

LAW COMMISSION ISSUES PAPER - REVIEW OF OFFICIAL INFORMATION LEGISLATION

COMMERCE COMMISSION SUBMISSIONS 10 DECEMBER 2010

This paper has been prepared in response to the Issues Paper produced by the Law Commission office regarding the review of the OIA and LGOIMA. The Commission is principally involved with the OIA and so the comments in this response relate to the application of that Act rather than the LGOIMA.

Response to the Law Commission Issues Paper

2. Scope of the Acts

1) *Do you agree that the schedules to each Act should list every agency that they cover?*

Yes. The current position makes it difficult to ascertain who is covered by the Acts and this would remove that ambiguity.

2) *Do you agree that the schedules to the OIA and LGOIMA should be examined to eliminate anomalies and ensure that all relevant bodies are included?*

Yes – this would be an essential part of ensuring that 1) is an improvement on the current position.

3) *Do you agree that SOEs and other crown entity companies should remain within the scope of the OIA?*

Yes. This is consistent with the position of the Commission that all organizations carrying out public functions should be subject to the OIA.

4) *Do you agree that council controlled organizations should remain within the scope of the LGOIMA?*

The Commission is not involved with the operation of the LGOIMA and so does not comment on this aspect of the Issues Paper.

5) *Do you agree that the Parliamentary Counsel office should be brought within the scope of the OIA?*

Yes. When determining which organizations should be in the scope of the OIA, consideration could be given to a form of ‘public function’ test. The Act relates to the exercise of any function or power that is public in nature or affects the public interest.

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

Yes this would remove any current ambiguity regarding information that ought properly to be released in relation to the Courts.

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

The Commission does not consider that it is necessary to create specific categories of information that are excluded from the Acts. Rather it supports the continuation of the case by case approach to information disclosure with the release of information being dealt with in accordance with the exclusions provided for under the Acts.

3. Decision making

- 8) *Do you agree that the OIA and the LGOIMA should continue to be based on a case by case model?*

The Commission supports the case by case approach to information requests.

- 9) *Do you agree that more clarity and certainty about the official information withholding grounds can be gained through enhanced guidance rather than through prescriptive rules, redrafting the grounds or prescribing what information should be released in regulations?*

Yes. The Commission commented in the Law Commission survey that the Ombudsman's Office Practice Guidelines are helpful but not binding and it would be useful to have more examples of how different categories of information should be treated.

It would be helpful if the Ombudsman's guidelines and/or Parliament provided more guidance on recurring categories of request which would provide more predictable outcomes for routine information enquiries.

- 10) *Do you agree that there should be a compilation, analysis of, and commentary on, the casenotes of the Ombudsmen?*

Yes this would be a helpful guide to the likely treatment of various categories of information and the application of the statutory provisions.

- 11) *Do you agree there should be greater access to, and reliance on, the casenotes as precedents?*

Yes. Applying the Act on a case by case basis alone could lead to inconsistency in the application of the various provisions of the Act. A precedent system would be helpful to develop principles that guide the application of the Act, particularly in more routine cases.

- 12) *Do you agree there should be a reformulation of the guidelines with greater use of case examples?*

Yes. This would assist in developing an understanding of best practice when dealing with information requests. Whilst each request is specific to the information sought, published

common principles to be considered when similar categories of information are sought by others would be of assistance.

13) Do you agree there should be a dedicated and accessible official information website?

Yes. This is consistent with the object of making information and the ability to access it more accessible to interested parties.

4. Protecting good government

14) Do you agree that the 'good government' withholding grounds should be redrafted?

These grounds are still considered necessary and the Commission has already identified that it would be helpful to have guidance on the application of the current provisions. Redrafting for clarity is supported along with guidance through the cases before the Ombudsmen.

15) What are your views on the proposed reformulated provisions relating to the 'good government' grounds?

The Commission would support amendment of the Act along the lines provided for in paragraph 4.46 of the Issues Paper. It does not consider that the UK equivalent provision set out in paragraph 4.53 of the Issues Paper is sufficient to adequately reflect the various grounds currently covered by our provisions 9(2)(f) and (g) of the OIA. We have not commented on the equivalent LGOIMA provision.

5. Protecting commercial interests

16) Do you think the commercial withholding ground should continue to be confined to situations where the purpose is to make a profit?

We agree that applying a broader interpretation of 'commercial' than that currently applied by the Ombudsmen may increase the categories of information bodies seek to withhold. Nevertheless the realities of commercial activity, particularly that engaged in by public bodies are such that profit may not always be the dominant motive. The Commission is in favour of recognizing that activities can be engaged in on a commercial scale even if their benefits cannot be measured in monetary terms. It considers that the application of the commercial activity ground should be broader than the requisite of a purpose of making a profit.

17) If you favour a broader interpretation, should there be statutory amendment to clarify when the commercial withholding ground applies?

Yes. This can best be achieved by including a definition of commercial activity in the interpretation section of the Act. Without making specific statutory provision for a broader definition, public bodies are unlikely to change the current narrow approach.

18) Do you think the trade secrets and confidentiality withholding grounds should be amended for clarification?

We agree that the Law Commission proposal to provide detailed guidelines with case law examples would be beneficial and would adequately address any current misunderstandings relating to trade secrets and confidentiality.

19) Do you agree that the official information legislation should continue to apply to information in which intellectual property is held by a third party?

Yes.

20) Do you have any comment on the application of the OIA to research work, particularly that commissioned by third parties?

The Commission recognizes the particular issues that arise with this ground but agrees with the Law Commission that there ought not to be an absolute veto on the production of such information.

21) Do you think the public interest factors relevant to disclosure of commercial information should be included in guidelines or in the legislation?

The Commission supports the production of guidelines to assist in the application of this ground to particular information requests. Inclusion in the legislation gives rise to a risk of rigidity and obsolescence over time that can be minimized by the use of guidelines.

22) Do you experience any other problems with the commercial withholding grounds?

No.

6. Protecting privacy

23) Which option do you support for improving the privacy withholding ground:

Option 1 – guidance only, or;

Option 2 – an ‘unreasonable disclosure of information’ amendment while retaining the public interest balancing test, or;

Option 3 – an amendment to align with principle 11 of the Privacy Act 1993 while retaining the public interest test, or;

Option 4 – any other solutions?

The Commission is supportive of there being more guidance and examples provided to agencies in accordance with Option 1 but it would also support an unreasonable disclosure amendment as described in Option 2. An amendment along those lines is consistent with the kind of determination that an agency should make anyway but codifies that process so that the need to consider the implications of access to personal information is at the forefront of the mind of the relevant agency when it considers an information request. This may assist in ensuring that there is proper consideration of the privacy/OIA interface when such requests occur.

24) Do you think there should be amendments to the Acts in relation to the privacy interest of:

a. Deceased persons?

Yes – there is still a safeguard of countervailing public interest factors but this protection ought to be available given the information gathering powers available to public bodies.

b. Children?

The Commission does not commonly deal with information requests relating to children and so does not comment on this aspect of the Issues Paper.

25) *Do you have any views on public sector agencies using the OIA to gather personal information about individuals?*

Whilst such an approach may be convenient any information release should comply with the Privacy Act to ensure that the public interest in maintaining trust in public sector agencies is preserved.

7. Other withholding grounds

26) *Do you agree that no withholding grounds should be moved between the conclusive and non-conclusive withholding provisions in either the OIA or LGOIMA?*

Yes. The potential for ambiguity recognized in the Issues paper can be satisfactorily addressed through more specific and detailed guidance as contemplated.

27) *Do you think there should be new withholding grounds to cover:*

a. Harassment;

No. We consider that section 9(2) (g) provides protection in this context and again guidance from the Ombudsmen's Office could assist in the application of this section.

b. The protection of cultural values;

No. At this stage we see that protection via the confidentiality and privacy grounds addresses this issue and we are not aware of an instance where this has been tested and proved inadequate.

c. Anything else?

No.

28) *Do you agree that the 'will soon be publicly available' ground should be amended as proposed?*

Yes. We anticipate that this would be interpreted to require the release to be imminent and so would address the concern about the provision being used as a delay tactic.

29) *Do you agree that there should be a new non-conclusive withholding ground for information supplied in the course of an investigation?*

Yes. This should not change the application of section 6(c) provided it is being applied correctly.

30) *Do you have any comments on, or suggestions about, the 'maintenance of law' conclusive withholding ground?*

We agree that it is not necessary to amend the section 6(c) ground in the event that a new withholding ground is created relating to information supplied in the course of an investigation.

8. The public interest test

31) Do you agree that the Acts should not include a codified list of public interest factors? If you disagree, what public interest factors do you suggest should be included?

Yes for the reasons described in paragraph 8.14 of the Issues Paper. It is important for the concept to move with the times and that can occur more easily without prescriptive statutory criteria.

32) Can you suggest any statutory amendment which would clarify what 'public interest' means and how it should be applied?

For the reasons already referred to we do not favour a statutory definition of public interest. There is ample judicial comment on the concept and that should be allowed to develop over time. We see merit in there being more guidance and examples applying the test from the Ombudsmen.

33) Do you think the public interest test should be contained in a distinct and separate provision?

Yes – this does elevate the visibility of the public interest weighing up requirement which should cause those dealing with information requests to consciously turn their minds to that part of the evaluation exercise.

34) Do you think the Acts should include a requirement for agencies to confirm that they have considered the public interest when withholding information and also indicate what public interest grounds they considered?

No – we do not see that a statutory requirement to state this is likely to materially change the substance of behavior when analyzing an information request.

9. Requests – some problems

35) Do you agree that the phrase 'due particularity' should be redrafted in more detail to make it clear?

The recommended form contained in paragraph 9.15 of the Issues Paper is acceptable but the Commission does not have a strong view on whether an amendment is necessary. Best practice when receiving a request that lacks particularity is to contact the requester and work with them to refine their request in any event.

36) Do you agree that agencies should be required to consult with requesters in the case of requests for large amounts of information?

Again this should not require a statutory amendment – consultation is the logical step in such circumstances in any event.

37) *Do you agree the Acts should clarify that the 20 working day limit for requests delayed by lack of particularity should start when the request has been accepted?*

This is something that should be made clear to the requester by the relevant agency at the outset of their discussions when the request is in the process of being refined. A statutory amendment would be acceptable and may assist requesters.

38) *Do you agree that substantial time spent in 'review' and 'assessment' of material should be taken into account in assessing whether material can be released, and that the Acts should be amended to make that clear?*

Yes.

39) *Do you agree that 'substantial' should be defined with reference to the size and resources of the agency considering the request?*

Yes. This recognizes the realities of the range of agencies that will be have obligations under the Acts.

40) *Do you have any other ideas about reasonable ways to deal with requests that require a substantial amount of time to process?*

No.

41) *Do you agree it should be clarified that the past conduct of a requester can be taken into account in assessing whether a request is vexatious?*

Yes.

42) *Do you agree that the term 'vexatious' should be defined in the Acts to include an element of bad faith?*

This should not be necessary. The term should be interpreted in accordance with cases discussing and developing its application – adding an express element of bad faith may make the test more difficult.

43) *Do you agree that an agency should be able to decline a request for information if the same or substantially the same information has been provided, or refused, to that requester in the past?*

Yes if the information has already been provided, not in itself if it has been declined. Each information request should be considered afresh and if there are repeated requests these may become unreasonable to the point of meeting the vexatious ground. A request that has been refused earlier may be acceptable now, e.g. a request for information during an investigation versus a request after the investigation has been completed.

44) *Do you think that provision should be made for an agency to declare a requester 'vexatious'? If so, how should such a system operate?*

No. Use of the vexatious ground for refusing information should be sufficient. There is no universal body that would administer records of vexatious requesters and so each agency would be required to keep its own register of such requesters. The ability to request official information is a fundamental right that should be available to all citizens and we do not consider a bar on making requests to all official agencies to be desirable.

45) Do you agree that, as at present, requesters should not be required to state the purpose for which they are requesting official information nor to provide their real name?

Yes.

46) Do you agree the Acts should state requests can be oral or in writing, and that the requests do not need to refer to the relevant official information legislation?

Yes this could be of assistance to some requesters. This should not change the way that agencies deal with others who ask for information but are not aware that their request would be treated as an OIA request.

47) Do you agree that more accessible guidelines should be available for requesters?

Yes. Links to the Ombudsmen's guidelines could also be made available through websites of agencies subject to the Acts.

10. Processing requests

48) Do you agree the 20 working day time limit should be retained for making a decision?

Yes.

49) Do you agree that there should be express provision that the information must be released as soon as reasonably practicable after a decision to release is made?

Yes. This also makes it clear to requesters that the release of the information is dealt with separately from the decision to release.

50) Do you agree that, as at present, there should be no statutory requirement to acknowledge receipt of an official information request but this should be encouraged as best practice?

Yes. A statutory provision seems unnecessarily prescriptive.

51) Do you agree that 'complexity of the material being sought' should be a ground for extending the response time limit?

Yes.

52) Do you agree there is no need for an express power to extend the response time limit by agreement?

Yes.

53) *Do you agree the maximum extension time should continue to be flexible without a specific time limit set out in statute?*

Yes.

54) *Do you agree that handling urgent requests should continue to be dealt with by Ombudsmen guidelines and there is no need for further statutory provision?*

Yes – we agree it would be difficult to set procedures for categorizing the relative urgency of requests and how they ought to be dealt with. The guidelines allow flexibility in the approach to this aspect of the Acts.

55) *Do you agree there should be clearer guidelines about consultation with ministerial offices?*

Yes – this would be beneficial for agencies and information requesters.

56) *Do you agree there should not be any mandatory requirement to consult with third parties?*

Yes. To do otherwise would place an unjustified burden on agencies that ought to be able to focus on the analysis of the information and its suitability for release. In practice consultation with third parties will occur during this phase anyway.

57) *Do you agree there should be a requirement to give prior notice of release where there are significant third party interests at stake?*

Yes. The information release could have a significant impact on third parties and they should have the opportunity to prepare themselves for that.

58) *How long do you think the notice to third parties should be?*

We agree that the 5 working day period recommended would be suitable.

59) *Do you agree there should be provision in the legislation to allow for partial transfers?*

Yes.

60) *Do you agree there is no need for further statutory provisions about transfer to ministers?*

Yes provided that further guidelines are developed regarding consultation between agencies and Ministers.

61) *Do you have any other comment about the transfer of requests to ministers?*

No.

62) Do you think that whether information is released in electronic form should continue to depend on the preference of the requester?

Yes. Requesters should not be precluded from obtaining official information if they do not have the ability to receive it in electronic form.

63) Do you think the Acts should make specific provision for metadata, information in backup systems and information inaccessible without specialist expertise?

The Commission does not currently have a view on this question but notes that if provision is to be made it should be specific to these categories of information to avoid potential misapplication of any general statement relating to information inaccessible without specialist expertise.

64) Should hard copy costs ever be recoverable if requesters select hard copy over electronic supply of the information?

Yes.

65) Do you think that the official information legislation needs to make any further provision for agencies to place conditions on the re-use of information, or are the current provisions sufficient?

No.

66) Do you agree there should be regulations laying down a clear charging framework for both the OIA and the LGOIMA?

Yes. Currently charging for information can be an arbitrary decision and so requesters would not be clear on whether they will be required to pay for the information they seek. Clear guidelines would put this beyond question and would give agencies a consistent framework to apply in any given case.

67) Do you have any comment as to what the framework should be and who should be responsible for recommending it?

We consider that the charging framework should be in the form of regulations which would apply equally to the OIA and LGOIMA.

68) Do you agree that the charging regime should also apply to political party requests for official information?

Yes. Given that the research indicates these are a source of many unwieldy information requests we see no compelling reason why political agencies should be treated differently to other categories of requester.

11. Complaints and remedies

69) Do you agree that both the OIA and the LGOIMA should set out the full procedures followed by the Ombudsmen in reviewing complaints?

Yes. Requesters have varying degrees of understanding about the process and it would be preferable to put that process beyond doubt.

70) Do you think the Acts provide sufficiently at present for failure by agencies to respond appropriately to urgent requests?

Yes. It should not be necessary to make specific provision in this regard.

71) Do you agree with the existing situation where a person affected by the release of their information under the OIA or LGOIMA cannot complain to the Ombudsman?

Yes. To provide otherwise would be unjustifiably onerous on the relevant agency and may serve to discourage the transparency and openness that the Acts are designed to encourage.

72) Do you agree there should be grounds to complain to the Ombudsmen if sufficient notice of release is not given to third parties when their interests are at stake?

Yes.

73) Do you agree that a transfer complaint ground should be added to the OIA and LGOIMA?

Yes – this would encourage best practice.

74) Do you think there should be any changes to the processes the Ombudsmen follow in investigating complaints?

No. The current approach is flexible and will therefore continue to be appropriate over time.

75) Do you agree that the Ombudsmen should be given a final power of decision when determining an official information request?

Yes.

76) Do you agree that the veto power exercisable by Order in Council through the Cabinet in the OIA should be removed?

No. The power was used sparingly prior to 1987 when it lay with an individual minister and has not been used since that time when it has been available to the Governor General by Order-in-Council. It is appropriate from a balance of power perspective that the Executive retain the power to override a release decision.

77) Do you agree that the veto power exercisable by a local authority in the LGOIMA should be removed?

We do not express a view on this given that we are not generally involved in the operation of the LGOIMA.

78) *If you believe the veto power should be retained for the OIA and LGOIMA, do you have any comment or suggestions about its operation?*

No comment.

79) *Do you agree that judicial review is an appropriate safeguard in relation to the Ombudsmen's recommendations and there is no need to introduce a statutory right of appeal to the Court?*

Yes.

80) *Do you agree that the public duty to comply with an Ombudsmen's decision should be enforceable by the Solicitor General?*

Yes.

81) *Do you agree that the complaints process for Part 3 and 4 official information should be aligned with the complaints process under part 2?*

Yes – this encourages consistency in approach and therefore certainty for all parties in terms of the process that will apply to any complaints related to official information requests.

82) *Do you agree that, rather than financial or penal sanctions, the Ombudsmen should have express statutory power to publicly draw attention to the conduct of an agency?*

Yes. This would be a low cost efficient and effective deterrent for any agency.

83) *Should there be any further enforcement powers, such as exist in the United Kingdom?*

No. The power to publicly draw attention to the agency is a strong one in itself.

12. Proactive disclosure

84) *Do you agree that the OIA should require each agency to publish on its website the information currently specified in section 20 of the OIA?*

Yes. This promotes the objective and purposes of the OIA.

85) *Do you think there should be any further mandatory categories of information subject to a proactive disclosure requirement in the OIA or LGOIMA?*

No. Such a requirement is potentially unreasonably onerous and would require comprehensive definitions of categories of information that would have to be disclosed.

86) *Do you agree that the OIA and the LGOIMA should require agencies to take all reasonably practicable steps to proactively release official information?*

Yes. The 'all reasonable steps' proviso arguably takes account of the varying resources available to official agencies.

87) *Should such a requirement apply to all central and local agencies covered by the OI legislation?*

Arguably such a requirement could be unreasonably onerous for small entities. From an OIA perspective we believe it should be a requirement for government departments and Crown entities. We do not comment on the obligations to be imposed on local authorities.

88) *What contingent provision should the legislation make in case the 'reasonably practicable steps' provision proves inadequate? For example, should there be a statutory review or regulation making powers relating to proactive release of information?*

A statutory review after three years would be consistent with regular reviews of the operation of these Acts in any event and we see this as an appropriate period for review of the relevant statutory provision.

89) *Do you think agencies should be required to have explicit publication schemes for the information they hold, as in other jurisdictions?*

We consider it preferable to trial a statutory provision placing a duty on agencies to take all reasonably practicable steps before moving to the more onerous publication scheme option. This could be reviewed in three years time when the review proposed under paragraph 88 takes place.

90) *Do you agree that disclosure logs should not be mandatory?*

Yes.

91) *Do you agree that section 48 of the OIA and section 41 of the LGOIMA which protect agencies from court proceedings should not apply to proactive release?*

Yes. The proactive release of information is a different category of release to that involving a specific request. Agencies should turn their minds to the legal consequences of any release that they voluntarily publish.

13. Oversight and other functions

92) *Do you agree that the OIA and the LGOIMA should expressly include a function of providing advice and guidance to agencies and requesters?*

Yes this is critical to the proper functioning of the Acts.

93) *Do you agree that the OIA and the LGOIMA should include a function of promoting awareness and understanding and encouraging education and training?*

Yes although this is likely to require further resourcing.

94) *Do you agree that an oversight agency should be required to monitor the operation of the OIA and the LGOIMA, collect statistics on use, and report findings to parliament annually?*

Yes. Given the need for regular review of legislation of this kind, a monitoring body would make that review simpler and the impact of changes would be more easily measured.

95) *Do you agree that agencies should be required to submit statistics relating to official information requests to the oversight body so as to facilitate this monitoring function?*

Yes this would be an essential part of ensuring that the monitoring body can function effectively and in a cost efficient manner.

96) *Do you agree that an explicit audit function does not need to be included in the OIA or the LGOIMA?*

Yes.

97) *Do you agree that the OIA and the LGOIMA should enact an oversight function which includes monitoring the operation of the Acts, a policy function, a review function, and a promotion function?*

Yes. Given that it will have responsibility for monitoring the operation of the Acts it would be best placed to undertake the other functions and this should be a more resource efficient method of undertaking these functions.

98) *Do you agree that the Ombudsmen should continue to receive and investigate complaints under the OIA and the LGOIMA?*

Yes. The Ombudsman's Office has built up significant knowledge and experience in dealing with this legislation and it makes sense to retain and develop that further within that office.

99) *Do you agree that the Ombudsmen should be responsible for the provision of general guidance and advice?*

Yes. Again it is the most logical choice given its comprehensive experience in the field.

100) *What agency should be responsible for promoting awareness and understanding to the OIA and the LGOIMA and arranging for programmes of education and training for agencies subject to the Acts?*

If an Information Commissioner's office was created then it would be consistent with how these functions are dealt with in comparable jurisdictions to use that office. We see this as appropriate in the New Zealand context as well.

101) *What agency should be responsible of administrative oversight of the OIA and the LGOIMA? What should be included in the oversight functions?*

We agree with the proposition that the State Services Commission be responsible for the oversight of the OIA. We do not express a view regarding oversight of the LGOIMA.

102) *Do you think an Information Commissioner office should be established in New Zealand? If so, what should its functions be?*

Yes. See question 99. We agree that it would be appropriate for this office to oversee the OIA.

103) *If you think an Information Commissioner Office should be established, should it be standalone or part of another agency?*

We consider that such an office should be standalone to ensure independence and greater ability to speak out on official information matters.

14. Local Government Official Information and Meetings Act 1987

Questions 104 and 105 have not been addressed here.

15. Other issues

106) *Do you agree that the official information legislation should be redrafted and re-enacted?*

Yes. The current structure of the OIA arguably contributes to misunderstanding and redrafting, and this would be a good opportunity to address those issues.

107) *Do you agree that the OIA and the LGOIMA should remain as separate Acts?*

Yes. The subject matter is quite distinct and official agencies involved with the two Acts are usually subject to one or the other rather than both.

108) *Do you have any comment on the interaction between the PRA and the OI legislation? Are any statutory amendments required in your view?*

No comment.

