Reference: 20120450

28 August 2012

THE TREASURY
Kaitohutohu Kaupapa Rawa

Alex Harris
Fyi-request-455-143c53fd@requests.fyi.org.nz

Dear Alex Harris

Thank you for your Official Information Act request, received on 30 July 2012. You requested the following:

> *"Recently your organisation submitted to the Law Commission's review of the Official Information Act. I would like to request the following information under the OIA:*
>
> * *a copy of your submission, and*
>
> * *all drafts, advice, and internal communications (including emails) relating to that submission.*
>
> *I would prefer to receive an electronic response. Queries about this request will be automatically forwarded to me by the fyi.org.nz website. With regards to s12 of the OIA, I am an NZ citizen and in NZ."*

Information Being Released

Please find enclosed the following documents:

Item	Date	Document Description	Proposed Action
1.	22 January 2008	Internal Document: OIA's harmful effects on advice to Government	Release in full
2.	February 2008	Internal Document: OIA's effects on advice – internal options	Release in full
3.	7 March 2008	Internal Document: OIA's effects on advice –discussion and next steps	Release in full
4.	13 December 2009	Email: Law Commission Questions for OIA Review	Withhold junior official's name under s9(2)(g)(i)
5.	16 December 2009	Email: OIA harmful effects on advice to Government	Release in full

1 The Terrace
PO Box 3724
Wellington
New Zealand

tel. 64-4-472 2733
fax. 64-4-473 0982
www.treasury.govt.nz

Item	Date	Document Description	Proposed Action
6.	16 December 2009	Email: OIA effects on advice to Government – discussion and next steps	Release in full
7.	16 December 2009	Email: Policy Advice Quarterly Article: worth a read	Release in full
8.	16 December 2009	Email: OIA harmful effects on advice to Government - How/who should take this forward?	Withhold some information under s9(2)(g)(i)
9.	16 December 2009	Email: OIA harmful effects on advice to Government - How/who should take this forward?	Release in full
10.	15 January 2010	Response to the Law Commission's review of Official Information legislation	Release in full
11.	19 February 2010	Intranet Notice	Release in full
12.	9 March 2010	Email: Official Information Act – commercial withholding grounds	Release in full
13.	September 2010	Summary of Law Commission's Sept 2010 Issues Paper on the OIA	Release in full
14.	1 October 2010	Email: Law Commission Review of the OIA	Release in full
15.	4 October 2010	Comments on Law Commission's Review of OIA	Release in full
16.	4 October 2010	Intranet Notice: Review of the OIA	Release relevant information only
17.	4 October 2010	Intranet Notice: Review of the OIA	Release in full
18.	10 November 2010	Email: Responses to Law Commission review of the OIA	Release in full
19.	1 December 2010	Email: Law Commission Review of the OIA – Central Agencies Response	Release in full
20.	1 December 2010	Email: Law Commission Review of the OIA – Central Agencies Response	Release in full
21.	16 March 2012	Letter to Law Commission re final draft report on OIA	Release in full

I have decided to release the relevant parts of the documents listed above, subject to information being withheld under section 9(2)(g)(i) of the Official Information Act – to maintain the effective conduct of public affairs through the free and frank expressions of opinion.

Information Publicly Available

Submissions made from government departments on the Law Commission's Issues Paper have been published on the Law Commission website. The Treasury made three submissions; the final submission is on their website. Accordingly, I refuse your request for this submission on the Issues Paper under section 18(d) of the Official Information Act – the information requested is or will soon be publicly available.

The submission is detailed in the table below.

Item	Date	Document Description	Website Address
1.	10 December 2010	Treasury's response to the Law Commission's discussion questions relating to The Public's Right to Know: A Review of the Official Information Act 1982 and Parts 1 – 6 of the Local Government Official Information Act 1987.	http://www.lawcom.govt.nz/project/review-official-information-act-1982-and-local-government-official-information-act-1987

(Our earlier submissions to the Law Commission are included in the table of information for release and are being released in full.)

Information to be Withheld

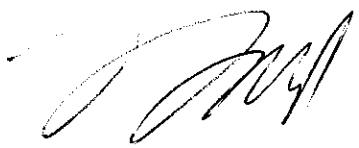
There are some handwritten notes covered by the request that I have decided to withhold in full under section 9(2)(g)(i) of the Official Information Act - to maintain the effective conduct of public affairs through the free and frank expressions of opinion.

In making my decision, I have considered the public interest considerations in section 9(1) of the Official Information Act.

This fully covers the information you requested.

You have the right to ask the Ombudsman to investigate and review my decision.

Yours sincerely



Jeremy Salmond
Treasury Solicitor and Manager, Legal Group

(1)

Date: 22 January 2008 SH-5-0-3

To: OCE

From: Nic Blakeley

THE OIA IS HAVING HARMFUL EFFECTS ON ADVICE TO GOVERNMENT. DOES THIS MATTER? DO WE CARE?

1. The purpose of this memo is to pose some questions for discussion:
   - Do you agree the OIA is having harmful effects on advice to government?
   - What degree of involvement in this debate should Treasury have?
   - Are there things we should be doing to mitigate the harmful effects?
2. Should we take these issues further? If so, how?

The OIA is "corroding trust in government"

3. I've just read a book called "Free and Frank: Making the Official Information Act 1982 work better" by Nicola White (it's in the Treasury library). The book is the result of a two-year research project and draws on over 50 interviews.

4. Nicola's conclusion makes for fairly sombre reading (p298): "At present, the cynicism surrounding the day-to-day administration of the Act in the political field is having a slow and steady corrosive effect. It is corroding trust in government."

5. Nicola covers a large number of issues, but there are some recurring themes, such as electronic information, large requests, time delays, and protecting government decision-making.

6. It's the last issue I want to focus on since it's also one I've been concerned about, particularly from my experiences over the road. "The provisions of the OIA that caused the most comment throughout this research project were those that protect the advice and decision-making processes of government." (p269)

7. To be clear, I'm a big fan of the OIA and I agree with many of Nicola's conclusions on the positive impacts of the OIA, such as how quality of advice is probably generally higher given the authors know there is the potential for it to become public. But nevertheless, there are consequences.

The OIA is having harmful effects on advice to government.

8. Nicola lists "the harmful effects of the OIA on the operation of government advice processes" (p271), including:

   - "blunt advice is offered less easily, and obfuscation and softer language are widely preferred

- wide-ranging advice is restricted, with written documentation tending to stick to the safe middle ground and more adventurous thoughts being tested in discussion
- if issues are delicate or difficult, they are dealt with orally
- ...
- the public record suffers from incomplete documentation and from papers that are written for the record rather than for the moment
- ..."

9. All of these issues ring very true for me. Do these harmful effects resonate? Could the issues be greater in departments without such a 'free and frank' tradition as Treasury? Some broad questions this raises for me are:

   - Should Treasury have a view on whether and to what scale these harmful effects are influencing Treasury's advice?
   - Should Treasury be thinking about ways we can mitigate the harmful effects as far as possible in the way we provide advice?
   - Should Treasury have a view on whether this is acceptable 'collateral damage' in the pursuit of open government, or whether we think the concerns are strong enough to warrant looking seriously at changes to the Act or its implementation?

The Danks Committee envisaged these sort of 'harmful effects'.

10. The Danks Committee's 1980 report contained the following comments[1]:

> If the attempt to open processes of government inhibits the offering of blunt advice or effective consultation and arguments, the net result will be that the quality of decisions will suffer, as will the quality of the record. The processes of government could become less open and, perhaps, more arbitrary.
>
> The requirement of openness could be evaded, for example, by preparing and giving advice orally, or by maintaining parallel private filing systems; the record of how decisions are arrived at would be incomplete or inaccessible; public confidence would suffer, and if the relative roles and responsibilities of ministers and officials became the subject of public debate, mutual recriminations could all too often develop. The desire to avoid this sort of situation could incline governments to look for politically acceptable or compliant people at senior levels in the public service; such a service is not likely to be able to recruit and retain staff of ability and integrity.

1 "Towards Open Government", Danks Report, General, 1980, p19
http://www.ombudsmen.govt.nz/cms/imagelibrary/100166.pdf

Nicola's central conclusion is more rules.

11. Nicola argues that many of the problems with the Act stem from the case-by-case approach adopted by the ombudsmen. It's interesting to note that the Danks Committee never envisaged the case-by-case approach that is now in operation – "we see substantial disadvantages in this [approach]"[2]. We are also outliers in world practice in freedom-of-information regimes by adopting this sort of approach.

12. Do you agree with Nicola's assessment of the main problem?

13. Nicola concludes that the current case-by-case approach has enough drawbacks to recommend greater use of rules, in particular (i) greater use of precedent by the ombudsmen, and (ii) responsibility for the SSC to develop administrative rules and guidelines drawing on ombudsmen rulings (p251). (Nicola has other proposals for change, but this is the most central.)

What degree of involvement in this debate should Treasury have?

14. As a central agency with a leadership role in the public sector, I would probably argue that there is a clear role for Treasury's involvement in an issue with pervasive impact on the reputation and quality of advice of the public sector.

15. Any involvement could range from less public to more public, for example:

- participation in the next review of the Act [when?]
- discussion directly with the Ombudsman
- raising the issue with other central agencies/departments
- raising the issue at a conference (e.g. via a speech)

Are there things we should be doing to mitigate the harmful effects?

16. Whether or not Treasury gets involved in the public debate, to the extent we think we are experiencing 'harmful effects' to some degree, we could (should?) be looking at whether there are things we can do to mitigate them.

17. There are three particular ideas that occur to me that could be worth further investigation:

Greater use of the existing protections

18. On sensitive areas, I wonder if we should think harder about the *dynamic* impact of release on our decision. On tax, for example, there is no doubt in my mind that the current Minister is very reluctant for work on personal tax because of how that advice could be used against him later (and, crucially, has been in the past).

19. There are interesting incentives on analysts: the costs are asymmetric, where all costs of a potential investigation fall on them while the benefits are less clear.

20. Maybe we should make greater use of the existing protections and be prepared to defend these decisions to the Ombudsman?

---

2 "Towards Open Government", Danks Report, Supplementary, 1980, p16
http://www.ombudsmen.govt.nz/cms/imagelibrary/100168.pdf

Greater use of pre-emptive releases

21. Nicola discusses 'next generation' OIA processes as encompassing pre-emptive release systems (p214). We do this occasionally now, but I can see some advantages in making pre-emptive releases of information a more regular part of our policy advice process. In particular:

    - **Spirit of open government.** Nicola quotes Blair Stewart of the Office of the Privacy Commissioner (p259): " [freedom of information] laws which solely focus upon request and response will never fully achieve open government."

    - **Make public release part of everyday thinking.** I wonder if more explicit consideration of public release would make us give more thought to how the information could be misused. The result could be more contextual information, more explicit discussion of assumptions, and so on. This could help make Ministers more comfortable with 'free and frank' material being released.

    - **Help Ministers' risk management.** Although this approach could well see more information released, it would occur in a more controlled and thoughtful way, which could result in less risk for Ministers rather than more.

22. An example from 2007 would be the work on hollowing out. In retrospect, we probably could have foreseen the work would be requested and could have thought about a good way to manage the release much earlier (i.e. the third point above). It's also a topic of public debate and we perhaps could have thought about how the information could be useful for public engagement in the debate (i.e. the first point above). And finally, I wonder whether knowing it would be released may have made us look more at the context (e.g. surrounding work programme), rather than it effectively being a stand-alone piece (i.e. the second point above).

23. Of course, the counter-argument is that there is a danger in pre-emptive release driving further practice of "papers that are written for the record rather than for the moment".

More explicit assumptions/viewpoints/balance in our advice

24. The potential for information to be publicly misused often stems from a piece of advice's stand-alone nature. Being more explicit about assumptions and other potential viewpoints is not only good for OIA purposes – it's better advice.

25. A recent example was JW's suggested amendments to some tax recommendations. John suggested explicitly acknowledging that delivering more money-in-the-hand by targeting through the benefit system could have perception differences compared with delivering the same amount through the tax system in a less targeted fashion. This is arguably obvious and/or not something Treasury feels in a position to comment on. Yet not acknowledging it perhaps implicitly suggests that the effect is either not large or not relevant (the current Minister might disagree with both).

26. Making assumptions explicit is both good advice and also would help Ministers respond if they have a different view to officials and the information is used against them politically later. e.g. "Treasury saw no value in the Minister's approach" vs.

"Treasury noted that there was an alternative, depending on how much weight you put on X".

Is it worth taking these issues further? How?

27. This memo is written from a position of complete ignorance about what is already going on within Treasury or within government generally.

28. If this issue isn't currently being picked up, should it be? If so, what is the best vehicle?

Annex: references to harmful effects on advice

29. The main places in the book that refer to the harmful effects on advice are:

- pp30-31
- pp72-3
- pp92-3
- pp98-101
- p158
- pp174-179
- p213
- p230-2
- p241
- pp269-274

(2)

OIA'S EFFECTS ON ADVICE – INTERNAL OPTIONS

Following on from an OCE/SCI/Legal discussion on this note…
OIA's harmful effects on advice to government (Treasury:1047011)

…it was agreed to consider a few options for internal discussion, in addition to any cross-departmental process more broadly.

Objectives

Possible objectives for internal discussion would be:

1. **Gathering information.** Getting a better sense of how widely people internally see the OIA affecting their advice could feed into Treasury's involvement in the cross-departmental process.

2. **Providing a refresher on free and frank provisions.** It could be timely to remind people of the provisions available in the Act to protect free and frank advice.

3. **Coming up with ideas for things Treasury should do differently.** If there are things Treasury could/should do to mitigate any harmful effects, a broader group of people internally could come up with some ideas.

Options

A few possible options are:

1. **Treasury-wide session.** e.g. a 5th floor session, emphasis on an interactive session, open invite list (advertised on intranet), a 1-page pre-session handout to prompt thinking/ideas.
   a. *Pros:* potentially large sample size, could be good interaction
   b. *Cons:* could be unwieldy, people may be less frank with lots of people

2. **Meeting.** e.g. a meeting with 10-15 'wise heads' from around the building, a 1-page pre-session handout to prompt thinking/ideas.
   a. *Pros:* manageable size, ability to be frank
   b. *Cons:* only a small sample size, wouldn't meet objective 2

3. **Survey.** e.g. an intranet posting seeking feedback, 1-2 pages of questions (mainly yes/no with some comments).
   a. *Pros:* potentially large sample size, ability to be very frank
   b. *Cons:* likely low response rate, no ability for interaction

Is the Official Information Act harming Treasury advice?

Interactive session, Xx February, x am, 5th floor.

Protecting free and frank advice

Quick refresher on OIA protections:

- s.9(2)(f)(iv) – maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials
- s.9(2)(g)(i) – maintain the effective conduct of public affairs through the free and frank expression of opinions

Is the OIA changing Treasury's advice for the worse? How?

Does Treasury advice suffer from any of the following?[1]

- blunt advice is offered less easily, and obfuscation and softer language are widely preferred
- wide-ranging advice is restricted, with written documentation tending to stick to the safe middle ground and more adventurous thoughts being tested in discussion
- if issues are delicate or difficult, they are dealt with orally
- the public record suffers from incomplete documentation and from papers that are written for the record rather than for the moment

More generally:

- Are there issues that Treasury hasn't advised on because of the OIA that it should have?
- On particular issues, are there instances where Treasury hasn't provided completely free and frank advice because of the OIA?
- What are the potential drivers? Ministers? Minister's offices? Ombudsman's interpretations? Uncertainty over Ombudsman's interpretations?

Are there things Treasury should do to mitigate any harmful effects?

For example:

- Should we be making more use of the existing protections under the Act?
- Would greater pro-active release of advice be helpful or unhelpful?
- Should we be more explicit about assumptions/viewpoints/balance in our advice?

Others?

[1] Examples of the OIA's 'harmful effects on advice' described in Nicola's White's book "Free and Frank: Making the Official Information Act 1982 work better".

3

THE OFFICIAL INFORMATION ACT AND TREASURY ADVICE

File note for meeting on 7 March 2008 to discuss:

- OIA's effects on advice - discussion prompt (Treasury:1055799)
- OIA's harmful effects on advice to government (Treasury:1047011)

Present: Steve Cantwell, Kate Challis, Michelle Harding, Bill Moran, Jane Meares, Steve Glover, Gary Blick, Ben McBride, Nic Blakeley.

1. Is the OIA changing Treasury's advice for the worse? How?

A distinction was drawn between (i) modifying advice *ourselves* (i.e. self-censoring) and (ii) modifying what we provide at the *Minister*'s request.

People thought Treasury *didn't* self-censor, but that other departments probably did to some degree. People thought Treasury probably *did* respond to the Minister's requests, but that more likely explanations included adapting to the way the Minister works best, rather than because of the OIA directly.

If there is a negative impact on Treasury advice, people thought it is more likely to be in the process of *developing* the advice – for example, conducting internal discussions orally rather than via email. This links to the broader cross-government process on the OIA, with a question of the discoverability of internal discussions.

People thought the particular Minister made a lot of difference. Departments with a Minister who was more nervous of the OIA would be more likely to respond negatively to advice they didn't want to hear. Discussion also touched on a related issue of only providing advice once, but more from the point of view of good quality advice rather than an OIA issue. See Annex for an aside on this issue.

2. Are there things Treasury should do to mitigate any harmful effects?

Nothing in particular was identified as things Treasury should do differently in its day-to-day work. However, a few areas were identified in relation to OIA request specifically that could be worth further thought. Only some of these are directly related to mitigating any harmful effects on advice (mainly because there weren't a large number of harmful effects identified).

- **Proactive release.** Thinking about proactive release in 'obvious' areas can be a useful way to (i) better manage resources by dealing once with the inevitable plethora of OIA requests, and (ii) better manage the form of the release to make the information more useable. For example, including one overview document rather than 15 separate background notes could help public navigation and lower the risk of misinterpretation of the information.

- **Criteria to withhold.** Given that the Ombudsman doesn't tend to allow adding withholding criteria later, it is better to identify all the relevant criteria at the time of the initial request.

- **Transferring TOIAs to MOIAs.** There is varying practice for when/how we convert TOIAs into MOIAs – it could be beneficial to clarify this.

- **Ringing requester.** Ringing the requester to clarify the scope or establish what the requester is really after can be a useful thing to do, but is probably not in widespread practice.[1]

- **Context in releases.** Does the released information provide a complete picture? Is there the potential for the information to be misused? If the answer is 'yes', thought could be given to providing more context – e.g. in the covering release letter. For example, "Treasury ultimately reached an agreed position with the department, so these critical comments should be recognised as being made only part way through the process."

Next steps

Internal – updating guidance

People felt the above points could usefully be picked up in updated guidance for dealing with OIA requests. Changes in 2007 focussed on the process; guidance on the substance could usefully supplement that.

Specialist Support is already planning to update the existing intranet guidance.[2] This process would be a useful vehicle to pick up the above points.

External – ideas to feed into cross-departmental process

A few ideas came up that could be useful to feed into the cross-departmental process looking at the Act and its implementation more broadly:

- **Internal discussions and discoverability.** Are internal, early-stage discussions intended to be captured by the Act?

- **Cost.** Do we have a sense of the cost of the Act, e.g. in terms of officials' time? Is there a way of relating that to the benefits?

- **Request transfers.** Transferring TOIA to MOIA is not Treasury-specific. Is there a role for SSC in leading this sort of guidance across government?

- **Central agency role.** More broadly, is there scope of central agencies to better lead best practice in responding to OIA requests?

[1] Note that someone with sufficient experience should do this so they know what to expect and how to handle difficult questions from the requester.
[2] http://intranet/oia/guide/withholdinginfo.htm

Aside

The discussion regarding Ministerial preferences and giving advice once has some similarities with Ken Henry's discussion of the role of the public sector.[3] Giving advice (once) that the Minister doesn't want to hear seems to fall into the responsible category. Repetitively giving advice the Minister doesn't want to hear seems to fall into gratuitous. Giving advice in areas the Minister wants to hear is responsive, but moving toward obsequious if they don't need to know.

Government	Need to be told	Do not need to be told
Want to hear	RESPONSIVE	OBSEQUIOUS
Do not want to hear	RESPONSIBLE	GRATUITOUS

[3] "Challenges Confronting Economic Policy Advisers," Ken Henry, Address To The Curtin Public Policy Forum, Perth, 4 September 2007, http://www.treasury.gov.au/documents/1305/RTF/Curtin_Public_Policy_Forum.rtf

(4)

From: Withheld Under s9(2)(g)(i)
Sent: Monday, 13 December 2010 1:30 p.m.
To: Gina Butson
Subject: RE: Law Commission Questions for OIA review.DOC

Follow Up Flag: Follow up
Flag Status: Flagged

Hi Gina

Comments on sections of the submission below.

15 – this section will presumably require amendment upon the passing of QEII. Long live the Queen.
28 – looks good, covers the issues we discussed.
35 – will be tricky to draft effectively. I'm not sure we can offer much more until Ombudsman demonstrates willingness not to support requests that are indistinguishable from a fishing expedition.
46 – might note that informal requests will usually be dealt with well within the statutory requirement. So there is no problem to be solved with such requests. I think it would be helpful if requestors had to specify that a request was made subject to the OIA, since it is now much more widely known, with agencies having complementary obligation to inform of rights. However, in practice I'm not sure this gets us too much further. At present the Act
51 – looks good.
68 – looks good.

Also...

52 – it's unclear how response time can be extended by agreement under the OIA, i.e. the time limit is either extended or breached. Does the Commission anticipate circumstances when agreement may be desirable?

78 – the response to this is blank but looks like the response to 76 would also apply.

From: Gina Butson
Sent: Monday, 6 December 2010 3:22 p.m.
To: Withheld Under s9(2)(g)(i)
Subject: Law Commission Questions for OIA review.DOC

Withheld Under s9(2)(g)(i)

Our response to the Law Commission is due this Friday. Did you have any final comments/changes to make to our submission. I had notes to check with you re our responses to the following questions:
15, 28, 35, 46, 51, 68
(And anything else you'd just like to comment on)

Thanks,
G

Gina Butson | Senior Solicitor | **The Treasury**
Tel: +64 4 917 6204 | Gina.Butson@treasury.govt.nz

a. please immediately delete this email and notify the Treasury by return email or telephone (64 4 472 2733);
b. any use, dissemination or copying of this email is strictly prohibited and may be unlawful.

(5)

From: Jane Meares
Sent: Wednesday, 16 December 2009 9:13 a.m.
To: Gina Butson
Cc: Nic Blakeley; Paul Carpinter; Michelle Harding; Jonathan Ayto; Peter Lorimer; Ivan Kwok
Subject: FW: OIA - harmful effects on advice to government? How/who should take this forward?

Gina
In terms of your pull-together of comments on the Law Commission's OIA review please see this. Nic put this together in the context of the release of Nicola's book and the comments/reflections may well need to be captured in our response.
Cheers
Jane

Jane Meares | Treasury Solicitor | x8114

From: Mario DiMalo
Sent: Thursday, 14 February 2008 11:47 a.m.
To: Nic Blakeley; Paul Carpinter; Michelle Harding; Jonathan Ayto; Tyson Schmidt; Peter Lorimer; Ivan Kwok; Jane Meares; Iain Cossar
Cc: @OP OCE (Office of the Chief Executive)
Subject: RE: OIA - harmful effects on advice to government? How/who should take this forward?

Thanks for this follow-up Nic. It strikes me that this is worth pursuing.

What I wonder about is whether we want (i) more of a sense of how much of an issue this is across Treasury; or (ii) we agree that there is a problem of sufficient scale and we want to get agreement on what some solutions may be.

If it is the latter then a smaller discussion around your note sounds the best option (although the wise head on this may need to capture more of those writing the advice) - this is my judgement and other may have a different view. If the former then a wider discussion is best.

Mario

From: Nic Blakeley
Sent: Monday, 11 February 2008 12:15 p.m.
To: Paul Carpinter; Michelle Harding; Jonathan Ayto; Tyson Schmidt; Peter Lorimer; Ivan Kwok; Jane Meares; Mario DiMalo; Iain Cossar
Cc: @OP OCE (Office of the Chief Executive)
Subject: RE: OIA - harmful effects on advice to government? How/who should take this forward?

Hi all

As promised, here's a short note on internal options:

OIA's effects on advice - internal options (Treasury:1052366) Add To Worklist → Read this

Thoughts very welcome.

Cheers
Nic

Nic Blakeley | Senior Analyst | The Treasury
Phone +64 4 917 6896 | nic.blakeley@treasury.govt.nz

From: Nic Blakeley
Sent: Tuesday, 5 February 2008 8:35 a.m.
To: Paul Carpinter; Michelle Harding; Jonathan Ayto; Tyson Schmidt; Peter Lorimer; Ivan Kwok; Jane Meares; Mario DiMaio; Iain Cossar
Cc: @OP OCE (Office of the Chief Executive)
Subject: RE: OIA - harmful effects on advice to government? How/who should take this forward?

Hi all

Thanks for the meeting last week. You'll recall the two things to follow up were:

1. external - Ask John W if he wanted to test with OPC whether central agencies should push this work forward
2. internal - think about ways to get more info on how widely internally the OIA is seen as a problem, etc.

re 1. JW discussed with OPC on Friday . Apparently Sir Geoffrey Palmer has put his hand up for the Law Commission to have a look at the issues. Notwithstanding this, OPC agreed that central agencies should also pick this up again so that we can come to a view ourselves.

Ivan/Jane - do one of you want to get in contact again with the relevant agencies and kick this off?

re 2. I have been meaning to pull together a short note with ideas for what this could look like but haven't yet. Will come back to you all later this week.

Cheers
Nic

Nic Blakeley | Senior Analyst | **The Treasury**
Phone +64 4 917 6896 | nic.blakeley@treasury.govt.nz

(6)

From: Jane Meares
Sent: Wednesday, 16 December 2009 9:14 a.m.
To: Gina Butson
Subject: FW: OIA's effects on advice - discussion and next steps

Jane Meares | Treasury Solicitor | x8114

From: Nic Blakeley
Sent: Friday, 7 March 2008 12:31 p.m.
To: Steve Cantwell; Kate Challis; Michelle Harding; Bill Moran; Jane Meares; Stephen Glover; Gary Blick; Ben McBride
Subject: OIA's effects on advice - discussion and next steps

OIA's effects on advice - discussion and next steps (Treasury:1060193) Add To Worklist

Hi guys

Draft file note - let me know if you have an comments. I'll send out about 3pm to a wider audience (including other people who I've been discussing this stuff with).

Hat tip to Michelle for the Ken Henry link.

Ta
Nic

Nic Blakeley | Senior Analyst | **The Treasury**
Phone +64 4 917 6896 | nic.blakeley@treasury.govt.nz

7

From: Jane Meares
Sent: Wednesday, 16 December 2009 9:14 a.m.
To: Gina Butson
Subject: FW: Policy Quarterly Article - Worth a Read

Jane Meares | Treasury Solicitor | x8114

From: Nic Blakeley
Sent: Monday, 21 July 2008 8:35 a.m.
To: Jane Meares
Subject: FW: Policy Quarterly Article - Worth a Read

Jane – fyi. In this article, Graham Scott refers to Nicola's book on the OIA. He argues for beefing up protection for free & frank, and reducing protection for plain data/information.

Nic

Nic Blakeley | Senior Analyst | **The Treasury**
Phone +64 4 917 6896 | nic.blakeley@treasury.govt.nz

From: Cheryl Barnes
Sent: Friday, 18 July 2008 12:31 p.m.
To: Nic Blakeley
Subject: FW: Policy Quarterly Article - Worth a Read

Graham Scott's article...

Cheryl Barnes | Manager | **The Treasury**
Phone +64 4 917 6233 | cheryl.barnes@treasury.govt.nz

From: Cheryl Barnes
Sent: Friday, 18 July 2008 12:30 p.m.
To: @EP EIC - Productivity and Innovation Team
Subject: Policy Quarterly Article - Worth a Read

Hey all,

Graham Scott's recent article "*After the Reforms: Some questions about the State of the State in NZ*" is worth a read.

* http://ips.ac.nz/publications/publications/show/230 – Read this

(and there's a hard copy on the team table).

Graham's comments include:

- A question about whether the government has a 'clear and unequivocal' focus on the productivity of resource use (includes a suggestion that the Aus Productivity Commission contribute to a study of NZ's productivity record).
- Notes a shift towards more heavy-handed regulation (and a suggestion that Treasury take a leading role in regulatory review).
- A question about how effectively central agencies work together to improve state sector performance. This is a good lead into next week's Staff Briefing, where JW will be talking about the results of the recent review of central agency collaboration - and will set an expectation that we look to do much better at this...

I'm leading some work putting together the EPG retreat - one thought is to see if we can get Graham along to that as a guest speaker.

Interested in others' thoughts.

cheers
Cheryl

Cheryl Barnes | Manager | **The Treasury**
Phone +64 4 917 6253 | cheryl.barnes@treasury.govt.nz

(8)

From: Jane Meares
Sent: Wednesday, 16 December 2009 9:15 a.m.
To: Gina Butson
Subject: FW: OIA - harmful effects on advice to government? How/who should take this forward?

Jane Meares | Treasury Solicitor | x8114

From: Tyson Schmidt
Sent: Tuesday, 5 February 2008 11:21 a.m.
To: Nic Blakeley; Paul Carpinter; Michelle Harding; Jonathan Ayto; Peter Lorimer; Ivan Kwok; Jane Meares; Mario DiMaio; Iain Cossar
Cc: @OP OCE (Office of the Chief Executive)
Subject: RE: OIA - harmful effects on advice to government? How/who should take this forward?

[Withheld under s9(2)(g)(i)]

seriously though, I could see TI having a real interest in any movements around the current regime.

Tyson Schmidt | State Sector Management | The Treasury
Phone +64 4 917 6926 | Tyson.Schmidt@treasury.govt.nz

From: Nic Blakeley
Sent: Tuesday, 5 February 2008 8:35 a.m.
To: Paul Carpinter; Michelle Harding; Jonathan Ayto; Tyson Schmidt; Peter Lorimer; Ivan Kwok; Jane Meares; Mario DiMaio; Iain Cossar
Cc: @OP OCE (Office of the Chief Executive)
Subject: RE: OIA - harmful effects on advice to government? How/who should take this forward?

Hi all

Thanks for the meeting last week. You'll recall the two things to follow up were:

1. external - Ask John W if he wanted to test with OPC whether central agencies should push this work forward
2. internal - think about ways to get more info on how widely internally the OIA is seen as a problem, etc.

re 1. JW discussed with OPC on Friday . Apparently Sir Geoffrey Palmer has put his hand up for the Law Commission to have a look at the issues. Notwithstanding this, OPC agreed that central agencies should also pick this up again so that we can come to a view ourselves.

Ivan/Jane - do one of you want to get in contact again with the relevant agencies and kick this off?

re 2. I have been meaning to pull together a short note with ideas for what this could look like but haven't yet. Will come back to you all later this week.

Cheers

Nic

Nic Blakeley | Senior Analyst | **The Treasury**
Phone +64 4 917 6896 | nic.blakeley@treasury.govt.nz

(9)

From: Paul Carpinter
Sent: Wednesday, 16 December 2009 3:46 p.m.
To: Nic Blakeley; Jane Meares; Gina Butson
Cc: Michelle Harding; Jonathan Ayto; Peter Lorimer; Ivan Kwok
Subject: RE: OIA - harmful effects on advice to government? How/who should take this forward?

These are still good stuff. Perhaps could mention we've put some of this (eg open release of papers/work) into operation through eg the Tax Working Group process.

Paul Carpinter | Principal Advisor | **The Treasury**
Tel: +64 4 917 6127 | Paul.Carpinter@treasury.govt.nz

From: Nic Blakeley
Sent: Wednesday, 16 December 2009 9:25 a.m.
To: Jane Meares; Gina Butson
Cc: Paul Carpinter; Michelle Harding; Jonathan Ayto; Peter Lorimer; Ivan Kwok
Subject: RE: OIA - harmful effects on advice to government? How/who should take this forward?

Here's the underlying note itself:
OIA's harmful effects on advice to government (Treasury:1047011) Add to worklist

And here's a filenote of a couple of internal discussions:
OIA's effects on advice - discussion and next steps (Treasury:1060193) Add to worklist

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From: Jane Meares
Sent: Wednesday, 16 December 2009 9:13 a.m.
To: Gina Butson
Cc: Nic Blakeley; Paul Carpinter; Michelle Harding; Jonathan Ayto; Peter Lorimer; Ivan Kwok
Subject: FW: OIA - harmful effects on advice to government? How/who should take this forward?

Gina
In terms of your pull-together of comments on the Law Commission's OIA review please see this- Nic put this together in the context of the release of Nicola's book and the comments/reflections may well need to be captured in our response.
Cheers
Jane

Jane Meares |Treasury Solicitor | **x8114**

From: Marlo DiMaio
Sent: Thursday, 14 February 2008 11:47 a.m.

To: Nic Blakeley; Paul Carpinter; Michelle Harding; Jonathan Ayto; Tyson Schmidt; Peter Lorimer; Ivan Kwok; Jane Meares; Iain Cossar
Cc: @OP OCE (Office of the Chief Executive)
Subject: RE: OIA - harmful effects on advice to government? How/who should take this forward?

Thanks for this follow-up Nic. It strikes me that this is worth pursuing.

What I wonder about is whether we want (i) more of a sense of how much of an issue this is across Treasury; or (ii) we agree that there is a problem of sufficient scale and we want to get agreement on what some solutions may be.

If it is the latter then a smaller discussion around your note sounds the best option (although the wise head on this may need to capture more of those writing the advice) - this is my judgement and other may have a different view. If the former then a wider discussion is best.

Mario

From: Nic Blakeley
Sent: Monday, 11 February 2008 12:15 p.m.
To: Paul Carpinter; Michelle Harding; Jonathan Ayto; Tyson Schmidt; Peter Lorimer; Ivan Kwok; Jane Meares; Mario DiMaio; Iain Cossar
Cc: @OP OCE (Office of the Chief Executive)
Subject: RE: OIA - harmful effects on advice to government? How/who should take this forward?

Hi all

As promised, here's a short note on internal options:

OIA's effects on advice - internal options (Treasury:1052366) Add To Worklist

Thoughts very welcome.

Cheers
Nic

Nic Blakeley | Senior Analyst | The Treasury
Phone +64 4 917 6898 | nic.blakeley@treasury.govt.nz

From: Nic Blakeley
Sent: Tuesday, 5 February 2008 8:35 a.m.
To: Paul Carpinter; Michelle Harding; Jonathan Ayto; Tyson Schmidt; Peter Lorimer; Ivan Kwok; Jane Meares; Mario DiMaio; Iain Cossar
Cc: @OP OCE (Office of the Chief Executive)
Subject: RE: OIA - harmful effects on advice to government? How/who should take this forward?

Hi all

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Nic

Nic Blakeley | Senior Analyst | **The Treasury**
Phone +64 4 917 6896 | nic.blakeley@treasury.govt.nz

THE TREASURY
Kaitohutohu Kaupapa Rawa

10

15 January 2010

Prof John Burrows
Law Commissioner
Law Commission
P O Box 2590
WELLINGTON 6140

By email: officialinfo@lawcom.govt.nz

Dear Professor Burrows

REVIEW OF OFFICIAL INFORMATION LEGISLATION

Thank you for your letter dated 7 December 2009. The Treasury welcomes the opportunity to contribute to the review, which has attracted widespread interest within Treasury.

Our response focuses on several issues raised in the survey that were of particular interest to Treasury officials. We have also made some comments on the operation of the OIA more generally. We are happy to elaborate on our response, or provide examples, if that would assist the Commission. Our comments concern the Official Information Act 1982; we have not addressed the Local Government Official Information and Meetings Act 1987.

General

Treasury supports the principles contained in the OIA, and considers that it is an important piece of legislation that promotes open government and access to information. We do not consider that any major changes to the Act are necessary. Treasury also supports the role of the Ombudsmen in relation to the OIA, and sees the Ombudsmen's oversight as a continuing function. However, we have noticed a number of operational issues that arise in the application or interpretation of the Act; some of these issues could be dealt with through minor amendments to the legislation, whereas others could be resolved by greater guidance or training by the Ombudsmen.

1. Overview of the Act

Treasury does not consider that the Act needs to be substantially amended, but would support any amendments that made the legislation easier for officials to administer and the public to understand.

1 The Terrace
PO Box 3724
Wellington 6140
New Zealand

tel. 64-4-472-2733
fax. 64-4-473-0982

2. Applying the Act

2.1 Case-by-case consideration

Treasury considers that each request under the OIA must be considered individually in order to ensure that the principles of the Act are upheld. However, we do not consider that this precludes a precedent-type system, which could be used to guide officials' judgement on each request.

While the Case Notes and Guidelines of the Ombudsmen are useful tools in interpreting and applying the Act with respect to particular provisions in the Act, they generally do not make determinations about types of requests or documents; it would be helpful if the Guidelines and Case Notes had some precedent value.

Given that the Act has been in force for almost thirty years, it would be possible to have a precedent system or a record of 'presumptions' for how to deal with commonly requested information (e.g. lists, CVs, Cabinet papers etc). These presumptions would still require consideration on a case by case basis, but they would provide a starting point i.e. the presumption/precedent would apply unless there was a good reason for it not to apply. Additionally or alternatively, it would be helpful if there was a workbook of examples of requests, together with an explanation of (a) why the information was or was not released and (b) if it was withheld or refused, the grounds on which that was done.

Further, in our experience, some provisions in the Act are underutilised. This is generally a result of an official's or a department's reluctance to appear unhelpful, even if there is a valid ground for applying the provision and doing so would save the agency time and money. For example, Treasury rarely (if ever) refuses a request on the basis that is "frivolous or vexatious or that the information requested is trivial". It would be helpful if the Ombudsmen guidelines gave examples of requests that could properly be refused under this (and other) ground(s).

We consider that increased guidance from the Ombudsmen would facilitate decision-making within a department (efficiency) and would also help ensure a consistent approach within and across departments.

As a subsidiary point, we are aware that both the Practice Guidelines and Ombudsmen Quarterly Review are published on the Ombudsmen's website; however, the location of the OQR is not intuitive, nor is the index easy to navigate. It would be helpful if the Case Notes were grouped together with the Practice Notes on the website, and the index was arranged under broader umbrella topics with more detailed sub-topics, and by section references.

2.2 Two stage test

We agree with the two stage test, which requires the public interest to be balanced in every case. Given it is often a hard judgement to determine whether the public interest is outweighed by one of the grounds for withholding, we would welcome any extra guidance or case studies on the matter.

3. Reasons for withholding information

3.1 Maintenance of the law

Treasury periodically withholds information under section 6. Generally this is done where the request relates to the Tax Administration Act, the deposit guarantees scheme or international matters, such as negotiations with other countries, briefings on international matters or information provided to us in confidence by another country or by an international agency.

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?

Treasury has previously considered (internally) whether the OIA has affected the manner in which officials gave advice to Ministers. The outcome of discussions within Treasury was that we would continue to give free and frank advice to our Ministers. Notwithstanding, there continues to be a risk that the OIA may potentially negatively impact on the way departments give advice.

While keeping the principles of open government and access to information at the forefront, we consider that greater protections are needed in the Act for "free and frank" advice, or greater explanation as to how this provision should be applied. One issue that particularly requires consideration is the application of the free and frank ground to facts and data: the Act currently limits this ground to the "expression of opinions". We understand that the nature of 'free and frank' means that it will generally be applied to opinions; however, there are many instances where facts or data are part of the opinion i.e. the official has been free and frank in referring to the data/would not have included particular facts or data in the opinion if she had known that the opinion would be available to a wider audience.

(c) Which of the "good government" grounds is most often relied on?

Treasury most commonly relies on sections 9(2)(ba), 9(2)(f)(iv) or 9(2)(g)(i) to withhold information.

(d) How is it decided whether the Agency or Minister makes decisions about the request?

Requests are decided by the agency or the Minister depending on who has received the request, although there may be consultation between the Treasury and the Ministers office regardless of which has received the request i.e. Treasury may assist the Minister's office collate the information requested; Treasury may advise the Minister's office of a request that Treasury has received and our response. If a request received by Treasury is more closely connected with the Minister's functions, Treasury may transfer the request to the Minister's office.

3.3 Commercial interest

In the Ombudsman's Quarterly Review (Volume 13, Issue 2, June 2007) the Ombudsman discussed the meaning of the word "commercial" and concluded that, for an activity to be classified as commercial, it "must be undertaken for the purposes of making a profit", with the implication being that "profit" is only measurable in monetary terms. Much of what the Government and core public sector does has benefits which cannot always be measured in monetary terms, and indeed there are many instances where the government should not be seeking to make a profit. Nonetheless, these activities are "commercial" in nature. For the withholding ground in section 9(2)(i) to be meaningful, Treasury considers that "commercial" must be given a wider interpretation than "profit". We consider that this is consistent with the wording of the statute, which refers to "commercial activities", rather than to profit or "commercial outcomes".

3.4 Privacy

When Treasury withholds information under section 9(2)(a), it is generally in relation to information held in relation to Treasury's role in appointing members to Crown bodies and staff personal contact details.

In accordance with the Ombudsman's direction, Treasury withholds names of junior officials (i.e. the authors of reports) under the free and frank ground. However, we consider that the privacy ground is the more intuitive and appropriate ground under which to withhold names. Whether the privacy or free and frank ground applies, we consider that there should be greater protections in the Act for officials.

3.5 Processing difficulties

Almost all OIA requests that we receive require considerable work from the beginning point of identifying the information held to the end point of releasing or withholding the information. Given the principles underlying the Act, and the provisions built into the Act for clarifying the scope of the request and extending the time for a response, Treasury does not tend to refuse requests under section 18(f).

To ensure that this section is not underutilised and that different agencies apply it consistently, it would be useful if the Ombudsmen provided guidance as to the meaning of "substantial collation or research". In particular:

a. what is the threshold for applying this provision (the meaning of "substantial");

b. from what point in time should the request be considered i.e. the Ombudsman has previously distinguished (a) the identification of information held and decision-making on whether that information is in scope/can be withheld; and (b) the editing and preparation of the information for release. We consider that the process as a whole should be considered, as the identification of the material can be more or less time consuming than the editing of it, depending on the circumstances. This may require further consideration or guidance as to which point in the process is considered to be "collation". From the perspective of good governance, it is not possible to release information until it has been

properly prepared in the form to be released, and the appropriate decision-maker has confirmed that it is correct to release.

4. Scope of the Act

The OIA specifies that the terms "department" and "organisation" do not include "in relation to its judicial functions, a tribunal" (s2(6)). We agree with the carve out of tribunals, but note that this sometimes causes uncertainty as to the degree to which the OIA was intended to apply to a particular agency. For example, the Government Superannuation Appeals Board (to which Treasury provides secretariat services) is listed in Schedule 1 to the Ombudsmen Act; however, the sole function of the GSAB is "to hear and determine appeals from decisions made by, or under the authority of, the [Government Superannuation Fund Authority]" (s4 Government Superannuation Fund Act 1956). This causes some uncertainty as to what information held by the GSAB is intended to be subject to the OIA.

5. Information Technology

5a How is IT transforming information management, and what will this mean for the OIA?

IT systems mean that we store more drafts and emails than previously, and that there may be multiple versions of drafts, as different people make comments in their own version of the document. The flow on effect is that multiple versions of the same document often need to be reviewed, but the differences between each document are largely immaterial. It would be helpful if there was a clear ground on which agencies could elect not to supply a requestor with certain documents if the difference in the information contained in those documents was of minimal difference to information in other documents supplied to the requestor. We understand that the legislation relates to "information", rather than documents, so if the legislation already permits the *de minimus* approach, it would be useful for the Ombudsman to confirm and/or clarify it.

We also consider that consideration needs to be given to what expectations requestors should have about having access to software to be able to view information such as data and computer models.

5c Should the OIA include provisions to require or encourage pro-active publication of information by agencies?

Treasury proactively releases documents that we expect to be requested under the OIA (e.g. the proactive release of Budget documents). We have found proactive release of information to be very useful: it reduces our workload as we do not have to deal with multiple requests, and it reduces the risk of inconsistent responses.

One current limitation with proactive releases of information, however, is that they are not covered by the protections in section 48 of the Act. We would support the inclusion of a provision in the Act that encouraged the proactive publication of information by agencies if the section 48 protections extended to them.

Further, presently, when a document is published as part of a proactive release agencies are not limited to withholding information for 'good reason' as defined by the Act. If proactive releases fell within the ambit of the Act, anything that was withheld would have to be referenced to one of the grounds in the Act, and would be subject to the Ombudsman's review. We expect that this would increase public confidence in the operation of the Act.

If the OIA *required* the proactive publication of information by agencies, we consider that it should be directed only at 'significant' documents, such as reports to Ministers, and aides memoire. This would allow requestors to see key information, yet leave them with the opportunity to follow up with a more detailed or specific request. It would also help manage an agency's workload generated by OIA requests. There would need to be some protections/considerations in place, such as:

a. whether the documents were released by the Minister's office or the department;

b. the timing of release e.g. after the Minister or Cabinet has made a decision; and

c. whether the Act could clarify that, if a report had been released, there was no obligation on an agency to release drafts of that report (as drafts would not count as 'advice').

6. Administrative Compliance

In our experience, most requests require a lot of time to process (including locating the information, evaluating the information, making deletions or adding context statements and communicating the response to the requestor). While we understand the requestor's desire to receive information promptly, with competing priorities, it often requires a lot of work to meet the 20 working day timeframe.

Where we know that we will be unable to meet the 20 working day timeline due, for example, to the size of the request, we seek an extension under the Act; however, it can be difficult to estimate the amount of extra time necessary. For example, the consultation required means that 10 days can be insufficient for a transfer; for consistency with the timeframes for responding to a request, and to enable proper consultation and decision-making on the matter, we consider that 20 working days should be permitted for transferring requests. We further consider that there might be a case for allowing subsequent extensions if there is good reason to do so; a requestor could have the right to complain to the Ombudsman in relation to further extensions to ensure that the provision is not abused.

In terms requests that would be better answered by another department, rather than formally transferring the request under section 14, we have found that it is often more efficient and faster to contact the requestor under section 13 and assist her or him to direct the request to the other department; however, this is not done consistently.

7. Administrative Issues for Officials

(a) What procedures are in place to ensure administrative compliance with timeframes, transfers and charges?

Treasury has a document management system that it uses to scan, log and track all OIA requests received. OIA requests received are assigned to a Manager, who is responsible for delegating work on the request to an appropriate staff member. There are staff who provide assistance with responses to OIA requests and monitor progress on responses, including transfers. This assists ensuring requests are responded to within the statutory time limits. The document management system shows when an OIA request has been received, to whom a request has been assigned, and whether the response has been sent. The Legal team also offers advice on applying the Act, including whether there are grounds for withholding information. Treasury does not, as a matter of practice, charge for requests; however, this is something that we expect to review following direction from the Ombudsmen.

(c) What support and training do officials receive and what might improve skills for responding to requests?

Treasury currently offers a three-stage training course on the OIA. The course is compulsory for graduates joining Treasury and is available to all other employees of Treasury on an optional basis. The course covers the principles of the OIA; analysing and scoping the request; planning and consultation; collating the information; transfers and extending the time limit; grounds for withholding/refusal; editing information for release; internal roles and relationships; relationship with the Minister's office; file note/QA certification and the reply.

However, Treasury recognises that the OIA demands different skills from different staff at different stages of dealing with a request. Accordingly, Treasury is currently reviewing its guidance and training materials to ensure all staff are aware of the obligations under the Act and receive the specific training required for their roles. This is intended to ensure OIA requests are dealt with properly and efficiently, and to protect against risks of improper release of information.

It would be advantageous to integrate Ombudsman decisions into staff training; however, as such decisions do not have precedent value, from a training point of view they are difficult to integrate in a meaningful manner. They may add complexity to deliberations without necessarily contributing to clarity or certainty for better decision making.

A guide to the OIA, and how to process requests, is also available to Treasury staff on the Treasury intranet. We would be happy to provide you with a copy if you think that it would be helpful to your review.

7.2 Large requests & workload

(a) What is the impact of OIA inquiries on your other work?

Treasury receives a considerable number of OIA requests every year,[i] which

contributes significantly to officials' workloads and impacts on Treasury's resources. The statutory timeframes usually mean that officials must juggle competing priorities.

(b) How do you deal with wide-ranging "fishing" requests?

Where we do not consider that a request has been specified with due particularity, we contact the requestor to get a better idea of what information they are seeking. A conversation with the requestor usually proves very valuable for focussing a request, as we often find that broadly worded requests result from a requestor's uncertainty about the documents they are seeking, rather than a fishing expedition in the true sense. Consequently, we support the requirement in the Act to engage with the requestor in this way. However, there are instances where this does not result in greater clarity in which case we endeavour to provide as much information as possible.

We are concerned about the potentially inadequate 'negotiating' position of agencies with respect to large, ill-defined requests. Currently section 12 and section 18(f) are the primary grounds for rejecting or refusing such a request. A large request can still be specified with due particularity, so therefore is valid. Section 18(f) anticipates that information will be difficult to locate. In 1982, this may have been the case but it is much less likely today. While easy to identify (potentially) relevant information, it must then be reviewed to determine whether there is good reason to withhold any information. This function is not adequately provided for by section 18(f) as a consideration for refusing the request. This creates the expectation that the request will be dealt with by a suitable extension of time. It should be possible to improve on this position. It may be helpful if, rather than extending time for dealing with a large request, requestors were encouraged to make subsequent requests for specific information.

Related to the above point, Treasury has previously received a request under the Act for a list of all reports between two specified dates; the subject matter of the reports sought was not specified. Treasury viewed this as a fishing request/not specified with due particularity; however, the Ombudsman advised that a list is a subject matter in its own right (i.e. it does not need to relate to a particular topic). In our view, this opens the door too wide to fishing expeditions and will only result in increased workloads for agencies which are not balanced by the public interest in releasing the information.

(c) Have you any suggestions for improving the situation?

As noted above, a conversation with the requestor is generally useful in reducing the scope of the request. Often this is because we can clarify with the requestor the reason that they are requesting the information, which then leads to a conversation about the type of documents they wish to receive (e.g. whether the requestor wishes to receive a copy of every document that discusses a topic or whether they are agreeable to the agency not providing documents that repeat the content of other documents that will be provided).

It would be useful to include in the legislation provisions that effectively mirrored the process of discussing and refining a request with a requestor. For example:

a. a provision allowing the agency to supply a list of titles, with a brief description of contents of each, so the requestor can then pick the ones they want; or

b. a provision specifying that documents that simply repeat the content of other documents do not need to be provided to the requestor (potentially with a requirement that the requestor be provided with a copy of the most substantive of the documents, together with a list of documents that have not been released, with an option to receive those).

7.3 Interface with the Public Records Act 2005

The Public Records Act (PRA) 2005 defines records as any information that is compiled, recorded, or stored in any format. This definition is extremely broad and includes documents, images, sound, speech or data compiled, recorded or stored in written or recorded form.

In the interest of handling OIA requests in a timely manner Treasury staff responding to such requests search repositories where information is expected to be held. In most cases this is in Treasury's document management system. However, as more and more information is communicated through collaborative tools and informal channels such as wikis, blogs, instant messaging, and workspaces, there is a real risk that information is not captured or maintained as records and therefore not disclosed under the OIA. Although Treasury has record keeping policies in place to manage this information, these emerging technologies pose some difficult challenges for our organisation.

There are further emerging difficulties relating to information created by communication technology, e.g. text messages.

9. Role of Ombudsmen

Guidance and/or assistance from the Ombudsmen would ensure better consistency in approaches to OIA requests across different departments, and within agencies. It may also be helpful if each department had a designated contact Ombudsman, in the same manner that the Parliamentary Counsel Office has teams assigned to various departments and Crown Law has a liaison person for each department. This would ensure a consistent approach within a department and a better understanding of an agency's work and the reasons for withholding information.

As noted above, the Ombudsmen's role in training and guidance should extend to defining or clarifying some common terms and requests; this guidance should be easily accessible on the Ombudsmen's website.

We also consider that it would be valuable if the Commission's review addressed the interface between the OIA and the Ombudsmen Act, as we have encountered an instance of the latter Act being relied on where there was no apparent jurisdiction under the OIA i.e. the requestor did not meet the section 12 criteria.

On balance, we consider that it is better for Ombudsman to maintain the dual roles. There is risk that an independent arbiter may increase compliance and costs for agencies and requesters. This could also lead to a more litigious environment, with more resources applied to OIA requests. For organisations with fixed resource allocations, this would likely result in requests taking longer to deal with.

We hope that our comments are of assistance to you. Please do not hesitate to contact us if you would like further information. We look forward to the Commission's report on the legislation.

Gina Butson
Senior Solicitor
for Secretary to the Treasury

[1] In 2007/08 Treasury received 195 OIA requests, and assisted the Minister with 75 OIA requests. In 2008/09 Treasury received 164 OIA requests, and assisted the Minister with 104 OIA requests. In 2009/10 (current year) to date Treasury has received 155 OIA requests, and assisted the Minister with 63 OIA requests, although some of these included one request made to several departments and transferred to Treasury.

11

19 Feb 2010 - Treasury's response to the Official Information Act review

Thank you to everyone who contributed to Treasury's response to the Law Commission's review of the OIA. Our response is available for viewing on Legal's intranet site. See: Official Information Act for more information.

12

From: Gina Butson
Sent: Friday, 9 March 2012 11:24 a.m.
To: Andrew Blazey; James Cunningham
Subject: Official Information Act - "commercial" withholding grounds
Attachments: img-3091114-0001.pdf

Hi Andrew, James,

Attached is the draft chapter 5 of the Law Commission's report to Parliament on the OIA. Chapter 5 is about "Protecting commercial interests". I am seeking your input to our response to the Law Commission. The final date for comment is **Friday 16 March**.

As you will recall, the Ombudsmen have previously interpreted "commercial" as requiring "profit". We have submitted against this interpretation in the past – to both the Ombudsmen and to the Law Commission. The Law Commission is proposing a new withholding ground (see paragraphs 1.47 – 1.62 in particular), specifically noting that it would not be premised on a profit-making motive. The proposed new ground would apply if it were necessary to protect the "competitive position" or "financial interests" of the entity.

We agree that protection of commercial information should not rely on there being a profit motive, but we are concerned that "competitive position" may be narrower than "commercial". Our proposed response to the Law Commission is:

Treasury supports there being an ability to withhold information that relates to an entity's commercial activities or position, even where the activities or the entity is not profit-driven. We are concerned, however, that the proposed wording (i.e. "competitive position") is narrower than the existing reference to "commercial" and will be interpreted in a way that does not adequately protect an entity's commercially-sensitive information. We submit that the preferred approach is for the Ombudsmen's Office to update its guidance, and to acknowledge the nature of public entities' activities.

If the Commission's proposed new withholding ground (paragraph 1.54) is endorsed, given the Ombudsmen's current guidance on section 9(2)(i) of the OIA, we submit that there should be guidance on the new withholding ground that makes it clear that profit is not a prerequisite for this ground to apply (as per the Commission's clarification at paragraph 1.56 that the proposed new ground is not premised on a profit-making motive).

Similarly at paragraph 1.57, although it would fall within the natural interpretation of "any person", we consider that it should be made clear that the ground may apply to a party that the information is about (whether or not that party holds the information or has supplied the information).

We have previously submitted:

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

No. Treasury considers that s9(2)(i) of the OIA is currently broader than situations where the purpose is to make a profit: the OIA refers to "commercial activities", rather than to "commercial outcomes" or "profit". The 'profit making' constraint has only arisen through the Ombudsmen's guidance (Ombudsman's Quarterly Review, Volume 13, Issue 2, June 2007).

We consider that, in addition to it reflecting the natural meaning of the words, a purposive interpretation of s9(2)(i) also requires a broader interpretation of the commercial withholding ground: much of what the Government and core public sector does is commercial in nature, yet is not undertaken to make a profit or cannot be measured in monetary terms.

And:

3.3 Commercial interest

In the Ombudsman's Quarterly Review (Volume 13, Issue 2, June 2007) the Ombudsman discussed the meaning of the word "commercial" and concluded that, for an activity to be classified as commercial, it "must be undertaken for the purposes of making a profit", with the implication being that "profit" is only measurable in monetary terms. Much of what the Government and core public sector does has benefits which cannot always be measured in monetary terms, and indeed there are many instances where the government should not be seeking to make a profit. Nonetheless, these activities are "commercial" in nature. For the withholding ground in section 9(2)(i) to be meaningful, Treasury considers that "commercial" must be given a wider interpretation than "profit". We consider that this is consistent with the wording of the statute, which refers to "commercial activities", rather than to profit or "commercial outcomes".

Could you please let me know if you have anything to add to, or change about, our draft response.

Thanks,
G

Gina Butson | Senior Solicitor | **The Treasury**
Tel: +64 4 917 6204 | Gina.Butson@treasury.govt.nz

13

Law Commission Review of Official Information Legislation – September 2010

In December 2009 the Law Commission sought feedback from state sector agencies and the general public on the drafting and operation of the Official Information Act 1982 (and the Local Government Official Information and Meetings Act).

In late September 2010, the Law Commission released a 228 page Issues Paper, reflecting the Commission's views on changes that could (or should not) be made to the OIA. The paper is available on the Commission's website: http://www.lawcom.govt.nz/ProjectIssuesPaper.aspx?ProjectID=159 The Issues Paper is accompanied by an 18 page summary.

The Legal team, working with the Ministerial Advisory Service, is co-ordinating Treasury's response to the Law Commission's paper. We would appreciate input from those of you who deal with the Act on a practical level.

If you would like to comment on the Issues Paper, please provide your comments to Gina Butson (Legal) by ***26 November 2010***.

Given the length of the paper, you may wish to focus only on those areas of particular interest to you. The following is a summary of the key issues discussed in the paper. The paragraph references are to the Summary. It is suggested that you refer to the relevant chapter for a full discussion of the issue.

Summary of Issues Paper

Generally, the Law Commission does not recommend many drafting changes to the OIA. It recommends that stronger guidance on the operation of the OIA be published and that a persuasive precedent system be put in place.

Issue	Paragraph
Chapter 1: Background	
Discusses history of the OIA, technological changes, and the international environment	1 - 6
Chapter 2: Scope of the Acts	
All agencies subject to the OIA should be listed in a schedule to the OIA	8
Whether all agencies which should be subject to the OIA are in fact subject to it: • SOEs should remain subject to the OIA • PCO should be subject to the OIA	9
Concludes that there is no case for automatically exempting categories of documents or information.	10 - 11
Chapter 3: Decision-making	
Does not think that the withholding grounds should be redrafted	14
Considers that much more could be done by way of a system of precedent, and guidance based on that precedent. All of the Ombudsmen's case notes should be collated and analysed for consistent themes, patterns and principles, and should be clearly stated in a commentary.	15
A provision should be inserted into the OIA, clearly setting out the guidance function (as above). This should be conferred on the Office of	16

the Ombudsmen	
Chapter 4: Protecting good government	
Is the "free and frank" ground enough to ensure advice is indeed free and frank?	17 – 19
Puts forward a possible redraft of the withholding grounds so that section 9 doesn't refer to "constitutional conventions"; the intention is to clarify the application of the section, rather than change the substance.	17 - 19
Chapter 5: Protecting commercial interests	
Concludes that commercial information should not be withdrawn from the coverage of the OIA	21
Seeks comment of whether "commercial" must imply a profit-making motive	22
Concludes that the existence of intellectual property in information is not automatically a ground for withholding it	23
Chapter 6: Protecting privacy	
Discusses the "awkward interface" between the OIA and the Privacy Act 1993; considers whether drafting changes are needed to align the Act but on balance considers no changes are necessary	24 - 26
Chapter 7: Other withholding grounds	
Suggests an amendment to the ground that a request can be refused if information "is or will soon be publicly available", namely that this withholding ground only applies if the information is to be made publicly available within a very short time and its immediate disclosure would be administratively impractical.	28
Refers to the proper use of the "maintenance of law" ground	29
Suggests adding a new withholding ground 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; this would have to be balanced against the public interest.	29
Explores the possibility of adding a new withholding ground to protect cultural matters	30
Chapter 8: The public interest test	
Decides against defining the "public interest" in the OIA; considers whether there is benefit in adding a list of factors that are relevant in considering whether it is in the public interest to disclose information; considers that guidelines to be applied on a case by case basis is the best way forward	32 - 33
Seeks feedback on how to strengthen the requirement that the public interest be weighed. Suggests 2 possible improvements: • Insert a section in the Act codifying the requirements to balance the public interest in the case of overridable withholding grounds • Insert a section expressly requiring agencies to notify requestors of decisions to withhold information and to confirm that they have considered the public interest in disclosure and what interest they considered.	34
Chapter 9: Requests – some problems	
Considers some of the practicalities of handling and processing requests, including dealing with fishing expeditions.	35 - 36
Suggests some improvements: • redefining the term "due particularity" in plain English • including a requirement in the Act that agencies discuss the	37

request with the requestor where practicable • regulations to set down charging rules • clarify that "substantial collation or research" includes the review and assessment of material and is relative to the size and resources of the agency • redefine the term "frivolous or vexatious" in plain English • expressly provide that the past conduct of the requester can be taken into account in deciding whether the particular request is vexatious • enable an agency to tell a person that the agency won't be responding to any more of her or his requests if a requester has been persistently making requests in such numbers and of such a nature that they are unnecessarily interfering with the operations of the agency; notification could be appealed to the Ombudsmen • include a ground for refusing a request if the information has been provided, or refused, to the same requester on a previous occasion.	
Rejects the suggestion that requesters should have to state the purpose for which they want the information	38
Amend the OIA to specify that requests can be oral or in writing and need not refer to the legislation	39
Chapter 10: Processing requests	
Does not propose any change to time limits, but suggests clarifying that the 20 day time limit relates to the time taken to make the decision to release or not, and that the actual release of information should follow as soon as reasonably practicable	40
Proposes that the complexity of a request should be a ground for extending the time frames	41
Does not propose to include a statutory maximum for a time extension	41
Considers urgent requests and whether the term "undue" delay should be clarified	42
Expand guidelines to cover matters such as who should be responsible for which type of decisions, and the process for interaction between department and minister on matters in which there is likely to be political interest	43
Prior notice of a decision to release information should be given to affected third parties to give the third party an opportunity to challenge the decisions	44
The OIA should expressly provide for the transfer of part of a request	45
Does not propose extending the grounds for transfer	45
Rejects the suggestion that the OIA should mandate release of information in electronic form; the guiding presumption should still be that the requestor should receive the information in the form she or he wants unless it would impair efficient administration.	46
Discusses whether there should be an obligation to supply metadata; notes overseas developments	46
Proposes that regulations be made under the OIA laying down clear principles for charging; does not suggest that charging should be standard practice	49
Chapter 11: Complaints and remedies	
Notes that the complaints procedure is currently split between the OIA and the Ombudsmen Act; recommends that the whole process be	50

contained in the OIA (without removing it from the Ombudsmen Act i.e. it will be replicated)	
Improper or untimely transfers should be a ground for complaint	52
Considers whether agencies should be protected (s48 OIA) for releasing information when they shouldn't have	52
Recommends removing Cabinet's veto power i.e. power to override a decision by the Ombudsman; suggests that the only means of challenging the Ombudsmen's decision should be by judicial review; an Ombudsmen's finding should be better described as a "decision" or "determination"	53 - 54
Chapter 12: Proactive disclosure	
Does not propose that it be mandatory to release certain categories of information; proposes that agencies be required to take all reasonably practicable steps to make information available proactively, taking into account the type of information held by the agency, the public interest in it, and the agency's resources.	58
Proactive release should not be covered by the s48 protection	61
Chapter 13: Oversight and other functions	
Proposes an oversight function, which should have several dimension: monitoring the operation of the OIA; a policy function of reporting on prospective legislation or policy relating to access to official information; a function of reviewing the Act periodically; a function of promoting the increasing availability of official information, including the proactive release of information	62 - 66
Considers that the Ombudsmen should exercise the complaints function and the function of giving guidance	67
Considers that the State Services Commission should have the oversight role (the DIA would have the same role in relation to LGOIMA); the OIA should require an official in the SSC to be designated as being in charge of the official information function	68
Does not consider it necessary to set up an Information Commission, as in other jurisdictions	69
Chapter 14: Local Government and Official Information and Meetings Act 1987	
Relates to LGOIMA	70 - 71

(14)

From: Gina Butson
Sent: Friday, 1 October 2010 9:58 a.m.
To: @Legal; @Research Analyst Service
Cc: Nic Blakeley
Subject: Law Commission review of the Official Information Act
Attachments: img-9301042-0001.pdf; Summary of Law Commission_s Sept 2010 Issues Paper on the OIA.DOC; img-9301259-0001.pdf

Hi all,

Attached is a letter from the Law Commission regarding the next phase of its review of the OIA, together with the Commission's summary of its Issues Paper and my summary of the Commission's summary. The full issues paper is available at: http://www.lawcom.govt.nz/ProjectIssuesPaper.aspx?ProjectID=159

Submissions close on 10 December. I'm happy to work with Ash again on preparing a Treasury response. I intend to publish a notice on Treasury news today or Monday seeking input from analysts and also to update the Legal intranet site, which contains information on the Commission's review to date.

Please feel free to come and chat to me if you have issues relating to the review.

Cheers,
G

Gina Butson | Senior Solicitor | Legal | x8204

15

Date: 4 October 2010 SH-5-0-3

To: Gina Butson

From: Nic Blakeley

COMMENTS ON LAW COMMISSION'S REVIEW OF OFFICIAL INFORMATION ACT

Purpose and summary

1. This memo provides my comments on the Law Commission's Review of the Official Information Act. I focus mainly on the issue of the impact of the Act on 'good government'.[1]

2. Overall, I found the Review made sensible proposals. I agree with almost all of them. The main specific points I make in this note are:

   - My main area of concern is the impact on 'good government'. I think the proposals in Chapters 3 (creating precedent) and 4 (clarifying the withholding grounds) would make significant improvements in this regard.

   - I would like to see how the Act is used evolve over time to take into account higher-level information, with the aim of improving the 'public interest' benefits while minimising the disincentives on 'good government'. This aspect isn't covered much in the Review, but could form part of requesters' guidelines (question 47) and Ombudsman precedent (Chapter 3) as that evolves.

Supporting good government while promoting the principles of the Act

3. My main concern about the Act in practice is the adverse effects it has on behaviour. I regularly see effects (including in my own behaviour) such as:

   - taking care with way things are written, mostly less bluntly, with an explicit eye towards the eventual public release;

   - a preference for oral over written advice for especially sensitive topics, meaning sometimes advice will not be written down at all.

4. I think an underlying issue that is not covered in any detail in the Law Commission's review is the nature of information. I see a large bias toward written material in a way that the Act doesn't intend. For example, it is rare to see a response to an OIA request that includes a summary of written documents or a written summary of information in someone's head.[2]

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[1] In 2008, I wrote a note on the same topic after reading Nicola White's book and followed up with some internal discussions. See (OIA's harmful effects on advice to government:1047011) and (OIA's effects on advice - discussion and next steps:1060193).

[2] As an example to illustrate the issue, there is a longstanding comment within Treasury about how General Babble (which is individuals' opinions written down electronically) is subject to the

Consider the incentives on officials when writing documents

5. One of Treasury's maxims is surely that incentives matter. So consider the different incentives operating on officials:

   - a very high hurdle for withholding any type of written information;
   - uncertainty over the height of that hurdle, because of the case-by-case nature of decisions;
   - a very low hurdle for withholding any type of non-written information.

6. These incentives all point in the same direction, so it should be entirely unsurprising that the type of behaviour I describe above has resulted.

Some proposals in the Review would change the incentives

7. In the Review, I see a number of proposals that would alter these incentives in ways that I think are positive. In particular:

   - I agree strongly with questions 6-13 in Chapter 3. I think the effect of a much stronger system of precedent would be to significantly increase the level of certainty.
   - I agree with question 14 in Chapter 4 about clarifying the grounds for withholding for 'good government' reasons to improve clarity. In response to question 15, I like the proposed reformulation, especially the proposed (iv) and (v).

8. In addition, I have some thoughts on the type of precedent that would develop over time, such as:

   - a very high hurdle for public interest test to override the ability to have undisturbed consideration, unless the Government has opted to run a particularly closed policy development process (i.e. the incentive needs to be on the Government to run good policy processes);
   - a very high hurdle for release of background papers, early drafts and internal email discussions, on the basis that there is a strong public interest in robust debate in the policy development process that should be encouraged/protected; and
   - consideration given by the Ombudsman to the extent to which the response substantively covers the issues the requester is talking about (e.g. all key papers on a policy process, versus every single paper on file).

Act, presumably because it occurs on Treasury time/property. If so, then so are all those thoughts on topics within people's heads that are made during work hours while sitting in Treasury (in substance these are surely the same thing). In this case, there would be nothing to stop a requester asking for all Treasury officials' views on a topic, and it would probably be very simple to collect. The reason I think such a request should be refused is not that the information isn't written down, but because of privacy/political neutrality/free and frank/or various other grounds. I would see exactly the same grounds applying to General Babble – i.e. the fact General Babble is written down should not be the critical issue.

A more radical response to the incentive not to write things down

9. Compared with my incentives above, the proposals described above cover two of the three. The third is the incentive not to write things down at all. There is some coverage in the Review in relation to not creating an adequate public record (in Chapter 15). I think there is an overlap here with the idea of the purpose of the request.

10. The topic of whether a purpose of the request should be specified is covered in Chapter 9 (question 45), where the proposal is that status quo should remain (no requirement). My experience of OIA requests is that they are generally specified as some variant of "all information on topic X". Often these requests become very broad and so contact with the requester can narrow the topic, but it inevitably still comes back to the existence or otherwise of particular written documents on topic X, due to the bias in favour of written information.

11. To my mind, there are different levels of information. There is a joke about a lost hot air ballooner who asks where he is and gets a technically correct response about longitude and latitude, while being none the wiser.[3] I'm sure many requests provide lots of raw data, but the useful information content may be quite low. It was probably a waste of everybody's time.

12. A recent OIA request I have been dealing with is for all internal discussion about a topic. While I'm sure the requester would love to get some particular soundbites, I wonder if what she is really interested in is whether there were differences of view internally and what the nature of those differences in view were. I could easily create that information if that's what's required and would probably be happy to release it in due course (once the undisturbed consideration is not an issue). I think I would see the public interest test for an answer to that higher level question as much more easily met than for releasing all the specific comments I received internally. Yet currently the process doesn't readily allow or encourage the requester to ask that question nor for us to reply in this way.

13. So my more radical suggestion here is that the way the Act is used should evolve over time to allow release of the higher level questions that are relevant to the public interest, but protect the lower level questions that are less relevant and potentially more harmful to other aspects of the public interest. In practice, this could mean:

    - requesters being more open about the higher level questions they are seeking to answer, and the Ombudsman taking into account whether the higher level question has been addressed even if the detailed substance hasn't;

    - the Ombudsman requiring Ministers/departments to create information where no written information existed based on what is in people's heads.

14. These would both alter the incentives above in the right direction: raising the hurdle for some written information to be withheld (and providing more certainty), but lowering the hurdle to withhold information not written down.

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[3] The second part of the joke is quite funny too: http://www.tumelty.com/blog/post/2004/01/19/Hot-Air-Balloon-Joke.aspx

15. I don't think either of these require a change to the Act, but to the guidelines and Ombudsman precedent that would develop over time. So I agree with the Review not to require a purpose (question 45). And I definitely agree with the proposal of guidance for requesters (question 47) – the discussion above is one of the aspects I'd like to see built in.

Other comments

16. My comments above mainly cover Chapters 3 and 4. I have only skimmed the Review in relation to most other issues, but from what I saw, I liked most proposals. Some in particular were:

    - Chapter 2's proposals on scope look sensible;
    - I agree with Chapter 8 that there is limited benefit in defining 'public interest' and I quite like the idea to require agencies to state what 'public interest' factors they have considered;
    - Chapter 9's process proposals also look sensible;
    - Chapter 10's proposals also look sensible – my only question is around transfer of requests to Ministers: in practice an agency will transfer if there is disagreement, so arguably the fact you can't legally do that is irrelevant, but on the other hand it does raise the hurdle and make it more difficult, and gives departments leverage, on balance I think I agree with keeping the status quo;
    - I agree with Chapter 12's focus on increasing emphasis on proactive release but stopping short of mandatory disclosure, and my general view is that I see proactive release as a better starting point that significantly greater use of charging requesters, except for very large requests[4]; and
    - I agree with Chapter 15 about the legislation – this is a fundamental piece part of New Zealand's constitution, so taking the opportunity to update it to be as clear as possible would be desirable.

[4] See my comments on draft Treasury OIA guidelines here: (RE: OIA Charging and Proactive Releases - Discussion Document (Draft) (Nic Blakeley):1924926)

(16)

Official Information Act

Review of the Official Information Act

In 2010 the Law Commission is reviewing the Official Information Act 1982 and Parts I – VI of the Local Government Official Information and Meetings Act 1987.

During January and February the Commission invited comments on the legislation from officials and requestors. Treasury set up a discussion forum to canvas the views of Treasury officials, and the following response was consequently sent to the Law Commission on behalf of Treasury Review of Official Information Legislation (Treasury:1777758v1)

In late September, the Law Commission released an Issues Paper, which reflects feedback from the earlier consultation round and discusses areas of possible reform of the OIA. The Law Commission is seeking comment on its preliminary proposals. The Legal team and the Research Analyst Service are co-ordinating Treasury's response to the Issues Paper. Please contact Gina if you would like to contribute. The deadline for comments is 19 November 2010.

The following information is relevant to the review:

- the full Issues Paper is available on the Law Commissions Website;
- summary of the Issues Paper;
- overview of the issues raised in the Law Commissions review;
- letter from the Law Commission on the review.

Page updated: 04/10/2010

(17)

4 October 2010 - Potential Changes to the OIA

The Law Commission has kicked off the next phase of its review of the Official Information Act. It has released a comprehensive Issues Paper, which discusses potential changes to the OIA, enhanced guidance by the Ombudsmen, and an oversight role for SSC. The Legal team and RAS will be coordinating Treasury's response to the review. If you would like to contribute, please send your comments to Gina Butson by 19 November.

Further information (including the full Issues Paper and a summary of the paper) is available at:

http://www.lawcom.govt.nz/ProjectIssuesPaper.aspx?ProjectID=159

http://intranet/legal/ofinfoact.html

(18)

From: Gina Butson
Sent: Wednesday, 10 November 2010 7:13 p.m.
To: @Legal; @Ministerial Advisory Service; Nic Blakeley; Wayne Stevens
Subject: Responses to Law Commission review of the OIA
Attachments: 1953024_1.doc

Hi all,

For discussion 3 – 4pm this Friday 12 November

Attached is the list of questions that the Law Commission has asked in relation to the review of the Official Information Act. It is a long list: 108 questions. Many of these questions ask for only yes/no responses.

I have gone through the list and put in some draft responses – mainly either 'yes' or 'no', without further elaboration. This is partly because of time, but also because the Law Commission's discussion paper has quite detailed reasoning in it, which was taken into account in my answers. These responses are just my thoughts, and I am open to the wider group disagreeing with them. My answers are intended as a starting point for discussion/forming a view. Once we have discussed the responses, I can add further detail if people think it is necessary.

I have also reiterated some points that we made in our January submission – generally where the Law Commission hasn't agreed with our view (e.g. commercial withholding grounds; applying s48 to proactive releases).

The Commission is suggesting some amendments to the legislation – generally to clarify withholding grounds or the roles of oversight agencies. I think these proposed amendments warrant consideration. For ease of reference, I have (or, rather, Phillippa has) inserted them into the document below the relevant question.

I have highlighted a lot of questions where it would be particularity useful to hear the thoughts of the wider group (but that's not to say that you shouldn't offer thoughts on the other questions).

Given the length of the document, I think it might be useful if you (1) read through the attached list of questions and proposed responses and (2) either (i) read the Commission's summary of the discussion document; and/or (ii) delve into the whole document to read more about those matters that are of particular interest to you. Some matters you might find of particular interest are:

- the proposal to remove Cabinet's power of veto – chapter 11
- setting out charging rules in regulations – chapter 12
- establishing a formal oversight/monitoring role (SSC, Ombudsman or a new Information Commission) – chapter 13.

The full discussion paper and the summary are available on the Commission's website:
http://www.lawcom.govt.nz/project/review-official-information-act-1982
Treasury's January 2010 submission is here: Review of Official Information Legislation (Treasury:1777758v1)
The legal intranet also has a page on the OIA, including the review (note, however, that the Commission has changed some of its links, so ours may not be up to date): http://intranet/legal/ofinfoact.html

I understand that there is a lot to consider, and that we are unlikely to get through all 108 questions on Friday, but it would be helpful if you could at least look at the questions before Friday afternoon.

On Friday we can also discuss how to ensure that the response reflects the wider Treasury view – we still have a few weeks up our collective sleeve so we may be able to circulate the draft more widely for comment e.g. on Treasury news.

Cheers,

G

Gina Butson | Senior Solicitor | Legal | **x8204**

19

From: Gina Butson
Sent: Wednesday, 1 December 2010 1:48 p.m.
To: John Whitehead; Andrew Kibblewhite; Gabriel Makhlouf
Cc: Siobhan Marlow; Jane Meares; Mike Munro
Subject: Law Commission review of the OIA - Central Agencies' response

Hi all,

Following our meeting last Thursday on the Law Commission's review of the Official Information Act, I spoke to SSC and DPMC about preparing a joint Central Agencies response to the Law Commission's Issues Paper. I provided both agencies with a copy of our draft response and our earlier submission. From those discussions, it does not appear that there is much traction for a joint agencies response; however, I'm happy to pursue it if you wish.

DPMC (via Cabinet Office) has today advised that DPMC has decided not to respond to the Law Commission's Issues Paper at all. I understand that DPMC made detailed comments on the Law Commission's earlier survey, focussing mainly on Cabinet's power of veto. I understand that our draft response is consistent with any comments that DPMC would have made – we are arguing for Cabinet to retain the power of veto.

Speaking to SSC last week, I understood that the Commissioner wanted to make an independent submission, focussing on a few key points that directly concerned SSC. The Issues Paper specifically mentioned SSC as having a potential role in overseeing, administering and monitoring the OIA. I intend to keep in touch with SSC to ensure that nothing in our response conflicts with its response. So far I have only spoken directly to SSC Legal.

On this basis, please let me know if you wish me to pursue a joint Central Agencies response. I'm happy to adapt the draft Treasury response to accommodate the views of other agencies if necessary.

I intend to post our draft response on the intranet today so that other staff can have input if they wish; this should not preclude any further amendments (e.g. to centralagencialise it) prior to submission to the Commission.

Thanks,
Gina

Gina Butson | Senior Solicitor | Legal | **x8204**

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From: Gina Butson
Sent: Wednesday, 1 December 2010 1:12 p.m.
To: Jane Meares; Mike Munro
Cc: Siobhan Marlow
Subject: Law Commission review of the OIA - Central Agencies response

Hi Jane, Mike,

I've just heard back from Sean Kinsler in the Cabinet Office and apparently DPMC has decided not to respond to the Law Commission's issues paper at all. I understand that DPMC made some detailed comments on the Law Commission's earlier survey.

Speaking to SSC last week, I understood that the Commissioner wanted to make an independent submission, focussing on a few key points that directly concerned SSC.

So, this suggests that there will be no joint agencies response, unless I hear otherwise. I've given Cabinet Office and SSC a copy of our draft response. I understand that our response is consistent with any comments that DPMC would have made (especially in arguing for the veto to remain). SSC is likely to have more detailed comments on its own role, but I'll check in with them again to ensure that our responses don't conflict.

All going to plan, I intend to post our draft submission on the intranet today so that other staff can comment if they wish.

Cheers,
G

Gina Butson | Senior Solicitor | Legal | **x8204**

THE TREASURY
Kaltohutohu Kaupapa Rawa

21

16 March 2012

Emeritus Prof John Burrows QC
Commissioner
Law Commission
PO Box 2590
WELLINGTON 6140

Attention: John Burrows QC

Review of Official Information Legislation - Draft Report

Thank you for your letter dated 10 February 2012, enclosing the Commission's draft report. The Treasury appreciates the opportunities the Commission has given us to contribute to its review of the official information legislation.

We commend the Commission on its comprehensive and well-considered report. The Treasury shares many of the Commission's recommendations on improving the official information legislation and its operation, particularly the Commission's recommendations for increased guidance and coherence. On the whole, we support the Commission's conclusions and recommendations, as set out in the draft report. Our comments in this letter are limited to those areas where Treasury retains some concerns. As with our previous submissions (15 January 2010 and 10 December 2010), we comment only on proposals relating to the Official Information Act 1982.

Chapter 2: Decision-making

We agree with the recommendations set out in this chapter, but consider that the following refinements could be made to the recommendations:

- Signal in legislation that it is a function of the Ombudsmen's Office to undertake the activities set out in paragraph 1.53. The report signals support for this (paragraph 1.63) but does not include it as a formal recommendation.
- Include an express statement in the legislation that decisions of the Ombudsmen could be anonymous if confidentiality were an issue (following from the conclusion in paragraph 1.38).

Chapter 3: Protecting good government

We support the redrafting of the good government grounds, particularly the inclusion of protection for free and frank advice, and to extending the protection until the decision is in the public domain. Although it is not an issue raised in our earlier submissions, we

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query whether there is certainty around what is meant by the phrase "advice tendered" (see paragraph 1.70(v)). There has been some confusion in Treasury in the past about whether this requires the Minister to have asked for the advice or whether it applies to all advice given to the Minister, whether or not he requested it.

In addition, we submit that it needs to be made clear that this ground would protect facts and data that have been provided (i.e. by way of advice) on a free and frank basis. There are many instances where certain facts or data would not be included in advice if the information was to be released under the OIA.

Chapter 4: Politically sensitive requests

Consultation and notification

We support best practice guidance on consultation between departments and Ministers (paragraph 1.70). Any such guidance should be consistent with existing jurisprudence on consultation i.e. it should be clear that consultation does not necessarily involve negotiation toward an agreement.

Referring to paragraph 1.71, if guidance is to recommend that departments should consult Ministers "where important government interests are at stake", we consider that the guidance needs to be more specific about what "important government interests" might include.

Chapter 5: Protecting commercial interests

Treasury supports there being an ability to withhold information that relates to an entity's commercial activities or position, even where the activities or the entity is not profit-driven. We are concerned, however, that the proposed wording (i.e. "competitive position") is narrower than the existing reference to "commercial" and will be interpreted in a way that does not adequately protect an entity's commercially-sensitive information. We submit that the preferred approach is for the Ombudsmen's Office to update its guidance, and to acknowledge the nature of public entities' activities.

If the Commission's proposed new withholding ground (paragraph 1.54) is endorsed, given the Ombudsmen's current guidance on section 9(2)(i) of the OIA, we submit that there should be guidance on the new withholding ground that makes it clear that profit is not a prerequisite for this ground to apply (as per the Commission's clarification at paragraph 1.56 that the proposed new ground is not premised on a profit-making motive).

Similarly at paragraph 1.57, although it would fall within the natural interpretation of "any person", we consider that it should be made clear that the ground may apply to a party that the information is about (whether or not that party holds the information or has supplied the information).

Chapter 7: Other withholding grounds

Reason for refusal: soon to be publicly available

Treasury does not consider that the proposed rewording of section 18(d) (paragraphs 1.47 and 1.48) adds anything that could not be achieved by guidance. We also doubt that it gets to the real issue i.e. how soon is "soon"?

We consider that guidance should clarify that "soon" is a relative term, depending on the circumstances of each case. We consider that a more determinative approach to whether the ground applies is whether the department has a clear timeframe for when the information will be publicly available and whether the department is certain as to what information will be released.

We also consider that the guidance should spell out that information is "reasonably accessible" if it is reasonably accessible to the public at large, rather than to the requestor specifically (as per the Commission's reasoning at paragraph 1.41).

Chapter 9: Requests – some problems

Due particularity

Treasury appreciates that the proposed wording "The requester must provide sufficient detail to enable the agency to identify the information requested" (paragraphs 1.24 and 1.29) is preferable to the antiquated wording "due particularity". However, we do not consider that the proposed redraft will solve the problem of fishing expeditions. For example, the Minister of Finance has received a request for a list of all reports, received from multiple agencies, between two specified dates. The Ombudsmen considered that the request was made with due particularity.

Arguably, under the proposed new wording, the agency would be able to identify the information requested, even though the requester had not specified a subject matter. The same problem arises in relation to the example used at paragraph 1.12 of the Commission's report i.e. in relation to a request for "all information about climate change" it would still be possible for an agency to identify what information has been requested.

We also consider that there is potential to interpret this phrase in two different ways: (1) the request must be sufficiently clear that the department understands what the requester is seeking i.e. following the current "due particularity" interpretation; (2) the request must be sufficiently detailed/narrow to enable the department to identify relevant information within its filing systems.

Substantial collation and research

Treasury appreciates the arguments (paragraphs 1.35-1.37) against adding review and assessment to section 18(f). However, we consider that where multiple agencies and staff members are involved in processing a request then the consultation required should be factored into section 18(f). This is not related to the sensitivity of the information but only to the amount and therefore an objective test could be formulated.

In the example noted above where a Minister receives a request for a list of documents received from multiple agencies, the time spent collating the list and reading the list is relatively minor. The time spent sending the list out to the various departments and getting the relevant analysts from each department to check the individual titles to see if they should be released is very large. The Ombudsman has said this time cannot be counted towards 18(f). The effect of this is that a request for the title of every document received by the Minister since taking office, regardless of topic, cannot be

refused under section 12 or 18(f) and must be complied with no matter the administrative burden this would cause. We believe this could be mitigated in part by requiring requesters to identify a "subject matter" for the information they are seeking.

Reasonable assistance

The problem may be alleviated by the suggestion made at paragraph 1.29 that the agency should be able to treat a request as invalid if the agency has attempted to narrow the request but the requester refuses to do so. We consider that this suggestion should be reflected in the recommendations.

Time limits

In relation to time limits, we consider that the five working day time limit in recommendation 7 may be too restrictive. An agency may not realise that a request requires clarifying until it has obtained, and started reviewing, the relevant material. Further, competing priorities may not allow the relevant staff member to look into the request immediately.

Chapter 10: Processing requests – some issues

Urgent requests

We appreciate that there will be urgent requests and that agencies should do their best to accommodate them. However, we consider that such situations are better dealt with in guidance, alongside guidance such as advising requesters that it can be helpful to give reasons for the request so that agencies can better understand what is sought (Chapter 9, R12).

If an urgency provision is to be included in the OIA, some thought should be given to how to prevent requesters making up fact scenarios to justify getting information without delay. For instance, it could be specified that making a false urgent request could be a relevant factor in considering whether to declare a request vexatious.

Consultation with affected third parties

On the question of consultation with third parties, we repeat our comment above that any guidance or requirements should be consistent with existing jurisprudence.

Electronic format vs hard copy

The Commission recommends (at paragraph 1.90) that the agency could refuse to give the information to the requester in the requester's preferred form if such was not "reasonable in the circumstances". This is proposed as an alternative to the denial ground where the requester's preference would impair efficient administration. As another alternative, we consider that the charging guidelines or regulations should provide that an agency may charge the requester for the cost of printing or copying documents if the requester wishes to receive hard copies of the information. The charge should be on a strictly cost-recovery basis and should only apply to large requests.

Conditions imposed by agency

We consider that paragraph 1.120 should be linked to the discussion on vexatious requests i.e. failure to comply with conditions should be a relevant factor in assessing a requester's past behaviour.

Chapter 12: Proactive release and publication

Treasury submits that the protection against liability contained in section 48 of the OIA must be extended to proactive releases. This is particularly important if, as recommended by the Commission (R1), the OIA is to put a duty on agencies to take all reasonably practicable steps to proactively make official information publicly available. There will be no incentive for agencies to comply with this duty if the section 48 protections do not apply.

Section 48 applies if information is made available in good faith. We cannot see any reason why material proactively released should be distinguished from material released following a specific release. Indeed, Treasury tends to proactively release information for which it expects to receive a number of requests, and does so in the spirit of the purposes of the Act.

In practical terms we query how the distinction would operate if an agency released information in response to a request then, anticipating further requests, proactively released the same information.

Please do not hesitate to contact me if there is anything that you would like to discuss in relation to the above.

Yours sincerely,

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