for mutual legal assistance*

New Zealand receives a mutual assistance request and preservation request from a foreign country for records relating to a New Zealand telephone number. The telephone number is associated with email accounts involved in 'phishing'. Phishing is a fraudulent attempt, usually through email, to steal personal information by impersonating a genuine organisation. On receiving the request, New Zealand Police immediately issues a preservation order to the telecommunications company to preserve data relating to the telephone number. Over the next eight months, Crown Law assesses the mutual assistance request, corresponds with the requesting country to obtain further information, and then authorises NZ Police to apply for a production order to obtain the data so it can be sent to the foreign country for use in a criminal investigation.

*Example 2: Preservation order issued to a data storage provider to support a request for mutual legal assistance*

New Zealand receives a mutual assistance request and preservation request from a foreign country for data relating to possession and distribution of child pornography. The data is held in an account with a New Zealand cloud storage company. On receiving the request, NZ Police immediately issues a preservation order to the cloud storage company to preserve the data, meaning it

cannot be deleted by the account holder. Over the next eight months, Crown Law assesses the mutual assistance request, corresponds with the requesting country to obtain further information, and then authorises NZ Police to apply for a production order to obtain the data so it can be sent to the foreign country for use in a criminal investigation.

## WHERE CAN I FIND MORE INFORMATION?

Information on the proposed design of the data preservation scheme, can be found within the Budapest Convention Accession Consultation Document on the Ministry of Justice website.