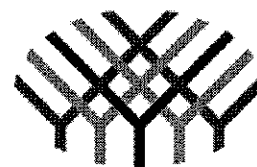


Meeting Paper Coversheet



Human Rights
Commission
Te Kāhui Tika Tangata

Received: 18 February 2011

Meeting: 2 March 2011

TITLE:

OFFICIAL INFORMATION ACT REVIEW

On 13 December 2010 the Commission wrote to the Law Commission on the Review of the Official Information Act.

RECOMMENDATION(S):

That the Commission **endorse** the letter sent to the Law Commission on the Review of the Official Information Act.

CONSIDERATION(S): (Policy, staffing, expenditure, publications, etc.)

N/A

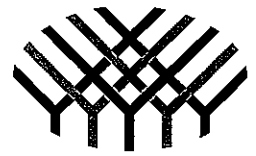
SOI OUTCOME AREA(S):

O1: The Human Rights Environment / *Te Taiao Tika Tangata*

Prepared by: Sylvia Bell

Responsible
Manager/Commissioner: Manager Strategic Policy / Chief Commissioner

File: S:\03-Policy\Human Rights Policy Intervention\Policy Submissions and Letters\Submissions 2010-2011



Human Rights
Commission
Te Kāhui Tika Tangata

13 December 2010

Official Information Legislation Review
Law Commission
PO Box 2590
Wellington 6140

Attention: Warren Young

Dear Dr Young

I write in response to the Law Commission's paper on the review of the Official Information Act 1982 (OIA). As one of the agencies identified in Schedule 1 of the Ombudsman Act 1975 the Human Rights Commission has been subject to the OIA since it was enacted in 1982. For the most part it has not encountered difficulties in applying the legislation. The accountability and transparency which are central to the OIA are also significant components of a human rights approach to the development of policy and legislation and the Human Rights Commission is, therefore, generally supportive of the presumption of disclosure. Although the review raises numerous issues we have confined our comments to those which the Human Rights Commission either has some experience of, or a specific concern about.

The main issue for the Human Rights Commission relates to the application of the OIA to the different sections of the Human Rights Act 1993 (HRA). The HRA is made up of a number of Parts. Part 3 deals with the resolution of disputes about compliance with Part 1A and Part 2. Under Part 3 there is a requirement that "except with the consent of the parties" information disclosed at a dispute resolution meeting must be kept confidential¹ and cannot be made available under the OIA². The Human Rights Commission has interpreted these provisions very broadly to ensure the integrity of the mediation process (which is consistent with case law on the point³). However, only Part 3 complaints (that is, complaints relating to discrimination) attract the protection of the OIA. The presumption in favour of disclosure applies to other human rights complaints, for example, that may be equally sensitive as those made under Part 3.

Clearly the privacy provision is the most relevant withholding provision. However, this raises the conflict identified in 6.1 of the Review – namely, the tension between the OIA's goal of making information available to the public and the need to protect people's privacy in information about them held by government and public agencies. In most cases the Human Rights Commission adopts an approach that is more consistent with that in the Privacy Act, that is, does not divulge personal information

¹ S.85 HRA 1993

² S.87 HRA 1993

³ *Hildred v Strong* [2007] NZCA 475

provided by complainant or respondents.

The reason for adopting this approach relates to the extension to the functions in s.5(2) that resulted from the 2001 Amendment to the HRA. For example, the s.5 functions include receiving representations from the public on any matter affecting human rights⁴ and the ability to inquire into "any matter" if the matter involves or may involve the infringement of human rights⁵. This has meant that the Human Rights Commission now receives a greater number of complaints about human rights matters generally. The issues raised in this context are no less important or sensitive than those involving discrimination but the absence of a specific OIA exemption means that they attract less protection. Given that it is unlikely that the entire HRA will be made exempt from the OIA, the Human Rights Commission is concerned that there is some clarification of the OIA privacy withholding ground. On reflection we are attracted to option 3 as it would be more consistent with the approach that the Human Rights Commission takes at present to broader human rights complaints and inquiries.

Q.23 - The Human Rights Commission supports amending the current privacy withholding ground so that it is aligned with Principle 11 of the Privacy Act but retains the public interest balancing test.

There is one further matter of specific concern to the Commission. This relates to the role of the Director of Proceedings. The Office of Human Rights Proceedings was created as part of the 2001 Amendment. Although the Office is technically part of the Commission, this is for administrative purposes only⁶. In carrying out his functions, powers and duties, the Director is obliged to act independently⁷. Under s.90 the Director decides whether to provide representation to individual complainants. The matters that he must have regard to in deciding whether to do so are set out at s.92(2).

In response to a request for representation the Director provides an in depth analysis of why he will (or will not) do so based on the statutory criteria. The relationship with a complainant is therefore effectively the same as solicitor and client, the Director acting as the complainant's counsel. The difficulty is that requests are made to the Director as though he were part of the Commission. Although he has invoked client /solicitor privilege to withhold information such as the reasons for not providing representation, this has been challenged on the grounds that the Director is acting as part of the Commission when he does so (rather than in his legal role because he has not at that point issued proceedings). This type of argument could be avoided if the Office of Human Rights Proceedings was identified separately in the relevant Schedule. This should be possible if there is an intention to reorganise the schedules to the OIA and the Ombudsman Act.

⁴ S.5(2)(f) HRA 1993,

⁵ S.5(2)(h) HRA 1993.

⁶ S.20(4) HRA 1993

⁷ S.20(2) HRA 1993

Q.2 – The Commission agrees that the schedules to the OIA should be examined to eliminate anomalies – in this case, however, to ensure that the Office of Human Rights Proceedings is identified separately.

The Human Rights Commission recognises that the way in which decisions are reached at present has its difficulties but considers that the situation would not necessarily be improved by introducing a system of rigid rules. A more flexible approach, based on the current case-by-case decision making, is more appropriate particularly if it is accompanied by a persuasive system of precedent and accompanying comment. The Ombudsman could usefully perform this function. A similar role to the Human Rights Commission of promoting awareness and understanding of the OIA and having the ability to review the Act from time to time if a need for reform arises would complement this function.

Q.9 – The Human Rights Commission agrees that enhanced guidance about the withholding grounds would be more useful than prescriptive laws; we also agree with the suggestions proposed in Qs.10 to 13.

The Human Rights Commission supports the idea of a further qualification which would allow information about children to be withheld where it is not in the child's best interests (subject to the overriding public interest). International human rights law requires that children are entitled to special care and assistance⁸ and that the best interests of the child are to be a primary consideration⁹. While we recognise that at present the privacy withholding ground can be used to protect the interests of children, a specific reference in the legislation would enhance understanding of the special protection that applies to children and reflect New Zealand's human rights obligations.

Q.24 - The Human Rights Commission considers that the Act should be amended to specifically recognise the privacy rights of children.

In our comments to the Law Commission on its review of the Privacy Act, we raised the issue of the relationship of the Privacy Act and the OIA in light of the decision in *Director of Human Rights Proceedings v Commissioner of Police*¹⁰ and the release of information by the Police under the OIA in a case of family violence. Our concern was the conflict between the OIA and the Privacy Act given that the OIA anticipates that information will be disclosed while the Privacy Act is premised on the assumption that personal information will be withheld. Although a person can complain to the Ombudsman about a decision to withhold information requested under the OIA it is not possible to complain about information that is released. Nor is it possible to complain to the Privacy Commissioner. The result is that people who have had information about them (which is also personal information) disclosed under the OIA have no remedy under either the OIA or the Privacy Act. At the time we suggested that the Human Rights Review Tribunal should be able to review decisions to supply information under the OIA if there is a bona fide reason for doing so. That is, an

⁸ UN Declaration of Human Rights

⁹ UNCROC Art.3(1)

¹⁰ CIV-2007-409-002984: High Court Christchurch (French J)

agency that releases information about an individual should be able to be asked to demonstrate that their reliance on a statutory exception is bona fide.

The Human Rights Commission was pleased therefore to see that the present review recognises that in such situations the person or company affected may be left without a remedy¹¹ as there is no mechanism comparable to the Ombudsman's ability to review withholding decisions¹². However, the paper also notes that creating a mechanism for reviewing information provided under the OIA could have the effect of inhibiting the release of information by officials out of a fear that their decisions will be reviewed. On balance, the Law Commission finds these reasons persuasive and recommends against extending the complaints process to address this concern. The Human Rights Commission does not agree. We consider that officials should be held responsible for the decisions they make and should be accountable for the information released.

Q.71 - The Commission considers that where a person is affected by the release of information under the OIA they should be able to complain to the Ombudsman.

Thank you for the opportunity to comment on the review. Please don't hesitate to contact Sylvia Bell, Principal Legal & Policy Adviser, if further clarification of any of these points is required.

Yours sincerely

Rosslyn Noonan
Chief Commissioner
Te Amokapua

¹¹ At 11.25

¹² At 11.29