

Submission of Marlborough District Council on Law Commission Issues Paper 18 “The Public’s Right to Know”

Marlborough District Council is a unitary authority with functions of both a Regional Council and a District Council covering the whole of the Marlborough region.

Discussion Questions

CHAPTER 2

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

Yes, this would provide accessibility and transparency for requesters and agencies alike.

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, there do appear to be some anomalies and this review is an opportunity to correct those anomalies. Council would prefer that the port company it owns is not made subject to LGOIMA.

Q3 Do you agree that SOEs and other crown entity companies should remain within the scope of the OIA?

Council has no view on this question.

Q4 Do you agree that Council controlled organisations should remain within the scope of the LGOIMA?

Council accepts that Council controlled organisations will remain within the scope of LGOIMA.

Q5 Do you agree that the Parliamentary Counsel Office should be brought within the scope of the OIA?

Council has no view on this question.

Q6 Do you agree that the OIA should specify what information relating to the operation of the Courts is covered by the Act?

Yes.

Q7 Should any further categories of information be expressly excluded from the OIA and the LGOIMA?

Council has no view on this question except that intellectual property not owned by the agency should be excluded (see Q19 & 20).

CHAPTER 3

Q8 Do you agree that the OIA and the LGOIMA should continue to be based on a case-by-case model?

Yes, the current case-by-case model works well for Council.

Q9 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, enhanced guidance would be very useful. Apart from that, Council does not see any need to alter the withholding grounds or the process itself except in those cases identified below.

The guidelines will better be able to reflect changing attitudes and situations than enshrining them in legislation. There must be recognition that they are only guidelines and that they do not have to be rigidly followed. The decision is still a decision of the Crown/ local body.

Q10 Do you agree there should be a compilation, analysis of, and commentary on, the case notes of the Ombudsmen?

Yes, some guidance can already be gained from the casenotes. Enhancement of the casenotes would be very useful in making decisions.

Q11 Do you agree there should be greater access to, and reliance on, the case notes as precedents?

Yes, but more as guidance than precedents. Council doesn't want to have to justify to the Ombudsmen why the casenotes were not followed in a particular situation. The focus should be on balancing the withholding grounds and the public interest.

Q12 Do you agree there should be a reformulation of the guidelines with greater use of case examples?

Yes. This would be very helpful.

Q13 Do you agree there should be a dedicated and accessible official information website?

Yes. Council would prefer that the casenotes and guidelines be provided through the website. This would ensure that the most up-to-date casenotes and guidelines are easily able to be referred to when making decisions.

CHAPTER 4

Q14 Do you agree that the "good government" withholding grounds should be redrafted?

Yes. The "free and frank" ground in LGOIMA is a very important withholding ground. It must be retained but could be redrafted to clarify it.

Q15 What are your views on the proposed reformulated provisions relating to the "good government" grounds?

The proposed provisions seem workable.

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, the commercial withholding ground should be expanded to cover all commercial activities whatever the purpose, profit-making or good government or any other purpose. Most of Council's commercial dealings are not profit-motivated. Being unable to rely on the commercial withholding ground in such cases would put Council at a real disadvantage and would prejudice its ability to get the best deal for ratepayers.

Q17 If you favour a broader interpretation, should there be a statutory amendment to clarify when the commercial withholding ground applies?

Yes, as the previous interpretation of the Ombudsmen has been limited, it should be expressly expanded to remove doubt. An amendment is necessary in this case to clarify that the interpretation previously held by the Ombudsmen has been altered.

If it is not considered appropriate to call the dealings local and central bodies undertake "commercial activities" then a new and separate ground covering these dealings should be created.

Q18 Do you think the trade secrets and confidentiality withholding grounds should be amended for clarification?

Yes, they should be amended so it is clearer what they cover.

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, intellectual property is a property right. Where it is owned by someone not subject to the OIA, there should be absolute protection from release for their property. The owner of the intellectual property should not be penalised for doing business with the Crown and local bodies. It should be in the control of those third parties as to when, to whom and how the information is released. It should be a matter of negotiation between the third party and the Crown/local body as to release or use by the Crown/local body.

Q20 Do you have any comment on the application of the OIA to research work, particularly that commissioned by third parties?

Research work commissioned by third parties should not be covered by the OIA. It is analogous to the intellectual property owned by third parties. Research work undertaken by an organisation subject to the OIA on its own account should remain subject to the OIA.

Q21 Do you think the public interest factors relevant to disclosure of commercial information should be included in guidelines or in the legislation?

A general non-exhaustive or exclusive definition of the public interest would be of assistance (see Chapter 8).

Q22 Do you experience any other problems with the commercial withholding grounds?

No, no other problems.

CHAPTER 6

Q23 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?

Council prefers Option 1; with a second preference for Option 3. The relationship between LGOIMA and the Privacy Act is clear and Council is experienced in dealing with requests for personal information whether by the person to whom the information relates or by others.

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

(a) deceased persons?

(b) children?

Council has no view on this issue.

CHAPTER 7

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

Council does not use the OIA or LGOIMA to gather personal information very often. Occasionally it is a very useful tool in assisting Council to fulfil its functions. This ability should be retained.

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?

Yes.

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

(a) harassment;

(b) the protection of cultural values;

(c) anything else?

Council considers that withholding grounds for harassment and protection of cultural values could be included in the legislation.

Q28 Do you agree that the “will soon be publicly available” ground should be amended as proposed?

Council accepts the ground could be amended as proposed.

Submission on review of OIA and LGOIMA

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

Yes, Council supports this new withholding ground. There could be prejudice to investigations if required to release information supplied during an investigation. It is very important that agencies can withhold this information especially when the investigation or inquiry is ongoing. If there is doubt that it fits within the “maintenance of the law” ground, a new ground should be created to cover it.

Q30 Do you have any comments on, or suggestions about, the “maintenance of law” conclusive withholding ground?

This is the source of some problems for us on an ongoing basis. Often people make information requests under LGOIMA when discovery is a more appropriate mechanism.

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?

A non-exclusive/exhaustive list of public interest factors could be of considerable assistance in making decisions but also in assisting requesters to understand what is being taken into account when a decision is made.

Q32 Can you suggest any statutory amendment which would clarify what “public interest” means and how it should be applied?

Having a non-exclusive/exhaustive definition of public interest should not change how it is applied. It should be applied as it is now; i.e. identifying what the public interest in a particular situation is and balancing it against the grounds for withholding.

Q33 Do you think the public interest test should be contained in a distinct and separate provision?

Council does not consider that a public interest test should be included in the legislation; just that it include some statutory guidance on what the public interest may be.

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?

Council accepts that the Act could require agencies to confirm the public interest has been considered and identify what those public interests are. This would need to be done in conjunction with some identification of what the public interest is, in the legislation, as discussed under Qs 31-33.

CHAPTER 9

Q35 Do you agree that the phrase “due particularity” should be redrafted in more detail to make it clearer?

Yes.

Submission on review of OIA and LGOIMA

Q36 Do you agree that agencies should be required to consult with requesters in the case of requests for large amounts of information?

Council considers it is desirable but it should not be mandatory. Timing issues come into play.

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, sometimes quite a bit of time is taken to clarify requests. The time limits should only commence once a request has been clarified.

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.

Q39 Do you agree that “substantial” should be defined with reference to the size and resources of the agency considering the request?

Yes.

Q40 Do you have any other ideas about reasonable ways to deal with requests that require a substantial amount of time to process?

There should be greater acceptance that charging is appropriate in such cases and not resisted by requesters.

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.

Q42 Do you agree that the term “vexatious” should be defined in the Acts to include the element of bad faith?

Yes.

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.

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?

Yes. The agency should be able to make that decision using it’s normal decision-making processes. The person declared ‘vexatious’ could then perhaps complain to the Ombudsmen but any determination by the Ombudsmen should not be binding on the agency.

Submission on review of OIA and LGOIMA

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?

Council accepts that requesters should not be required to state their purpose or real name. However, knowing the purpose often clarifies the request and assists in redefining the information needed by a requester to meet that purpose. That is, if we know why they want information we may be able to provide something they have not technically asked for but is really what they want. Often a requester is fishing and defining a purpose helps to firm up the mind about what is really needed.

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?

This is how Council treats requests for information now. We do not see the need for the legislation to expressly state it.

Q47 Do you agree that more accessible guidance should be available for requesters?

Most requesters Council deals with are okay and there is no need for more guidance.

CHAPTER 10

Q48 Do you agree the 20 working day time limit should be retained for making a decision?

Council considers that the 20 working day limit should be retained but where third parties must be consulted the limit should be able to be extended. The ability to extend the time limit should be retained. The starting point for the time limit should be only once the request has been clarified (as discussed above).

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?

Council accepts that the information should be released as soon as reasonably practicable after the decision to release is made. Council's practice is to release information simultaneously with the decision to release except in cases of requests for large amounts of information.

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.

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.

Submission on review of OIA and LGOIMA

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

Yes. It is important that the legislation retains as much flexibility as possible as each request is different.

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?

Council has no view on this issue.

Q56 Do you agree there should not be any mandatory requirement to consult with third parties?

Yes.

Q57 Do you agree there should be a requirement to give prior notice of release where there are significant third party interests at stake?

No, Council considers that there are times when it is desirable to give such prior notice but that this should not be mandatory. Giving prior notice is the current practice of Council in appropriate situations.

Q58 How long do you think the notice to third parties should be?

Council does not have a view on this issue except to say that notice should not be mandatory.

Q59 Do you agree there should be provision in the legislation to allow for partial transfers?

Yes.

Q60 Do you agree there is no need for further statutory provisions about transfer to ministers?

Council has no view on this issue.

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

Council has no view on this issue.

Q62 Do you think that whether information is released in electronic form should continue to depend on the preference of the requester?

The matter is not so clear cut. The preference of the requester should be taken into account but the decision on format should be left to the agency. For example, the agency should not be required to convert information into electronic format for release if it is held in hard copy or other format. The costs of having to comply with the requester's preference should be able to be taken into account.

Submission on review of OIA and LGOIMA

Q63 Do you think the Acts should make specific provision for metadata, information in backup systems and information inaccessible without specialist expertise?

Yes, provisions similar to those described in the Issues Paper should be incorporated into the Acts. The requirement to search back-up systems and access information by specialists would be especially onerous on small agencies such as ours. They would require time and resources we do not have to spare and covering the costs of doing so would not make up for the disruption in Council's ability to undertake business as usual if such requests were allowed.

It doesn't seem likely that many requesters would actually want the metadata information so Council considers that metadata should only have to be provided if it is expressly requested and it is reasonably practicable for the agency to provide it.

Q64 Should hard copy costs ever be recoverable if requesters select hard copy over electronic supply of the information?

It should be left to the discretion of the agency as to whether cost recovery is appropriate in any particular situation. So, in some situations, yes, an agency should be able to charge for hard copy supply where the information is available in electronic form.

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?

Express provision that release of information can be conditioned would be helpful. This provision could be broadly worded to allow flexibility. The ability to complain to the Ombudsman should be sufficient to ensure that the power to condition is not over- or mis-used.

Q66 Do you agree there should be regulations laying down a clear charging framework for both the OIA and the LGOIMA?

Yes, a clear charging regime through regulations would be of assistance both in how much to charge and to justify to the requester that the agency is entitled to charge.

Q67 Do you have any comment as to what the framework should be and who should be responsible for recommending it?

Council sees this as a public/private benefit issue. The requester is benefiting from the release of the information to them in some way. Council considers that rate-payers should not have to fund that private benefit by absorbing the costs involved in providing that benefit to the requester.

Q68 Do you agree that the charging regime should also apply to political party requests for official information?

Definitely yes, Council sees no justification for political parties to be treated any differently to other requesters.

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?

No, Council considers that the current process works well and there is no need to change that.

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?

Yes.

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?

No, the indemnity given to agencies in releasing information should be retained. This is a strong support underpinning the over-arching principle of release in the legislation. Removal of this indemnity could weaken that principle. The time constraints in making a decision are also a factor.

Council has difficulty with the notion that there is an overarching principle of release of information, Council is given a limited time to act and then be open to redress for doing what we are essentially being directed to do.

Q73 Do you agree that a transfer complaint ground should be added to the OIA and the LGOIMA?

Council has no view on this issue.

Q74 Do you think there should be any changes to the processes the Ombudsmen's (*sic*) follows in investigating complaints?

No.

Q75 Do you agree that the Ombudsmen should be given a final power of decision when determining an official information request?

No. The final decision should rest with the agency (in the local government area at least). The release of information (or not) should remain as a matter of policy for the agency concerned. The existing sanctions are sufficient to ensure compliance by agencies of the requirement of the legislation as evidenced by the fact that in the vast majority of cases the Ombudsmen's recommendations are followed. The veto power, although not often used, remains an important part of the overall framework of the legislation.

Q76 Do you agree that the veto power exercisable by Order in Council through the Cabinet in the OIA should be removed?

No.

Submission on review of OIA and LGOIMA

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

No. See comments under Q75. The existing system works well and Council sees no reason for it to change. Local authorities are accountable to ratepayers and electors; this accountability is a strong driver on Council to make the “right” decision. Local authorities are close to those to whom they are accountable; our community makes its views abundantly clear to Council.

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?

Yes, Council considers this power has not been abused and sees no reason to change the system. The veto may not have been used frequently but in the case of Council at least it has been used (once) and appropriately so in that case. The fact it is not widely used, is not a justification for its removal. The final decision to release (or not) must be left to the agency concerned. Removal of the veto could affect the balance that exists in the system.

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?

Yes.

Q80 Do you agree that the public duty to comply with an Ombudsman’s decision should be enforceable by the Solicitor-General?

No, and certainly not in the local government area.

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?

Council has no view on this issue.

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?

Council would prefer drawing attention to the conduct rather than having the Ombudsmen being able to impose financial, penal, or any other sanction. Drawing attention to conduct should be the most the Ombudsmen should be able to do. It is a very effective power in the local government area as pointed out above.

Q83 Should there be any further enforcement powers, such as exist in the United Kingdom?

There really is no need for enforcement powers. The existing situation works well.

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?

No, Council does not consider that it should be a legal requirement. It should be up to the agency involved to decide what should be published and when and in what format. Council has recently reviewed and updated its website and is continually focussed on what information could and should be available proactively through the website and otherwise.

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, Council already publishes a lot of information proactively. Council does not consider that it is necessary to have mandatory categories of information subject to a “proactive” disclosure requirement.

Q86 Do you agree that the OIA and LGOIMA should require agencies to take all reasonably practicable steps to proactively release official information?

No, Council sees no need for this to be provided in legislation.

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

No, as Council does not consider there should be such a requirement.

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?

No.

Q89 Do you think agencies should be required to have explicit publication schemes for the information they hold, as in other jurisdictions?

No, there is no need to have this provided for in legislation. All responsible agencies should have a strong focus on proactive publication as a matter of good government.

Q90 Do you agree that disclosure logs should not be mandatory?

Yes.

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?

No. If the aim is to encourage proactive release, then the release should also be subject to the indemnities in the Acts. Extending the indemnity would aid in the aim of proactive provision of information. Failure to provide an indemnity could make agencies more cautious about proactive release in some cases where release would, objectively, be desirable.

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, it is not necessary to provide legislatively for such a function. Providing advice and guidance is a major function of Council in all areas of operation. The requirement to provide such advice and guidance is not a requirement in other legislation Council operates under yet it is provided anyway as a matter of course.

Submission on review of OIA and LGOIMA

Q93 Do you agree that the OIA and LGOIMA should include a function of promoting awareness and understanding and encouraging education and training?

No, who to and whom by in the local government area? Such functions are important but it should not be necessary for them to be specified in legislation.

Q94 Do you agree that an oversight agency should be required to monitor the operation of the OIA and LGOIM A, collect statistics on use, and report findings to Parliament annually?

Council does not see what value there would be in the monitoring, collection of statistics and reporting. Further it would add to the burden of agencies; taking time and resources from their principal responsibilities.

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.

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 LGOIMA should enact an oversight function which includes monitoring the operation of the Acts, a policy function, a review function, and a promotion function?

No. Central government has the ability to set up agencies to undertake these tasks without legislation requiring it to be done.

Q98 Do you agree that the Ombudsmen should continue to receive and investigate complaints under the OIA and the LGOIMA?

Yes.

Q99 Do you agree that the Ombudsmen should be responsible for the provision of general guidance and advice?

Yes.

Q100 What agency should be responsible for promoting awareness and understanding of the OI A and the LGOIM A and arranging for programmes of education and training for agencies subject to the Acts?

This is a function that could be undertaken by the Ombudsmen.

Q101 What agency should be responsible for administrative oversight of the OIA and the LGOIMA? What should be included in the oversight functions?

The Ombudsmen should be responsible.

Q102 Do you think an Information Commissioner Office should be established in New Zealand? If so, what should its functions be?

No, it is just more bureaucracy and for what gain?

Q103 If you think an Information Commissioner Office should be established, should it be standalone or part of another agency?

There does not need to be one.

CHAPTER 14

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

Yes.

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

Council is not clear why the distinction was made in the first place. Council considers it is working well for local authorities and questions the need for change.

CHAPTER 15

Q106 Do you agree that the official information legislation should be redrafted and re-enacted?

Yes, Council would prefer a redraft.

Q107 Do you agree that the OIA and the LGOIMA should remain as separate Acts?

Yes.

Q108 Do you have any comment on the interaction between the PRA and the OI legislation? Are any statutory amendments required in your view?

Council does not have a view on this issue.

Final Comment

LGOIMA contains more than provisions concerning official information. Part 7 of LGOIMA provides for local authority meetings. Council considers that these provisions should be shifted into the Local Government Act 2002 which provides the functions powers and duties of local authorities. Council acknowledges that the Law Commission brief to review LGOIMA did not include the meetings provisions. However, if LGOIMA is to be redrafted the provisions on meetings could be shifted without review to the LGA.

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