**Ministry for Primary Industries**
Manatū Ahu Matua

OIA12-042

10 SEP 2012

Alex Harris
fyi-request-433-
felcfelc8@requests.fyi.org.nz

Dear Alex Harris

**OFFICIAL INFORMATION ACT REQUEST**

Further to my correspondence of 28 August 2012 regarding your Official Information Act request, I am now in a position to provide you with a copy of all drafts, advice, and internal communications (including emails) relating to MPI's submission to the Law Commission's review of the Official Information Act (OIA).

The information relating to your request is outlined in the attached schedule and released to you under the Official Information Act 1982. Please note that deletions have been made to some documents under section 9 (2)(a) of the Act, to protect the privacy of natural persons.
You have the right under section 28(3) of the Official Information Act to seek an investigation and review by the Ombudsman of our decision to withhold this information. A request must be made in writing to:

The Ombudsman
Office of the Ombudsmen
PO Box 10 152
WELLINGTON

Yours sincerely

Dan Bolger
**Deputy Director-General**
**Office of the Director-General**



**Office of the Director-General**
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| Document | Relevant section for withholding | Page |
|---|---|---|
| 1. Law Commission Review of Official Information Legislation | N/R | |
| 2. Email and attached Memo MAF Legal re Law Commission official info review | 9(2)(a)<br>9(2)(a)<br>9(2)(a) | 1<br>2<br>3 |
| 3. Email: Law Commission Review of OIA- Comments from Biosecurity Policy | 9(2)(a) | 1 |
| 4. NZFSA comments on the Law Commission's Issues Paper "The Public's Right to Know" A review of the Official Information Act 1982 | N/R | |
| 5. Email RE: Law Commision- Review of the Official Information Act | 9(2)(a) | 1 |
| 6. Letter from Law Commission to MAF | N/R | |

(1)

xx December 2010

Law Commission
Wellington

**LAW COMMISSION REVIEW OF OFFICIAL INFORMATION LEGISLATION**

Attached are submissions from the Ministry of Agriculture and Forestry on the Law Commission's Issues Paper, *The Public's Right to Know*.

As of 1 July 2010 the Ministry of Agriculture and Forestry and the NZ Food Safety Authority were amalgamated. The submissions therefore comprise 2 sets of comments from the Biosecurity NZ branch (which includes the Animal Welfare operational Directorate) and a set of comments from the Food Safety branch. Biosecurity NZ comments are provided in a general format while Food Safety have provided specific responses to some of the discussion questions. ~~I note that on~~ the issue of whether requesters should be required to state the purpose for which they are requesting official information, ~~the 2 branches hold differing views.~~ MAF does not hold a uniform view on this. & I note that

This is fine but one issue is tagged that needs clarity

Mark Patchett
Acting Director
Legal Services
Ministry of Agriculture and Forestry

## Biosecurity and Animal Welfare Policy Group submission on the Law Commission Review of the Official Information Act 1982

### Context

In the Biosecurity area, responding to an OIA request in a timely manner can become difficult when resources are pulled away at short notice to work on an urgent pest or disease incursion response, which can last for an extended period of time.

Animal welfare is a cross-cutting and often contentious area of public policy. It attracts a large number of substantial OIA requests from people who are strongly opposed to the government's position on various animal welfare issues. Consequently, animal welfare OIAs tend to be conducted in a hostile and adversarial environment, which places considerable strain on the agency (and individuals) dealing with the request.

### General Comment

The Law Commission has done a thorough job of considering possible changes to the OIA.

The Biosecurity and Animal Welfare Policy Group supports the general approach proposed. In particular we would welcome provision for increased guidance from the Office of the Ombudsmen on its finding with respect to complaints it has received and opinions it has formed.

We would also welcome:

- clarification on grounds for withholding information to enable "good government"
- increased guidance on how to apply the commercial withholding grounds, as currently some can be difficult to apply, e.g. s 9(2) (b) commercial position/trade secret is restrictive
- clarification to ensure the requesters of information define as clearly as possible the information they require i.e. improvements in specifying "due particularity"
- clarification on when the 20 day deadline for a decision on provision of information commences when an initial request is subsequently refined
- clarification that "collation and research" includes assessment and review of the information requested
- leaving the time for the actual provision of information to be as soon as reasonably practicable, taking into account impacts on the normal operation of the business
- increased guidance on when to charge for the provision of information
- making the complexity of a request a grounds for extending the time for a decision on releasing the information
- further guidance on contacting a requester personally when a request seems overly broad. Discussion between parties to refine the scope of a request is good in principle, but difficult in practice if the requester is adversarial, as is commonly the case in animal welfare. There is a risk that if formally required by the Act, such discussions could lead to requests being expanded, rather than reduced in scope.

**Other Suggestions/Comments**

- In cases where an agency has notified the requester of its intention to charge for a request, it would be helpful for the Act to specify a deadline for the requester to respond to the agency, e.g. 20 working days. If no response was received, the request could be closed.

- The format for the provision of information should be at the agencies discretion, not the requesters. Such an approach would enable the agency to deal with the request as efficiently as its internal processes allowed and would prevent trivial complaints to the Ombudsman.

- Disclosing the purpose of the request, i.e. what the information was being sought for, would be very helpful to an agency and would help improve transparency. It could also help in the refinement of requests.

- It would be difficult for a third party to effectively challenge the release of information when no mechanism exists for this in the Act. If the intention is to allow third parties to complain to the Ombudsman, the result could be negative for agencies dealing with OIA requests. Such agencies could be placed in a 'no win' situation and the deliberations needed around withholding/release decisions, and the need for decisions to be taken at senior management level, could add significant time/costs to the process.

**Animal Welfare Directorate submission on the Law Commission Review of the Official Information Act 1982**

Our comments relate to the proposals in the summary of the report and specifically to issues of relevance or concern to the Animal Welfare Directorate, as set out in our submission in February 2010. They are arranged by chapter heading, using the paragraph references in the summary of the report.

Chapter One
No comments

Chapter Two
Para 8 – we support the recommendation to list all agencies subject to each of the OIA and LGOIMA, in a schedule to the relevant Act.

Para 9 (which agencies should be subject to the legislation) – the discussion in Chapter 2 of the Issues Paper focuses on the inclusion of agencies which are not currently (but perhaps should be) within the scope of the Acts, particularly the OIA. In our submission in February, however (as well as the submission of the then Chairs of NAWAC and NAEAC), we drew attention to the anomalous inclusion of the two committees within the scope of both the OIA and LGOIMA. We are comfortable that the committees should continue to be subject to the OIA, due to their relationship to central government. However, we reiterate our view that they should not also be subject to LGOIMA. The reasons for this are set out in the documents submitted in February.

Chapter Three
Paras 13 - 16 – while generally supportive of the case-by-case approach to decision-making, we strongly support the recommendations for clearer guidance by the Office of the Ombudsmen, with examples, to assist agencies in responding to requests. The proposal to develop a persuasive system of precedent, described in para 15, would appear to be useful.

Chapter Four
Para 19 – while we are generally comfortable with the proposed redraft of sections 9(2)(f) and (g) of the OIA (see para 4.46 of the Issues Paper), the proposed new subsection (iv) is somewhat unwieldy and may make it more difficult to establish this ground for withholding information. It may be preferable to keep the subsection simpler (broader?), by removing the proposed reference to future effects, and dealing with such issues in the consideration of broader/competing public interests under section 9(1)).

Chapters Five and Six
No comments

Chapter Seven
Para 28 – we have some concerns about the proposal to further narrow the scope of the ground for the refusal of information on the basis that it is, or will soon be, publicly available. We acknowledge the comment in para 7.21 of the Issues Paper, that this ground should not be used to withhold draft documents. However, there is a category of documents, which have been developed past the 'draft'[1] stage and are destined for publication, yet which we believe it would be inappropriate to release publicly before they are finalised. Examples include:

- codes of welfare (and NAWAC's accompanying reports) at the final peer review and editing stages. There is often a high level of public (and sometimes commercial) interest in these documents, such that their early release may unfairly advantage (or disadvantage) one of many parties affected; and

[1] And in respect of which it would therefore be inappropriate to claim the protection for draft documents on other grounds.

- research reports provided to MAF for comment before they are finalised (which may contain factual or other inaccuracies which could be damaging if released prematurely).

Our practice has been to withhold such documents on the basis that they will soon be publicly available, (provided that we are confident that they will, in fact, be publicly released within a reasonably short timeframe, usually one to three months). We consider that to be an appropriate and justifiable application of the section, and would be concerned if the proposed amendment created a 'gap' in the protection for such documents, which we believe could be detrimental to the wider public interest.

Para 29 –**[any comments from Jacqui?]**

Chapter Eight
No comments.

Chapter Nine
Para 37 (point 2) – we do not support including a requirement for discussion with requesters, where practicable. Our Directorate's existing practice is to seek refinement of requests, where we believe this would be useful or appropriate. Our experience with certain requesters, however (as outlined in our submission in February) is that they are really using the OIA as a 'platform' for engagement on other issues. We do not believe that it would be productive, or in the wider public interest, to engage in discussion in such cases. We therefore do not agree that there should be a requirement for discussion in the legislation.

Para 37 (point 3) – we support the proposal for regulations laying down clear rules for charging for the provision of information.

Para 37 (point 4) – we agree that the power to refuse a request if it involves "substantial collation or research" should encompass review and assessment of the information which, as noted in the Issues Paper, often takes a very considerable amount of time. We suggest that what constitutes 'substantial' should be considered not just in relation to the size and resources of the agency as a whole, however, but to the part of the agency dealing with the request (ie ours is a small Directorate which receives a large volume of official information requests, compared to other parts of MAF).

Para 37 (point 5) – we strongly support expressly providing that the past conduct of the particular requester can be taken into account in deciding whether a request is vexatious.

Para 37 (point 6) – we support the suggestions for dealing with persistent requesters under the Act, including the proposal for appeal to the Ombudsman as independent arbiter. We consider that if the Ombudsmen were required to take a more active role in resolving the disputes or grievances that often underlie persistent requests, rather than simply ruling on complaints on a case-by-case basis, this could assist in actually resolving some of these cases (thus contributing to achieving the overall purpose of achieving transparency in government), rather than letting them drag on with the OIA being used as a sort of 'weapon'. The proposal for development of a 'precedent' system by the Ombudsmen may also assist in this regard (note, for example, the comments from our submission in February about repeated (annual) requests for the animal use statistics).

Chapter Ten
Paras 40 and 41 – we support the proposals regarding the prompt release of information (which is our practice anyway) and extensions of time (noting that the requester has a statutory right to complain to the Ombudsman, in any event).

Para 43 – we agree that guidelines dealing with the relationship between departments and their Minister, in responding to requests, would be useful.

Para 47 – we note the comment that an agency can release material which it might otherwise have withheld, on condition that it is used only in a certain way. We were not aware that such an option currently exists; in fact, one of the principal difficulties that our Directorate has encountered is in relation to the subsequent use of information released. As noted in our submission in February, we consider that it would be difficult (if not impossible) to control the use of information supplied under the Act, and that it may also be contrary to the spirit of the Act. Our suggestion, instead, was to consider exercising a degree of control over particular individuals who make excessive or unreasonable requests (see para 37 above). Nevertheless, if the Law Commission were inclined to support the conditional release of information, we consider that there would be benefit in making explicit statutory provision for this. Whilst it may not be possible to enforce a breach of such conditions, presumably such a breach could be relevant when considering a requester's course of conduct in relation to future requests (para 37).

Para 49 – we support the proposal for regulations as to charging (see para 37 above).

Chapter Eleven
Para 52 – we do not have a strong view on the proposals regarding 'reverse' freedom of information complaints. However, we suggest that, if such a regime were to be introduced, then it should include provision for agencies to obtain prior guidance from an external agency (eg the Office of the Ombudsmen) to reduce their risk of 'wrongfully' releasing information.

Chapter Twelve
See below.

Chapters Thirteen, Fourteen and Fifteen
No comments (apart from those relating to the application of LGOIMA to NAWAC and NAEAC, above).

Other/ General
Comments made in our February submission relating to recovery for the costs of consultation in deciding whether or not to release information, and imposing a time limit for requesters to provide clarification as to the scope of an OIA request, or to complain to the Ombudsman if an OIA request is refused so not appear to have been addressed. Those comments are included here again:

**Inability to recover for reasonable consultation costs**
Our concern in this case relates to MAF's inability to charge for consultation over exceedingly large OIA requests.

This person's annual practice has been to request, under the OIA, a copy of the documentation relating to the animal use statistics collected by MAF and published as part of the National Animal Ethics Advisory Committee's[2] annual report. This information comprises the animal use returns submitted under the Animal Welfare (Records and Statistics) Regulations 1999 by the 100+ organisations that either have their own code of ethical conduct or have an arrangement to use another organisation's code.

When submitting their returns, organisations are asked to indicate whether or not they are willing to have their return released, should it be requested under the OIA. When MAF receives a request for the information, we have in the past contacted those who said 'no' to seek their reasons. We then review the response and decide whether or not to withhold the information. The question is whether or not the recovery of the costs of that consultation, from the requester of the information, is legitimate.

Although there appear to be no Ombudsmen case notes directly addressing this point, our understanding, based on the material available, is that where the consultation is for the purpose of providing information

[2] NAEAC provides specialist, independent advice to the Minister of Agriculture on ethical and welfare issues arising from the use of live animals in RTT. MAF provides scientific, technical, policy and secretariat support to NAEAC.

to assist MAF with the decision whether or not to release the information (as compared to assisting with MAF's understanding of the information, prior to deciding whether or not to withhold it), then this is not recoverable.

Contacting all those involved and analysing their responses is a time consuming process and we are strongly of the view that recovery of reasonable consultation costs is or should be legitimate.

**Time limit for requesters to provide clarification of request**

In a number of cases, however, on being asked to clarify the scope of an OIA request, requesters have delayed for what seems to be an unreasonably long period of time (up to six months) before providing clarification, with the result that the preliminary work in responding to the request has to be effectively undertaken anew. Likewise, there have been instances where requesters have waited several months before exercising their right to seek Ombudsman review of a decision to withhold information under the OIA. This has compounded the work involved in responding to the Ombudsman's enquiry into the decision.

For these reasons, it may be appropriate to consider including a time limit for requesters to provide clarification (if sought) as the scope of an OIA request, and for exercising their right to complain to the Ombudsman if an OIA request is refused (or partially refused).

## Chapter 2: Scope of the Act

No comments

## Chapter 3: Decision-making

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

Yes, provided that more guidance is given for clarity and to allow for quicker decision-making.

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?

We agree that enhanced guidance would help to achieve more clarity and certainty about the withholding grounds, and we consider that this is necessary. Having to trawl through practice notes etc to get a feel for what is required is time-consuming and often the position still remains opaque. And because the Act is premised on a "case by case" basis, one cannot be sure that a new Ombudsman would deal with a case in the same way. We do not think that there should be more prescriptive rules, nor that the grounds should be redrafted, nor that regulations should prescribe what information should be released.

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

Yes and this should be accessible in a more user friendly way, particularly the ability to search on a particular subject or topic.

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

Yes, this would be of great assistance.

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

Not essential but we would find this useful.

## Chapter 4: Protecting good government

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

Yes. Like the suggested alternatives in the chapter

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

As above. Clearer distinction between opinion and advice would be helpful. Also recognising that discussion and exchange of ideas is essential to good government and that the possibility that this type of information could be released is inhibiting to expressing ideas and to recording them.

**Chapter 5: Protecting commercial interests**

The meaning of "commercial"

Q16 Do you think the commercial withholding ground should continue to be confined to situations where the purpose is to make a profit?

We think that the meaning of "commercial" should not be confined to situations where the purpose is to make a profit. We are of the view that there are activities that can properly be regarded as commercial – with associated information potentially requiring protection from disclosure - which do not necessitate pursuit of profit.

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

We do not think an amendment to the Act is necessary. We believe that the ordinary meaning of "commercial" is broad enough to encompass activities which do not involve profit, yet which are still commercial. An amendment to the Practice Guidelines of the Ombudsmen would be required, however.

The public interest in disclosure

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

We agree that the balancing exercise required in determining whether the public interest requires disclosure can be particularly difficult in the context of commercial information, and we noted this in our response to the OIA survey. We would find it very helpful to have a list of the public interest factors that may be relevant when considering possible disclosure of information which may prejudice a person's commercial position. This would be of particular assistance to those less experienced in dealing with OIA requests.

There sometimes appears to be confusion between what is "in the public interest" and what is "in the interests of the public" and it would be useful if the distinction between the two concepts were clarified.

In our view, it would be preferable for the factors to be set out in the Practice Guidelines rather than included in the Act. There are two main reasons for this: firstly, it would be easier to update and amend the list if necessary to keep up with changing times; and secondly, we think it is less likely that a list of factors contained in guidelines would be regarded as an exhaustive list of matters to consider. It is also easier to include examples in guidance than in legislation, and examples can be very helpful.

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

As we noted in our response to the Law Commission's OIA survey, the issue of when consultation is required or appropriate can be problematic. We discuss this further in response to question 56 below.

We also noted in our response to the survey that it can sometimes be difficult to gauge what is "unreasonable" prejudice (as opposed to reasonable prejudice). We think that guidance and examples could address this difficulty.

**Chapter 6: Protecting privacy**

Options for reform of the privacy withholding ground

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

Option 1 – guidance only

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?

On balance, we favour **option 2** for improving the privacy withholding ground. This is primarily because we think it would be helpful for there to be a threshold of "reasonableness" in considering whether personal information should be disclosed. As we stated in our response to the Law Commission's survey on the OIA, it is currently unclear whether disclosure of *any* personal information can prejudice a person's privacy, or only certain types of personal information. The proposed restatement would achieve a degree of consistency with the commercial withholding ground in s.9(2)(b)(ii) which also uses the word "unreasonably".

We concur that a restatement of the privacy withholding grounds should specifically focus on the disclosure of personal information (as defined in the Privacy Act). The increased clarity and specificity as to the type of privacy interest that is potentially protected would make it easier for officials to apply the privacy withholding ground. It would also make the ambit of the ground more consistent with the scope of the privacy interest addressed by the Privacy Act.

Whilst we agree that this would still be a relatively conceptual approach, we consider that further specific guidance is likely to be of sufficient assistance to officials, particularly in relation to the sorts of circumstances where disclosure of personal information may be reasonable or

unreasonable. Guidance as to the types of public interest factors that may be relevant would be very useful.

## Chapter 7: Other withholding grounds

### Withholding ground: maintenance of the law

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

In our response to the Law Commission's survey we pointed out the uncertainty in relation to the scope of the maintenance of the law withholding ground. We suggested that if the maintenance of the law ground was regarded as applying solely to court processes then consideration should be given to a new ground protecting the integrity of other aspects of the law, such as regulatory application processes.

We agree with the proposal that there should be a new withholding ground for information supplied in the course of an investigation or inquiry. We also agree that it should not be conclusive grounds for withholding information, but should be weighed against considerations of public interest.

Comment [JC1]: Agree

However, we think it is important that "investigation or inquiry" is not given an unduly narrow definition such that it would only encompass processes similar to judicial or quasi judicial determinations. For example, NZFSA may wish to undertake inquiries (in the broad sense of the word) into the suitability of persons seeking to be appointed to statutory positions. Although the requirements of natural justice will usually mean that relevant information is disclosed to the applicant, there may be some instances where this would not be appropriate; application of the public interest balancing test would accordingly determine the issue.

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

If a new ground is added as proposed above, we do not think any amendments are required to the maintenance of the law withholding ground.

## Chapter 8: The public interest test

### Possible statutory amendment

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?

We agree that the Acts should not include a list of codified public interest factors for the reasons expressed by the Law Commission.

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

We cannot think of any and we would hesitate to try and put any sort of explanation or gloss on the meaning of "public interest". While the test can be difficult to apply, we think it would be more problematic to try and further clarify in a statute what "public interest" means. We do think that guidance and examples would be helpful.

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

Yes, we think that this would aid clarity and would help to ensure that the need to balance the public interest in each case would not be overlooked.

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?

This should be In guidance only. In practice we do this anyway in responses to requests.

**Chapter 9: Requests – some problems**

Due particularity

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

Yes.

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

Yes. This should almost be in a flow diagram along the lines of the practice guidelines e.g. the time required to collate a large amount of information sought would mean that a substantial charge is likely, therefore go back to requestor and ask if it is possible for them to refine their request etc

Extensions of time

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.

Refusing the request

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?

As above. Perhaps the Act could expressly provide for the possibility of releasing information in tranches. Perhaps this could be an option put to the requestor. Also clarifying charging could assist.

### Vexatious requests / requesters

Q41 Do you agree that it should be clarified that the past conduct of a requester can be taken into account in assessing whether a request is vexatious?

Yes. And the number of requests from one individual

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?

No. For example if someone made a lot of requests for the same type of information then a subsequent request could be considered vexatious and refused as such. But if they then made a request for totally different types of information then having their name on a vexatious register would not be fair

### Purpose of request

Q 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?

Purpose no. Real name yes.

## Chapter 10: Processing requests

### Extension of time limits

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

Perhaps guidance could state that the agency should normally acknowledge each request and in their response indicate how long it expects it will take to collate and prepare the information sought. Maybe this timeframe could then be varied subsequently by agreement, if circumstances require.

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?

Yes. As soon as reasonably practicable should be described in guidance. If it is made clear that the decision should be communicated as soon as possible to the requestor but that the information can be released later then people may get responses in a quicker timeframe.

Q50. Do you agree that, as at present, thre should be no statutory requirement to acknowledge receipt of an official information request but this should be encouraged as best practice?

Agree (and as in Q48)

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

Yes, we agree that complexity should be an additional ground for extending the time limit for responding to a request for information.

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

We think it would be useful for there to be provision for the agency and the requester to agree to extend the time period for a response. However, there will need to be clear provision as to what will happen if the requester does not agree to an extension proposed by the agency.

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

Yes, we consider that there should not be a specific maximum extension time set out in the statute and that this should remain flexible so as to accommodate the circumstances of each particular case. As noted, a requester can complain to the Ombudsmen if they are unhappy with the length of an extension period.

### Consultation with affected third parties

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

We do not have a firm view as to whether it should be mandatory to consult with third parties where the requested information is personal information or commercial information. Our tentative thoughts are that it should not be mandatory. As a matter of practice, NZFSA routinely does consult with persons who it considers may be affected by the release of information. This is usually commercial entities, but it can also be individuals whose privacy could be affected by disclosure.

What we would find helpful would be clearer guidance from the Ombudsmen as to when consultation is advisable. For example, if the privacy withholding ground is reformulated as suggested in option 2 (paragraph 6.19 of the Issues Paper), it will be useful for officials to know whether they should consult with individuals only where the disclosure would involve an unreasonable disclosure of information affecting the individual's privacy (and where the agency considers there are public interests factors in favour of disclosure), or whether they should always seek to obtain the views of anyone with even a minor privacy interest at stake (and regardless of where the public interest is thought to lie).

Similarly, if a mandatory requirement is introduced for agencies to notify third parties before releasing information which may significantly affect their interests, we think that it would be helpful for agencies to know whether they should only consult in circumstances where there are considered to be significant third party interests at stake.

It would also be valuable to have guidance as to whether it is necessary (and if so, in what circumstances) after receiving comments from the person whom the information is about to then go back to the requester to obtain their views, and so on. If repeated consultations are appropriate in a given case, we think that provision should be made for further extensions of time to be permitted.

As we noted in our response to the OIA survey, the process of consultation can cause difficulty in complying with the time limit for responding to a request for information. For this reason, as we have stated, we think it would be useful for the agency and the requester to have the power to agree to an extension of the time for complying with the request for information.

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 think there is merit in this proposal, yet we wonder whether it would serve mainly to introduce yet another step (and therefore, possibly, delay) into the already complex analysis and judgment required to be carried out by officials dealing with information requests. Any such requirement would have to be worded very carefully and we think guidance would be needed to ensure that officials are clear about what sorts of interests are regarded as "significant", whether the test is objective or subjective etc.

If this proposal is implemented, consideration may have to be given to extending the time period for responding to information requests where notification to a third party is required – we would suggest that the period be extended by whatever time the party notified is given to respond.

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

We think that the suggested 5 working days is short enough not to cause undue delay in most instances, yet it gives the third party sufficient time to take some urgent action to protect their interests if they consider it necessary to do so.

**Chapter 11: Complaints and remedies**

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

Yes.

**Chapter 13: Oversight and other functions**

Q92 Do you agree that the OIA and the LGOIMA should expressly include a function of providing advice and guidance to agencies and requesters?

Yes

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

Yes.

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

(2)

**From:**
**Sent:** Wednesday. 15 December 2010 5:29 p.m.
**To:**
**Cc:**
**Subject:** Law Commission's official information review

**Attachments:** Memo MAF Legal re Law Commission offical info review 20101215.doc

Hi

As agreed, please find attached an electronic version of the comments that I have prepared on behalf of the Animal Welfare Directorate, in relation to the Law Commission's review of New Zealand's official information legislation. will also be reviewing this (as Acting Director Animal Welfare), in the next few days.

Please let me know if any of the comments require clarification. Otherwise, we would appreciate receiving a copy of the final MAF submission on the Issues Paper, in due course.

Thanks and regards

Memo MAF Legal re Law Commissi...

BIOSECURITY NEW ZEALAND

M E M O R A N D U M

To: MAF Legal

Copy: MAFBNZ Animal Welfare Directorate

From: MAFBNZ Animal Welfare Directorate

Date: 15 December 2010

Subject: **LAW COMMISSION'S REVIEW OF NEW ZEALAND'S OFFICIAL INFORMATION LEGISLATION**

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Dear

As agreed, please find attached comments on behalf of the Animal Welfare Directorate, in relation to the Law Commission's review of New Zealand's official information legislation (Issues Paper 18, September 2010).

Our comments relate to the proposals in the summary of the report and specifically to issues of relevance or concern to the Animal Welfare Directorate, as set out in our submission in February 2010. They are arranged by chapter heading, using the paragraph references in the summary of the report.

Chapter One
No comments

Chapter Two
Para 8 – we support the recommendation to list all agencies subject to each of the OIA and LGOIMA, in a schedule to the relevant Act.

Para 9 (which agencies should be subject to the legislation) – the discussion in Chapter 2 of the Issues Paper focuses on the inclusion of agencies which are not currently (but perhaps should be) within the scope of the Acts, particularly the OIA. In our submission in February, however (as well as the submission of the then Chairs of NAWAC and NAEAC), we drew attention to the anomalous inclusion of the two committees within the scope of both the OIA and LGOIMA. We are comfortable that the committees should continue to be subject to the OIA, due to their relationship to central government. However, we would appreciate if you would reiterate, to the Law Commission, our view that they should not also be subject to LGOIMA. The reasons for this are set out in the documents submitted in February.

Chapter Three
Paras 13 - 16 – while generally supportive of the case-by-case approach to decision-making, we strongly support the recommendations for clearer guidance by the Office of the Ombudsmen, with examples, to assist agencies in responding to requests. The proposal to develop a persuasive system of precedent, described in para 15, would appear to be useful.

Chapter Four
Para 19 – while we are generally comfortable with the proposed redraft of sections 9(2)(f) and (g) of the OIA (see para 4.46 of the Issues Paper), the proposed new subsection (iv) is somewhat unwieldy and may make it more difficult to establish this ground for withholding information. It may be preferable to keep the subsection simpler (broader?), by removing the proposed reference to future effects, and dealing with such issues in the consideration of broader/competing public interests under section 9(1)).

Chapters Five and Six
No comments

Chapter Seven
Para 28 – we have some concerns about the proposal to further narrow the scope of the ground for the refusal of information on the basis that it is, or will soon be, publicly available. We acknowledge the comment in para 7.21 of the Issues Paper, that this ground should not be used to withhold draft documents. However, there is a category of documents, which have been developed past the 'draft'[1] stage and are destined for publication, yet which we believe it would be inappropriate to release publicly before they are finalised. Examples include:

- codes of welfare (and NAWAC's accompanying reports) at the final peer review and editing stages. There is often a high level of public (and sometimes commercial) interest in these documents, such that their early release may unfairly advantage (or disadvantage) one of many parties affected; and

- research reports provided to MAF for comment before they are finalised (which may contain factual or other inaccuracies which could damaging if released prematurely).

Our practice has been to withhold such documents on the basis that they will soon be publicly available, (provided that we are confident that they will, in fact, be publicly released within a reasonably short timeframe, usually one to three months). We consider that to be an appropriate and justifiable application of the section, and would be concerned if the proposed amendment created a 'gap' in the protection for such documents, which we believe could be detrimental to the wider public interest.

Para 29 – has MAF Enforcement ( ) been asked to comment on the proposed new ground for withholding information supplied in the course of an investigation or inquiry, where disclosure is likely to prejudice the outcome?

Chapter Eight
No comments.

Chapter Nine
Para 37 (point 2) – we do not support including a requirement for discussion with requesters, where practicable. Our Directorate's existing practice is to seek refinement of requests, where we believe this would be useful or appropriate. Our experience with certain requesters, however (as outlined in our submission in February) is that they are really using the OIA as a 'platform' for engagement on other issues. We do not believe that it would be productive, or in the wider public interest, to engage in discussion in such cases. We therefore do not agree that there should be a requirement for discussion in the legislation.

[1] And in respect of which it would therefore be inappropriate to claim the protection for draft documents on other grounds.

Para 37 (point 3) – we support the proposal for regulations laying down clear rules for charging for the provision of information.

Para 37 (point 4) – we agree that the power to refuse a request if it involves "substantial collation or research" should encompass review and assessment of the information which, as noted in the Issues Paper, often takes a very considerable amount of time. We suggest that what constitutes 'substantial' should be considered not just in relation to the size and resources of the agency as a whole, however, but to the part of the agency dealing with the request (ie ours is a small Directorate which receives a large volume of official information requests, compared to other parts of MAF).

Para 37 (point 5) – we strongly support expressly providing that the past conduct of the particular requester can be taken into account in deciding whether a request is vexatious. We are very interested in the suggestion that this is effectively the current position, and would welcome further information on this point, as we have been unable to locate the statutory provision to this effect.

Para 37 (point 6) – we support the suggestions for dealing with persistent requesters under the Act, including the proposal for appeal to the Ombudsman as independent arbiter. We consider that if the Ombudsmen were required to take a more active role in resolving the disputes or grievances that often underlie persistent requests, rather than simply ruling on complaints on a case-by-case basis, this could assist in actually resolving some of these cases (thus contributing to achieving the overall purpose of achieving transparency in government), rather than letting them drag on with the OIA being used as a sort of 'weapon'. The proposal for development of a 'precedent' system by the Ombudsmen may also assist in this regard (note, for example, the comments from our submission in February about repeated (annual) requests for the animal use statistics).

Chapter Ten

Paras 40 and 41 – we support the proposals regarding the prompt release of information (which is our practice anyway) and extensions of time (noting that the requester has a statutory right to complain to the Ombudsman, in any event).

Para 43 – we agree that guidelines dealing with the relationship between departments and their Minister, in responding to requests, would be useful. MAFBNZ Policy and Risk Directorate may also wish to comment on this point (and para 45?).

Para 47 – we note the comment that an agency can release material which it might otherwise have withheld, on condition that it is used only in a certain way. We were not aware that such an option currently exists; in fact, one of the principal difficulties that our Directorate has encountered is in relation to the subsequent use of information released. As noted in our submission in February, we consider that it would be difficult (if not impossible) to control the use of information supplied under the Act, and that it may also be contrary to the spirit of the Act. Our suggestion, instead, was to consider exercising a degree of control over particular individuals who make excessive or unreasonable requests (see para 37 above). Nevertheless, if the Law Commission were inclined to support the conditional release of information, we consider that there would be benefit in making explicit statutory provision for this. Whilst it may not be possible to enforce a breach of such conditions, presumably such a breach could be relevant when considering a requester's course of conduct in relation to future requests (para 37).

Para 49 – we support the proposal for regulations as to charging (see para 37 above).

Chapter Eleven
Para 52 – we do not have a strong view on the proposals regarding 'reverse' freedom of information complaints. However, we suggest that, if such a regime were to be introduced, then it should include provision for agencies to obtain prior guidance from an external agency (eg the Office of the Ombudsmen) to reduce their risk of 'wrongfully' releasing information.

Chapter Twelve
See below.

Chapters Thirteen, Fourteen and Fifteen
No comments (apart from those relating to the application of LGOIMA to NAWAC and NAEAC, above).

Other/ General
Are there any general MAF comments on proactive disclosure? (chapter 12). We probably have nothing specific from an Animal Welfare perspective.

We would be grateful if any comments made in our February submission and not covered elsewhere (for example, recovery for the costs of consultation in deciding whether or not to release information, and imposing a time limit for requesters to provide clarification as to the scope of an OIA request, or to complain to the Ombudsman if an OIA request is refused) could be re-included (in appropriate) in the MAF submission on the Law Commission's Issues Paper.

If you require clarification of any of our comments, please let me know.

Regards

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**From:**
**Sent:** Friday, 10 December 2010 10:12 a.m.
**To:**
**Cc:**
**Subject:** Law Commission Review of OIA - Comments from Biosecurity Policy

**Attachments:** OIA review.doc

Hi

Please find attached comments from the Biosecurity (including Animal Welfare) Policy Group on the Law Commission's review of the Official Information Act.

Please let me know if you need anything further.

OIA review.doc (35 KB)

Many thanks,

www.biosecurity.govt.nz

Think before you print

# Biosecurity and Animal Welfare Policy Group submission on the Law Commission Review of the Official Information Act 1982

## Context

In the Biosecurity area, responding to an OIA request in a timely manner can become difficult when resources are pulled away at short notice to work on an urgent pest or disease incursion response, which can last for an extended period of time.

Animal welfare is a cross-cutting and often contentious area of public policy. It attracts a large number of substantial OIA requests from people who are strongly opposed to the government's position on various animal welfare issues. Consequently, animal welfare OIAs tend to be conducted in a hostile and adversarial environment, which places considerable strain on the agency (and individuals) dealing with the request.

## General Comment

The Law Commission has done a thorough job of considering possible changes to the OIA.

The Biosecurity and Animal Welfare Policy Group supports the general approach proposed. In particular we would welcome provision for increased guidance from the Office of the Ombudsmen on its finding with respect to complaints it has received and opinions it has formed.

We would also welcome:

- clarification on grounds for withholding information to enable "good government"
- increased guidance on how to apply the commercial withholding grounds, as currently some can be difficult to apply, e.g. s 9(2) (b) commercial position/trade secret is restrictive
- clarification to ensure the requesters of information define as clearly as possible the information they require i.e. improvements in specifying "due particularity"
- clarification on when the 20 day deadline for a decision on provision of information commences when an initial request is subsequently refined
- clarification that "collation and research" includes assessment and review of the information requested
- leaving the time for the actual provision of information to be as soon as reasonably practicable, taking into account impacts on the normal operation of the business
- increased guidance on when to charge for the provision of information

- making the complexity of a request a grounds for extending the time for a decision on releasing the information

- further guidance on contacting a requester personally when a request seems overly broad. Discussion between parties to refine the scope of a request is good in principle, but difficult in practice if the requester is adversarial, as is commonly the case in animal welfare. There is a risk that if formally required by the Act, such discussions could lead to requests being expanded, rather than reduced in scope.

**Other Suggestions/Comments**

- In cases where an agency has notified the requester of its intention to charge for a request, it would be helpful for the Act to specify a deadline for the requester to respond to the agency, e.g. 20 working days. If no response was received, the request could be closed.

- The format for the provision of information should be at the agencies discretion, not the requesters. Such an approach would enable the agency to deal with the request as efficiently as its internal processes allowed and would prevent trivial complaints to the Ombudsman.

- Disclosing the purpose of the request, i.e. what the information was being sought for, would be very helpful to an agency and would help improve transparency. It could also help in the refinement of requests.

- It would be difficult for a third party to effectively challenge the release of information when no mechanism exists for this in the Act. If the intention is to allow third parties to complain to the Ombudsman, the result could be negative for agencies dealing with OIA requests. Such agencies could be placed in a 'no win' situation and the deliberations needed around withholding/release decisions, and the need for decisions to be taken at senior management level, could add significant time/costs to the process.

**NZFSA comments on the Law Commission's Issues Paper "The Public's Right to Know" A review of the Official Information Act 1982**



## Chapter 2: Scope of the Act

No comments

## Chapter 3: Decision-making

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

Yes, provided that more guidance is given for clarity and to allow for quicker decision-making.

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?

We agree that enhanced guidance would help to achieve more clarity and certainty about the withholding grounds, and we consider that this is necessary. Having to trawl through practice notes etc to get a feel for what is required is time-consuming and often the position still remains opaque. And because the Act is premised on a "case by case" basis, one cannot be sure that a new Ombudsman would deal with a case in the same way. We do not think that there should be more prescriptive rules, nor that the grounds should be redrafted, nor that regulations should prescribe what information should be released.

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

Yes and this should be accessible in a more user friendly way, particularly the ability to search on a particular subject or topic.

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

Yes, this would be of great assistance.

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

Not essential but we would find this useful.

## Chapter 4: Protecting good government

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

Yes. Like the suggested alternatives in the chapter

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

As above. Clearer distinction between opinion and advice would be helpful. Also recognising that discussion and exchange of ideas is essential to good government and that the possibility that this type of information could be released is inhibiting to expressing ideas and to recording them.

## Chapter 5: Protecting commercial interests

### The meaning of "commercial"

Q16 Do you think the commercial withholding ground should continue to be confined to situations where the purpose is to make a profit?

We think that the meaning of "commercial" should not be confined to situations where the purpose is to make a profit. We are of the view that there are activities that can properly be regarded as commercial – with associated information potentially requiring protection from disclosure - which do not necessitate pursuit of profit.

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

We do not think an amendment to the Act is necessary. We believe that the ordinary meaning of "commercial" is broad enough to encompass activities which do not involve profit, yet which are still commercial. An amendment to the Practice Guidelines of the Ombudsmen would be required, however.

### The public interest in disclosure

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

We agree that the balancing exercise required in determining whether the public interest requires disclosure can be particularly difficult in the context of commercial information, and we noted this in our response to the OIA survey. We would find it very helpful to have a list of the public interest factors that may be relevant when considering possible disclosure of information which may prejudice a person's commercial position. This would be of particular assistance to those less experienced in dealing with OIA requests.

There sometimes appears to be confusion between what is "in the public interest" and what is "in the interests of the public" and it would be useful if the distinction between the two concepts were clarified.

In our view, it would be preferable for the factors to be set out in the Practice Guidelines rather than included in the Act. There are two main reasons for this: firstly, it would be easier to update and amend the list if necessary to keep up with changing times; and secondly, we think it is less likely that a list of factors contained in guidelines would be regarded as an exhaustive list of matters to consider. It is also easier to include examples in guidance than in legislation, and examples can be very helpful.

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

As we noted in our response to the Law Commission's OIA survey, the issue of when consultation is required or appropriate can be problematic. We discuss this further in response to question 56 below.

We also noted in our response to the survey that it can sometimes be difficult to gauge what is "unreasonable" prejudice (as opposed to reasonable prejudice). We think that guidance and examples could address this difficulty.

## Chapter 6: Protecting privacy

### Options for reform of the privacy withholding ground

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

Option 1 – guidance only

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?

On balance, we favour **option 2** for improving the privacy withholding ground. This is primarily because we think it would be helpful for there to be a threshold of "reasonableness" in considering whether personal information should be disclosed. As we stated in our response to the Law Commission's survey on the OIA, it is currently unclear whether disclosure of *any* personal information can prejudice a person's privacy, or only certain types of personal information. The proposed restatement would achieve a degree of consistency with the commercial withholding ground in s.9(2)(b)(ii) which also uses the word "unreasonably".

We concur that a restatement of the privacy withholding grounds should specifically focus on the disclosure of personal information (as defined in the Privacy Act). The increased clarity and specificity as to the type of privacy interest that is potentially protected would make it easier for officials to apply the privacy withholding ground. It would also make the ambit of the ground more consistent with the scope of the privacy interest addressed by the Privacy Act.

Whilst we agree that this would still be a relatively conceptual approach, we consider that further specific guidance is likely to be of sufficient assistance to officials, particularly in relation to the sorts of circumstances where disclosure of personal information may be reasonable or unreasonable. Guidance as to the types of public interest factors that may be relevant would be very useful.

## Chapter 7: Other withholding grounds

### Withholding ground: maintenance of the law

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

In our response to the Law Commission's survey we pointed out the uncertainty in relation to the scope of the maintenance of the law withholding ground. We suggested that if the maintenance of the law ground was regarded as applying solely to court processes then consideration should be given to a new ground protecting the integrity of other aspects of the law, such as regulatory application processes.

We agree with the proposal that there should be a new withholding ground for information supplied in the course of an investigation or inquiry. We also agree that it should not be conclusive grounds for withholding information, but should be weighed against considerations of public interest.

However, we think it is important that "investigation or inquiry" is not given an unduly narrow definition such that it would only encompass processes similar to judicial or quasi judicial determinations. For example, NZFSA may wish to undertake inquiries (in the broad sense of the word) into the suitability of persons seeking to be appointed to statutory positions. Although the requirements of natural justice will usually mean that relevant information is disclosed to the applicant, there may be some instances where this would not be appropriate; application of the public interest balancing test would accordingly determine the issue.

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

If a new ground is added as proposed above, we do not think any amendments are required to the maintenance of the law withholding ground.

## Chapter 8: The public interest test

### Possible statutory amendment

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?

We agree that the Acts should not include a list of codified public interest factors for the reasons expressed by the Law Commission.

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

We cannot think of any and we would hesitate to try and put any sort of explanation or gloss on the meaning of "public interest". While the test can be difficult to apply, we think it would be more problematic to try and further clarify in a statute what "public interest" means. We do think that guidance and examples would be helpful.

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

Yes, we think that this would aid clarity and would help to ensure that the need to balance the public interest in each case would not be overlooked.

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?

This should be In guidance only. In practice we do this anyway in responses to requests.

## Chapter 9: Requests – some problems

### Due particularity

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

Yes.

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

Yes. This should almost be in a flow diagram along the lines of the practice guidelines e.g. the time required to collate a large amount of information sought would mean that a substantial charge is likely, therefore go back to requestor and ask if it is possible fro them to refine their request etc

## Extensions of time

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.

## Refusing the request

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?

As above. Perhaps the Act could expressly provide for the possibility of releasing information in tranches. Perhaps this could be an option put to the requestor. Also clarifying charging could assist.

## Vexatious requests / requesters

Q41 Do you agree that it should be clarified that the past conduct of a requester can be taken into account in assessing whether a request is vexatious?

Yes. And the number of requests from one individual

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?

No. For example if someone made a lot of requests for the same type of information then a subsequent request could be considered vexatious and refused as such. But if they then made a request for totally different types of information then having their name on a vexatious register would not be fair

### Purpose of request

Q 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?

Purpose no. Real name yes.

## Chapter 10: Processing requests

### Extension of time limits

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

Perhaps guidance could state that the agency should normally acknowledge each request and in their response indicate how long it expects it will take to collate and prepare the information sought. Maybe this timeframe could then be varied subsequently by agreement, if circumstances require.

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?

Yes. As soon as reasonably practicable should be described in guidance. If it is made clear that the decision should be communicated as soon as possible to the requestor but that the information can be released later then people may get responses in a quicker timeframe.

Q50. Do you agree that, as at present, thre should be no statutory requirement to acknowledge receipt of an official information request but this should be encouraged as best practice?

Agree (and as in Q48)

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

Yes, we agree that complexity should be an additional ground for extending the time limit for responding to a request for information.

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

We think it would be useful for there to be provision for the agency and the requester to agree to extend the time period for a response. However, there will need to be clear provision as to what will happen if the requester does not agree to an extension proposed by the agency.

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

Yes, we consider that there should not be a specific maximum extension time set out in the statute and that this should remain flexible so as to accommodate the circumstances of each particular case. As noted, a requester can complain to the Ombudsmen if they are unhappy with the length of an extension period.

**Consultation with affected third parties**

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

We do not have a firm view as to whether it should be mandatory to consult with third parties where the requested information is personal information or commercial information. Our tentative thoughts are that it should not be mandatory. As a matter of practice, NZFSA routinely does consult with persons who it considers may be affected by the release of information. This is usually commercial entities, but it can also be individuals whose privacy could be affected by disclosure.

What we would find helpful would be clearer guidance from the Ombudsmen as to when consultation is advisable. For example, if the privacy withholding ground is reformulated as suggested in option 2 (paragraph 6.19 of the Issues Paper), it will be useful for officials to know whether they should consult with individuals only where the disclosure would involve an unreasonable disclosure of information affecting the individual's privacy (and where the agency considers there are public interests factors in favour of disclosure), or whether they should always seek to obtain the views of anyone with even a minor privacy interest at stake (and regardless of where the public interest is thought to lie).

Similarly, if a mandatory requirement is introduced for agencies to notify third parties before releasing information which may significantly affect their interests, we think that it would be helpful for agencies to know whether they should only consult in circumstances where there are considered to be significant third party interests at stake.

It would also be valuable to have guidance as to whether it is necessary (and if so, in what circumstances) after receiving comments from the person whom the information is about to then go back to the requester to obtain their views, and so on. If repeated consultations are appropriate in a given case, we think that provision should be made for further extensions of time to be permitted.

As we noted in our response to the OIA survey, the process of consultation can cause difficulty in complying with the time limit for responding to a request for information. For this reason, as we have stated, we think it would be useful for the agency and the requester to have the power to agree to an extension of the time for complying with the request for information.

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 think there is merit in this proposal, yet we wonder whether it would serve mainly to introduce yet another step (and therefore, possibly, delay) into the already complex analysis and judgment required to be carried out by officials dealing with information requests. Any such requirement would have to be worded very carefully and we think guidance would be needed to ensure that officials are clear about what sorts of interests are regarded as "significant", whether the test is objective or subjective etc.

If this proposal is implemented, consideration may have to be given to extending the time period for responding to information requests where notification to a third party is required – we would suggest that the period be extended by whatever time the party notified is given to respond.

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

We think that the suggested 5 working days is short enough not to cause undue delay in most instances, yet it gives the third party sufficient time to take some urgent action to protect their interests if they consider it necessary to do so.

**Chapter 11: Complaints and remedies**

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

Yes.

**Chapter 13: Oversight and other functions**

Q92 Do you agree that the OIA and the LGOIMA should expressly include a function of providing advice and guidance to agencies and requesters?

Yes

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

Yes.

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

5

**From:**
**Sent:** Tuesday, 16 November 2010 12:22 p.m.
**To:** Mark Patchett:

**Cc:**

**Subject:** RE: Law Commission -Review of the Official Information Act

Thanks Mark and MAF" response. As previously signalled, this team is certainly keen to contribute to this important "all

As per my email of 30 September to some of you on the release of the Law Commission report, please note that NZFSA was an active contributor to this project in responding to the survey that gave rise to this Report and recommendations, prior to the amalgamation. As such, we have already done a great deal of ground work on this Branch's somewhat mixed experiences with the Act, and we made various recommendations at that time to the Law Commission as to suggested reforms, on the basis of issues we have experienced to date. led that project here, and coordinated those comments.

From my cursory read of this substantive report it doesn't appear that all of our concerns have been picked up in the recommendations.

, in a nutshell, may find that survey response from NZFSA useful in terms of understanding some of this Branch's issues to date with the Act, and it will be important that we not only consider the recommendations that were made, but any other issues that for some reason, have not borne fruit in the Report, or were not raised with the Law Commission.

, as discussed, I would be grateful if you could continue your excellent work in this area, and coordinate with on this.

Cheers,

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**From:** Mark Patchett
**Sent:** Tuesday, 16 November 2010 11:18 a.m.
**To:**

**Subject:** Law Commission -Review of the Official Information Act

Greetings,

Back in September, the Law Commission released its issues paper on the review of the Official Information Act. http://www.lawcom.govt.nz/project/review-official-information-act-1982?quicktabs_23=issues_paper#node-2033 . I have read the summary and it contains lots of excellent recommendations. We think this paper requires a MAF wide response and (senior solicitor) has agreed to co-ordinate it.

What I suggest is that the branches identify who will provide comments on the paper and these comments should be given to who will then work them into a MAF response. This will be circulated again before being sent out. I know that there is a lot on and so our ability to respond is limited at this time, but if people read the summary in the issues paper they can then direct their attention to the relevant parts of report and comment on those.

I have spoken to the Law Commission and they have agreed to our comments being provided on 22 December. This means comments to by 10 December please.

Mark Patchett
Acting Director of Legal Services
Ministry of Agriculture and Forestry

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LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE



WF 30/9.



29 September 2010

Mr Murray Sherwin
Chief Executive and Director-General of
Agriculture and Forestry
Ministry of Agriculture and Forestry
PO Box 2526
WELLINGTON

Dear Mr Sherwin

**REVIEW OF OFFICIAL INFORMATION LEGISLATION**

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

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

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

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

Yours sincerely

John Burrows
Commissioner

→ Warwick Fora - one to be co-ordinated via Legal Pac

→ Mark

Can you please co-ordinate a response through the combined legal teams please (Chief Crime & Jacque).

Thanks W.



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