

25 October 2017

Alex Harris
fyi-request-6607-295818ee@requests.fyi.org.nz

Dear Alex

Advice on reform of the Official Information Act in the last five years

I refer to your request of 28 September 2017 requesting, under the Official Information Act 1982 (OIA), “any advice on reform of the OIA and the LGOIMA in the last five years”.

As advised, the part of your request relating to the LGOIMA has been transferred to the Departmental of Internal Affairs (DIA). DIA administers that Act, and will respond to you in due course.

As you stated in your email, in July 2012 the Law Commission released its report “The Public’s Right to Know: Review of the Official Information Legislation” which is available at <http://www.lawcom.govt.nz/our-projects/official-information-act-1982-and-local-government-official-information-act-1987>

Accordingly, the following document is released in response to your request:

23/1/13	Cabinet paper – Government Response to Law Commission Report: <i>The Public’s Right to Know</i>	Released in full, excluding attachments.
	Attachments (not released):	
	Appendix 1: Law Commission recommendations	- Publicly available
	Appendix 2: Summary of Law Commission report	- Publicly available
	Appendix 3: Proposed government response	- Publicly available

The Government response to this report was presented to Parliament in February 2013. Upon consideration of the Law Commission’s findings (including that the legislation’s

underlying principles are sound and are fundamentally working well), the fiscal environment and a range of other urgent Government priorities, the Government decided against reform of the OIA.

A copy of the Government response can be viewed at www.lawcom.govt.nz. It focused on several of the Commission's key recommendations to improve the working of the Act. The key areas are summarised below.

Improving the relationship between the OIA and the Privacy Act 1993

The Government agreed that the protection of third party information, including the relationship with the Privacy Act, would be progressed in the review of the Privacy Act. The Government agreed to the development of a new Privacy Act, which is being drafted. There is information about this on our website at <https://www.justice.govt.nz/justice-sector-policy/key-initiatives/privacy/>

Provisions for protecting commercially sensitive information

The Government agreed to progress work on a new withholding ground to provide protection if releasing information could cause material prejudice to competitive positions or financial interests, and to clarify how existing legislation applies to commercially sensitive information. Due to competing priorities, this work has not been progressed.

Extending the OIA to the administrative functions of the court

The government agreed to extend the OIA to the administrative functions of the court. This has been progressed in the context of the Judicature Modernisation Bill 2013, by clarifying which information is Ministry of Justice information, as opposed to court information, and therefore subject to the OIA. The bill created the Senior Courts Act 2016 and the District Court Act 2016, both of which can be viewed at www.legislation.govt.nz (see section 173 and Schedule 2 of the Senior Courts Act, and section 236 and Schedule 1 of the District Court Act).

Statutes Amendment Bill

As noted in your email, six minor Law Commission recommendations were included in Part 23 of the Statutes Amendment Bill (No 4) 2014, which was enacted in 2015. This legislation can be viewed at www.legislation.govt.nz

Improved guidance and education

The Government also agreed to support the Office of the Ombudsman's work in improving education and guidance on the OIA. Completed resources can be viewed at www.ombudsman.parliament.nz

The Government is progressing a work programme to improve the OIA capability of the public sector. More information about this work is available at www.ssc.govt.nz/nz-ogp-action-plan.

Official Information (Parliamentary Under-Secretaries) Amendment Bill

In addition, Parliament passed the Official Information (Parliamentary Under-Secretaries) Amendment Act in 2016. This Act amended the definition of "Minister of the Crown" in the OIA to ensure that official information held by Parliamentary Under-Secretaries in their official capacity is subject to the OIA. The Ministry of Justice provided advice on the bill which can be viewed at www.parliament.govt.nz and the Act can be viewed at www.legislation.govt.nz

You have the right under section 28(3) of the OIA to complain to the Ombudsman about the decisions made in relation to your request. The Ombudsman's contact details are available at www.ombudsman.parliament.nz

Yours sincerely



Caroline Greaney
General Manager, Civil and Constitutional

In confidence

Office of the Minister of Justice

Cabinet Business Committee

Government Response to Law Commission Report: *The Public's Right to Know: Review of the Official Information Legislation*

Proposal

1. This paper seeks approval of the government response to the Law Commission Report *The Public's Right to Know* that should be tabled in the House by 4 February 2013 in accordance with Cabinet Office circular CO (09) 1.

Executive summary

2. The Law Commission's Report reviews the Official Information Act 1982 (OIA) and Parts 1–6 of the Local Government Official Information and Meetings Act 1987 (LGOIMA). The Report concludes that the fundamental principles on which the Acts are based remain sound but there are some issues with the operation of the Acts.
3. The Report includes 137 recommendations for change, including redrafting both Acts. Other key proposals include: improved Ombudsmen's guidance; expanding the OIA to Parliamentary agencies and the courts; creating a new oversight office; new commercial protections; extending proactive release; and increasing third party protections.
4. Having considered the findings of the Law Commission, the current fiscal environment and the range of other urgent government priorities, I have targeted the government response toward priority recommendations, rather than proposing to undertake a major reform of the official information legislation.
5. Consequently, the government response thanks the Law Commission for the Report, notes that major legislative reform to the official information legislation will not be undertaken at this time but the following recommendations will be progressed:
 - 5.1. The government supports improved education and guidance from the Ombudsmen;
 - 5.2. The government agrees with extending the OIA to the administrative functions of the courts and this will be progressed alongside the review of the Judicature Act 1908;
 - 5.3. The Ministry of Justice and the Ministry of Business, Innovation and Employment will progress work on the proposed new commercial protections, together with the Department of Internal Affairs in relation to commercial protections in LGOIMA;
 - 5.4. Recommendations concerning the relationship with the Privacy Act 1993 will be progressed in the context of the review of the Privacy Act;
 - 5.5. Minor or technical legislative changes will be assessed for inclusion in appropriate legislative vehicles as they become available.
6. The proposed response states that the government does not agree to the following Law Commission recommendations:
 - 6.1. Combining the OIA and LGOIMA in one Act;

- 6.2. Creating a new oversight office;
- 6.3. Extending the OIA to the Offices of Parliament (the Office of the Auditor-General and the Office of the Ombudsman), Parliamentary Counsel Office, Office of the Clerk and Parliamentary Service, and the Speaker.

Law Commission review of official information

7. On 2 July 2012, the Law Commission provided the Minister of Justice and the Minister of Local Government with its final Report *The Public's Right to Know: Review of the Official Information Legislation* (the Report). The Report reviews the Official Information Act 1982 and Parts 1–6 of the Local Government Official Information and Meetings Act 1987. The Minister of Justice and the Minister of Local Government are, respectively, the responsible portfolio Ministers.
8. The review was proposed by the Law Commission in 2007 and formally referred by the government to the Law Commission in 2009. There has been no other comprehensive review of the OIA and LGOIMA by government since their enactment. The Commission's process included publication of an issues paper in September 2010 and consulting extensively with the public and with public sector agencies.
9. On 25 July 2012, I presented the Report to the House of Representatives. If the government does not wish to accept all or some of the Law Commission's recommendations, it must table a response in the House by 4 February 2013 in accordance with Cabinet Office circular CO (09) 1.

Law Commission recommendations

10. The Law Commission's Report concludes that, while evolving technology and the public's expectations relating to access to information have substantially changed, the fundamental principles on which the Acts are based (for instance, the presumption in favour of openness) remain sound. It notes some issues with the operation of the Acts (including some delays in processing requests, misapplication of the withholding grounds, and the administrative burden on agencies). It also notes developments such as the Declaration on Open and Transparent Government and the movement to proactive release of information, and recommends the need to keep pace with the evolving technological environment and with international freedom of information best practice.
11. Key recommendations include:
 - 11.1. Statutory creation of a new oversight office – establishing a high-level government leadership role for official information;
 - 11.2. Proactive release – agencies should take reasonable steps to make information available to the public;
 - 11.3. Extending the OIA – to include the administration of the courts, the Offices of Parliament, Parliamentary Counsel Office, Office of the Clerk and Parliamentary Service, and the Speaker;
 - 11.4. New commercial protections – including competitive positions, financial interests and relationship with the public sector;
 - 11.5. Notifying third parties – a duty to notify parties prior to release of official information (which relates to both commercial protections and privacy);

- 11.6. New Ombudsmen guidelines – including case reports, commentary and comprehensive guidance.
12. The Law Commission also recommends that the OIA be redrafted entirely and that consideration be given to amalgamating it with the LGOIMA.
13. A summary of the Report is attached as Appendix 1 and the Law Commission's recommendations are attached as Appendix 2.

Proposed Government Response

14. The official information legislation is designed to promote accountable governance through transparency and freedom of information about public sector actions and decisions, balanced with appropriate protections to allow effective decision-making. The government supports these aims and has carefully considered the Law Commission's detailed report and recommendations.

15. The Law Commission notes that:

"our initial impressions were that the Official Information Act 1982 and Local Government Official Information and Meetings Act 1987 are central to New Zealand's constitutional arrangements and that their underlying principles are sound and that they are fundamentally working well. These have been confirmed as the review has progressed... However, the Commission has reached the view that much could be done to improve the operation and efficiency of the official information legislation, through a mix of legislative and non-legislative means." (para 1.33 - 1.34, pg 25).

16. Having considered the findings of the Law Commission, the current fiscal environment and the range of other urgent government priorities, I have targeted the government response toward priority recommendations, rather than proposing to undertake a major reform of the official information legislation. The government response (Appendix 3) thanks the Commission for its report and provides responses to a number of priority recommendations, but does not respond to each of the Law Commission's 137 recommendations.

17. While the Government will not progress the recommendations as a whole, particular recommendations are responded to, including:

17.1. *The Law Commission recommends improved education and guidance.* This includes improving the current Ombudsmen's guidelines, creating a case notes directory, and creating an analytical commentary to accompany the case notes. We understand that the Ombudsmen have already made significant progress in implementing these recommendations. The Government supports the work that the Ombudsmen are undertaking to progress the Law Commission recommendations regarding further guidance and education. There may be resource implications for the Ombudsmen, and the Office of the Ombudsman notes that additional baseline funding to their Vote will be sought in the 2013 budget.

17.2. *The Law Commission recommends extending the OIA to the Offices of Parliament, Parliamentary Counsel Office, Office of the Clerk and Parliamentary Service, and the Speaker.* The Government does not agree with the Law Commission's recommendation and supports the status quo. New Zealand has an open Parliament by international standards and Parliament currently makes a great deal of information available. Parliament has processes for developing rules

around access and use of information and this is more likely to achieve the desired balance between access to information and the proper functioning of Parliament. This approach is consistent with the approaches taken in the Australian and Canadian federal parliaments and the US Congress. The Law Commission recommended that the OIA be extended to include administrative and financial information of the Offices of Parliament (excluding any audit, assurance work, inquiry or investigation by them). Given the proposed exclusion of the substantive aspects of the work undertaken by the Offices of Parliament, the existing scrutiny provided through the Parliamentary estimates and financial review processes is considered appropriate. This scrutiny is publically accessible and provides transparency in the work and spending of the Offices of Parliament.

- 17.3. *The Law Commission recommends extending the OIA to the administrative functions of the courts.* This would include information about expenditure, resources and operations, and statistical information about court cases. Information about specific court cases, judicial communications, and judges' performance and functions would continue to be excluded from the scope of the OIA. Most of the information that would be covered by this extension is held by the Ministry of Justice. The Law Commission consulted extensively with the judiciary to achieve broad agreement as to the substance of this amendment. The government agrees that the administrative functions of the courts should be covered by the OIA and I intend to progress this recommendation as part of courts-related policy work in the context of the current review of the Judicature Act 1908.
- 17.4. *The Law Commission recommends that new commercial protections are created.* The new withholding ground would provide protection where material prejudice to competitive positions or financial interests could result and to clarify how the legislation applies to the commercially sensitive information of companies in commercial relationships or interacting with the public sector. I consider these recommendations are an important issue for business and the government. The Ministry of Justice and the Ministry of Business, Innovation and Employment will work together to progress this work. The Department of Internal Affairs will also contribute to this work as it relates to the commercial protections in LGOIMA.
- 17.5. *The Law Commission recommends the statutory creation of a new oversight office.* The government considers that the oversight provided by the Ombudsmen, including responsibility for complaints and guidance, is effective and that the creation of a new oversight office may duplicate work. Government departments and agencies should continue to look to the Office of the Ombudsman for guidance. The Office of the Ombudsman provides specific training and education to agencies subject to the Acts, as well as publicly available information and guidance. The Ombudsmen also have responsibility for complaints under the OIA, giving them an overview of areas or agencies needing particular attention. These functions are performed effectively by the Office of the Ombudsman and should continue.
- 17.6. *The Law Commission recommends that consideration be given to combining the OIA and LGOIMA into one Act.* The government does not consider that work to consider combining the two Acts should be progressed. The Report notes that the arguments are 'finely balanced'. There are matters where it is appropriate for there to be differences in approach and subject matter between the OIA (covering central government) and LGOIMA (covering local government) and these should be retained. The Report notes that the need for clarity and accessibility is paramount and that increased complexity would result from combining the Acts.

17.7. *A number of the Law Commission's recommendations relate to the protection of third party information, including the relationship with the Privacy Act. Most of these do not recommend major legislative change, but improved guidance or clarifying legislative amendment. These recommendations will be aligned with the review of the Privacy Act 1993, and any necessary clarifying or technical legislative changes to the official information legislation will be considered in the course of the review.*

17.8. *The Law Commission makes a number of recommendations to clarify existing provisions and to make minor or technical legislative changes. The government will assess these recommendations for inclusion in appropriate legislative vehicles (such as the Statutes Amendment Bill) as they become available.*

Forward work programme and other matters to be considered

18. Some matters have been identified that warrant further consideration to determine whether we can improve access to information, and whether the right balance has been achieved between the public interest and the burden on public agencies of responding to OIA requests. These include:

- proactive release
- requests and refusals eg, handling vexatious and frivolous requests or large volume requests.
- whether the scope and level of the 2002 charging guidelines remain appropriate.

19. The Ministry of Justice and central agencies will develop the details of a forward work programme for these matters and the work arising from the Government response for reporting to the State Sector Reform and Expenditure Control (SEC) Committee in July 2013. The work programme will also outline the associated resource implications.

Next steps for the Government Response

20. I will present the government response to the House by 4 February 2013.

Consultation

21. This paper was prepared by the Ministry of Justice and the Department of Internal Affairs and the following agencies have been consulted: State Services Commission, Office of the Ombudsman, Law Commission, Office of the Privacy Commissioner, Crown Law, Ministry of Business, Innovation & Employment, Treasury, Te Puni Kōkiri, New Zealand Customs Service, Department of Corrections, Ministry for Primary Industries, Inland Revenue, Ministry of Transport, New Zealand Transport Agency, Accident Compensation Corporation, Department of Conservation, Ministry for Culture and Heritage, Ministry for the Environment, Ministry of Foreign Affairs and Trade, New Zealand Police, Ministry of Education, Statistics New Zealand, Ministry of Social Development, Veterans' Affairs New Zealand, Serious Fraud Office, and Ministry of Health. The Department of the Prime Minister and Cabinet has been informed.

22. The Law Commission, as part of its official information review, consulted with the public, non-government organisations and government agencies on its recommendations to reform the Acts.

Comment from the Law Commission

23. The Law Commission is an independent agency. After its Reports have been tabled in Parliament it does not have an advocacy role, nor does it lobby for adoption of its proposals. The Report must speak for itself, and the adoption and implementation of its recommendations are for the government of the day. In this instance, given an indication that a major legislative initiative is unlikely in this subject area, the Commission has had a useful exchange with officials as to what matters should be considered to have priority and will assist in their implementation, where appropriate. It does urge that this subject area, said by most analysts to be the most important feature of the democracy after democracy itself, be kept under review.

Financial implications

24. Development of education and guidance material may result in additional work for the Office of the Ombudsman. The Ombudsmen intends to consult partner agencies, and prepare a work plan that would enable this work to be done, probably over a number of years, within existing baselines. However, the Office of the Ombudsman has noted that it will seek additional funding in Vote Ombudsmen 2013. There may also be increased costs associated with the extension of the scope of the OIA to the administrative functions of the courts.

Human Rights

25. The proposals in this paper appear to be consistent with rights affirmed in the New Zealand Bill of Rights Act 1990.

Legislative implications

26. At this stage, no major legislative change is proposed. The legislative implications arising from the government's response to priority recommendations will be addressed as part of the legislative process for each identified legislative vehicle. Minor clarifications will be considered as appropriate legislative vehicles such as Statutes Amendment Bills become available.

Regulatory impact analysis

27. As there are no legislative changes proposed in this paper, no regulatory impact analysis is required.

Publicity

28. The presentation of the government response to the House may draw some publicity. I will issue a press release at that time.

Recommendations

29. The Minister of Justice recommends that the Committee:
1. **note** that the Law Commission Report *The Public's Right to Know: Review of Official Information Legislation* was presented to the House of Representatives on 25 July 2012;

2. **note** that the government response to the Law Commission Report *The Public's Right to Know: Review of Official Information Legislation* must be tabled in the House of Representatives by 4 February 2013;
3. **note** that the Law Commission in its Report considers that the Official Information Act 1982 and Local Government Official Information and Meetings Act 1987 are central to New Zealand's constitutional arrangements and that their fundamental principles are sound;
4. **note** that the Law Commission Report has 137 recommendations for change and improvement to the official information legislation, including redrafting the Acts;

Government Response

5. **agree** that the government response indicates the government is unlikely to progress the Law Commission recommendations for major legislative reform;
6. **agree** that the government response will respond in the following way to particular recommendations in the Law Commission's Report:
 - 6.1. The government supports improved education and guidance from the Ombudsmen;
 - 6.2. The government does not support extending the Official Information Act to the administrative aspects of Parliament or the Offices of Parliament;
 - 6.3. The Ministry of Justice will progress extending the Official Information Act to the administration functions of the courts in alignment with the review of the Judicature Act 1908;
 - 6.4. The Ministry of Justice and the Ministry of Business, Innovation and Employment will consider the new commercial protections, along with the Department of Internal Affairs in relation to the commercial protections in the Local Government Official Information and Meetings Act;
 - 6.5. The government does not support the statutory creation of a new oversight office;
 - 6.6. The government will not progress work to consider combining the Official Information Act and Local Government Official Information and Meetings Act into one Act;
 - 6.7. The protection of third party information, including the relationship with the Privacy Act, will be progressed in the review of the Privacy Act 1993;
 - 6.8. Minor or technical legislative changes will be assessed for inclusion in appropriate legislative vehicles as they become available;
7. **note** that some other matters may warrant further consideration to determine whether access to information can be improved and whether the right balance is being achieved between the public interest and the burden on public agencies of responding to OIA requests (e.g. charging guidelines);
8. **agree** that the Ministry of Justice will, with the support of central agencies, report to the Cabinet Committee on State Sector Reform and Expenditure Control in July 2013 with details of a forward work programme and associated resource implications; and

9. **invite** the Minister of Justice to present to the House of Representatives the attached government response to the Law Commission Report *The Public's Right to Know: Review of Official Information Legislation*.

Hon Judith Collins
Minister of Justice

Date signed:

Appendix 1: Law Commission's recommendations in *The Public's Right to Know: Review of Official Information Legislation*

Appendix 2: Summary of the Law Commission Report *The Public's Right to Know: Review of Official Information Legislation*

Appendix 3: Proposed government response to Law Commission Report *The Public's Right to Know: Review of Official Information Legislation*