36 Most agencies can tell stories of requests which have involved literally hundreds of hours of staff time over and above normal duties, in locating, assessing and then collating information for a requester. One agency said to us, "in some areas such as fishing expeditions, I think we have reached the tipping point in terms of cost benefit." There needs to be a balance. The Danks Committee itself acknowledged that. Large requests are often made with perfectly proper motives, and sometimes the requester simply does not understand the magnitude of what he or she is asking for. At other times the motive may simply be to find material to embarrass an adversary. Any change in this area must get the balance right. Any steps to relieve agencies of unreasonable burdens must not prejudice or deter genuine requesters.

37 There are currently a number of mechanisms in the Act which agencies can use to ameliorate the worst effects of unreasonably large requests. Our impression is that some agencies are reluctant to use them for fear of seeming obstructive. In this chapter we make some suggestions which taken together may help to alleviate some of the current difficulties.

- First, the Acts currently require that a request must be made with "due particularity". We suggest redefining that term in plain English to clarify its meaning that the request should refer as precisely as possible to the required information.
- Secondly, agencies can contact the requester personally where a request seems overly broad and it is often then possible to agree on a narrowed-down request which meets the requester's needs. We suggest that a requirement of discussion with the requester where practicable should be included in the Acts.
- Thirdly, charging requesters is used inconsistently with large requests and we suggest in chapter 10 that charging practice should be more uniform, with provision for regulations laying down clear rules across the board.
- Fourthly, there is currently power to refuse a request if it involves "substantial collation or research", but it is not certain whether this encompasses review and assessment of the information which often takes a very considerable amount of time. We suggest the position should be put beyond doubt by expressly acknowledging these functions in the Acts. We also suggest it should be clear that the word "substantial" is relative to the size and resources of the agency concerned.
- Fifthly, it is currently possibly to refuse a request if it is "frivolous or vexatious". We suggest that might well be defined in modern plain language. We also suggest there would be benefit in expressly providing that the past conduct of the particular requester can be taken into account in deciding whether the request in question is vexatious. That is effectively the position now, but it seems to be much misunderstood.
- Sixthly, we ask whether it should ever be possible for a particular person to be declared a vexatious requester. Some overseas legislation does recognise this concept. We suggest that if a requester has been persistently making requests in such numbers and of such a nature that they are unnecessarily interfering with the operations of the agency, the agency should be entitled to tell that person it will not respond to any more requests. Such a notification could be appealed to the Ombudsmen. We also suggest it should be a ground for refusing a request that the same information has been provided, or refused, to the same inquirer on a previous occasion.

38 We received some suggestions that requesters should state the purpose for which they want the information. This could be relevant in deciding whether a particular requester is vexatious, whether rules about charging should apply, determining whether a release would be in the public interest and helping to refine an overly broad request. However, we feel in the end that this is not only unlikely to be effective but also difficult to reconcile with the purpose of the legislation.

39 Finally in this chapter, we discuss the confusion which undoubtedly exists about what constitutes a request under the act. Some people, both requesters and agencies, seem to believe that an OIA (or LGOIMA) request must be in writing and must specifically refer to the Act. This is not the case. Any request for information from an agency is effectively an official information request. Such has been the confusion we suggest this is another instance where an amendment to the Act might help. It might state that requests can be oral or in writing, and that they need not refer to the relevant legislation.

Chapter 10 Processing requests

40 We often hear complaints about delays by agencies in producing requested information. Recent research, however, indicates that the great majority of requests are responded to well under the statutory maximum of 20 working days. We do not make any proposal that that maximum time limit be reduced. In one respect, however, an amendment may be desirable. The 20 working day limit, as the Acts are currently framed, relates to the time taken to make the decision to release or not, not to the actual release. It might help, we think, if the Acts further provided that the actual release of the information should follow as soon as reasonably practicable thereafter.

41 In relation to the power to extend time, we propose, as the Law Commission did in 1997, that the complexity of the request be a ground for extending time. We wondered whether there should be a maximum time of any period of extension, but are mindful of the risk that any stated statutory maximum extension limit may tend to become the default time limit. So unless we hear from submitters that the currently flexible approach is being abused we prefer to stay with the present position where there is no statutory maximum for a time extension.

42 In this chapter we also consider requests which are said to be urgent. We think there is no need to change the present law because undue delay in responding is treated in the same way as a refusal and is therefore a ground of complaint. The urgency of the request is, we think, a consideration in determining whether delay is "undue" or not. However, we ask whether the Acts should expressly provide clarity on that point.

43 The topic of consultation is a vexed one in a number of contexts. Agencies to whom a request is made will often wish to consult, either with other agencies who may hold some of the information, or with ministerial offices, or with third parties to whom the information relates. The last two merit discussion. The desirability of agencies sometimes consulting their ministers before the release of information is undoubted, but not without its difficulties. Guidelines do exist at the moment but we feel that they could be expanded so as usefully to cover things such as who

should be responsible for which type of decisions, and the process for interaction between department and minister on matters in which there is likely to be political interest.

44 As to consultation with third parties, some overseas jurisdictions do have a requirement for consultation before releasing information affecting third parties. While such consultation is highly desirable (and commonly happens now) we stop short of suggesting that it should be compulsory given the time pressures already on agencies. We suggest instead that prior notice should be given of a decision to release in order to give the third party an opportunity to challenge the release.

45 Another area of difficulty is transfer. There is currently provision for transferring a request to another agency where the transferring agency does not hold the requested information, or where the request is more closely connected with the other agency. What is not expressly provided for, however, is transfers of part of the request, and we suggest the Act should make express provision for this. Questions also sometimes arise about transfer from departments to ministers. It has been proposed the OIA should allow transfer to a minister where the department and minister disagree on whether the information ought to be released. We do not favour such an amendment, and believe transfers should properly be permitted only on the grounds presently spelt out in the act. Our preferred option for dealing with the relation between ministers and their departments is to have clear guidelines in place, as we have intimated earlier.

46 The Act currently provides that information released to the requester may be released in a number of different ways, but with a preference for the manner preferable to the requester. One or two responses to our survey suggested that release in electronic form should become the norm because, among other things, it places any cost of printing on the recipient rather than the agency. Release in electronic form is perfectly permissible now, but we do not agree that it should be mandated by the Act. The guiding presumption should still be that the requester should receive the information in the form he or she wants unless it would "impair efficient administration". We also discuss whether there should be an obligation to supply metadata and note overseas developments on this topic.

47 An important issue once information has been released is the uses to which it can be put by the recipient. The fact that it has been released under the OIA or LGOIMA does not automatically mean that the recipient can publish it to the world. It might be defamatory, it might be in breach of confidence, or it might be in breach of copyright. An agency can release material which it might otherwise have withheld on condition that it is used only in a certain way. There appears to be nothing wrong with this practice, and we do not think the Acts need to make explicit provision for it. Effectively it operates now by way of agreement.

48 Certain initiatives are in train to facilitate the reuse of released material. If there is no copyright in the information released, agencies are already encouraged to accompany the release by a "no known rights" statement. The NZGOAL initiative proposes the use of Creative Commons licences to allow the reuse of copyright material on conditions. None of those, however, cover material which is in breach of some other law such as defamation.

49 The final issue dealt with in this chapter is that of charging. The Act currently allows agencies to charge a reasonable sum when they release information, but there is great variability among agencies as to whether they charge and how much they charge. Guidelines prepared by the Ministry of Justice are in existence, but they do not apply to LGOIMA. There seems to be a fairly general feeling that more certainty would be desirable. We propose that regulations should be made under both Acts laying down clear principles for charging. The use of regulations as opposed to guidelines would make sure that the rules were authoritative, clearly understood and uniform. It would give confidence to agencies who are currently uncertain whether to charge or not. We are certainly not suggesting that charging should be general practice, but there do seem to be occasions now when requests are of such a kind, and impose such resource costs on an agency, that some charge to recoup those costs would not be unreasonable. A balance should be drawn between public duty and private benefit. We acknowledge that framing such rules, together with the necessary exceptions to them, will not be at all an easy matter and suggest some options to consider. We seek views on the concept of charging regulations and on what their content should be.

Chapter 11 Complaints and remedies

50 In this chapter we deal with complaints and remedies. We outline the current complaints system operated by the Ombudsmen, and note that it is a composite of some procedures laid down in the Ombudsmen Act and others peculiar to the official information legislation. We think the whole process should be contained in the OIA and LGOIMA even if that involves replicating the aspects currently in the Ombudsmen Act.

51 We consider whether there should be any new grounds of complaint, and conclude that improper or untimely transfers should be able to ground a complaint. We have previously suggested that there should be an obligation to give notice to third parties before releasing their information; if that comes about, failure to give such notice should also constitute a ground of complaint.

52 We then ask a vexed question on which we ourselves do not yet have a settled view. It is whether there should be "reverse" freedom of information complaints. Currently complaints can be made if information is withheld but there is no ground of complaint if information is released when on a proper application of withholding grounds it should not have been. The most likely instance would be private personal information or confidential commercial information in respect of which there was a valid withholding ground and no overriding public interest in release. By virtue of section 48 of the OIA and section 41 of LGOIMA, no legal action can be taken against the agency for releases such as this, and there is an argument for saying that no complaint should lie to the Ombudsmen either, because the very existence of the jurisdiction could have a chilling effect on release in marginal cases. However one can also see the case for saying that an agency which has caused harm to an individual or organisation by careless or inadequate processes should be subject to redress. We particularly invite comment on this. If it is felt that there should be a complaint there is the further questions of whether that should be done via the official information legislation or the Ombudsmen Act.

53 The most substantial question which with this chapter deals however is the question of the so called "veto". Currently if an Ombudsman, having investigated a complaint, decides that information should be released the Ombudsman will so recommend to the agency concerned. The agency is then under a "public duty" to release the information unless, in the case of the OIA the recommendation is reversed by Order in Council (that is to say effectively by Cabinet), and in the case of the LGOIMA by the local authority itself in a meeting. Appropriate procedures and publicity are required. We trace the history of the veto, noting that in the case of the OIA the power of veto originally resided in the minister concerned, but was transferred to full Cabinet in 1987. No recommendation has ever been vetoed by Cabinet, and in the case of LGOIMA we know of only two cases where a local authority has exercised the power. This is a result, no doubt, of the adverse publicity which would result from doing so, and also of the respect for the authority accorded to decisions of the Ombudsmen.

54 We propose that the veto in both LGOIMA and the OIA be done away with, in which case the only means of challenging the Ombudsmen's decision would be via judicial review. We discuss the implications of this, and acknowledge there has to date been resistance to dispensing with the veto power. It can be seen as recognising an appropriate constitutional balance and comity. But given its virtual non-use and the consequences which would follow from its exercise we think it is no longer necessary to retain it. In that event it would no longer make sense to call the Ombudsmen's 'recommendations' by that name. It is virtually a contradiction in terms to say, as the Acts now do, that the recommendation imposes a public duty to comply. We think the Ombudsmen's finding should better be called a "decision" or "determination".

Chapter 12 Proactive disclosure

55 Proactive disclosure of official information is an important and live issue internationally. Information technology facilitates electronic publication of material by agencies without it having been requested by anyone, in a way never possible before. Most agencies do publish important information and documents on their websites. The advantages of this process go without saying. The agency is saved the trouble of responding to perhaps several requests for the same material, and no member of the public is given unique advantage because the material is available for all at the same time. Agencies can also plan release rather than being confronted with unplanned and unsolicited requests. There are however costs involved, including the costs of vetting all the material before publication to make sure that none of it should be withheld.

56 A number of policy frameworks in NZ encourage proactive release. The Policy Framework for Government-held Information released in 1997 states that government departments should make information available "easily, widely and equitably". The Digital Strategy 2.0 published in 2008 says that "the government is committed to making public information available to everyone. The information should be available in the way you want it when you want it." And now most recently there is the New Zealand Government Open Access and Licensing Framework (NZGOAL) released in August 2010. Although not mandatory, NZGOAL establishes a preferred framework for the public release of copyright and non-copyright information held by state services agencies, and provides the

means for facilitating the reuse of such material. In addition there are a number of websites that act as directories or portals to public sector information. The Office of the Ombudsmen's statement of intent for 2010–2013 has identified the promotion of proactive release as a strategic priority.

57 In a number of overseas jurisdictions there are statutory requirements to publish certain kinds of information, and requirements for agencies to produce publication schemes by which they commit themselves to the progressive publishing of information. The question is what should be done about this in NZ. There is a certain amount of information that agencies are currently legislatively required to publish – by virtue of the Public Finance Act, the State-owned Enterprises Act, the Crown Entities Act and the Local Government Act for example. Currently the Ministry of Justice is required to publish a Directory of Official Information stating what types of information each state agency holds. We do think there would be point in requiring each individual agency to carry on its website the types of information currently required to be published in this Directory of Official Information.

58 At this stage we are not inclined to propose that the publication of further categories of information be mandatory, but rather to require that agencies take all steps which are reasonably practicable to proactively make information publicly available, taking into account the type of information held by the agency, the public interest in it, and the resources of the agency. Such an "all reasonable steps" provision would incentivise agencies to move progressively towards more open availability. It aligns with the strong encouragement focus of the existing policy statements. We suggest in a later chapter that there should be an agency or agencies with oversight of the official information legislation and one function would be to promote and encourage the ongoing availability of official information and its proactive release.

59 We believe, then, that an "all reasonable steps" provision is the best way to proceed at the moment, but need to ask what is to happen if that does not work. We propose for discussion two options to deal with that contingency – either a regulation-making power which could be used to mandate the publication of certain categories of information, or a review of the Acts in three years to see whether something stronger is required.

60 Some overseas jurisdictions have disclosure logs in which agencies that have released official information are required to record this on a log page so that other persons are able to request it or otherwise access it. We are not presently inclined to suggest that this be required in New Zealand.

61 Proactive disclosure raises a further difficult question. Currently section 48 of the OIA (section 41 LGOIMA) provides that agencies which disclose information on request are not subject to legal liability for the release. For example they are not liable in defamation if the released information contains defamatory material. If we are to move to a regime of more proactive disclosure there is a question whether similar protection should apply to agencies which proactively release material. We think not. It is one thing to be required to release information on request, it is another to decide proactively to make it available to whole world. We presently think that proactive disclosure should be at the risk of agency concerned. To give it complete protection would be a considerable step, and would be at the expense of an individual's legal reputation and rights.

62 The complaints investigation function is vested in the Ombudsmen under both Acts. Under the OIA, the Ministry of Justice has a duty to publish a Directory of Official Information, and a discretionary function to furnish advice or assistance to departments or organisations. There are no functions or duties in either Act to provide guidance, education or training, and no agency is given the express statutory function of overseeing and monitoring the operation of the legislation.

63 In fact the Ombudsmen have by default taken over the guidance function and they also provide some training to agencies which ask for it. In doing so they are going beyond what is required by the Acts. The State Services Commission also occasionally issues guidance, most notably guidance about consultation between departments and ministers. There is no longer any equivalent to the Information Authority which ceased to exist in 1988.

64 In this chapter we suggest that the Act should specifically require four functions to be carried out:

- investigation of complaints;
- provision of guidance;
- promotion and education;
- oversight.

65 The oversight function would have several dimensions: monitoring the operation of the Act; a policy function of reporting on prospective legislation or policy relating to access to official information; a function of reviewing the Acts periodically; and finally a function of promoting the increasing availability of official information, including the proactive release of such information.

66 Several other more recent Acts, in particular the Privacy Act 1993, stand in stark contrast to the OIA in conferring such functions. We recommend the creation of these functions in the OIA and LGOIMA for a number of reasons. As earlier stated, there is currently misunderstanding and uncertainty about many of the Act's provisions. Guidance, training and education are important, yet no one is charged with that duty. Nor does anyone keep statistics on the operation of the Acts, or the requests or complaints made under it. It is difficult to assess with certainty how well they are working. Publicity is accorded only when a complaint is made to the Ombudsmen, and even that publicity is of a limited kind. The OIA expressly states that its purpose is to progressively make official information available, yet no one is charged with incentivising or overseeing that progressive development. We believe that the functions we suggest would go a long way to curing these deficiencies.

67 The next question is who should exercise these functions. We favour the Ombudsmen retaining the complaints jurisdiction and also the function of giving guidance. We see no incompatibility in the same office having both functions. Indeed the Ombudsmen's detailed knowledge of the Acts gained through the complaints process means that they are the best placed to give guidance on their operation. We are less certain about who should promote the Acts and educate both agencies and the public on their operation. We have no doubt that

the Ombudsmen should in some way be engaged in the provision of that education, but the promotion and arrangement of it may well belong more to an oversight body.

68 We think, on the other hand, that the oversight function should be performed by a body which can stand back from the day-to-day operation of the Acts and assess their working in general. We currently think that the most appropriate agencies to do this are the State Services Commission in relation to the OIA and the Department of Internal Affairs in relation to LGOIMA. The Acts should, we think, require an official in those agencies to be designated as being in charge of the official information function.

69 There is certainly some interest in the creation in this country of an Information Commission of the kind which is developing in a number of other countries, but currently we are not yet persuaded such a move is necessary here. There would be cost involved and the functions can be performed by existing agencies. However we are interested in testing opinion on this, and ask also, if such a Commission were to be set up, what its functions should be. Should it do everything from complaints through to oversight, or be confined to oversight? What about the promotion and training function?

Chapter 14 Local Government Official Information and Meetings Act 1987

70 In this chapter we look specifically at the LGOIMA and note the differences between it and the OIA. Most of the differences are an inevitable result of the different constitutional arrangements between central and local government. The one has a unitary structure culminating in Cabinet, while the other comprises a large number of local authorities each governing its own area. The withholding provisions in the Acts, while very largely the same, reflect those differences, as does the very definition of "official information". Likewise the power of veto is vested in Cabinet in relation to central government but in each local authority in the case of local government. The Ministry of Justice has functions under the Official Information Act but not under the LGOIMA.

71 There are, however, a few other differences which seem less justifiable. For example the persons who can request information under the two Acts differ. In the one case they must be either resident in or present in New Zealand, but in the other that is not required. Whereas the purpose statement of the OIA states that it is a purpose of the Act to make official information progressively available, that is not so in the LGOIMA. We can see no reason for these differences and suggest that the two Acts should be aligned with regard to them. In particular we think that the purpose sections in both Acts should include *progressively* making official information available.

Chapter 15 Other issues

72 This chapter deals with some miscellaneous issues. The first is whether the Acts should be repealed and completely redrafted and re-enacted, or whether they should simply be amended. We recommend few drafting changes to the withholding grounds. In relation to other matters we do recommend some changes in the hope they will help to change or clarify practice. There will also need to be additions to the Act to deal with the new functions we propose and the institutions that will deal with them. Alone these changes would probably not justify repeal and re-enactment. But we also heard criticism of the order and structure of the Acts. They do not follow any logical order, and are not easy for newcomers or even the initiated to find their way around. So on balance we prefer complete redrafting.

73 We also received some opinion that the two Acts should be combined into one because they are the same in so many respects. But in our view there will remain enough differences for it to be quite confusing to combine them in one Act. A person interested only in local government would need to pluck from the new composite Act those provisions dealing with that. It is simpler for users to go to one Act which deals solely with their relevant area, either central government or local government. So for that reason we at this time favour keeping the two Acts separate.

74 We also consider whether there needs to be any alignment between the Public Records Act 2005 and the official information legislation. The Public Records Act (PRA) is intimately involved with, and very important for, the OIA and LGOIMA. It provides for good recordkeeping and for the retention and disposal of information. "Information" is very widely defined in the official information legislation, and "record" is equally widely defined in the Public Records Act. The interface between the two pieces of legislation is obvious; in essence only information that must be retained under the PRA will in the longer term be available to requesters under the OIA and LGOIMA. This raises the question as to whether, when compliance with the PRA is sufficiently developed, there should be a ground for complaint to the Ombudsmen or another body if agencies do not keep information in accordance with the PRA. We currently do not believe that either piece of legislation needs to be amended to fit with the other.