

OFFICIAL INFORMATION ACT 1982 REVIEW  
December 2010

**Submission to:** Official Information Legislation Review  
Law Commission  
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**Submission of Solid Energy New Zealand Limited**

**1. Background**

- 1.1. Solid Energy New Zealand Limited (Solid Energy) is a State Enterprise under the State-Owned Enterprises Act 1986.
- 1.2. Solid Energy is New Zealand's largest energy producer with interests in coal mining, renewable energy and new energy projects throughout New Zealand. We aim to maximise value for New Zealand through responsible custodianship and development of strategic natural resources within New Zealand.
- 1.3. Solid Energy receives approximately 20 – 30 requests for official information each year. The requests for information come from a variety of individuals and organisations, particularly from political parties, journalists and environmental groups.

**2. Scope of the Act**

- 2.1. Solid Energy questions whether State-Owned Enterprises (SOEs) should remain subject to the Official Information Act (OIA) and requests that the Law Commission reconsider its view on this. There are a number of reasons for this:

- 2.1.1. The context in which the Act operates today is significantly different from the context that applied at the time the Act was enacted and SOEs were established. Solid Energy now actively engages with and informs the public through a variety of means to a far greater extent than it did so at the time of its creation as an SOE.

In addition, Solid Energy is subject to a continuous disclosure regime (Continuous Disclosure Rules) which has been instigated by the Crown Ownership Monitoring Unit. To facilitate this process Solid Energy places information that is required to be disclosed in accordance with the Rules on its website. The website also contains a considerable amount of information including the company's annual reports and media releases.



- 2.1.2. Solid Energy, like other SOEs is required by the State-Owned Enterprises Act as its principal objective to operate as a successful business and, to that end, "be as profitable and efficient as comparable businesses that are not owned by the Crown..."

There are times that the requirement to disclose our business and commercial details puts Solid Energy at a commercial disadvantage to our competitors in the energy sector who do not have the same obligations. While it is possible that there may be valid reasons to withhold information in accordance with the Act, the requirement to disclose information that others in the industry are not can be an encumbrance on our business.

Further the significant amount of time involved and the costs related to responding to requests for information impair and exacerbate the objective to operate effectively and efficiently.

- 2.1.3 Significantly, being subject to the OIA impairs our ability to carry out open and forthright internal discussions and communications on a wide range of issues that are vitally important to our business. While this is an unintended consequence of an SOE being subject to the OIA it is a very real and significant concern for the company. If communications and discussions are restricted due to a concern that all such information will be subject to release into the public arena, it follows that those discussions and communications will not be as robust, honest and forthright.

Solid Energy employees (and management of the company in particular) are aware that as an SOE the company is subject to the requirements of the OIA and that correspondence and communications (particularly emails) may be requested by the public on any matter. The knowledge that communications and discussions concerning a particular issue may be required to be released has the effect of inhibiting those discussions and communications which are vital to the successful and safe operation of our business. Instead of an exchange of frank advice, people may be more inclined to provide verbal advice or not be as forthright in their views, particularly if the topic of discussion is one that may be considered to be controversial in the eyes of the public.

This issue is particularly relevant in the area of health and safety (although not limited to this area of our business) and particularly relevant within the mining industry at this time. We do not want any reason for staff to have to consider limiting their opinions or communications out of a concern that information could be released. We are working in an industry where it is vital that the safe operation of the business is not impeded in any way. For that to occur, staff must be able to offer their forthright and blunt opinions on all aspects of the business and not be concerned that the correspondence may find its way into the public domain. This inhibition of information flow for these reasons is already occurring within our business and is increasing. This is already a serious concern for us with respect to our ability to manage safety in particular, but also other aspects of our business. From every point of view we consider this situation to be unacceptable.

We note that an organisation is able to withhold information in accordance with section 9(2)(g)(i), although this withholding ground appears less relevant for organisations than it does for Ministers of the Crown and government departments. We note the Ombudsmen's Guidelines state that "the purpose



of this section is to avoid prejudice to the generation and expression of free and frank advice which are necessary for good government” However, even if this provision is relevant the threshold for use is high and any decision to withhold information is always subject to any overriding public interest considerations.

We submit that the inclusion of SOEs as organisations subject to the OIA does inhibit effective consultation and communications. The net effect can be a very real lessening of communications within the organisation, the end result being a less effective and safe business. We do not believe the public interest is served by this, nor is the government shareholder. In light of this we request that the Law Commission consider again whether SOEs should remain subject to the OIA.

- 2.2 If the Law Commission is to recommend that SOEs ought not to be taken out of the coverage of the OIA, Solid Energy submits that any reform package should at least include recognition of the unique position of SOEs in the OIA. This could be achieved in one of two ways:
- 2.2.1 The first option, and Solid Energy's preferred option, would be for matters relating to SOEs to be reviewed by a specialist Ombudsman, appointed for their knowledge, understanding and experience of commercial enterprises, and the kinds of factors that an SOE is required to take account in order to achieve its objectives under section 4 of the State Owned Enterprises Act;
- 2.2.2 The alternative option would be to impose a requirement in any case in which an Ombudsman is investigating a decision of an SOE under the Act, to consult with an appropriately qualified independent expert, able to advocate for the Crown's ownership interest in SOEs and the implications of different approaches to the Act on an SOE's ability to comply with section 4 of the State-Owned Enterprises Act. A model clause of this nature would be section 29B of the OIA, which requires that the Ombudsmen consult with the Privacy Commissioner before making any determination relating to matters of privacy under the OIA.

### 3. Supply of Commercial Information

- 3.1. Solid Energy as part of its business activities often engages third party consultants and contractors to provide advice on specific matters related to our business. This information both in its formation (in the hands of the consultant/contractor) and on receipt by Solid Energy is, of course, information subject to release. By its nature this type of information will be information that is not publically available but will almost invariably have a commercial value. A competitor or interested third party is able to request the information provided by the consultant/contractor notwithstanding that Solid Energy has incurred costs associated with obtaining the information. Solid Energy is limited in its ability to withhold the information if none of the section 9 reasons apply. Further, Solid Energy is unable to charge a commercial fee to the requester to offset the price paid by Solid Energy for the information. The requester therefore receives “free” commercial information.

The public interest is seldom served in the release of this type of information. Quite the reverse. In compromising Solid Energy's ability to operate in an efficient manner, competitive with similar global enterprises not required to meet such requirements, the public interest in allowing Solid Energy to provide Government with a reasonable return on its investment may be harmed.



3.2. Solid Energy submits that where information of this type is requested and the information is of a type that could be readily obtained by the requester from a third party (albeit at a cost), then either:

3.2.1. the information should be able to be withheld. A new ground for withholding would be required to be added to section 9 of the Act for the release of information that is predominantly to be used for commercial purposes or gain; or

3.2.2. at the very least that the charging guidelines be amended to allow organisations to charge at commercial rates for this type of information.

#### **4. Charging**

4.1 Solid Energy makes a number of submissions in relation to charging:

4.1.1 Solid Energy agrees that the Ministry of Justice guidelines on charging under the OIA should be laid down in regulations that set out not only what scale of charges should apply to a request but also that all activities required to respond to a request be chargeable. Solid Energy submits that all matters and activities that are directly necessary to respond to a request should be chargeable.

Requesters and the Ombudsmen often significantly underestimate the time involved in responding to requests for information. A significant proportion of the time spent in responding to requests once the information itself has been located and collated (often a time consuming exercise in itself) can be spent in the reviewing stage (often line by line) deciding on what, if any information should be withheld. Further, time spent on deliberating on grounds for withholding information and consulting with colleagues or third parties is unable to be charged in accordance with Ministry of Justice Guidelines. Solid Energy submits that all time spent in responding to a request should be able to be charged.

4.1.2 We note the Law Commission's view that the discretion to impose charges be a necessary reserve power for controlling large requests and encouraging refinement of the scope of a request. However Solid Energy submits that charging requesters should be a discretion available in response to every request for information unless the response requires only minimal time to complete.

4.1.3 Solid Energy does not agree that a charging framework that uses a flat fee model is appropriate. On occasions, only a small amount of information may be released but a significant amount of time and resources will have been expended in responding to the request.

#### **5. Purpose of Request**

5.1 Solid Energy submits that requesters should, on request by the receiving organisation, be required to disclose the purpose for the information requested.

5.2 Understanding a requester's reason for requesting the information is a valuable tool to be able to refine large or wide-ranging requests and also helps in determining whether a charge for the information is warranted or appropriate.



5.3 Solid Energy submits that the Act be amended to clearly set out that a requester may be required to provide a purpose for the information if requested by the agency holding the information.

5.4 Notwithstanding a requester may refuse to provide a purpose or provide a fictitious reason the obligation for the requester to provide a purpose will help to increase the efficiency in responding to a request.

## **6. Extensions of Time**

6.1. Dealing with requests that are broad, large or not set out with due particularity can cause delays in responding to requesters within the necessary time frame.

6.2. Solid Energy agrees that the OIA should clarify that the 20 working day time limit for requests that are delayed by a lack of particularity should start from the date the request has been refined by the requester and accepted by the receiver. This is because even after the request has been refined the time required to respond to the refined request can still be significant (but may be achievable within the 20 working days), which would then negate the need to extend the time to respond.

## **7. Urgent Requests**

7.1 Given the time-consuming nature of responding to most requests Solid Energy does not believe that there should be a new ground of complaint for an organisation not responding to a requester's request for an urgent response. The Ombudsman already has sufficiently broad powers under the Ombudsmen Act to investigate a response to a request for urgency.

7.2 There is already a clear obligation under the Act to respond as soon as reasonably practicable and in any case not later than 20 working days after the receipt of a request for information.

7.3 In a large organisation where resources and information are scattered throughout the country, responding to urgent requests in a short time frame can be difficult to meet. What can appear to be a trivial or minor request can in fact include a number of people working from a number of sites with varying workloads and availability.

## **8. Processing requests**

8.1 Solid Energy agrees with the Law Commission that organisations should continue to have a maximum 20 working day period to make a decision on whether to release information. We note that in most cases making a decision to make information available or to withhold information will generally be made after all the information is collected, collated and reviewed. This can take considerable time. Any reduction to the 20 working day time period would cause considerable time pressure and would likely result in a greater number of extensions of time.

8.2 Solid Energy agrees that complexity of a request should be grounds for extending the time limit in which to decide whether a request is to be granted.

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### **Statutory Right to Review**

- 9.1 Solid Energy does not agree with the Law Commission's view that judicial review is an appropriate safeguard in relation to the Ombudsmen's recommendations.
- 9.2 In our experience an Ombudsman's decisions can sometimes be weighted in favour of releasing all official information notwithstanding the very real concerns that may have been expressed by Solid Energy in relation to an Ombudsman's recommendations. Accordingly we think that the Ombudsman's decisions should be made more contestable.
- 9.3 Solid Energy submits that any decision made by the Ombudsman should be able to be appealed to the High Court. We submit that it is not enough that the legality of the decision making process is considered in a judicial review process but that the merits of the Ombudsman's decision should be able to be argued in Court.

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