Your Ref	In reply please quote	If calling, please ask for
	CPM1508	Gudrun Jones

Waikato DISTRICT COUNCIL

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17 December 2010

Professor John Burrows, QC
Law Commissioner
Law Commission
PO Box 2590
WELLINGTON 6011

Dear Professor Burrows

REVIEW OF OFFICIAL INFORMATION LEGISLATION

Thank you for your letter of 4 October 2010 and questionnaire, inviting comments on your second Issues Paper of the above review.

We attach our completed questionnaire, which was endorsed at our Council meeting held earlier this week. We have not answered a number of questions because we do not have any particular views on those questions.

Thank you for giving us the opportunity to continue being involved in the review process of the review of official information legislation.

Yours sincerely

Gudrun Jones (Ms)
LEGAL COUNSEL

WAIKATO DISTRICT COUNCIL -RESPONSE TO QUESTIONNAIRE

ISSUES PAPER - QUESTIONS

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

Yes, for clarity.

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?

Yes.

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

Yes, there is no reason why they should be excluded.

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

Yes.

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

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

Yes, to be consistent with Tribunals.

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

No, there are sufficient exempt categories

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

Yes.

Q9 Do you agree that more clarity and more 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?

Yes, enhanced guidance is the key.

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

Yes.

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

Yes.

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

Yes.

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

Yes.

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

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

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

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

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

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?

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

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

Yes

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

No.

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

Option1 – guidance only, or;

Option 1 is supported.

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?

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

(a) deceased persons?

(b) children?

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

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:harassment;

(a) harassment

Yes, the Acts should not be used to provide information which enables a requester to harass other people.

(b) the protection of cultural values;

(c) anything else?

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

No, an agency should not be forced to release volumes of information to individual requesters "within a short time" where the information will be available in let's say 6 weeks' time.

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

Yes.

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

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?

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

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

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?

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

Yes.

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

Yes, although consultation with requesters is often done in these cases, some requesters resent this and insist on receiving the large amounts of information they have requested. A "consulting provision" in the Act would alert requesters that agencies have a right or duty 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?

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

Yes.

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

No.

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

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?

Yes.

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

Yes.

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

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?

No. It is easier for the agency to provide relevant information if they know why the requester requires it. The majority of requesters state the purpose already.

A requester should state his/her real name.

Q46 Do you agree the Acts should state that requests can be in oral or in writing, and that the requests do not need to refer to the relevant official information legislation?

Yes.

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

Yes, by the Office of the Ombudsmen

Q48 Do you agree the 20 working day time limit should be retained for making a decision?

Yes.

Q49 Do you agree that there should be express provision that the information must be released as soon as reasonably practicable after a decision to release is made?

Q50Do 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.

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

Yes, there are few agencies who have dedicated staff who deal exclusively with official information requests.

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

Yes.

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

Yes.

Q54 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?

Yes.

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

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

Yes.

Q57 Do you agree there should be a requirement to give prior notice of release where there are significant third party interests at stake?

No.

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

Q59 Do you agree there should be provision in the legislation to allow for partial transfers?

Yes.

Q60 Do you agree there is no need for further statutory provision about transfer to Ministers?

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

Q62 Do you think that whether information is released in electronic form should continue to depend on the preference of the requester?

Q63 Do you think the Acts should make specific provision for metadata, information in backup systems and information inaccessible without specialist expertise?

Q64 Should hard copy costs ever be recoverable if requesters select hard copy over electronic supply of the information?

Q65 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 current provisions are sufficient.

Q66 Do you agree there should be regulations laying down a clear charging framework for both the OIA and the LGOIMA?

Yes. This will lead to consistency and avoids uncertainty.

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

This could be considered by the Ombudsmen, in consultation with official information providers.

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

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?

Yes.

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?

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?

No.

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

No.

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

No.

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?

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

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?

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?

Yes.

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

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?

Θ82 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?

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

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?

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

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

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

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?

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

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

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?

If there is a mandatory requirement to proactively release certain information, then the protection from court proceedings should apply.

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

Yes.

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

Yes.

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?

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?

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

Yes.

Q97 Do you agree that the OIA and the LGOIMA should expressly enact an oversight function which includes monitoring the operation of the Acts, a policy function, a review function, and a promotion function?

Yes.

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

Yes.

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

Yes.

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

The Department of Internal Affairs

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

The Department of Internal Affairs.

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

No, there would be no need for a third party.

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

Q104 Do you agree that the LGOIMA should be aligned with OIA in terms of who can make requests and the purpose of the legislation?

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

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

Yes.

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

Yes, to avoid confusion.

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

In our view, sttutory amendments in releation to the Public Records Act and official information legislation is not required.

WDC1002/13/1/7 **Resolved: (Crs Fulton/Vickers)**

POL1002/05/11 **Review of Local Government Official Information and Meetings Act 1987**

THAT the comments regarding the operation of the Local Government Official Information and Meetings Act 1987 be conveyed to Local Government New Zealand and the Law Commission.

CARRIED on the voices

ITEM NO: 5.1.7

Waikato DISTRICT COUNCIL

TO	Waikato District Council
DATE	10 December 2010
FROM	T G Whittaker General Manager Strategy and Support SIGNED
APPROVED BY	G J Ion Chief Executive SIGNED
INDEX/FILE REF	GOV1301
SUBJECT	**Review of Official Information Legislation**

REPORT WRITER: Gudrun Jones, Legal Counsel

PURPOSE OF REPORT

To inform Council of the Law Commission's review of New Zealand's official information legislation, and to recommend to Council to respond to the Commission's request for comments in respect of the Commission's Issues Paper on official information legislation.

IMPLICATIONS

a) Policy	Nil.
b) Annual Plan/LTCCP	Nil.
c) Significance	Nil.
d) Financial	Nil.
e) Legal	Council has a legal obligation to provide official information to requesters in accordance with the provisions of the Local Government Official Information and Meetings Act 1987.
f) Communication and Consultation	Council has been asked to comment on the Law Commission's recently released Issues Paper on official information. There is no consultation required.
g) Community Outcomes	
h) Well-beings	Nil.
i) Tangata Whenua Considerations	Nil.

SUMMARY

In December last year, the Law Commission sought the views of organisations regularly involved and familiar with the operation of the Official Information Act 1982 (OIA) or Local Government Official Information and Meetings Act 1987 (LGOIMA), in respect of those provisions of the Acts which worked well and those which presented problems. A report was submitted to the Policy Committee at its meeting of 8 February 2010 and Council's submission sent to the Law Commission. (A copy of the report and Council resolution

POL1002/05/11) are attached. After analysing all submissions, the Commission has now released another Issues Paper and questionnaire, asking Council again for comments. Note that Part 7 of LGOIMA (LocalAuthority Meetings) is not being considered at this stage by the Commission.

A response to a number of questions of the Commission's questionnaire has been prepared for Council's consideration and is attached. The comments are in line with Council's comments made earlier this year.

RECOMMENDATION

THAT the report of the General Manager Strategy and Support – Review of Official Information Legislation – dated 10 December 2010 be received;

AND THAT the response to the Law Commission's questionnaire be forwarded to the Commission.

REPORT

Background

The Law Commission has a project underway to review New Zealand's official information legislation and has been gathering views from both providers and requesters of official information about their main concerns with the operation of this legislation.

An issues paper and questionnaire was sent to stakeholders last year, and Council made a submission in February this year. The Commission has now produced another comprehensive issues paper and questionnaire, asking again for comments by affected parties. The Commission acknowledges that different parties have different concerns or no particular view on certain aspects of the legislation and this is reflected in the proposed response.

The Law Commission does not suggest any change to fundamental principles of both the OIA and LGOIMA, but recognises that the Acts could operate more effectively. Furthermore, electronic technology has transformed the information environment and the Commission wants to ensure that this is reflected in the legislation. The Commission also supports more administrative support for those who regularly work with the legislation.

In general, dealing with official information requests has not posed any problems in this Council, although responding to requests can be time consuming. Occasionally, requesters have challenged Council's decision to withhold certain information, by writing to the Office of the Ombudsmen, but such matters have so far always been resolved. However, improving the legislation will benefit both requesters and providers of official information.

Options Considered

Council is not obliged to comment on the Law Commission's Issue Paper; however, it is considered that Council should support the Law Commission's review of the Acts and provide its views. The Commission anticipates that a report will be prepared and submitted to Parliament in the middle of next year. It is then up to Parliament to decide whether to proceed further and draft a Bill.

Consideration of views of those affected

Council is being asked to comment on the Issues Paper in its capacity as provider of official information. No consultation with others is required.

Conclusion

The Law Commission is undertaking a review of official information legislation and is asking Council to comment on the Commission's recent Issues Paper. A response to the Commission's questionnaire has been prepared and it is recommended that this be forwarded to the Commission.

Attachments:
Copy of Report to the Policy Committee "Review of Local Government Official Information and Meetings Act 1987", dated 29 January 2010.
Copy of Council Resolution POL1002/05/11
Copy of proposed response to the Law Commission's Issues Paper on official information legislation.

POL1002/05/11 Review of Local Government Official Information and Meetings Act 1987
File GOV1309 Agenda Item 5.10

Resolved: (Cr Vickers/His Worship the Mayor)

THAT the report of the General Manager Strategy and Support - *Review of Local Government Official Information and Meetings Act 1987* - dated 29 January 2010 be received;

AND THAT the comments regarding the operation of the Local Government Official Information and Meetings Act 1987 be conveyed to Local Government New Zealand and the Law Commission.

CARRIED on the voices

Waikato DISTRICT COUNCIL

TO	Policy Committee
DATE	29 January 2010
FROM	T G Whittaker General Manager Strategy and Support
APPROVED BY	G J Ion Chief Executive
INDEX/FILE REF	GOV1309
SUBJECT	**Review of Local Government Official Information and Meetings Act 1987**

SIGNED

SIGNED

REPORT WRITER: *Gudrun Jones, Legal Counsel*

PURPOSE OF REPORT

Local Government has been asked to prepare a sector response and has asked for feedback from Councils.

IMPLICATIONS

a) Policy	Nil.
b) Annual Plan/LTCCP	Nil.
c) Significance	Nil.
d) Financial	Nil.
e) Legal	Council has to deal with official information requests in accordance with the Local Government Official Information and Meetings Act 1987.
f) Communication and Consultation	Nil.
g) Community Outcomes	Nil.
h) Well-beings	Nil.
i) Tangata Whenua Considerations	Nil.

SUMMARY

The Government has asked the Law Commission to review the Official Information Act 1982 (OIA) and the Local Government Official Information and Meetings Act 1987 (LGOIMA). The Law Commission has prepared a summary questionnaire and is seeking the views of all those regularly involved in and familiar with the operation of both Acts. Local Government has been asked to prepare a sector response and has asked for feedback from Councils.

RECOMMENDATION

THAT the report of the General Manager Strategy and Support - *Review of Local Government Official Information and Meetings Act 1987* - dated 29 January 2010 be received;

AND THAT the comments regarding the operation of the Local Government Official Information and Meetings Act 1987 be conveyed to Local Government New Zealand and the Law Commission.

REPORT

Background

Both the OIA and LGOIMA have been in force for over 20 years. This legislation was enacted to promote openness in respect of central and local government business and to contribute to public trust and confidence in central and local government.

The Law Commission has prepared a questionnaire which covers a number of aspects of the legislation, and is seeking the views of both those requesting official information and those dealing with information requests. Detailed submissions are not sought at this stage, rather indications of where any problems lie and suggestions for improvements.

Issues

There have been no issues in this Council with regard to information requests, except that some requesters have certain expectations concerning the nature and quantity of information Council has to provide, or in which form. However, to date, such matters have been resolved with requesters.

Below are proposed comments about some of the aspects of LGOIMA included in the Commission's questionnaire:

1. Clarity, readabilty and framework of the Act.

Comment

The provisions of the Act are relatively easy to read and to understand. The Act is not very long and is set out in a logical manner.

2. Advantages or disadvantages in having one Act which covers official information in respect of both local and central government.

Comment

Although there are similar provisions in both the Official Information Act (OIA) and LGOIMA with regard to the release of information and review by the Ombudsman of a decision not to release information, LGOIMA contains additional provisions relating to local government business and in particular, contains a part on local authority meetings. It would be preferable to keep the OIA and LGOIMA separate, rather than stating in one Act that certain sections of the Act apply to the central government sector and other sections to the local government sector. This could become confusing when amendments are made in respect of one sector only and not the other.

It is considered that one Act for both sectors would be less readable and clear, and could be confusing and that the OIA and LGOIMA should remain separate Acts.

3. How important is it for upholding the principles of the Act?

Comment

The purpose of the Act is to promote open central and local government. The principle of the Act is to make official information available unless there is a good reason to withhold it. This principle is recognised as important and underpins the Council's decisions whether to release information or not.

4. How helpful are the case notes and guidelines of the Ombudsmen? Would you like more general guidance from the Ombudsmen for frequently recurring situations?

Comment

The case notes and guidelines are very helpful. More general and frequent guidance from the Ombudsmen for frequently recurring situations would be helpful.

5. What is your view with the two stage test?

Comments

The two-stage test has to be applied when the local authority considers withholding information under section 7 of LGOIMA (other reasons for withholding information). The section sets out a number of reasons to withhold, which may apply to a case, but also requires the official to consider whether the information should be released all the same, if it is in the public interest. This requirement is cumbersome, and given the nature of the reasons to withhold information under Section 7, it is not easy to to make a judgment in what circumstances the public interest should prevail. More guidance and examples of such circumstances by the Ombudsmen would be helpful.

6, Commercial interest withholding provisions and the way they are applied

Comment

The provisions of the Act which allow the withholding of information in relation to commercial are fairly straight forward and sufficiently flexible to deal with in different cases, bearing the principle of openness in mind. The "commercial interest" provisions do not pose problems for the Council.

7. Interface between section 7(1)(a) of the Act (withholding information to protect the privacy of persons) and the Privacy Act 1993

Comments:

Although this is not considered as problematic, a reference in section 7(1)(a) to the Privacy Act 1993 could be inserted in LGOIMA, to remind officials of the relevant principles of the Privacy Act.

8. Processing difficulties – Requesters asking for large amounts of information

Requests of information in a certain form (electronic or hard copies, information set out in a certain way etc.) can at times not be complied with. Section 17B inserted in the Act in 2003 (discussing with requester whether the information can be made available in another form if that is possible for Council), is regularly used. It usually results in the requester narrowing down their request in terms of quantity of material requested and accepting the information in a form Council can deliver,

9. Procedures to ensure administrative compliance with timeframes, transfers and charges

Staff dealing with information requests know of Council's obligations in respect of compliance with LGOIMA. The Council's in-house legal advisor is available for support and advice, or referral for actioning the request, should circumstances require this.

10. Requests for large amounts of information – Impact on workload

As with other Councils, there seems to be a growing number of "fishing" and vague requests for large amounts of information, requiring staff to search a large number of files and collating the information. Since most Councils do not have staff dedicated to dealing with official information requests, these requests place a burden on those involved in providing the information. Staff tries to manage the impact on workload by discussing a request with the requester, with a view to narrowing the scope of information to be provided. This, together with advising the requester that LGOIMA provides for Councils charging fees for the retrieval, collation and photocopying of information, and giving an estimate of the amount, usually results in the requester refining the request.

Options considered

The Law Commission and Local Government New Zealand have asked for comments with regard to Councils' experience in administering LGOIMA. Council has to decide whether it wishes to submit the comments set out above.

Consideration of views of those affected

Comments on LGOIMA are sought from Council as administrator of the Act. No further consultation is required.

Conclusion

Council has been asked to comment on certain aspects of LGOIMA. It is recommended that Council provides the above comments to the Law Commission and Local Government New Zealand, to enable the Law Commission to assess whether amendments to LGOIMA should be made, and if so, what has to be addressed.

LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

4 October 2010

Mr Gavin Ion
Waikato District Council,
Private Bag 544
NGARUAWAHIA 3742

Dear Mr Ion

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 have published an Issues Paper, *The Public's Right to Know: Review of the Official Information 1982 and Parts 1-6 of the Local Government Official Information 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. It is only available online.

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 local bodies. The closing date for submissions is Friday 10 December 2010.

Yours sincerely

John Burrows
Law Commissioner

Gudrun -
Could we prepare
a submission for
the Policy Committee
in November.
Thanks
JOE
8/10

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LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

4 October 2010

Mr Gavin Ion
Waikato District Council,
Private Bag 544
NGARUAWAHIA 3742

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Yours sincerely

John Burrows
Law Commissioner

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Review of Official Information Act 1982

Status: Work in Progress

- General
- Issues Paper
- Press Release

The Public's Right To Know

Published 29 Sep 2010

The Public's Right to Know –A Review of the Official Information Act 1982 and Parts 1-6 of the Local Government Official Information and Meetings Act 1987 (NZLC IP18, 2010), published 29 September 2010, discusses areas of possible reform relating to New Zealand's official information legislation and asks for comment on some preliminary proposals. This Issues Paper is part of the Commission's Review of the Official Information Act 1982 and Parts 1-6 of the Local Government Official Information and Meetings Act 1987. 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 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. The closing date for submissions is Friday 10 December 2010. This paper is only available electronically. A summary document (including the questions from our issues paper) is also available by clicking on the link above.

Whole document (PDF, 3,409 KB)

NZLC IP 18 Part 1.pdf (PDF, 1,861 KB)

NZLC IP18 Part 2.pdf (PDF, 1,865 KB)

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Appendix A

Discussion questions

CHAPTER 2	Q1	Do you agree that the schedules to each Act (OIA and LGOIMA) should list every agency that they cover?
	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?
	Q3	Do you agree that SOEs and other crown entity companies should remain within the scope of the OIA?
	Q4	Do you agree that council controlled organisations should remain within the scope of the LGOIMA?
	Q5	Do you agree that the Parliamentary Counsel Office should be brought within the scope of the OIA?
	Q6	Do you agree that the OIA should specify what information relating to the operation of the Courts is covered by the Act?
	Q7	Should any further categories of information be expressly excluded from the OIA and the LGOIMA?
CHAPTER 3	Q8	Do you agree that the OIA and the LGOIMA should continue to be based on a case-by-case model?
	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?
	Q10	Do you agree there should be a compilation, analysis of, and commentary on, the casenotes of the Ombudsmen?
	Q11	Do you agree there should be greater access to, and reliance on, the casenotes as precedents?
	Q12	Do you agree there should be a reformulation of the guidelines with greater use of case examples?
	Q13	Do you agree there should be a dedicated and accessible official information website?

CHAPTER 4	Q14	Do you agree that the "good government" withholding grounds should be redrafted?
	Q15	What are your views on the proposed reformulated provisions relating to the "good government" grounds?
CHAPTER 5	Q16	Do you think the commercial withholding ground should continue to be confined to situations where the purpose is to make a profit?
	Q17	If you favour a broader interpretation, should there be a statutory amendment to clarify when the commercial withholding ground applies?
	Q18	Do you think the trade secrets and confidentiality withholding grounds should be amended for clarification?
	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?
	Q20	Do you have any comment on the application of the OIA to research work, particularly that commissioned by third parties?
	Q21	Do you think the public interest factors relevant to disclosure of commercial information should be included in guidelines or in the legislation?
	Q22	Do you experience any other problems with the commercial withholding grounds?
CHAPTER 6	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?
	Q24	Do you think there should be amendments to the Acts in relation to the privacy interests of: (a) deceased persons? (b) children?
	Q25	Do you have any views on public sector agencies using the OIA to gather personal information about individuals?

CHAPTER 7	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?
	Q27	Do you think there should be new withholding grounds to cover: (a) harassment; (b) the protection of cultural values; (c) anything else?
	Q28	Do you agree that the "will soon be publicly available" ground should be amended as proposed?
	Q29	Do you agree that there should be a new non-conclusive withholding ground for information supplied in the course of an investigation?
	Q30	Do you have any comments on, or suggestions about, the "maintenance of law" conclusive withholding ground?
CHAPTER 8	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?
	Q32	Can you suggest any statutory amendment which would clarify what "public interest" means and how it should be applied?
	Q33	Do you think the public interest test should be contained in a distinct and separate provision?
	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?
CHAPTER 9	Q35	Do you agree that the phrase "due particularity" should be redrafted in more detail to make it clearer?
	Q36	Do you agree that agencies should be required to consult with requesters in the case of requests for large amounts of information?
	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?
	Q38	Do you agree that substantial time spent in "review" and "assessment" of material should be taken into account in assessing whether material can be released, and that the Acts should be amended to make that clear?
	Q39	Do you agree that "substantial" should be defined with reference to the size and resources of the agency considering the request?
	Q40	Do you have any other ideas about reasonable ways to deal with requests that require a substantial amount of time to process?

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?

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

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?

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?

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?

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

CHAPTER 10

Q48 Do you agree the 20 working day time limit should be retained for making a decision?

Q49 Do you agree that there should be express provision that the information must be released as soon as reasonably practicable after a decision to release is made?

Q50 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?

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

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

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

Q54 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?

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

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

Q57 Do you agree there should be a requirement to give prior notice of release where there are significant third party interests at stake?

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

Q59 Do you agree there should be provision in the legislation to allow for partial transfers?

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

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

Q62 Do you think that whether information is released in electronic form should continue to depend on the preference of the requester?

Q63 Do you think the Acts should make specific provision for metadata, information in backup systems and information inaccessible without specialist expertise?

Q64 Should hard copy costs ever be recoverable if requesters select hard copy over electronic supply of the information?

Q65 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?

Q66 Do you agree there should be regulations laying down a clear charging framework for both the OIA and the LGOIMA?

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

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

CHAPTER 11

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?

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?

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?

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?

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

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?

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?

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

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?

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?

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

CHAPTER 12

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?

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

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

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

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?

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

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

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?

CHAPTER 13

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

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

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?

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?

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

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?

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

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

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?

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

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

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

CHAPTER 14

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?

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

CHAPTER 15

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

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

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

LAW COMMISSION

REVIEW OF OFFICIAL INFORMATION ACT 1982 AND LOCAL GOVERNMENT OFFICIAL INFORMATION AND MEETINGS ACT 1987

The Law Commission has been asked by Government to review the Official Information Act 1982 (OIA). Since Parts I to VI of the Local Government Official Information and Meetings Act 1987 (LGOIMA) are in most respects identical, or almost identical, to the OIA, our review will also include the relevant parts of this Act.

Both Acts have been successful in promoting a culture of openness in relation to central and local Government activities and their underlying principles are not in question. But after 20 or more years the operation of the Acts are still sometimes attended by problems and these have been exacerbated rather than resolved by the explosion of information technology.

In **early 2010** the Commission will present options for improving the law and practice of the OIA and LGOIMA in a published Issues Paper and will seek comment and submissions from the wide audience of people who use or are interested in the operation of these Acts. It may well be that many of the problems identified will not be able to be addressed by legislative change and that we shall need to consider improving practice.

We now seek the views of all those regularly involved and familiar with the operation of the OIA or LGOIMA, both officials and requesters, in order to refine our understanding of the problems and to hear what works well, at the outset of our review. At this stage we are not seeking detailed submissions, rather indications of where problems lie and ideas for further exploration or reform. In preparing the survey we benefitted from recent research into the operation of the OIA published by Nicola White,[1] and Steven Price.[2]

The survey briefly summarises the often overlapping topics that the Law Commission has identified as important. We have not attempted to cover all aspects at this stage and welcome views on any other matters of concern arising from experience with the Acts. Most of the questions can be answered by both officials and requesters but a few are primarily for officials. The survey is intended as a guide to stimulate thinking rather than a template for comment on every issue.

The survey is on the Law Commission's talklaw website http://talklaw.co.nz/talkofficialinformation, which also provides an online forum for public comment and discussion. Responses can be sent online or sent to PO Box 2590, Wellington. When responding please identify yourself and your organisation if applicable.

Responses should be with the Commission by 15 February 2010.

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[1] Nicola White *Free and Frank: Making the Official Information Act 1982 work better* (Institute of Policy Studies, Victoria University of Wellington, 2007):

[2] Steven Price *The Official Information Act 1982: A Window on Government or Curtains Drawn* (Occasional Paper 17, New Zealand Centre for Public Law, Victoria University of Wellington) http://www.medialawjournal.co.nz/downloads/OP_Price.pdf

SURVEY OF REQUESTERS AND OFFICIALS

1 Overview of the Act

OIA and LGOIMA have the same straightforward framework which is recognised as one of the strengths of the legislation. Both Acts provide one principle of general availability of information followed by specific reasons for withholding information. This framework has proved to be flexible in changing circumstances yet robust enough to maintain the core integrity of the Act. None of the four OIA amending acts since 1982 have altered this basic structure.

Nevertheless the Acts have been in force for over 20 years during which time there have been very substantial changes to Parliament, to governance procedures, and in technology. The provisions are now being applied in an operating landscape with different political accountabilities than in the 1980s and without reliance on paper based information systems.

Moreover, drafting styles have changed since the 1980s. Modern legislation is usually drafted with a wide audience in mind, and avoids the more legalistic language that prevailed in the 1980s. Misunderstanding about what the OIA and LGOIMA require can affect both requesters and officials.

This review is an opportunity to check how effective and accessible the legislation is for users today, and to ask for views on the overall conceptual framework. If the legislative provisions in both Acts continue to be almost identical, it might be easier for the public to find all official information provisions in the same act.

Topic 1 Questions
(a) Do you find the OIA and/or LGOIMA easy to read and understand?
(b)What changes would make the Acts easier to follow?
(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

Each request for official information must be considered individually, on a case-by-case basis. Unlike the position in some jurisdictions, there are neither rules nor blanket exemptions for classes of document, apart from information subject to professional legal privilege. Ombudsmen Case Notes and Guidelines provide some guidance, but there is no formal system of precedent to guide decision making. Officials must identify the particular harm that could result from release of the information.

The case-by-case approach gives these Acts flexibility as circumstances change. Indeed the main rationale is that the harm flowing from release may differ according to when the decision to release is made. But flexibility can lead to a perception of inconsistent decisions by agencies and repeated requests for the same kind of information. Requesters have observed considerable variance between agencies

operating under the OIA.

Treating each case on its individual merits runs somewhat counter to the more natural approach of officials to base their response on how similar requests were treated previously. The sheer volume of requests can also be an obstacle to individual consideration by officials.

No doubt in recognition of these difficulties, the Ombudsmen have recently begun to indicate "general approaches" to commonly recurring matters, such as public sector contracts and severance payments. This level of guidance seems to be a useful development.

Topic 2.1 Questions
(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?
(d)Would you like more general guidance from the Ombudsmen on frequently recurring situations?

2.2 Two stage test:[3]

Sections 9 and 7 lists reasons for withholding information and require officials to apply a twofold test to decide whether or not to release information. Information must be released if the answer to both questions is yes:

1. Is it necessary to withhold any of the requested information in order to protect the interests specified in the listed sections?
2. If so, is the interest in withholding outweighed by the public interests favouring disclosure?

The public interest test underlines the overarching approach of the Acts – open access to information unless there are specific reasons to withhold it. Research suggests, however, that officials who routinely answer requests find the two stage approach cumbersome, and that the public interest test is not always separately considered once grounds have been found for withholding information.

Topic 2.2 Questions
(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

Reasons for withholding information are set out in both Acts.[4] We are interested in views on all these statutory grounds, but five in particular appear to have been problematic.

[3] OIA s 9. LGOIMA s 7.

[4] OIA ss 6, 7, 9, 18, and 27. LGOIMA s 6, 7, 9, 17.

3.1 Maintenance of the law[5]

In both Acts section 6 provides conclusive reasons for withholding information; grounds that cannot be overridden by any public interest in favour of release. LGOIMA has two conclusive reasons, identical to those in the OIA, whereas the OIA has several other grounds. Information can be withheld under both acts if release would prejudice the "maintenance of the law". This ground has been criticised as being unhelpfully vague and appears sometimes to be applied indiscriminately.

We are also interested in the difference between conclusive grounds for withholding information and grounds that must be balanced against the public interest. Whether or not all the reasons in section 6 should be treated as 'conclusive' rather than having to be balanced against the public interest in disclosure, and whether any other conclusive grounds should be added to section 6, are questions for this review.

Topic 3.1 Questions
(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[6]

Under these provisions, information can be withheld:

- to maintain constitutional conventions to protect Government confidentiality & officials' neutrality (OIA only);
- to maintain effective conduct of public affairs by free and frank expression of opinions by, to, or between Ministers and officials; or
- because the information will soon be publicly available.

These provisions balance the need to ensure effective government decision-making with the public interests in effective public participation, transparency and accountability. They are commonly relied on reasons for withholding information but are difficult to interpret and apply, particularly in relation to the timing of release of information that is not finalised policy. Elected representatives inevitably have a strong interest in the timing and nature of release of information with strong public interest, whether good or bad news.

Topic 3.2 Questions
(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 release of information?

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[5] OIA s 6(c). LGOIMA s 6(a).

[6] OIA ss9(2)(f), 9(2)(g), 18(d). LGOIMA ss 7(2)(f), 17(d).

3.3 Commercial interest[7]

Under these provisions, information can be withheld:

- where release would disclose a trade secret or unreasonably compromise a commercial position;
- to protect confidential information if disclosure would prejudice supply of similar information or damage public interest;
- where disclosure would prevent a Minister or an organisation from carrying out commercial activities or entering into negotiations.

These provisions are used relatively frequently and the interpretation of the Ombudsmen is fairly settled. However, there is little data about how restrictive or useful these provisions are for requesters, nor how straightforward they are for officials to apply. The last 20 years have seen greater commercialisation by some agencies and authorities in carrying out their functions, which may have led to a reduction of access to information held by them.

Topic 3.3 Questions
(a) What is your experience of the commercial interest withholding provisions and the way they are applied?
(b) Have you any suggestions for improvement?

3.4 Privacy[8]

This provision allows an agency to withhold information to protect the privacy of natural persons, both alive and deceased. Evidence suggests that protection of privacy is one of the most widely cited but misunderstood and inconsistently applied reasons for withholding information. This may result in the inappropriate release of personal information in some cases, or the withholding of information on dubious grounds in others.

The definition of "official information" includes "personal information," so there is an interface between OIA/LGOIMA and the Privacy Act 1993 but this interface can be problematic.[9]

Topic 3.4 Questions
(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?

3.5 Processing difficulties[10]

Both Acts allow information to be withheld if the material cannot be made available without substantial work. In such cases, provisions added in 2003 require officials to consider whether consulting with the requester could narrow the request and also

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[7] OIA ss9(2)(b), (ba), (i), (j). LGOIMA ss 7(2)(b), (c), (h), (i).

[8] OIA ss9(2)(a), 12(1A). LGOIMA ss 7(2)(a), 10(1A).

[9] The interface between the OIA and the PA is also being considered as part of the Law Commission's Review of Privacy.

[10] OIA ss 18(f), 18A, 18B. LGOIMA ss 17(f), 17A, 17B.

whether the problem can be solved by charging or extending the time limit.[11] These provisions can be useful in managing constant requests for the same information.

Research into the operation of the OIA suggests there is little consistency of approach in that some agencies will go to considerable trouble to provide large amounts of information while others decline to do so. There is little evidence, as yet, of the new provisions being routinely applied where large amounts of material is requested.

The problems with collating large amounts of information, as they existed in the 1980s, have been transformed by the ability to store and transmit information electronically. However, the retrieval and filing of electronic information pose a new range of issues, discussed in section 5 below.

Topic 3.5 Questions
(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

The provisions discussed above were selected on the basis of their frequent use and difficulty of application. We are interested in hearing any concerns about the other reasons for withholding information provided for in the Acts. There may also be additional grounds that should be added to those currently available.

Topic 3.6 Questions
(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?

4 Scope of the Act

The organisations subject to the OIA are listed in Schedule 1 of the OIA or in Part 1 or 2 of Schedule 1 to the Ombudsmen Act 1975. The organisations subject to LGOIMA are the local authorities and public bodies named in Schedule 1 of that Act, and include all committees, subcommittees, etc of these authorities and bodies.

The combined effect of the two Schedules relating to the OIA is that almost all organisations responsible to central Government in some way come within scope. However, there is wide variation in the governance structures and objectives of the organisations covered by the OIA, and the rationale for some organisations to be in or out is not always transparent.

The extension of the Act to state enterprises that operate commercially has been contentious, especially where there are competing private companies not subject to the OIA. The House of Representatives is not within the Act and nor are the agencies that

[11] OIA ss 18A, B. LGOIMA ss 17A, B.

service the House, such as Parliamentary Service, the Office of the Clerk, and Parliamentary Counsel Office. Information held by Courts is excluded altogether but tribunals are only excluded in relation to their "judicial functions". Commissions of Inquiry are excluded. There may be similar issues in determining the appropriate scope for LGOIMA.

Topic 4 Questions
(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
(c) What rationale should be applied to determine which organisations should be in the scope of OIA and LGOIMA?

5 Information Technology

Technological advances have transformed the format of information held by agencies and therefore how information is stored. This includes not only e-mail, meta-data and the internet, but also texts, instant messaging, wikis and blogs. While the framework of the OIA and LGOIMA can accommodate the computer age, some current practice and procedures for managing official information may be anachronistic. Increasingly officials manage content rather than documents.

In a paper based system, as when the OIA was developed, each document had a distinct number and was stored on the relevant file. Getting rid of paper required time and a physical action, such as shredding. Now documents are created, circulated, amended and deleted instantly. Agency policy about retention of electronic information for OIA purposes probably varies widely, particularly in relation to the status of drafts and emails that contain significant content.

To be accessible, electronic documents must not only be retained they must include meta-data that enables them to be traced electronically. Even if the information is retained effectively in the first place, it may become inaccessible in future because of technological change. Up-front planning is required to retain and maintain access to electronic official information. (Archives NZ administers the Public Records Act 2005 and gives advice on digital record keeping, see also section 7.3 below.)

Agencies are fast realising the enormous advantages of the internet, such as the capacity to publish large amounts of information and raw data that requesters can look up for themselves. It has been suggested that in this electronic age OIA and LGOIMA should require agencies and authorities to categorise and publish certain public interest information pro-actively.

Topic 5 Questions
(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[12]

Recent research for the OIA suggests there is wide variation in how the 20 day rule is applied, and that it is sometimes not observed. It also seems to have become the de facto deadline, even if that amount of time is not required.

Some requesters claim that delays are used to frustrate release for political reasons, and that the needs of the requester are not considered. Officials sometimes find that 20 days is unrealistic in light of departmental and ministerial checking processes. In recent years, the Ombudsmen have taken a stronger line in investigating complaints about delay.

6.2 Extension of time[13]

If a large amount of work is involved or if consultation is needed to make a decision, officials can extend the timeframe by giving requesters a new date and the reasons for it within the 20 day limit. Again OIA research suggests this provision is not always observed in that the extension is not communicated within 20 days, or the new date is not met. It is sometimes difficult to assess how long will be required, especially if the request requires collaboration between officials.

The provisions to seek extension of time are not always used effectively, possibly because there is a general lack of awareness that officials can actually extend the maximum time limits.

6.3 Transfer of requests[14]

Transfers to other agencies, where it is appropriate, must be made promptly and within 10 working days of receiving a request (unless a time limit is explicitly extended). This is not straightforward when several agencies have to collaborate, or at least consult about how to provide the information. The need for transfer may not be recognised initially, or consultation may take so long that the transfer goes over the 10 day notification deadline. It seems that requesters are also sometimes simply told to direct their inquiry elsewhere, and that the possibility of including relevant information from other agencies may not be considered at all.

In the central Government context, transfers to Ministerial offices have increased, which further increases the likelihood of delay. Despite informal guidance from Ombudsmen and State Services, there appears to be considerable variation in practice and understanding about the correct processes for managing information requests as between Ministers' offices and agencies. We have already adverted to this in 3.2.

6.4 Charges[15]

In relation to the OIA, the Ministry of Justice produces administrative guidelines on charging for information, available on its website. Local authorities are not covered by these although some have chosen to prepare policies consistent with them.

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[12] OIA s 15(1). LGOIMA s 13(1).

[13] OIA ss 15A(1). (2). LGOIMA ss 14(1). (2).

[14] OIA s 14. LGOIMA s 12.

[15] OIA s15(2). LGOIMA s 13(2).

Ensuring that charges are maintained at reasonable levels and applied consistently is not easily achieved. Recent research with the OIA suggests that charges are not often imposed, and if they are there is such wide variation in practice that charging seems arbitrary, and sometimes not in accordance with the guidelines. LGOIMA has a regulation making power in relation to charges and states that charges under the Act shall not exceed the prescribed amount, but there are no such prescribed charges.

Some requesters have suggested that unreasonable charges may be imposed to deter requests for large amounts of information.

Topic 6.1-6.4 Questions
(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

Applying each Act requires balancing competing interests, which is a complex task, especially if unfamiliar with the whole framework of each Act. It is often devolved to the unit holding the information and research suggests that many breaches of the OIA and LGOIMA result from a misreading of the relevant Act rather than from any deliberate attempt to evade its provisions.

Processing information requests is not always a well-resourced activity. In larger organisations there are usually internal controls to check compliance and quality control of responses, but these controls differ in effectiveness. The Ombudsmen currently run training sessions for agencies that request them. Some commentators have suggested there could be better advisory support, administrative systems and training for officials handling requests.

Topic 7.1 Questions for Officials
(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?

7.2 Large requests & workload

Some officials find administering information requests an increasing burden because of vague or all-encompassing requests.

There appear to be growing numbers of "fishing" requests from the media and from political opposition parties or groups. In turn, requesters find that officials sometimes "read down" and interpret questions in an unduly narrow manner. Deciding what is relevant to a request, given the plethora of papers, drafts, memos, and emails, can pose real difficulties for officials.

Topic 7.2 Questions for officials
(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 (OIA only)

The Public Records Act 2005 (PRA), administered by Archives NZ, places a duty on agencies to create and maintain records of its affairs "in accordance with normal, prudent business practice." Agencies must maintain all their records "in an accessible form, until disposal is authorised in accordance with the Act". Public records include documents, images, sound, speech, or data compiled, recorded or stored in written or recorded form. This broad definition covers a vast array of records created or received in any agency.

Potentially all this information can be sought and considered for release under the OIA. In considering best practice for the OIA, this review will also consider its interface with the PRA, and the process for managing records under that Act.

Topic 7.3 Questions for Officials
(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

Decisions by the Ombudsmen take the form of recommendations that are binding on agencies, subject to a veto that can be exercised by Cabinet to override the recommendation in the case of the OIA,[16] and subject to the passing of a resolution against release by a local authority.[17] The requirement for a Cabinet decision rather than one by an individual Minister was introduced in 1987. Since then, all Ombudsmen recommendations have been implemented, which means that serious breaches of the Act are rectified despite the fact that the Act provides no sanctions for breaches.

Anecdotal evidence suggests that the vast majority of breaches are inadvertent and not a result of any intent to defeat the provisions of these Acts, but there may be some cases where, for one reason or another, there is a deliberate intention to avoid the release of information. There may also be inadvertent but very serious breaches. Some have suggested there should be power to impose sanctions for serious breaches of the Act.

Topic 8 Questions
(a) Should sanctions be imposed for any breach of these Acts?
(b) If so, what sort of breaches, and what sort of sanctions?

[16] OIA s 32.
[17] LGOIMA s 32.

9 Role of Ombudsmen

There is general agreement from commentators that oversight and guidance on the operation of the OIA and LGOIMA benefits from leadership from an independent and authoritative body. Currently the Ombudsmen perform this leadership function. Their role is twofold: investigating complaints on a case-by-case basis and giving informal guidance on OIA and LGOIMA through publications such as the Practice Guidelines and assistance with training.

The guidance role of the Ombudsmen has developed in the absence of any central agency with responsibility for operation of these Acts. The dual role may have placed some pressure on Ombudsmen resources which may impact on the speed of decision making and the extent of the assistance which is able to be provided.

In practice Ombudsmen perform the vital function of being the final arbiter on decisions of officials about release of official information in relation to both Acts. Although there is provision under the OIA for the Governor-General to direct otherwise by Order in Council, this provision has never been used. Under LGOIMA, the local authority can, by resolution at a meeting, decide not to observe the Ombudsmen's recommendation.

Topic 9 Questions
(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

We have asked questions about aspects of the OIA and LGOIMA where some issues of concern have been raised. There may be other aspects you wish to comment on, including what works well. We welcome such comment.

Topic 10 Question: *Are there any other aspects of OIA or LGOIMA you wish to comment on?*

SUMMARY
OFFICIAL INFORMATION SURVEY 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?
(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?
(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?
release of information?

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?

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?

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?

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

(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?

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(d) Is a single review mechanism sufficient?

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

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Official or Requester

Usual involvement with official information, eg media, legal adviser, prepare responses, politician, research, public interest group

Name (optional)

Organisation (if applicable)

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10 General

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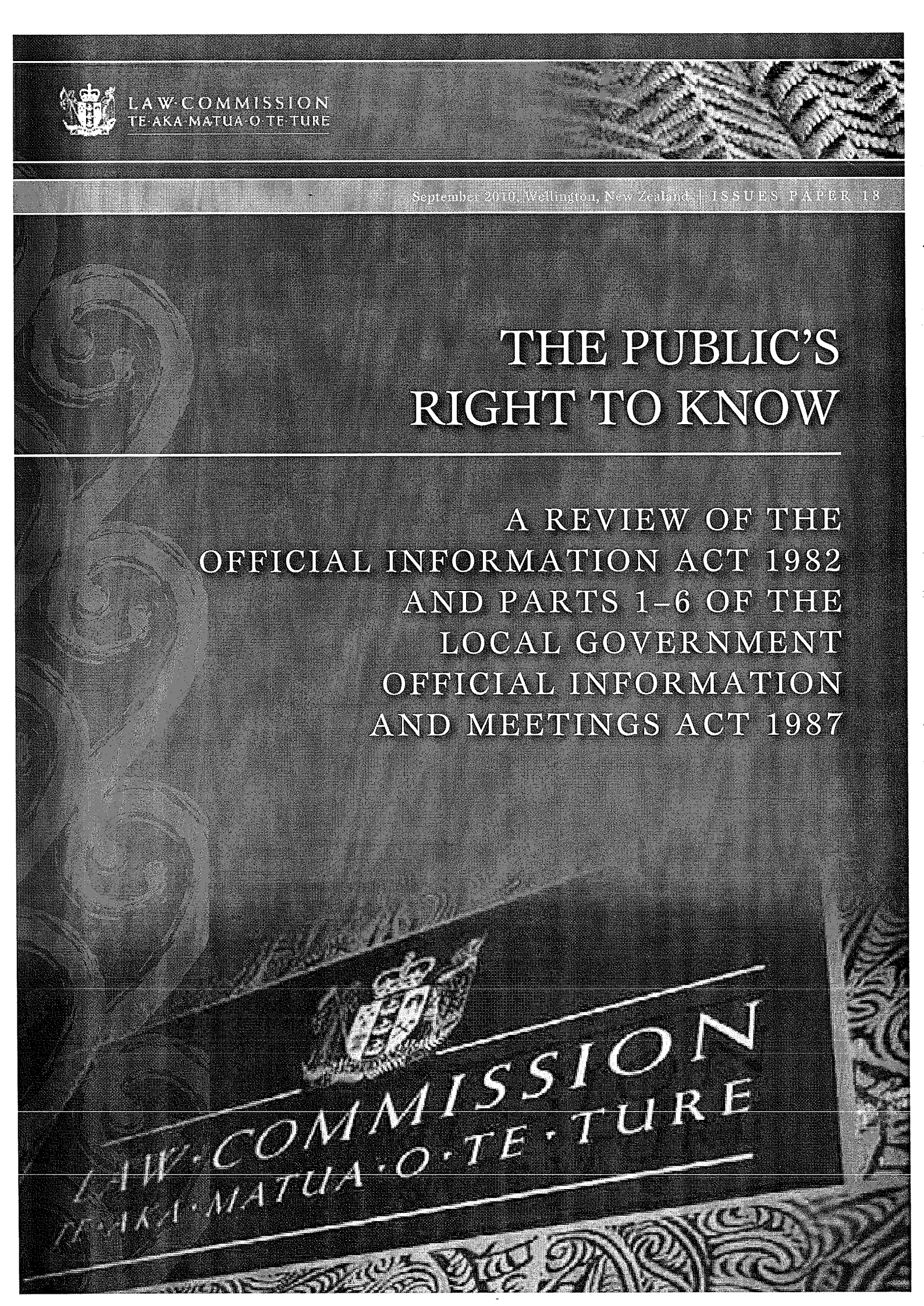
LAW COMMISSION
TE AKA MATUA O TE TURE

September 2010, Wellington, New Zealand | ISSUES PAPER 18

THE PUBLIC'S RIGHT TO KNOW

A REVIEW OF THE OFFICIAL INFORMATION ACT 1982 AND PARTS 1–6 OF THE LOCAL GOVERNMENT OFFICIAL INFORMATION AND MEETINGS ACT 1987



LAW·COMMISSION
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A REVIEW OF THE OFFICIAL INFORMATION ACT 1982 AND PARTS 1–6 OF THE LOCAL GOVERNMENT OFFICIAL INFORMATION AND MEETINGS ACT 1987

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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FOREWORD

The key principle of the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987 is that official information should be made available unless in the particular case there is good reason for withholding it.

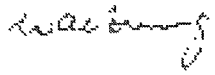
Overall the Acts have achieved their purpose. They have changed the culture about the availability of official information. Our society is now much more open than it was. Change to the basic philosophy of the Acts is not in contemplation.

However this is not to say that there are no problems. Agencies find some of the withholding grounds difficult to apply, and requesters can also have difficulty understanding them. We ask whether any of the grounds would benefit from being expressed differently, or whether more guidance is needed to assist users in working with them. Compliance with the Acts can also sometimes involve considerable resource, and we ask whether there is any way in which unreasonably large requests can be contained so that benefit and cost can be kept in proper balance.

In addition to a number of more mechanical matters such as time limits and transfer of requests, we also ask some large new questions. Given rapid advances in technology, we ask to what extent proactive disclosure of information on the internet (as opposed to supplying it to individuals on request) should be encouraged or even mandated. We also consider whether important functions such as training, education and oversight of the operation of the Acts should be provided for in the legislation and, if so, which agency should undertake them. These questions are being asked internationally, and we review these international developments.

There is no doubt that the New Zealand legislation has served its purpose. Overseas commentators have cited it as a model. But time moves on, and we must not rest on our laurels. Otherwise we risk being left behind.

In this Issues Paper we ask a number of questions, and invite public submissions on them. We would like to hear from as many people as possible, including those who make requests under the Acts and the agencies which are subject to them.



Warren Young
Acting President

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- Beverly Wakem, Chief Ombudsman
- David McGee QC, Ombudsman
- Nicola White, Assistant Auditor-General, Office of the Auditor General
- Dean Knight, Senior Lecturer, Law Faculty, Victoria University of Wellington
- Steven Price, Adjunct Lecturer, Law Faculty, Victoria University of Wellington
- Commonwealth Press Union
- Staff in the Office of the Ombudsmen, State Services Commission, Department of Internal Affairs, Department of Conservation, Department of Prime Minister & Cabinet, Ministry of Foreign Affairs and Trade
- All the individuals and organisations that took time to respond to our December 2009 survey

The Commissioners responsible for this project are John Burrows and Geoffrey Palmer. The legal and policy advisors who worked on this issues paper were Joanna Hayward, Ewan Lincoln, Steve Melrose and Margaret Thompson.

Call for submissions

We welcome your views on the issues discussed in this paper and in particular on the questions set out in the chapters and collected at the end of the paper. It is not necessary to answer all questions. Your submission or comment may be set out in any format, but it is helpful to indicate the number of the question you are discussing, or the paragraph of the issues paper to which you are referring.

Submissions or comments on this issues paper should be sent to the Law Commission by **Friday, 10 December 2010**.

Official Information Legislation Review
Law Commission
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Email – **officialinfo@lawcom.govt.nz**

Enquiries may be made to **Margaret Thompson**, phone **04 914 4830**.

Official Information Act 1982

The Law Commission's processes are essentially public, and it is 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 of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.

The Public's Right to Know

A review of the Official Information Act 1982 and Parts 1–6 of the Local Government Official Information and Meetings Act 1987

CONTENTS

APPENDICES

Discussion in this paper usually relates equally to the operation of the Official Information Act 1982 (OIA) and the Local Government Official Information and Meetings Act 1987 (LGOIMA). Where there are identical or almost identical provisions in both OIA and the LGOIMA we refer in the body of the text to the OIA with the corresponding section of the LGOIMA in a footnote. This is solely to make the text easier to read and for economy of expression. When the LGOIMA raises separate issues we deal with it separately.

Summary

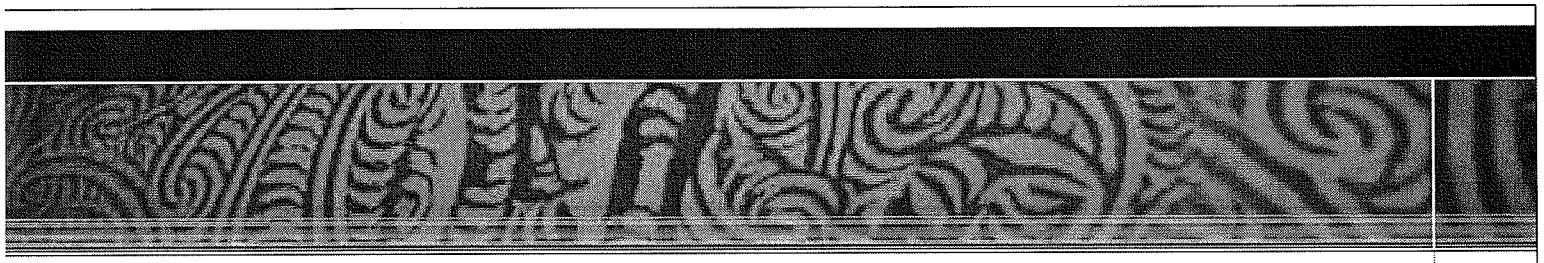
Chapter 1 Background

1 This project reviews the Official Information Act 1987 (OIA) and the official information provisions of the Local Government Information & Meetings Act 1982 (LGOIMA). The provisions of the two acts are very similar: indeed for the most part they are identical. Both of them operate on the principle that if official information is requested it will be made available unless there is good reason for withholding it. The good reasons are spelled out in the Acts. Some of them are conclusive, but the majority can be over-ridden if in a particular case there is a public interest in disclosure. There is also a list of administrative reasons for refusal.

2 In chapter 1 we outline the history of the Acts, dating back to the report of the Danks Committee in 1980. Since that time there have been substantial changes in the context in which the Acts operate. There have been major constitutional and legislative changes. The state sector was restructured in the 1980s: the State Sector Act 1988 replaced a unified public service with relatively autonomous government departments, and more clearly delineated separate responsibilities of ministers and heads of department. The move to an MMP electoral system with more political parties involved in government accelerated the use of the OIA for political purposes.

3 There has also been major technological change. The way documents are created and stored has changed almost beyond recognition over the past thirty years. When the OIA was enacted official information was mainly in the form of hard copy documents. Since then the digital information revolution has vastly increased the volume of information that can be produced, collected and stored. This has proved a two-edged sword. On the one hand it is now sometimes easier to retrieve documents, but on the other there are likely to be many more of them, including emails and earlier drafts of documents. Information technology also has great potential for the proactive publication of information by government agencies on their websites and great strides have already been made in this direction. There is now a much stronger expectation of openness and availability of information than in the past. People have become more suspicious of any government activity that takes place in secret. Citizens expect to be able to find out how, why, and by whom government decisions are made.

4 Then there is the international environment. Many governments in jurisdictions similar to our own – in particular the UK and Australia – have recently reviewed their official information legislation, and there is a clear trend towards more proactive release, and also to the creation of information commissions.



5 In preparing this issues paper the Commission has been greatly assisted by the 1997 review of the Act undertaken (with somewhat restricted terms of reference) by the Law Commission and also by the published research of Nicola White and Steven Price. We issued a public survey at the end of 2009 which asked a number of broad questions to find out the main kinds of problems that people experienced with the legislation.

6 The Commission's overall impression is that the OIA and LGOIMA are central to New Zealand's constitutional arrangements, that their underlying principles are sound, and that they are generally working well. At the same time it is clear that there are areas where changes could be made to improve the effectiveness of the legislation. We seek comments on a large number of issues and options. In many instances we state our preference for certain solutions but we still want to test those solutions and hear views on them.

Chapter 2 Scope of the Acts

7 We examine two aspects of the scope and coverage and the Act: which agencies are subject to it and the types of information covered by it.

8 We make the initial point that it is necessary to peruse the schedules not just of the OIA and LGOIMA but also of the Ombudsmen Act 1975 to find out what agencies are subject to the official information regime. Even that is not enough because some types of agencies, for example council controlled organisations, which are subject to the legislation via other Acts do not appear in any of the schedules. We think that all agencies subject to the OIA should appear in a schedule in the OIA itself, and similarly that all agencies subject to the LGOIMA should appear in the schedule to that Act.

9 The next issue is whether all agencies which should be subject to the legislation are in fact subject to it. There are some discrepancies to which we draw attention in the chapter, and we suggest that the schedules of the Act need to be gone through carefully to decide what, if any, agencies should be added to them. We pay special attention to State-owned Enterprises and conclude that they should remain subject to the Act. We suggest the Parliamentary Counsel Office should come within it, and note that in the Law Commission's review of the Civil List Act consideration will be given to whether parliamentary agencies should be covered. We also wonder why courts appear to be exempt from the OIA whereas tribunals are exempt only in relation to their judicial activities.

10 The other aspect of scope to which we make brief reference in this chapter is the types of information which are covered by it. Generally all information, of whatever kind, held by an agency is subject to the Act. Every case depends on its own facts. We ask whether there is a case for exempting any categories of information and conclude not. However we do spend some time discussing information held by an agency which has been supplied by or generated for third parties. We return to that issue later in the paper.

11 In essence we are not in favour of creating new categories of documents or information which are automatically exempt from the operation of the Act.

Chapter 3 Decision-making

12 In this chapter we examine the method of decision-making under the withholding grounds. The NZ legislation, with a very few exceptions, does not exempt categories of information but lays down open-textured principles and requires a decision to be made on the facts of each case as to whether the particular information should be withheld on the basis of those principles. We have what is often described as a "case-by-case" system. We have no desire to change that system. It does however have its difficulties. The assessments required in each individual case can take time. There is uncertainty, particularly if officials charged with making the decision are inexperienced, or the agency in question has handled few requests of this kind in the past. There are risks of idiosyncratic decision, and of inconsistency between the decisions of different agencies on very similar fact situations.

13 Guidance is available to assist agencies, primarily from the Office of the Ombudsmen Practice Guidelines on the Ombudsmen's website. There is also a large volume of case notes on that website, although they are incomplete and not up to date. We received much comment from persons responding to our survey that they would like clearer guidance, and in particular guidance with examples.

14 We have considered how greater certainty and consistency could be brought into the process. We do not think there is much to be gained by redrafting the withholding grounds in the Acts. As we shall see, there may be a few situations where that would make a difference but generally speaking it is hard to see that a change of words would provide greater certainty or assistance. Nor are we in favour of empowering regulations to be made which lay down rules about certain sorts of document. This is the category approach rather than the case-by-case approach, and we think it is too rigid. The flexibility of the case-by-case approach has much to be said for it.

15 However we think much more could be done by way of a system of precedent, and guidance based on that precedent. We think this is the way forward. We believe that all case notes of the Ombudsmen, past and present, should be collated and analysed and that consistent themes, patterns and principles emerging from them should be clearly stated in a commentary. The case notes should be used to develop a system of persuasive precedent. Reference to the case notes would enable the practice guidelines to be made more specific than they now are. The guidelines could contain examples derived from the case notes. In any event there should be clear links between the guidance and previously decided cases. This was what a number of respondents to our survey said they were looking for.

16 Such a system would not, of course, set a system of rigid rules. Patterns and precedents emerging would be presumptive only, and would be subject to the particular facts of each case. The system would be flexible enough to move with the times, while still providing certainty and consistency. Thus the open texture of the Act would be supported by a substructure of detailed guidance. We think the function of providing guidance in this form should be given added authority by inserting a provision in the Act to require it. We suggest in chapter 13 that the function be conferred on the Office of the Ombudsmen.

Chapter 4 Protecting good government

17 In this chapter we examine the group of withholding grounds relating to "good government" which have given particular difficulties. Some of the grounds ostensibly relate to the maintenance of constitutional conventions, others are to protect the free and frank expression of opinions provided by officials to ministers and others. We have no doubt that there is an important place for such grounds. The interests underlying them are as worthy of protection today as they were when the OIA was first enacted. Our system of government is founded on basic understandings such as collective ministerial responsibility. Moreover the ability of the government to govern requires some room for deliberation in private to develop and consider ideas without fear of adverse consequence. The legislation must recognise this.

18 Nevertheless the respondents to our survey made it clear that the grounds can be difficult for agencies to apply because they are very broad and indeterminate. In particular, they thought the reference to constitutional conventions is obscure. We agree that it is problematic. Expert commentators have described the list of so-called conventions as "conceptually incoherent". Conventions can also change over time, another factor which can increase the uncertainty. We also received views that the "free and frank" withholding ground is still not enough to ensure that truly free and frank discussion really does take place. It was also felt that there was no reason why it should be confined to "opinions" as opposed to "advice".

19 Particularly because of the confusion about constitutional conventions we are inclined to think that this is one of the few areas where the withholding grounds might benefit from redrafting. In this chapter we put forward a possible redraft, which omits all reference to constitutional conventions. For the most part the redraft does not change substance, so the existing Ombudsmen case notes and guidance will remain relevant. However in respect of a small number of matters of detail we do suggest extensions of the existing grounds. There is not much that can be done, though, to ensure that discussion will always be completely free and frank – human nature being what it is. We particularly look forward to comments on these suggestions.

Chapter 5 Protecting commercial interests

20 This chapter deals with another problematic set of withholding grounds, the commercial withholding grounds. These grounds protect the commercial interests of central and local government agencies and also of the third parties with whom they deal. We give illustrations in this chapter of the extensive growth in the commercial orientation of some public organisations since the 1980s. We note the sensitivities which can lie around such matters as the details of contracts, the findings of research commissioned by a third party, and the arrangements made by local authorities to attract events to their areas.

21 We are clear that commercial information should not be withdrawn from the coverage of the Act. The commercial withholding grounds should be sufficient to protect such information provided they are properly applied. There nevertheless will be occasions where the public interest in the type of information or the expenditure of money involved will justify disclosure of commercial information. As a judge has said, we cannot have developing "a commercial Alsatia beyond the reach of statute".

22 We do, however, look at a number of possible reforms. In particular the Ombudsmen currently give a narrow interpretation to the expression "commercial", holding that it implies a profit-making motive. A number of our respondents took issue with this, saying that involvement in commercial activities is not always done with a profit motive, but sometimes simply for the purposes of better government. We have not formed a view on this and ask for comment.

23 We also discuss information held by agencies in which the intellectual property belongs to others. We wonder whether the concepts of "trade secret" and "information supplied in confidence" need to be further defined in the Act, but conclude this would not help much. We emphasise that the existence of intellectual property in information is not automatically a ground for withholding it. There may be cases, although they are likely to be few, where the public interest in disclosure would over-ride all else. We also recognise that applying the public interest test once a commercial interest withholding ground has been identified is difficult, and not always properly done. We think that better guidance, coupled with reliance on precedent as suggested in chapter 3, is probably the best avenue for creating certainty.

Chapter 6 Protecting privacy

24 There is no attempt to define privacy in the Act, and we note that it was passed well before the Privacy Act 1993 which has developed our understanding of privacy. We discuss the awkward interface between the OIA (and LGOIMA) and the Privacy Act. The two Acts begin with different presumptions, the Privacy Act with the presumption that personal information will not be disclosed unless certain statutory reasons are made out, and the OIA with the presumption that such information will be released unless the privacy withholding ground can be made out (it in turn being able to be overridden by a public interest in disclosure).

25 We received a few suggestions that it might be possible to align the two statutes, but have reached the conclusion that this would require quite complex reasoning on the part of those applying the Act. Such an alignment of the two Acts in fact sounds a lot easier than it would turn out to be in practice. We wondered whether a threshold test should be introduced to the OIA and LGOIMA to provide that only unreasonable disclosures of private information could trigger the withholding ground in these Acts. However, not only might this be taken to narrow the withholding ground: it may in fact lead to greater confusion on the part of those reading the Acts. So our present inclination is to leave the wording as it is. We think that analysis of the Ombudsmen case notes and practice guidelines drawing on those cases will serve the purpose here as elsewhere.

26 In this chapter we also ask whether the privacy protections for deceased persons should continue and whether there is need to expressly safeguard the privacy interests of children. We also draw attention to a matter which was also raised in our review of the Privacy Act, that is to say whether public sector agencies should be able to use the OIA to share personal information about individuals. We do not think they should.

Chapter 7 Other withholding grounds

27 In this chapter we look generally at some withholding grounds and administrative reasons for refusal not dealt with elsewhere. We comment on the distinction between the conclusive withholding grounds and the grounds which are overridable by public interest in disclosure, and note that the distinction between some of those grounds is not as great as might have been supposed. However we do not suggest that any amendment to the Acts is warranted.

28 We particularly discuss the reason for refusal that the information requested "is or will soon be publicly available". We are satisfied from some of the responses to our survey that this is misused by some agencies to delay the release of information for an unreasonable time. We think that this may be one of the areas where statutory amendment would help, and we suggest an amendment to the effect that the reason only applies if the information is to be made publicly available within a very short time, and its immediate disclosure would be administratively impractical.

29 We also discuss the problematic, and conclusive "maintenance of the law" withholding ground. Its main application is to uphold the prevention, investigation and detection of offences and a right to a fair trial. However it is clear that some agencies use it well beyond this fairly narrow scope to protect any information they have received in the course of an investigation they are carrying out, whether that investigation relates to wrongdoing or not. We do not think the ground was ever intended to be used in this situation. Yet we think that the interest which agencies who thus use the ground are trying to protect has substance, and suggest that a new withholding ground should be added to the Acts to make provision for it. The ground would be to the effect that withholding is necessary to protect information supplied in the course of an investigation or inquiry where disclosure is likely to prejudice the conduct or outcome of that investigation or inquiry. But we can see no reason why this should be a conclusive ground in the way that "maintenance of the law" is; it should be subject to the public interest override.

30 We also ask about the possibility of adding a further withholding ground to the OIA to protect cultural matters. There is currently one in LGOIMA but it is narrowly confined to resource management matters to avoid serious offence to Tikanga Māori or the disclosure of Wahi Tapu. We would like to hear whether there is a need for a more broadly framed provision in both the OIA and LGOIMA to protect cultural interests.

Chapter 8 The public interest test

31 Protecting the public interest in disclosure is a central concept of the legislation. The majority of withholding grounds can be overridden by the public interest in disclosure of the information. We have the impression that many agencies and indeed requesters do not find it easy to understand and apply this test.

32 The term 'public interest' is not defined in the Acts, but that is not surprising: the expression appears in very many acts of parliament (legislation websites refer to over 1000 instances) and in none of them does it seem to be defined. It also makes its appearance in common law so is a familiar expression to lawyers but less so to others. We do not think there would be much profit in trying to define it in the Acts, but we do consider whether there might be benefit in statutorily listing a number of factors which are relevant when considering whether it is in the public interest to disclose. This approach has been taken in some of the Australian legislation, most notably in Queensland where the act contains a very long list of factors.

33 However we think there are dangers in such legislative prescription. There is a risk that some of those applying the provision might treat the list as exhaustive, which it could never be. It could also lead to rigidity in an area where flexibility and ability to move with the times are particularly important. Yet again we believe that a set of guidelines informed by case examples is the best way forward. This is an area in particular where concrete examples could be particularly useful.

34 Rather more concerning, however, were admissions that we had from some agencies that once a withholding ground is made out, they are inclined not to consider the public interest in disclosure at all, or at least to consider it in only a very perfunctory way. We suggest that there may be two ways of improving this situation. One would be to have a separate section in the Acts with its own marginal note, codifying quite separately the requirements to balance public interest in the case of the overridable withholding grounds. Another might be a provision expressly requiring agencies notifying requesters of decisions to withhold information to confirm that they have considered the public interest in disclosure and what interest they considered. This kind of certification requirement would at least mean that attention is focussed on the ground. We are interested in this chapter in discovering whether submitters have other ideas for improving understanding and use of the public interest test.

Chapter 9 Requests – some problems

35 In this chapter and the next we discuss some of the practicalities of handling and processing requests. We deal here with some problems for agencies. The majority of requests are reasonable and manageable, but it is clear that from time to time requests are made which place considerable burdens on agencies. Among them are requests for a very large number of documents, all of which need to be perused by the agency to ensure that there are no grounds for withholding all or any parts of them. Others are framed in very broad terms and are effectively "fishing" requests to see whether the large amounts of information requested might contain anything of interest. Sometimes particular requesters ask again and again for variants of the same type of information.