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OIA Feedback
Ministry of Justice
Wellington

By email: oiafeedback@justice.govt.nz

Re: Access to official information – consultation

The New Zealand Law Society welcomes the opportunity to provide feedback to the Ministry of Justice on how the Official Information Act 1982 (the OIA) is working in practice. The Ministry's consultation will inform a decision whether to progress a review of the OIA or whether to keep the focus on practice improvements.[1]

For the reasons set out below, the Law Society considers that a comprehensive review of the OIA should be expedited, at the same time as the government continues to focus on practice improvements. Both are required to ensure the Act remains effective in achieving the fundamental objective of open and accountable government.

Executive summary

The OIA is central to New Zealand's constitutional arrangements. The purposes of the Act include –

> "… consistently with the principle of the Executive Government's responsibility to Parliament,—
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> (a) to increase progressively the availability of official information to the people of New Zealand in order—
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> (i) to enable their more effective participation in the making and administration of laws and policies; and
>
> (ii) to promote the accountability of Ministers of the Crown and officials,—
>
> and thereby to enhance respect for the law and to promote the good government of New Zealand"

In principle, the Act provides a sound basis for making information publicly available and improving transparency of government. However, in practice it still faces many of the challenges identified in earlier reviews, including the Law Commission's comprehensive review of the Act in 2012.

Most of the Law Commission's 2012 recommendations[2] have not been adopted and, in the Law Society's view, this has contributed to the continuing difficulties with the Act. We consider that

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1 https://consultations.justice.govt.nz/policy/access-to-official-information/.

2 *The Public's Right to Know – Review of the Official Information Legislation*, Law Commission, NZLC R125, 2012, at pp8 - 17, and pp377 – 400.

neither the government response to the Law Commission report[3] nor the relatively minor amendments made in the Official Information Amendment Act 2015 do justice to the Commission's work. The Commission's 2012 report was the result of a thoroughly researched project led by eminent jurist John Burrows QC and it is disappointing that many of the recommendations have not been actioned.

The Law Society considers the Commission's recommendations should be the starting point for careful consideration in the current consultation. The Ministry should undertake a thorough review of the recommendations, with a view to implementing a much larger number of them. The Law Society's comments that follow highlight several of the Commission's key recommendations (but this is not meant to indicate that the Law Society does not support other recommendations by the Commission not specifically mentioned).

Consultation questions

1. In your view, what are the key issues with the Act?

Key difficulties identified in previous reviews include:

- the burden caused by large and broadly defined requests;
- tardiness in responding to requests;
- time constraints limit the ability to properly determine the scope of the information covered by a request,
- the 20-day maximum period allowed for responding to requests is for many agencies seen as the standard, with very few agencies responding in accordance with the direction to respond "as soon as reasonably practicable". We also question whether requests for urgency are being adequately met but there is a lack of detailed data on the operation of the OIA to properly measure timeliness of compliance;
- too strict reading of requests;
- concerns and perceptions about ministerial interference in agency responses to requests for information;[4]
- lack of application to agencies of Parliament.

The burden caused by large and broadly defined requests

The Law Commission's 2012 report identified tardiness in responding to OIA requests was in part caused by the burden of large and broadly defined requests and the need to balance this against available resources.[5] Large requests pose difficulties for smaller non-core state sector agencies, with tight budgets and lower staffing levels, in identifying the relevant information and then

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[3] Government Response to Law Commission report on *the Public's Right to Know: Review of the Official Information Legislation,* presented to the House of Representatives on 4 February 2013.

[4] Concerns about Ministerial interference have been well documented, most recently in an article published in the media: https://www.stuff.co.nz/national/111130258/hide-and-seek-how-politicians-seek-to-hide-your-information-away. See also the Chief Ombudsman's 2015 report (footnote 9, below).

[5] Footnote 2 above, at pp10 – 11. This was also identified by the Law Commission in its 1997 report: *Review of the Official Information Act 1982,* NZLC R40, 1997, at 1.

deciding whether any withholding grounds apply. At the same time, the ground for refusing requests because they require substantial research or collaboration can often not be applied, and there is a high threshold for refusing a request on the basis that it is "vexatious". As a result, smaller agencies divert resources away from other functions, compromising their ability to meet those other functions.

To address this, the Law Commission recommended amendments to clarify when a request may be refused because the information is publicly available, and to deal with matters such as due particularity, substantial collation and research, and "vexatious" requests. As discussed below, some of these recommendations were not adopted and the Law Society considers that doing so would improve matters.

Tardiness

The high workload of the Office of the Ombudsman (although processing times have improved) makes it difficult for it to enforce compliance. In addition, there is a lack of real sanctions for delaying a response or incorrectly withholding information.

Significantly improved guidance provided by the Office of the Ombudsman[6] has made a difference in the level of output and ability of the Office to investigate and close complaints.[7] However, tardiness seems to be a continuing problem and information still seems to be unjustifiably withheld in some cases.

Time constraints limit the ability to properly determine the scope of the information covered by a request

Properly determining the scope of information covered by a request is essential to making an initial decision, within the initial time period, on whether an extension is required. This is particularly onerous for smaller non-core state sector agencies, which have tight budgets and staffing levels, with little ability to accommodate the work required to respond to large requests.

The 20-day period to respond to requests

The 20-day maximum period allowed for responding to requests is for many agencies seen as the standard, with very few agencies responding in accordance with the direction to respond "as soon as reasonably practicable". The 20-day limit appears to be applied as a means to delay responses.[8] Such practices are concerning and defeat the overarching purpose of the legislation. As discussed below, changes to the Act could reduce delays in responding to requests. The current lack of detailed data and statistics about the operation of the OIA makes measurement of delays difficult, including in gauging whether requests for urgency are being met or the extent to which the requirement in section 15(1) to decide requests "as soon as practicable" is being met.

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6 See for example the guide entitled *The OIA for Ministers and agencies,* June 2016, available at: http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/2995/original/the_oia_for_agencies_nov_2018.pdf?1543353943. See also four guides released by the Chief Ombudsman, April 2019: http://www.lawsociety.org.nz/news-and-communications/latest-news/news/new-oia-guidance-published-by-ombudsman.

7 The financial resources of the Office appear to have almost doubled since 2012: Annual Report 2017/18 at 60.

8 See comments made by the previous Prime Minister as reported in the media: https://www.radionz.co.nz/news/political/257009/pm-admits-govt-uses-delaying-tactics.

Too strict reading of requests

Some agencies read requests too strictly, especially when made by requesters who are not familiar with internal government processes, thereby limiting their scope.

Concerns and perceptions about Ministerial interference in agency responses to requests for information

The Commission's 2012 report identified issues regarding perceptions of political interference and recommended that any protocol between an agency and a Minister should be published on the agency website.

In 2015 the Chief Ombudsman issued a report[9] identifying five key areas of risk and vulnerability in how the OIA is implemented.[10] This 2015 report highlighted problematic practices involving ministerial staff and recommended approaches to improve proactive release of information, increase training for officials to ensure their understanding of the legislative obligations, improve policies and procedures for creating, storing and managing information, and improved practices that included deployment of available tools within the Act. Most government agencies have now introduced proactive release practices, but the volume and nature of information that is made available varies significantly as between agencies.

The Office of the Ombudsman published guidance in 2016,[11] and a model protocol in July 2017[12] that could reduce perceptions of political interference (although it does not appear that any such protocols have been agreed and/or published).[13]

Despite these steps, concerns about how the Act is implemented remain.[14]

Application to Parliamentary agencies

The Law Commission also recommended extending the OIA, on the grounds of open government, to include agencies of Parliament – namely, information held by the Speaker in his/her role with ministerial responsibilities for Parliamentary Service and the Office of the Clerk; the Parliamentary Service; the Parliamentary Service Commission; the Office of the Clerk in its departmental holdings; the Offices of Parliament (the Ombudsmen, the Office of the Controller and Auditor General and

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9 *Not a game of hide and seek* – Report of the Chief Ombudsman December 2015 available online at: http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/1573/original/not_a_game_of_hide_and_seek_-_review_of_government_oia_practices.pdf?1466555782.

10 These areas being: Leadership and culture, Organisation, structure, staffing and capability, Internal policies, procedures and systems, Current practices, Performance monitoring and learning.

11 See footnote 6.

12 *Model protocol on dealing with OIA requests involving Ministers*, available online at: http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/2969/original/model_protocol_july_2017.pdf?1543277872.

13 The only protocol that does appear to exist is the protocol for the release of parliamentary information – see: https://www.parliament.nz/en/pb/parliamentary-rules/other-rules-and-protocols/protocol-for-the-release-of-information-from-the-parliamentary-information-communication-and-security-systems/.

14 A recent example of such concerns was published in media as recently as March 2019 – see: https://www.stuff.co.nz/national/111130258/hide-and-seek-how-politicians-seek-to-hide-your-information-away.

the Parliamentary Commissioner for the Environment); and the Parliamentary Counsel Office.[15,16] The Law Society supports that recommendation.

2. Do you think these issues relate to the legislation or practice?

As noted above, the Law Society considers that operational difficulties with the OIA relate to both the legislation and practice, and changes to both are required to improve the effectiveness of the Act.

3. What reforms to the legislation do you think would make the biggest difference?

The Law Society recommends that the following reforms suggested by the Law Commission in 2012 be implemented:

- Amend the "good government" grounds for withholding official information in sections 9(2)(f) and 9(2)(g).[17]
- Introduce a new non-conclusive withholding ground for information provided in the course of an investigation or inquiry.[18] (We note that section 32 of the Inquiries Act 2013 specifically excludes certain information from the application of the OIA,[19] but the Inquiries Act only applies to certain types of inquiries[20] and does not provide protection for other forms of inquiry or investigations by state entities.)
- Defining the meaning of "due particularity" to make it clearer what this means and specify that agencies cannot treat a request as invalid on the basis of a lack of due particularity, unless the agency has reasonably fulfilled its duty to assist the requester.[21]
- Include legislative provisions requiring notification to (and where appropriate consultation with) parties whose information is held by agencies, before release.[22] This would ensure that third parties whose information is held by agencies are better protected from inappropriate release.

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15 2012 report (footnote 2 above), r122 – r129 (pp338 – 347). The same recommendation was made by the Commission in its 2010 report, *Review of the Civil List Act 1979 – Members of Parliament and Ministers*, NZLC R119, at r5.

16 The Commission also recommended that the OIA should not apply to proceedings in the House of Representatives, or Select Committee proceedings; and internal papers prepared directly relating to the proceedings of the House or committees; information held by the Clerk of the House as agent for the House of Representatives; information held by members in their capacity as members of Parliament; information relating to the development of parliamentary party policies, including information held by or on behalf of caucus committees; and party organisational material, including media advice and polling information. See R119 (footnote 15) at r6.

17 See 2012 report (footnote 2) at r8, at p378.

18 See 2012 report (footnote 2) at r24, at p381.

19 This includes information or evidence provided to the inquiry: see section 15(1)(a) of the Inquiries Act 2013.

20 The Act only relates to three specific types of inquiry: Royal Commissions, public inquiries and government inquiries – see section 6 of the Inquiries Act 2013.

21 See 2012 report (footnote 2) at r35, r36 and r38, at p383.

22 See 2012 report (footnote 2) at r58 and r59, at p387.

- Make amendments to recognise a positive duty of proactive disclosure of official information.[23] The information that could be included here would be data and information about the operation of the agency (such as key decisions made, dates of meetings and events, numbers of complaints handled, progress reports on work programmes, etc). This would serve the purpose of making information more available, and should also reduce the number of requests made to agencies.[24]
- Amend section 15 to include a deadline for the agency to make available any information it has decided to release.[25]
- Amend the Act to extend its coverage to: information held by the Speaker in his/her role with ministerial responsibilities for the Parliamentary Service and the Office of the Clerk; the Parliamentary Service; the Parliamentary Service Commission; the Office of the Clerk in its departmental holdings; the Offices of Parliament (the Ombudsmen, the Office of the Controller and Auditor General and the Parliamentary Commissioner for the Environment); and the Parliamentary Counsel Office.[26]

The Law Society also recommends amendments be made to the Act to improve its performance and to address aspects which may cause perverse behaviour that may undermine the legislative objective of open government. These include:

- Amendments to reduce the propensity for agencies to see the 20 working day limit as a goal instead of a maximum deadline. Such amendments could include:
    - Placing more emphasis in the Act on the requirement to respond as soon as reasonably practicable to a request, and making clear that the 20 working day limit is the maximum (unless there is an extension).
    - A three-month maximum deadline for extensions under section 15A, with no ability to extend further unless agreed by the Ombudsman. While such a provision may place added burdens on the Office of the Ombudsman, if implemented effectively it might reduce the numbers of complaints the Office is required to investigate.[27] Proactive assistance for agencies to meet their legislative obligations is likely to better serve the public interest than subsequent investigations into alleged breaches.
    - Provisions that encourage release of information in batches as soon as it has been reviewed, to respond more promptly to requesters and avoid holding back all the information until everything has been reviewed.
- An amendment requiring agencies to treat all information that can reasonably be considered as coming within the scope of a request as being covered by that request, and regardless of the form in which the information is held.
- Introducing amendments that improve the ability of government agencies to resist ministerial interference in responding to official information requests. These could include:

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23 See 2012 report (footnote 2) at rr85 – 104, at pp391 – 394.

24 The Law Commission noted the same benefit in its 2012 report – see footnote 2, at [12.35(g)] and noted that this could ultimately reduce the burden of broadly defined requests – see [12.53] at p264.

25 See 2012 report (footnote 2) at r50, at p386.

26 See R5 in (NZLC R119) at 32-37 and R122-R129 in (NZLC R125) at 338 to 344.

27 Over the last 4 years the office has received an average of 12,000 complaints per annum.

- provisions confirming the independence required for agencies to make decisions on requests;
- provisions clarifying the role of Ministers and ministerial advisors in dealing with agency requests;
- provisions that mandate protocols between Ministers and agencies which can be based on the model protocol developed by the Office of the Ombudsman.

- Making further improvements to increase the monitoring and oversight role of central agencies. This would materially advance the leadership role recommended by the Chief Ombudsman in her 2015 report.[28] A similar recommendation was made by the Law Commission in 2012 and further consideration should be given to the Law Commission's recommendation that independent oversight of the official information legislation is warranted and overdue.[29] (It seems the State Services Commission is already playing a part in this through its current practice of providing guidance and publicly reporting statistics on agency response times.[30] However, this may not go far enough in monitoring agency compliance and protecting agencies from the risks of ministerial interference.)
- Consider more sanctions for failure to meet deadlines or where information is withheld and it is clear that the relevant agency has knowingly or carelessly applied the grounds for withholding – such as enabling the Ombudsman to provide detailed reports to the State Services Commission and chief executives of agencies on the performance of agency staff in responding to requests (these could be made confidential where they deal with personal information or identify individuals below a certain level within an agency).

If you wish to discuss these comments, please do not hesitate to contact the convenor of the Law Society's Public and Administrative Law Committee, Jason McHerron, via the Law Society's Law Reform Adviser Lucette Kuhn (lucette.kuhn@lawsociety.org.nz).

Yours faithfully

Tiana Epati
President

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[28] See recommendation 3 in *Not a game of hide and seek* – Report of the Chief Ombudsman December 2015, at 14.

[29] See 2012 report (footnote 2) at Chapter 13 and r102 at pp 296-332 and 394

[30] See online at: http://www.ssc.govt.nz/official-information-statistics