

26 SEP 2019

Andrew Ecclestone
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Our ref: OIA 77683

Dear Mr Ecclestone

Official Information Act request: Analysis of submissions on the review of the Act

Thank you for your email of 29 August 2019 requesting, under the Official Information Act 1982 (the Act), the analysis of submissions made during the review of the Act. You specifically requested:

"On page 3 of [the progress report to the State Services Commission on progress with Commitment 7 of the Open Government Partnership National Action Plan], the Ministry states that: "The Ministry of Justice is currently analysing submissions, noting emerging themes, such as scope, compliance, timeliness, and oversight."

This is an Official Information Act (OIA) request to be supplied with a copy of the analysis of the submissions, and all other related documents (including emails, memos, etc) that note the 'emerging themes'. If the analysis is incomplete, I request to be supplied with the analysis that has been conducted to date, along with the related information. Please note I am not seeking the advice to Ministers on how to proceed."

There are three documents that fall within the scope of your request:

1. Categories of issues raised with the Act
2. Categories of reforms proposed to improve the Act
3. Draft summary of submissions

The first two documents are released to you in full. The third document will form part of the Ministry's advice to the Minister of Justice on the Act. As such, the information requested is withheld under section 9(2)(f)(iv), to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials. I am satisfied that there are no other public interest considerations that render it desirable to make the information withheld under section 9 available at this time.

If you are not satisfied with my response to your request, you have the right to complain to the Office of the Ombudsman under section 28(3) of the Act. Any complaints must be in writing. The Office of the Ombudsman can be contacted at: info@ombudsman.parliament.nz

Yours sincerely



Caroline Greaney
General Manager, Civil and Constitutional, Policy

Document one: Categories of issues raised with the OIA

1a	The age of Act
1b	Political motivation and priorities

Current practice

2a	Quality of responses - general
2b	Quality of responses - withholding information
2c	Quality of responses - information provided
2d	Quality of responses - inconsistency
3	Agency / staff knowledge, training, support materials
4a	Quality of response processes - making requests
4b	Quality of response processes - file management
5	Charging for requests
6	Timeliness of responses
7	Agency resourcing and costs
8a	Culture - interactions between requestors and responders
8b	Culture - devaluing requests
8c	Culture - a 'culture of secrecy'
9	Ministerial and political interference
10	Misuse of the Act
11a	Public information about the OIA
11b	Publishing statistics about the OIA
12a	Review of decisions - general
12b	Review of decisions - timeliness
12c	Review of decisions - resourcing

The current Act

13	Overall quality / usability of Act
14	The Act's definitions, purpose, and principles (Part 1, Sections 4 and 5)
15	Relationship of the Act to other legislation (LGOIMA, Privacy, Ombudsman, etc)
16	Coverage of the Act - which agencies are subject (Section 2; Part 2, Section 12; Schedule 1)
17	Eligibility to make OIA requests (Section 2; Part 2, Section 12)
18	Grounds for withholding information (Part 1, Sections 5-11)
19	Timeframes for requests and extensions (Part 2, Section 15)
20	Grounds for refusing requests (Part 2, Section 18)
21a	Required release of certain information (Part 3)
21b	Proactive release of certain information (Part 3)
22	Review of decisions (Part 5)
23	Protection against certain actions (Part 7, Section 48)
24a	Holding parties accountable for their obligations under the Act
24b	Oversight, incentives and penalties
25	Leadership and coordination - including the role of the Ombudsman

Document two: Categories of reforms proposed to improve the OIA

1a	Review and change the Act - complete rewrite
	<ul style="list-style-type: none"> • Review both the OIA and the LGOIMA at the same time • Make the OIA and LGOIMA into one Act • Make the OIA free standing and should cover investigation into OIA practices (not rely on the Ombudsman Act) • Keep OIA in Ombudsman’s jurisdiction • The OIA should be removed from the Ombudsman’s jurisdiction
1b	Review and change the Act - amend
	<ul style="list-style-type: none"> • Act doesn’t need fundamental change, but elements could be improved • Amend to provide greater clarity • Align the OIA and LGOIMA
2	Redevelop the Act’s principles, purpose, and definitions (Part 1, Sections 4 and 5)
	<ul style="list-style-type: none"> • Improve the definition of official information • Reassert / reset presumptions • Reconsider the Privacy Act’s subservience to the OIA. The ways in which personal information and rights to privacy are viewed have evolved in the last 30 years. Re-consider whether there should be a carve out for personal information • Address the fundamental disjunct between the Privacy Act and the OIA • Perhaps start from considering to what end information is released • Personal information should not be carved out from the OIA • Making the starting point for personal information the same as it is in the Privacy Act (but with the public interest override) maybe clearer • Amend Section 5 to better reflect the rights of requestors • Include a definition of the public interest and how it is determined in the Act • Put greater emphasis on openness and transparency • Amend to reflect modern information technology and quantities available
3	Change / clarify relationship to other legislation
	<ul style="list-style-type: none"> • The OIA should override secrecy provisions in other legislation. • Could look at the interaction between the Ombudsman Act and the OIA e.g. the schedules • Clarify OIA’s relationship with material subject to an Inquiry • any review to include secrecy clauses in other legislation
4	Change the agencies subject to the Act (Section 2; Part 2, Section 12; Schedule 1)
	<ul style="list-style-type: none"> • The Make OIA apply to Officers of Parliament, Parliamentary Services, and the Parliamentary Counsel Office (with the appropriate safeguards / exemptions) • Including the Ombudsman, except in relation to the investigation function • MPs and more agencies, including Crown entities and the Parliamentary agencies • Schedules should be clarified. Air NZ should be added, as the government is a majority shareholder • Extend coverage to government companies and government related projects of non-government parties • Align coverage with the Public Records Act • Extend coverage to court documents • Exempt some agencies and create separate regimes

5	Change eligibility for people to make OIA requests (Section 2; Part 2, Section 12)
	<ul style="list-style-type: none"> • Do away with eligibility and make OIA requests available to everyone
6	Change grounds for refusing requests (Part 2, Section 18)
	<ul style="list-style-type: none"> • Amend to clarify refusal grounds • Put greater powers to disallow vexatious and frivolous requests in the Act • Clarify the meaning of 'information requested is or will soon be publicly available'
7	Change the withholding grounds, including 'good reason' (Part 1, Sections 5-11)
	<ul style="list-style-type: none"> • Amend to clarify withholding grounds • Change withholding grounds to allow for a public interest override • Withholding grounds should be improved, clarify commercial sensitivity (needs another withholding ground as it doesn't apply to government agencies as the Ombudsman interpretation of commercial was "making a profit". Another ground would be useful. • Perhaps add a new ground on commercial sensitivity • There could be benefit in reducing the number of withholding grounds • Should have fewer withholding grounds and higher threshold than "good reason" • Re-examine the privacy expectation of officials and clarify some categories of personal information • Withholding grounds should be left as they are as they have been the subject of 30+ years of interpretation. Free and frank will soon have a new guide which should help agencies. • The Ombudsman's preliminary investigations should not be subject to the OIA
8	Change the statutory timeframes (Part 2, Section 15)
	<ul style="list-style-type: none"> • Shorten the response timeframe • Vary the response timeframe based on type or complexity of information requested • Change emphasis from 20 days to as soon as reasonably possible • More explanation to requestors when extensions are granted • No longer allow extensions or require extension decisions are made sooner • Lengthen the response timeframe
9	Change charging guidelines (part 2, Section 15)
	<ul style="list-style-type: none"> • Clearer charging guidelines
10a	Require agencies (including Ombudsman) to release more information, including on OIAs (Part 3)
	<ul style="list-style-type: none"> • Create a statutory requirement for agencies to publish OIA requests and information releases • Create a statutory requirement for agencies to report on the operation of the OIA • Continue and improve OO and SSC publishing of OIA statistics • Continue and improve publishing of Ombudsman's proactive reviews • Ombudsman should publish OIA complaints / reviews of decisions • Expand proactive release requirements • Require agencies to create certain information

10b	Provide for immunity when proactive release (Part 7, Section 48)
	<ul style="list-style-type: none"> • Doesn't support immunity - no evidence of a problem that needs the section 48 immunity • Doesn't support immunity - it would mean government was not liable for anything published. There needs to be limits about what can be published for which there is immunity, and this needs to be prescribed in legislation • Doesn't support immunity - Proactive release obligations should be set out in the OIA and information should be protected according to those obligations. We should review other jurisdictions laws on proactive release. He also wondered what evidence there was that proactive release without the liability waiver was a problem. • Supports immunity - Agencies and Ministers should be protected from liability when they release information proactively • Supports immunity - but only if there's a carve out for personal information - without that it would be a "disaster"
10c	Provide for consulting with third parties before release
11	Change rules around review of decisions (Part 5)
	<ul style="list-style-type: none"> • Shorten the response timeframe • Keep OIA in Ombudsman's jurisdiction • Have a "power to recommend" rather than a power of decision subject to judicial appeal
12	Create / increase penalty and compliance powers
	<ul style="list-style-type: none"> • That penalty and compliance powers should be added to the Act, for officials or managers, including offences • Ombudsman to monitor and enforce • Align OIA with State Sector Act to make non-compliance and performance management issue
13	Create rules around ministerial involvement (division)
	<ul style="list-style-type: none"> • Prohibit ministerial involvement in official information for release, including penalties
14	Provide improved public information - on rights, the Act and making requests
	<ul style="list-style-type: none"> • that the Ombudsman should be required to raise awareness
15	Shared agency processes, training, and resources - to improve quality and timeliness
	<ul style="list-style-type: none"> • Have a joined up government approach to OIA requests so there's predictability in decision making • Need some centralised responsibility for local government's responses to requests under the LGOIMA • Create a process to develop precedent for agencies to draw upon • OIA to mandate shared govt data-base • that the Ombudsman should be required to provide the guidance • OIA processes concerning personal information could be made simpler and smoother following the Canadian example. There are opportunities for efficiency.

16	Agency / staff training
	<ul style="list-style-type: none"> • Continue and improve publishing training and guidance for responders, including on understanding obligation, applying withholding grounds, etc • Train agencies/staff to use the tools in the legislation to manage volume e.g. substantial collation and frivolous and vexatious • Standardise training to improve quality and timeliness
17	Resourcing agency and ombudsman to fill requests
	<ul style="list-style-type: none"> • Mandate proper resourcing to improve quality and timeliness
18a	Arrangements to lead, oversee, and co-ordinate - an organisation
	<ul style="list-style-type: none"> • Establish an Information Authority / Commission type body (as in other countries) • This could: <ul style="list-style-type: none"> ○ provide independent oversight ○ have power to making binding decisions on agencies to release information, with decisions appealed to the high court ○ keep agencies performance under review and recommend changes ○ provide and/or oversee guidance and training ○ promote positive culture and attitudes to timeframes, etc ○ provide statistics ○ also oversee Ministers and local government • appreciating the cost - new infrastructure would not be needed - could be housed in Justice as a separate entity or as part of DPMC • Law Commission suggested this in 2012 • that OIA requests are processed by an independent third part
18b	Arrangements to lead, oversee, and co-ordinate - a role
	<ul style="list-style-type: none"> • Establish an Information Commissioner (similar to the Privacy Commissioner) - a proactive official whose role it is to: <ul style="list-style-type: none"> ○ champion the release of official information ○ guide officials on the OIA ○ in looking at agency systems and processes and identifying improvements and opportunities for efficiency • Their decision could be appealed to the HRRT and then to the Courts. This would help provide a better body of jurisprudence on the OIA. • An Information Commissioner and Privacy Commissioner should be of equal standing • They could be co-located and share resources
18c	Arrangements to lead, oversee, and co-ordinate - increase functions of the Ombudsman
	<ul style="list-style-type: none"> • If stronger oversight of the OIA is needed, it would be sensible to provide more resourcing to the Ombudsman than create another agency • to promote access to official information, guidance, etc. • to monitor and enforce compliance

- repeal Cabinet's powers to veto release
