

Jeremy Cauchi

From: Marion Sanson
Sent: Friday, 23 July 2010 3:26 p.m.
To: John Roberts; Evelyn Wareham
Cc: John Wilson
Subject: RE: OIA Law Com review

Hello,

I had a catch-up at the beginning of the month with the advisor responsible for the Review, Margaret Thompson. She is working on an issues paper, but no date given for its release.

I was going to e-mail her back with some specific comments from Archives NZ. Do you want to be involved in this, Evelyn?

Regards

Marion Sanson

Legal and Policy Adviser
Archives New Zealand
Te Rua Mahara o te Kāwanatanga

-----Original Message-----

From: John Roberts
Sent: Friday, 23 July 2010 11:23 a.m.
To: Marion Sanson
Subject: FW: OIA Law Com review

See below. Any idea?

John Roberts
Group Manager, Government Recordkeeping Programme

-----Original Message-----

From: Evelyn Wareham
Sent: Friday, 23 July 2010 11:13 a.m.
To: John Roberts
Subject: OIA Law Com review

Hi John

Do you know where this is at?

Cheers
Evelyn (at UNESCO mtg)

Evelyn Wareham
Programme Manager, Digital Continuity

Archives New Zealand

Sent from my Blackberry

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

20 September 2010

Commissioner Burrows
Law Commission
P O Box 2590
Wellington

Attention: Margaret Thompson

Kia ora

Law Commission review of Official Information Legislation

This is an initial response to the Commission's Review of the Official Information Act 1982 (OIA) and Parts I-VI of the Local Government Official Information and Meetings Act 1987 (LGOIMA).

I note that your initial survey asked for an indication of where we perceive the problems lie and ideas for further exploration or reform, and I was pleased that the survey questions included the interface with the Public Records Act 2005.

Below I have provided details of how the current interface between the OIA and the Public Records Act operates. In addition, there are a number of issues I would like to raise for the Law Commission's consideration.

Interface with the Public Records Act

As you are aware, Archives New Zealand is the department currently responsible for implementing the Public Records Act. Purposes of the Act include ensuring there is a full and accurate record of Government, that government records of long term value are preserved, and that public access to the record of government is facilitated. Archives New Zealand has repositories of public archives in the 4 main centres.

Under the Public Records Act, records must be classified as "open access" or "restricted", either at 25 years of age or at earlier transfer to Archives New Zealand. The public have a right of inspection of open access records, and may apply for access to restricted records.

Access to restricted records depends on any legislation governing the records, but for most records access is gained under the OIA, LGOIMA for local authority records, or the Privacy Act 1993. The presumption is that public records and local authority records will be classified as open access, unless there are good reasons to restrict access. Good reasons are normally based on the OIA reasons for withholding. The controlling public office or local authority must specify the period of restricted access.

Good reasons for withholding information

The Chief Archivist is about to review the advice issued under section 44(1) of the Public Records Act for public offices, and section 46(3) for local authorities classifying the access status of their records. A copy of the current advice: *Making Access Decisions under the Public Records Act* is attached, for your information. At page 5 a list of potential grounds for classifying records as restricted is given.

The legal professional privilege ground for withholding

A restriction period for documents that are the subject of legal professional privilege is yet to be included in the Chief Archivist's advice. Archives New Zealand has suggested that Crown Law recommend a period or periods. Recently we have taken to recommending a 70 year restriction period for legal advice files, after which period the restriction can be reviewed and renewed if necessary.

Archives New Zealand suggests that it may be timely for the Law Commission to address the legal professional privilege withholding ground and its application to legal advice to government. It ought to be possible to identify a period, or periods, depending on the area of advice, after which the Crown ought to make the legal advice publicly available.

Cultural sensitivity as a new ground for withholding

Archives New Zealand has experience of the issue of cultural sensitivity as a ground for withholding information, in an indirect sense. The issue has arisen in the context of the transfer to Archives New Zealand of information about members of ethnic minorities, and the access status of such records.

Archives New Zealand holds film, photographs and papers documenting the relationship between government and minority ethnic groups, obviously Māori, but also Chinese, and Pacific Island peoples.

Archives New Zealand suggests that cultural sensitivity be considered as a potential new official information withholding ground, and is interested in being party to the development of any proposals in this area.

The Public Records Act regime for access to open access archives

Frequently the OIA is cited in requests for records that are actually held as public archives and are publicly available for free inspection under section 47 of the Public Records Act. The Office of the Ombudsman has confirmed that section 52(3)(b)(ii) of the OIA applies and that requests for open access archives are properly dealt with under the Public Records Act's access regime, rather than the OIA.

I consider that the public would find it helpful to have greater clarity over the interface between the Public Records Act regime for open access archives, and the OIA.

A possible way of reducing public confusion would be to exclude open access public archives from the OIA's definition of "official information".

Information not written down

The Public Records Act underpins the OIA and LGOIMA by requiring a full and accurate record of the affairs of each public office, and local authority. We would be interested to know whether concerns are expressed that records are not being made, and whether the provisions of the Public Records Act are seen as providing effective support for the purposes of the OIA.

Archives New Zealand would welcome the opportunity to discuss these matters, and any others the Commission wishes to raise, as this review progresses. Archives New Zealand's contact on this matter is Marion Sanson. Marion can be contacted by phone: 894-6046, or marion.sanson@archives.govt.nz

Yours sincerely



John Roberts
Group Manager, Government Recordkeeping (robj)

Ref: A506440

Enc: *Making Access Decisions under the Public Records Act*

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29 September 2010

President

Rt Hon Sir Geoffrey Palmer SC

Commissioners

Dr Warren Young

George Tanner QC

Emeritus Professor John Burrows QC

Mal Sim

Mr Greg Goulding
Chief Executive and Chief Archivist
Archives New Zealand Te Rua Mahara o te Kāwanatanga
PO Box 12050
WELLINGTON

Dear Mr Goulding

REVIEW OF OFFICIAL INFORMATION LEGISLATION

The Law Commission has a project underway to review New Zealand's official information legislation. In December 2009 we asked both requesters and providers of information to let us know their main concerns with the operation of this legislation and in March 2010 we published a summary of the main findings from this survey.

We have now looked closely at the matters people drew to our attention and published an Issues Paper, *The Public's Right to Know: Review of the Official Information Act 1982 and Parts 1-6 of the Local Government and Meetings Act 1987*. This paper discusses the main areas where reform may be required and asks for comment on our preliminary proposals. It can be downloaded from the Law Commission's online consultation site, www.lawcom.govt.nz.

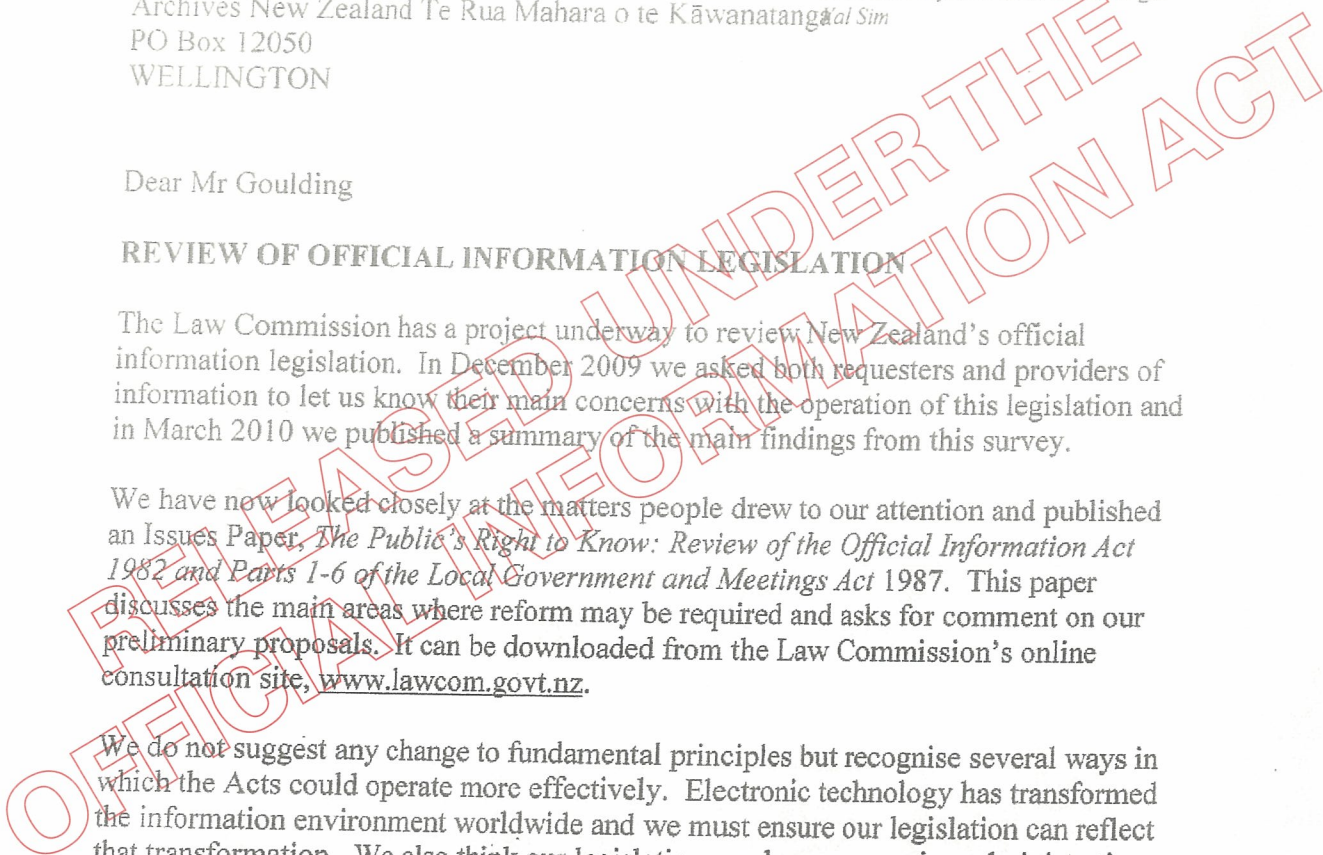
We do not suggest any change to fundamental principles but recognise several ways in which the Acts could operate more effectively. Electronic technology has transformed the information environment worldwide and we must ensure our legislation can reflect that transformation. We also think our legislation needs more ongoing administrative oversight and support and ask how this might best be achieved.

We are keen to hear the views of your agency. The closing date for submissions is Friday 10 December 2010.

Yours sincerely

John Burrows
Commissioner

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| FOR INFO <input type="checkbox"/> | DRAFT TO CE <input type="checkbox"/> | REPLY DIRECT <input checked="" type="checkbox"/> |
| TO BE ACTIONED BY: | John R / P2P | |
| DUE DATE: 20/10/10 | DATE SENT: | |
| OBJECTIVE ID No: | | |



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Talking Points for Meeting with Law Commission on its Issues Paper
"The Public's Right to Know - Review of the OI Legislation"

Thursday 9 November 2010 10 am, Law Commission Office on Featherston St

We are expecting to meet with:

Commissioner Prof John Burrows,

Researcher Margaret Thompson

In your letter of 20 September 2010 we raised these issues:

a) Interface between OI Legislation and the Public Records Act

The point made by Archives New Zealand is that OI reasons are good reasons for classifying as restricted access, and the controlling public office (CPO) continues to be responsible for responding to OI requests for a public office until the point that the record is transferred and it becomes an open access record. Point to discuss is that the Public Records Act may not be sufficiently explicit in s 44(8) and s 58 as to position of restricted access public archives.

Law Commission Paper:

The interface between the OIA and the Public Records Act is discussed at para 15.19.

Law Commission thinks interface does not require legislative attention, but some submitters suggested need for better alignment: para 74, 15.19 to 15.37.

Law Commission doesn't discuss coverage alignment of coverage. Generally this is the same, but some differences e.g. subsidiaries of SOEs covered by OIA if they are related companies of SOEs, whereas Public Records Act does not cover SOE subsidiaries at all. The discussion about alignment ideally takes place when decisions are being made about the nature of the body being created. How could this happen?

Law Commission asks at Q1 whether every agency covered by OI should be listed.

Submitters raised concerns that compliance with the Public Records Act is not taken seriously, and sometimes Chief Archivist (CA) has authorised destruction of records subsequently requested under OIA.

Coverage of SOEs, CCOs, PCO, courts is raised – Q 3 – 6.

Question what happens when non-compliance with Public Records Act? A submitter suggested: see para 15.37, that the Ombudsmen's Office have a role where non-compliance with the Public Records Act because means inability to comply with OI legislation.

Archives New Zealand's suggestion is that the interface could be improved by stating that access to restricted access public archives remains the responsibility of the CPO, and that open access public archives are not subject to OIA.

Under the SSMB the effect of s 58 will be clearer; that records in the repository are not thereby subject to the OIA.

Exclude open access public archives/LA archives as a category of OI – Q7.

b) Good reasons for withholding

The context for Archives New Zealand's specific concern is that we want to up-date the CA's Guidance on restrictions/restriction periods. Two particular areas for consideration are:

Legal Professional Privilege

“Necessary to maintain LPP” is currently a withholding ground under s 9(2)(h) of the OIA, s 7(2)(g) LGOIMA.

Law Commission’s Q26 asks whether any grounds currently subject to the public interest test should be changed to conclusive grounds; para 7.9.

Law Commission notes at para 7.41 that the LPP ground often treated as if conclusive. CA’s Guidelines provide no guidance on restriction period.

Policy intentions of both the Public Records Act and OIA support legal advice being open access in the long-term. The public policy for LPP for government is actually weak as the rationale for LPP is to encourage people facing litigation to consult and fully acquaint their legal advisor with the facts, this does not apply to government. Government must be carried out in accordance with the law, and government is subject to the Rule of Law, therefore government is obliged to take legal advice, act accordingly, and be accountable for doing so.

In response to Q26 Archives New Zealand favours maintaining the public interest obligation in relation to LPP, and setting an end point for LPP is needed for the archival context.

Protection of cultural matters

Law Commission wants to hear views on whether cultural sensitivity ought to be a more broadly framed withholding ground under OIA; para 30.

Under LGOIMA s 7(2)(g) provides a limited ground for withholding information for the reason –

“In the case only of an application for a resource consent, or water conservation order, or a requirement for a designation or heritage order, under the Resource Management Act 1991, to avoid serious offence to tikanga Maori, or to avoid the disclosure of the location of wahi tapu;”

Archives New Zealand acknowledges that this will not be a straightforward test to apply and guidance would be needed in identifying whether serious offence to tikanga Māori would be a real possibility.

Law Commission notes the NZGOAL policy that government information not be made available for publication or reuse where this would “threaten the control over and integrity of Māori or other traditional knowledge or other culturally sensitive material” see para 7.14, 7.15

Archives New Zealand wants to test the possibility of this ground with the CA’s Māori advisory group at its next meeting and will respond in more detail in response in Dec.

Other comment - Archives New Zealand supports Law Commission approach

Continue case-by-case with more guidance; para 3.56

redraft of “protecting good government” grounds s 9(2)(f) and (g); para 4.46

re-position public interest limb; para 8.17

privacy of deceased; para 6.39 and 30 years cut-off for privacy of deceased persons; para 6.40.

conditions may be set on release; as if a contract; Q 65.

Specific Law Commission questions relevant to Archives New Zealand:

Q1 list every agency subject to OIA?

Q 34 require agencies to elucidate on their analysis of public interest test?

Jeremy Cauchi

From: Margaret Thompson [mthompson@lawcom.govt.nz]
Sent: Tuesday, 16 November 2010 10:29 a.m.
To: Marion Sanson
Subject: RE: Withholding Ground to protect cultural matters

Marion,

Being aware of the specific withholding provision in LGOIMA relating to RMA and cultural matters, we thought we should ask an open question in the Issues Paper. Your own comments to us on behalf of Archives also called attention to the question.

So I am afraid at this stage, we do not have any formulated views.

Margaret

From: Marion Sanson [mailto:Marion.Sanson@archives.govt.nz]
Sent: Monday, 15 November 2010 2:00 p.m.
To: Margaret Thompson
Subject: Withholding Ground to protect cultural matters

Hello Margaret,

Good to meet with you and Professor John Burrows last week.

This week I am preparing a brief paper for the Chief Archivist's Māori Advisory Group to inform discussion & elicit comment on a possible new withholding ground in the OIA to protect cultural matters. The discussion is likely to be around identifying examples of the type of information that Māori think should be protected from disclosure, and the public interests that could be implicated.

I wondered where the idea of this new ground came from? If it is from other departments or organisations, whether you might provide a point of contact for me, or any more information you have about the thinking behind the concept.

Regards

Marion Sanson

Legal and Policy Adviser

Archives New Zealand
Te Rua Mahara o te Kāwanatanga

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Jeremy Cauchi

From: Pat Park [parkp@tpk.govt.nz]
Sent: Wednesday, 1 December 2010 11:50 a.m.
To: Beverly Penjueli; Marion Sanson
Cc: Molly Kino
Subject: NZGOAL and OI - protection for culturally sensitive material

Kia ora Bev

Yes, I have an interest in this in part.

Kia ora Marion

Some of our people have been working with other interests including Archives and the National Library on the Law Commission paper.

I need to download the NZGOAL framework to bring myself up to speed on that. Thanks for bringing it to our attention.

From: Beverly Penjueli
Sent: Wednesday, 1 December 2010 11:02 a.m.
To: Pat Park
Subject: NZGOAL and OI - protection for culturally sensitive material

Kia ora Pat – have you been involved in these matters? We haven't.

Ngā mihi
Beverly Penjueli
Group Manager Legal Services
Te Puni Kōkiri

From: Marion Sanson [mailto:Marion.Sanson@archives.govt.nz]
Sent: Friday, 26 November 2010 5:54 p.m.
To: Beverly Penjueli
Subject: NZGOAL and OI - protection for culturally sensitive material

Kia ora Beverley,

I note with interest that restrictions listed in the NZ Government Open Access Licensing (NZGOAL) Framework (on the SSC website) include at para 29(g) and (h) protection of Māori or other traditional knowledge or other culturally sensitive material.

Is TPK aware that these restrictions are raising difficult or interesting issues for government agencies?

I also note that the Law Commission has asked in its Issues Paper on Official information for feedback on adding a new ground to protect culturally sensitive information, and widening the ground in s 7(2)(ba) of the LGOIMA. Does your organisation support the addition of a withholding ground of this kind in the OIA? and what issues do you envisage need addressing?

Please consider whether there is someone on your team, or at TPK, interested in a conversation about these initiatives. It would be helpful if they could make contact with me on Monday or Tuesday next week.

Naku noa, nā

Marion Sanson

Legal and Policy Adviser

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As part of ArNZ's work responding to the Law Commission's in res

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For the Chief Executive's Attention

Urgent Semi urgent (next day) Standard

Papers attached for information

File Ref: 2010/0443

From: Marion Sanson

Date: 9 December 2010

Subject: Response to Law Commission on Review of OI Legislation

Notes to CE:

- a) The Law Commission has invited submissions on its Issues Paper "The Public's Right to Know: A Review of the OIA and Pts 1-6 of the LGOIMA".
- b) Archives New Zealand wrote to the Law Commission in response to its survey, setting out the areas where we see issues and outlining the interface between the OI Legislation and the PRA. Last month we met with the Law Commission and developed these areas further.
- c) The particular issues in which Archives New Zealand has an interest are:
- i) clarifying that open access public archives and open access local authority archives are not subject to OI legislation;
 - ii) a cut-off point for the withholding ground of protecting the privacy of a deceased;
 - iii) development of a cultural sensitivity type of withholding ground to support the Chief Archivist's access restriction advice;
 - iv) clarifying the legal professional privilege withholding ground so that legal advice is withheld only where there is a real possibility of harm as a result of the release of the specific advice and no outweighing public interest in disclosure.
- d) Please see the attached draft response elaborating on these issues and responding to relevant discussion questions raised by the Commission.
- e) The Commission has allowed an extension of the time for responding to 24 December 2010.

| |
|---|
| Consultation undertaken with: John Roberts, Peter Aagaard, Terehia Biddle, Chris Adam, members of Te Pae Whakawairua. |
| Briefing Approved by: Date |
| Advice Received and letter Approved/ Changes needed: Date |

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

22 December 2010

Professor John Burrows
Law Commissioner
Law Commission
P O Box 2590
Wellington 6011

Dear Professor Burrows

Review of Official Information Legislation

This is Archives New Zealand's response to your letter of 29 September 2010 inviting submissions on the questions the Law Commission has raised in its Issues Paper: "The Public's Right to Know" reviewing the Official Information Act 1982 and parts 1 – 6 of the Local Government Official Information and Meetings Act 1987. Thank you for allowing additional time to respond.

The Chief Archivist (acting at that time), wrote to the Commission in September 2010 commenting on specific issues for Archives New Zealand, namely the interface between the official information legislation and the Public Records Act 2005, and two withholding grounds. On 9 November, John Roberts and Marion Sanson from Archives New Zealand met you and Margaret Thompson to discuss the Commission's Issues Paper.

Following that helpful meeting I have given further attention to the issues discussed and now make the following submissions. The questions raised by the Law Commission have provided a useful framework for my response.

I remain hopeful that the Chief Archivist, using the mechanisms in the Public Records Act, will continue to wield influence to encourage compliance with the Public Records Act, and so support the official information legislation.

Yours sincerely

Greg Goulding
Acting Chief Archivist and Chief Executive

Ref: A531417

Archives New Zealand's Responses to the Law Commission's Discussion Questions

Chapter 2 Scope of the Official Information Acts

Q1 - Do you agree that the schedules to each Act (OIA and LGOIMA) should list every agency that they cover?

Archives New Zealand considers a list of agencies puts the question of coverage beyond doubt and therefore is a helpful approach. In a number of cases the schedules refer to classes of agency, an example being related companies of state enterprises. This is unavoidable and we doubt it creates difficulties in ascertaining whether any particular organisation is covered or not.

I have noted the value in an alignment between the areas of coverage of the Public Records Act 2005, and the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987 (the OI legislation). The Public Records Act requires that public offices and local authorities create and maintain a full and accurate record of their affairs. Compliance with the Public Records Act's recordkeeping requirements supports each organisation in locating information held, and if the information is not held, to explain why. It is unsatisfactory from the both the public's and the entity's point of view when an entity that is subject to the OIA has not kept information that it could be expected to hold. Related companies of state enterprises are an example of a class of entity that are subject to the OI legislation but not to the Public Records Act.

Archives New Zealand favours the approach of establishing OI coverage from the entity's point of creation, and by the mechanism of a positive listing.

Q 3, 4, 5 - Do you agree that SOEs, other crown entity companies and council controlled organisations should remain within the scope of the OI legislation, and that the Parliamentary Council Office should be brought within scope?

These questions ask about coverage by the OI legislation. SOEs and other crown entity companies, and council controlled organisations are covered by the Public Records Act. The rationale is accountability of government, and Archives New Zealand considers they should continue to be covered. I consider there is no good reason to continue to exclude the Parliamentary Counsel Office. I note however that much of the information held by that Office may qualify as legally privileged. I have more comments about this withholding ground below.

Q 6 - Do you agree that the OIA should specify what information relating to the operation of the Courts is covered by the Act?

I agree that from a records and business management approach, it ought to be possible to separate the records of the operation of the courts from the records of the decision-making by the courts. Public access to the former should be managed under OIA, while court rules govern access to records of the court's judicial function.

Q 7 - Should any further categories of information be expressly excluded from the OIA and the LGOIMA?

Section 47 of the Public Records Act provides a statutory right of access to records that have been classified as open access. Accordingly, Archives New Zealand asks that open access records, as defined in the Public Records Act, and publicly accessible under that Act, be excluded from OI legislation coverage.

Members of the public are often unclear as to whether to ask for access under the Public Records Act or under the OI legislation. For archives classified as restricted access, the OI legislation will generally be part of the framework for deciding whether or not to provide access in response to a specific request.

Chapter 3 Decision-making

Q 8 – Do you agree that the OI legislation should continue to be based on a case-by-case model?

Yes, Archives New Zealand favours decision-making on a case-by-case basis under OI legislation.

Although Archives New Zealand's work with records and archives is generally on a class basis, this is for pragmatic reasons and based on volumes. Records are classified as to access on the basis of what they may contain, rather than specific knowledge of what they do contain. For example, a class described as policy development may turn out to include personal information data. I agree that it is preferable that decisions in response to requests are based on the content of the information, rather than the category of the document.

Q 9 - Options for achieving greater clarity and certainty around withholding grounds

Archives New Zealand's experience from answering OI requests is that the Ombudsmen's Case Notes and Guidelines provide helpful guidance.

Chapter 4 Protecting Good Government

Qs 14 and 15 – “Good government” withholding grounds

Archives New Zealand agrees that the “good government” grounds could be improved through redrafting, and considers that the redraft suggested at para 4.46 is sound.

Chapter 6 Protecting privacy

Q 23 - Which option is preferable for improving the privacy withholding ground?

Archives New Zealand considers there would be benefits in amending the current withholding ground to align the ground with Privacy Principle 11 of the Privacy Act 1993, while retaining the public interest test. A reason is that the current withholding ground is too broad, while Privacy Principle 11 gives better guidance as to when information may be disclosed.

Q 24 – Do you think there should be amendments to the Acts in relation to the privacy interests of deceased persons?

Archives New Zealand favours protection for the privacy interest of deceased persons having a finite life. Information that has been retained for longer than 25 years is likely to have archival value, and there would be public interest reasons for access, such as accountability of government and the relevance of the records to New Zealanders' historical and cultural history.

It is possible that there will be an opportunity to discuss this withholding ground with Australian counterparts in the New Year, and I would welcome the opportunity to feedback further thoughts.

Chapter 7 Other withholding grounds

Q 27 – Do you think there should be a new withholding ground to cover the protection of cultural values

Archives New Zealand is finding management of culturally sensitive information a challenging policy area in regards to both material held in the archival collection, and in regards to current information held by the department. There is a lack of definitional certainty around what is covered by terms such as "cultural information".

There is an expectation that the report by the Waitangi Tribunal in response to the WAI 262 claim will provide guidance on this issue, but as you are aware, the report has not been issued.

The Guidelines issued by the Chief Archivist under section 44(1)(a) of the Public Records Act for classifying information as restricted or open, advise that protection of traditional knowledge is a good reason to restrict access. However, when a request is made under the OIA to access such restricted information, there is no corresponding basis under the OIA to consider withholding access.

I am pleased that the Law Commission drew my attention to the guidance in the NZGOAL policy around the exception for culturally sensitive material. It is interesting that, apart from the narrow protection in LGOIMA, the protection to date is in the form of guidance rather than legislative requirement.

The issue was discussed at the December 2010 meeting of the Chief Archivist's Māori Advisory Group. A range of concerns and views emerged, and the Group was not able to reach agreement on its approach to the issue in the time available.

I consider it would be helpful for the Law Commission to continue to explore the issues surrounding protection of culturally sensitive information, or traditional knowledge, held by government.

(c) any other withholding grounds?

Archives New Zealand would like to see a change to the OI legislation's wording around the legal professional privilege (LPP) withholding ground.

The public policy for LPP for government is weak. I understand that the policy rationale for LPP is to encourage a person with a legal problem to consult and fully acquaint their legal advisor with their situation. This policy motivation ought not be necessary for the government, as government must be carried out in accordance with the law, and government is subject to the law. It follows that the government ought to take legal advice, to act in accordance with sound legal advice, and be accountable for doing so. So the privilege is needed only to prevent the disclosure of legal advice for a short window where disclosure of the advice would be adverse for the Crown in litigation or to protect its position.

The policy intentions of both the Public Records Act and OIA support legal advice being open access in the long-term.

The wording of s 9(2)(h) of the OIA, and s 7(2)(g) of the LGQIMA; that withholding is necessary to “maintain” LPP has the effect that, provided LPP has not been waived by the Crown, then that is the end of the matter and sufficient reason exists to withhold the advice. Rather, the approach should be on a case-by-case basis, to see whether maintaining LPP in the particular information under consideration protects the Crown from any real possibility of harm in the circumstances.

A suggested redraft of this ground might be:

(2) Subject to ... this section applies if .. the withholding of the information is necessary to – ...

(h) protect the Crown’s need to maintain legal professional privilege in the information ...

The Law Commission notes at para 7.41 that the LPP ground is often treated as if it were conclusive; we consider that the public interest test should continue to apply.

Q 28 - Amendment to the “information will soon be publicly available” ground

Archives New Zealand supports the proposed amendment. While specifying that the information will be available within “a very short time” does not add much precision to the time period, providing the additional criteria that immediate disclosure is unnecessary or administratively impractical, is useful context.

Chapter 8 The public interest test

Q 31, 32 - expression of the public interest

In an information management context, s 3 of the Public Records Act has, at least in part, articulated the public interest in the context of the creation, retention and public access to government information. Some of the s 3 matters may be relevant to an expression of the public interest in OI.

On balance, I do not favour a codified list of public interest factors in the OI context because I think the factors are likely to be too situation specific, and because satisfactory high level indications are already provided in sections 4 and 5 of the relevant OI legislation.

Q 34 - Confirmation that the public interest has been considered

I agree that the OI legislation should require agencies to confirm that they have considered the public interest when withholding information and also the public interest factors considered. I would expect that the creation of a more detailed record addressing the consideration of the public interest in the context of a request would aid the decision-maker's reasoning process.

Chapter 10 Processing Requests

Q 48 - Retention of the 20 working day time limit

Archives New Zealand supports the current time frames and notes that the 20 working day period provides a comparable timeframe for Archives New Zealand's archival reference requests.

Q 49 and 50 – Do you agree that there should be express provision that the information must be released as soon as practicable after a decision to release is made, and that there should be a requirement to acknowledge receipt of a request?

I do not favour adding to the statutory requirements, but rather, more guidelines and encouraging best practice.

Q 65 – Do you think that the OI legislation needs to make any further provisions for conditions on release of information?

As the OI legislation stands it is unclear whether conditions may be imposed for the release of information. It may be that organisations would be more willing to release information if it was clearer that conditions on reuse may be imposed.

Chapter 11 Complaints and Remedies

Q 71 and 72 - complaints to the Ombudsman by third parties

Archives New Zealand agrees that introducing a "reverse" right of complaint in cases where information has been released would likely have a negative impact on the functioning of the OI legislation. However, I do agree there is a case for a complaint by third parties who are not notified prior to the release of information where this impacts on their interests.

Chapter 15 Other issues – The interface with the Public Records Act 2005

Q108 - Interaction between the OI legislation and the Public Records Act

I reiterate from Q7 Archives New Zealand's suggestion to improve the interface between the OI legislation's access arrangements, and the Public Records Act's provisions for access to open access archives. Specific exclusion of "open access record", as defined in the Public Records Act, from the definition of official information would clarify that such information is not accessed under the OI legislation.

Archives New Zealand has not encountered any issues over the definition of “record” and of “information”. The difference in terminology highlights that not all information is in records and that an organisation can be asked to record information that is within the knowledge of the organisation. Consistent with this, a record is recorded information.

Concerning the comment about destruction of information, I am well aware of the significance of disposal decisions and appreciate that information authorised for destruction will, at some point in time, no longer be available for release under the OI legislation. Best efforts are made by Archives New Zealand staff to ensure that information that has long term value continues to be retained by agencies, and to be accessible.

On the other hand, the Chief Archivist’s disposal authorities are developed through a process that includes stakeholder and public input. Information as to which records may be destroyed, and which are destined for the public archives, is publicly available.

Whenever Archives New Zealand receives a complaint that unauthorised disposal of records has occurred, an investigation is undertaken. Archives New Zealand is developing an enforcement policy that starts with providing education and tools to assist agencies to achieve compliance with the Public Records Act. Action will be escalated and could result in court action in cases where non-compliance is systematic and no effort is made to improve information management.

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Jeremy Cauchi

From: Marion Sanson
Sent: Friday, 24 December 2010 2:23 p.m.
To: 'Margaret Thompson'
Subject: Response from Archives NZ to Law Commission Issues Paper on OI dec 2010 (A531417)
Attachments: ObjRef.obr

Hello Margaret,

Here is an electronic version of the submission from Archives NZ; the signed copy has been posted to the Commission today,

Regards

Marion Sanson

Legal and Policy Adviser

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