



BRIEFING FOR THE MINISTER OF POLICE

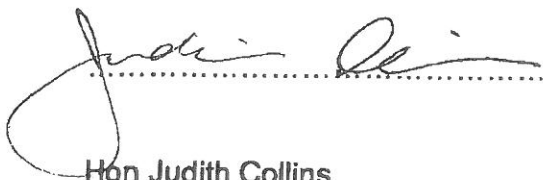
Subject	Police Submission on the Law Commission Issues Paper on the Review of the Official Information Act 1982		
Date	20 December 2010	Ref	BR/10/330
Priority	<input type="checkbox"/> Urgent	<input checked="" type="checkbox"/>	Non-urgent

Recommendations

The recommendations are that the Minister of Police:

- a) note the Law Commission has completed an Issues Paper on the Official Information Act 1982 (a summary of which is attached); Yes/No
- b) note the contents of this paper, which summarises the Police submission on the Law Commission's Review (which is also attached); Yes/No
- c) note that Police will be providing the full submission to the Law Commission on 20 December 2010; and Yes/No
- d) note that the Law Commission will normally make submissions available to the public on request, once they are near to completion of their report. Yes/No

Minister's comments:



 Hon Judith Collins
 Minister of Police

19/11/2010

Date

Police Submission on the Law Commission's Issues Paper on the Review of the Official Information Act 1982

Purpose

1. This paper summarises the Police submission on the Law Commission's Issues Paper on the Review of the Official Information Act 1982.

Background

2. The Law Commission's overall impression is that the Official Information Act 1982 (the Act) is central to New Zealand's constitutional arrangements, that its underlying principles are sound, and that it is generally working well. However, it is clear that there are areas where changes could be made to improve the effectiveness of the legislation.
3. Police has responded to those areas of the review which have most relevance for Police. The submission reflects the views of National Managers and District Commanders.

Police Submission

Decision-making (Chapter 3)

4. The Issues Paper supports precedent-based guidance from the Ombudsmen rather than a more prescriptive approach in regulations. Police supports this view and considers enhanced guidance would give greater certainty and consistency without being overly prescriptive.

Protecting Good Government (Chapter 4)

5. The review recommends redrafting of the 'good government' withholding grounds (relating to constitutional conventions and effective conduct of public affairs), due to the difficulties experienced by agencies when applying these grounds. Police supports this proposal and considers these provisions would benefit from greater clarity and certainty.

Protecting Commercial Interests (Chapter 5)

6. The review considers whether the current relatively narrow interpretation of 'commercial' by the Ombudsmen, should be broadened, to include not only situations where a profit motive is present, but to a greater range of commercial activity. Police supports a statutory amendment to clarify and extend when the commercial withholding ground applies.

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Protecting Privacy (Chapter 6)

7. The Issues Paper considers that reliance on Ombudsmen case notes and practice guidelines to determine when personal information should be disclosed is sufficient, rather than a reformulation of the statutory ground. Police supports the use of firmer guidelines and examples for agencies to apply in their decision-making process and that the privacy needs of deceased persons and children should be expressly protected.

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Other Withholding Grounds - 'Maintenance of the Law' (Chapter 7)

8. Currently a conclusive reason for withholding information is if the release would prejudice the maintenance of law (section 6(c) of the Act). Police agrees that this should be retained. Police suggests that the wording of section 6(c) could be expanded to cover individuals who provide information or assistance in any investigation or inquiry if the release of the information would pose a risk to any individual or group.
9. The Issues Paper suggests adding a new non-conclusive withholding ground in section 9 of the Act to cover material provided in the course of inquiries and investigations. If a new non-conclusive withholding ground is added to deal with information provided in the course of an investigation or inquiry, Police suggests that the phrase, 'or the provision of similar information in the future' should be included in the new ground.
10. In relation to the proposed non-conclusive withholding ground, Police wishes to raise an area of uncertainty, which currently exists with regard to witness statements which later become withdrawn from evidence. Police submits that in a situation such as described, the information contained in material which is later withdrawn from evidence, should properly be covered under the Act.

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Public Interest Test (Chapter 8)

11. Police agrees with the Issues Paper's view that guidance and Ombudsmen precedents would be of greater assistance in assessing the public interest in determining whether to disclose information, than a codified list of public interest factors. As discussed in the review, 'public interest' is a difficult term to define, and Police considers the use of guidance and Ombudsmen precedents for determining the public interest is a more flexible approach than the statutory prescription of a list of public interest factors.

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Requests - some problems (Chapters 9)

12. This part of the Issues Paper discusses some of the practicalities of handling and processing requests. The review considers the following:
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- redefine the phrase 'due particularity' (which requests must have) to state that a request for information must accurately define the scope of that request. Police supports this proposal and considers agencies should be encouraged to consult with requesters, in relation to requests for large amounts of information;
- whether the past conduct of a requester is relevant when declaring an individual a 'vexatious requester' and the possibility of expressly providing for that in the Act. Police supports this recommendation and suggests that detailed records would be needed to justify an agency's decision to declare a particular requester vexatious.

Processing Requests (Chapter 10)

13. A number of changes are suggested in the Issues Paper in relation to time limits, provision for transfer of requests, and charging for information. These include:
 - retaining the current 20 working day time limit for agencies to make a decision about a request and respond to a request, and amending section 15 of the Act so that actual release of the information must occur as soon as reasonably practicable after a decision to release. Police supports this proposal.
 - an express provision for the transfer of part of a request. Police considers this would facilitate the processing of some requests.
 - development of clear guidelines for consultation between agencies and Ministers for the transfer of requests. Police supports this position.
 - revising the current charging framework and including this in regulations. Police supports this proposal.

Complaints and Remedies (Chapter 11)

14. The review proposes removing the Cabinet's power of veto with respect to an agency's decision to withhold information, with the Ombudsmen given a final power of decision. Police considers the Cabinet's power of veto should be retained.

Proactive Disclosure (Chapter 12)

15. The Issues Paper recommends that agencies take all reasonably practicable steps to proactively release official information. Police agrees with this approach and currently meets expectations in this regard.

Next Steps

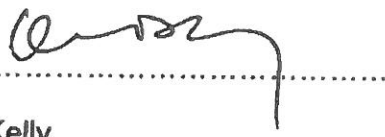
16. Police proposes to submit its submission (attached) to the Law Commission on 20 December 2010. The Law Commission states in their Issues Paper that all submissions will normally be made

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available on request under the Official Information Act (OIA). There is no legislative ground for Police to request that our submission not be released under the OIA. It is highly likely that the Law Commission will get OIA requests or will proactively release submissions close to the release date of their final report next year.

Recommendations

17. The recommendations are the Minister of Police:
- a) note the Law Commission has completed an Issues Paper on the Review of the Official Information Act 1982 (a summary of which is attached);
 - b) note the contents of this paper, which summarises the Police submission on the Law Commission's Review;
 - c) note that Police will be providing the full submission to the Law Commission on 20 December 2010; and
 - d) note that the Law Commission will normally make submissions available to the public on request, once they are near to completion of their report.



Kevin Kelly
Acting General Manager, Development

Date: 17 / 12 / 2010

Supplementary Information

Contact for telephone discussion (if required)

Name	Position	Telephone		Suggested First Contact
		Direct Line	After Hours	
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20 December 2010

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Law Commission
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WELLINGTON

SUBMISSION ON THE LAW COMMISSION REVIEW OF THE OFFICIAL INFORMATION ACT 1982

Introduction

1. This submission on the Law Commission Review of the Official Information Act 1982 is made on behalf of New Zealand Police.
2. This submission represents the views of a cross-section of Police staff who either respond to or manage staff who respond to Official Information Act requests as part of their business. Views of prosecutions staff, operations staff, National Managers and District Commanders form the basis of this response.
3. Responses and comments on those parts of the Act which have the greatest relevance for Police when responding to OIA requests, are covered in this submission. Particular areas of the review hold significance for Police, and these include issues with regard to the protection of privacy, the 'maintenance of law' withholding ground and the processing of requests.

Chapter 3 - Decision-making

4. Police agrees that the current case-by-case system for decision making should be retained. While the case-by-case model can be more time-consuming, due to the complexities of responding to OIA requests, a set of prescriptive rules is not appropriate. While more time may be involved in the case-by-case system, that approach requires agencies to take more time to consider the issues in relation to OIA responses.
5. Enhanced guidance is favoured to provide more clarity and certainty about the official information withholding grounds, rather than the proposed alternatives, such as prescriptive rules, redrafting the grounds or prescribing what information should be released in regulations. For example, an addendum of how past decisions have been interpreted by various agencies, could provide greater guidance for agencies. (*Questions 8 and 9*).

Chapter 4 - Protecting Good Government

6. Police is of the view that there is justification for redrafting the good government grounds and supports the reformulated 'good government' grounds set out in the review document. Redrafting the constitutional conventions grounds would help clarify their meaning. It is important that free and frank advice is protected so as not to discourage future exchanges between parties concerned. The reformulated provisions in the review document are less complicated and prescriptive than the current provisions and would provide a framework which agencies could more readily apply to a particular case.
7. The quotation at para 4.31 of the report, encapsulates the importance of the free and frank provision for Police and the risk if it did not exist. Without this ground there may be a risk that too much weight may be attributed to considerations of scrutiny of decision-making in the public domain at the expense of making sound fact-based decisions and acting on those decisions. (Question 14 and 15)

Chapter 5 - Protecting Commercial Interest

8. Police favours a broader interpretation to be given to the commercial withholding ground and considers that this ground should not be confined to situations where the purpose is to make a profit. A statutory amendment should be made to clarify when the commercial withholding ground applies. (Questions 16 and 17)

Chapter 6 - Protecting Privacy

9. Police supports 'Option 1, guidance only', for improving the privacy withholding ground. (Question 23). Given the tension that exists between determining what is private information and what is official information, it is suggested that guidance would assist in that determination, an approach which is essentially similar to the Principles of the Privacy Act 1993.
10. Police considers that protection for deceased persons should continue, particularly to protect the interests of living family. The introduction of a 'bright-line test' of 30 years is supported so that agencies have clear guidelines to apply when making decisions about whether to withhold or release information about deceased persons.
11. With regard to the protection of the privacy interests of children, Police considers that there should be an express provision to protect these interests. Such a provision could be based on the Children, Young Persons and Their Families Act 1989, which makes the 'interests of the child paramount'.

- 12. To ensure the interests of children and the families of deceased persons are protected, there should be a higher bar for disclosure with respect to decisions whether to withhold or release information about deceased persons or children. (Question 24)

Chapter 7 - Other Withholding Grounds- Maintenance of the Law

- 13. Police agrees that the conclusive withholding grounds in section 6 should be retained. It is suggested that the wording of section 6(c) could be expanded to cover individuals who provide information or assistance in any investigation or inquiry if the release of the information would pose a risk to any individual or group.
- 14. Police notes that they consider the maintenance of the law ground covers more than particular investigations or enquiries and includes disclosure of methods of investigation and other matters sensitive to Police. Police notes that the wording of the proposed non-conclusive withholding ground may result in only being able to withhold information related to a particular investigation or inquiry.
- 15. If a new non-conclusive withholding ground is added to deal with information provided in the course of an investigation or inquiry, it is suggested that the phrase, '*or the provision of similar information in the future.*' should be included in the new ground. (Questions 29 and 30)
- 16. In relation to the proposed non-conclusive withholding ground, Police wishes to raise an area of uncertainty, which currently exists with regard to witness statements which later become withdrawn from evidence. Police submits that in a situation such as described, the information contained in material which is later withdrawn from evidence, should properly be covered under the Act.

Chapter 8 - Public Interest Test

- 17. Police considers that there is no need to introduce a codified list of public interest factors. As discussed in the review, it is difficult to define 'public interest' and rather than having a prescriptive list of public interest factors, the use of guidance and Ombudsmen precedents would be of greater assistance in determining whether to disclose, based on a consideration of public interest factors in a particular case.

Chapter 9 Requests -Some problems

Due Particularity

- 18. Police considers that the phrase 'due particularity' should be redrafted to make it clearer, as many ill-defined requests are received and there is often the need to seek clarity from the requester regarding what is sought. Where large amounts of information are requested, agencies

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should be encouraged to consult with requesters. Experience shows that consulting with a requester can result in more targeted responses reducing costs and time involved for both parties. (Questions 35 and 36). Police agrees that the Act should clarify that the 20 working day limit for requests delayed by lack of particularity should start when the request has been accepted. (Question 37)

Vexatious requests

19. Police is of the view that the past conduct of a requester should be taken into account when assessing whether a requester is vexatious and that 'vexatious' should be defined in the Act to include an element of bad faith. (Questions 41 and 42)
20. Police also agrees that an agency should be able to decline a request for information if the same or substantially the same information has been provided or refused to that requester in the past. (Question 43)
21. Provision should be made for an agency to declare a requester vexatious. For such a provision to work in practice, there would need to be detailed record-keeping to justify any decision made in this regard. A register of requesters, the information requested, and the number of requests could be maintained by each agency. When making a decision to declare a particular requester, 'vexatious', an agency would need to be able to demonstrate that careful consideration had been given to the past requests made by that requester, including the volume and type of request.
22. It is proposed that a decision declaring a requester vexatious should be made on the authority of an agency's Chief Executive or delegated authority holder. (Question 44)

Chapter 10- Processing Requests

Release of Information within Timeframe

23. Police agrees that the 20 working day time limit, from time of receipt of request (subject to Question 37), for making a decision and responding should be retained and an express provision included in the Act which states information must be released as soon as reasonably practicable after a decision to release is made. (Questions 48 and 49)
24. Police also supports the review's recommendation that the maximum extension time should continue to be flexible without a specific time limit set out in statute. Retaining the flexibility of the current provision could be supported by guidance of the Ombudsmen. (Question 53)

Transfer provisions

25. Police agrees there should be provision included in the legislation to allow for partial transfers. (Question 59)

- 26. While Police agrees that there is no need for further statutory provisions about transfer to Ministers, it is considered that there is need for clearer guidelines for agencies to apply, in relation to clarifying the nature and purpose of Ministerial consultation as discussed at para 10.37 of the review. (Question 61)

Reform of charging framework

- 27. Police supports the provision of regulations to lay down a clear charging framework as part of the legislation. (Question 66)
- 28. A charging framework based on a 'categories model' is preferred, with charges made for the time and cost of compiling the response, including printing or DVD costs involved. Any hourly rates charged should reflect the seniority of the staff compiling the particular request. Requesters could be advised of the estimated costs and asked if they wish to proceed on the basis that their request will attract charges under the legislation. Such a framework would be more likely to encourage requesters to refine the scope of their request and hence discourage 'fishing requests' to ascertain what information may be held by a particular agency. (Question 67)

Chapter 11 - Complaints and Remedies

The Ombudsman's recommendation and the Cabinet veto

- 29. Police considers the veto power exercisable by Order in Council through the Cabinet should be retained, rather than conferring a final power of decision on the Ombudsman, when determining an official information request. (Questions 75 and 76)

Chapter 12 - Proactive Disclosure

- 30. Police agrees with the Issues Paper's recommendation to move towards more open availability of information and that the OIA should require agencies to take all reasonably practicable steps to proactively release information. (Question 86)

Kevin Kelly
General Manager Development (Acting)