DEPARTMENT
of the PRIME MINISTER
and CABINET

24 August 2012

By email

Alex Harris
Email: fyi-request-422-60fca97d@requests.fyi.org.nz

Dear Ms Harris

Information request – submission on Law Commission's review of the OIA

1 On 31 July 2012 the Department of the Prime Minister and Cabinet ("**DPMC**") received the following request from you under the Official Information Act 1982 ("**OIA**"):

> *Recently your organisation submitted to the Law Commission's review of the Official Information Act. I would like to request the following information under the OIA:*
>
> - *a copy of your submission*
> - *all drafts, advice, and internal communications (including emails) relating to that submission.*

2 You might be aware that the Law Commission recently released all the submissions it received as part of the OIA review. The submissions responded to the Commission's issues paper on the OIA and date from 2010. You can find the submissions on the Commission's website at http://www.lawcom.govt.nz/project/review-official-information-act-1982-and-local-government-official-information-act-1987.

3 DPMC did not make a submission on the Law Commission's OIA issues paper. In 2010 DPMC did, however, provide the Commission with some views on the OIA review. These views were contained in letters dated 4 March 2010 and 27 August 2010 from the Secretary of the Cabinet and in a letter dated 7 September 2010 from the Chief Executive of DPMC. Please find **enclosed** copies of these letters.

4 Some information in the letters has been withheld. I have done so under section 9(2)(a) of the OIA, to protect the privacy of natural persons. No public interest in releasing the withheld information has been identified that would be sufficient to override the reasons for withholding it.

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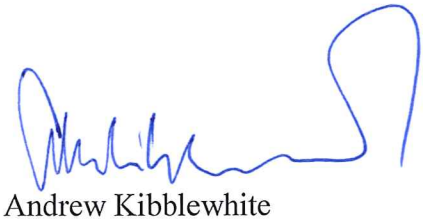
5 Please note that you have the right to complain about this decision to the Office of the Ombudsmen under section 28(3) of the OIA.

Yours sincerely



Andrew Kibblewhite
Chief Executive

4 March 2010

Emeritus Professor John Burrows QC
Law Commissioner
Law Commission
Level 19
171 Featherston Street
Wellington 6011
New Zealand

Dear Professor Burrows

Response to Law Commission review of official information

1 Thank you for the opportunity to provide input into this project. The Cabinet Office is a business unit of the Department of the Prime Minister and Cabinet tasked with providing secretariat support to the Cabinet and Cabinet Committees and constitutional advice and support to the Governor-General and Prime Minister. This letter has been discussed within the wider Department.

Applying the Act

2 The Cabinet Office is comfortable with the case-by-case consideration of requests and with the two-stage test. While the case-by-case method increases the risk of unpredictability across responses, and is more time-intensive for officials responding to requests, we acknowledge the benefits of the approach, including assessing each request or complaint on its merits. We think, however, that the increasing willingness of the Office of the Ombudsman to agree that certain principles will prima facie apply to particular kinds of information is very helpful.

Reasons for withholding information

3 Where the Cabinet Office withholds information under the Act, it is usually done so under one or more of the following grounds:

3.1 under section 9(2)(f)(i) of the Act, where to do so is necessary to maintain the constitutional convention for the time being which protects the confidentiality of communications with the Sovereign or the Sovereign's representative;

3.2 under section 9(2)(f)(ii) of the Act where to do so is necessary to maintain the constitutional convention for the time being which protects collective and individual ministerial responsibility;

3.3 under section 9(2)(f)(iii) of the Act where to do so is necessary to maintain the constitutional convention for the time being which protects the political neutrality of officials;

3.4 under section 9(2)(f)(iv) of the Act, where to do so is necessary to maintain the constitutional convention for the time being which protects the confidentiality of advice tendered by Ministers of the Crown and officials; and

3.5 under section 9(2)(g)(i) of the Act, where to do so is necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between Ministers of the Crown and officials.

3.6 under section 9(2)(a) of the Act, where to do so is necessary to protect the privacy of natural persons;

3.7 under section 9(2)(ba)(i) of the Act, where to do so is necessary to protect information which is subject to an obligation of confidence in circumstances where releasing the information would be likely to prejudice the supply of similar information and where it is in the public interest that such information continue to be supplied;

4 We note, however, that the "maintenance of good government" (or a similar phrase) is not a stand-alone ground for withholding information. This value is protected only to the extent that the information at issue falls within categories such as "advice" and "opinions". The Cabinet Office produces a lot of confidential information that does not fit neatly into these categories, such as Cabinet agendas, the Legislation Programme, etc. The premature release of these kinds of documents would certainly undermine good government. We have always managed to withhold these documents, but it has not always been straightforward. To address this, one option would be to add a further ground of "good government" or "sound administration" in the Act.

5 We also consider that section 9(2)(f)(i) of the Act, which protects the confidentiality of communications with the Sovereign or the Sovereign's representative, is drafted in rather a narrow way. The Cabinet Office generates internal material, notes to the Prime Minister, etc, regarding the Sovereign and her representative. We have always withheld that other information, but I think the drafting should more expressly cover it.

Processing issues

6 There are two connected problems resulting from developments in information technology.

7 The first is that even with quite a specific request, large amounts of information can be retrieved relatively quickly from a department's databases. The value of the information can be quite low (because of the trivial nature of many emails, repetition of information, etc). It is, however, very time-consuming to assess.

8 The second issue concerns fishing expeditions. Developments in information technology mean that large amounts of information can be quickly retrieved from a department's databases (for example, in response to a request for "all briefing papers to the Minister in the last year"). Assessing that information, however, may well be a significant, time-consuming, task (often involving a number of staff).

9 In my view, the original intention of the Danks Report that broad requests or "fishing expeditions" would not be facilitated is not adequately reflected in the Act. On the contrary, we have heard the view expressed that developments in information technology, combined with the policy intent expressed section 4(a) of the Act (which contemplates increasing progressively the availability of information in New Zealand, in order to enhance respect for the law and to promote the good government of New Zealand), means that information requested in "fishing expeditions" can and should be assessed and released.

10 I think that this approach places undue emphasis on the principle of the progressive availability of information, without an equivalent focus on the rider "and thereby to enhance respect for the law and to promote the good government of New Zealand." Tying up policy staff for days reviewing reams of material is not necessarily the best use of taxpayers' money. The Danks Committee, and the Act itself, recognise that there will always need to be a balancing exercise. In some areas, such as fishing expeditions, I think we have reached the "tipping point", in terms of cost/benefit.

11 One possible response to this issue, which has been suggested to us, is to proactively release information – for example, online. That way, it already publicly available when requests are received. There are, however, two problems with this solution. First, it means that advice is inevitably written for a public audience rather than the proper audience – the Minister (or Cabinet). Second, advice differs in its sensitivity over time. A decision not to release a briefing note proactively might need to be revisited after one month, or six months, or a year – it would depend in each case.

12 Another possible policy response would be to allow the refusal of requests that are essentially fishing expeditions, either because they are insufficiently particular, or (by clarifying that section 18(f) of the Act includes the time taken to assess material requested) because they would take too much time to assess. In the case of the latter option, it would be useful to determine whether the concept of "substantial collation, research or assessment time" is absolute or relative to the extent of the resources a particular department may have and the competing demands on staff time. In a very small office such as ours, such requests can use up a great deal of our available resources.

13 Another possible response to the increasing number and scope of requests, and (given changes in ICT) the increasing amount of material to assess, is the charging regime. As I understand it, agencies apply different approaches to the charging regime. It would be useful to clarify the circumstances in which charging is appropriate. It would also be useful to clarify whether the existing convention that MPs and political parties not be charged for access to government information can continue to be accommodated.

Possible sanctions / role of the Ombudsmen

14 We enjoy a constructive relationship with the Ombudsmen, and find their Office fair and reasonable in administering the regime. We support the educative role of the Ombudsmen in running training sessions about the operation of the official information regime. We note that this role is not an explicit statutory function, and that the Office has assumed that function in order to fill a gap. Consideration should be given as to whether this educative role should be given a statutory basis, as, for example, is the case with the Privacy Commissioner. We do not support the inclusion of sanctions in any reformed regime.

15 We appreciate the opportunity to comment and would be happy to discuss the issues raised further. Please contact , Deputy Secretary of the Cabinet, on in the first instance.

Yours sincerely

Rebecca Kitteridge
Secretary of the Cabinet

CABINET OFFICE

27 August 2010

Professor John Burrows, QC
Law Commissioner
PO Box 2590
Wellington 6140
New Zealand

Dear Professor Burrows

Review of official information legislation – draft issues paper

1 Thank you for providing the Cabinet Office with the opportunity to comment on the Law Commission's draft issues paper on the review of official information legislation. We think that the issues paper is an extremely helpful articulation of the issues involved, and commend the Law Commission for its thoroughness and balance.

2 We intend to provide more substantive comments in response to the paper when it is published. In relation to the draft, however, we have two points to make. The first concerns the discussion of substantial collation and research, and the second concerns the Cabinet veto.

Substantial collation and research

3 The draft issues paper proposes that the Official Information Act should be amended to include "review" and "assessment" alongside "substantial collation and research" in section 18(f). We agree with that proposal. Our concern is with the underlying rationale for the proposed change, as set out in the draft issues paper. The paper implies that "collation" and "research" are distinct concepts from "review" and "assessment", and that section 18(f) needs to be broadened to include the concepts of review and assessment.

4 We are aware that the Office of the Ombudsmen has traditionally taken a narrow interpretation of section 18(f), and that many have accepted that interpretation as an effective "ruling". We would, however, point out that that view is not universally accepted. We have always maintained that the broader activities of review and assessment can and should be brought within the phrase "collation and research". We are currently disputing this very point with the Office of the Ombudsmen, in response to an OIA complaint.

5 We are worried that your issues paper will be seen as endorsing a particular interpretation of section 18(f), as it is currently drafted. If you agree that the phrase "collation and research" is open to interpretation, we would prefer your recommendation to be phrased as being necessary to clarify the interpretation and intent of section 18(f).

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The Cabinet veto

6 The second point relates to your consideration of the Cabinet veto. It is our strong view that the existence of the veto power, even as a latent power, continues to serve an essential function in balancing the powers of the executive and the Ombudsmen and promoting a sense of comity between those parts of government.

7 The veto may well yet be used if the Cabinet determines it is necessary in the public interest to do so, and the Ombudsmen are aware of that fact. As your report notes, the executive consistently complies with recommendations from the Ombudsmen. In some cases, however, that is only because the Ombudsmen have moderated more extreme positions in circumstances where the veto would otherwise have been deployed.

8 The implicit knowledge of the veto's existence is a useful counterbalance and check on the otherwise unaccountable nature of the powers possessed by the Ombudsmen. Cabinet Ministers, in contrast, accountable to Parliament and to the public, have real cause for pause before taking the dramatic, controversial, and (if judicially reviewed) expensive step that an exercise of the veto would constitute.

9 The Cabinet, however, is precisely the body with the democratic mandate and institutional competence to fully balance the public interest in such circumstances.

10 Please contact me if I can speak further to either of these points.

Yours sincerely

Rebecca Kitteridge

Rebecca Kitteridge
Secretary of the Cabinet

DEPARTMENT
of the PRIME MINISTER
and CABINET

7 September 2010

Emeritus Professor John Burrows QC
Law Commissioner
Law Commission
PO Box 2590
Wellington 6011

Dear Professor Burrows

Law Commission Review of Official Information Legislation

Thank you for the opportunity to comment on the Law Commission's draft issues paper on the review of official information legislation. This is an important area of the law, and I welcome the Commission's comprehensive work.

I endorse the comments made by the Cabinet Office in its letter to you dated 27 August 2010, and reiterate the concerns raised in relation to the proposal to remove the Cabinet veto of Ombudsman decisions. The draft issues paper flags the issue of whether removal of the veto would upset the equilibrium of the official information decision making system. In my view, it certainly would. The veto provides an essential check and balance on the power of the Ombudsmen and is an important, albeit subtle, influence on decision making in the official information context. The absence of such a check and balance could have perverse and unforeseen consequences. For example, it is not known whether removal of the veto would influence the subjective judgements that are made in relation to what documents are within the scope of a request.

The fact the veto has never been used suggests it is operating as it should, and that no change is necessary. In the absence of any real problems with the manner in which the veto has been operating, and uncertainty as to the effect of such a change, the status quo should be maintained.

I look forward to hearing of the Commission's progress in relation to this project.

Yours sincerely

Maarten Wevers
Chief Executive

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