Submission by the Office of the Privacy Commissioner on the Law Commission's Review of the Official Information Acts

7 February 2011

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Introduction

The Privacy Commissioner welcomes the opportunity to provide input to the Law Commission's Review of the Official Information Act and Local Government Official Information and Meetings Act.

The official information statutes are important mechanisms for holding governments and public bodies accountable. The entitlements that they confer to seek access to government-held information are important to our democratic society. The OIA has been highly successful in moving New Zealand governments from their 'deeply engrained' habit of secrecy (to use Sir Guy Powles' phrase) to today's more open practices – a transition for which citizens can be grateful.

The Act has endured for 25 years with only modest change. It is timely in today's more information rich environment to have this thorough review. The OIA must work well if the various and important public interests reflected in it are to be properly reconciled and given effect to.

The points of interaction between this review and the Privacy Act are greater than might at first be apparent. The protection of requested information where privacy issues are raised if citizens' privacy is to be respected is the obvious point of interaction but by no means the only one. In addition:

- many of the statutory provisions in the Privacy Act 1993, particularly those concerning requests for access to information and the complaints machinery, are modeled upon the OIA and thus decisions to change, or not to change the OIA, may raise mirror issues in the Privacy Act;
- there is a direct connection between some of the law and processes in the OIA and Privacy Act such as in relation to consultation between the respective review authorities and agency liability for disclosure of personal information.

The submission offers a number of observations and suggestions based upon OPC's experience in working with the OIA and operating a similar information access law. In addition, suggestions are made to strengthen the Act's processes to fairly and more efficiently protect the interests of third parties, particularly where their privacy is at risk.

OPC in this submission refers to either the Privacy Commissioner or the Office of the Privacy Commissioner as the context warrants.

CHAPTER 2: SCOPE OF THE ACTS

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

No comment.

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?

No comment.

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

OPC supports SOEs continuing to be subject to the OIA. OPC agrees with conclusion of the earlier 1989 parliamentary committee that removing the jurisdiction of the OIA would result in a significant loss in public confidence in the government's oversight of the SOEs.

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

OPC agrees that council controlled organisations should remain within the scope of LGOIMA to ensure public accountability.

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

No comment.

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

OPC agrees that the courts should be subject to some form of information access law as an important component of accountability and transparency. The OIA appears anomalous in applying to tribunals in their administrative capacity but not to courts. By contrast, the access rights in the Privacy Act apply to any tribunal or court except 'in relation to its judicial functions'. Making a distinction between judicial and other functions of courts has proved possible under the Privacy Act.

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

OPC does not generally advocate expressly excluding further categories of information from the OIA although that does remain an option for Parliament to follow in particular cases in other legislation (as it did, for example, in relation to cockpit voice recordings in the Transport Accident Investigation Amendment Act 1999). In particular, OPC does not support the exclusion of 'informal information' or 'third party information' for although difficulties can arise in both circumstances, the OIA adequately caters for those difficulties. Exclusion of those two classes of information would create significant anomalies that could undermine public accountability and transparency.

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?

No comment.

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?

No comment.

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

Inspired by the Ombudsmen's practice of releasing case notes, OPC began releasing its own case notes in 1996. OPC had a number of objectives in releasing case notes including to provide some continuity with the personal access review regime operated by the Ombudsmen from 1982 to 1993. Thus OPC has its own 14 year experience with releasing case notes to draw upon in offering comments upon this question.

OPC agrees with a considerable amount of the discussion in this chapter when it highlights the usefulness of case notes and the desirability of making suitable arrangements so that they can most easily and usefully be accessed. However, we are cautious about the enthusiasm for establishing these as a 'system of precedent', a matter we return to at Q11.

OPC accepts that the approach that might be usefully taking for Privacy Act case notes might not be appropriate for OIA purposes but offers these observations in case they may be useful.

OPC has found case notes to be a valuable means for disseminating views that the Commissioner has reached on interpretation of the provisions in the Privacy Act in real cases. It has also been useful for illustrating the operation of the machinery of the Act, such as early resolution, settlement of cases after an opinion has been rendered and dismissal of a matter for want of jurisdiction. People like to hear of real cases rather than abstract formulations or hypothetical scenarios.

Case notes are usually simplified versions of opinions rendered by the Privacy Commissioner. Some of the facts, or some of the law, is usually omitted or simplified for the recounting of the case. Certain details have to be generalised lest least the complainant's identity be revealed.

Some years ago, OPC grappled with some of the issues discussed in the chapter in relation to accessibility and comprehensiveness of the case note collection. Arrangements for availability of Human Rights Review Tribunal decisions under the Privacy Act were also a consideration. OPC concluded that simply making case notes available on the Privacy Commissioner's website was not a final optimum solution but instead there should be a on-line repository of case notes, and privacy cases, which

could be accessed centrally and searched across different databases. This is now a reality and New Zealand cases are available together with overseas privacy case notes and judgments in the International Privacy Law Library hosted by the World Legal Information Institute. Publication online became the norm with published and indexed compilations ceasing to be a primary means of dissemination

A system of citation was essential for such an initiative. Accordingly, OPC facilitated adoption of certain citation and dissemination standards for privacy case reports first by the Asia Pacific Privacy Authorities Forum and later by the International Conference of Data Protection and Privacy Commissioners. The centralised on-line database is hosted by the World Legal Information Institute who are much more expert in electronic dissemination of legal information than are privacy authorities.

Accordingly, if any of this experience is able to be translated to the OIA environment, it might be worth considering:

- divorcing the producer of the case reports, the Ombudsmen, from the entity tasked with effective dissemination;
- considering whether a dedicated national database is the place to start and stop or whether it is better to get compatible centralised databases with the various bodies operating similar FOI laws – a good starting point might be to upload the existing and future Ombudsmen case notes to NZLII.

OPC notes that the issues paper places stress upon analysis of, and commentary upon, case notes. OPC agrees with the importance of that task. OPC further notes that in other situations this is not a role vested with the authors of judgments or opinions but with dispassionate experts in academia or legal reporting. That may have more promise than simply expecting the authority that has rendered the opinion to provide further analysis of, and commentary upon, case notes it has released.

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

As already mentioned, OPC is a keen supporter of case notes both from its own experience. We have found this a useful way of disseminating information in the absence of a system of release of full opinions, determinations or judgments. However, a case note system differs from a body of jurisprudence forming the basis of a system of precedent as normally understood in the common law system. For instance:

- in the Ombudsmen's case note system (and OPC's), case notes are only released on a selection of cases whereas in a system of judgments, all cases are available albeit that some remain unreported while other find their way into official series;
- the cases are selected for reporting by the Ombudsmen themselves (or OPC with respect to our case notes) and not by any learned or independent council of law reporting and are therefore subject to certain selection biases;
- the Ombudsmen's (and OPC's) case notes simply reflect 'opinions' and not determinations which obviously differs from judgments;
- the Ombudsmen's system is not subject to any meaningful appeal process and the cases of judicial review are too infrequent to provide much judicial input or guidance in contrast to a normal system of court reporting or precedent (or in OPC's case with the involvement of the Human Rights Review Tribunal).

The possibility of the Ombudsmen issuing determinations rather than merely opinions is signaled in the discussion and we return that below (see Q75). In the event of that happening the case for or against a precedent system may differ significantly from the current position described and commented upon here. In such a system it might be expected that all determinations be made public as is the case in jurisdictions such Ontario and some Australian states.

Re-characterising the case note arrangements as 'a system of precedent' runs the risk of losing some of the features of the New Zealand system that the discussion in the issues paper professes to value, namely, the case by case consideration on the merits. Applying precedent would seem to imply that the Ombudsmen would be bound by their previous decisions.

Such a system would also run the risk, in the absence of any ability for appeal or meaningful review, to become more inflexible and unaccountable. In the absence of a higher court having meaningful supervision, the case notes might come to represent the final word on any question of interpretation but without the merit that the common law system usually offers in terms of testing and re-testing legal argument though a hearing, reasoned judgment and appeal process.

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

No comment.

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

No comment.

CHAPTER 4: PROTECTING GOOD GOVERNMENT

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

No comment.

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

No comment.

CHAPTER 5: PROTECTING COMMERCIAL INTERESTS

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

No comment.

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

No comment.

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

The tenor of the discussion is that the substance and drafting of the reasons for refusing requests are largely satisfactory and that tinkering with the language is undesirable given users familiarity with the Act. OPC accepts these sentiments up to a point. It accepts that overall the reasons for withholding have worked well and are, for the most part, reasonably clear (although as noted in the paper there is scope for restructuring to make the Act easier to use – see Q106). However, OPC suggests that where the existing reasons for refusal can be improved, made clearer and easier to use through amendment to wording that this should be done. The 'trade secret' reason for refusal may be such an example.

OPC has recommended that a simple definition of 'trade secret' be inserted in to the counterpart provision in the Privacy Act. Several years ago a suitable definition of 'trade secrets' was inserted into s.230(2) of the Crimes Act which states:

> '… **trade secret** means any information that:
> (a) is, or has the potential to be, used industrially or commercially; and
> (b) is not generally available in industrial or commercial use; and
> (c) has economic value or potential economic value to the possessor of the information; and
> (d) is the subject of all reasonable efforts to preserve its secrecy.'

The provision in the Crimes Act has the merit of being quite plainly drafted. It is true that the constituent elements of that definition can also be discerned from the Ombudsmen's guidance on the interpretation of the OIA. However, OPC takes the view that if it is possible in a simple and clear way to outline the elements of the reasons for withholding on the face of the statute, in the drafting of those reasons or in defined terms, then this should be done. At the moment, a user of the statute has to look to external sources to understand what is meant by 'trade secret'. It is not possible to apply that part of the Act without having that additional special knowledge.

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 comment.

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

No comment.

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

No comment.

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

No comment.

CHAPTER 6: PROTECTING PRIVACY

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?

OPC considers that option 2 offers some promise and may be worth further exploring. Option 3, although conceptually sound and offering a clearer way of reconciling the two information statutes, may be an unnecessarily radical change from what has gone before.

OPC considers that the current formulation of the reasons for withholding, whether reformed by option 2 or not, can work satisfactorily but considers that some supporting changes will help make it work optimally. Additional guidance, as suggested in option 1, may be useful but is insufficient alone. Training of officials is an essential although never-ending task to back this up. Changes to processes to give the affected individuals, to whom the information relates, a voice and place in the process are also important (see Q56).

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

(a) deceased persons?

(b) children?

OPC is interested to hear of the responses received to consultation on these two questions as the issues are also relevant in the Privacy Act context.

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

OPC does not support the OIA being used as a 'back door' for intra-government information disclosure of personal information.

CHAPTER 7: OTHER WITHHOLDING GROUNDS

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?

No comment.

Q27 Do you think there should be new withholding grounds to cover:
(a) harassment;
(b) the protection of cultural values;
(c) anything else?

With respect to (a), OPC considers that there may be merit in harassment forming a stand alone reason for refusal. While harassment is incorporated into section 9(2)(g), chapter 4 explained that the various reasons touching upon protecting good government are not always easy to apply. While public officials may be satisfactorily protected from harassment by section 9(2)(g), there remains the risk of harassment to individuals identified in government held information that is released. It is true that the risk of harassment can be indirectly considered through the privacy provisions, but OPC wonders whether a stand alone ground would be clearer and more effective.

OPC has no comment on paragraphs (b) and (c).

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

OPC supports the redrafting which neatly seems to address the existing provisions' shortcomings as recounted in the issues paper.

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

OPC accepts that it may be useful for a new reason for refusal based on information supplied in the course of an investigation to be introduced. However, OPC notes that it currently interprets the equivalent 'maintenance of the law' reason for refusal in the Privacy Act in a more liberal way than the paper suggests is the practice of the Ombudsmen under the OIA. OPC has, for example, in some recent complaint investigations allowed the Health and Disability Commissioner to withhold information from requesters under section 27(1)(c) of the Privacy Act so long as that Commissioner's investigation is active.

Under the Privacy Act, if requesters do not accept the Privacy Commissioner's opinion supporting the refusal they can take the matter to the Human Rights Review Tribunal to seek access to the information.

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

The Law Commission recognises there are counterpart issues in the Privacy Act and OPC notes with approval that it will not make a final decision on the 'maintenance of the

law' exception until it takes similar decisions in relation to the Privacy Act review. Under the Privacy Act the 'maintenance of the law' formulation is used not only as a reason to refuse an access request but also as the basis for exceptions to four of the information privacy principles.

CHAPTER 8: THE PUBLIC INTEREST TEST

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?

No comment.

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

No comment.

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

No comment.

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?

No comment.

CHAPTER 9: REQUESTS – SOME PROBLEMS

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

No comment.

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

Requests for large amounts of information can occur in the privacy arena too. OPC generally finds that an informal approach by agencies works well – agencies can, and often do, consult with Privacy Act requesters. Our experience coincides with what is said in para 9.16: consultation can assist a great deal in helping to refine the clarity and scope of a request, to the benefit of both agency and requester. It can save a lot of time and unnecessary expenditure, and it can prevent confusion. It is therefore strongly in the agency's interests to consult. The same will be true under the OIA. It is unclear what additional benefit there would be amending the statute to create an obligation to consult.

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?

No comment.

Q38 Do you agree that substantial time spent in "review" and "assessment" of material should be taken into account in assessing whether material should be released, and that the Acts should be amended to make that clear?

The reason for refusal relating to "substantial collation and research" appears to relate to the retrievability of the information – that is, the viability of processing the request in the first place. If the information is not retrievable – at least without unreasonable use of resources – the organisation effectively cannot provide the information and should be entitled to refuse the request accordingly. A comparison with section 29(2) of the Privacy Act may be useful here.

"Review and assessment" refer to a quite different part of the process – that is, once the information has been retrieved, the organisation needs to consider it against any reasons for refusing the request. It is less clear that the time spent considering the information, no matter how substantial, should be a reason for refusing the request altogether.

Any request for a large amount of information is likely to involve "substantial" time on review and assessment. Extending the withholding ground as suggested could open the door for organisations to refuse requests for large quantities of information. This would be undesirable in principle.

Instead organisations should (as they currently do, at least in part) have flexibility in how they handle requests involving substantial review and assessment. The ability to seem extensions of time is particularly important. Allowing reasonable cost recovery if the

organisation has to spent substantial time on review and assessment might also be a possibility.

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

Any definition would need to be reasonably flexible. Creating a distinction between large and small organisations, or 'rich' and 'poor' organisations, is probably fraught with difficulty. Simply because an organisation is large does not mean that a request is automatically more manageable. OPC experience suggests that large organisations can sometimes have particular difficulties with information retrieval. For instance, they may hold information in a wide variety of centres (including overseas). Instead, the Law Commission's suggestion of adding "and would place an unreasonable burden on the resources of the [organisation]" seems sensible.

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

No comment.

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?

From OPC experience with the equivalent provision in the Privacy Act, we agree that past conduct can sometimes be relevant in determining whether a request is vexatious. However, care is needed as past conduct is not necessarily determinative of whether the current request is vexatious. For instance, a requester may in the recent past have made persistent requests, all of which have been refused for good reasons. If the current request has the same characteristics as the earlier requests, this may indicate the requester is actually acting in bad faith.

We are not sure whether a legislative change is in fact required to clarify this point, but if it is, then the Commission's suggestion is sensible.

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

A different and clearer term or phrase might be preferable to 'vexatious' if one can be found. However, the formulation noted in para 9.33 ("no reasonable person could properly treat it as … having been made in good faith") sets a threshold that could be almost unreachable. While the threshold should remain high (and objectively testable), we suggest instead be something like "a reasonable person is entitled to view the request as made in bad faith" be considered.

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?

The question bundles together two proposals, both of which may have merit but should perhaps be examined separately. The proposals are that an agency should be able to decline a repeat request for the same information because either:

- the request has previously been refused: or
- the request has previously been granted.

Repeat requests will involve some resource on the part of the agency. Many agencies may find repeat requests unproblematic while some agencies on occasion might find the resultant call on resources substantial, either because of large and complex requests or because they get a large number of repeat requests. The proposal has potential administrative advantages in making the decision to refuse a request a more straightforward process and, in those cases where the information would otherwise have to be made available again, will save some resource in terms of the task of making the information available a second time.

OPC takes the view that some expenditure of resources is an inevitable part of the information access process and a worthwhile price to pay for the benefits that an access regime provides. However, repeat requests do not necessarily provide public benefits corresponding to the expenditure of resources. In particular, two major purposes of the official information legislation – to make information available to requesters and to provide accountability for the organisation's actions – may already have been fulfilled by appropriately processing the original request.

The first part of the proposal would enable agencies to decline a request on the basis that the same or substantially the same information has been refused to that requester in the past. Although not mentioned in the question, the issues paper makes clear that the proposal would be as recommended by the Law Commission in 1997 which includes a proviso 'that no reasonable grounds exist for that person to request the information again.' Obviously the proviso is critical since there will be many circumstances where requesters may reasonably anticipate a department will now be able to release the information in accordance with the legislation. For example, a request while an investigation is ongoing might be refused while a similar request made at a later stage could be granted. Another example might be information refused for reasons of privacy while an individual is alive might perhaps be treated differently after that person's death.

With the proviso just mentioned, OPC would support the proposal. OPC suggests that thought be given to the supporting legal and administrative machinery and guidance if the potential savings in processing time in relation to requests and review of requests are to be achieved. For example, it might be useful for a genuine requester who thinks the circumstances have changed to explain why it is reasonable to request the information again. Ideally, if the objectives of this change are to be achieved, the process of handling the request can be focused upon what has changed and that might warrant reconsideration. If nothing has changed the proposed provision would presumably allow a new refusal to be notified quite quickly.

There would also be some other implications to work through to make sure that the new arrangements work properly. For example, if a requester did not take the first request on

review to the Ombudsmen on its substantive merits, but does take the second refusal on review, will the review by the Ombudsmen presume that the refusal was correct and focus only upon the reasonableness of repeating the request? That might be an efficient approach in keeping with the objectives of this proposal but there may be objections to doing so. However, if the Ombudsmen looks at the full merits, there may be some difficulties for the agency depending on how recently they considered the first request. If the agency has to be prepared for a full reconsideration by the Ombudsmen on the review, there may not be significant resource savings in using this new shortcut reason for refusal.

The second part of the proposal would empower the agency to refuse a request based upon the fact that the same information had previously been given to the requester. This was not in the original 1997 proposal but has been bundled into the question. The cited precedent for this approach is the Criminal Disclosure Act. Criminal proceedings have, in the past, been a context in which there have been a number of repeat requests in a setting which the stakes are high and the administrative burdens have been said to be substantial. The criminal justice repeat request issue has now been satisfactorily dealt with by that other statute.

OPC does not oppose the proposal that a requester that has already been supplied with the information could be refused if asking a second time for the information. After all, the OIA has already performed its purpose by making information available on the first occasion and it appears that the subsequent requests might represent a cost on the public purse without corresponding public benefit. While there will sometimes be good reasons to make a repeat request, that possibility is protected by the proposed caveat that a refusal is subject to there being no reasonable grounds for requesting the information again.

As a matter of practice, there may be some challenges in operating the proposed arrangements. OPC does not see those administrative difficulties as insuperable nor a reason to shy away from making the proposed change. However, they should be anticipated and managed in the legal and administrative machinery and in the guidance to agencies. For example, if the administrative benefits of the proposal are to be realised then a relatively generous interpretation of 'substantially the same' information may need to be taken. Similarly, some thought might need to be given to the possibility of requesters getting around the new reason for refusal by asking for the information in another capacity (e.g. rather than as an individual as the 'president' of an un-incorporated action group) or by asking a friend to make the same request. OPC has no particular suggestions in relation to these and similar issues with the proposal but suggests that they be considered.

Q44 Do you think that provision should be made for an agency to declare a requester "vexatious"? If so, how should such a system operate?

We do not believe that an organisation receiving a request should itself be able to declare a requester vexatious (with the effect that it would be able to refuse to deal with that requester altogether). However, it is worth considering whether a suitable process exists or can be created to declare a person vexatious following which requests need not be actioned except perhaps with leave.

Given the purposes of the official information legislation, including enhancing democratic participation, it would be an extreme measure to bar a person from making official information requests altogether. Such power should not be left in the hands of an Executive body, particularly one that is affected by the requester's behaviour and therefore arguably biased. That measure should only be taken after proper consideration by a suitably impartial body such as the Ombudsmen or a judicial body. Perhaps this is a role that could be conferred on the Human Rights Review Tribunal? The HRRT has an existing specialism in information access law under the Privacy Act.

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?

The motive for asking for information is generally not relevant – official information should be available to any requester unless there is a proper basis for withholding it. The availability of information is a fundamental purpose of the legislation and requiring a motive (on which an organisation might then make a judgment) could compromise that purpose.

Similarly, under the Privacy Act, motive is not generally relevant to access requests.

It would also be impractical to require requesters to state their purpose – if they wished to lie, it would be easy for them to do so. And it does not seem desirable to introduce a range of enforcement mechanisms to ensure that requesters tell the truth. Instead, it seems best to retain the current informal system where an agency can ask the requester why they need the information – by way of being able to handle the request helpfully – and most requesters are happy to volunteer the information.

Similar issues might arise with requiring requesters to provide their real name.

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?

Requesters should not need to refer to the legislation. They should not need to be familiar with the official information or privacy legislation – it is enough to know that they can ask for information. Organisations with greater knowledge of the statutory requirements should provide all reasonable assistance. It is not uncommon for requesters to be uncertain whether their request falls under the OIA or the Privacy Act and it does not matter if they cite the wrong Act or neither Act. Complaints on review can be transferred between the Ombudsmen and OPC. Requiring requesters to refer to the specific legislation would be off-putting for many, would be unnecessarily bureaucratic and would elevate form over substance.

It is up to the agency to determine what legislation applies to the request and to deal with it accordingly.

If there is confusion on the point, then we agree that it might be helpful to specify that requests can be oral or in writing. A specific statement in the Act would help address the

practice of some officials to fob off requesters or deliberately disregard some requests where the OIA is not explicitly cited in the request.

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

For the law to work optimally it would be desirable for all parties – both those that make and respond to requests – to understand some aspects of the law and its operation (although requesters should not be expected to become expert). Most of the discussion on the shortcomings of the OIA has tended to focus upon the need to better educate officials. While that must be a priority, this question does raise a useful point about the possible need for guidance for requesters.

There might be several types of guidance that could contribute to the objectives of the OIA. The nature of that guidance may affect the choice of entity that can best offer it. For example:

- guidance on interpretation of the law suitable for requesters could perhaps be a role vested with the same body that has the task of offering interpretational guidance to organizations;
- guidance on where to direct particular requests would need a good knowledge of information held across government;
- guidance on how to frame a request could be approached in terms of easing the administrative burden on officials or, alternatively, in terms of ensuring that requests are effective even in the face of uncooperative departments. Advice tendered by an experienced investigative journalist may differ from that of the Ombudsmen or SSC on that last topic.

It may also be useful to inform people of their rights of access and to encourage them to use them, a role for civil society perhaps.

CHAPTER 10: PROCESSING REQUESTS

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

No comment.

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

No comment.

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

No comment.

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

OPC supports this proposal.

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

No comment.

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

No comment.

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

No comment.

Q55 Do you agree there should be clearer guidelines about consultation with ministerial offices?

No comment.

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

Please see our answer to Q71 (where we draw together strands of several of our answers and make some suggestions for reform of the processes as they concern

protection of privacy). The question of consultation with affected third parties is just one of the parts of the process that need to be considered, albeit an important one.

The merits of consultation with third parties might be seen in two somewhat different contexts:

- status quo – under the current arrangements, third parties have no rights in the process and thus consultation can mainly be viewed from the perspective of how useful it is to the persons that are accorded a role in the current processes, namely the requester, department and the review body. OPC's view is that with the current processes that consulting with third parties – for example people whose privacy might be affected by release of official information – is best practice. In situations involving privacy, we encourage organisations, and the Ombudsmen on review, to consult the individuals concerned wherever possible. While occasionally consultation might create difficulties or slow up the process, in our experience it usually works well and delays are far more commonly caused by departments and the review process than these third parties. Consultation can often improve the process. Sometimes it speeds the release of information where no objection is encountered or, where the third party has concerns, it helps to focus the issues and enable the department to better understand the sensitivities;
- if the OIA process were to be reformed to give third parties a recognised place in the process - consultation will carry the same advantages and disadvantages as with the current processes but serve the additional purpose of giving effect to third parties' rights and providing them with a meaningful way of protecting their interests.

OPC takes the view that there should be provision expressly in the statute for interested third parties to be consulted with a process for those views to be taken into account by the organisation making the decision on release and in relation to review processes (which should include a right for the interested third party to take the matter on review to the Ombudsmen).

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

Please see our answer to Q71 in which we try to tie together strands from our answers to several questions.

The issues paper in essence offers two options to provide improvements over the status quo in relation to protecting third party interests, notably the protection of privacy and trade secrets. These seem to be:

- a process whereby the third party has a right to be notified by the department of a request, to make a submission to the department before a decision is taken on the release of the information and to take the matter on review to the Ombudsmen if the department decides that it does intend to release the information (this is a brief characterisation of the model described at 10.42);
- the Law Commission's favoured approach that the third party be given notice after the department takes its decision to grant the request, but before the information is actually released, to provide a small window of opportunity for the affected third party to informally influence the department, ready itself for the release or perhaps take judicial review proceedings (described at 10.47).

OPC favours the option whereby the third party having a clear interest in the matter of release is accorded a proper opportunity to be heard in the process. This seems only fair. It could go some considerable distance to make the process of protecting privacy and trade secrets in such cases a meaningful reality. The other option does not seem a very credible response to the issue of protecting privacy in accordance with the objects of the Act.

OPC takes the view that the process should be coupled with a right for the interested third party to take the matter on review to the Ombudsmen. This recognises the strength of the current processes and seems a logical adjunct to the proposed reform whether it be a consultation process as OPC favours, or the more restricted notification requirement, that the Law Commission currently favours. Judicial review is an important administrative law safeguard and interested parties should, of course, be able to avail themselves of such judicial processes. However, judicial review is not well geared towards information access questions and, given the expense, having that as the only review option will deny effective protection to most individuals that wish to protect their privacy. Judicial review also cannot substitute for the role of substantive appeal rights. Nor does it provide a meaningful opportunity to be heard by the decision-maker

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

No comment.

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

If the agencies are truly confused about their ability to transfer a request in part, then it might be useful for the legislation to clarify that they can.

However, we are surprised that any difficulty might arise. Our view is that section 14 (like section 39 of the Privacy Act) is broad enough to encompass partial transfers – particularly when coupled with the requirement in section 13 (section 38 of the Privacy Act) to provide assistance to requestors. It is therefore not clear that legislative change is necessary.

We do not have any experience in our own jurisdiction indicating a change is necessary. However, OIA requests may more commonly involve multiple agencies than Privacy Act requests do.

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

No comment.

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

No comment.

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

We think that the requester should be able to continue to specify his or her preferred method of receiving the information (with the existing caveats allowing the organisation some flexibility where acceding to such a request is not appropriate).

Releasing information in electronic form may increasingly suit both agencies and requesters. There is nothing to stop an agency from suggesting that this may be a convenient form in which to release the information.

However, the requester may have good reasons to prefer another format or be unable to make use of the information in electronic format. The requester's entitlement to receive the information should not depend on the equipment or programs that they have available, or on their technical capability, or the preferences of others.

We also mention that there might be cases where a department may prefer to release information in a format, including on occasion a non-electronic format, to protect privacy or some legitimate governmental interest. The arrangements should remain flexible to accommodate that.

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

If the volume of requests involving this type of information is high, or if agencies are unsure how to manage them, it may be useful to include a specific provision. We are unsure, though, that this is necessary at this time.

If a provision were to be included, the Privacy Act's approach might be worth considering, though it could be too broad to work successfully in the OIA environment. The Privacy Act links access entitlements to the retrievability of information. If information is not readily retrievable, a request may be refused.

It is important, however, that ready retrievability is not read down too much. Agencies need to have good information management systems – they should be expected to be able to retrieve most types of records on request.

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

No comment.

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

The possibility of releasing information on conditions is somewhat problematic as the law is written at present. The OIA does not create machinery for imposing conditions nor really anticipate a role for conditions to be imposed upon release. However, the Act does anticipate that the Ombudsmen might handle a complaint relating to the imposition of conditions. This presumably is a supervisory role to prevent agencies introducing

non-statutory barriers to access rather than to role intended to give legitimacy to the imposition of conditions. (The position under the Privacy Act is similar.)

It is clear that the OIA anticipates the various interests, such as privacy, to be protected by the refusal of a request (subject, of course, to countervailing public interests).

An advantage of a regime for imposing conditions is perhaps perceived to includes an enhanced ability to make more finally grained decisions on refusal – perhaps allowing for the release in certain circumstances where otherwise a blanket refusal would be necessary. If the relevant interest, such as privacy, can thus be protected it appears on its face to be a 'win:win' for both transparency and accountability. Similarly one might imagine that the ability to make more finely grained decisions on release would also translate into the cases where there is good reason to refuse a request because of privacy but there are countervailing public interests. Perhaps in some such cases those countervailing public interests can be served in a way that the privacy interest can be protected by a condition.

Accordingly, OPC welcomes exploration of the possible role of conditions on release in the OIA (and if a good solution can be found, a counterpart provision in the Act says regime and the Privacy Act). However, we are of the view that it will essential for the conditions to be effective and enforceable. A simple promise by a requester to do or refrain from doing something of itself is not enough. The regime must be effective to ensure that conditional release does not become a figleaf for releasing information when meaningful protection of privacy should demand its withholding.

If conditions were seen as having a useful place in the OIA regime, we consider tat least the following issues might need to be satisfactorily addressed:

- the scope of conditions, where they are appropriate and where they are not;
- the form of conditions, how they can be framed and imposed;
- participation in framing the conditions, whether the requester can insist on unconditional release or nothing, whether third parties affected by the conditions are to be consulted;
- review of conditions by the Ombudsmen, before or after release;
- redress for affected persons in the case of breach of a condition;
- incentives for compliance with conditions and sanctions for non-compliance;
- clarifying responsibility for enforcing and upholding conditions (is it a role for the department concerned, the Ombudsmen or an aggrieved third party?).

OPC does not underestimate the challenge in crafting a suitable regime. We see no value in unenforceable conditions which provide only an illusion of protection of the relevant interests (or conversely an unreasonable barrier to access). However, we think that if an appropriate effective and enforceable regime for conditions can be devised, this may offer benefits for the objects of OIA as well as the appropriate protection of interests such as privacy.

It is possible that the Privacy Act might have some part to play in crafting a fully effective and enforceable regime. It could only be part of any regime since it covers only personal information and is focused on resolution of complaints and civil redress and thus does not provide the incentives, sanctions and enforcement regime that might be necessary. However, if release on conditions is part of the future OIA regime, it would be desirable

in cases of release on conditions intended to protect privacy, for the Privacy Act to reflect the conditional nature of the release and possibly provide redress in cases of breach.

Question 66 – Do you agree there should be regulations laying down a clear charging framework for both the OIA and the LGOIMA? (also question 67)

We have no particular view on this question in the official information context. However, we do mention that any new charging framework could have an indirect effect on charging under the Privacy Act. While public sector agencies cannot charge a requester for access to his or her personal information, private sector agencies can and occasionally do charge. Those private sector agencies are aware of the guidelines for charging under the OIA and would be equally aware of any new framework.

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

No comment.

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

No comment.

CHAPTER 11: COMPLAINTS AND REMEDIES

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

No comment

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

No comment.

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?

Briefly, in relation to this question, OPC takes the view that there should be provision for persons affected by the release of information to take a complaint. By itself, a complaint to the Ombudsmen after the event is not an effective reform and seems incomplete. We consider that in addition to the possibility of complaint or redress where information has been released that should have been withheld, there is a need for integrated reforms dealing with the process for agencies to consult with affected third parties and for the possibility for review of a decision to release to be taken to the Ombudsmen, before release and not merely after the event.

Since these various issues interrelate, we take the opportunity to offer a longer and more general response. This answer draws upon some of the issues touched upon in questions 56, 57, 58, 65, 71, 72, 75, 76, 77, 79 and 82.

In OPC's view the OIA has numerous strengths and is a key law encouraging both accountability and transparency, virtues that are essential to a modern, vibrant and democratic society. However, our view is that the processes are somewhat deficient in giving effect to the protection of the rights and interests of third parties whose information are held by government bodies and need enhancement. (The issues of concern to OPC relate, of course, to protection of personal information and privacy. However, counterpart issues arise with trade secrets and commercially confidential information entrusted by businesses with public bodies. Although not discussed in detail in this answer, our proposals with respect to privacy cases should probably also be applied to cases involving request for trade secrets.)

At the outset, we emphasise a fundamental point that the objective of a freedom on information law must be to successfully ensure *both* the release of information where appropriate *and* the protection of interests identified as needing protection. The OIA is not successful if it simply ensures the release of information notwithstanding competing interests such as privacy. The OIA explicitly provides that the Act's purpose includes 'to protect official information *to the extent consistent with*…the preservation of personal privacy.' In OPC's view the scheme of the OIA has deficiencies in relation to protecting third party interests.

The shortcomings of the OIA processes would appear to include:

- not providing an entitlement, nor in many cases even an opportunity, for affected third parties to be consulted on a decision that may significantly affect their interests;
- the absence of an obligation even to tell significantly affected third parties that there has been a decision to release information or that information has been, or is about to be, released;
- the absence of a process for affected third parties to request the review of a decision to release information before the release is made;
- an imbalance in such cases since the requester, but not the affected party, can participate in the process;
- no statutory consequences for wrongful release of information and, in particular, no opportunity for affected third parties to complain about information wrongly released or to seek redress for harm caused by the release;
- the lack of meaningful appeal or review on the merits of an Ombudsmen determination.

The reform that OPC recommends would add the following elements to current OIA processes:

- an obligation upon departments to give notice to the individual concerned where there are significant third party interests at stake (i.e. release will substantially affect the privacy of an identified individual);
- the affected individual would have a right to make a submission to the department in relation to the request;
- if the department proposes to release the information, the affected individual would be given the right to take the matter on review to the Ombudsmen and the information would not be released in the meantime;
- in cases where the department withholds requested information and the requester takes a complaint to the Ombudsmen, the Ombudsmen would be obliged to give notice to the affected individual concerned where there are significant third party interests at stake and provide an opportunity to be heard;
- the Ombudsmen's opinions would be re-characterised as determinations and be binding (subject to the outcome of any appeal);
- where the Ombudsmen determines that the information must be released, the affected individual may appeal the determination to the HRRT where there significant third party interests at stake;
- the Cabinet veto would be dropped but there would be a provision for a department, with Cabinet approval, to appeal to the HRRT where the Ombudsmen determines that information must be released.

The proposal just described offers promise from OPC's perspective. Amongst other advantages:

- it maintains some of the strengths of the existing system most notably having the Ombudsmen undertaking access reviews in much the same way as the present;
- it provides robust administrative and legal processes that are missing from the current system in relation to cases where release would have a significant effect on third party interests;
- it provides stronger overall open government requirements transforming the Ombudsmen's powers from opinions to determinations;
- it provides new accountability by making consultation with affected third parties mandatory and providing for appeal;

- it replaces the poorly regarded veto provisions which are perceived to introduce a political element into the arrangements and are difficult to use with a more transparent appeal process;
- the use of the courts is avoided as the primary appeal authority but instead the proposal draws in the HRRT which did not exist when the OIA was devised but which has now had 17 years of information access law jurisdiction and expertise.

OPC believes that through inclusion of appropriate thresholds, time limits, exceptions and processes, the process need not introduce undue delay.

It would be possible to adopt some elements of this proposal without taking the entire package. For example, the proposal would offer some benefits without including provision for appeal. However, we take the view that determinations on release where there are significant third party interests at stake warrant an appeal process. That does not seem a terribly remarkable proposition in most areas of law including with respect to the Privacy Act.

In this proposal we have not suggested that requesters be given the opportunity to appeal the Ombudsmen's determinations to the HRRT. Instead, we took the view that the appeal rights should be linked to the cases where the determination affects a party's rights or legal interests. The cases that we are concerned with where there are significant third party interests at stake (i.e. privacy or the disclosure of trade secrets entrusted to the government) and the third party should be empowered to participate in determination of the extent of those interests. Similarly, a binding determination upon the government affects the government's interests and thus, with Cabinet approval, departments should be able to appeal determinations. By contrast, the OIA does not attempt to confer legal rights upon requesters to have access to information. Rather, the OIA confers procedural entitlements upon requesters.

OPC would not be opposed to requesters being given appeal rights but do not see conferring such rights as an essential feature of our proposal. Under our proposal, the vast majority of cases that are not resolved to departmental level will be finally determined by the Ombudsmen. We anticipate that only a tiny proportion will go on appeal.

Obviously, that proportion would expand if unsuccessful requesters could also appeal. We are confident that arrangements along the lines that we have proposed could be successfully devised and work satisfactorily. Some care will need to be taken in devising thresholds and procedures in relation to third party consultation obligations. There might need to be exceptions for certain cases, for instance, for reasons of practicability. However, there are precedents for 'reverse-FOI' rights in other jurisdictions and we expect that those matters can be satisfactorily dealt with.

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?

See answer to Q72.

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

No comment

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

As mentioned at Q71, OPC sees a useful role for third party consultation in appropriate cases.

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

There may be significant advantages in having the Ombudsmen provide determinations of OIA requests rather than simply rendering opinions. A properly crafted legislative scheme for Ombudsmen determinations may be better than the current arrangement that effectively makes the Ombudsmen opinions enforceable rather than merely persuasive yet without many of the legal safeguards one might normally expect in a process for making determinations affecting people's interests.

OPC would wish to see enhancements of the processes to protect third party interests, notably individuals whose privacy is at risk by the release of information. As discussed in more detail at Q71, this should include notification to the individual, an opportunity to be heard, an ability for the third party to complain to the Ombudsmen and an appeal right.

In the counterpart review of the Privacy Act, OPC has supported a suggestion for OPC to move to issuing determinations rather than simply rendering persuasive opinions. However, that proposal is premised upon there being an appeal right to the Human Rights Review Tribunal by the person whose interests are affected.

There is discussion earlier in the issues paper about the role of Ombudsmen case notes and precedents (see Q8-11). OPC anticipates that if there is a move to a system of making issuing determinations that some kind of formal document will need to be issued in each case, perhaps in the form of a complete opinion or some abbreviated short-form determination. It may not necessary be the case that all matters taken on complaint to the Ombudsmen would end in a determination since experience in other jurisdictions, including OPC's under the Privacy Act, suggests that a proportion of cases will continue to be resolved by consent without reaching that point. It may be that case notes have a continuing useful educative role to play in reporting upon a selection those resolved cases even if more vexed matters are dealt with by formal binding determinations.

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

In some cases a veto could possibly be used to protect the privacy interests of third parties when the Cabinet is of the view that an Ombudsmen determination has not struck the right balance in relation to parties whose interests are significantly affected by the release of information. However, it seems more likely that vetos will be contemplated when other governmental reasons are perceived to be as risk. Vetos do not provide a substitute for a process that enables the third parties to be heard before an access decision upon release is made.

The existing veto process is extremely difficult to use from a political perspective. This has made it of little use as a meaningful OIA mechanism as a useful final check on the Ombudsmen's decisions. The veto, rightly or wrongly, may be perceived as a potential political weapon rather than a constitutional one or as a respectable part of the overall OIA processes.

Accordingly, OPC suggests that the veto power be removed and replaced by appeal to the Human Rights Review Tribunal. It could be provided that a department may only appeal with Cabinet approval. This would align the new appeal threshold with the veto threshold and would ensure that decisions to appeal were taken collectively by Cabinet rather than by an individual department. As a result appeals would be quite exceptional and not routine.

It may well be that Cabinet would be more willing to occasionally authorise the taking of an appeal to the HRRT than it is to exercise a veto. This would be a healthy development and benefit the OIA system more generally since no administrative review body is infallible. A fundamental tenet of the common law system is the judicial oversight and guidance provided by an appeal process.

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

As with Q76, OPC suggests that if the veto is removed it might perhaps be replaced by an appeal right to the HRRT on the resolution of a full 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?

No comment.

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?

OPC does not see judicial review as a substitute for appeal on the merits. However, OPC sees promise in using the specialist HRRT as an appeal body rather than the regular courts.

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

No comment

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?

No comment.

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?

No comment.

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

The issues paper points to evidence of non-compliance and observers that 'not all of the conduct is blameless'. An inference is drawn of 'game playing'. The report quotes an informed commentator who speaks of 'deliberate flout[ing] of the law', 'stone-wall[ing]' and a lack of 'good-faith'.

The approach suggested in the issues paper is simply to authorise the Ombudsmen to report publicly on the conduct of the agencies. While obviously supporting the Ombudsmen having such a power, surely they can make such reports already under existing powers? The discussion would seem to suggest that stronger powers of the type already vested in other FOI enforcement bodies might be warranted.

CHAPTER 12: PROACTIVE DISCLOSURE

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?

OPC has no strong view as to whether the directory of OIA should continue to be published although we can see some sense in moving to a system whereby departments simply publish the same details on their own website. Such a change would seem to accord with the way in which citizens now expect to locate and retrieve information. Such a change in approach would probably also be more cost effective and timely to compile and maintain.

In developing a reform option in this context, OPC would encourage the Law Commission to take into account the counterpart directory provision in section 21 of the Privacy Act in relation to agency holdings of personal information. OPC had recommended that the provision for directories under the Privacy Act be dropped and replaced by a similar reform as suggested here, namely that agencies be required to publish some of the same details themselves. It is suggested that if a similar reform is adopted in relation to the OIA that some thought be given to harmonising the requirements so that public bodies conveniently can meet their dual obligations.

Q85 Do you think there should be any further mandatory categories of information subject to a proactive disclosure requirement in the OIA or LGOIMA?

As mentioned in relation to Q84, there is provision in section 21 of the Privacy Act for details of agencies' personal information holdings to be published in a directory. Those Privacy Act directories have never actually been published. Given the expectations upon public bodies to be transparent about their information handling, there might a case to impose specific obligations on departments that do not apply to, say, private companies. The classes of information set out in section 21 of the Privacy Act, in relation to databases of personal information, may be of that nature.

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

The proposal does present some risks to privacy through mass or routine release of personal information. If such releases were to be treated as being done 'under the OIA', this could be quite problematic in terms of accountability for such disclosures under the Privacy Act.

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

No comment.

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 comment.

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

No comment.

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

No comment.

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*?*

OPC agrees that there should be no statutory protection for agencies from court proceedings in relation to proactive release of information. In particular, public bodies should not be given carte blanche immunity from any Privacy Act liability for harm arising from disclosing personal information, for instance by thoughtlessly posting it on the internet.

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?

No comment.

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

There would seem to be ample scope for improving the training arrangements relating to the OIA regime. It will be difficult to achieve the objectives of the legislation unless officials are trained in their responsibilities under the Act. This can occasionally spill over as a problem affecting the administration of the Privacy Act in cases where officials fail to treat an OIA request properly and, instead of given proper statutory reasons for refusal, as is required under the OIA, fob requesters off citing the Privacy Act.

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

If this proposal goes forward, thought should be given to the merit of similarly collecting statistics on public sector subject access requests.

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?

Some effort would be required by organisations to produce statistics, and a coordinating entity to compile and analyse the results. It will be important to ensure that the value of these statistics warrants the effort.

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

No comment.

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 comment.

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

No comment.

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

No comment.

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

No comment.

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

No comment.

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

No comment.

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

No comment.

CHAPTER 14: LOCAL GOVERNMENT OFFICIAL INFORMATION AND MEETINGS ACT 1987

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?

No comment.

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

No comment.

CHAPTER 15 : OTHER ISSUES

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

OPC tends to agree with the discussion relating to accessibility. Many of the OIA provisions are reasonably clear but the structure is a barrier to simple understanding. In relation to the personal access regime, the Privacy Act has inherited some of this undue complexity, slightly illogical ordering and difficult to find provisions. OPC has made detailed proposals in the Privacy Act context for a complete recording of the reasons for refusal in the Privacy Act with each reason receiving its own section and heading. A similar approach might also be warranted in terms of the OIA.

If the opportunity were to be taken to redraft and re-enact the entire statute, that would also offer an opportunity to simplify some of the other provisions or make other improvements such as more informative headings (for instance the heading 'documents' is relatively uninformative in both section 16 of the OIA and the section 42 of the Privacy Act).

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

No comment.

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

No comment.