Pam Pye

From: Pam Pye
Sent: Monday, 17 January 2011 2:54 p.m.
To: OfficialInfo@lawcom.govt.nz
Cc: Warren Parker
Subject: Submission on Issues Paper 18 - The Public's Right to Know
Attachments: Law Commission OIA Submission due 10 Dec 2010.doc

Attached is a submission on the Official Information Act from Landcare Research in response to your request for comments from providers of information under the Act.

We are sorry that we were unable to get this to you by the 10 December 2010 deadline, but understand from a Radio NZ National item that you are accepting late submissions and we hope it will be of use in your review.

Please contact me if you have any queries or require clarification on any points
Kind regards, Pam

Pamela Pye
Legal Counsel, Landcare Research
Gerald Street, P O Box Lincoln 7640
DDI: 03 321 9856
Mobile: 0274 313 116

LAW COMMISSION ISSUES PAPER 18: THE PUBLIC'S RIGHT TO KNOW

Submission by:

Landcare Research New Zealand Limited (Crown Research Institute)

Contact:

Pamela Pye (pyep@landcareresearch.co.nz DDI 03 321 9856)

ISSUES PAPER - QUESTIONS

Chapter 2

Q1 Do you agree that the Schedules to each Act (OIA and the LGOIMA) should list every agency that they cover? Yes – this should be clear without the need to refer to other Acts.

Q2 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 – should be done in conjunction with Q1 action.

Q3 Do you agree that SOEs and other crown entity companies should remain within the scope of the OIA? Yes - they should for information arising from any government/publicly funded activities. Commercial or other activities involving third party intellectual property should be able to be excluded under the commercial withholding grounds. It seems unclear whether Crown entity subsidiaries with less than 50% Crown ownership are covered by the Act or not.

Q4 Do you agree that council controlled organisations should remain within the scope of the LGOIMA? Yes – if more than 50% council owned.

Q5 Do you agree that the Parliamentary Counsel Office should be brought within the scope of the OIA? No views

Q6 Do you agree that the OIA should specify what information relating to the operation of the Courts is covered by the Act? Yes – or what is excluded (eg, judicial functions).

Q7 Should any further categories of information be expressly excluded from the OIA and the LGOIMA? No views

Chapter 3

Q8 Do you agree that the OIA and the LGOIMA should continue to be based on a case-by-case model? Yes – difficulty in specifying categories to cover range of information held by agencies probably outweighs uncertainties and problems associated with case-by-case basis.

Q9 Do you agree that more clarity and more 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 – enhanced guidance from a website/database with sophisticated search facilities would be preferable to presciptive approach because of difficulty in drafting latter to cover all eventualities.

Q10 Do you agree there should be a compilation, analysis of, and commentary on, the casenotes of the Ombudsmen? Yes – that would be helpful.

Q11 Do you agree there should be greater access to, and reliance on, the casenotes as precedents? Yes – it should assist providers with decision-making and lead to more consistency for requesters.

Q12 Do you agree there should be a reformulation of the guidelines with greater use of case examples? Yes – perhaps with FAQs (eg, Department of Labour Employment Relations Service).

Q13 Do you agree there should be a dedicated and accessible official information website? While this would be preferable to having guidance spread among several agencies' websites as at present, it would need to be "owned" and maintained by one agency which had overall responsibility for the Act (eg, SSC).

Chapter 4

Q14 Do you agree that the "good government" withholding grounds should be redrafted? As a Crown Research Institute, we would not like to see non-core agencies excluded from this provision as raised in 4.38, as there may be instances where we advise Ministers or core government agencies on sensitive matters. We agree that "advice" should be added to "opinion" as suggested in 4.42, as we do not believe there is any clear distinction between the two.

Q15 What are your views on the proposed reformulated provisions relating to the "good government" grounds? Although simplicity of UK Act alternative is attractive, we agree that more detail as indicated in 4.46 would be easier to administer.

Chapter 5

Q16 Do you think the commercial withholding ground should continue to be confined to situations where the purpose is to make a profit? No – under the Crown Research Institutes Act we are required to maintain financial viability by achieving an agreed rate of return but need not maximise profit. The UK and Ontario definitions in 5.26 and 5.27 reflect a more realistic interpretation of the term "commercial" for agencies such as ours

Q17 If you favour a broader interpretation, should there be a statutory amendment to clarify when the commercial withholding ground applies? As the profit motive pre-requisite has arisen from the Ombudsmen's practice guidelines, not the legislation, a determination from the Chief Ombudsman that "commercial" may be interpreted more broadly may be all that is required

Q18 Do you think the trade secrets and confidentiality withholding grounds should be amended for clarification? Yes – These are a common form of IP and it is essential that CRIs, in particular, can contract with third parties (including government departments) on the basis that ownership and integrity of any IP arising from the contract is guaranteed – without such protection proprietary and other benefits to the third party could be lost. In fact, CRIs are often required to give the third party an indemnity that any IP arising from the services will be unencumbered. In many cases CRIs undertake relatively little genuine "public good" research. Also, we consider that s9(2)(ba)(i) should apply to the agency's trade secrets and confidential information as well as that of third parties.

Q19 Do you agree that the official information legislation should continue to apply to information in which intellectual property is held by a third party? No – the issue highlighted in Q18 could be addressed by excluding such IP from definition of official information.

Q20 Do you have any comment on the application of the OIA to research work, particularly that commissioned by third parties? Application of the Act should be dependent on where ownership of the IP lies. Also see Q18.

Q21 Do you think the public interest factors relevant to disclosure of commercial information should be included in guidelines or in the legislation? No – as with Q8, any such definition would be likely to be too restrictive. Public interest is context-specific and, beyond obvious factors like national security, public health and safety, typically subjective. Thus it would be very difficult to usefully prescribe in guidelines.

Q22 Do you experience any other problems with the commercial withholding grounds? Our main concern involves preserving the confidentiality of information provided by other parties in commercial contracts. Even where information is withheld, the context within which this is set can disclose useful information to competitors and thus harm commercial relationships.

Chapter 6 We express no views on this chapter as we very rarely use this ground

Q23 Which option do you support for improving the privacy withholding ground:

Option1 – 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?

Q24 Do you think there should be amendments to the Acts in relation to the privacy interests of:

(a) deceased persons?

(b) children?

Q25 Do you have any views on public sector agencies using the OIA to gather information about individuals?

Chapter 7

Q26 Do you agree that no withholding grounds should be moved between the conclusive and non-conclusive withholding provisions in either the OIA or LGOIMA? We agree with the Commission's conclusion that little would be gained by this.

Q27 Do you think there should be new withholding grounds to cover:

(a) harassment; Agree adequately covered by s9(2)(g).

(b) the protection of cultural values; In principle we agree with the Commission's suggestion that NZGOAL policy be added to s9 withholding grounds but recommend waiting until the Waitangi Tribunal's Wai 262 report (flora, fauna and cultural IP claim) is released early 2011 before formulating wording.

(c) anything else?

Q28 Do you agree that the "will soon be publicly available" ground should be amended as proposed? Agree with suggested wording provided it also covers information already being available, eg, "that the information is publicly and readily available or will be within a very short time…"

Q29 Do you agree that there should be a new non-conclusive withholding ground for information supplied in the course of an investigation? Yes

Q30 Do you have any comments on, or suggestions about, the "maintenance of law" conclusive withholding ground? Agree guidelines and examples would be helpful.

Chapter 8

Q31 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 – because of the difficulty in defining what this somewhat subjective term means - each party may have divergent views on this.

Q32 Can you suggest any statutory amendment which would clarify what "public interest"

means and how it should be applied? No - see Q31 above.

Q33 Do you think the public interest test should be contained in a distinct and separate provision? Agree that it may be overlooked because of its placement and convoluted wording, but would prefer that it be redrafted and kept as a subsection of s9.

Q34 Do you think the Acts should include a requirement for agencies to confirm they have considered the public interest when withholding information and also indicate what public interest grounds they considered. While the requirement to confirm that the agency had considered the public interest is acceptable to us, the requirement to indicate what public interest grounds were considered is not supported because of the difficulty in defining the term and likelihood of differences in interpretation between agencies and requesters.

Chapter 9

Q35 Do you agree that the phrase "due particularity" should be redrafted in more detail to make it clearer? Yes - it would be helpful and save time for agencies if this was made clearer to requesters. Guidelines with examples could also be helpful.

Q36 Do you agree that agencies should be required to consult with requesters in the case of requests for large amounts of information? We would prefer that this continue to be recommended practice rather than mandatory, as this could add considerably to time (and cost) spent responding to requests.

Q37 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? Yes, time should run from when the modified request is received by the agency.

Q38 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, we strongly support this proposal.

Q39 Do you agree that "substantial" should be defined with reference to the size and resources of the agency considering the request? No, as the amount of information on a particular matter is not necessarily commensurate with the size of the organisation.

Q40 Do you have any other ideas about reasonable ways to deal with requests that require a substantial amount of time to process? While sub-clause (1) of the Australian legislation is reasonable and reflected in wording proposed at end of 9.27, we consider that the details in sub-clause (2) would be better placed in guidelines.

Q41 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, this would be helpful.

Q42 Do you agree that the term "vexatious" needs to be defined in the Acts to include the element of bad faith? Yes, incorporating the "reasonableness" test is supported.

Requesters with,for example, political or competitive motivations can employ tactics that impose a substantial and unreasonable burden on agencies, eg, making multiple requests for variants of information on contentious topics, such as recently observed with respect to climate change research.

Q43 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, this should be made clear in the legislation.

Q44 Do you think that provision should be made for an agency to declare a requester "vexatious"? If so, how should such a system operate? We agree that the solution outlined in 9.37 whereby the agency gave notice that it would not answer any more questions and the requester has recourse, if they wish, to complain to the Ombudsmen is worth further consideration.

Q45 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? For the reasons outlined in 9.41, we agree that the requirement to state the reason for request is likely to be impractical. However, we do consider that requesters should provide their real name – it is implied in s12(1) of the Act that they will, so it may be sufficient to include this requirement in guidelines.

Q46 Do you agree the Acts should state that requests can be oral or in writing, and that the requests do not need to refer to the relevant official information legislation?

For administrative reasons we would prefer that requests be made in writing, which includes email. Similarly, we prefer that requesters cite the Act otherwise the request may be overlooked, not responded to within the Act's time frame, or declined without reference to the Act's withholding grounds.

Q47 Do you agree that more accessible guidance should be available for requesters? Yes, as this would very likely improve the processing of requests to the benefit of both parties.

Chapter 10

Q48 Do you agree the 20 working day time limit should be retained for making a decision? Yes, we have found that this is a fair and reasonable time period and up to 20 days may be what is genuinely reasonably practicable.

Q49 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? We have no objection to such a provision but consider that having it in the guidelines would be sufficient without the need to amend legislation.

Q50 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, it is our policy to acknowledge requests if we are unable to respond to them within a few days of receipt and we agree that this should be encouraged as best practice rather than included in the Act

Q51 Do you agree that 'complexity of the material being sought' should be a ground for extending the response time limit? Yes

Q52 Do you agree there is no need for an express power to extend the response time limit by agreement? Yes

Q53 Do you agree the maximum extension time should continue to be flexible without a specific time limit set out in statute? Yes

Q54 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

Q55 Do you agree there should be clearer guidelines about consultation with ministerial offices? No views

Q56 Do you agree there should not be any mandatory requirement to consult with third parties? Yes, but we agree that this should be encouraged as best practice. Also, there may be a contractual requirement to consult if information relating to an agency's client is requested.

Q57 Do you agree there should be a requirement to give prior notice of release where there are significant third party interests at stake? We would prefer that this remain best practice promulgated in guidelines as the difficulty would be determining which third parties' interests were 'significant'.

Q58 How long do you think the notice to third parties should be? Five working days seems reasonable

Q59 Do you agree there should be provision in the legislation to allow for partial transfers? Yes, we agree with the provision suggested in 10.53

Q60 Do you agree there is no need for further statutory provision about transfer to Ministers? N/A

Q61 Do you have any other comment about the transfer of requests to ministers? N/A

Q62 Do you think that whether information is released in electronic form should continue to depend on the preference of the requester? The requester's preference should be the default position unless there is good reason not to comply with it.

Q63 Do you think the Acts should make specific provision for metadata, information in backup systems and information inaccessible without specialist expertise? Yes, subject to consistency with NZGOAL, we would support legislative provisions along the lines of the Australian legislation described in 10.65 and 10.66

Q64

Should hard copy costs ever be recoverable if requesters select hard copy over electronic supply of the information? This should be at the discretion of the agency but subject to the requester's prior consent to meeting the costs.

Q65 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? While it may be difficult to formulate legislative provisions, we would recommend that the Guidelines make this clear to requesters.

Q66 Do you agree there should be regulations laying down a clear charging framework for both the OIA and the LGOIMA? Yes, as this would make it clear to requesters that agencies may legitimately impose a charge and also ensure consistency among sector agencies (eg, CRIs) where they have all been asked for the same imformation. Furthermore, the schedule for charges should be regularly updated and be commercially realistic.

Q67 Do you have any comment as to what the framework should be and who should be responsible for recommending it? We would recommend that, eg, SSC investigates various options including examples of actual costs incurred by a recent sample of respondents and best practice in other jurisdictions and circulates these to agencies for comment/indication of preference (Note: This would also encourage agencies to keep a record of time and other costs and, thus over time, provide a robust basis for reviewing charges). One of the difficulties with charging is estimating how much time it will take to find and extract the information, therefore in the interim the categories model described in 10.90 may prove easier to administer.

Q68 Do you agree that the charging regime should also apply to political party requests for official information? Yes, they should be treated the same as any other requester.

Chapter 11

Q69 Do you agree that both the OIA and LGOIMA should set out the full procedures followed by the Ombudsmen in reviewing complaints? Yes

Q70 Do you think the Acts provide sufficiently at present for failure by agencies to respond appropriately to urgent requests? Yes

Q71 Do you agree with the existing situation where a person affected by the release of their information under the OIA or the LGOIMA cannot complain to the Ombudsman? Similar provisions to Australia should be available.

Q72 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.

Q73 Do you agree that a transfer complaint ground should be added to the OIA and the LGOIMA? Yes, in both fact of a transfer and timeliness.

Q74 Do you think there should be any changes to the processes the Ombudsmen's follows in investigating complaints? No, current process seems fair to both parties.

Q75 Do you agree that the Ombudsmen should be given a final power of decision when determining an official information request? No. even if Ombudsmen make a 'determination' rather than a 'recommendation', it should be subject to judicial review.

Q76 Do you agree that the veto power exercisable by Order in Council through the Cabinet in the OIA should be removed? No views

Q77 Do you agree that the veto power exercisable by a local authority in the LGOIMA should be removed? N/A

Q78 If you believe the veto power should be retained for the OIA and LGOIMA, do you have any comment or suggestions about its operation? N/A

Q79 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? Agree explicit provision should be made for judicial review in the Acts.

Q80 Do you agree that the public duty to comply with an Ombudsman's decision should be enforceable by the Solicitor -General? No, we consider that sufficient avenues for reasonable recourse are available (eg, censure of departmental heads by SSC and Crown entity CEOs by responsible Minister).

Q81 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, we agree manner of dealing with complaints should be consistent.

Q82 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, we consider that in NZ such public approbrium would be effective.

Q83 Should there be any further enforcement powers, such as exist in the United Kingdom? No, we do not believe these are necessary.

Chapter 12

Q84 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? We would have no objection to publishing information currently in the Ministry of Justice Directory on our website although, given that it is already available at one source via internet enabled links, it would seem to be unnecessary for this to be duplicated.

Q85 Do you think there should be any further mandatory categories of information subject to a proactive disclosure requirement in the OIA or LGOIMA? No, we agree that this should be an organisational rather than legislative decision.

Q86 Do you agree that the OIA and LGOIMA should require agencies to take all reasonably practicable steps to proactively release official information? No, we do not support legislating for it as sufficient policy incentives (eg, NZGOAL) exist.

Q87 Should such a requirement apply to all central and local agencies covered by the OI legislation? N/A

Q88 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? N/A

Q89 Do you think agencies should be required to have explicit publication schemes for the information they hold, as in other jurisdictions? No, as this would place an unreasonable burden on under-resourced agencies. For CRIs, their annual statement of corporate intent already provides information on national databases and collections and access to scientific data.

Q90 Do you agree that disclosure logs should not be mandatory? Yes, for the same reason as Q89.

Q91 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, we agree that this does not seem justified as agencies should consider legal consequences before proactively releasing information.

Chapter 13

Q92 Do you agree that the OIA and the LGOIMA should expressly include a function of providing advice and guidance to agencies and requesters? No views on incorporating in legislation, but we agree this function should be carried out by the Ombudsmen's office, which is very helpful in providing advice and guidance on request.

Q93 Do you agree that the OIA and the LGOIMA should include a function of promoting awareness and understanding and encouraging education and training? We question whether it is necessary to legislate for these functions (and it would be useful to have a strong and explicit evidence base before showing such a change was warranted).

Q94 Do you agree that an oversight agency should be required to monitor the operation of the OIA and LGOIMA, collect statistics on use, and report findings to Parliament annually? In addition to the cost burden, we consider this is unnecessary – if Crown entities cannot be trusted to report accurate information related to their activities we have a fundamental problem. A periodic audit to ensure alignment with their roles and responsibilities should be sufficient. Furthermore, if implemented, we consider that any statistics reported should only relate to information withheld. If all requests

for information were to be recorded, it would only be practical to do this where the requester cites the OIA.

Q95 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? No, agencies may keep their own records of requests which cite the OIA, but it would be an unnecessary and expensive burden to require them to provide such statistics to an oversight body (and besides would duplicate information already available from the original source). In these times of serious fiscal restraint (and even in more prosperous times) central Government must exercise strong disciplines not to create additional costs for agencies or impose these on those subjected to their activities. The questions "How would the proposed change create greater value / improve productivity?" and 'How could current activities be conducted more efficiently?" both need to be rigorously addressed. These questions could be asked of a good number of questions posed in this survey.

Q96 Do you agree that an explicit audit function does not need to be included in the OIA or the LGOIMA? Yes

Q97 Do you agree that the OIA and the LGOIMA should expressly enact an oversight function which includes monitoring the operation of the Acts, a policy function, a review function, and a promotion function? We question whether it is necessary to legislate for such a function.

Q98 Do you agree that the Ombudsmen should continue to receive and investigate complaints under the OIA and the LGOIMA? Yes, they very effectively carry out his function but need to be better resourced for it.

Q99 Do you agree that the Ombudsmen should be responsible for the provision of guidance and advice? Yes, as they have the practical experience and expertise.

Q100 What agency should be responsible for promoting awareness and understanding of the OIA and LGOIMA and arranging for programmes of education and training for agencies subject to the Acts? We consider the Ombudsmen's office already carries out the education and training function effectively.

Q101 What agency should be responsible for administrative oversight of the OIA and the LGOIMA? What should be included in the oversight functions? We believe the SSC should carry out this function for the OIA – this is particularly appropriate given its oversight of E-government and NZGOAL. Monitoring and reporting on operation of the Act and policy development and promotion should be included, but we do not support it collecting data and statistics.

Q102 Do you think an Information Commissioner Office should be established in New Zealand? If so, what should its functions be? No, we do not belive this is necessary.

Q103 If you think an Information Commissioner Office should be established, should it

be standalone or be part of another agency? Not applicable.

Chapter 14

Q104 Do you agree that the LGOIMA should be aligned with OIA in terms of who can make requests and the purpose of the legislation? N/A

Q105 Is the difference between the OIA and LGOIMA about the status of information held by contractors justified? Which version is to be preferred? N/A

Chapter 15

Q106 Do you agree that the official information legislation should be redrafted and re-enacted. No, we consider essential changes could be made by amending the Acts.

Q107 Do you agree that the OIA and the LGOIMA should remain as separate Acts? Yes, as combining them would require a compete redraft and would result in a more complex Act.

Q108 Do you have any comment on the interaction between the PRA and the OI legislation? Are any statutory amendments required in your view? No views.