PART A

Internal advice/memoranda in advance of submission of February 2010

From: Blair Stewart
Sent: Thursday, 30 September 2010 5:54 p.m.
To: Marie Shroff
Cc: Linda Williams
Subject: Law Commission's Issues Paper on Reform of OIA - "The Public's Right To Know"

Marie

I've had a quick look at this and see that it's another mammoth effort, 280 pages and a staggering 108 questions (there were 195 questions with the privacy review but privacy law is a far more complex subject with a whole lot more issues and options). Closing date 10 December.

While there are many stand-alone aspects of this review that we could choose to engage with or not depending upon priorities, I'd have to say there are a large number of inter-relationships with the ongoing review of the Privacy Act.

Although one always wonders about whether there's an appetite for reform of the OIA, especially given certain vested political and governmental interests, I think there would be risks in us choosing not to effectively engage in the process in so far as it is relevant to either privacy, the Privacy Act and its review, and institutional arrangements that might impact upon OPC.

A quick reminder about some obvious points of interaction:

- many machinery provisions in the Privacy Act are modelled upon OIA, LGOIA or Ombudsmen Act e.g see table of equivalent provisions taken from *Necessary and Desirable*;
- some issues of reform of Privacy Act reform, turn on the same issue being changed or addressed compatibly in OIA;
- privacy can be significantly affected by release of information under OIA;
- the institutions under both laws interact, change to one may affect the other.

There are some specific issues we know of which could create risks to what we're trying to achieve, e.g.:

- down-grading existing protections for privacy;
- blunt approaches to promote openness or government information sharing using the OIA;
- proposals to merge OIA and Privacy Act or respective review bodies;
- missed opportunity to promote improvements that we think will make things work better.

If we are to do a submission I expect there would be some limited opportunity to carry across some answers to questions we've already agreed for the Privacy Review process. I think it would also be possible to ring fence our involvement so that we tried to answer only questions we have some relevant interest in or special viewpoint upon, although I would guess given the points of interaction that we might be likely to have some kind of interest in more than 50% of the questions.

Having seen how they Law Commission works I think it is useful to be on the record on questions in issues papers even if we do also have some back channels for input.

BTW I see that the Ombudsmen did a 27 page submission on the Privacy Acct review so I can't see there would be any sensitivities from that quarter in the prospect of us making a submission (it may be a different matter as to whether they like what they read).

I think it would be useful for us to have a preliminary discussion quite soon as to whether you'd like me to look at this more closely as an adjunct to the Privacy Act Review (as I'd tentatively suggest) or see it handled in some other way (but if so in a way that can be adequately reconciled with what we're advancing in the Privacy Act Review).

Blair

From: Katrine Evans
Sent: Monday, 14 December 2009 1:13 p.m.
To: Blair Stewart
Subject: RE: LC Review of OIA

Follow Up Flag: Follow up
Flag Status: Flagged

Good idea, and yes I agree we have to be involved on some aspects of it. In fact I was kind of surprised that they hadn't approached us before, given the cross-over stuff.

I'm sure they'd give us an extension if we needed it, but it would be nice to get it clear before part 4 of the privacy review hits, I guess.

K

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From: Blair Stewart
Sent: Sunday, 13 December 2009 6:15 p.m.
To: Katrine Evans
Cc: Linda Williams
Subject: LC Review of OIA

Katrine

You may have seen a discussion paper - or elaborate pre-issues paper - arrive from the Law Commission on review of OIA.

MS has suggested that you and I ought to discuss how we should handle it.The Commissioner was at pains to say that she didn't necessarily want to see a lot of resource invested in the exercise - which I believe may relate to her scepticism about the strike rate for reforms to the OIA going anywhere. I mentioned that there were a couple of areas where the LC review of privacy ran into this review and we need to be involved in those issues (e.g. key *N&D* recommendations to reorder and clarify reasons for refusal have not been addressed by LC pending looking at similar issues here) so I'd like us to be seriously involved in at least those aspects.

May I suggest that Linda set up a meeting for us to discuss this - the deadline is 22 January which is pretty absurd, almost insulting for an exercise in reforming an openness and participation law!

Blair

Blair Stewart
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tel +64 9 302 8654 fax +64 9 302 2305 www.privacy.org.nz

Search privacy case notes from around the world

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From: Katrine Evans
Sent: Tuesday, 15 December 2009 10:19 a.m.
To: Blair Stewart
Subject: Law Commission review of OIA

Follow Up Flag: Follow up
Flag Status: Flagged

Hi Blair

Following our chat yesterday, I've had a look at the questionnaire from the Law Com with a view to seeing what, if anything, we should be contributing to the OIA project at this stage. I think that, with one exception, we could do without having any input at this time.

The questionnaire is aimed at giving them guidance on how they should focus their issues paper. They're trying to find out the practical experience of officials and requesters. But Nicola White already largely did this as part of her project, and Steven Price has chipped in usefully as well - I'm not sure what else this questionnaire will achieve, to be honest.

So, we could reserve any substantial or wider policy comments until the issues paper consultation stage - tempting as it is to get involved because it's so interesting, realistically I'm not sure we'll be able to assist more than most people at this time. I think it's best not to spend scarce time before 15 Feb. If the issues paper comes out mid 2010, we may be a bit freer at that stage to be able to contribute meaningfully.

The exception is that we should probably briefly answer the questions under topic 3.4 (privacy withholding provision, alignment with Privacy Act, and potential improvements); and, in association with it, topic 2.2 on the usefulness of the two-stage test.

Topic 5 on the effect of IT on information management is something that we could tackle, but I think my main issue with it is that they don't seem to be asking similar questions under the privacy review - so maybe we should suggest as part of our comments that this is something they could include? Ditto timeframes, transfer, charges etc, where they are not currently included...

The only other possibility may be the enforcement side - the questionnaire asks about sanctions for instance, and topic 9 is leading towards the possibility of a court/tribunal-based option as a second line of review. Our experience could certainly be useful. Again, though, I suspect the issues paper will capture those ideas sufficiently well that we can reserve our input until that stage. Plus we've already done a lot of work on enforcement that John Burrows has access to and can cross-over as necessary.

Happy to discuss. If you want me to lead on the response to free you up for privacy review stuff, let me know (not that I'm going to fight you for the job!!)

K

PART B

Submission of February 2010

SUMMARY
OFFICIAL INFORMATION SURVEY QUESTIONS

This is a word document which you can adapt as needed for your response and return to officialinfo@lawcom.govt.nz

The Law Commission's processes are subject to the Official Information Act 1982. Thus copies of submissions made to the Law Commission will normally be made available on request, and the Commission may refer to submissions in its reports. Any requests for withholding information on grounds of confidentiality or any other reasons will be determined in accordance with the Official Information Act 1982.

Who are you?

Please provide the following information about yourself.

- Are you primarily someone who seeks information or who provides information?
- What is your usual involvement with official information, e.g. media, legal adviser, prepare responses, politician, research, public interest group?
- Name (optional)?
- Organisation (if applicable)?

Blair Stewart
Assistant Commissioner (Auckland)
Office of the Privacy Commissioner
PO Box 466
Auckland

Blair.Stewart@privacy.org.nz

tel: 09-302 8654

The Office of the Privacy Commissioner (OPC) is involved with some of the issues you're reviewing in various capacities as the review authority for the law that grants subject access rights, the Privacy Act 1993. The relevant provisions in the Privacy Act were modelled upon provisions in the OIA. There is a concurrent review of the Privacy Act.

Thus the common origin of some of the statutory provisions, the statutory interaction and the concurrent reviews are some of the prime reasons for participating in this review.

Both as a review authority under a similar and complementary information access law, and in the OPC's broader information and privacy roles, this office has a close professional interest in issues of transparency, access, information disclosure,

accountability, etc. In 2002, for instance, we organised an International Symposium on Privacy and Freedom of Information. Thus we remain interested in participating in appropriate ways with your review as it goes forward during 2010. Although I've chosen to comment upon just upon a very few of the questions (and not necessarily the most important) the OPC may have experiences of some relevance on many of the others as well. There may be more technical areas involving, say, interpretations by OPC on concepts found in both Acts (e.g. "maintenance of the law") on which I haven't attempted to comment here. We expect that you may plan to consult OPC directly in relation to issues touching upon areas relevant to the Privacy Act and will be happy to provide assistance if requested.

For reasons of timing, limited opportunity to devote much resource to this review at this time, and the unavailability of some other staff just now, this submission should be viewed as largely my own personal opinions albeit from the perspective of OPC. While I trust it will be helpful and all that is needed at this stage, I have not discussed the detail of the submission with the Commissioner. If it is important to have an "official" position on any question, just let me know and we can prepare something more formal. This seemed unnecessary given the stage you're at and the nature of the comments I've offered.

Questions

1 Overview of the Act

(a) Do you find the OIA and/or LGOIMA easy to read and understand?
(b)What changes would make the Acts easier to follow?

When we reviewed similar statutory provisions in Parts 4 and 5 of the Privacy Act we made a number of recommendations for improvements (set out in the 1998 Report Necessary and Desirable: Privacy Act 1993 Review, *Parts 4 and Part 5 and a 2003 supplement) and you might like to consider some of these suggestions here. For instance, in the case of the Privacy Act's equivalent provisions, we felt it would help people find the relevant reasons for refusal if each had its own section and corresponding section heading.*

(c) Do you have any comment on the overall framework of either Act?
(d) What advantages or disadvantages would there be in having the official information legislation for both local and central government in the same act?

2 Applying the Act

2.1 Case-by-case consideration

(a) What is your experience with the case-by-case approach?
(b) How important is it for upholding the principles of the Act?
(c) How helpful do you find the Case Notes and Guidelines of the Ombudsmen?

OPC has been publishing case notes since 1996 inspired by the Ombudsmen's case note series and closely modeled upon them. However, in 2002 having taken advice from an international expert on electronic legal resources, we made two

deceptively small, but significant, changes to our case notes and case noting practice.

The first was to develop a citation system consistent with recommended international norms. For instance, this needs to show that the case is from the New Zealand Commissioner or Ombudsman not merely just "the" Commissioner or Ombudsman. When we changed over from the previous system (which like the Ombudsmen just used complaint file references) we went back and recaptioned earlier notes for the sake of completeness although that is not essential.

The second was to facilitate the searching, retrieval and dissemination of our case notes by depositing them into a common database with similar authorities from other jurisdictions. We placed them in the World Legal Information Institute's on-line International Privacy Law Library where our case notes now join more than 8500 from 13 other authorities. Searches may now be easily made across a range of data sets in a 'one stop shop' arrangement.

In case the experience has lessons to offer in the freedom of information space I can advise that we developed, for the Asia Pacific Privacy Authorities Forum, common standards on case note citation and case note dissemination which has now been adopted at international level by resolution of the International Conference of Data Protection and Privacy Commissioners in November 2009 (for which I can provide further information on request).

(d)Would you like more general guidance from the Ombudsmen on frequently recurring situations?

2.2 Two stage test

(a) What is your experience with the two stage test?
(b) How important is it for upholding the principles of the Act?
(c) Have you any suggestions for improvement?

3 Reasons for withholding information

3.1 Maintenance of the law

(a) What is your experience with the s6 conclusive grounds for withholding information?
(b) What is your experience with the s6 maintenance of law ground?
(c) Should any of the grounds in s6 be subject to the public interest test?
(d) Should any other conclusive grounds be added to s 6?

For officials

(e) In what circumstances do you commonly apply the s6 maintenance of law ground?

3.2 Good government

(a) What is your experience of the provisions that enable information to be withheld on the basis of enabling good government?
(b) Have you any suggestions for improvement?

For officials

(c) Which of the "good government" grounds is most often relied on?
(d) How is it decided whether the Agency or Minister makes decisions about the

3.3 Commercial interest

(a) What is your experience of the commercial interest withholding provisions and the way they are applied?
(b) Have you any suggestions for improvement?

In Necessary and Desirable *(mentioned above) we looked at the drafting of the trade secret reason for refusing access. We have been ambivalent as to whether that reason is even needed in a subject access law like the Privacy Act (initially concluding that it was unnecessary in the1998 report – see recommendation 50 -but deciding in 2008 that although infrequently used it was worth keeping, see 4th supplement). However, clearly it is needed in a general access law like the OIA. Accordingly, see our drafting suggestions in our 3rd supplement in which we suggested adding a simple definition as follows:*

> *"For the purposes of this section, 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*
> *is the subject of all reasonable efforts to preserve its secrecy."*

3.4 Privacy

(a) What is your experience of the privacy withholding provision, and of its alignment with the Privacy Act 1993?
(b) What might improve the situation?

We expect that you will be consulting us further on these kinds of detailed matters of privacy and inter-relationship with the Privacy Act and so I won't offer any detailed comments here. We have of course spoken in the context of the privacy review looking from the other side of the inter-relationship. We will look forward to further dealings over the issues.

3.5 Processing difficulties

(a) What is your experience of the provisions that enable information to be withheld because release would require substantial work?
(b) How appropriate are they today?
(c) Have you any suggestions for improvement?

3.6 Withholding provisions in general

(a) Do you have comment about any other grounds for withholding information?
(b) Should additional grounds for withholding information be added to those already provided for in the Acts?

(c) Should any of the current grounds be removed, amended or clarified?

I note this as one point of interaction with the regime under the Privacy Act. At the moment the wording of the common reasons for refusing access between the two Acts are virtually identical. In some cases good ideas for change may

appropriately be carried into the provisions in both Acts. However, it may not be essential for the provisions to remain identical in every respect although if differences are to be contemplated the implications of any new divergences will need to be worked through. At a fundamental level it will be essential that the rights of the individuals concerned to have access to personal information held about them by the government are not less than the access enjoyed by third parties to the same information. This has been the case since the beginning of the OIA. If it is proposed to narrow a reason for refusal in the OIA it will probably be necessary to mirror that narrowing in the Privacy Act. However, the same does not necessarily follow in terms of any proposal to narrow a reason for refusal in the Privacy Act nor any proposed broadening of the reasons in the OIA.

4 Scope of the Act

(a) Are there organisations covered by the OIA or LGOIMA that should be excluded?
(b) Are there organisations not covered by the OIA or LGOIMA that should be included?

Although I am not at this stage trying to "make the case" for coverage, it is notable that your paper omits to mention the possible extension to private bodies performing public functions. Given the way that public administration has evolved since 1982 this would seem to be worth examining. I am aware that some overseas freedom of information laws already do so and cover, for instance, associations exercising discipline over a regulated profession.

(c) What rationale should be applied to determine which organisations should be in the scope of OIA and LGOIMA?

5 Information Technology

(a) How is IT transforming information management, and what will this mean for the OIA and LGOIMA?
(b) What changes to the OIA and LGOIMA would encourage better use of the efficiencies and advantages available through IT?
(c) Should the OIA and LGOIMA include provisions to require or encourage pro-active publication of information by agencies?

6 Administrative Compliance

6.1 Timeframes & delay; Extension of time; Transfer of requests; Charges

(a) What problems do you experience with timeframes, transfer of requests and charging?
(b) What other problems do you find with the administration of the Acts?
(c) What measures might alleviate the problems you experience?

7 Administrative Issues for Officials

7.1 Workplace management

(a) What procedures are in place to ensure administrative compliance with timeframes, transfers and charges?
(b) How well are the OIA and LGOIMA understood by officials responding to requests?
(c) What support and training do officials receive and what might improve skills?

Questions (a) to (c) raise important practical issues that have a flow on effect in relation to the Privacy Act. Improvements in OIA understanding by officials and to the OIA's administration would be beneficial to address misconceptions wrongly attributed to the Privacy Act, whereby officials sometimes fob off requesters by claiming they cannot release requested information because of the Privacy Act. When the OIA applies, which is mostly the case, officials responding to the request are of course obliged to give reasons for their refusal in OIA terms – and such reasons do not include "the Privacy Act" amongst them. If officials were to be more aware of their OIA obligations, and to give effect to them, the occasional media storm that can blight the Privacy Act's reputation would largely disappear. Surprisingly, these cases of "blaming the Privacy Act" seem not to tarnish the reputation of the OIA and yet mostly they repressing a repeated failure of that Act – officials failing to follow the OIA's procedural requirements, officials failing to give reasons as required by the OIA, officials failing to notify the requester of the right to get the decision reviewed as required by the OIA – not to mention, of course, the failure to promptly release information in those cases where refusal is not justified.

I should add that a number of cases publicly reported "blaming the Privacy Act" may well involve requests that might appropriately be refused under the OIA. However, it is important that the proper reasons be given together with advice of the right to have the refusal reviewed. To simply fob a requester off with a blanket and non-applicable reason represents a lack of public accountability and unsurprisingly aggravates requesters. To tell a requester that you've decided to withhold certain information to protect a person's privacy under OIA s.9(2)(a) but that he can have that decision reviewed by the Ombudsmen will get a better response that "sorry mate, can't answer that because of the Privacy Act".

I would encourage the review to look carefully at such sector wide issues represented in these three questions.

7.2 Large requests & workload

(a) What is the impact of OIA and LGOIMA inquiries on your other work?
(b) How do you deal with wide-ranging "fishing" requests?
(c) Have you any suggestions for improving the situation?

7.3 Interface with the Public Records Act 2005

(a) What is your experience of compliance with the Public Records Act 2005 and its relationship to the OIA?
(b) Have you any suggestions for improvement?

8 Possible Sanctions

(a) Should sanctions be imposed for any breach of these Acts?
(b) If so, what sort of breaches, and what sort of sanctions?

9 Role of Ombudsmen

(a) What is your view about the dual functions of the Ombudsmen?
(b) Should the Ombudsmen continue to investigate OIA and LGOIMA complaints?
(c) Should the Ombudsmen provide guidance and assistance with training?
(d) Is a single review mechanism sufficient?

10 General

Are there any other aspects of OIA or LGOIMA you wish to comment on?

PART C(1)

Correspondence/memoranda in advance of submission of February 2011

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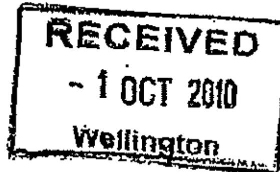
TE·AKA·MATUA·O·TE·TURE



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29 September 2010

President
Rt Hon Sir Geoffrey Palmer SC

Commissioners
Dr Warren Young
George Tanner QC
Emeritus Professor John Burrows QC
Val Sim

Ms Marie Shroff
Privacy Commissioner
Privacy Commissioner
PO Box 10 094
WELLINGTON

Dear Ms Schroff

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

From:	Blair Stewart
Sent:	Tuesday, 12 January 2010 2:26 p.m.
To:	Ewan Morris
Subject:	FW: OIA Review - submission by Blair Stewart - Office of the Privacy Commissioner
Attachments:	summary_of_Qs_for_download_081209[1].doc
Importance:	Low
Follow Up Flag:	Follow up
Flag Status:	Flagged

Ewan

I can't recall if you're also doing the OIA reference and will see this directly.

In case not, I attach a copy. Obviously I've not said a lot about the big issues from our perspective as those have al;ready been the subject of discussion or will need a more carefully positioned statement a little later in the project. However, given the relationship of the OIA review to the privacy review I thought it would be churlish to say nothing or to feign a lack of interest!

Katrine and Marie aren't back in the office yet.

Regards

Blair Stewart Assistant Commissioner (Auckland) | Office of the Privacy Commissioner
PO Box 466 Auckland 1140 New Zealand | ☎ +64-9-302 8654 | 🖷 +64-9-302 2305

From: Blair Stewart
Sent: Tuesday, 12 January 2010 2:19 p.m.
To: 'officialinfo@lawcom.govt.nz'
Subject: OIA Review - submission by Blair Stewart - Office of the Privacy Commissioner

Dear Law Commission

Please find attached a brief response to your OIA paper.

Regards

Blair Stewart Assistant Commissioner (Auckland) | Office of the Privacy Commissioner
PO Box 466 Auckland 1140 New Zealand | ☎ +64-9-302 8654 | 🖷 +64-9-302 2305

From: Blair Stewart
Sent: Friday, 24 December 2010 12:17 p.m.
To: Linda Williams
Subject: Submission on the OIA

Follow Up Flag: Follow up
Flag Status: Flagged

Linda

When you return to the office would you please do the annotated corrections to the submission on the OIA and then email a copy to Katrine with the following message:

> Blair asked me to send this to you with a request that you look it over if you get a chance so that you might discuss it with him after his return on 17 January. He asked me to highlight that it is not quite complete in that the important answer to Q71 is only half written (and this leads into issues covered by several following questions) and Q102 and 103 also have yet to be written. However, he felt that the direction he's planning to take in Q71 should be clear enough even in its incomplete state sufficient to be worth look at and discussing.

Would you also please set up a meeting between Katrine and I to discuss the submission during the week I'm back (ideally no later than Wednesday as I need to finalise it to send to the Law Commission).

I didn't get around to dictating any new material.

Blair

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2010 marks the 30th Anniversary of the OECD Privacy Guidelines - find out more

From:	Linda Williams
Sent:	Monday, 10 January 2011 9:55 a.m.
To:	Katrine Evans; Blair Stewart
Subject:	: Submission on the OIA
Attachments:	Submission by the Office of the OPC#2.obr
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Katrine

Blair asked me to send this to you with a request that you look it over if you get a chance so that you might discuss it with him after his return on 17 January. He asked me to highlight that it is not quite complete in that the important answer to Q71 is only half written (and this leads into issues covered by several following questions) and Q102 and 103 also have yet to be written. However, he felt that the direction he's planning to take in Q71 should be clear enough even in its incomplete state sufficient to be worth look at and discussing.

I will forward through an calendar request for a meeting time next week.

Thanks

Linda

From: Blair Stewart
Sent: Wednesday, 13 January 2010 12:44 p.m.
To: Marie Shroff; Katrine Evans
Subject: FW: OIA Review - submission by Blair Stewart - Office of the Privacy Commissioner
Attachments: RE: OIA Review - submission by Blair Stewart - Office of the Privacy Commissioner; summary_of_Qs_for_download_081209[1].doc

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As discussed late last year I put together a fairly low key and relatively informal submission to the Law Commission's OIA preliminary paper. I mainly saw it as an opportunity to be on the record as having an interest. The staffer handling the review has replied to say they will speak with us as they develop their preliminary views.

I didn't hit all the issues. Indeed some of the comments focused on small matters (e.g. case notes) and (deliberately) ignored the big issues (e.g. reform ideas for protecting privacy). With the extension of the deadline for responses there is opportunity to put in a supplementary submission to address additional issues if you think that is warranted.

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From: Blair Stewart
Sent: Tuesday, 12 January 2010 2:19 p.m.
To: 'officialinfo@lawcom.govt.nz'
Subject: OIA Review - submission by Blair Stewart - Office of the Privacy Commissioner

Dear Law Commission

Please find attached a brief response to your OIA paper.

Regards

Blair Stewart Assistant Commissioner (Auckland) | Office of the Privacy Commissioner
PO Box 466 Auckland 1140 New Zealand | ☏ +64-9-302 8654 | 🖷 +64-9-302 2305

From: Steven Melrose <SMelrose@lawcom.govt.nz>
Sent: Wednesday, 13 January 2010 11:22 a.m.
To: Blair Stewart
Subject: RE: OIA Review - submission by Blair Stewart - Office of the Privacy Commissioner

Dear Mr Stewart,

Thank you for your response to the Law Commission's survey regarding official information. Your background in the area of privacy regulation and comments you offer in regard to the Privacy Act and OIA will be helpful in developing our preliminary views on the topic.

If not before, we will contact you when our issues paper is released in the early half of 2010.

Kind regards,

Steve Melrose
Legal and Policy Advisor
Law Commission
Te aka matua o te ture

From: Official Information Act
Sent: Tuesday, 12 January 2010 2:19 p.m.
To: Naidene McClew; Steven Melrose; Margaret Thompson
Subject: FW: OIA Review - submission by Blair Stewart - Office of the Privacy Commissioner

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From: Blair Stewart[SMTP:BLAIRS@PRIVACY.ORG.NZ]
Sent: Tuesday, January 12, 2010 2:19:23 PM
To: Official Information Act
Subject: OIA Review - submission by Blair Stewart - Office of the Privacy Commissioner
Auto forwarded by a Rule

Dear Law Commission

Please find attached a brief response to your OIA paper.

Regards

Blair Stewart Assistant Commissioner (Auckland) | Office of the Privacy Commissioner
PO Box 466 Auckland 1140 New Zealand | ☏ +64-9-302 8654 | 🖷 +64-9-302 2305

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From:	Blair Stewart
Sent:	Tuesday, 8 February 2011 10:31 a.m.
To:	John Burrows
Cc:	'mthompson@lawcom.govt.nz'; Ewan Lincoln; Linda Williams; 'OfficialInfo@lawcom.govt.nz'
Subject:	Submission by the Privacy Commissioner on the Review of the Official Information Act
Attachments:	OIA Submission by the Office of the OPC, 07 02 11.doc

Dear Professor Burrows

Please find attached the submission from the Office of the Privacy Commissioner on the review of the Official Information Act.

Thank you for your indulgence in permitting us to lodge the submission after the notified closing date.

As always, we are happy to talk through any aspect of the submission. Some of the issues intersect with the review of privacy law, or raise counterpart issues in the Privacy Act, and so perhaps some of those issues might be suitable for discussion at our privacy review liaison meetings. However, we stand ready to speak separately if that's useful or more convenient to the staff working on the OIA review.

As earlier discussed, the Commissioner Marie Shroff is happy to meet with you at a convenient time to discuss the issues more generally if that would be helpful. Such a discussion would likely range more widely than purely the issues raised by, or of direct interest to, the OPC and would draw upon her extensive experience in the public sector, particularly as former Cabinet Secretary.

Regards, Blair Stewart

Blair Stewart Assistant Commissioner (Auckland) | Office of the Privacy Commissioner
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Advancing cooperation in cross-border enforcement of privacy laws: OPC is a member of GPEN and CPEA

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From: Marie Shroff
Sent: Monday, 7 February 2011 5:05 p.m.
To: Blair Stewart
Subject: RE: OIA submission

Follow Up Flag: Follow up
Flag Status: Flagged

I am happy for you to file it by email as OPC submission, as noted below.

Thanks for your excellent work on this important submission. I believe it was really necessary for us to point out privacy implications. "Read across" does not seem to be high on their agenda.

From: Blair Stewart
Sent: Monday, 7 February 2011 4:48 p.m.
To: Marie Shroff
Cc: Christine Smith
Subject: OIA submission

Marie

I'm getting the final corrections to the OIA submission tidied up. Are you happy for me to simply file it by email or do you prefer it to come directly or more formally by letter/email from yourself?

If I sent it I would likely remind them that you personally have previously offered to meet and talk about the OIA with them, such discussion might range more widely than the submission and draw upon your previous experiences unconnected with privacy issues.

Blair

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Advancing cooperation in cross-border enforcement of privacy laws: OPC is a member of GPEN and CPEA

PART C(2)

Internal staff comments complied in advance of submission of February 2011

Note: these comments do not necessarily reflect the views of the Office of the Privacy Commissioner.

Chapter 5
General Comments

Chapter 5 **Allocated to:**	
General Comments	(a) Suggested overall approach Very little of this chapter has any privacy implications. Protection of commercial interests tends to be focused on the interests of organisations and features very rarely in Privacy Act complaints. Other than the issue around trade secrets the other questions appear largely irrelevant from a privacy perspective.
	(b) Reaction to initial response
	(c) Tasks to be undertaken
	(d) Any other comments

Chapter 5
Law Commission Questions

Chapter 5	Allocated to:	Q16 Do you think the commercial withholding ground should continue to be confined to situations where the purpose is to make a profit? Unsure, and unclear whether this is something OPC should wish to comment on. Q17 If you favour a broader interpretation, should there be a statutory amendment to clarify when the commercial withholding ground applies? As above. Q18 Do you think the trade secrets and confidentiality withholding grounds should be amended for clarification? No. Agree with Law Commission that case law and guidelines would be more useful than a new statutory definition. 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? Yes Q20 Do you have any comment on the application of the OIA to research work, particularly that commissioned by third parties? No Q21 Do you think the public interest factors relevant to disclosure of commercial information should be included in guidelines or in the legislation? Yes, in guidelines rather than the legislation.

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

Chapter 6
General Comments

Chapter 6 Allocated to:	
General Comments	(a) Suggested overall approach Generally agree with LC's preferred options.
	(b) Reaction to initial response
	(c) Tasks to be undertaken
	(d) Any other comments

Chapter 6
Law Commission Questions

Chapter 6	Allocated to:	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? Agree with LC's initial view that option 1 should be preferred. Option 1 - Maintaining the existing test for the privacy withholding ground would be consistent with the other withholding grounds that agencies apply under the OIA (identify the protected interest and weigh against the public interest). LC discuss a current problem that some agencies don't properly undertake the task of weighing public vs privacy interest. Instead, if they identify a privacy interest they withhold by default. This has parallels with how some agencies deal with withholding information under 29(1)(a) of the PA. Rather than determining whether a disclosure of another individual's affairs would be unwarranted, they withhold immediately if there is information about another person. However, the fundamental problem that some agencies appear to have is with the balancing exercise required in both cases. Since this is the unavoidable part of making both PA and OIA decisions, any difficulties seem to best addressed by providing additional guidance and examples. Option 2 - Seems unlikely to provide greater clarity for agencies. It would essentially introduce an additional element of the test (whether the disclosure would be unreasonable), for which agencies would also require guidance, while maintaining the existing aspects of the privacy interest vs. public interest balancing exercise. Option 3 – Suggest that this would involve greater rather than reduced complexity for agencies applying the test. Q24 Do you think there should be amendments to the Acts in relation to the privacy interests of: (a) deceased persons? No, agree with the LC's view that it's appropriate for the OIA to specifically allow for privacy protection for deceased individuals, subject to the public interest test. See comments in OPC submission on LC Privacy Act Review (Chpt 3 Q13), where we urged caution about removing privacy protection from deceased individuals. We

		suggested that even if it were to be removed from section 29(1)(a), there would be a case for retaining it in the OIA. (b) children? Agree with LC's initial view that not necessary to expressly incorporate privacy protection for children into OIA legislation. The fact that information relates to a child can be dealt with simply under the existing test, by means of recognising an increased privacy interest where information relates to a vulnerable individual like a child. Q25 Do you have any views on public sector agencies using the OIA to gather personal information about individuals? Agree with LC's view that OIA should not be used as backdoor for information sharing. This issue is probably best addressed by OPC via information sharing considerations and submissions in the LC Privacy Act Review (Chapter 10)

Chapter 7
General Comments

Chapter 7 Allocated to:	
General Comments	(a) Suggested overall approach Not much to add here – mostly not relevant from a privacy point of view.
	(b) Reaction to initial response
	(c) Tasks to be undertaken Possible room to make further / different comments on proposed new investigation ground ie if we want to argue that the current maintenance of the law ground encompasses investigations/inquiries.
	(d) Any other comments

Chapter 7
Law Commission Questions

Chapter 7	Allocated to:	Q26 Do you agree that no withholding grounds should be moved between the conclusive and non-conclusive withholding provisions in either the OIA or LGOIMA? Yes. Q27 Do you think there should be new withholding grounds to cover: (a) harassment; (b) the protection of cultural values; (c) anything else? a) No – I agree with the LC that if the privacy ground is retained as is there is no need for a separate withholding ground re harassment – the privacy ground can cover this. b) Seems like a good idea to me – possibly as a s9 ground where the public interest can trump as opposed to a s6 conclusive ground c) No. Q28 Do you agree that the "will soon be publicly available" ground should be amended as proposed? Yes (although I wonder if it would be better to put in a specific timeframe rather than just saying "within a very short time"). Q29 Do you agree that there should be a new non-conclusive withholding ground for information supplied in the course of an investigation? This seems like a good idea. I note that in a couple of recent complaint investigations where HDC has withheld information from providers under the equivalent s27(1)(c) we have been ok with this provided the investigation is active. We have taken the view that maintenance of the law can encompass investigations and inquiry by the HDC. We are therefore seemingly interpreting the Privacy Act in a way which the Ombudsmen and LC are not keen on, hence their perceived need to add in a new ground. Agree it should be non-conclusive. Q30 Do you have any comments on, or suggestions about, the "maintenance of law" conclusive withholding ground? No – agree with comments about it not being appropriate to balance this with public interest.

Chapter 8
General Comments

Chapter 8 Allocated to:	
General Comments	(a) Suggested overall approach Agree with LC's overall approach
	(b) Reaction to initial response
	(c) Tasks to be undertaken
	(d) Any other comments

Chapter 8
Law Commission Questions

Chapter 8	Allocated to:	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? Agree that the Acts should not codify what public interest might mean. Q32 Can you suggest any statutory amendment which would clarify what "public interest" means and how it should be applied? No – but agree with LC, who is in agreement with Megan Carter (at point 8.20) that comprehensive, available guidelines would be more fluid and more appropriate that further legislative definition Q33 Do you think the public interest test should be contained in a distinct and separate provision? I agree with and like the suggested rewording (at 8.17) 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? Given the LC's concerns that agencies are not currently taking this step, then yes I think placing a higher burden on agencies could bring them in line with their obligations. With wider availability of guidance, and raised awareness, the same outcome may be achieved without placing a requirement of confirmation in the Act.

Comments for OIA submission

Hi Blair

I've drafted up some points for you to consider for our submission on the OIA on chapter 9. I haven't edited my text at all – I've literally just scribbled – so come back to me with any questions that you have.

I have not answered questions 35, 37 or 47. There is no privacy cross-over with "due particularity" and it's probably not appropriate for us to comment on whether guidance is necessary or who would best provide it. I have also put the answer for Q40 in with the answer for Q38.

Chapter 9 "Requests – some problems"

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

It is unclear what additional benefit there would be in creating an obligation to consult.

Requests for large amounts of information can occur in the privacy arena too. We generally find that an informal approach 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.

However, as para 9.17 says, some requesters are not prepared to modify their requests. Putting an obligation on the organisation to consult would not resolve this difficulty.

We do not therefore see that there would be anything to be achieved by creating an obligation to consult.

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 withholding ground 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, however 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 (**Q40**) 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. //check whether can charge now//

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

We believe that 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. Instead, the Law Commission's suggestion of adding "and would place an unreasonable burden on the resources of the [organisation]" seems sensible.

After all, simply because an organisation is large does not mean that a request is automatically more manageable. Our 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), or the volume and complexity of information that they handle may cause problems. At the same time (as compared with small organisations) they may have more financial flexibility so they can resource information requests, are more likely to have IT support or knowledge managers to assist them with information retrieval, and are also more likely to be able to divert staff to handle a large information request if necessary.

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 our experience with the equivalent withholding ground under the Privacy Act, we agree that past conduct can clearly 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 or most of which have been refused for good reasons. If the current request has the same characteristics as the earlier requests – so the requester should, by now, know better than to request the information – 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?***

The term "vexatious" is not plain English, and we agree that a different and clearer term or phrase should be used.

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 for vexatiousness should remain high (and objectively testable), we suggest instead that the wording could be something like "a reasonable person is entitled to view the request as made in bad faith".

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?***

We agree that organisations should be able to decline a request on these grounds, but that there should be some limitations.

Sometimes such a request may be vexatious, but since the threshold for vexatiousness is so high, in our experience it is difficult for organisations to be able to use that withholding ground.

There is still a problem with repeat requests, however, in that organisations are expending (sometimes significant) resources in meeting the requests, but at least two major purposes of the official information legislation – to make information available to requesters, and to provide accountability for the organisation's actions – have already been fulfilled.

However, some limitation is required. There can be occasions where an organisation has provided the information in the past but nonetheless, in the circumstances, it is reasonable for the requester to receive the information again. For instance, we have occasionally dealt with repeat requests under the Privacy Act where the requester can no longer get hold of the information that the agency had provided (for instance because it is in someone else's hands, or the requester has moved and has lost the information). In those situations, particularly where there is a genuine need for the information, it is hard to see why the requester should not be entitled to make a repeat request.

Moreover, under the OIA the organisation is entitled to charge a reasonable fee for providing the information. Organisations often do not charge for first-time provision of information, but they may – justifiably – feel that they should charge for providing repeat information. (In that respect, it is perhaps notable that public sector organisations have more flexibility under the OIA than they do under the Privacy Act, where they cannot charge).

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 agency 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 may be worth considering whether there is a process – similar, perhaps to the vexatious litigant process – through which the Attorney-General could take suitably extreme cases to Court and ask for the Court to declare a person vexatious.

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, if at all, after proper consideration by a judicial body.

There is nothing currently stopping an organisation from taking appropriate administrative measures in relation to unreasonable or abusive requesters. For instance, if a requester persistently telephones an organisation and abuses staff, the organisation can bar him or her from telephoning and instead require contact to be in writing, to a designated person.

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?*

We do agree that 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 when a requester asks for access to information about himself or herself. Access to information is a fundamental principle of the legislation.

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.

The same policy and practicality issues would 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?*

If there is confusion on the point – as there can also be with Privacy Act requests – then we agree that it might be helpful to specify that requests can be oral or in writing.

There is nothing to stop an organisation from having a standard form that it fills in when a person makes an oral request (indeed, it can be desirable to have a standard form, to ensure that the request is processed properly).

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. In particular, it is common 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 (complaints can be transferred between the Ombudsmen and the Privacy Commissioner). Requiring requesters to refer to the specific legislation would be off-putting for many, and would be unnecessarily bureaucratic.

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

Comments on OIA review – chapter 10

Hi Blair

Here are my comments on the questions on chapter 10 ... Again, I have scribbled rather than editing, so see what you think. Some of this, I fear, is my personal musings rather than our knitting, so should probably go. And some of it might be wrong. This is off the top of my head rather than well-considered.

Introductory remarks

The provisions in the Privacy Act 1993 mirror the provisions of the OIA on matters such as time limits, transfers and handling urgent requests. We have therefore been able to answer some of these questions based on our experience of how agencies manage Privacy Act requests.

There do not seem to be particularly strong policy reasons in most cases to distinguish between the two Acts. If any change were made to the OIA, the Law Commission might therefore like to consider whether an equivalent change should be made in the Privacy Act.

We have not answered questions 55, 60, 61 or 68 since these issues do not tend to arise under the Privacy Act. We also have no particular view on question 58.

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

The Privacy Act has the same timeframe for making a decision on Privacy Act requests, and it is useful to keep the Acts in line unless there are policy reasons for distinguishing between them. There do not appear to be such policy reasons here.

With the Privacy Act, too, decisions need to be made as soon as reasonably practicable (which can be a good deal shorter than 20 working days). Extensions of time are available if there are good reasons to need more time to make the decision. There is no indication that these timeframes are unrealistic for agencies.

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?

It may be useful in practice to have a specific reference to a timeframe for release of the information.

Strictly speaking, such a reference may be unnecessary, since information must be released without undue delay. An alternative to having an express provision would be that the 'undue delay' requirement is more strictly enforced.

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?

Yes. Acknowledgement is clearly best practice when a request will take some time to process. It can also be useful when the agency has received an oral request – an acknowledgement can show the agency's understanding of what has been requested and how the agency is going to handle the request. This allows any misapprehensions to be cleared up early. However, it appears unnecessary to impose a requirement to acknowledge in all cases. For instance, with simple requests, the acknowledgement of the request, notifying the decision to release and the actual release of the information may all coincide.

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

This may be a useful development, as complex material may require greater internal discussion and sign-offs before a decision about release can be made.

However, in our experience problems tend to arise only in circumstances when there is a large quantity of material some or all of which is complex. The volume of information is already a ground for extending the response time limit.

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

Requiring agreement rather than simply notification of extension would probably be unworkable in practice. Unreasonably protracted extensions are clearly undesirable, but can probably be controlled successfully by the Ombudsmen, either under the provisions of the OIA or, in many cases, under the Ombudsmen Act.

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

Yes – see answers above.

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?

It is clearly desirable that agencies and requesters should have some clarity around how urgent requests will be handled. It could be overly prescriptive, however, for the legislation to try to define what urgency actually means.

In practice, requesters under the Privacy Act can sometimes believe that making an 'urgent' request unilaterally imposes a requirement on the agency to respond very quickly. The legislation itself is

Our experience is that the concept of "undue delay" takes on particular importance with urgent requests. For instance, see case note 88137 on our website.

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

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 strongly advise that agencies should consult the people concerned wherever possible.

It is possible that the legislation could make it mandatory to consult with third parties, but could include an exception for situations where it is undesirable or impracticable to consult. However, agencies might be reluctant to use the exceptions (because they want to avoid arguments, or possible complaints). A mandatory requirement would therefore probably impose too great a burden on agencies. We therefore support consultation being left at the level of best practice.

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?

Again, prior notice of release is usually best practice, particularly where the release might result in publicity for the third parties involved.

We are unsure, though, that requiring prior notice is necessary or practicable in all circumstances and consider that this, too, may be best left at the level of best practice.

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.

We are slightly surprised that this difficulty arises, though. Our view is that section 14 (like section 39 the Privacy Act) is probably 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 people. It is therefore not clear that legislative change is necessary.

Nor do we 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.

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 protections for the agency remaining in place also).

Releasing information in electronic form may increasingly suit both agencies and requesters, and 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 not have the appropriate hardware or software to read the information in the format that the agency can send it in. 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.

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 in New Zealand at this time.

If a provision were to be included, the Privacy Act has a flexible model that might be worth considering, though it could be too broad to work successfully in the OIA environment. The Privacy Act tends to deal with issues such as these by reference to the retrievability of the information. If information is not readily retrievable, this is a ground for refusing a request.

This appears to be a successful way of handling these issues. For instance, we occasionally get complaints involving requests for deleted emails. These may be retrievable *in fact* (by a specialist) but may nonetheless not be *readily* retrievable – for example if the costs and the difficulty of retrieval are disproportionately high.

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. Unlike the OIA, the Privacy Act can deal with wider information management issues (for instance under the storage and security principle).

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

Given the 'digital divide' and the real possibility that even requesters with computers may not have the appropriate software to read the information, we do not believe it is justifiable to impose a charge *simply* because a requester selects hard copy.

Obviously, providing hard copies of information may in fact create costs for the agency that providing electronic copies does not. Agencies may be able to recover some of those costs, as they do now. But charges should not be used deliberately to deter a person from requesting information in a particular form.

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?

We are not aware that agencies commonly – if at all – impose conditions on re-use to protect personal privacy. Yet problems do arise with re-use of official information containing personal information about third parties.

These problems arise in situations where there is insufficient reason to withhold information altogether on privacy grounds, but where some types of re-use – for example involving publication on the internet – can have a disproportionate effect on individuals named in the documents. For example, information from police investigations can involve details about a variety of third parties. Release to the requester may be necessary and justified. But further publication of the details of the third parties – particularly in a permanent and easily searchable way such as online – may have an unjustifiable impact on them.

Concerns about re-use can result in information being withheld altogether. To the extent that this can undermine the availability of official information, this is a problem.

The Privacy Act can and does deal with some instances of re-use, by allowing complaints against individuals who re-use official information that they have received in a way that breaches personal privacy. However, this is the 'ambulance at the bottom of the cliff' – by the time we receive a complaint, the damage has been done. It would be more useful to have conditions that prevented the harm in the first place.

At the same time, as the chapter notes, it might be difficult to frame provisions in the Act to expressly allow imposition of conditions. This is for reasons of principle as well as difficulties of drafting. For instance, the motives of the requester are irrelevant to their ability to access information – but imposing conditions may involve considerations of motive. Also, any conditions affecting republication clearly need to amount to reasonable limitations on the requester's freedom of expression.

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 whether regulations (rather than the existing guidance) are desirable in the official information context. We also have no views on what the framework should be or who should be responsible for recommending it.

We note, however, 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.

The Privacy Commissioner makes an independent (legally binding) decision about what a "reasonable" charge is in the circumstances. She is not bound by any official information guidelines or framework. However, given the similar principles underlying access to personal information and access to official information, those guidelines or framework are a relevant consideration for her.

Chapter 11
Law Commission Questions

Chapter 11	Allocated to:	Q69 Do you agree that both the OIA and LGOIMA should set out the full procedures followed by the Ombudsmen in reviewing complaints? Q70 Do you think the Acts provide sufficiently at present for failure by agencies to respond appropriately to urgent requests? The LC has suggested that, while there is no specific ground for the Ombudsmen to review complaints regarding urgent requests, cases dealing with responses to urgent requests can be dealt with as situations where there is an undue delay in making the information available. Under the Acts an undue delay is deemed to be a refusal. However, it has been our view that (at least in terms of PA requests) undue delay will only apply in cases where an agency has already agreed to release the info. So this would only cover cases where a person has made a request under urgency, and the agency has said it will release the info, but fails to do so promptly. In cases where an agency has failed to respond to a request made under urgency, we have considered that this is a failure to respond to the request as soon as is reasonably practicable – and hence a breach of the timeframe required for requests. This is also a deemed refusal in terms of the Acts. However, the problem with reviewing this as a deemed refusal is that there may be cases where an agency would have had a reason to refuse, but simply didn't tell the requester about it. In this case its not the decision made in response to the request which needs to be reviewed, it's the agency's decision not to respond under urgency. So my suggestion would be that there should be separate section setting out that the Ombudsmen may investigate / review a decision not to respond under urgency in its own right. This would be similar to the section which sets out that the Ombudsmen may investigate / review a decision to extend the timeframe for responding (section 28(2). 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? No. At the very least the Ombudsmen should be able to look the process an agency has followed in determining whether it will release OI which contains personal information. The options in terms of a remedy / solution would be limited, given that in these sorts of cases the information would have been disclosed, and the good faith provisions limit civil and criminal

		proceedings. However, the Ombudsmen could still have a role assessing the appropriateness of the process followed in releasing info in response to OI requests and making possible recommendations on how to deal with future requests. 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? While I think the idea of requiring agencies to notify third parties with significant interest in the requested info prior to release is a good one. However, the one issue I can see would be the difficulty in identifying situations where a third party with a 'significant' interest in the requested OI was not notified vs situations where someone with an interest which was not considered to be significant was not notified. There would need to be clear guidance for agencies as to what constitutes a "significant" interest in order to provide certainty for agencies trying to fulfil its obligations in terms of notification. Q73 Do you agree that a transfer complaint ground should be added to the OIA and the LGOIMA? Q74 Do you think there should be any changes to the processes the Ombudsmen's follows in investigating complaints? Q75 Do you agree that the Ombudsmen should be given a final power of decision when determining an official information request? Q76 Do you agree that the veto power exercisable by Order in Council through the Cabinet in the OIA should be removed?

		Q6 Do you agree that the OIA should specify what information relating to the operation of the Courts is covered by the Act? We consider it would be helpful if the OIA specified what information relating to the operation of the Courts is covered by the Act. It would assist if the Act set out the relationship between the Ministry of Justice and the Courts to clarify the status of information held by the Ministry that related to the judicial functions of Courts. However, we consider it may be helpful to draft a clarification in general terms so as to set out the status of Courts' information held by other government agencies, such as the Ministry of Social Development. We also agree that it would be helpful for the Act to include some clarification of what information held by Courts may be subject to requests. We consider that the purely administrative functions of a Court should be subject to requests under the Act. We consider this could be done by amending the Act to read that the terms department or organisation do not include "in relation to its judicial functions, a Court". However, we agree that such an approach may create some uncertainty about the boundaries between judicial and administrative functions, as the similar provisions under the Privacy Act have done. We consider that administrative versus judicial should be described and defined to the extent possible to avoid confusion about what information that Act will apply to. While some functions will be clearly administrative (eg rental agreements for Court premises) and some clearly judicial (eg, proceedings including evidence filed with the Court and judicial decisions), there may be some functions that fall within the grey area between the two that will need careful consideration. Functions that fall into a grey area may include activities that do not directly involve a proceeding before a judge but are nonetheless associated with Court proceedings such as enforcement actions by bailiffs or certain activities of registrars. Q7 Should any further categories of information be expressly excluded from the OIA and the LGOIMA?

PART D

Submission of February 2011

Linda Williams

From:	Blair Stewart
Sent:	Tuesday, 8 February 2011 10:31 a.m.
To:	John Burrows
Cc:	'mthompson@lawcom.govt.nz'; Ewan Lincoln; Linda Williams; 'OfficialInfo@lawcom.govt.nz'
Subject:	Submission by the Privacy Commissioner on the Review of the Official Information Act
Attachments:	OIA Submission by the Office of the OPC, 07 02 11.doc

Dear Professor Burrows

Please find attached the submission from the Office of the Privacy Commissioner on the review of the Official Information Act.

Thank you for your indulgence in permitting us to lodge the submission after the notified closing date.

As always, we are happy to talk through any aspect of the submission. Some of the issues intersect with the review of privacy law, or raise counterpart issues in the Privacy Act, and so perhaps some of those issues might be suitable for discussion at our privacy review liaison meetings. However, we stand ready to speak separately if that's useful or more convenient to the staff working on the OIA review.

As earlier discussed, the Commissioner Marie Shroff is happy to meet with you at a convenient time to discuss the issues more generally if that would be helpful. Such a discussion would likely range more widely than purely the issues raised by, or of direct interest to, the OPC and would draw upon her extensive experience in the public sector, particularly as former Cabinet Secretary.

Regards, Blair Stewart

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Advancing cooperation in cross-border enforcement of privacy laws: OPC is a member of GPEN and CPEA

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.