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THE PUBLIC'S RIGHT TO KNOW

A REVIEW OF THE OFFICIAL INFORMATION ACT 1982 AND PARTS 1–6 OF THE LOCAL GOVERNMENT OFFICIAL INFORMATION AND MEETINGS ACT 1987

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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FOREWORD

The key principle of the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987 is that official information should be made available unless in the particular case there is good reason for withholding it.

Overall the Acts have achieved their purpose. They have changed the culture about the availability of official information. Our society is now much more open than it was. Change to the basic philosophy of the Acts is not in contemplation.

However this is not to say that there are no problems. Agencies find some of the withholding grounds difficult to apply, and requesters can also have difficulty understanding them. We ask whether any of the grounds would benefit from being expressed differently, or whether more guidance is needed to assist users in working with them. Compliance with the Acts can also sometimes involve considerable resource, and we ask whether there is any way in which unreasonably large requests can be contained so that benefit and cost can be kept in proper balance.

In addition to a number of more mechanical matters such as time limits and transfer of requests, we also ask some large new questions. Given rapid advances in technology, we ask to what extent proactive disclosure of information on the internet (as opposed to supplying it to individuals on request) should be encouraged or even mandated. We also consider whether important functions such as training, education and oversight of the operation of the Acts should be provided for in the legislation and, if so, which agency should undertake them. These questions are being asked internationally, and we review these international developments.

There is no doubt that the New Zealand legislation has served its purpose. Overseas commentators have cited it as a model. But time moves on, and we must not rest on our laurels. Otherwise we risk being left behind.

In this Issues Paper we ask a number of questions, and invite public submissions on them. We would like to hear from as many people as possible, including those who make requests under the Acts and the agencies which are subject to them.

Warren Young
Acting President

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- All the individuals and organisations that took time to respond to our December 2009 survey

The Commissioners responsible for this project are John Burrows and Geoffrey Palmer. The legal and policy advisors who worked on this issues paper were Joanna Hayward, Ewan Lincoln, Steve Melrose and Margaret Thompson.

Call for submissions

We welcome your views on the issues discussed in this paper and in particular on the questions set out in the chapters and collected at the end of the paper. It is not necessary to answer all questions. Your submission or comment may be set out in any format, but it is helpful to indicate the number of the question you are discussing, or the paragraph of the issues paper to which you are referring.

Submissions or comments on this issues paper should be sent to the Law Commission by **Friday, 10 December 2010**.

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Official Information Act 1982

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the Law Commission will normally be made available on request, and the Commission may refer to submissions in its reports. Any requests for withholding of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.

The Public's Right to Know

A review of the Official Information Act 1982 and Parts 1–6 of the Local Government Official Information and Meetings Act 1987

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APPENDICES

Discussion in this paper usually relates equally to the operation of the Official Information Act 1982 (OIA) and the Local Government Official Information and Meetings Act 1987 (LGOIMA). Where there are identical or almost identical provisions in both OIA and the LGOIMA we refer in the body of the text to the OIA with the corresponding section of the LGOIMA in a footnote. This is solely to make the text easier to read and for economy of expression. When the LGOIMA raises separate issues we deal with it separately.

Summary

Chapter 1 Background

1 This project reviews the Official Information Act 1987 (OIA) and the official information provisions of the Local Government Information & Meetings Act 1982 (LGOIMA). The provisions of the two acts are very similar: indeed for the most part they are identical. Both of them operate on the principle that if official information is requested it will be made available unless there is good reason for withholding it. The good reasons are spelled out in the Acts. Some of them are conclusive, but the majority can be over-ridden if in a particular case there is a public interest in disclosure. There is also a list of administrative reasons for refusal.

2 In chapter 1 we outline the history of the Acts, dating back to the report of the Danks Committee in 1980. Since that time there have been substantial changes in the context in which the Acts operate. There have been major constitutional and legislative changes. The state sector was restructured in the 1980s: the State Sector Act 1988 replaced a unified public service with relatively autonomous government departments, and more clearly delineated separate responsibilities of ministers and heads of department. The move to an MMP electoral system with more political parties involved in government accelerated the use of the OIA for political purposes.

3 There has also been major technological change. The way documents are created and stored has changed almost beyond recognition over the past thirty years. When the OIA was enacted official information was mainly in the form of hard copy documents. Since then the digital information revolution has vastly increased the volume of information that can be produced, collected and stored. This has proved a two-edged sword. On the one hand it is now sometimes easier to retrieve documents, but on the other there are likely to be many more of them, including emails and earlier drafts of documents. Information technology also has great potential for the proactive publication of information by government agencies on their websites and great strides have already been made in this direction. There is now a much stronger expectation of openness and availability of information than in the past. People have become more suspicious of any government activity that takes place in secret. Citizens expect to be able to find out how, why, and by whom government decisions are made.

4 Then there is the international environment. Many governments in jurisdictions similar to our own – in particular the UK and Australia – have recently reviewed their official information legislation, and there is a clear trend towards more proactive release, and also to the creation of information commissions.

5 In preparing this issues paper the Commission has been greatly assisted by the 1997 review of the Act undertaken (with somewhat restricted terms of reference) by the Law Commission and also by the published research of Nicola White and Steven Price. We issued a public survey at the end of 2009 which asked a number of broad questions to find out the main kinds of problems that people experienced with the legislation.

6 The Commission's overall impression is that the OIA and LGOIMA are central to New Zealand's constitutional arrangements, that their underlying principles are sound, and that they are generally working well. At the same time it is clear that there are areas where changes could be made to improve the effectiveness of the legislation. We seek comments on a large number of issues and options. In many instances we state our preference for certain solutions but we still want to test those solutions and hear views on them.

Chapter 2 Scope of the Acts

7 We examine two aspects of the scope and coverage and the Act: which agencies are subject to it and the types of information covered by it.

8 We make the initial point that it is necessary to peruse the schedules not just of the OIA and LGOIMA but also of the Ombudsmen Act 1975 to find out what agencies are subject to the official information regime. Even that is not enough because some types of agencies, for example council controlled organisations, which are subject to the legislation via other Acts do not appear in any of the schedules. We think that all agencies subject to the OIA should appear in a schedule in the OIA itself, and similarly that all agencies subject to the LGOIMA should appear in the schedule to that Act.

9 The next issue is whether all agencies which should be subject to the legislation are in fact subject to it. There are some discrepancies to which we draw attention in the chapter, and we suggest that the schedules of the Act need to be gone through carefully to decide what, if any, agencies should be added to them. We pay special attention to State-owned Enterprises and conclude that they should remain subject to the Act. We suggest the Parliamentary Counsel Office should come within it, and note that in the Law Commission's review of the Civil List Act consideration will be given to whether parliamentary agencies should be covered. We also wonder why courts appear to be exempt from the OIA whereas tribunals are exempt only in relation to their judicial activities.

10 The other aspect of scope to which we make brief reference in this chapter is the types of information which are covered by it. Generally all information, of whatever kind, held by an agency is subject to the Act. Every case depends on its own facts. We ask whether there is a case for exempting any categories of information and conclude not. However we do spend some time discussing information held by an agency which has been supplied by or generated for third parties. We return to that issue later in the paper.

11 In essence we are not in favour of creating new categories of documents or information which are automatically exempt from the operation of the Act.

Chapter 3 Decision-making

12 In this chapter we examine the method of decision-making under the withholding grounds. The NZ legislation, with a very few exceptions, does not exempt categories of information but lays down open-textured principles and requires a decision to be made on the facts of each case as to whether the particular information should be withheld on the basis of those principles. We have what is often described as a "case-by-case" system. We have no desire to change that system. It does however have its difficulties. The assessments required in each individual case can take time. There is uncertainty, particularly if officials charged with making the decision are inexperienced, or the agency in question has handled few requests of this kind in the past. There are risks of idiosyncratic decision, and of inconsistency between the decisions of different agencies on very similar fact situations.

13 Guidance is available to assist agencies, primarily from the Office of the Ombudsmen Practice Guidelines on the Ombudsmen's website. There is also a large volume of case notes on that website, although they are incomplete and not up to date. We received much comment from persons responding to our survey that they would like clearer guidance, and in particular guidance with examples.

14 We have considered how greater certainty and consistency could be brought into the process. We do not think there is much to be gained by redrafting the withholding grounds in the Acts. As we shall see, there may be a few situations where that would make a difference but generally speaking it is hard to see that a change of words would provide greater certainty or assistance. Nor are we in favour of empowering regulations to be made which lay down rules about certain sorts of document. This is the category approach rather than the case-by-case approach, and we think it is too rigid. The flexibility of the case-by-case approach has much to be said for it.

15 However we think much more could be done by way of a system of precedent, and guidance based on that precedent. We think this is the way forward. We believe that all case notes of the Ombudsmen, past and present, should be collated and analysed and that consistent themes, patterns and principles emerging from them should be clearly stated in a commentary. The case notes should be used to develop a system of persuasive precedent. Reference to the case notes would enable the practice guidelines to be made more specific than they now are. The guidelines could contain examples derived from the case notes. In any event there should be clear links between the guidance and previously decided cases. This was what a number of respondents to our survey said they were looking for.

16 Such a system would not, of course, set a system of rigid rules. Patterns and precedents emerging would be presumptive only, and would be subject to the particular facts of each case. The system would be flexible enough to move with the times, while still providing certainty and consistency. Thus the open texture of the Act would be supported by a substructure of detailed guidance. We think the function of providing guidance in this form should be given added authority by inserting a provision in the Act to require it. We suggest in chapter 13 that the function be conferred on the Office of the Ombudsmen.

Chapter 4 Protecting good government

17 In this chapter we examine the group of withholding grounds relating to "good government" which have given particular difficulties. Some of the grounds ostensibly relate to the maintenance of constitutional conventions, others are to protect the free and frank expression of opinions provided by officials to ministers and others. We have no doubt that there is an important place for such grounds. The interests underlying them are as worthy of protection today as they were when the OIA was first enacted. Our system of government is founded on basic understandings such as collective ministerial responsibility. Moreover the ability of the government to govern requires some room for deliberation in private to develop and consider ideas without fear of adverse consequence. The legislation must recognise this.

18 Nevertheless the respondents to our survey made it clear that the grounds can be difficult for agencies to apply because they are very broad and indeterminate. In particular, they thought the reference to constitutional conventions is obscure. We agree that it is problematic. Expert commentators have described the list of so-called conventions as "conceptually incoherent". Conventions can also change over time, another factor which can increase the uncertainty. We also received views that the "free and frank" withholding ground is still not enough to ensure that truly free and frank discussion really does take place. It was also felt that there was no reason why it should be confined to "opinions" as opposed to "advice".

19 Particularly because of the confusion about constitutional conventions we are inclined to think that this is one of the few areas where the withholding grounds might benefit from redrafting. In this chapter we put forward a possible redraft, which omits all reference to constitutional conventions. For the most part the redraft does not change substance, so the existing Ombudsmen case notes and guidance will remain relevant. However in respect of a small number of matters of detail we do suggest extensions of the existing grounds. There is not much that can be done, though, to ensure that discussion will always be completely free and frank – human nature being what it is. We particularly look forward to comments on these suggestions.

Chapter 5 Protecting commercial interests

20 This chapter deals with another problematic set of withholding grounds, the commercial withholding grounds. These grounds protect the commercial interests of central and local government agencies and also of the third parties with whom they deal. We give illustrations in this chapter of the extensive growth in the commercial orientation of some public organisations since the 1980s. We note the sensitivities which can lie around such matters as the details of contracts, the findings of research commissioned by a third party, and the arrangements made by local authorities to attract events to their areas.

21 We are clear that commercial information should not be withdrawn from the coverage of the Act. The commercial withholding grounds should be sufficient to protect such information provided they are properly applied. There nevertheless will be occasions where the public interest in the type of information or the expenditure of money involved will justify disclosure of commercial information. As a judge has said, we cannot have developing "a commercial Alsatia beyond the reach of statute".

22 We do, however, look at a number of possible reforms. In particular the Ombudsmen currently give a narrow interpretation to the expression "commercial", holding that it implies a profit-making motive. A number of our respondents took issue with this, saying that involvement in commercial activities is not always done with a profit motive, but sometimes simply for the purposes of better government. We have not formed a view on this and ask for comment.

23 We also discuss information held by agencies in which the intellectual property belongs to others. We wonder whether the concepts of "trade secret" and "information supplied in confidence" need to be further defined in the Act, but conclude this would not help much. We emphasise that the existence of intellectual property in information is not automatically a ground for withholding it. There may be cases, although they are likely to be few, where the public interest in disclosure would over-ride all else. We also recognise that applying the public interest test once a commercial interest withholding ground has been identified is difficult, and not always properly done. We think that better guidance, coupled with reliance on precedent as suggested in chapter 3, is probably the best avenue for creating certainty.

Chapter 6 Protecting privacy

24 There is no attempt to define privacy in the Act, and we note that it was passed well before the Privacy Act 1993 which has developed our understanding of privacy. We discuss the awkward interface between the OIA (and LGOIMA) and the Privacy Act. The two Acts begin with different presumptions, the Privacy Act with the presumption that personal information will not be disclosed unless certain statutory reasons are made out, and the OIA with the presumption that such information will be released unless the privacy withholding ground can be made out (it in turn being able to be overridden by a public interest in disclosure).

25 We received a few suggestions that it might be possible to align the two statutes, but have reached the conclusion that this would require quite complex reasoning on the part of those applying the Act. Such an alignment of the two Acts in fact sounds a lot easier than it would turn out to be in practice. We wondered whether a threshold test should be introduced to the OIA and LGOIMA to provide that only unreasonable disclosures of private information could trigger the withholding ground in these Acts. However, not only might this be taken to narrow the withholding ground: it may in fact lead to greater confusion on the part of those reading the Acts. So our present inclination is to leave the wording as it is. We think that analysis of the Ombudsmen case notes and practice guidelines drawing on those cases will serve the purpose here as elsewhere.

26 In this chapter we also ask whether the privacy protections for deceased persons should continue and whether there is need to expressly safeguard the privacy interests of children. We also draw attention to a matter which was also raised in our review of the Privacy Act, that is to say whether public sector agencies should be able to use the OIA to share personal information about individuals. We do not think they should.

Chapter 7 Other withholding grounds

27 In this chapter we look generally at some withholding grounds and administrative reasons for refusal not dealt with elsewhere. We comment on the distinction between the conclusive withholding grounds and the grounds which are overridable by public interest in disclosure, and note that the distinction between some of those grounds is not as great as might have been supposed. However we do not suggest that any amendment to the Acts is warranted.

28 We particularly discuss the reason for refusal that the information requested "is or will soon be publicly available". We are satisfied from some of the responses to our survey that this is misused by some agencies to delay the release of information for an unreasonable time. We think that this may be one of the areas where statutory amendment would help, and we suggest an amendment to the effect that the reason only applies if the information is to be made publicly available within a very short time, and its immediate disclosure would be administratively impractical.

29 We also discuss the problematic, and conclusive "maintenance of the law" withholding ground. Its main application is to uphold the prevention, investigation and detection of offences and a right to a fair trial. However it is clear that some agencies use it well beyond this fairly narrow scope to protect any information they have received in the course of an investigation they are carrying out, whether that investigation relates to wrongdoing or not. We do not think the ground was ever intended to be used in this situation. Yet we think that the interest which agencies who thus use the ground are trying to protect has substance, and suggest that a new withholding ground should be added to the Acts to make provision for it. The ground would be to the effect that withholding is necessary to protect information supplied in the course of an investigation or inquiry where disclosure is likely to prejudice the conduct or outcome of that investigation or inquiry. But we can see no reason why this should be a conclusive ground in the way that "maintenance of the law" is; it should be subject to the public interest override.

30 We also ask about the possibility of adding a further withholding ground to the OIA to protect cultural matters. There is currently one in LGOIMA but it is narrowly confined to resource management matters to avoid serious offence to Tikanga Māori or the disclosure of Wahi Tapu. We would like to hear whether there is a need for a more broadly framed provision in both the OIA and LGOIMA to protect cultural interests.

Chapter 8 The public interest test

31 Protecting the public interest in disclosure is a central concept of the legislation. The majority of withholding grounds can be overridden by the public interest in disclosure of the information. We have the impression that many agencies and indeed requesters do not find it easy to understand and apply this test.

32 The term 'public interest' is not defined in the Acts, but that is not surprising: the expression appears in very many acts of parliament (legislation websites refer to over 1000 instances) and in none of them does it seem to be defined. It also makes its appearance in common law so is a familiar expression to lawyers but less so to others. We do not think there would be much profit in trying to define it in the Acts, but we do consider whether there might be benefit in statutorily listing a number of factors which are relevant when considering whether it is in the public interest to disclose. This approach has been taken in some of the Australian legislation, most notably in Queensland where the act contains a very long list of factors.

33 However we think there are dangers in such legislative prescription. There is a risk that some of those applying the provision might treat the list as exhaustive, which it could never be. It could also lead to rigidity in an area where flexibility and ability to move with the times are particularly important. Yet again we believe that a set of guidelines informed by case examples is the best way forward. This is an area in particular where concrete examples could be particularly useful.

34 Rather more concerning, however, were admissions that we had from some agencies that once a withholding ground is made out, they are inclined not to consider the public interest in disclosure at all, or at least to consider it in only a very perfunctory way. We suggest that there may be two ways of improving this situation. One would be to have a separate section in the Acts with its own marginal note, codifying quite separately the requirements to balance public interest in the case of the overridable withholding grounds. Another might be a provision expressly requiring agencies notifying requesters of decisions to withhold information to confirm that they have considered the public interest in disclosure and what interest they considered. This kind of certification requirement would at least mean that attention is focussed on the ground. We are interested in this chapter in discovering whether submitters have other ideas for improving understanding and use of the public interest test.

Chapter 9 Requests – some problems

35 In this chapter and the next we discuss some of the practicalities of handling and processing requests. We deal here with some problems for agencies. The majority of requests are reasonable and manageable, but it is clear that from time to time requests are made which place considerable burdens on agencies. Among them are requests for a very large number of documents, all of which need to be perused by the agency to ensure that there are no grounds for withholding all or any parts of them. Others are framed in very broad terms and are effectively "fishing" requests to see whether the large amounts of information requested might contain anything of interest. Sometimes particular requesters ask again and again for variants of the same type of information.

36 Most agencies can tell stories of requests which have involved literally hundreds of hours of staff time over and above normal duties, in locating, assessing and then collating information for a requester. One agency said to us, "in some areas such as fishing expeditions, I think we have reached the tipping point in terms of cost benefit." There needs to be a balance. The Danks Committee itself acknowledged that. Large requests are often made with perfectly proper motives, and sometimes the requester simply does not understand the magnitude of what he or she is asking for. At other times the motive may simply be to find material to embarrass an adversary. Any change in this area must get the balance right. Any steps to relieve agencies of unreasonable burdens must not prejudice or deter genuine requesters.

37 There are currently a number of mechanisms in the Act which agencies can use to ameliorate the worst effects of unreasonably large requests. Our impression is that some agencies are reluctant to use them for fear of seeming obstructive. In this chapter we make some suggestions which taken together may help to alleviate some of the current difficulties.

- First, the Acts currently require that a request must be made with "due particularity". We suggest redefining that term in plain English to clarify its meaning that the request should refer as precisely as possible to the required information.
- Secondly, agencies can contact the requester personally where a request seems overly broad and it is often then possible to agree on a narrowed-down request which meets the requester's needs. We suggest that a requirement of discussion with the requester where practicable should be included in the Acts.
- Thirdly, charging requesters is used inconsistently with large requests and we suggest in chapter 10 that charging practice should be more uniform, with provision for regulations laying down clear rules across the board.
- Fourthly, there is currently power to refuse a request if it involves "substantial collation or research", but it is not certain whether this encompasses review and assessment of the information which often takes a very considerable amount of time. We suggest the position should be put beyond doubt by expressly acknowledging these functions in the Acts. We also suggest it should be clear that the word "substantial" is relative to the size and resources of the agency concerned.
- Fifthly, it is currently possibly to refuse a request if it is "frivolous or vexatious". We suggest that might well be defined in modern plain language. We also suggest there would be benefit in expressly providing that the past conduct of the particular requester can be taken into account in deciding whether the request in question is vexatious. That is effectively the position now, but it seems to be much misunderstood.
- Sixthly, we ask whether it should ever be possible for a particular person to be declared a vexatious requester. Some overseas legislation does recognise this concept. We suggest that if a requester has been persistently making requests in such numbers and of such a nature that they are unnecessarily interfering with the operations of the agency, the agency should be entitled to tell that person it will not respond to any more requests. Such a notification could be appealed to the Ombudsmen. We also suggest it should be a ground for refusing a request that the same information has been provided, or refused, to the same inquirer on a previous occasion.

38 We received some suggestions that requesters should state the purpose for which they want the information. This could be relevant in deciding whether a particular requester is vexatious, whether rules about charging should apply, determining whether a release would be in the public interest and helping to refine an overly broad request. However, we feel in the end that this is not only unlikely to be effective but also difficult to reconcile with the purpose of the legislation.

39 Finally in this chapter, we discuss the confusion which undoubtedly exists about what constitutes a request under the act. Some people, both requesters and agencies, seem to believe that an OIA (or LGOIMA) request must be in writing and must specifically refer to the Act. This is not the case. Any request for information from an agency is effectively an official information request. Such has been the confusion we suggest this is another instance where an amendment to the Act might help. It might state that requests can be oral or in writing, and that they need not refer to the relevant legislation.

Chapter 10 Processing requests

40 We often hear complaints about delays by agencies in producing requested information. Recent research, however, indicates that the great majority of requests are responded to well under the statutory maximum of 20 working days. We do not make any proposal that that maximum time limit be reduced. In one respect, however, an amendment may be desirable. The 20 working day limit, as the Acts are currently framed, relates to the time taken to make the decision to release or not, not to the actual release. It might help, we think, if the Acts further provided that the actual release of the information should follow as soon as reasonably practicable thereafter.

41 In relation to the power to extend time, we propose, as the Law Commission did in 1997, that the complexity of the request be a ground for extending time. We wondered whether there should be a maximum time of any period of extension, but are mindful of the risk that any stated statutory maximum extension limit may tend to become the default time limit. So unless we hear from submitters that the currently flexible approach is being abused we prefer to stay with the present position where there is no statutory maximum for a time extension.

42 In this chapter we also consider requests which are said to be urgent. We think there is no need to change the present law because undue delay in responding is treated in the same way as a refusal and is therefore a ground of complaint. The urgency of the request is, we think, a consideration in determining whether delay is "undue" or not. However, we ask whether the Acts should expressly provide clarity on that point.

43 The topic of consultation is a vexed one in a number of contexts. Agencies to whom a request is made will often wish to consult, either with other agencies who may hold some of the information, or with ministerial offices, or with third parties to whom the information relates. The last two merit discussion. The desirability of agencies sometimes consulting their ministers before the release of information is undoubted, but not without its difficulties. Guidelines do exist at the moment but we feel that they could be expanded so as usefully to cover things such as who

should be responsible for which type of decisions, and the process for interaction between department and minister on matters in which there is likely to be political interest.

44 As to consultation with third parties, some overseas jurisdictions do have a requirement for consultation before releasing information affecting third parties. While such consultation is highly desirable (and commonly happens now) we stop short of suggesting that it should be compulsory given the time pressures already on agencies. We suggest instead that prior notice should be given of a decision to release in order to give the third party an opportunity to challenge the release.

45 Another area of difficulty is transfer. There is currently provision for transferring a request to another agency where the transferring agency does not hold the requested information, or where the request is more closely connected with the other agency. What is not expressly provided for, however, is transfers of part of the request, and we suggest the Act should make express provision for this. Questions also sometimes arise about transfer from departments to ministers. It has been proposed the OIA should allow transfer to a minister where the department and minister disagree on whether the information ought to be released. We do not favour such an amendment, and believe transfers should properly be permitted only on the grounds presently spelt out in the act. Our preferred option for dealing with the relation between ministers and their departments is to have clear guidelines in place, as we have intimated earlier.

46 The Act currently provides that information released to the requester may be released in a number of different ways, but with a preference for the manner preferable to the requester. One or two responses to our survey suggested that release in electronic form should become the norm because, among other things, it places any cost of printing on the recipient rather than the agency. Release in electronic form is perfectly permissible now, but we do not agree that it should be mandated by the Act. The guiding presumption should still be that the requester should receive the information in the form he or she wants unless it would "impair efficient administration". We also discuss whether there should be an obligation to supply metadata and note overseas developments on this topic.

47 An important issue once information has been released is the uses to which it can be put by the recipient. The fact that it has been released under the OIA or LGOIMA does not automatically mean that the recipient can publish it to the world. It might be defamatory, it might be in breach of confidence, or it might be in breach of copyright. An agency can release material which it might otherwise have withheld on condition that it is used only in a certain way. There appears to be nothing wrong with this practice, and we do not think the Acts need to make explicit provision for it. Effectively it operates now by way of agreement.

48 Certain initiatives are in train to facilitate the reuse of released material. If there is no copyright in the information released, agencies are already encouraged to accompany the release by a "no known rights" statement. The NZGOAL initiative proposes the use of Creative Commons licences to allow the reuse of copyright material on conditions. None of those, however, cover material which is in breach of some other law such as defamation.

49 The final issue dealt with in this chapter is that of charging. The Act currently allows agencies to charge a reasonable sum when they release information, but there is great variability among agencies as to whether they charge and how much they charge. Guidelines prepared by the Ministry of Justice are in existence, but they do not apply to LGOIMA. There seems to be a fairly general feeling that more certainty would be desirable. We propose that regulations should be made under both Acts laying down clear principles for charging. The use of regulations as opposed to guidelines would make sure that the rules were authoritative, clearly understood and uniform. It would give confidence to agencies who are currently uncertain whether to charge or not. We are certainly not suggesting that charging should be general practice, but there do seem to be occasions now when requests are of such a kind, and impose such resource costs on an agency, that some charge to recoup those costs would not be unreasonable. A balance should be drawn between public duty and private benefit. We acknowledge that framing such rules, together with the necessary exceptions to them, will not be at all an easy matter and suggest some options to consider. We seek views on the concept of charging regulations and on what their content should be.

Chapter 11 Complaints and remedies

50 In this chapter we deal with complaints and remedies. We outline the current complaints system operated by the Ombudsmen, and note that it is a composite of some procedures laid down in the Ombudsmen Act and others peculiar to the official information legislation. We think the whole process should be contained in the OIA and LGOIMA even if that involves replicating the aspects currently in the Ombudsmen Act.

51 We consider whether there should be any new grounds of complaint, and conclude that improper or untimely transfers should be able to ground a complaint. We have previously suggested that there should be an obligation to give notice to third parties before releasing their information; if that comes about, failure to give such notice should also constitute a ground of complaint.

52 We then ask a vexed question on which we ourselves do not yet have a settled view. It is whether there should be "reverse" freedom of information complaints. Currently complaints can be made if information is withheld but there is no ground of complaint if information is released when on a proper application of withholding grounds it should not have been. The most likely instance would be private personal information or confidential commercial information in respect of which there was a valid withholding ground and no overriding public interest in release. By virtue of section 48 of the OIA and section 41 of LGOIMA, no legal action can be taken against the agency for releases such as this, and there is an argument for saying that no complaint should lie to the Ombudsmen either, because the very existence of the jurisdiction could have a chilling effect on release in marginal cases. However one can also see the case for saying that an agency which has caused harm to an individual or organisation by careless or inadequate processes should be subject to redress. We particularly invite comment on this. If it is felt that there should be a complaint there is the further questions of whether that should be done via the official information legislation or the Ombudsmen Act.

53 The most substantial question which with this chapter deals however is the question of the so called "veto". Currently if an Ombudsman, having investigated a complaint, decides that information should be released the Ombudsman will so recommend to the agency concerned. The agency is then under a "public duty" to release the information unless, in the case of the OIA the recommendation is reversed by Order in Council (that is to say effectively by Cabinet), and in the case of the LGOIMA by the local authority itself in a meeting. Appropriate procedures and publicity are required. We trace the history of the veto, noting that in the case of the OIA the power of veto originally resided in the minister concerned, but was transferred to full Cabinet in 1987. No recommendation has ever been vetoed by Cabinet, and in the case of LGOIMA we know of only two cases where a local authority has exercised the power. This is a result, no doubt, of the adverse publicity which would result from doing so, and also of the respect for the authority accorded to decisions of the Ombudsmen.

54 We propose that the veto in both LGOIMA and the OIA be done away with, in which case the only means of challenging the Ombudsmen's decision would be via judicial review. We discuss the implications of this, and acknowledge there has to date been resistance to dispensing with the veto power. It can be seen as recognising an appropriate constitutional balance and comity. But given its virtual non-use and the consequences which would follow from its exercise we think it is no longer necessary to retain it. In that event it would no longer make sense to call the Ombudsmen's 'recommendations' by that name. It is virtually a contradiction in terms to say, as the Acts now do, that the recommendation imposes a public duty to comply. We think the Ombudsmen's finding should better be called a "decision" or "determination".

Chapter 12 Proactive disclosure

55 Proactive disclosure of official information is an important and live issue internationally. Information technology facilitates electronic publication of material by agencies without it having been requested by anyone, in a way never possible before. Most agencies do publish important information and documents on their websites. The advantages of this process go without saying. The agency is saved the trouble of responding to perhaps several requests for the same material, and no member of the public is given unique advantage because the material is available for all at the same time. Agencies can also plan release rather than being confronted with unplanned and unsolicited requests. There are however costs involved, including the costs of vetting all the material before publication to make sure that none of it should be withheld.

56 A number of policy frameworks in NZ encourage proactive release. The Policy Framework for Government-held Information released in 1997 states that government departments should make information available "easily, widely and equitably". The Digital Strategy 2.0 published in 2008 says that "the government is committed to making public information available to everyone. The information should be available in the way you want it when you want it." And now most recently there is the New Zealand Government Open Access and Licensing Framework (NZGOAL) released in August 2010. Although not mandatory, NZGOAL establishes a preferred framework for the public release of copyright and non-copyright information held by state services agencies, and provides the

means for facilitating the reuse of such material. In addition there are a number of websites that act as directories or portals to public sector information. The Office of the Ombudsmen's statement of intent for 2010–2013 has identified the promotion of proactive release as a strategic priority.

57 In a number of overseas jurisdictions there are statutory requirements to publish certain kinds of information, and requirements for agencies to produce publication schemes by which they commit themselves to the progressive publishing of information. The question is what should be done about this in NZ. There is a certain amount of information that agencies are currently legislatively required to publish – by virtue of the Public Finance Act, the State-owned Enterprises Act, the Crown Entities Act and the Local Government Act for example. Currently the Ministry of Justice is required to publish a Directory of Official Information stating what types of information each state agency holds. We do think there would be point in requiring each individual agency to carry on its website the types of information currently required to be published in this Directory of Official Information.

58 At this stage we are not inclined to propose that the publication of further categories of information be mandatory, but rather to require that agencies take all steps which are reasonably practicable to proactively make information publicly available, taking into account the type of information held by the agency, the public interest in it, and the resources of the agency. Such an "all reasonable steps" provision would incentivise agencies to move progressively towards more open availability. It aligns with the strong encouragement focus of the existing policy statements. We suggest in a later chapter that there should be an agency or agencies with oversight of the official information legislation and one function would be to promote and encourage the ongoing availability of official information and its proactive release.

59 We believe, then, that an "all reasonable steps" provision is the best way to proceed at the moment, but need to ask what is to happen if that does not work. We propose for discussion two options to deal with that contingency – either a regulation-making power which could be used to mandate the publication of certain categories of information, or a review of the Acts in three years to see whether something stronger is required.

60 Some overseas jurisdictions have disclosure logs in which agencies that have released official information are required to record this on a log page so that other persons are able to request it or otherwise access it. We are not presently inclined to suggest that this be required in New Zealand.

61 Proactive disclosure raises a further difficult question. Currently section 48 of the OIA (section 41 LGOIMA) provides that agencies which disclose information on request are not subject to legal liability for the release. For example they are not liable in defamation if the released information contains defamatory material. If we are to move to a regime of more proactive disclosure there is a question whether similar protection should apply to agencies which proactively release material. We think not. It is one thing to be required to release information on request, it is another to decide proactively to make it available to whole world. We presently think that proactive disclosure should be at the risk of agency concerned. To give it complete protection would be a considerable step, and would be at the expense of an individual's legal reputation and rights.

62 The complaints investigation function is vested in the Ombudsmen under both Acts. Under the OIA, the Ministry of Justice has a duty to publish a Directory of Official Information, and a discretionary function to furnish advice or assistance to departments or organisations. There are no functions or duties in either Act to provide guidance, education or training, and no agency is given the express statutory function of overseeing and monitoring the operation of the legislation.

63 In fact the Ombudsmen have by default taken over the guidance function and they also provide some training to agencies which ask for it. In doing so they are going beyond what is required by the Acts. The State Services Commission also occasionally issues guidance, most notably guidance about consultation between departments and ministers. There is no longer any equivalent to the Information Authority which ceased to exist in 1988.

64 In this chapter we suggest that the Act should specifically require four functions to be carried out:

- investigation of complaints;
- provision of guidance;
- promotion and education;
- oversight.

65 The oversight function would have several dimensions: monitoring the operation of the Act; a policy function of reporting on prospective legislation or policy relating to access to official information; a function of reviewing the Acts periodically; and finally a function of promoting the increasing availability of official information, including the proactive release of such information.

66 Several other more recent Acts, in particular the Privacy Act 1993, stand in stark contrast to the OIA in conferring such functions. We recommend the creation of these functions in the OIA and LGOIMA for a number of reasons. As earlier stated, there is currently misunderstanding and uncertainty about many of the Act's provisions. Guidance, training and education are important, yet no one is charged with that duty. Nor does anyone keep statistics on the operation of the Acts, or the requests or complaints made under it. It is difficult to assess with certainty how well they are working. Publicity is accorded only when a complaint is made to the Ombudsmen, and even that publicity is of a limited kind. The OIA expressly states that its purpose is to progressively make official information available, yet no one is charged with incentivising or overseeing that progressive development. We believe that the functions we suggest would go a long way to curing these deficiencies.

67 The next question is who should exercise these functions. We favour the Ombudsmen retaining the complaints jurisdiction and also the function of giving guidance. We see no incompatibility in the same office having both functions. Indeed the Ombudsmen's detailed knowledge of the Acts gained through the complaints process means that they are the best placed to give guidance on their operation. We are less certain about who should promote the Acts and educate both agencies and the public on their operation. We have no doubt that

the Ombudsmen should in some way be engaged in the provision of that education, but the promotion and arrangement of it may well belong more to an oversight body.

68 We think, on the other hand, that the oversight function should be performed by a body which can stand back from the day-to-day operation of the Acts and assess their working in general. We currently think that the most appropriate agencies to do this are the State Services Commission in relation to the OIA and the Department of Internal Affairs in relation to LGOIMA. The Acts should, we think, require an official in those agencies to be designated as being in charge of the official information function.

69 There is certainly some interest in the creation in this country of an Information Commission of the kind which is developing in a number of other countries, but currently we are not yet persuaded such a move is necessary here. There would be cost involved and the functions can be performed by existing agencies. However we are interested in testing opinion on this, and ask also, if such a Commission were to be set up, what its functions should be. Should it do everything from complaints through to oversight, or be confined to oversight? What about the promotion and training function?

Chapter 14 Local Government Official Information and Meetings Act 1987

70 In this chapter we look specifically at the LGOIMA and note the differences between it and the OIA. Most of the differences are an inevitable result of the different constitutional arrangements between central and local government. The one has a unitary structure culminating in Cabinet, while the other comprises a large number of local authorities each governing its own area. The withholding provisions in the Acts, while very largely the same, reflect those differences, as does the very definition of "official information". Likewise the power of veto is vested in Cabinet in relation to central government but in each local authority in the case of local government. The Ministry of Justice has functions under the Official Information Act but not under the LGOIMA.

71 There are, however, a few other differences which seem less justifiable. For example the persons who can request information under the two Acts differ. In the one case they must be either resident in or present in New Zealand, but in the other that is not required. Whereas the purpose statement of the OIA states that it is a purpose of the Act to make official information progressively available, that is not so in the LGOIMA. We can see no reason for these differences and suggest that the two Acts should be aligned with regard to them. In particular we think that the purpose sections in both Acts should include *progressively* making official information available.

Chapter 15 Other issues

72 This chapter deals with some miscellaneous issues. The first is whether the Acts should be repealed and completely redrafted and re-enacted, or whether they should simply be amended. We recommend few drafting changes to the withholding grounds. In relation to other matters we do recommend some changes in the hope they will help to change or clarify practice. There will also need to be additions to the Act to deal with the new functions we propose and the institutions that will deal with them. Alone these changes would probably not justify repeal and re-enactment. But we also heard criticism of the order and structure of the Acts. They do not follow any logical order, and are not easy for newcomers or even the initiated to find their way around. So on balance we prefer complete redrafting.

73 We also received some opinion that the two Acts should be combined into one because they are the same in so many respects. But in our view there will remain enough differences for it to be quite confusing to combine them in one Act. A person interested only in local government would need to pluck from the new composite Act those provisions dealing with that. It is simpler for users to go to one Act which deals solely with their relevant area, either central government or local government. So for that reason we at this time favour keeping the two Acts separate.

74 We also consider whether there needs to be any alignment between the Public Records Act 2005 and the official information legislation. The Public Records Act (PRA) is intimately involved with, and very important for, the OIA and LGOIMA. It provides for good recordkeeping and for the retention and disposal of information. "Information" is very widely defined in the official information legislation, and "record" is equally widely defined in the Public Records Act. The interface between the two pieces of legislation is obvious; in essence only information that must be retained under the PRA will in the longer term be available to requesters under the OIA and LGOIMA. This raises the question as to whether, when compliance with the PRA is sufficiently developed, there should be a ground for complaint to the Ombudsmen or another body if agencies do not keep information in accordance with the PRA. We currently do not believe that either piece of legislation needs to be amended to fit with the other.

Chapter 1
Background

SCOPE OF REVIEW

1.1 This issues paper is part of the Law Commission's review of official information legislation. Specifically, we are reviewing:

- the Official Information Act 1982 (OIA); and
- the official information provisions of the Local Government Official Information and Meetings Act 1987 (LGOIMA).[1]

New Zealand's official information legislation is now more than 25 years old. It therefore seems timely to review it, taking into account the major constitutional, technological and other changes that have taken place since 1982.

1.2 In this review we will not be considering:

- Part 7 of the LGOIMA, which deals with various matters relating to local authority meetings, or section 44A in Part 6 of that Act dealing with Land Information Memorandums; or
- secrecy provisions that remain in place in a number of statutes (such provisions require members and employees of certain government agencies not to disclose specified types of official information).[2]

1.3 Moreover, we cannot in this review hope to canvas the entire field of the management of official information. Our focus must always be on matters that relate to the current, or possible future, provisions of the OIA and the LGOIMA. Nonetheless, at various points in the paper we do touch on some larger issues about the management of information, including issues arising from changes in technology, and consider their implications for the two statutes.

1.4 Some other current Law Commission projects are relevant to this review:

- The Law Commission's review of the Civil List Act 1979 will involve consideration of whether some agencies associated with Parliament should be brought within the coverage of the OIA.[3]

1 LGOIMA, Parts 1–6.

2 The Law Commission gave some consideration to statutory prohibitions on disclosure of information as part of stage 3 of its Review of Privacy: see Law Commission *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy Stage 3* (NZLC R113, 2010) at ch 8.

3 The final report in the Civil List Review project will be published later in 2010.

- The Law Commission is engaged in a major review of privacy law, including the Privacy Act 1993. In its issues paper on the Privacy Act, the Commission asked questions about the interaction of the OIA and the Privacy Act.[4] We discuss privacy issues in relation to the official information statutes in chapter 6 of this issues paper.

THE SCHEME OF THE ACTS

1.5 Government agencies, Ministers and local authorities produce and hold large volumes of information. The OIA and the LGOIMA provide a mechanism for citizens to access much of this. The Acts say that information must be given to those who request it, unless a good reason exists to withhold it. The Acts themselves set those good reasons out. Individuals are able to request "official information" from bodies and Ministers subject to either Act.

1.6 To receive information a person has to request it from the agency that holds it, either in writing or orally. They must do so with "due particularity" so the agency can understand what is being asked for. Upon receiving a request an agency will consider whether it is framed in sufficiently clear terms for it to respond. If not, the agency should assist the person to reframe their request. An agency or Minister has the power to refuse a request if it involves "substantial collation or research" and for other administrative reasons.

1.7 Agencies are required to respond to requests as soon as is reasonably practicable but in any case in no more than 20 working days. Both the OIA and the LGOIMA make provision for transferring requests to other agencies or Ministers in certain cases. Agencies and Ministers can impose conditions upon the release of information and can impose reasonable charges.

1.8 Both Acts are based on a presumption that information will be disclosed, but each recognises that particular interests exist that need to be protected, and provides withholding provisions which agencies and Ministers can engage to justify withholding some or all of the information within the scope of the request. Some of these withholding grounds are conclusive, meaning that information can be withheld if it offends one of the interests in the Act; for example national security. Other grounds can be overridden, where the public interest in the release of the information outweighs the interest; the privacy of natural persons for example.

1.9 To support officials who respond to requests and to provide some insight for requesters, the Ombudsmen have issued Practice Guidelines on the OIA and the LGOIMA. Guidance also exists in the Ombudsmen Quarterly Review, and informal guidance is sometimes given by the Office of the Ombudsmen.

4 See particularly Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC IP17, 2010) at 308–319. See also Law Commission *Public Registers: Review of the Law of Privacy Stage 2* (NZLC R101, 2008) at 52–53, discussing the official information statutes. The final report for stage 4 of the Privacy Review project will be published by early 2011.

1.10 Both Acts contain a complaints process for requesters who are dissatisfied with the response they receive from an agency or Minister or with a decision to withhold information. The Office of the Ombudsmen is responsible for receiving and investigating official information complaints. An Ombudsman has power to recommend that an agency or Minister release official information, and the agency or Minister becomes subject to a public duty to follow that recommendation unless the recommendation is "vetoed".

1.11 The Courts have a limited role to play under each Act. Provision is made for bringing judicial review of decisions but this is postponed by the Act until an Ombudsman has investigated a decision and made a recommendation.

PREVIOUS REVIEWS AND RESEARCH

1.12 There is an important body of research on the operation of the OIA, and to a much lesser extent the LGOIMA, that we can draw on in this review.[5] There has also been one previous review of the OIA by the Law Commission. We will cite this earlier work as appropriate throughout this issues paper, but here we briefly describe the earlier Law Commission review and two key research studies.

Previous Law Commission review

1.13 In 1992 the Law Commission was given a reference to review certain specific aspects of the OIA. Publication of the Commission's final report on that reference was delayed until 1997, in part so that the report could take account of the implications of the move to the mixed-member proportional (MMP) electoral system. In its report, the Commission commented that the OIA generally achieved its stated purposes, but that there were a number of factors that inhibited the effective operation of the Act and thus inhibited the wider availability of official information. It said:[6]

> The major problems with the Act and its operation are:
>
> - the burden caused by large and broadly defined requests,
> - tardiness in responding to requests,
> - resistance by agencies outside the core state sector, and
> - the absence of a co-ordinated approach to supervision, compliance, policy advice and education regarding the Act and other information issues.
>
> Neither these problems, nor the terms of reference, bring into question the underlying principles of the Act.

1.14 The Commission's report made a number of recommendations for specific amendments to the Act, as well as administrative reforms to assist the smooth operation of the legislation. A few of the Commission's recommendations were implemented by amendments to the Act introduced through a Statutes Amendment Bill in 2003, but most have not been implemented.

1.15 The Law Commission report is the only previous formal review of the OIA. As noted above, it was not a review of the Act as a whole but of certain provisions of the Act, although the Commission did make some more general comments on the Act's

5 Previous commentary on the OIA is summarised in Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007) at ch 9.

6 Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997) at 1.

operation. The Commission noted that most of the issues raised in its terms of reference also related to the parallel provisions of the LGOIMA.[7] We are not aware of any previous review that has focused on the official information provisions of the LGOIMA. A 1990 report of a working party on the LGOIMA was focused on Part 7 of the Act (the part dealing with local authority meetings), although it did make some recommendations about the coverage of the Act that were also applicable to the official information provisions.[8]

Research projects

1.16 In the past few years there have been two major research studies on the OIA (both studies focused solely on the OIA, and did not consider the LGOIMA). These studies are important sources of data for our review.

1.17 Steven Price from the Faculty of Law at Victoria University of Wellington undertook research in 2002.[9] His research had two parts: an analysis of agencies' responses to OIA requests, and two informal roundtable discussions (one with requesters and one with agencies that handle requests).[10] He analysed the views of requesters and officials, as well as various features of the requests and responses (including sources of requests, processing time, information withheld and grounds used for withholding). His overall conclusions were that there are grounds for both comfort and concern in the results. Most requests were met in full and within the deadline, many requesters obtained useful information as a result, and many officials applied the Act conscientiously, giving proper consideration to the grounds in the OIA when information was withheld. On the other hand, a significant minority of responses were late; more often than not when information was withheld there was little evidence that due consideration had been given to the legal grounds for doing so; and there was a general failure to explicitly balance the public interest in making information available against the reasons for withholding that information.[11]

1.18 Nicola White carried out her research on the OIA while based at the Institute of Policy Studies at Victoria University of Wellington between 2004 and 2006. She had previously worked in senior positions in the public service where she had experience of responding to OIA requests. In addition to undertaking a comprehensive review of the existing literature on the Act, she interviewed 52 people about their experiences of the Act. These people were from a range of backgrounds, and included both requesters and respondents. Her research and conclusions were published as a book.

7 Ibid, at xiii.

8 IWG Cochrane, JF McLees and PW Pile *Report of the Working Party on the Local Government Official Information and Meetings Act 1987* (report to the Minister of Local Government, 1990).

9 Steven Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?* (New Zealand Centre for Public Law, Victoria University of Wellington, Wellington, 2005).

10 Ibid, at 7. Price submitted OIA requests to all national-level agencies subject to the OIA, asking for copies of their ten most recent OIA responses during the last year together with copies of the requests themselves: this information formed the basis of his quantitative dataset. In addition, he requested the last ten requests where information was withheld, the last five where the time limit for response was extended, and the last five in which a minister or minister's office was consulted before the response was prepared. This latter information was included in his qualitative analysis.

11 Ibid, at 50.

1.19 White identified ten key themes from her review of the existing literature on the OIA, which were confirmed by data from her interviews:[12]

- government is now much more open than it was before the OIA;
- many OIA requests are processed easily;
- there is still significant uncertainty on many detailed questions of substance and process in relation to the Act;
- the role of the Ombudsmen with respect to the OIA is settled;
- delay in responding to OIA requests is, and always has been, a problem;
- large requests are hard to manage;
- more training about the Act is needed within the state sector;
- protecting government decision-making remains contentious;
- electronic information will provide a major challenge for the Act; and
- it may be time to consider systems for pre-emptive release of official information.[13]

1.20 White concluded from her research that the OIA had played a major role in shifting the culture of government towards much greater openness; that the basic systems for processing OIA requests generally work well; that the quality of decision-making and advice within government had improved due to the increased scrutiny made possible by the OIA; and that the Ombudsmen had performed their role as the review authority for the Act well.[14] However, she also found that the Act continues to present significant difficulties and challenges: managing the interface between ministers and officials in relation to politically-contentious requests; managing large requests; dealing with issues relating to timeframes for responding to requests; meeting the challenges of information management in an electronic age; striking the right balance between openness and protecting government advice and decision-making processes; coping with the administrative burden of responding to OIA requests; and building up systematic expertise in the operation of the OIA within the state sector.[15] White makes a number of suggestions for responding to the challenges facing the Act, and we discuss some of these suggestions in this issues paper. Overall, she sees a need for clearer rules about the Act, and for a stronger leadership role by the State Services Commission in relation to the OIA.[16]

1.21 We have found Price's and White's research very helpful for our review. We agree with their conclusions that the OIA has had a beneficial effect in opening up New Zealand government to scrutiny and that it works well in many respects, but that some significant problem areas remain. We note that their research involved relatively small numbers of interviewees and did not cover the LGOIMA, which is why we have supplemented it with our own survey, discussed below.

12 Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007) at 91–93.

13 Ibid, at ch 21.

14 Ibid, at ch 22.

15 Ibid, at ch 23.

16 White's proposals for change are in ibid, at chs 25–32. Other useful commentary is contained in papers delivered at the Information Law Conference Marking 25 Years of the Official Information Act (15 May 2007).

THE MOVE TOWARDS OPEN GOVERNMENT

1.22 New Zealand is not alone in having moved from a regime of secrecy about the internal decision-making and administrative processes of government to one of relative openness and transparency. There has been a worldwide trend towards legislating for freedom of access to official information.[17] Freedom of information generally,[18] and the importance of citizens having access to government information in particular,[19] are also recognised in international law.[20]

1.23 Arguments in favour of open government and freedom of access to official information include:

- Freedom of information promotes participation in the democratic process by allowing people to be better informed about public issues and about the workings of government.
- Transparency and freedom of information allow government to be held to account. The scrutiny that comes with a right of access to official information helps to encourage good policy-making and to guard against corruption and malpractice. Access to official information also assists people to exercise other rights, and to seek redress when those rights are violated.
- Freedom of information and openness promote trust in government, while secrecy promotes suspicion.
- Government collects information on our behalf, with taxpayers' money, and for purposes that are supposed to benefit the country as a whole. Official information is therefore a resource that belongs to all of us, which we should be able to access.
- Official information is useful, not only for people within government but also for the wider society. Government collects and holds a lot of information that can be used and analysed beneficially by researchers, businesses, and others from outside government.

1.24 Prior to the enactment of the OIA, the framework for dealing with official information in New Zealand was set by the Official Secrets Act 1951, which was modelled on the Official Secrets Act 1911 (UK). Section 6 of the Official Secrets Act made it an offence for public servants to communicate official information except to persons to whom they were authorised or under an official duty to communicate it. This prohibition on disclosure was reinforced by provisions of the State Services Act 1962 and the Public Service Regulations 1964 prescribing disciplinary action for unauthorised disclosures.[21] Despite such provisions, the presumption against disclosure of official information began to shift in the

17 See National Freedom of Information Coalition "Freedom of Information Center: International FOI Laws" < www.nfoic.org > ; David Banisar "National Freedom of Information Laws, Regulations and Bills 2009" (2009) Privacy International < www.privacyinternational.org > .

18 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), art 19(2): "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds".

19 Convention Against Corruption (opened for signature 9 December 2003, entered into force 14 December 2005), arts 10(a), 13(1)(b) and (d).

20 See generally Patrick Birkinshaw "Freedom of Information and Openness: Fundamental Human Rights?" (2006) 58 Admin L Rev 177; Hugh Tomlinson "Freedom of Expression and Freedom of Information: Part 2: International Instruments and Other Jurisdictions" (6 May 2010) < http://inform.wordpress.com > .

21 Committee on Official Information *Towards Open Government: General Report* (Government Printer, Wellington, 1981) at 13.

early 1960s, and official information began to be made more widely available.[22] Nonetheless, the Official Secrets Act continued to encourage what former Chief Ombudsman Sir Guy Powles in 1980 called a "habit of secrecy in government" that was "so deeply ingrained" that legislative reform was needed to change it.[23]

1.25 In 1978 the Government established a Committee on Official Information, chaired by a former academic and Chair of the University Grants Committee, Sir Alan Danks. Apart from Sir Alan and Professor Ken Keith (later Sir Kenneth) of Victoria University of Wellington, the members of the "Danks Committee" were all senior public servants.[24] The Committee's terms of reference called for it to consider the extent to which official information could be made available to the public while bearing in mind the need to safeguard national security, the public interest and individual privacy. The Committee's findings were published in two reports in 1981: a general report setting out its overall recommendations for reform and a new legislative framework for dealing with official information;[25] and a supplementary report looking at the details of its proposed reforms and including a draft Official Information Bill.[26]

1.26 The essence of the Danks Committee's recommendations for reform was the presumption that official information will be made available unless there is a good reason to withhold it. To this end, the Committee recommended repealing the Official Secrets Act and enacting an Official Information Act. The Committee's recommendations were largely accepted by the Government and supported by the then Labour Opposition. The Official Information Act was passed in 1982, and came into force on 1 July 1983. One of its effects was to repeal the Official Secrets Act.

1.27 In 1985 the then Ministers of Local Government and Justice established a working group to consider the extension of the principles of the OIA to local government and to review the Public Bodies Meetings Act 1962. The working group reported in 1986, and recommended the enactment of a single piece of legislation (a draft Bill for which was included in the report) covering both access to local government official information and matters relating to local government meetings. They considered that as the OIA "had been drafted specifically to accommodate the existing institutional framework and the associated rules and conventions of government departments and organisations, it would be impractical to simply broaden the Act to apply to local authorities."[27] The Local

22 Greater openness about government processes was advocated by the 1962 Royal Commission of Inquiry on the State Services, and in 1964 a circular from the State Services Commission directed that information should only be withheld if there was a good reason for doing so: Committee on Official Information *Towards Open Government: General Report* (Government Printer, Wellington, 1981) at 21; Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997) at 145.

23 Sir Guy Powles "Freedom of Information and the State" (paper for conference on Freedom of Information and the State, Victoria University of Wellington, 6–7 December 1980) at 2, quoted in Rick Snell "The Kiwi Paradox: A Comparison of Freedom of Information in Australia and New Zealand" (2000) 28 Fed LR 575 at 579.

24 They were Mr B J Cameron, Mr W B Harland, Mr W Iles, Mr D B G McLean, Mr P G Millen and Dr R M Williams.

25 Committee on Official Information, above n 21.

26 Committee on Official Information *Towards Open Government: Supplementary Report* (Government Printer, Wellington, 1981).

27 *Report of the Working Group on Official Information in Local Government* (report to the Minister of Local Government and the Minister of Justice, 1986) at 5.

Government Official Information and Meetings Act 1987, based on the working group's report and with official information provisions closely modelled on the OIA, came into force on 1 March 1988.

KEY CHANGES TO OFFICIAL INFORMATION LEGISLATION AND OVERSIGHT SINCE 1982

1.28 In addition to the extension of freedom of information legislation to local government by the LGOIMA, there have been a number of other particularly significant changes to official information legislation since 1982. Amendments to the OIA in 1987 introduced time limits for responses to OIA requests; extended the OIA's coverage to bodies such as hospital boards, education boards and universities; and provided that Ombudsmen decisions that information should be released could only be vetoed by a decision of Cabinet through Order in Council, rather than by an individual minister as was previously the case. The State-Owned Enterprises Act 1986 provided that State-Owned enterprises would be covered by the OIA. Their equivalents at local government level, council-controlled organisations (previously known as local authority trading enterprises), were only brought within the coverage of the LGOIMA with the enactment of the Local Government Act 2002.[28]

1.29 Another major change occurred with the enactment of the Privacy Act 1993. Previously, the OIA and the LGOIMA had provided for a right of access by individuals to information about themselves held by central and local governments. The Privacy Act created a generic regime for access by natural persons to information about themselves, regardless of whether that information is held by public or by private sector agencies. Accordingly, the provisions of the OIA and the LGOIMA concerning rights of access to personal information were amended so that they no longer apply to requests by natural persons for information about themselves but do still apply to requests by bodies corporate covered by the OIA for such information.

1.30 As well as legislative changes, there have been some important administrative changes to oversight of official information legislation since 1982. The Danks Committee recommended the creation of an Information Authority with a regulatory and monitoring function in relation to the OIA, including the development of guidelines or rules as to when and how particular categories of information should be made available.[29] The need for such a body was widely questioned, but the Government accepted that an Information Authority should be created for the initial "bedding in" period of the Act's operation. It was therefore established with a sunset clause providing that it would expire in 1987. During its short life, the Information Authority focused on reviewing existing secrecy provisions in legislation and recommending the repeal of many of them. It also produced papers and reports on various aspects of the OIA, including a report on personal information that laid out some of the groundwork for the Privacy Act.[30] The State Services Commission also had an important training and guidance role in the early years of the OIA. Since the Commission's functions were limited by the State Sector Act 1988 it has played only a minor role in relation to official information. In 1988, following the expiry of the Information Authority, the Ministry of Justice became responsible for the OIA. It initially

28 Local Government Act 2002, s 74.

29 Committee on Official Information, *above* n 21, at 31–33; and above n 26, at 15–22.

30 Information Authority *Personal Information and the Official Information Act: An Examination of the Issues* (Wellington, 1985). For more on the work of the Information Authority, see White, above n 12, at 41–44.

established an Information Unit in recognition of this responsibility, but this unit disappeared when the Ministry was restructured in 1995.[31] The Ministry of Justice remains responsible for the OIA, while the Department of Internal Affairs is responsible for the LGOIMA.[32] We discuss oversight and support issues in chapter 13.

CHANGING CONTEXT FOR OFFICIAL INFORMATION LEGISLATION

1.31 There have been major political, technological and social changes since official information legislation was introduced, and any reform of the legislation must take these changes into account.

Constitutional and legislative

1.32 In this sphere the changes have been of two main types. First, there has been significant restructuring of the state since the 1980s, which in turn has several aspects. Privatisation and corporatisation have seen some organisations leave the public sector, while others have remained within the state sector but have radically changed their forms and mandates. New types of entities, completely unknown when the OIA was enacted, have been created: state-owned enterprises, district health boards and Crown research institutes, among others. This raises some difficult questions about which types of entities should be within the OIA's coverage, a topic we discuss in chapter 2. State restructuring may also have led to a loss of institutional memory with regard both to the application of the OIA and to management of records and information.

1.33 The State Sector Act 1988 also introduced changes that have implications for the administration of the OIA. That Act replaced a unified public service with relatively autonomous government departments, and more clearly delineated the separate responsibilities of Ministers and heads of departments. Chief executives of government departments gained considerable decision-making power and autonomy. In relation to the OIA, this means that chief executives can release official information on their own authority, with little or no oversight from the State Services Commission or any other body. Local government, too, has undergone major restructuring, with council chief executives taking on a similar role to that of their central government counterparts, and similarly having their management role more clearly distinguished from councils' policy role. More recently, the Local Government Act 2002 gave local authorities greater powers and signalled an intention by central government to keep at arm's length from local government. Thus, restructuring at both the central and local government levels may have increased the potential for tensions over release of information between elected representatives (Ministers or councillors) and chief executives or other officials; and made it more difficult to achieve consistency in the application of official information legislation between different government agencies or local authorities.

31 The activities of the State Services Commission and the Ministry of Justice in relation to the OIA are discussed in White, above n 12, at 44–46.

32 Cabinet Office *Directory of Ministerial Portfolios as at January 2010* at 46, 50.

1.34 The second set of changes applies at the central government level and arises from the move to an MMP electoral system. In many respects, MMP has fundamentally altered New Zealand politics.[33] Some of the implications for the OIA of the adoption of MMP are as follows:

- The OIA provides that information can be withheld in order to maintain the constitutional conventions that exist for the time being.[34] The advent of MMP has changed these conventions in certain respects, as discussed in chapter 4.
- The extensive use of the OIA by members of parliament and researchers for opposition political parties was not anticipated by the Danks Committee,[35] but is now a major feature of the OIA landscape.[36] While this development is not a product of MMP alone, it has certainly been accelerated as a result of the increased number of political parties and of the competition between those parties. In the first few years after the adoption of MMP, the number of complaints to the Ombudsmen from Parliamentary requesters rose significantly.[37]
- Coalitions and other support arrangements have become essential to governing under MMP, but can create complications for the application of the OIA. Former Chief Ombudsman John Belgrave commented that "the majority of concerns about disclosure of information in the MMP context relate to timing and the need to honour undertakings of confidentiality during the process of inter-party (and intra-party) negotiations during deliberative phases of the policy process", although he felt that the existing provisions of the OIA were adequate to deal with these concerns.[38]

Technological

1.35 The technological context for official information legislation has changed almost beyond recognition over the past 30 years. When the OIA was enacted, official information was still mainly in the form of hard-copy documents. Since then, the digital information revolution has radically transformed the nature and uses of official information. The volume of information that can be produced, collected and stored has increased dramatically. Official information can take new forms, such as email, tweets, text messages, blogs and digital video. Digitisation and advances in software allow information to be analysed in ways that were not envisaged when it was created or collected, revealing previously unknown relationships, patterns or trends. These developments have significant implications for the management of information within state sector organisations and for the uses that can be made of that information.

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33 See Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004) especially at 13–18; Ryan Malone *Rebalancing the Constitution: The Challenge of Government Law-Making under MMP* (Institute of Policy Studies, Wellington, 2008).

34 Official Information Act 1982, s 9(2)(f).

35 White, above n 12, at 31–32.

36 See for example the findings of Price, above n 9, at 21. Of the requests Price analysed, 23 per cent were classified as being 'political', in that they came from MPs, political staff or political research units.

37 White, above n 12, at 55–56.

38 John Belgrave, former Chief Ombudsman "Open-and-Shut Legislation? The Official Information Act" (speech to LexisNexis Information Law conference, Auckland, 21 July 2006) at 5–6. See also Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997) at 20–22.

1.36 Reactions differ as to the significance of these technological advances for the OIA. Some requesters feel that the Act's time limits for responding should be truncated, given that information can be retrieved at the touch of a button. Officials believe, however, that technology can actually make things more difficult. The public service now has to deal with more and more information. Email 'trails', and numerous earlier drafts of documents, mean more material to collate, scrutinise and assess – much of it repetitive, some of it of minimal relevance. The Chief Archivist, who administers the Public Records Act 2005, promotes and advises officials in relation to proper management of public records. We look in chapter 15 at some issues of information management.

1.37 Technological change has also helped to drive social and cultural change. Today, there is a much stronger expectation of openness and availability of information than in the past and the OIA is both a product and a driver of this trend towards greater openness. We discuss in chapter 12 the Government's NZGOAL initiative which further encourages open access to government information. The expectation of availability is not limited to government information – the internet, in particular, has helped to create an expectation that a very wide variety of information will be freely available to anyone at any time. In addition, society as a whole has arguably become more open and less secretive, although protection of personal privacy remains important and is a strong counter-balance to the drive for greater freedom of information. People's attitudes towards government have also changed. People are less willing to trust government to do the right thing, and more suspicious of any government activity that takes place in secret. Citizens expect to be able to find out how, why and by whom government decisions are made, and official information legislation, together with technological change supports and encourages this expectation.

1.38 Technology has further potential for requesters. The WhatDoTheyKnow website in the UK, for example, allows people to make anonymous official information requests through a central portal.[39] Responses are sent back to the website which are then automatically made available for the requester and other members of the public to view. A system has been set up in Mexico to ensure that requests are managed carefully and can be tracked and monitored by the requestors and the oversight body.[40] In some jurisdictions there are "disclosure logs" whereby agencies log details of information they have supplied under official information legislation so that others can also have access to it. The potential of such devices is only beginning to be appreciated.

International

1.39 A further aspect of the context in which this review is taking place is developments in freedom of information internationally. The UK has recently reviewed its legislation, as have the Commonwealth of Australia and some of the Australian states. There are common themes, although little unanimity in detail, in the reforms in those jurisdictions. The encouragement of pro-active or pre-emptive

39 < www.whatdotheyknow.com >

40 The portal, 'InfoMex', is available on the Mexican Federal Institute of Data Protection and Information Access' website: < www.ifai.org.mx > .

release of information, and the establishment of offices of Information Commissioner are pervasive features. We must study these developments but also keep in mind their different contexts.

WIDER LEGISLATIVE LANDSCAPE

1.40 Elsewhere in this issues paper we discuss the interaction of the OIA and the LGOIMA with other statutes. Here we simply note that official information legislation sits within a wider legislative landscape including:

- Other statutes that deal with the management and handling of information: in particular, the Privacy Act 1993 (discussed in chapter 6), the Public Records Act 2005 (discussed in chapter 15) and the Criminal Disclosure Act 2008.[41]
- Statutes that include provisions requiring certain official information to be published or otherwise made available. For example, the Fiscal Responsibility Act 1994 introduced requirements (now incorporated in the Public Finance Act 1989) for the government to report on its fiscal and economic policies. Other examples of reporting requirements are found in the Crown Entities Act 2004, the State-Owned Enterprises Act 1986 (and the State-Owned Enterprises Continuous Disclosure Rules), the Crown Research Institutes Act 1992 and the Local Government Act 2002.
- Statutes that include provisions requiring officers of public sector agencies to maintain the secrecy of certain official information. The secrecy provisions in the Tax Administration Act 1994 are examples of such provisions.[42]
- Section 14 of the New Zealand Bill of Rights Act 1990, which protects "the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."

PROCESS AND APPROACH OF THIS REVIEW

1.41 In December 2009 the Law Commission released a survey on the operation of the OIA and the LGOIMA. The survey sought the views of officials who respond to requests under the two Acts and also of those who make requests. It was sent to all agencies that are covered by the OIA and the LGOIMA, as well as to media organisations and other key interest groups, and was also available on the Law Commission's public consultation website www.talklaw.co.nz. The survey asked a series of questions about various aspects of the official information statutes, with the aim of identifying key issues and concerns and informing the writing of this issues paper. More than 130 responses were received, over 90 per cent of them from organisations that respond to official information requests. A summary of responses is available on the Commission's TalkLaw website. We found the responses to the survey very useful, and have summarised or quoted from them throughout this issues paper. We appreciate the time taken by those who responded to the survey, and hope they will also make submissions on this issues paper. We also had useful meetings with Ombudsmen, representatives of key government departments, media representatives, and legal academics who have researched official information issues.

41 White, above n 12, at 65. White notes that in the OIA's early years, the right of access to personal information under the Act was frequently used by defendants in criminal trials to obtain information from the Police relating to cases against them, prior to trial: When access rights to personal information were moved to the Privacy Act, such applications were made instead under that Act. The Criminal Disclosure Act 2008 has now created a specific regime for pre-trial disclosure in criminal cases.

42 Tax Administration Act 1994, Part 4. See further Law Commission *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy Stage 3* (NZLC R113, 2010) at ch 8.

1.42 The questions in the survey were very open-ended, and were mainly directed at eliciting people's experiences of working with the Acts. In this issues paper we ask more focused questions and also put forward some concrete proposals for reform. We emphasise, however, that we have not yet reached a final view on any of the issues raised, and our final recommendations will be shaped by the submissions we receive on this issues paper. We would like to hear from a range of individuals and organisations representing both requesters and agencies that respond to requests under the OIA and the LGOIMA.

1.43 Once the Commission has received submissions on this issues paper, it will prepare its final report, which will make recommendations to the Government for reform of the official information laws.

1.44 The Commission's overall impression at this stage is that the OIA and the LGOIMA are very valuable parts of New Zealand's legal and governmental framework, that their underlying principles are sound, and that they are working well in many respects. At the same time, it is clear that there are areas in which improvements could be made. In considering possible reforms to official information laws, the Commission will keep in mind the following criteria. We believe that official information legislation must:

- continue to be open-textured and flexible, and avoid becoming overly prescriptive;
- remain relevant as technology and information-management practices develop;
- support and enhance good governance;
- balance the needs and interests of requesters on the one hand, and the compliance costs for Ministers, departments and other public sector organisations on the other; and
- balance the public interest in making official information freely available against protection of other public interests such as national security, law enforcement, health and safety, personal privacy, commercial confidentiality and the effective conduct of government.

1.45 Above all, reform of official information legislation must be informed by the lessons from almost 30 years of practical experience of such legislation in New Zealand and other places.

Chapter 2
Scope of the Acts

AGENCIES SUBJECT TO THE ACTS

2.1 The agencies subject to the Official Information Act (OIA) are:[43]

(i) a Department;
(ii) a Minister of the Crown in his or her official capacity; and
(iii) an organisation.

2.2 A "department" is a government department named in Part 1 of Schedule 1 of the Ombudsmen Act 1975 (other than the Parliamentary Counsel Office[44]). An "organisation" is an organisation named in Part 2 (but not Part 3) of Schedule 1 of the Ombudsmen Act 1975 (other than the Parliamentary Service or Mortality Review Committees), and also an organisation named in Schedule 1 of the OIA itself.[45] As far as the Local Government Official Information and Meetings Act (LGOIMA) is concerned, the first schedule of that Act lists the local authorities subject to it. They are in 2 categories, *classes* of local authority and *particular* named local authorities.

Accessibility

2.3 There are a number of issues. The first is *accessibility*. The Acts should be able to be understood by the people who wish to use them, and it should be a straightforward matter to find out which agencies are subject to them. Currently it is far from easy. In the case of the OIA three schedules of two Acts need to be perused. It would be helpful, at the very least, if the agencies in the Ombudsmen Act schedules were also listed in the OIA itself. It is tiresome and confusing to have to move from one Act to the other. Even then, navigation of the schedules is not intuitive. For instance a person unfamiliar with the legislation would have some difficulty finding whether universities are subject to the OIA. They are, but only via an entry "Institutions established under Part 14 of the Education Act 1989" in Part 2 of Schedule 1 of the Ombudsmen Act 1975. This could usefully be expanded.

43 Official Information Act 1982, s2 (1), definition of "official information".
44 Ibid, s 2(1), definition of "department".
45 Ibid, s 2(1), definition of "organisation".

2.4 LGOIMA suffers from another problem: an important category of agency does not appear in the schedule to that Act at all. Council Controlled Organisations (CCOs) are made subject to Parts 1–6 LGOIMA by section 74 of the Local Government Act 2002, but are not listed in the schedules of the LGOIMA. The schedules thus do not give the full picture.

2.5 We believe that all agencies subject to the OIA and the LGOIMA should be clearly and explicitly listed in one place in each of those Acts.

Q1 Do you agree that the schedules to each Act (OIA and LGOIMA) should list every agency that they cover?

WHO SHOULD BE COVERED BY THESE ACTS

2.6 A more important question, however, is the content of the schedules, and whether any agencies which are not currently within the Acts should be within them.

2.7 It is not easy to articulate a simple criterion for what agencies should be subject to the OIA. But the purpose section of the OIA is indicative.[46] It provides:

> The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament, -
>
> (a) to increase progressively the availability of official information to the people of New Zealand in order-
>
> (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:

2.8 It follows that it is the relationship of the agency to central government which is the central factor. In response to a question in our survey a wide range of possible criteria were suggested: that the agency is funded by Government (receipt of even $1 of Government money was enough in one response); that it performs a public function and has an impact on society; that its powers are conferred by Government; that it is responsible to our elected representatives; that it performs a function which was previously exercised by the state. Yet no one of these alone will serve as a definition.[47]

2.9 We think the most promising approach is that in the Legislation Advisory Committee (LAC) Guidelines.[48] They provide a list of factors all or some of which should be present. The factors are:

- the agency's dependence on central government funding;
- the obligation of the agency to consult with the Minister on particular matters, respond to ministerial directions, or obtain ministerial approval;

46 Ibid, s4.

47 See also Committee on Official Information *Towards Open Government: Supplementary Report* (Government Printer, Wellington, 1981), at para 1.08, which says the required element could be assessed in various ways: "dependence on central government funding;….a statutory requirement to take note of the policy of, or to heed directions from, central government; or capacity for central government to intervene in their affairs or to make executive appointments to them."

48 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2001 ed with amendments, Wellington, May 2001) at para 9.6.2.

- the existence of ministerial control over appointments in contrast to, for example, elected membership representing relevant interest groups;
- the existence of any government controls on finance, for example by the Auditor-General;
- the public purpose of the agency.

2.10 No one of these factors is decisive. If, for example, the receipt of any Government funding was enough, bodies such as private schools and the Royal Society of New Zealand would be caught, and there is little argument for saying that they should be. If the public purpose of the agency was the test it would arguably cover all telecommunication companies and all electricity suppliers whether publicly funded or not. Nor is it necessary that all the criteria are present. In any one case a combination of some or all of them will determine the decision. This is bound to leave some difficult decisions at the margins.

2.11 Currently, it must be said, the lists in the schedules are not entirely logical and contain discrepancies. There is a rather 'hit-and-miss' feel about them. So, for example, while all crown entities are subject to the OIA, not all of them are listed by name in the statutes: the Real Estate Agents Authority, for instance. The Māori Television Service is included but not the Treaty of Waitangi Fisheries Commission. The Plumbers, Gasfitters and Drainlayers Board and the Building Practitioners Board are included, but not the Electrical Workers Registration Board. It is not easy to perceive a clear reason for such discrepancies.

2.12 Some agencies have escaped the OIA because they have not been specifically set up by statute. For example some might believe the position of Air New Zealand is anomalous. It is no longer a state-owned enterprise, but the Government is presently a majority shareholder and it is our national carrier. We also heard suggestions that Public Health Organisations should be subject to the legislation. They are not statutory bodies either.

2.13 There are discrepancies in the LGOIMA as well. For example, Port Companies are not included even though they may be more than 50 per cent in public ownership; they are specifically excluded from the definition of CCO.[49]

2.14 We believe the Schedules to both Acts need to be gone through carefully in order to eliminate anomalies and bring within coverage organisations with such a relationship to local or central Government that they should properly be included, according to the criteria we have suggested.

Parliament and Parliamentary Counsel Office

2.15 In the light of the list of criteria in the LAC guidelines, it is difficult in a democracy to justify the absence of the agencies of Parliament from the schedules to the OIA. In the United Kingdom the two houses of Parliament are expressly included in the Freedom of Information Act 2000 (although that is not the case in Canada and Australia). In its review of the Civil List Act, the Law Commission is considering whether the Office of the Clerk, the Parliamentary Service, the Parliamentary

49 Local Government Act 2002, s 6(4). This provision excludes a range of other bodies as well.

Service Commission, and the Speaker of the House in his capacity as Minister for Vote Parliamentary Service should be brought within the OIA.[50] We do not need, in the present review, to deal further with this matter.

2.16 However we do believe that one further agency with a connection to Parliament should also be subject to the Act: Parliamentary Counsel Office. It is not really an Office of Parliament. Rather it is a non-public service organisation: it is described in the Legislation Bill 2010 currently before Parliament as an "instrument of the Crown".[51] There is a case for bringing it under the OIA whatever decision is made about the parliamentary offices referred to above. Certainly it holds much confidential information in the form of drafting instructions and draft Bills, but these, we believe, can be adequately protected by the existing grounds for withholding, in particular legal professional privilege[52] and are not a ground for keeping it outside the Act. The office is already subject to the jurisdiction of the Ombudsmen. In fact it has for some years provided information on request, and subjecting it to the OIA should not occasion a marked change of practice.

Courts and tribunals

2.17 As the OIA currently stands, the terms 'department' and 'organisation' do not include:[53]

> (a) a Court or;
>
> (b) in relation to its judicial functions, a tribunal

2.18 In relation to the courts, two matters merit discussion. First, the Ministry of Justice holds much information relating to the courts. In particular, its case management system contains information about individual criminal cases. It also provides various services to the judiciary which are related to judicial rather than executive functions. The Ministry regards itself as holding this information as an agent for the courts,[54] thus taking it out of the reach of the OIA in relation to those matters. However much confusion is caused by this arrangement, and we believe it would be helpful to spell out the relationship between the Ministry and the Courts expressly in the legislation.

2.19 Secondly, there is a contrast between courts and tribunals in the legislation as presently worded. Courts are excluded entirely, tribunals only "in relation to their judicial functions". This current wording might be taken to suggest that even purely administrative information about the court (for example, matters of expenditure, buildings and resources) is not within the Act. We can see no reason why that should be so. We note that much of the Australian freedom of information legislation exempts the Courts only in relation to their judicial

50 See also para 1.4

51 See discussion in Law Commission *Review of the Statutes Drafting and Compilation Act 1920* (NZLC R107, 2009) at ch 4.

52 See *State of New South Wales v Betfair* [2009] FCAFC 160. The Legislation Bill 2010, clause 58, would codify this privilege.

53 OIA, s 2(6)(a) and (b).

54 By virtue of OIA s 2(f), definition of "official information".

functions, leaving "matters of an administrative nature" within scope.[55] We have considered whether our Act should take that approach, and expressly exempt the Courts only in relation to their judicial functions. Yet we have reservations about this. While tribunals can in fact have both judicial and administrative functions, courts properly only have judicial functions, and trying to separate "judicial" from "administrative" could be the cause of much confusion.

2.20 A better approach would be to identify in a specific way the information concerning the general operation of the courts, this information being maintained by the executive, and provide clearly that it is subject to the OIA. This will require work but would provide a clarity which is lacking at present.

State-Owned Enterprises

2.21 We received several responses to our survey to the effect that State-Owned Enterprises (SOEs) should fall outside the Official Information Act, although some put the case more strongly than others. Several reasons were given. The first is that SOEs operate in a competitive environment, and by being subject to disclosure of their affairs are placed at a disadvantage with their private competitors. Secondly, the State Owned Enterprises Act 1986 subjects SOEs to a detailed public disclosure and reporting regime which ensures that their financial affairs and activities are made public anyway. Several SOEs recently became subject to a set of Continuous Disclosure Rules drawn up by the Crown Ownership Monitoring Unit (COMU);[56] which enhances their transparency. It is argued, then, that there is no need for any additional disclosure to which the OIA might subject them. A third reason is that some elements of the OIA do not readily apply to SOEs. For example in relation to the purpose section, access to SOE information does not promote effective participation in the making of law and policy; and some of the "good government" withholding grounds are not obviously relevant to SOEs. Some responses to the survey comment that the principal objective of every State-Owned Enterprise is only to "operate as a successful business".[57]

2.22 In 1989, Parliament set up a special select committee to examine and report on the question of whether SOEs should remain subject to the OIA. It concluded that they should. Their main reasons for so deciding are summarised in the report as follows:[58]

> 4.1 The State-Owned Enterprises Act imposes on State enterprises, as part of those matters that go towards the operation of a successful business, the obligation to be a good employer and to exhibit a sense of social responsibility. While the requirement to be "as profitable and efficient as comparable businesses that are not owned by the Crown" may be seen as the principal objective, the other obligations cannot be overlooked.

55 Freedom of Information Act 1982 (Cth), s 5; Right to Information Act 2009 (Tas), s 6; Right to Information Act 2009 (Qld), sch 2, para 2, clause 1; Government Information (Public Access) Act 2009 (NSW), Sch 2, clause 1.

56 COMU is a business unit located within the Treasury.

57 State-Owned Enterprises Act 1986, s4(1).

58 Report of the State-Owned Enterprises (Ombudsmen and Official Information Acts) Committee 1989 (Wellington, 1989) at para 4.

4.2 It is the nature and functions of the SOEs, their role in the community and their ownership, that are the deciding factors in whether they should be covered by the [Ombudsmen Act] and OIA. SOEs are still owned by the public, and the hybrid nature of their functions continue, together with issues of scale or monopoly.

4.3 The OA and OIA provide a measure of accountability for the public, particularly on matters that affect individuals and which the other SOE accountability processes do not address, and to remove the jurisdiction of the two Acts would result in a significant loss in public confidence in the Government's oversight of the SOEs.

2.23 The question is whether 20 years later the situation has changed. There certainly have been changes in relation to some SOEs. Reconfiguration of the postal services industry and the electricity industry are two examples. However we have concluded that the essential nature of SOEs has not fundamentally changed from what it was 20 years ago. The hybrid nature of which the select committee spoke remains. The functions they perform are of major public significance. Most importantly, they remain state-owned and their ministers are responsible to Parliament for the proper exercise of their functions. They are subject to judicial review. The fact that the Government has elected to retain these enterprises in Crown ownership means their connection with Government is seen as being of continuing importance. Subjection to the OIA is a consequence of that. Nor are the other reporting and disclosure requirements enough. There may be information held by SOEs which falls outside these other requirements. We believe that SOEs should remain subject to the OIA.

2.24 In relation to the LGOIMA the same reasoning applies to council controlled organisations (CCOs). It is notable that as recently as 2002, when the Local Government Act was re-enacted, CCOs were specifically made subject to the official information provisions of LGOIMA. We believe that the commercial reasons for withholding information are adequate to protect the commercial interests of such bodies *if those grounds are properly applied.* We examine in chapter 5 whether a refinement of the wording of those grounds might improve that protection and whether more guidance may be needed in applying them.

Q2 Do you agree that the schedules to the OIA and LGOIMA should be examined to eliminate anomalies and ensure that all relevant bodies are included?

Q3 Do you agree that SOEs and other crown entity companies should remain within the scope of the OIA?

Q4 Do you agree that council controlled organisations should remain within the scope of the LGOIMA?

Q5 Do you agree that the Parliamentary Counsel Office should be brought within the scope of the OIA?

Q6 Do you agree that the OIA should specify what information relating to the operation of the Courts is covered by the Act?

TYPES OF INFORMATION

2.25 By and large the OIA and LGOIMA apply to *any* information held by the agencies subject to them. This includes even information which is not in documentary form. A judge has said it includes 'any knowledge however gained or held'.[59] Categories of information are not excluded, as is the case in Australia where, for example, any document which has gone before cabinet is automatically outside the scope of the Act.[60] In New Zealand, the case-by-case approach applies. If information can be withheld, it is not by virtue of its category but because, in the circumstances, a withholding ground has been made out in relation to the *information* it contains.

2.26 Although this is generally true it is not absolutely true. Certain Acts impose obligations of secrecy on agencies in relation to certain types of information: the Statistics Act 1975 in relation to the contents of census forms, for instance.[61] Moreover the OIA itself excludes certain categories of information from the reach of the Act. They include information which is held by an agency solely in its capacity as an agent or for the purposes of safe custody for a person who is not within the Act;[62] information held by the Public Trustee or the Māori Trustee in their capacity as a trustee;[63] evidence given or submissions made to a commission of inquiry;[64] information in any correspondence between an agency and the Office of the Privacy Commissioner or the Ombudsmen relating to an investigation;[65] information in a victim impact statement;[66] and information which could be sought under the Criminal Disclosure Act 2008.[67] There are similar exclusions in the LGOIMA.

2.27 We have considered whether other *categories* of information should be excluded from the coverage of the Act. The advantage of doing this is that it would create certainty and eliminate the need for the exercise of individual judgement. The disadvantage is that a rigid exclusion would mean that in a particular case information could be withheld even if there were no sensible reason for doing so, and even if other elements of public interest were in favour of its disclosure. Two possibilities for such exclusions were put to us.

Informal information

2.28 The first was presented in various forms. In essence it is as follows. Modern information technology means that many agencies hold a vast supply of information of an informal kind such as email trails, some of which are of the barest relevance to any matter of public importance, and numerous superseded drafts of documents containing tentative provisions which have long since ceased to represent the views of anyone. The suggestion is that it might be

59 *Commissioner of Police v Ombudsmen* [1985] 1 NZLR 578 (HC) at 586 per Jeffries J.

60 Freedom of Information Act 1982 (Cth), s 34.

61 See other examples in John Burrows and Ursula Cheer *Media Law in New Zealand* (5 ed, Oxford University Press, Melbourne, 2005) at 541–547.

62 OIA, s 2(f), definition of "official information".

63 Ibid, (g).

64 Ibid, (h).

65 Ibid, (i) and (j).

66 Ibid, (k).

67 OIA, s 18(da).

possible to draw a line between what we might describe as "formal" information which has influenced decision-making and informal information which is not of lasting influence on anything. One response put the point as follows:

> The scope of what constitutes 'official information' should be tightened so that ephemeral documents, with dubious formal standing which have never actually been seen by decision-makers, should be excluded….I argue that the scope of relevant official information, particularly in the policy making context, should be significantly narrowed. Formal and official advice should definitely be included, as should any supplementary information provided to decision-makers. But iterative discussions amongst officials, particularly by email, ought not to be considered official advice, and should not be covered.

2.29 The view has some attractions, but after consideration we do not favour it. It is concerned only with the circumstance where a decision has been made and the requester is seeking the information which led to that decision. But much information held in agencies does not relate to decision-making at all: for instance records of statistics, expenditure and a wide range of other matters. The suggested exclusion would not cover any of that.

2.30 Even in the decision-making context, there would be difficulty drawing the line. How is one to say what was and what was not relevant to the decision-making? What if matters not presented to the decision-makers (informal advice to officials, for instance) in fact influenced the formal advice given to the decision-makers? It would, in fact, be very difficult to clearly carve out information which could be excluded because of irrelevance to the decision. It was also remarked to us that if drafts were to be excluded, documents might too often be alleged not to have proceeded beyond the draft stage. We therefore do not favour trying to define a category of informal information' which is exempt from the Acts.

Third party information

2.31 The second category for which an exemption has been argued is information held by an agency which relates solely to, and may have been provided by, a private entity not subject to the Act. This has been described as "third party" information. An example would be information provided by a private organisation which has applied to a local authority for a resource consent. We were given examples where competitors have been given access to this information which they have used to their own advantage. We have some sympathy for this argument, but are reluctant to create a general exempt category of information supplied by, or relating to, a private organisation. The agency exemption and the commercial interest withholding grounds are normally adequate to protect such information *provided that they are properly and consistently applied.*

2.32 However two types of third-party information have given us pause. One relates to the Crown research institute or university which has done research under contract for a private organisation. The results of the research, and the data generated by it, have been paid for, and effectively belong to, the private entity which commissioned the research even though they may be "held" by the research organisation which is subject to the OIA. We look at that issue in chapter 5, and conclude there is no need to change the present law. The existing withholding grounds seem to us to provide adequate protection.

2.33 We have also wondered whether there should be an exception for information supplied to a statutory body in the course of proceedings before that statutory body to determine an application or to resolve a dispute. This is information which the supplier of the information is effectively required to provide, and which is provided for a single specific purpose. Justice cannot be properly done without it. As pointed out above exemptions already apply to correspondence in the course of a Privacy Commissioner or Ombudsman inquiry, to proceedings before a court or tribunal, and to evidence to a Commission of Inquiry. It is not a long step to exclude from the Act's reach information supplied to any statutory decision-making body in the course of its proceedings. However we have tentatively concluded that, while such information deserves more protection than it currently has, this can best be done by creating a new withholding ground rather than by creating a new exempt category. We discuss this further in chapter 7.

Information that must be disclosed

2.34 On the other side of the coin, there is a question of whether certain categories of information should be subject to *mandatory* disclosure. Some already are, by virtue of Acts such as the Public Finance Act 1989, the State-Owned Enterprises Act 1986 and the Local Government Act 2002. The OIA itself provides for the mandatory disclosure of internal rules affecting decisions.[68]

2.35 The Danks Committee foreshadowed that with time, and after ongoing experience with the OIA, it should be possible to draw up a list of types of document which should be disclosed as a matter of course.[69] This raises wider, very important, issues about proactive disclosure. We deal with them in chapter 12.

Q7 Should any further categories of information be expressly excluded from the OIA and the LGOIMA?

WHO SHOULD MAKE REQUESTS

2.36 A further question of scope relates to who may make requests. The OIA and LGOIMA treat this differently. We defer discussion of this to chapter 14, which discusses the differences between the two Acts.

68 OIA, s 22; LGOIMA, s 21.

69 Committee on Official Information, above n 47, at 3.13 – 3.17.

Chapter 3
Decision-making

THE CASE-BY-CASE SYSTEM

3.1 Whether official information is to be made available is to be determined:[70]

> in accordance with… the principle that the information shall be made available unless there is good reason for withholding it.

3.2 This presumption in favour of openness has worked well and over a period of 28 years has led to a significant change in climate. There can be no suggestion, and no one has suggested, that the main principles of these Acts should be changed. The former State Services Commissioner, Dr Mark Prebble, recently said that the OIA:[71]

> …is the best reform that's happened during my whole time in the public service; it has been good for every agency it's been applied in.

3.3 The "good reasons" for withholding are set out in sections 6 – 9 of the OIA.[72] Some are conclusive, others (those in section 9) are overridable if there is a public interest in disclosure. The reasons are for the most part expressed (as they must be) in broad and open-ended terms. The assessment of whether a good reason exists in a particular case requires an exercise of judgement on the facts of that case. As we explained in chapter 2 our legislation does not, generally, exclude or include *categories* of information. We have what has been described as a "case-by-case" system. This requires a fact-specific assessment of each request by the agency, and also by the Ombudsmen in cases which reach them.[73] This assessment requires not only close attention to whether a withholding ground is made out, but also, in the case of a ground in section 9, whether in the circumstances the public interest in disclosure overrides the ground.

70 Official Information Act 1982, s 5; Local Government Official Information and Meetings Act 1987, s 5.

71 Television interview with Dr Mark Prebble, former Chief Executive DPM&C 1998–2004 and State Services Commissioner 2004–08 (*The Nation*, TV3, 3 April 2010, 2.06pm).

72 LGOIMA, ss 6 & 7.

73 See Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007) at 248: 'A strong belief in the case-by-case approach has been established through a combination of the focus on principle in the general framework of the OIA and the general approach of the Ombudsmen, as the review authority that over the years has been primarily responsible for setting the tone of OIA administration. It is central to the general role of the Ombudsmen that they look at the circumstances of every individual case that crosses their door'.

3.4 The New Zealand OIA is well regarded overseas. In particular, Australian commentators have compared it favourably with the Australian federal system under which certain categories of document are exempted from disclosure.[74] In New Zealand it is the *content* of the information in the document in each case that matters, rather than the *category* of document.

DIFFICULTIES

3.5 However the case-by-case system does bring certain problems with it, and many who responded to our survey drew our attention to them.

3.6 First, the case-by-case system takes time. There are no firm rules by which to operate, and dealing with each case on its merits requires careful consideration of all the facts. It is less efficient in terms of resource than a rule-based system.

3.7 Secondly, there can be more room for what some see as "game-playing" by agencies. Not only does it enable them to buy time while they assess the facts; it can also enable them to respond that even though this type of information may have been released in the past, the facts on this occasion are different and justify a different result.

3.8 Thirdly, the case-by-case approach can lead to uncertainty. Agencies can find the decision whether or not to release very difficult, particularly if the officials charged with making the decision are inexperienced, or the agency in question has handled few requests of this kind previously. There are no rules, and in some areas little guidance as to what they ought to do. Matters are exacerbated in the case of those withholding grounds which are expressed in broad and ill-defined language – the "free and frank" and commercial interest exceptions are notable examples discussed in chapters 4 and 5 respectively.

3.9 Fourthly, since each case depends on its own facts, there is a risk that an agency might reach an idiosyncratic decision. If that happens there can sometimes be adverse consequences, in particular if they too readily release information which might be commercially sensitive or of a private nature. One of the main concerns about the commercial withholding grounds is that some organisations whose commercial information is held by an agency think those grounds are sometimes not properly applied.

3.10 Fifthly and most importantly, a lack of rules and principles can lead to inconsistency. Some requesters commented on the ad-hoc and inconsistent approaches taken by different agencies to similar questions and, sometimes, different interpretations between an agency and the Ombudsmen. Some respondents to our survey even believe that successive Ombudsmen have taken different approaches to the same matter over the years. This can make it difficult for agencies to be confident about the stance they should take on a particular

74 See for example Rick Snell "The Kiwi Paradox – A Comparison of Freedom of Information in Australia and New Zealand" (2000) 28 Federal Law Review 575 (written before recent amendments to the Australian legislation which we outline in chapter 13) and Jana Woodward "Trans-Tasman Freedom of Information", a paper submitted for Honours Thesis, ANU College of Law, 10 June 2008.

occasion. Many agencies have, over time, developed internally their own consistent practices for dealing with frequently recurring requests, but the consistent practice of one agency may not be the same as that of another.

3.11 The uncertainty and variability which mark the present system can detrimentally affect both agencies and requesters. Agencies sometimes find it genuinely difficult to know how to handle a request, and requesters sometimes complain about delay and inconsistency of approach.

3.12 It was clear from the submissions to us that the agencies would greatly welcome firmer guidance to assist their decision-making, and that requesters would welcome more consistency of outcome. Nevertheless, most submitters supported the continuation of the case-by-case system and we do not recommend that it be changed.

Q8 Do you agree that the OIA and the LGOIMA should continue to be based on a case-by-case model?

CURRENT GUIDANCE

3.13 There is already some guidance available to agencies, although the consensus seems to be that more is needed, and of a more specific kind. Currently, no statutory agency has responsibility for providing such guidance. In the absence of any such requirement, it is the Ombudsmen's office which has, of its own motion and as it were by default, filled the gap. Most respondents commended that initiative. The guidance that is available is of four main kinds.

3.14 First, the Ombudsmen's website contains a set of guidelines for applying the OIA, known as the "Practice Guidelines". There are guidelines for almost all of the withholding grounds, and indeed for the Act's other provisions as well. Some of these guidelines are quite lengthy, and provide step-by-step guidance as to how to reason to a conclusion. While some agencies expressed their appreciation of this assistance, many felt that the guidelines are of a somewhat abstract nature, and closely follow the wording of the Act without providing concrete examples. In other words, while the guidelines give guidance as to the process to be followed, many felt they do not clearly point the way to an appropriate response to even frequently recurring problems. One respondent said the guidelines are:

> ...of limited assistance because they are long and technical documents. The Guidelines would benefit from being rewritten and simplified. Specific examples of case studies would also be helpful.

3.15 Secondly, there are guidelines published by Government entities other than the Ombudsmen. The Ministry of Justice has a set of guidelines on charging.[75] The Cabinet Manual contains a section on the OIA, containing, in particular, practical notes about consultation on OIA requests, in particular consultation by a Department with its Minister.[76] A 2008 Cabinet Circular sets out the

75 Ministry of Justice "Changing Guidelines for Official Information Act 1982 Requests" (March 2002).

76 Cabinet Office *Cabinet Manual 2008*, at ch 8.

principles that guide the handling of requests for the Cabinet records of a previous administration.[77] The State Services Commission has also produced a set of guidelines about consultation on, and transfer of, OIA requests.[78]

3.16 Thirdly, there are the casenotes of the Ombudsmen which summarise decisions reached by the Ombudsmen after investigating complaints about the alleged wrongful withholding of information. Some casenotes are available on the Ombudsmen's website and used also to be published in an annual hard copy compendium. The last of the compendia was published in 2007. At the moment, the casenotes published on the website also stop at that point. The casenotes are not indexed.

3.17 Fourthly, two other publications from the Ombudsmen's office give useful assistance. The "Ombudsmen Quarterly Review" summarises and discusses important recent decisions. It is a valuable resource in that it has a thematic focus and discusses matters of principle. There is an index to the Review. The Office's Annual Report to Parliament also draws attention to recent developments, and it may comment on recurring problems. Both of these documents may be accessed on the Ombudsmen's website.

3.18 It was commented by some that the Ombudsmen's website is not intuitive, and that it is possible for a newcomer to the OIA to be unaware of the very existence of the casenotes or even the guidelines, and not to realise the usefulness of the Quarterly Review.

THE FUTURE

3.19 The question is how more certainty and consistency can be obtained.

Amending the Act

3.20 We have considered whether amending, or redrafting, the withholding grounds would help. There are two ways in which this could be done.

3.21 First, a small number of responses to the survey suggest that where a consistent practice has been developed by the Ombudsmen over the years that practice should be codified in the Act itself in the form of rules, supplementing the various withholding grounds. We are not in favour of this. Giving practice statutory authority could diminish the need to examine each case on its merits; the statutory rule would be likely to operate too rigidly. Such codification could reduce flexibility, and freeze the present practice in time. The Commission has no inclination to replace the case-by-case system with a system of rules.

3.22 A second method of statutory amendment is to attempt to redraft the existing withholding grounds in plainer and simpler language. The objective would not be to change the substance of the grounds but to express their present meaning in a more user-friendly way. However, in the case of most of the grounds we do not think that there would be much benefit in this. Most of the withholding grounds are expressed in short and relatively clear form. They are certainly open-ended but their purpose requires that they should be.

77 Cabinet Office CO(08) 12 (December 2008).

78 State Services Commission "Release of Official Information: Guidelines for Co-ordination" (October 2000, last updated 4 August 2002). Available at < www.ssc.govt.nz > .

3.23 The main difficulty is not that the grounds are hard to read or understand. It is that the application of them to a multitude of different circumstances is often not an easy task. In most cases redrafting would not be guaranteed to serve any better than the present ones. Difficult marginal cases will arise whatever the form of words. One respondent to the survey said, perceptively:

> Most officials participating in this survey find that the OIA is reasonably easy to read and understand (although it is sometimes difficult to apply).

3.24 There is also a danger in re-expressing long-established provisions. Changes in wording can create new uncertainty, and render of less value earlier precedents and Ombudsmen's rulings. Even if there is no intention to change substance, there can often be an argument that the new and changed wording has inadvertently done so.

3.25 So we are of the view that most of the withholding grounds should not be redrafted. However there may be a few that should be. A small number of grounds have given particular difficulty, among them the 'good government' grounds. In the ensuing chapters we shall examine these to see whether the way they are expressed has contributed to this difficulty. We believe the wording of the withholding grounds should only be changed if the present form of expression is obscure, or constitutes a real barrier to understanding, or is in some way misleading. It should only be done if the redrafted version would be clearly better. Otherwise we believe the best way of assisting agencies to apply the grounds is by way of guidance and training.

Making regulations

3.26 It is noteworthy that in the OIA as originally enacted it was envisaged that the Information Authority would recommend regulations prescribing categories of information which should be available as of right, although not categories which should be immune from disclosure.[79] There remains a vestige of this in the present Act: section 21(2) provides that a requester has a right of access to any category of information "that is declared by regulations made under this Act to be a category of official information in respect of which a right of access exists". No such regulations have been made, and it is perhaps questionable whether section 21(2) was meant to survive the demise of the Information Authority.

3.27 We have considered whether such a regulation-making power provides a way forward. In chapter 12, discussing proactive disclosure, we have asked whether there may be a role for the prescription by regulation of certain types of specific information which should be published proactively without the need for a request. Even then care would need to be taken in each case that the material proactively published did not include information which should properly be withheld, for example because it might prejudice the maintenance of the law or because it had been received in confidence.

79 See OIA, s 38(1)(c) (expired 1 July 1988).

3.28 On balance we do not favour regulations prescribing what should be released, and what withheld, in response to a request. Such rules would be too rigid, and would militate against the sensitive appraisal of facts which is such a strength of the New Zealand system. It would be a move towards categories of document. What is required, we believe, is improved guidance rather than a system of rigid rules.

3.29 In her book *Free and Frank* Nicola White has similarly considered and rejected such a solution:[80]

> A system of strong, formal and independent rule-making, as originally proposed by the Danks Committee, would contain a formal body charged with developing rules, which would be promulgated as regulations and so have full legal status. There is little to recommend such a system in the current environment. … Formal regulations are also likely to be too cumbersome for the types of issues that would now benefit from rules. Finally, implementing this system would require substantial amendment of the OIA.

Q9 Do you agree that more clarity and certainty about the official information withholding grounds can be gained through enhanced guidance rather than through prescriptive rules, redrafting the grounds or prescribing what information should be released in regulations?

Precedent and guidance

3.30 We believe it would be desirable to have a set of firmer guidance than currently exists to supplement the case-by-case approach. Given the open textured nature of the Act it is important there is a detailed system of guidelines underlying and supporting its principles. In her book, Nicola White reached a very similar conclusion.[81] While not advocating a system of formal rule-making she supports a system whereby the Ombudsmen could develop a more overt system of precedent, and the State Services Commission could develop guidelines drawing on Ombudsmen rulings. While the system we are considering is not on all fours with this, it has much in common with it, and serves to meet the almost universal call we have had from the agencies to give them more certainty in how to apply the Act. It is noteworthy that even the architects of the Act, the Danks Committee, did not believe that the case-by-case system could ever on its own be enough. They saw "substantial disadvantages" in leaving matters entirely to the application of broad criteria and deciding the application and interpretation on a case-by-case basis. They saw lack of consistency as a problem.[82]

3.31 The solution we propose relies on a system of precedent using the casenotes of the Ombudsmen which have built up over a long period of years. Those casenotes need to be compiled, analysed, indexed and accompanied by a commentary. The resulting compilation and commentary would be beneficial in the following ways.

80 White, above n 73, at 250.

81 Ibid, at 241.

82 Committee on Official Information *Towards Open Government: Supplementary Report* (Government Printer, Wellington, 1981) at 3.05.

3.32 First, the volume of cases decided by the Ombudsmen over the years is substantial in number, and on some matters patterns of decision have emerged. These could be extracted and expressed as presumptions which will normally apply, although still capable of being overridden in the special circumstances of particular cases. The Ombudsmen themselves have, of recent years, been moving in precisely this direction. In their 2009 Annual Report they instance two such areas. They say:[83]

> As a general rule, the identities of contractors awarded public sector contracts whether by tender or not, and the total cost of those contracts, should always be disclosed in the public interest…The key principle is that there is a fundamental and overriding public interest in total transparency about who is awarded public sector contracts… While the possibility must be kept open as a case may arise where anonymity may be necessary, such a case has not yet been identified.

3.33 They reached a similar conclusion about severance payments:[84]

> In respect of severance payments, disclosure of the fact that a severance payment has been made to a public sector employee is clearly in the public interest. Therefore this information should, as a general rule, always be made available without undue delay. However, disclosure of the amount of such a payment and any conditions of the settlement agreement upon termination of employment, will depend on the circumstances of a case…If the information relates to a senior employee, and the severance or exit package is sizeable, it is unrealistic in the current public sector environment to expect that such information should remain private and confidential.

3.34 In similar vein, the Ombudsmen have issued guidance about events funding by local authorities. They have published a summary of the main issues that arise and the general approach they are currently taking in cases where a local authority has entered into some form of funding arrangement. They have identified principles of general application.[85]

3.35 There will be an appreciable number of other situations where principles will have emerged. The principles thus extracted will not, of course, be absolute rules. They will always be able to give way in the circumstances of a particular case. But they will create a presumption, and at times a very strong presumption. The stronger the line of cases creating that presumption the stronger would need to be the countervailing factors necessary to override it in a particular case. Such principles would form the basis for rewriting some parts of the Ombudsmen's Guidelines.

3.36 Secondly, on other matters there may be only one earlier case on the point under consideration rather than a line of cases. This case would serve as a persuasive precedent in a new case on similar facts. Of course it would not be a binding precedent: the case-by-case approach would ensure that. Matters relevant to the degree of persuasion would be its age (attitudes and practices can change over time); how fully it was reasoned; and how strongly the views of the Ombudsmen in that case were expressed.

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83 Office of the Ombudsmen *Annual Report for Year Ended 30 June 2009* (Wellington, 2009) at 25.

84 Ibid.

85 Office of the Ombudsmen *Events Funding by Local Authorities – Implications under the Local Government Official Information and Meetings Act* referred to in Ibid, at 27.

3.37 Thirdly, there will undoubtedly be requests on which no firm guidance is available in the accumulated casenotes. This might be either because the point has not arisen before, or because such cases as there are do not form a consistent pattern. Such questions would have to be decided according to first principles. But even there, the available casenotes would be of considerable assistance. Even if there are no cases directly in point, there may be sufficient analogies with one or more of those earlier cases for them to be helpful. Analogy has been a technique of the common law from the beginning.

3.38 The ready availability of all cases on a particular withholding ground will provide users with concrete examples to render the abstract and open-ended propositions in the Act more understandable. The range of early decisions will, as it were, help to give shape to the abstract withholding ground. We are reminded of the words of Lord Denning:[86]

> I often cannot understand [the words of a statutory provision] by simply reading it through. But when an instance is given it becomes plain…To make it intelligible you must know the sort of thing Parliament had in mind, so you have to resort to particular instances to gather the meaning.

3.39 The case examples would be indexed to the relevant withholding grounds and should be linked into the guidelines, thus making those guidelines less abstract than they tend to be at the moment. Several responses to our survey are to the effect that availability of examples is exactly what is wanted.

> [Guidelines] would be particularly useful if they contained specific examples or case-studies as opposed to merely summarising general principles.

3.40 Moreover, a compilation of cases and associated commentary can also perform another service by highlighting considerations which are regularly taken into account in deciding whether or not to release information. These considerations could relate to types of information, and also to surrounding circumstances favouring release or withholding as the case may be. They might include such things as the amount of public money involved, the level at which decisions have been taken, whether the information reveals mismanagement, whether the issue is one which has already attracted public controversy, and so on. So even if there are no decisions directly in point it is still an advance on the present situation for agencies to have readily available the kinds of considerations they should weigh in the balance.

3.41 Much work will need to be done before such a system can be effective. Currently the casenotes of the Ombudsmen are not particularly accessible. By no means all of them are on the Ombudsmen's website. Indeed, those on the website stop with the 2007 compendium, and we understand that there are important cases even before that time which have never been committed to electronic form. As we have said, even the casenotes currently on the website are not easy to find.

86 *Escoigne Properties Ltd v IRC* [1958] AC 549, 566.

3.42 To operate as an effective determinant of behaviour, casenotes and the guidance based on them should be prominent, accessible and well known. So improving the accessibility of the website is the first step. We would favour a dedicated Official Information website, with links from the websites of the Ombudsmen and other key agencies. The next step is to summarise, compile and index the casenotes, and provide analytical commentary on them.

3.43 We envisage much more than just a summary and index of the cases, important although both of these things are: indeed an index relating each case to the withholding ground on which it was based is absolutely essential. There also needs to be a commentary which draws attention to the patterns and principles emerging from the series of cases; to any inconsistencies which might be perceived between decisions; and to the important factors and considerations which have been emphasised by the Ombudsmen in their decisions. One is looking, in other words, not just at patterns of *decision* but at patterns of *reasoning* as well. Such a publication, constantly updated, would provide practical guidance for both officials and requesters.

3.44 We note in passing that this kind of problem is not unique to the OIA casenotes. In 2006 a Review of the Broadcasting Standards Authority decisions made the point that they would benefit from a publication analysing the decisions and the principles arising from them.[87] In fact that exercise in relation to the BSA has now been undertaken by Steven Price in his book *Media Minefield*.[88] It has made the accumulated body of BSA decisions a much more useful tool than they were before. In like vein, we would draw attention to the analysis by Dr Ryan Malone of the Reports of the Regulations Review Committee, which is to be found on the NZ Centre for Public Law website.[89]

3.45 The work of compilation could perhaps be done within the Office of the Ombudsmen but we believe there would be merit in contracting the major work of the initial compilation and commentary to an independent person. The resulting product would of course need to be brought continually up-to-date, and that latter work could effectively be carried out in the Ombudsmen's office.

3.46 One response to the survey summarises the desirability of the methodology we are currently advocating in the following succinct paragraph:

> Given that the OIA has been in force for almost 30 years it would be possible to have a precedent system or a record of presumptions for how to deal with commonly requested information. (eg. lists, CVs, Cabinet papers etc). These presumptions would still require consideration on a case-by-case basis but they would provide a starting point ie. the presumption/precedent would apply unless there was a good reason for it not to apply. Additionally, or alternatively, it would be helpful if there was a workbook of examples of requests together with an explanation of a) why the information was or was not released and b) if it was withheld or refused, the grounds on which that was done.

87 John Burrows *Assessment of Broadcasting Standards Authority Decisions* (2006).

88 Steven Price *Media Minefield – A Journalist's Guide to Media Regulation in New Zealand* BSA, NZTTO, NPA (2007) Part One.

89 Ryan Malone and Tim Miller *Regulations Review Committee Digest* (3rd ed., Wellington, 2009), available online.

3.47 We agree. The system we propose would have a number of clear advantages.

3.48 First, as we have said, the existence of such a system of precedent would allow the rewriting of the Ombudsmen's Guidelines. Where appropriate they could contain firmer and more precise guidance than is possible at the moment; and in all cases they could contain cross-references to the relevant case notes.

3.49 Secondly, the guidance provided would be derived from the experience of actual cases. Attempting to create rules *a priori* without that grounded experience can lead to insufficiently precise formulations.

3.50 Thirdly, a system of precedent would lead to greater consistency in decision-making. Sir Rupert Cross has said "the basic principle of the administration of justice is that like cases should be decided alike."[90]

3.51 Fourthly, it would provide much firmer guidance than is now available. It would thus provide greater certainty to agencies in their decision-making, and to requesters who would better know what to expect, and better understand why a certain decision has been made.

3.52 Fifthly, the system would not create a set of rigid rules. Patterns and precedents emerging would be presumptive only, and would be subject to the particular facts of each case. The system would be flexible enough to move with the times. The blend of certainty and flexibility it would create would be similar to the method of the common law.

3.53 Sixthly, the creation of such a system would enhance practices both within agencies and in the Ombudsmen's office. It would lead to a more informative website and would be likely to lead also to an enhancement in the reasoning in the Ombudsmen's casenotes.

3.54 In conclusion, we believe that a resource of the kind we have indicated, coupled with a system of training and education, is a better way forward than extensive statutory amendment or the laying down of rules either by regulation or by an agency such as the State Services Commission.

3.55 The system of precedent and guidance we propose is so important that we think it needs to given added authority by expressly conferring a statutory function to provide it, rather than just leaving it to happen voluntarily. We return to this in chapter 13.

Conclusion

3.56 We thus propose that the main means of attaining consistency and certainty in the operation of the Acts should be reliance on precedent, and the use of those precedents to prepare firmer guidelines which provide concrete examples.

90 Rupert Cross and J W Harris *Precedent in English Law* (4th ed, Oxford University Press, 1991) at 3. See also Theodore Benditt "The Rule of Precedent" in Laurence Goldstein (ed) *Precedent in Law* (Oxford University Press, 1991) at ch 4.

3.57 However a number of withholding grounds seem to have caused particular problems. In the next few chapters we shall examine them separately to see if anything more needs to be done to clarify their meaning and application. They are, in order, the "good government" grounds; the "commercial sensitivity" grounds; and the privacy ground.

Q10 Do you agree there should be a compilation, analysis of, and commentary on, the casenotes of the Ombudsmen?

Q11 Do you agree there should be greater access to, and reliance on, the casenotes as precedents?

Q12 Do you agree there should be a reformulation of the guidelines with greater use of case examples?

Q13 Do you agree there should be a dedicated and accessible official information website?

Chapter 4

Protecting good government

WITHHOLDING GROUNDS

4.1 This chapter considers the provisions that protect effective government and administration, colloquially referred to as the 'good government' withholding grounds. The withholding grounds in question are sections:

- 9(2)(f) of the OIA concerned with the maintenance of constitutional conventions; and
- 9(2)(g)(i) of the OIA and 7(2)(f)(i) of LGOIMA concerned with maintaining the effective conduct of public affairs through the free and frank expression of opinion.

4.2 The responses to our survey acknowledged the importance of these grounds but suggest they are poorly understood and can be difficult for officials to apply. Their somewhat opaque nature and a perception among users that they are overused lead to a lack of trust, a result at odds with the premise of official information legislation, which is about enhancing trust in government. As currently expressed the interests to be protected may not be well reflected in the grounds, which may account for some of this suspicion and the difficulty officials face.

4.3 The Law Commission considered these grounds in its 1997 review of the OIA.[91] It identified significant issues with the grounds but, after attempting to redraft them, ultimately decided that the grounds were best left as they were, and that improvements could be gained instead through administrative means such as training and greater public discussion. The Commission said:[92]

> The developing position under the Act has shown s 9(2)(f) and (g) to be less than perfect in terms of clarity and logic of presentation. Nevertheless the practice they have produced is, in general, well understood. We have considered whether there would be value in rewriting them, either to state the existing propositions with more clarity and logic, or to identify more precisely the types of interest they are intended to protect. We have concluded that a change to the legislative formulation would be counter-productive. The jurisprudence and practice under the existing provisions has taken some time to develop – it will, and ought to continue to evolve.

91 Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997) at ch 6.

92 Ibid, at para 247.

4.4 The passage of time suggests that such training and information as are available have not done enough to increase the acceptance or understanding of the good government grounds. We consider that some of the misunderstanding and confusion that attends these grounds is caused by their awkward expression and conceptually incoherent nature. Because of the enduring nature of these problems we have decided to revisit the Commission's earlier recommendation and to consider whether the grounds should be reformulated to better reflect the interests they are intended to protect. With some minor exceptions the intention is to improve the expression of the grounds and not to change their substance. The guidance and casenotes of the Ombudsmen will continue to be applicable.

SURVEY VIEWS

4.5 The responses in our survey about these grounds varied. Some respondents to our survey had the following to say about these grounds.

- They are too broad and indiscriminate.
- They are difficult to apply. But they may be difficult to redraft and guidance may be an appropriate means of improving understanding and practice.
- The "free and frank" ground seems to be more narrowly interpreted in NZ than other jurisdictions, including Australia.
- With regards to 'free and frank expression of opinion', our general approach is that this ground is not one that officials can genuinely rely on to speak freely and frankly about a matter. This has had the effect of shutting down open debate or recording of such views.
- They do not reflect the structures of agencies outside of the core public sector.
- The ability to withhold information to protect the free and frank expression of opinion should be extended to cover all advice, not just opinions (as per the U.K. Freedom of Information Act) and it should be made clearer that this ground does not relate exclusively to the form of the opinions/advice (i.e., not just to intemperate language).
- These grounds are important but are difficult to apply. In fact, they depend a lot on Ombudsman guidance. The reference to "constitutional conventions" is obscure and one cannot be clear about the actual scope of the conventions.
- The difficulties in interpreting and applying these grounds reflect the real difficulty in finding a balance between effective decision-making and open government.
- They draw a difficult line between "advice" and opinion" and this should be clarified.
- They fuel uncertainty and suspicion and create a relationship of mistrust towards government.
- They have led to a "dumbing down" of advice, to the point where papers are written for a public audience and contentious or difficult matters are only communicated orally.
- Section 9(2)(f)(iv) doesn't reflect the current government's practice of obtaining advice from outside the public sector (eg technical advisory groups).

THE CASE FOR THE "GOOD GOVERNMENT" GROUNDS

4.6 Although some responses to our survey did call for these grounds to be removed from the Act, we have no doubt that there is a proper place for grounds that protect good government and effective administration. However we do share a concern that there is potential for them to be used merely to withhold embarrassing or controversial information.

4.7 The interests underlying the grounds are as worthy of protection today as they were when the OIA was first enacted. Our system of government is founded on basic relationships and understandings, such as collective ministerial responsibility, that are necessary for our system of government to function. Collectively the unwritten sources that make up New Zealand's constitution, including constitutional conventions, define where power sits, and who may exercise it in the New Zealand system of government. The official information legislation needs to reflect that model. The ability of the government to govern requires some room for deliberation in private to develop and consider ideas without fear of adverse consequence, and the legislation must recognise this.

4.8 In its review of secrecy laws in Australia, the Australian Law Reform Commission observed that the Westminster system of government, the same system we have in New Zealand, "was premised on secrecy" and that deliberations of the government were private.[93] Ministers' ability to impart and receive advice from their officials in confidence reinforced the principle of a politically neutral public service. Ministers could freely create and debate ideas with Ministerial colleagues and officials. Before the OIA this desire for secrecy and confidentiality was taken to unnecessary extremes in Acts such as the Official Secrets Act. That completely closed approach is now in the past. We have a much more open-government model. However the good government grounds in the OIA, and to a lesser extent in the LGOIMA, are a necessary reminder that complete openness is sometimes damaging to government and therefore society as a whole.

4.9 Some room for deliberation and some forms of confidentiality are necessary for our model of government to work. All official information regimes in jurisdictions that have Westminster models of government acknowledge the continued need for some confidentiality at the centre of government, albeit by different means. The case for retaining some level of protection in both central and local government is equally strong in New Zealand.

IDENTIFYING THE ISSUES

Constitutional conventions

4.10 The OIA provides that, subject to release in the public interest, information can be withheld if it is necessary to:[94]

> (f) maintain the constitutional conventions for the time being which protect—
>
> (i) the confidentiality of communications by or with the Sovereign or her representative:
>
> (ii) collective and individual ministerial responsibility:
>
> (iii) the political neutrality of officials:
>
> (iv) the confidentiality of advice tendered by Ministers of the Crown and officials;

4.11 Constitutional conventions make up a part of New Zealand's constitution as much as the principles of the Treaty of Waitangi or the Constitution Act 1986. They are "customs, practices, maxims or precepts which are not enforced or recognised by the courts".[95] They have an important role to play in making our system of Government work because they are seen as binding even though they

93 Australian Law Reform Commission *Secrecy Laws and Open Government in Australia* (ALRC R112, Canberra, 2009) at para 2.5.

94 Official Information Act 1982, s 9(2)(f). There is no equivalent ground in LGOIMA

95 Dicey *Introduction to the Law of the Constitution* (10th ed., Macmillan & Co Ltd, New York, 1962) at 417.

are not of legal effect and thus not enforceable in the Courts. However, constitutional conventions are not readily understood and even amongst constitutional lawyers their boundaries are open to debate.

4.12 The section makes direct reference to two well recognised constitutional conventions which are key features of our Westminster style of government – the conventions of collective and individual ministerial responsibility.

4.13 Our survey highlighted a general sense of confusion with aspects of this provision. Some of the responses called for it to be redrafted, others asked us to consider whether the reference to constitutional conventions is really necessary at all.

(i) Reference to "constitutional conventions"

4.14 The reference to "constitutional conventions" in the OIA provision is itself a problem for requesters and officials, particularly those without legal training. This difficulty was recognised in the Ombudsmen's 13th Compendium: [96]

> The initial difficulty for many users of the Official Information Act is in understanding what the term "constitutional conventions" actually means. In this regard, it is helpful to take guidance from recognised texts in constitutional matters.

4.15 References to Dicey, and Sir Ivor Jennings' three-part test for understanding constitutional conventions, as well as a quote from Professor Joseph appear in the Ombudsmen's Practice Guidelines. Just how helpful these references are for officials dealing with OIA requests is questionable.

(ii) The nature of the interests involved

4.16 Of more concern is the mixed list of purposes and conventions contained in section 9(2)(f), a list that academics Eagles, Taggart and Liddell call "conceptually incoherent".[97]

4.17 Contrary to popular belief, the section is not a list of constitutional conventions that are to be protected (with the exception of (f)(ii)). What are listed are the relationships or interests *protected by* certain constitutional conventions. As currently drafted, officials are required to understand what the constitutional conventions are that protect these particular interests. A link must therefore be identified between the listed interest and the convention that is being relied upon before a decision to withhold can be made.

4.18 When the list is examined only one subparagraph contains conventions as that term is generally understood. This is (f)(ii). Eagles, Taggart and Liddell claim that (f)(iii) reflects a purpose (rather than a convention in its own right), and that (f)(iv) appears to elevate a practice of keeping confidential advice tendered by or to Ministers to the status of a convention.[98] Eagles et al criticise this muddled list and suggest it introduces unnecessary complexities into the interpretation of the section.

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96 Office of the Ombudsmen *Practice Guidelines* (Wellington, 2002) Part B, ch 4.5 at 3–4.

97 Ian Eagles, Michael Taggart & Grant Liddell *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992) at 339.

98 Ibid.

4.19 So the list in section 9(2)(f) is of stated interests which unstated constitutional conventions support. This scrambling of conventions and the interests they exist to protect creates confusion and obscurity, and undermines the effectiveness of the provision.

(iii) Which constitutional conventions?

4.20 One feature of constitutional conventions is that they change over time. This is reflected in the wording of section 9(2)(f) which allows information to be withheld to protect constitutional conventions *for the time being*. Given their evolving nature there is no authoritative source of conventions in New Zealand. An official is required to second-guess prevailing norms and assess whether these constitute a convention that exists for the time being. Professor Joseph has recognised the difficulty involved in identifying a particular convention:[99]

> The tests for recognising conventions are neither universally agreed nor, when agreed, easily applied. Some conventions are clear and some are not so clear.

4.21 Given that there is no authoritative source of constitutional conventions in New Zealand there is little support for officials who are trying to apply statutory provisions in a politically charged environment. Officials cannot be expected to be confident that grounds exist if there is no authoritative source to which they can go to identify them.

4.22 We believe that, as far as possible, the interests or relationships to be protected should be explicitly stated in the Act.

(iv) "Maintaining" a constitutional convention

4.23 After an official has identified a convention that protects one of the interests listed in section 9(2)(f), to successfully invoke the provision the official must go on to consider whether withholding is necessary to "maintain" the convention in question. This suggests that the withholding must be necessary to sustain the very life of the convention, as opposed to being able to rely upon it where release would merely lead to its breach or some detriment to it. This is a very high threshold. There is support for this in the Ombudsmen's Guidelines:[100]

> Maintenance of constitutional conventions does not require compliance in every case. Constitutional conventions can be breached on occasion without actually lapsing.

Eagles et al comment further:[101]

> ... [I]t is in the very nature of a constitutional convention that it can be departed from 'without necessarily impairing its effectiveness'.
>
> It is asking much of officials to decide whether the release of information in a particular case would lead to a serious risk to the life of a constitutional convention.

4.24 So this requirement introduces an unfortunate complication into the decision-making process.

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99 Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, 2007) at 220.

100 Office of the Ombudsmen *Practice Guidelines* (Wellington, 2002) at 4.5 'Constitutional conventions'.

101 Ian Eagles, Michael Taggart & Grant Liddell, above n 97, at 364.

4.25 To summarise, the following features of the constitutional convention ground in section 9(2)(f) of the OIA seem to be problematic:

- the reference to "constitutional conventions";
- the mixed list of references to conventions, interests, and relationships in sub-paragraphs (i), (ii), (iii), and (iv); and
- the reference to "maintain".

4.26 The reformulated provision we propose below attempts to address each of these problems.

Free and frank expression of opinion

4.27 Provisions to protect free and frank opinion exist in both Acts. The OIA ground allows, subject to the public interest in release, information to be withheld if it is necessary to:[102]

> (g) maintain the effective conduct of public affairs through—
>
> (i) the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty; or
>
> (ii) the protection of such Ministers, members of organisations, officers, and employers from improper pressure or harassment

The equivalent LGOIMA provision covers members or officers or employees of any local authority.[103]

4.28 The Ombudsmen's Guidelines state that the purpose of these sections "is to avoid prejudice to the generation and expression of free and frank opinions which are necessary for good government."[104] In essence the provisions exist to thwart the chilling effect that openness can have on the expression of blunt or unfettered opinions communicated between Ministers and officials.

4.29 In considering whether information can be withheld under this provision the Ombudsmen consider three questions:[105]

(i) How would disclosure of the information at issue inhibit the free and frank expression of opinions in future?

(ii) How would the inhibition of such free and frank expression of opinions prejudice the effective conduct of public affairs?

(iii) Why is this predicted prejudice so likely to occur that it is necessary to withhold the information in the circumstances of the particular case?

102 OIA s 9(2)(g)(i).

103 LGOIMA, s 7(2)(f)(i).

104 Office of the Ombudsmen *Practice Guidelines* (Wellington, 2002) at 4.6 'Free and Frank Expression of Opinion'.

105 Ibid, Part B ch 4.6 at 2–3.

4.30 The Danks Committee explained the potential negative consequences that could flow from a transparency model that went too far:[106]

> If the attempt to open processes of government inhibits the offering of blunt advice or effective consultation and arguments, the net result will be that the quality of decisions will suffer, as will the quality of the record. The processes of government could become less open and perhaps, more arbitrary.

They go on to say that if provision is not included to protect good government:

> [T]he requirement of openness could be evaded, for example, by preparing and giving advice orally, or by maintaining parallel private filing systems; the record of how decisions are arrived at would be incomplete or inaccessible; public confidence could suffer, and if the relative roles and responsibilities of ministers and official become the subject of public debate, mutual recriminations could also develop.

4.31 The following passage from one survey response is reproduced here because it captures the importance of the "free and frank" ground and the dangers for our governmental system if it did not exist:

> Working on the basis that all internal memos or briefings may be liable for release means that policy makers and officials are more likely to write with an eye for public consumption, on the understanding that the intended internal or Ministerial readership of a document may not be the only ultimate audience. This can be a positive where it encourages the provision of thoroughly-considered, well-reasoned and objective (and therefore publicly defensible) advice. However, this can be a negative where it creates an inclination for writers to keep their opinions bland and inoffensive, to the point of being less frank and less useful, on the basis that this is organisationally safer.

4.32 Nicola White's research suggests that even with the "free and frank" ground the OIA has had negative effects on the policy process in New Zealand. Some of the consequences she identified are that:[107]

- blunt advice is offered less easily, and obfuscation and softer language are widely preferred;
- wide-ranging advice is restricted, with written documentation tending to stick to the safe middle ground with more adventurous thoughts being tested in discussion;
- if issues are delicate or difficult, they are dealt with orally;
- many people working at the centre or at sensitive levels of government work largely without creating records and, for example, will avoid email completely because of lack of any assurance that their comments could be protected.

106 Committee on Official Information *Towards Open Government: General Report* (Government Printer, Wellington, 1981) at 19.

107 Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007) at 271.

4.33 A recent empirical study in the UK suggests introduction of freedom of information legislation has led to a more risk averse approach within Government and that more advice is given orally, or simply not given at all.[108] That report also notes the risks to the public record that arise as a result. These consequences align with much of White's anecdotal research.

4.34 In the end, the question is one of balance. We believe the "free and frank" ground for withholding must remain in the Act for the reasons the Danks committee gave. We have concerns that even with this ground being available some officials feel inhibited and are less free and frank than might be desirable. To some extent this caution seems inevitable. However, careful application of the "free and frank" ground and attention to the cases and guidelines of the Ombudsmen should assist to keep things in proper balance. Training and guidance is also necessary. We consider later in this chapter whether the "free and frank" grounds would also benefit from redrafting.

(i) Maintenance of the effective conduct of public affairs

4.35 The term "to maintain the effective conduct of public affairs' is not defined further in the Act. Eagles et al point out that after demonstrating that release would inhibit candid opinion making or result in undue harassment or pressure, officials must demonstrate that these proven detriments are so weighty or pervasive as to cause public affairs to be less effectively maintained.[109] The degree to which this must occur is not stated on the face of the provision.

4.36 We have considered whether this terminology should be removed from the Act, but on reflection think there is point in retaining it. It makes it clear that it is not enough just that free and frank statements of opinion have been made: there must be the added factor that effective government would be prejudiced by their disclosure. The expression is narrower, and more closely confined than 'public interest', which would otherwise probably have to make an appearance in the provision.

(ii) Scope

4.37 Some agencies that responded to our survey questioned how this ground applies to bodies outside of the core of government.

4.38 Eagles et al make reference to the purpose of this provision – the maintenance of effective public affairs – and question what this means for agencies that fall outside core government or local government: SOEs, CRIs and tertiary education institutions, for example.[110] These grounds were drafted and enacted before the significant restructurings and reforms of the 1980s and were not in the minds of the Danks Committee or the drafters when these provisions were created.

4.39 However, given that all these bodies have relationships with Ministers we are currently not inclined to make a change, but would welcome submissions on that point.

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108 The Constitution Unit *Understanding the Formulation and Development of Government Policy in the context of FOI* (University College London, London, 2009).

109 Ian Eagles, Michael Taggart & Grant Liddell, above n 97, at 367.

110 Ibid.

(iii) Advice vs opinion

4.40 Both Acts refer to "opinions" rather than "advice" in the "free and frank" ground.

4.41 It was suggested by some officials that we consider reframing this ground to cover advice as well as opinion, and thereby remove any distinction between the two. This is the case in the UK Freedom of Information Act 2000 and one thoughtful response to the survey suggests we adopt such wording here. The relevant UK ground reads:[111]

> Information to which this section applies is exempt if… disclosure of the information
>
> (b) would, or would be likely to, inhibit
>
> (i) the free and frank provision of advice, or
>
> (ii) the free and frank exchange of views for the purposes of deliberation, or
>
> (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

4.42 We believe such a change could be considered for New Zealand. "Advice" and "opinion" are sometimes used interchangeably, and at best the line between them is blurred. Our present inclination is to extend the "free and frank" ground to cover both opinions and advice. However we would be reluctant to make such a change if the result would significantly reduce the amount of information released to requesters. We seek views on whether it would have such an effect.

(iv) The order of the grounds

4.43 It has regularly been noted by the Ombudsmen that the (f) and (g) grounds do not reflect the chronological order in which opinions and advice are generated. We agree that any redrafted grounds should reflect the natural order of the policy process. As noted in the Law Commission's earlier report:[112]

> …subparagraph (g)(i) concerns the earlier matter, the generation of opinions, those opinions frequently becoming the basis on which advice is given, while subparagraph (f) is about the latter matter, the consideration of that advice.

A POSSIBLE REDRAFT

4.44 While our general approach in this issues paper is not to suggest the redrafting of the withholding grounds, there is an argument that the "good government" grounds are so confusing and unclear that they would benefit from attention.

4.45 Here we offer a possible reformulation of the current good government grounds. The main intention is not to change the substance of the existing grounds, merely to clarify their expression, and to remove the concerns we have identified above. But we also take the opportunity to expand their application in two respects.

111 Freedom of Information Act 2000(UK), at s 26(2)(b).

112 Above n 91, at 84.

4.46 The suggested reformulation for OIA would combine sections 9(2)(f) and (g) as follows:

> The withholding of the information is necessary to maintain the effective conduct of public affairs by protecting:
>
> (i) collective and individual ministerial responsibility;
>
> (ii) the political neutrality of officials;
>
> (iii) negotiations and the free and frank expression of opinion between the parties that form the government;
>
> (iv) the free and frank expression of opinions and provision of advice by or between Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty, where the making available of the information would be likely to prejudice the free and frank expression of similar opinion or the provision of advice in the future;
>
> (v) the ability of Ministers properly to consider advice tendered before a decision is made;
>
> (vi) Ministers, members of organisations, officers and employees of any department or organisation from improper pressure or harassment.
>
> (vii) the confidentiality of communications by or with or about the Sovereign or her representative.

4.47 The equivalent provision for the LGOIMA would require adaptation to the local government focus of that Act.

Discussion

4.48 Most of this redraft restates, we believe more clearly, what is in the current provisions. Redrafted subparas (i) and (ii) are reformulations of the current provisions which omit reference to "constitutional conventions" but we think capture the required substance. (vi) is also a reformulation.

4.49 Ground (iii) is new and reflects the fact that post-MMP governments can be made up of multiple parties. The ability for these parties to communicate with each other confidentially is necessary and worthy of protection. It may of course be that some of the information generated or used in such exchanges would not be official information at all. But it seems desirable to have protection for information which is.

4.50 Ground (iv) is a reformulation of the current ground in section 9(2)(g)(i) of the OIA and section 7(2)(f)(i) of the LGOIMA, but differs in a number of respects. First, a reference to 'advice' has been added for the reasons given above that the distinction between opinion and advice is a slender one indeed. Secondly, we have spelled out what we see as the main rationale for the protection of free and frank advice, namely the concern that publication might deter the provision of such advice in the future. While we put forward this wording, we would like to hear of any perceived drawbacks of doing so.

4.51 Ground (v) is a substantial reformulation of section 9(2)(f)(iv). Again, this reflects the Ombudsmen's approach to the current ground. We believe it is clearer and more transparent. Its purpose is to give Ministers some room to make decisions on advice they receive. It can only be used *before* a decision is made, so will only be capable of use for a finite period of time. Once a decision has been

reached the information will have to be released, unless another valid withholding ground can be relied upon. We should also point out that under this formulation, the ground can be used to protect advice provided to a Minister by those outside, as well as inside, Government. This is consistent with the Law Commission's view in 1997.

4.52 Ground (vii) is a reformulation of section 9(2)(f)(i) save for the addition of the word 'about'. That word has been added in response to a request from the Cabinet Office asking us to consider whether communications about the Sovereign and her representative should be protected. We think they should. It has been pointed out that the modern justification for the need to retain confidentiality of such confidences is the need to 'preserve the constitutional position of the Queen or the Governor General by limiting the visible involvement of either in matters of political controversy.'[113] Extending the protection to cover communications *about*, as well as *with*, the Sovereign and her representative will further this end.

An alternative

4.53 An alternative to the reformulated grounds (iv) and (v) above would be to follow the United Kingdom Freedom of Information Act 2000 provision.[114]

> Information can be withheld if release of the information
>
> (i) would, or would be likely to, inhibit
>
> (a) the free and frank provision of advice
>
> (b) the free and frank exchange of views for the purposes of deliberation.

4.54 While the economy of expression of this version has some attractions, we are not sure that it conveys all the nuances of the required protection and prefer our first proposal.

Guidance

4.55 Although we propose that the good government grounds in the OIA and the ground in the LGOIMA be reformulated, we also believe that assistance in the form of better guidance remains crucial to these grounds being understood and consistently applied. Since most of the redrafting relates only to expressing the existing concepts in plainer form, we envisage that the large volume of Ombudsmen guidance and case precedents would remain as applicable and valuable as before. The omission of the reference to 'constitutional conventions' should not in any way affect the value of this earlier guidance and jurisprudence.

Q14 Do you agree that the "good government" withholding grounds should be redrafted?

Q15 What are your views on the proposed reformulated provisions relating to the "good government" grounds?

113 Ian Eagles, Michael Taggart & Grant Liddell, above n 97, at 364.

114 FOI Act (UK), at s 36(2)(b).

Chapter 5

Protecting commercial interests

5.1 This chapter deals with the reasons which allow the withholding of information on commercial grounds, sometimes broadly referred to as the "commercial sensitivity" grounds. They are as follows:

> Section 9(2) This section applies if, and only if, the withholding of the information is necessary to –
>
> (b) protect information where the making available of the information-
>
> (i) would disclose a trade secret;[115] or
>
> (ii) would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information;[116] or
>
> (ba) protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information-
>
> (i) would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied;[117] or
>
> (ii) would be likely otherwise to damage the public interest;[118] or
>
> (i) enable a Minister of the Crown or any department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities;[119] or
>
> (j) enable a Minister of the Crown or any department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations);[120]

5.2 Two of these, (ba) and (j), extend wider than commercial matters but can clearly be used in the commercial context.

115 LGOIMA, s 7(2)(b)(i).
116 LGOIMA, s 7(2)(b)(ii).
117 LGOIMA, s 7(2)(c)(i).
118 LGOIMA, s 7(2)(c)(ii).
119 LGOIMA, s 7(2)(h).
120 LGOIMA, s 7(2)(i).

5.3 None of these grounds are conclusive, and all are able to be overridden by the public interest in disclosure in a particular case.[121]

THE COMMERCIAL ENVIRONMENT OF THE LEGISLATION

5.4 In 1980 the Danks Committee accepted that the OIA needed to protect commercial interests, but emphasised the need for balance between these commercial interests and the public interest in access to information. It considered that "no general rule about protection will fit", and the merits of each case would need to be considered. Since 1980 statutory reform of the governance models for central and local government in relation to economic transactions has transformed the environment in which the OIA commercial withholding provisions operate.[122] Although the Danks report predated these developments, it recognised the web of interests involved in publicly supported business enterprises that distinguishes them from enterprises exposed fully to market forces: [123]

> Not all government business activity has the profit-seeking, competitive colour of private enterprise. And where national matters of economic or social moment such as the pursuit of regional development or of fuller employment become objectives, taxpayers who are called upon to subsidise such quasi-commercial activities should be informed about strategies and costs. Where commercial, social, and economic objectives become conjoined, as in the case of the Railways, it is impossible to find a comprehensive rule which will apply, and again judgments on the merits of each case will be called for.

5.5 The late 80s and 90s saw extensive growth in commercially-oriented public organisations. The range of activities is potentially vast. An indicative list of situations where a public agency might hold commercial information includes procurement, purchasing, regulation (for example issuing licences or investigating breaches of regulations), public-private partnerships, policy development (for example policy aimed at promoting a particular industry) and policy implementation (for example the awarding of grants for business proposals).

5.6 In 2010 the Crown Ownership Monitoring Unit in the Treasury (COMU), which provides strategic ownership advice to the Government on the commercial assets it owns and monitors the performance of entities responsible for those assets, has oversight of central government business with a value of 60 billion dollars. These entities report to Ministers and are also subject to financial reporting regimes appropriate to their structure, as well as being subject to the OIA. They include State-Owned Enterprises, Crown Research Institutes, Crown financial institutions, Crown companies and some statutory entities. Under the Local Government Act 2002 councils can set up organisations to undertake activities and can hold voting interests in organisations outside the

121 OIA, s 9(1); LGOIMA, s 7(1).

122 Statutes such as the State Owned Enterprise Act 1986, State Sector Act 1988, Public Finance Act 1989, Crown Entities Act 2004 and Local Government Act 2002.

123 Committee on Official Information *Towards Open Government: General Report* (Government Printer, Wellington, 1981) at para 46. See also the helpful discussion by the Information Authority in *Review No 1, A review of provisions in the Official Information Act 1982 that pertain to commercial information, together with proposals for the amendment of the Act* (Wellington, 1984).

council. A study commissioned by the Department of Internal Affairs identified 257 council organisations that deliver services such as transport, port operations, provision of water and energy, removal of waste, libraries, museums and sports venues with a total value in June 2007 of 6 billion dollars.[124]

5.7 A council controlled organisation (CCO) is one that is 50 per cent or more owned by a council, either solely or with other councils. A council controlled trading organisation is one that undertakes trading with the purpose of making a profit. The structure of CCOs can vary widely. For example they can be companies, trusts or joint ventures. Apart from a few statutory exceptions, all CCOs are subject to the official information provisions of the LGOIMA.[125]

5.8 The 2010 Auckland City governance arrangements amalgamate some existing commercial enterprises and create others; and may be the forerunner of further evolution of service provision in other local authority regions. The LGOIMA applies to the new Auckland CCOs, and may become more important in terms of public accountability than at present since the new legislation alters the reporting and consulting requirements of these CCOs from that set out in the Local Government Act 2002.

SOME PROBLEMS OF APPLICATION

5.9 The Ombudsmen's Guidelines set out the steps to follow in assessing each of the withholding grounds. They note that when applying section 9(2)(b)(ii) it is not enough to recognise potential commercial sensitivity: it must be established *what* prejudice or harm might follow from disclosure and *why* that level of prejudice would be unreasonable. Then any countervailing public interest in disclosure must be considered. The Ombudsmen note that direct consultation with affected third parties may sometimes be needed to establish the nature of any prejudice to them.[126]

5.10 Some concern has been expressed as to the substance and application of the withholding grounds. Nicola White notes that "commercial sensitivity" is one of the most frequently used grounds and that there is "some uncertainty at the margins".[127] Steven Prices notes, when commenting on the confidentiality ground:[128]

> Agencies occasionally used this exception to withhold contractual documents which were, as one agency put it, "confidential to the parties and were entered into on that basis." It was usually not clear who sought – or benefited from – the confidentiality or, more importantly, what harm might come of disclosure.

124 MWH Consultants "Council Controlled Organisations: Analysis of LCTCCPs and Annual Reports", prepared for Department of Internal Affairs (June 2008). The study included energy companies, port companies and Watercare Limited because of their significant contribution to council revenue, although these categories are excluded from the requirements of the Local Government Act 2002. The study notes considerable shortcomings in the information available to the authors.

125 Local Government Act 2002, s 74(1).

126 Office of the Ombudsmen *Practice Guidelines* (Wellington, 2002) Part B at 4.2.

127 Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007) at 173 and 91.

128 Steven Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?* (New Zealand Centre for Public Law, Victoria University of Wellington, Wellington, 2005) at 42.

5.11 In the responses to our survey it was clear that some agencies with significant commercial interests find the grounds difficult to apply. Some sought more clarity. Others felt that certain sorts of information should be excluded from the official information statutes altogether. Comments from local bodies illustrated considerable variation in the application of the provisions. The media felt that the grounds were overused with too much blanket withholding of any information relating to commercial activity. We notice that Part E of the Ombudsmen's Practice Guidelines, dealing with "common misconceptions", contains some 26 misconceptions relating to the application of these commercial withholding provisions. This is more than those relating to any other ground.

5.12 A few examples will illustrate the difficult decision-making that is sometimes required:

- Sometimes public authorities collect information from and about particular organisations. This might be in the course of contracting with them, or in the course of determining an application. The organisations which supplied the information may well regard this information as their own. Some have said that it should be exempt from disclosure altogether. Yet under the legislation even if it falls within one of the withholding grounds it can be overridden by public interest considerations.
- Sometimes agencies such as CRIs or universities engage in research which is privately funded. As often as not there will be a confidentiality contract between the agencies and the funder in relation to the research findings. These findings will then be subject to an obligation of confidence within ground (ba), and may sometimes also be able to be classed as a trade secret within ground (b)(i). Yet once again the public interest in disclosure can trump these grounds, strong and exceptional though such a case may have to be.
- Crown Entities, Councils or CCOs may enter into commercial arrangements with other organisations. They may not wish to release details of these arrangements, on the basis that this would prejudice future dealings with the same or other parties, or that it might give an advantage to their competitors in the private sector. No disclosure requirements are imposed on those private competitors. Several councils mentioned the potential for prejudice to their commercial position and possibly to third parties where contractors provide services at a cut price in order to secure council contracts. Disclosure of the low price might harm the contractor's negotiation with other clients, and the risk of disclosure may prevent Councils from negotiating the best price for ratepayers. They consider this should be a valid basis for withholding.
- Councils sometimes compete to attract events to their areas. They may be concerned that disclosure of details could put them at a disadvantage with competing venues and in negotiating arrangements. Disclosure of the funding arrangements for transfer of the Ellerslie Flower Show to the Christchurch City Council from Auckland raised these matters. The Ombudsmen has published some principles of general application to assist local authorities in such situations.[129]

129 Office of the Ombudsmen *Events Funding by Local Authorities – Implications under the Local Government Official Information and Meetings Act* referred to in Office of the Ombudsmen *Annual Report for Year Ended 30 June 2009* (Wellington, 2009) at 25.

5.13 The correct balance to be reached in relation to these withholding grounds is often a point of disagreement between the parties involved. Different economic perspectives may lead to different views. Some commercially-oriented organisations still find their inclusion in the Acts disconcerting. It would require much more research than has yet been done to analyse exactly how much prejudice really can be caused by releasing commercial information. The responses to our survey provided details of only one example: it was a response from a third party and was a clear example of a case where the release of such information provided an opportunity for a competitor.[130]

POSSIBLE AREAS FOR REFORM

5.14 Our overall approach in this issues paper, discussed in chapter 3 particularly, is that the guidance and training available to those who apply the Acts should be enhanced. But in relation to these commercial grounds which continue to give trouble, we need to ask whether any statutory amendments would help. Given the many competing influences and pressures involved we are inclined to doubt whether they would. But it may be that more clarity is able to be achieved through amendment and to that end we examine some possibilities.

Coverage of the Acts

Organisations

5.15 Some agencies, especially some SOEs, put forward an argument that they should not be subject to the OIA at all, arguing first that their subjection to the legislation means the playing field is not level for them vis-a-vis their private competitors, and secondly that they are already subject to stringent compulsory reporting requirements. We considered those arguments in chapter 2 and concluded that they do not justify any change in the present position.

Third party information

5.16 From time to time arguments arise that information which is held by agencies, but which originates from third parties, should not have to be disclosed. It is argued that either such information should be excluded from the definition of "official information" or it should be made a conclusive rather than overridable ground for withholding. That is particularly so, it is said, where the information is subject to a contract of confidentiality. We deal with this matter more fully later in this chapter. It is enough to say at this point that currently we would not support a change to the Acts in this respect.

5.17 Nevertheless we have in other parts of this issues paper proposed certain measures which will to some extent alleviate the concerns. First, in chapter 7 we suggest there should be a separate withholding ground for information which is supplied in the course of an investigation or inquiry, although that would still be an overridable ground.

5.18 Secondly, in chapter 10 we strongly support the practice of consulting with third parties who might be affected before disclosure is made, although we would not go so far as to require that to be mandatory. Some say that in the commercial arena

130 Because the Act provides no ground of complaint for a release as opposed to a withholding, it is difficult to assess how many releases of commercial information have caused harm.

the consultation process can be frustrating because third parties are not necessarily clear about the harm that disclosure may cause them; the process may take much longer than the statutory deadlines; often the third parties cannot advise with certainty whether the information should be protected or disclosed; and the whole process has an inhibiting effect on the commercial relationship between the parties. Despite this it is normally to be strongly recommended. In chapter 10 we suggest imposing a requirement that third persons be notified in appropriate time before the information is disclosed. This would give a third party that considers that it is threatened by serious commercial prejudice the opportunity of applying for judicial review. Although this is a costly remedy, it may not be disproportionate if there were significant commercial interests at stake. We propose that failure to give this notice should be a ground for complaint to the Ombudsmen.

5.19 Thirdly, in chapter 10 we ask the question whether it should be possible to complain to the Ombudsmen about improper decisions to release information. We found the arguments for and against this finely balanced, and while we currently tend against extending the complaint process to cases of this kind, we nevertheless welcome views on the matter.

The meaning of "commercial"

5.20 The word 'commercial' appears in three of the withholding grounds. It is not defined in the legislation. There are sharply differing views as to what it means. The Practice Guidelines of the Ombudsmen advise that in order to be "commercial", activities must be undertaken for the purpose of making of a profit. Determining this is a prerequisite to assessing whether the release of information would prejudice a commercial position or commercial activities. The Guidelines say:[131]

> (a) The first issue to consider is the meaning of "commercial". The Ombudsmen are of the view that, in order to be "commercial", activities must be undertaken for the purpose of making a profit. This interpretation is based on:
>
> Dictionary definitions of the word "commercial", which refer to the conduct of commerce and trade for the purposes of profit and loss; and
>
> Case law which has established that a profit motive is implied by the term "commercial" activities. For example, in Calgary (City) v Alberta (Assessment Appeal Board), the Court, citing other Canadian case law, stated that:
>
> "…whatever other attributes an activity may have it is not a commercial activity unless in addition it has as its predominant purpose the making of a profit."
>
> It is therefore considered that a profit motive is a pre-requisite for the conduct of "commercial" activities.
>
> A distinction is recognised at law between financial motives and "commercial" motives. Prudent management of the financial position of an organisation does not establish that there is a "commercial" motivation. The status of an organisation is not always relevant – for example, a charitable organisation may conduct activities in order to earn a profit, even though those profits are then applied for charitable purposes.

131 Office of the Ombudsmen, above n 126, Part B at 4.2. See also Ombudsmen's Quarterly Review Vol 13, Issue 2, June 2007.

5.21 The Guidelines go on to say that when applying section 9(2)(b)(ii) of the OIA,[132] once it is established that the purpose of the activity is commercial in the above sense, the agency must then consider whether the person who supplied or is the subject of the information has a "commercial position".[133]

> (b) Once it is established that the purpose is "commercial", the agency must consider whether the person who supplied or is the subject of the information has a "commercial position".
>
> In this regard, the person's activities are relevant. An involvement in commercial activities is a logical pre-requisite to the existence of a commercial position. However, this does not mean that it is necessary for there to be prejudice to a person's commercial activities before it can be said that the commercial position has been prejudiced. Nor does it mean that the information at issue must relate to the commercial activities of the person before it can be said that release of the information would be likely to prejudice the person's commercial position.

5.22 We received a number of responses to our survey to the effect that this requirement of a profit motive is too narrow, and there can be commercial activities which do not involve profit.

5.23 One pointed out that the test currently applied makes it difficult for non-commercial organisations with significant economic interests to apply the commercial grounds for withholding, and that this category is likely to increase. Another suggested that "commercial" must be given a wider interpretation than "profit", which implies profit measurable in monetary terms, whereas the statute refers to commercial *activities* not commercial profit or outcomes. That respondent considered that the Ombudsmen's definition does not match public sector realities and said that much of what is done by Government and the core public sector is not undertaken to make a profit. Activities may not have benefits that can always be measured in monetary terms but are nonetheless commercial in nature.

5.24 One large local authority noted that it undertakes a number of commercial activities but not necessarily for the purpose of making a profit: for example it may be involved in funding events to stimulate the wider community. The Council takes a wider, prudential view of the term "commercial" that reflects the purposes and principles of the Local Government Act 2002.

5.25 One agency said that non-profit organisations may undertake activities analogous to a competitive, commercial environment, for example sports organisations that compete internationally. Release of information could prejudice the interests of such agencies. Non-governmental agencies also sometimes compete for government contracts. Whether research and development projects will be profitable may not be immediately obvious, but they can certainly be competitive.

5.26 There is some support elsewhere for this contention that "commercial" does not necessarily involve profit. The three dictionaries in most common use in New Zealand (Oxford, Collins and Chambers) all give "of or engaged in commerce" as the first

132 LGOIMA, s 7(2)(c)(ii).

133 Office of the Ombudsmen, above n 126, Part B at 4.2.

meaning of commercial and "having profit as the main aim" as a second or third meaning. The Information Commissioner's Office in the UK provides the following guidance on their commercial withholding provisions which are very similar to ours:[134]

> A commercial interest relates to a person's ability to participate competitively in a commercial activity ie. the purchase and sale of goods or services. The underlying motive for these transactions is likely to be profit but this is not necessarily the case, for instance where a charge for goods or the provision of a service is made simply to cover costs.

5.27 An order made under the Ontario freedom of information legislation also contains a useful definition:[135]

> Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. The term can apply to both profit making or non-profit organisations.

5.28 A broader interpretation of "commercial" than currently adopted by the Ombudsmen would potentially increase the kinds of information where withholding is possible, and might well increase the amount of information which is in fact withheld. However this is not a reason for adhering to the Ombudsmen's interpretation if other factors support a conclusion that the interpretation is not right.[136]

5.29 We have not ourselves yet formed a view on this vexed question, and want to know what submitters think. Should "commercial" be confined to situations where the purpose is to make a profit? If not, how should the present practice be changed: by an amendment to the Act or in some other way?

Q16 Do you think the commercial withholding ground should continue to be confined to situations where the purpose is to make a profit?

Q17 If you favour a broader interpretation, should there be a statutory amendment to clarify when the commercial withholding ground applies?

Intellectual property

5.30 Earlier in this chapter we noted concerns about third party information. Some information which has been supplied to the holding agency by, and might be said to be "owned" by, third parties may be the subject of intellectual property (IP). The relationship of intellectual property to the OIA and LGOIMA is not well understood. The question can arise in several forms. One of the most acute is where the agency is, for instance, a CRI or a university which has undertaken research for another private or public organisation. When commercial interests are at stake, negotiating who owns the IP in the research is critical. It may sometimes reside completely in the client. If a request is made for the disclosure

134 Information Commissioner's Office *Freedom of Information Act Awareness Guidance No. 5: Commercial Interests* (March 2008) at 4.

135 Order P493 (9 July 1983) made under the Ontario Freedom of Information and Protection of Privacy Act 1990.

136 See also Paul Quirke "Drawing back the corporate veil: reforming the commercial activities exemption in section 9(2)(i) of the Official Information Act 1982" (LLM research paper, Victoria University of Wellington 2005).

of this information grounds will almost always exist for withholding, but they can be overridden by the public interest in appropriate circumstances. If an organisation is asked to disclose information in such circumstances the sensitivities are obvious. We discuss briefly the types of intellectual property which will generally be in issue.

Trade secrets

5.31 Section 9(2)(b)(i) expressly permits withholding official information to protect a trade secret. This term is not well understood by non-lawyers, and even to lawyers its boundaries are not always clear. The Ombudsmen's Practice Guidelines provide criteria derived from judgments of the Australian courts.[137]

(1) the extent to which the information is known outside of the business;

(2) the extent to which it is known by employees and others involved in the business;

(3) the extent of measures taken to guard the secrecy of the information;

(4) the value of the information to the business owner and contemporaries;

(5) the amount of effort or money expected in developing the information;

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

5.32 The English Information Commissioner says:[138]

> Perhaps the most important thing to grasp is that the term [trade secret] can have a fairly wide meaning. It covers not only secret formulae or recipes, but can also extend to such matters as names of customers and the goods they buy, or a company's pricing structure, if these are not generally known and are the source of a trading advantage. Many of the cases considered by the courts have concerned an employer's ability to prevent the use of information about his business being used by an ex-employee.

5.33 We have wondered whether "trade secret" would benefit from further definition in the Act but it is difficult to see that a definition would achieve any more than, or indeed be as useful as, detailed guidelines coupled with examples from case law precedents of the kind that we have recommended earlier in this issues paper. We think such guidance will be more illuminating than a new statutory definition.

Confidential information

5.34 Breach of confidence is also a concept well understood to lawyers but not so familiar to non-lawyers. Confidentiality can be imposed by an express contract or by an implied one. Sometimes the very circumstances of a transaction show that both parties must have clearly understood that the information was supplied or held in confidence. Even at common law, confidentiality can be overridden by the public interest in disclosure, and the same is true under the official information legislation.

5.35 We wonder whether the "obligation of confidence" ground would benefit from statutory amendment. There are two possible reasons. The first is that presently section 9(2)(ba)(i) deals only with information provided by someone else, not

137 Derived from a summary in *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37 at 50.

138 Information Commissioner's Office, above n 134 at 3.

information generated by the agency which holds it. Section 9(2)(ba)(ii), which introduces another "public interest" test, has to deal with the latter. Clearer and more specific provision for the situation when the information is generated by the agency might be desirable.

5.36 The second reason is that the concept of "public interest" appears twice in this withholding ground, as part of a threshold test[139] and again once the ground to withhold is established when the public interest in disclosure must be balanced as the final stage. The public interest thus features in two different ways. We have been asked whether such complexity is necessary.

5.37 We currently have no strong views on the need for amendment, although we are inclined to believe that once again clearer guidance with examples will serve as well as any statutory redefinition which could unsettle established practice. But we are anxious to receive submissions on this.

Q18 Do you think the trade secrets and confidentiality withholding grounds should be amended for clarification?

Copyright

5.38 Often information held by agencies is subject to copyright. Sometimes that copyright will lie in the Crown, and sometimes it will be in the organisation, public or private, which supplied it or on behalf of which it was generated. Copyright can be transferred by agreement. Copyright does not protect information, rather it protects the expression of it: a subtle distinction, and one on which there is a considerable amount of learning. However once again it is clear that the public interest in disclosure can override copyright in relation to the official information legislation. Section 48 protects the disclosing agency from any liability if it discloses copyright material, but the recipient of the information who wishes to publish it must be careful not to infringe the copyright which still attaches to the material. We have noted in chapter 12 the NZGOAL initiative which aims to make copyright material available for reuse by a licensing system.

An exemption for intellectual property?

5.39 We need to examine the claim that material covered by intellectual property should not be released under the official information legislation at all. The area is one of great sensitivity. Some of the agencies that we surveyed claim that the risk of disclosure discourages potential clients from commissioning work from them. Those who do commission it need to weigh up the risk of disclosure under the OIA against the potential benefit arising from the reputation and expertise of the people in those institutions. Some suggest, without always explicitly stating it, that ownership of intellectual property rights should always trump any public interest.

5.40 Nevertheless we believe there can clearly be circumstances where the public interest might require disclosure regardless of contract or intellectual property rights. The situations may be relatively unusual, but allowance needs to be made for them. The case of *Wyatt Co Ltd v Queenstown Lakes District Council* holds that

139 Office of the Ombudsmen, above n 126, Part B at 4.3.

a confidentiality contract does not conclusively mean that the information cannot be disclosed[140]. In that case a proposal accepted by the Council said that "the council's agreement to maintain full confidentiality of both methods and statistics is requested because these represent the proprietary interests [of the company]." The Ombudsmen identified some aspects of the reports entitled to be kept confidential, but otherwise upheld release. In the application for judicial review Jeffries J agreed. He said:[141]

> There cannot be allowed to develop in this country a kind of Alsatia beyond the reach of statute. Confidentiality is not an absolute concept admitting of no exceptions. It is an implied term of any contracts between individuals that the promises of their contract will be subject to statutory obligations. At all times the applicant would or should have been aware of the provisions of the Act and in particular s7 [LGOIMA], which effectively excludes contracts of confidentiality preventing release of information.

5.41 We do not think that the law should be changed on this point. It is not difficult to think of situations where information labelled as confidential should properly be made known. One example would be where the subject matter of a confidential arrangement was unlawful; or where the information subject to it revealed a danger to public safety of which the community needed to be warned; or where the subject matter involved an unjustified expenditure of public money. We therefore make no recommendations for change but would like to hear more about the difficulties that may arise for agencies and third parties, particularly in relation to research.

Q19 Do you agree that the official information legislation should continue to apply to information in which intellectual property is held by a third party?

Q20 Do you have any comment on the application of the OIA to research work, particularly that commissioned by third parties?

The public interest in disclosure

5.42 In this context, as in others, the balancing exercise required when determining whether the public interest requires disclosure can be quite difficult. It is particularly so here because there needs also to be weighed in the balance the public interest in maintaining confidentiality and in supporting effective commercial arrangements. It seems to us that the following public interest factors are of particular relevance to the commercial withholding grounds:

- the need for trust and good relationships with third parties that provide commercial information;
- oversight of, and accountability for, public expenditure;
- citizen's right to know how taxpayer or ratepayer funds are being used;
- ensuring that companies can compete fairly on a level playing field;
- the contribution of the information to a wider public policy debate;
- the return of a profit to the Crown or local government;
- the promotion of ethical and profitable commerce;
- the nature of the enterprise and its potential impact on people's lives.

140 *Wyatt Co (NZ) Ltd v Queenstown Lakes District Council* [1991] 2 NZLR 180.

141 Ibid, at 191.

5.43 We have wondered whether there might be benefit in listing these factors, and perhaps others, in the legislation specifically in relation to the commercial withholding grounds.

5.44 Given the particular difficulty which these grounds have engendered such a legislative endorsement might help. But we have concerns that to do so would be subject to the same vices as legislating for the public interest generally. We discuss these in chapter 8. In essence we think that legislating for "factors to be taken into account" can give rise to rigidity and the appearance of exclusivity. We are inclined to think that full and detailed guidelines, with examples where appropriate, would be safer, and probably more helpful. But we acknowledge that some may think a firmer statutory basis is desirable and we would welcome views.

Q21 Do you think the public interest factors relevant to disclosure of commercial information should be included in guidelines or in the legislation?

Q22 Do you experience any other problems with the commercial withholding grounds?

Chapter 6
Protecting privacy

6.1 Where official information is or includes personal information about citizens, there is a tension between:

- the goal of the Official Information Act to make government held information more accessible to the public, and
- the need to protect people's privacy interest in information about them that is held by government and public agencies.

This tension is acknowledged in the purpose sections of both statutes, which reflect both the purpose of making official information available and the need to protect official information, consistent with the "public interest and the preservation of personal privacy".[142]

THE PRIVACY WITHHOLDING GROUND

6.2 The tension between privacy and availability is managed through the privacy withholding ground. This provides that a good reason to withhold official information exists where it is "necessary to protect the privacy of natural persons, including that of deceased persons";[143] unless outweighed by other considerations that render it desirable, in the public interest, to make that information available.

6.3 The withholding ground applies where a request for official information has been received.[144] In other situations where personal information is released by agencies, such as through proactive release, this must be in accordance with the Privacy Act's privacy principles[145] (unless the privacy principles are displaced by other legislation). Agencies are therefore generally subject to a dual disclosure regime in relation to personal information. They must apply the Privacy Act principle 11 disclosure test, except in the context of an official information request, where the release of personal information instead depends on the operation of the privacy withholding ground in the OIA and the LGOIMA.

142 Official Information Act 1982 s 4(c); Local Government Official Information and Meetings Act 1987 s 4(c).

143 OIA s 9(2)(a); LGOIMA, s 7(2)(a).

144 The OIA release framework overrides the Privacy Act by virtue of the Privacy Act, s 7(1). One issue raised in *Review of the Privacy Act 1993* was whether the OIA's precedence over the Privacy Act in this context should be made more explicit: New Zealand Law Commission *Review of the Privacy Act 1993* (NZLC IP 17, 2010) Q131.

145 See Office of the Ombudsmen *Practice Guidelines* (Wellington, 2002) Part E Common Misconceptions, at 6.

6.4 From responses to our survey, we identified a fairly strong wish by agencies for the statutory interface between the official information legislation and the Privacy Act to be clarified. Some survey responses found no problem with the interface, but many others found it unsatisfactory and confusing. Some agencies found the need to work in both statutes cumbersome and several state that they only use the Privacy Act. This is of concern as agencies that use a Privacy Act methodology exclusively may not be paying sufficient regard to the second step of the privacy withholding ground, namely the need to balance any identified privacy interest against the public interest in releasing personal information.

6.5 Consultation with the Privacy Commissioner in relation to our issues paper *Review of the Privacy Act 1993* indicated that generally the interface works well, although it is not easy for users who are not familiar with its intricacies to understand it.[146] In her book on the OIA,[147] Nicola White did not uncover any particular problems with the privacy withholding ground. In his research, Steven Price found that application of the privacy withholding ground was "extremely inconsistent and, in some cases, alarmingly sloppy."[148]

Comparison of Privacy Act and OIA tests

6.6 In our issues paper, *Review of the Privacy Act 1993*,[149] we noted some of the differences between the OIA and Privacy Act tests for the release of personal information. The default position under the Privacy Act (principle 11) is that personal information *is not to be disclosed*, unless there are reasonable grounds for an agency to believe that one of the listed exceptions applies. The listed exceptions include some public interest grounds such as public health and safety and maintenance of the law. Breach of the principle only provides grounds for complaint if disclosure results in one of the harms described in section 66(1)(b).

6.7 The OIA takes a different approach. It starts from the position that information *is to be disclosed* unless there is good reason for withholding it. The withholding ground refers broadly to "privacy" and "the public interest" and requires agencies to identify the relevant competing interests and then to conduct a balancing exercise between them, with disclosure of information being mandatory where favoured by the public interest. Stylistically therefore, the official information approach is a more conceptual one than principle 11's specific listed exceptions approach. There are also a number of structural differences in the two approaches which we discuss further below. Both approaches however depend on a case by case assessment.

146 Kathryn Dalziel *Privacy in Schools: A Guide to the Privacy Act for Principals, Teachers and Boards of Trustees* (Office of the Privacy Commissioner, Wellington, 2009) 24; Office of the Privacy Commissioner *Review of the Privacy Act 1993: Interaction With Other Laws* (Discussion Paper No. 10, Wellington, 1997).

147 Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007) at 174.

148 Steven Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?* (New Zealand Centre for Public Law, Victoria University of Wellington, Wellington, 2005) at 39.

149 Law Commission *Review of the Privacy Act 1993* (NZLC IP17, March 2010) at paras 11.39–11.42.

Nature of the privacy interest

6.8 Privacy as a legal concept was in a state of relative infancy at the time that the OIA was enacted.[150] Nearly 30 years on, privacy jurisprudence is more developed, assisted in large part by the Privacy Act 1993. Most legislative privacy provisions now deal with a particular aspect or sub-set of privacy interests, rather than with the concept of privacy as a whole, a concept which is notoriously difficult to define comprehensively. For example, the privacy principles deal with informational privacy in particular. Other statutory provisions prohibit or provide sanctions against particular activities that are regarded as intruding on people's privacy.

6.9 The common law has also responded to privacy concerns, establishing the tort of publication of private facts, and weighing privacy considerations in various contexts including name suppression, and the balancing of competing considerations under sections 5 and 21 of the Bill of Rights Act 1990. Other bodies such as the Broadcasting Standards Authority (BSA) and the Press Council have developed privacy standards to guide decision-making about privacy complaints. The BSA standards identify intrusions into privacy including the "highly offensive" public disclosure of private facts, and "intentional interference in the nature of prying" with an individual's interest in solitude or seclusion.

6.10 The broad and undefined scope of the privacy interest in the OIA withholding ground now stands out, when compared to other statutory and legal formulations. While the context dictates that it is informational privacy that is usually at issue, its broad scope may make it more complex for agencies to identify the particular privacy interest in a given situation,[151] although the Office of the Privacy Commissioner does not believe that there are difficulties in practice. We note that in other jurisdictions, freedom of information legislation generally targets informational privacy as potentially protected, subject to public interest factors that may nevertheless favour release.[152]

6.11 For practical purposes, the Privacy Act framework can be used by agencies as a tool to identify whether there is a privacy interest involved, and agencies responding to our survey say that they do this.[153] However, in a submission in response to *Review of the Privacy Act 1993,* the Health and Disability Commissioner noted that reference to principle 11 as a tool to considering disclosure under the OIA can be unhelpful and confusing because the principle 11 approach (presumption of non-disclosure subject to exceptions) is opposite to the OIA approach (presumption in favour of release, unless a good ground for

150 For a survey of the development of privacy in New Zealand law, see New Zealand Law Commission *Privacy Concepts and Issues: Review of the Law of Privacy Stage 1* (NZLC SP 19, January 2008) at ch 4.

151 See discussion of privacy in Ian Eagles, Michael Taggart & Grant Liddell *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992) at ch 10, Part A.

152 See eg Freedom of Information Amendment (Reform) Bill 2009 (Cth); Government Information Public Access Act 2009 (NSW); Freedom of Information Act 2000 (UK); Access to Information Act 1985 (Canada).

153 See for example case W41406 (2001) where the Department for Courts used principle 11 as a guide to s 9(2)(a).

withholding).[154] Another problem, as noted, is that de facto reference to principle 11 for OIA purposes seems to mean for some agencies that they do not go on to consider the public interest grounds under the OIA in favour of release.

6.12 The Ombudsmen's Guidelines recommend that in assessing the strength of the privacy interest at stage one, relevant factors include:

- the nature of the information and what it would reveal about the person(s) to whom it relates;
- the circumstances in which the information came to be held by the agency;
- whether the person to whom the information relates would consent to its disclosure;
- the extent to which the information is already in the public domain.

Some of these factors are not dissimilar to some of the exceptions to principle 11 such as purpose, consent and whether the information came from a publicly available publication but there are also significant differences.[155]

6.13 When investigating complaints about the withholding of information on privacy grounds, the Ombudsman is required to consult with the Privacy Commissioner.[156] According to the Ombudsmen's Guidelines this is to ensure that where an Ombudsman is inclined to the view that section 9(2)(a) either does not apply or that countervailing public interest factors outweigh the need to withhold information to protect privacy, he or she considers the Privacy Commissioner's views on the matter before forming any final views.[157]

Options for reform of the privacy withholding ground

6.14 In *Review of the Privacy Act 1993* we expressed the view that it would be helpful if the OIA and the Privacy Act were more closely aligned.[158] The OIA privacy withholding ground is a relatively complex test to apply for the wide range of officials who are required to make these decisions. Like other withholding grounds in section 9, the test cannot simply be applied on its face as officials must develop an understanding of the legal concepts used and apply these to the factual circumstances. Experienced officials who are well-versed and trained in OIA processes can be expected to apply the test thoroughly and properly. However we are concerned that officials who are less experienced are likely to struggle with the intricacies of this withholding ground.[159]

154 Privacy Principle 11 states that personal information should not be disclosed unless it fits within one of the prescribed purposes within the principle, including for example if the information is being disclosed for the purpose for which it was collected, or it is necessary for the enforcement of the law, or necessary for the protection of public health or safety.

155 See also discussion at para 6.36 below.

156 OIA, s 29B. LGOIMA, s 29A.

157 Office of the Ombudsmen, *above n 144,* Part B, Ch at 4.1, Appendix One "Consultation procedures between the Ombudsmen and the Privacy Commissioner".

158 Law Commission, above n 149, at para 11.43.

159 Steven Price notes the comments of officials at a roundtable discussion that "OIA requests are often delegated to junior staff": Price, above n 148, at 16.

6.15 We are also conscious that officials are expected to be familiar with and expert in two distinct disclosure frameworks. It seems to us that the extent of the differences between the two approaches creates potential for confusion in the decision-making process.

6.16 There are four complex steps required to apply the OIA privacy withholding ground:

- working out whether the information concerned attracts any privacy interest;
- where a privacy interest is identified, working out how strong it is;
- identifying which public interest factors could outweigh the privacy interest;
- conducting a balancing exercise of the competing interests to determine where the public interest lies;
- the last two factors are, of course, not unique to this withholding ground but the complexity is perhaps greater with these grounds.

6.17 We have identified three possible reform options.

- The privacy withholding ground could remain unchanged but, as discussed in chapter 3, there could be clearer and firmer guidance supplemented by case examples to assist agencies to identify and then balance privacy and public interest factors. This is the solution we generally favour in relation to the other withholding grounds.
- The privacy withholding ground could be subject to a minor amendment to make it more consistent with the usual assessments agencies are required to carry out under the Privacy Act when responding to requests by people for their own personal information, subject to an overriding public interest balancing exercise.
- The privacy withholding ground could be reworded to be consistent with the determinations that agencies are required to carry out under principle 11 of the Privacy Act when considering the release of information, subject to an overriding public interest balancing exercise.

Option 1: Firmer guidance

6.18 From our survey, we found that officials find it difficult to assess which public interest factors outweigh privacy interests. Meaningful consultation between the agency and requester will help an agency to identify where the public interest lies. In chapter 3 we outline our proposal for more systematic use of the Ombudsmen's case notes to provide guidance to and examples for agencies in their decision-making processes. The privacy withholding ground is an area where firmer guidance of this sort would be very useful to agencies, especially in relation to identifying public interest considerations that may outweigh the need for privacy protection.

Option 2: Unreasonable disclosure

6.19 This option would involve restating the privacy withholding ground so that agencies would initially determine whether *the disclosure would involve an unreasonable disclosure of information affecting the privacy of any natural person, including a deceased person.* A privacy interest identified on this basis would

then be subject to the public interest balancing exercise, so that information may be released, even where it would amount to an unreasonable disclosure, where desirable in the public interest.

6.20 The benefit of moving to a privacy formulation of this sort is that it is more consistent with the type of determination that agencies already make in the context of access by people to their own personal information under both the Privacy Act[160] and other parts of the official information legislation.[161] This could make it easier for agencies to apply the privacy withholding ground. The key difference would then be the specific second step to consider countervailing public interest factors.

6.21 Aligning the privacy withholding ground more closely with the privacy access exception should not involve a significant change of approach. Paul Roth suggests that currently the OIA privacy withholding ground and the Privacy Act access exceptions should be applied consistently.[162] This approach would introduce a privacy interest threshold based on "reasonableness" so that any reasonable disclosure would be mandated without needing to consider the public interest. At present even a minor privacy interest justifies withholding if there are no countervailing public interest factors.

6.22 This formulation of the privacy interest for freedom of information purposes is used in Australia, where a document is exempt if its disclosure would involve the unreasonable disclosure of personal information about any person (whether living or deceased).[163] The Freedom of Information Amendment Act 2010 makes such information conditionally exempt, with release being required unless contrary to the public interest.[164]

6.23 A restatement of the privacy withholding ground along these lines should specifically focus on the disclosure of personal information (as defined in the Privacy Act), as the Australian provision does. This would be more consistent with the scope of the privacy interest addressed by the Privacy Act and be more specific about the type of privacy interest that is potentially protected. This may make it easier for agencies to operate the privacy withholding ground. If the privacy withholding ground focusses specifically on informational privacy, other privacy interests such as physical intrusion would only be protected if they are covered by other withholding grounds. For example, in chapter 7 we discuss the extent to which harassment may justify withholding. There is also a specific conclusive withholding ground for the protection of personal safety.[165]

160 Privacy Act 1993, s 29(1)(a). One difference between this proposal and the access exception in the Privacy Act however would be the use of "unreasonable" rather than "unwarranted". We think that "unreasonable" is preferable in this context as "reasonableness" is now a fairly common legal threshold in relation to privacy interests.

161 OIA, s 27(1)(b); LGOIMA, s 26(1)(b).

162 Paul Roth *Privacy Law and Practice* (looseleaf ed, LexisNexis) at PVA29.7.

163 Freedom of Information Act 1982 (Cth), s 41.

164 Freedom of Information Amendment (Reform) Act 2010 (Cth), 59.

165 OIA, s 6(d); LGOIMA, s 6(b).

6.24 A restatement of the privacy withholding ground in terms of "unreasonable disclosure" would retain a relatively conceptual approach and there may still be too much scope for the various elements of the withholding ground to become confused. For example, agencies would need to determine whether a disclosure is unreasonable as a matter of privacy law, and then proceed to consider the public interest factors that may outweigh the privacy interest. These concepts could become blurred unless clear guidance is provided. It could also be argued that a disclosure cannot be 'unreasonable' if it is in the public interest to make that disclosure: some may see this as a contradiction in terms.

Option 3: Disclosure based on principle 11

6.25 This option would involve restating the privacy withholding ground so that agencies would initially determine *whether disclosure of personal information would be prohibited under principle 11 of the Privacy Act*. The restated privacy withholding ground would then be subject to the public interest balancing exercise so that information may be released, even in breach of principle 11, where desirable overall in the public interest.

6.26 While principle 11 includes some public interest grounds for the disclosure of personal information (such as public health and safety, and maintenance of the law), it does not address other public interest factors that may support the disclosure or release of information from a freedom of information perspective, such as accountability for the spending of public money, and transparency of public processes. Issues such as these would continue to be taken into account at the public interest balancing stage.

6.27 This approach would specifically focus on informational privacy. The protection of other types of privacy interests would then depend on the operation and scope of other withholding provisions as discussed above.

6.28 This approach is used in the United Kingdom where the Freedom of Information Act provides that information may be exempt from disclosure where it is "personal data" whose disclosure would contravene one of the data protection principles in the Data Protection Act. This disclosure exemption was considered in the case involving the UK MPs' expenses scandal,[166] where the Court observed that:

> The issue in a nutshell is the potential conflict between the entitlement to information created by the [Freedom of Information Act] and the rights to privacy encapsulated in the [Data Protection Act].

The conditions of the relevant data protection principle allowed for the public interest in exposing the flaws of the expenses system through disclosure to outweigh the MPs entitlement to privacy.

6.29 This approach has also been recently adopted in New South Wales where legislation provides that there is a public interest consideration against disclosure if it could reasonably be expected to contravene an information privacy principle or a health privacy principle.[167] The relationship between privacy legislation and the new

166 *Corporate Officer of the House of Commons v The Information Commissioner* [2008] EWHC 1084.

167 Government Information (Public Access) Act 2009 (NSW), s 14(2), note 3.

freedom of information legislation was considered by the New South Wales Law Reform Commission;[168] the Commission's starting point being that the legislation dealing with the two regimes should, so far as possible, operate as a "seamless code." This concept was discussed in a Canadian case where La Forest J described the Canadian Parliament as weaving the Access to Information Act and Privacy Act into a seamless code:[169]

> …setting out a coherent and principled mechanism for determining which value [access to information and privacy] should be paramount in a given case.

6.30 If the "seamless code" approach were to be adopted in New Zealand, disclosure decisions would involve similar privacy assessments under the Privacy Act and the official information legislation, but with an additional public interest test under the official information legislation. The benefit of this sort of approach is the closer integration of the privacy and official information frameworks. Experience in one framework would become more transferable and relevant to the other framework. This would represent a shift from the current provision, with the result that the relevance of historical decisions of the Ombudsmen would be reduced; however guidance from the Privacy Commissioner's jurisdiction would be available and the Ombudsmen's historical decisions would also retain a degree of relevance, particularly where they deal with public interest factors.

6.31 One consideration is whether an approach based on principle 11 would be implemented by way of cross-reference to the Privacy Act or by restatement of the principle in the official information legislation. For agencies familiar with the Privacy Act a cross-reference would be unproblematic, but if unfamiliar this may add complexity. There are also questions about whether some of the exceptions to principle 11 should be adapted for use in the official information context (see below). If so, it may be preferable to restate the principle. It would also be necessary to consider the different versions of principle 11 embodied in Codes of Practice issued under the Privacy Act.

6.32 Some may question the appropriateness of using the principle 11 approach as the basis for an OIA withholding ground, and ask whether this would unduly interfere with the overall pro-release scheme of the OIA. Although basing the withholding ground on principle 11 would involve an initial premise of non-release subject to exceptions, it might be argued that this is the correct starting point to provide adequate protection for personal information. Public sector agencies are generally required to meet the Privacy Act standards as embodied in the privacy principles and one view is that there should be consistent standards in the handling of personal information held by government agencies. Freedom of information objectives can be given due weight through the public interest balancing exercise.

6.33 A second structural difference to consider is that release by an agency under one of the exceptions to principle 11 is discretionary in the Privacy Act context, but would be mandatory in the official information context. This would mean that

168 New South Wales Law Reform Commission *Access to Personal Information* (NSWLRC, R 126, Sydney, February 2010) at para 1.4.

169 *Dagg v Canada (Minister of Finance)* [1997] 2 S.C.R. 403.

careful attention would need to be given to the list of principle 11 exceptions and their scope as these may not all be relevant in the official information context and could be discarded.

Preferred option

6.34 At this stage, our preferred option is option 1, in line with our general approach as explained in chapter 3. Clear guidelines and case examples are likely to assist as much as any reformulation of the statutory ground.

6.35 Nevertheless we accept that there may be benefits in option 2, a specific proposal for restatement of the privacy withholding ground, and would like to hear views on it. Option 2 would introduce a threshold to the privacy withholding ground so that only unreasonable disclosures of information are potentially protected by the withholding ground (subject to the operation of the public interest test). The threshold is based on a test that is familiar to agencies assessing requests by people for access to their own information where disclosure might affect someone else's privacy. This option is consistent with the Australian approach. Apart from the new threshold, the privacy withholding ground would otherwise remain intact.

6.36 Option 3 would involve a more extensive revision of the privacy withholding ground to base it on privacy principle 11. This approach is used in the United Kingdom and New South Wales. While on the one hand it may be desirable for the privacy withholding ground to be more closely related to the privacy disclosure principle, we have some concern that this could upset settled understandings about the privacy withholding ground, and could require more complex reasoning which might deter those unfamiliar with the two Acts concerned. It would effectively involve agencies in working with two pieces of legislation at once. In response to our issues paper *Review of the Privacy Act 1993*, the Ombudsmen have expressed the view that a test based on principle 11 would be more complex and prescriptive.

6.37 Before reaching a final view about the revision of the privacy withholding ground, we welcome submissions and comments.

Q23 Which option do you support for improving the privacy withholding ground:

Option 1 – guidance only, or;

Option 2 – an "unreasonable disclosure of information" amendment while retaining the public interest balancing test, or;

Option 3 – an amendment to align with principle 11 of the Privacy Act 1993 while retaining the public interest test, or;

Option 4 – any other solutions?

Deceased persons

6.38 Currently the OIA withholding ground recognises the privacy interest of deceased persons as well as the living. This can be contrasted with the Privacy Act approach which does not specifically protect the privacy interest of the deceased, except in relation to access requests, where access can be denied if it would involve the unwarranted disclosure of the affairs of a deceased individual;[170] and in relation to health information, where principle 11, as it applies in the Health Information Privacy Code, is extended to apply to the health information of deceased individuals as well as living individuals.[171]

6.39 One might argue that the official information legislation, which is concerned with promoting freedom of information objectives, need not be more protective of a wider range of privacy interests than the Privacy Act. However, it must be remembered that nothing in the Privacy Act prevents agencies from protecting the privacy interests of the deceased, even if they are not strictly required to, as disclosure is always discretionary. In contrast, if the official information legislation is to protect the privacy interest of the deceased, the legislation needs to expressly provide for that protection. Given the extensive information gathering powers of government agencies, including coercive powers, we think it appropriate that the OIA specifically allows for withholding to protect the privacy interest of the deceased, subject to any countervailing public interest factors.

6.40 The privacy interest of the deceased will generally decrease over time. The approach in New South Wales has been to explicitly exclude information about people who have been deceased for more than 30 years from the protection of the privacy withholding ground. On the one hand, this gives agencies a clear bright-line for when information may be automatically released without having to weigh up public interest factors. On the other hand, the risk is that any information about a person deceased for less than 30 years might tend to be automatically withheld. At this stage, we are not persuaded that this sort of bright-line should be introduced. However we are interested in hearing any views about this approach.

Children

6.41 The privacy withholding ground does not contain any special protection for the privacy interests of children. We note that the Government Information Public Access Act 2009 (NSW) provides that one public interest factor against disclosure is where the disclosure of personal information about a child would not be in the child's best interests.[172]

6.42 At this stage we are not convinced that this additional factor needs to be expressly incorporated in New Zealand's official information legislation, as the privacy withholding ground can now operate to protect the special privacy interests of children. However we are interested in hearing views about whether this would be a useful additional basis for withholding information, subject to the overriding public interest.

170 Privacy Act 1993, s 29(1)(a).

171 Privacy Act 1993, s 46(6)(a).

172 Government Information (Public Access) Act 2009 (NSW), s 14(2), note 3.

Q24 Do you think there should be amendments to the Acts in relation to the privacy interests of:
(a) deceased persons?
(b) children?

Information sharing: OIA requests between public sector agencies

6.43 One important issue that we outlined in the issues paper *Review of the Privacy Act 1993* in some detail is the extent to which government agencies may use the OIA to obtain or share personal information about citizens.[173] The view that we put forward in that issues paper is that the OIA should not be used by central public service departments and ministries to acquire personal information about citizens from each other. This is because applying the public interest test to specific instances of personal information sharing between public agencies may not take adequate account of the public interest in maintaining public trust in public sector agencies as the guardians of citizens' information, and ensuring citizen engagement with government. This sort of information sharing should take place in compliance with the Privacy Act, and in the issues paper on that subject we outlined a number of reform options that may assist to clarify ways in which government information sharing may take place.

6.44 The issue in this review is to ensure that the OIA does not provide a "back-door" to information sharing amongst central government agencies. One option is that a provision could be enacted in the Privacy Act that no OIA release is to be made to certain public sector agencies if the principal purpose of a request is to obtain personal information for an information sharing initiative. This approach is already used in section 109 of the Privacy Act to restrict releases of personal information under the OIA for data matching purposes.

6.45 We will be giving further attention to government information sharing in the context of the *Review of the Privacy Act 1993*. The policy development work to be undertaken in that context is a necessary precursor to addressing any OIA loophole. We therefore do not make any firm proposals at this stage but will consider the implications for the OIA as part of that policy process. In the meantime we welcome any comment or submission on the question of government information sharing and the OIA.

Q25 Do you have any views on public sector agencies using the OIA to gather personal information about individuals?

173 Law Commission, above n 149, at ch 10.

Chapter 7

Other withholding grounds

7.1 In the previous chapters we discuss the privacy, good government and commercial interest grounds for withholding, and the reasons for refusal that have given difficulty. In chapter 10 we consider the "substantial collation or research" reason for withholding. In this chapter we consider some other withholding grounds in sections 6 and 9 of the OIA[174] and reasons for refusal in section 18,[175] and raise a few questions about them.

THE DISTINCTION BETWEEN THE SECTION 6 AND SECTION 9 WITHHOLDING GROUNDS

7.2 The withholding grounds in section 6 of each Act are conclusive. They are not subject to overriding public interest. If one of these grounds can be made out the agency can decline to disclose the requested information without further consideration. The grounds in section 9 of the OIA,[176] on the other hand, are subject to overriding public interest. If one of them is made out, further inquiry is necessary into whether it is *desirable in the public interest* to make the information available.

7.3 It is not always immediately apparent how the choice has been made to allocate grounds between section 6 and section 9. In some instances little more is involved than a question of degree. Thus, section 6(e) of the OIA makes it a *conclusive* ground for withholding that disclosure would be likely:

> to damage seriously the economy of New Zealand by disclosing prematurely, decisions to change or continue Government economic or financial policies relating to [six specified matters including exchange rates, taxation, Government borrowing and the entry into overseas trade agreements].

7.4 On the other hand, section 9(2)(d) of that Act makes it a rebuttable ground, overridable by public interest, that withholding is necessary to:

> …avoid prejudice to the substantial economic interests of New Zealand.

174 LGOIMA, ss 6 & 7.

175 LGOIMA, s 17.

176 The equivalent grounds in the LGOIMA can be found in section 7. References to section 9 of the OIA should be read as if they apply to section 7 of the LGOIMA where applicable. We leave out of account here the provisions of section 7 of the OIA relating to the Cook Islands, Tokelau, Niue and the Ross Dependency.

7.5 The distinction between serious damage to the economy and prejudice to the substantial economic interests of New Zealand is subtle, yet different reasoning processes are required by the two provisions.

7.6 In the same vein, section 6(d) renders it a conclusive ground that disclosure would be likely:

> to endanger the safety of any person.

7.7 On the other hand, section 9(2)(c) provides a rebuttable ground for withholding that the information is necessary:

> to avoid prejudice to measures protecting the health or safety of members of the public.

7.8 While section 6(d) would appear to require the immediacy of danger to a particular person as opposed to prejudice to more general safety measures affecting the public, there may well be cases which could fit equally well under either head. The Ombudsmen's guidelines provide no guidance on sections 9(2)(c) and 6(d), suggesting that they have not received much, if any, independent scrutiny.

7.9 Examples such as these illustrate the different approaches which the Act can require to similar matters, and therefore the potential difficulties for officials. We have wondered whether some items should be moved from one section to the other, or whether some of the grounds in section 9 might be omitted altogether because of their virtual non-use and overlap with items in section 6.

7.10 However, we have decided that, nearly 30 years down the track, we should keep changes to sections 6 and 9 to a minimum, and that little would be gained by shuffling items between categories. Provided that the more detailed guidance which we suggest elsewhere in this paper is forthcoming, we think that, generally speaking, there is not a strong case for moving from the established position with which people are familiar.

Q26 Do you agree that no withholding grounds should be moved between the conclusive and non-conclusive withholding provisions in either the OIA or LGOIMA?

POSSIBLE NEW GROUNDS

7.11 We have also considered whether any new withholding grounds should be added to the mix in sections 6 and 9 of the OIA and sections 6 and 7 of the LGOIMA.

Harassment

7.12 In the response to our survey there was only one such suggestion. This was for a withholding ground that non-disclosure is necessary to protect an individual or individuals from harassment. We are presently not inclined to expressly add such a ground. Section 9(2)(g) already goes much of the way. It provides that it is a ground for withholding that such withholding is necessary to:[177]

> maintain the effective conduct of public affairs through…
>
> (ii) the protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment.

177 LGOIMA, s 7(2)(f)(ii).

7.13 This ground is limited to cases where the effective conduct of public affairs would be prejudiced by the harassment. In cases where the sole concern is the protection of an individual employee from harassment we believe that, if the present formulation of the privacy withholding ground is retained, it could be used in this context. A number of agencies indicated in their submissions that they already use it for that purpose, but would like clarity as to whether that is appropriate. We think this is another instance where examples drawn from casenotes of the Ombudsmen could give reasonable certainty to agencies. We are not inclined to add a new ground. However, if the privacy withholding ground were to be amended as discussed in 6.23 above we would wish to reconsider this.

Cultural matters

7.14 We would also like to hear views on whether there should be another new ground in the OIA relating to the protection of cultural matters. We note that in the LGOIMA there is already a ground justifying withholding:[178]

> in the case only of an application for a resource consent, or water conservation order, or a requirement for a designation or heritage order, under the Resource Management Act 1991, to avoid serious offence to tikanga Māori, or to avoid the disclosure of the location of waahi tapu;

7.15 This ground is understandably narrowly confined to matters within the purview of local government. We would like to hear whether there is any need for an analogous protection in the OIA or whether the confidentiality and privacy grounds give adequate cover. We note that the NZGOAL policy, released in August 2010, provides an exception when the material in question would "threaten the control over and/or integrity of Māori or other traditional knowledge or other culturally sensitive material". We welcome views on whether a similar ground might be inserted in the OIA and LGOIMA.

Other

7.16 We suggest in the next section of this chapter that one category of case sometimes pleaded under the withholding ground "maintenance of the law" may merit a separate ground of its own.

Q27 Do you think there should be new withholding grounds to cover:
(a) harassment;
(b) the protection of cultural values;
(c) anything else?

178 LGOIMA, s 7(2)(ba).

GROUNDS AND REASONS WHICH MIGHT BE AMENDED

7.17 We think two provisions need special attention.

Reason for refusal: soon to be publicly available

7.18 Section 18 lists a number of reasons for which requests for information may be refused.[179] The first is simply that a good ground for withholding has been established under sections 6, 7 or 9. With the exception of section 18(c)[180] which relates to the requirements of other laws, the reasons in section 18 may be characterised as "administrative reasons". This is what the Ombudsmen call them in their guidelines.[181]

7.19 One of these other reasons merits separate discussion. Paragraph (d) provides a reason for refusal that:

> the information requested is or will soon be publicly available.

This deals with cases where the information is *already* publicly available so does not need to be disclosed under the Act, or is *about* to be publicly available so it would be wasting the department's time, or be impractical, to disclose it now. The Guidelines of the Ombudsmen give the following examples:[182]

> This can encompass situations such as when the information is contained in the text of a speech that is about to be delivered or it is in a report which has been printed and there are difficulties in providing it immediately. It would be administratively impractical for an agency to be expected to provide a copy of the information in these circumstances.

7.20 The Guidelines also say that the section presupposes there is an element of certainty about when the information will become publicly available, and that it is good practice to provide the requestor with a specific date of release or otherwise explain the perceived difficulty in meeting the request immediately.[183]

7.21 This reason should not be used, as seems sometimes to happen, simply to delay release. It appears that it is also sometimes used to withhold draft documents, which is not appropriate. If drafts are to be withheld, the "free and frank advice" provision or the other grounds relating to good Government should be applied.

7.22 But the provision raises the question of what is meant by "soon". A number of requesters who responded to our survey believed that the elasticity of the word "soon" allows too much scope for manipulation, and that the provision is too often misused. We received the following comments.

- At times OIA requests are declined on the grounds that the information will soon be publicly available. But Ministry or Department spokespeople cannot say when that might be and in practice it is proved to be several months afterwards.

179 LGOIMA, s 17.

180 LGOIMA, s 17(c).

181 Office of the Ombudsmen *Practice Guidelines* (Wellington, 2002) Part B Chapter 2.

182 Ibid, at B2.2, 6.

183 Ibid.

- The ground relating to timing ie. some kind of announcement is about to be made, is also misused to delay and disrupt information seeking with no tangible requirement on how soon such an announcement must be made.
- If we are to keep this clause a time period within which the information must be released (I suggest a week) should be defined.

7.23 So how soon is soon? While we are trying to keep statutory amendment of the grounds to a minimum, we do think that this is a situation where tighter statutory definition might be helpful to clarify its ambit, and to curtail the misuse of the provision which seems to be taking place.

7.24 The phrase "publicly available" is also not always clear in its application. If the information is freely available on a website that is one thing, but other situations may not be so clear. What, for instance, of one case we were told about where the information had appeared in a newspaper several months ago? In that case it has certainly been publicly available. But is it now? Even if it can be accepted that it is, it is certainly not readily available unless the date of publication is known and a copy can be found. We think there would be merit in substituting for the words "publicly available" the words "publicly and readily available". One would hope that agencies would also refer the requester to where the information can be found.

7.25 We would suggest the following wording to meet the points made above:

> that the information is to be made publicly and readily available within a very short time, and its immediate disclosure is unnecessary or administratively impractical.

Q28 Do you agree that the "will soon be publicly available" ground should be amended as proposed?

Withholding ground: maintenance of the law

7.26 An important but difficult withholding ground is that in section 6(c) of the OIA.[184] This provides that it is a conclusive reason for withholding information if the making available of that information would be likely:

> to prejudice the maintenance of the law, including the prevention, investigation and detection of offences and the right to a fair trial.

7.27 Being in section 6, this ground is not subject to the overriding public interest, and we think that that is appropriate. The maintenance of the law and its processes, and the right to a fair trial, are of such public interest that it is difficult to see how prejudice to them could be justified in the public interest. In relation to fair trial, the New Zealand Court of Appeal has indeed said that that right "is as near an absolute right as any which can be envisaged."[185]

184 LGOIMA, s 6(a).

185 *R v Burns (Travis)* [2002] 1 NZLR 387 (CA), at 404 per Thomas J.

7.28 One agency which responded to us emphasized this point, saying that they were not aware of any cases where application of a public interest test would have altered the outcome. Adding the test indeed would undermine confidence in the important interests captured in the ground itself.

7.29 Of more concern, however, is exactly what is meant by "maintenance of the law". The wording in paragraph (c) is a boilerplate phrase which appears in many other Acts of Parliament. In our review of the Privacy Act 1993 we note the difficulties it has caused in that context as well.[186] The internal context of the provision, and its references to offences, suggests that its main focus is the criminal law. If so, its main purpose is to ensure that criminal conduct is properly investigated, dealt with, and brought to justice. A number of agencies do so use it, for example the Police and Customs, and also local authorities investigating matters which may lead to a prosecution.

7.30 The Customs service said:

> We apply this ground to information relating to the investigation of an offence where information has not yet been laid where release would compromise an investigation, and/or prosecution where information has been received from an informant or where it would reveal investigative or profiling techniques.

7.31 However the ground is capable of extending beyond the confines of criminal proceedings to cover the court process in general. The last phrase of 6(c), "prejudice to a fair trial", can apply in the civil context as much as the criminal.

7.32 The question is how far beyond this the maintenance of the law ground goes. A number of agencies indicated that they use it much more widely to prevent prejudice to an inquiry or investigation which they are undertaking. IRD, for instance, uses it in relation to information acquired in the course of an audit; ERO in relation to reviews of schools which have been instigated in response to a complaint; the Commerce Commission in relation to investigations into a leniency application; and the Health and Disability Commissioner in relation to investigations of complaints against a health professional under the Health and Disability Commissioner Act 1994. The Health and Disability Commissioner made a detailed submission on the point. He said:

> As HDC investigations are inquisitorial in nature, it is vitally important that we have the opportunity to obtain untainted factual responses from the parties involved. Responses by the provider to questions asked by HDC assist me to decide what the next step should be in the investigation process and ultimately provide the evidence for my opinion on whether a breach of the code has occurred. Disclosure of information obtained as part of an investigation at an early stage may result in a provider tailoring their response accordingly rather than being free and frank…Releasing responses from other providers under investigation or the expert advice on the standard of care raises a distinct possibility that the evidence subsequently obtained from that provider will be tainted.

186 Law Commission *Review of the Privacy Act 1993* (NZLC IP17, March 2010), Ch 12.

The Commissioner also said:

> In accordance with the HDC Act, public interest and to bring HDC in line with an equivalent statutory office, the Privacy Commissioner, I consider that section 6(c) of the OIA should be clarified to permit withholding of information during an investigation.

7.33 We have substantial doubts, which we understand are shared by the Ombudsmen, about whether the "maintenance of the law" ground is appropriate in such cases. Its wording does not readily accommodate this. Yet, we agree that there is merit in a withholding ground which covers information supplied in the course of an inquiry or investigation where disclosure of that material might prejudice the inquiry or investigation. We made reference to this in chapter 2. The reasons put forward by the Health and Disability Commissioner seem to us to be reasonable.

7.34 We noted in chapter 2 that material provided to a court, tribunals in their judicial function, and commissions of inquiry, is outside the scope of the Official Information Act. Information contained in correspondence in the course of an investigation conducted by the Ombudsmen or Privacy Commissioner is similarly beyond the reach of the Act.[187] Material provided to other agencies in the course of an inquiry and investigation being conducted by them is clearly analogous, and we think provision should be made to allow that to be withheld as well. Rather than agencies resorting to the "maintenance of law" ground, we believe there is a case for an explicit new withholding ground to cover material provided in the course of inquiries and investigations.

7.35 But this does not mean that such material should never be available to a requester under any circumstances. Natural justice may require it to be disclosed to the other party, for instance. Although the exclusions discussed in the paragraphs above are exempted from the concept of official information, not many of them mean that access is denied completely. Information held by a court is not inaccessible by the public without exception: it is subject to some public access under the High Court[188] and District Court[189] rules. Many, although not all, tribunals have power to order that evidence given to them will or will not be published.[190] Commissions of inquiry have similar flexibility within the general power to regulate their own procedure.[191]

7.36 So, unlike the present maintenance of the law exception, we believe that this new ground should not be conclusive, but should allow disclosure if factors of public interest outweigh the desirability of withholding in a particular case. We thus believe a new withholding ground should be added to section 9 of the OIA and section 7 of the LGOIMA, to the following effect:

> if the withholding of the information is necessary to protect information which has been provided to a department or organisation in the course of an investigation or inquiry and disclosure is likely to prejudice the conduct or outcome of that investigation or inquiry.

187 OIA, s 2 definition of "official information" (i) & (j); LGOIMA, s (2) definition of "official information" (b)(iii) & (c).

188 High Court Rules, RR 3.5 – 3.16 (as amended in 2009).

189 District Court Rules 2009, RR 3.11 – 3.22

190 See for example, in relation to the Tenancy Tribunal, the Residential Tenancies Act 1986, s 95.

191 See now the Inquiries Bill 2008 (283 – 2), clause 15.

7.37 If such a ground is added we do not think there remains any need to amend the wording of the present "maintenance of law" exception. In some other jurisdictions exceptions, similar to our "maintenance of law", are defined rather more fully. For example the one in British Columbia excepts from disclosure where (among other things) such disclosure could reasonably be expected to:[192]

- harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement;
- reveal the identity of a confidential source of law enforcement information;
- reveal any information relating to or used in the exercise of prosecutorial discretion;
- deprive a person of the right to a fair trial or impartial adjudication;
- reveal a record that has been confiscated by a peace officer in accordance with an enactment; or
- facilitate the escape from custody of a person who is under lawful detention.

At present we do not think we need to go so far.

7.38 The main problem with the New Zealand "maintenance of the law" exception at the moment is the attempt to use it to deal with investigations and inquiries. If a new and more appropriate ground is added for that situation, we are inclined to think the present wording can stay as it is. However in our review of the Privacy Act we have raised a similar question in relation to that Act. The contexts of the two Acts are different, and the same solution may not be appropriate to both. We shall not make a formal decision until our review of the Privacy Act is complete.

7.39 We are told that the maintenance of the law ground is abused in other ways also. For example it is apparently sometimes used to withhold information about the conduct of criminal investigations even in cold cases where the matter was closed many years before. We think, however, that the availability of clear guidelines and examples, as we have proposed elsewhere, should be adequate to deal with this situation without the need to amend the statutory provision itself.

Q29 Do you agree that there should be a new non-conclusive withholding ground for information supplied in the course of an investigation?

Q30 Do you have any comments on, or suggestions about, the "maintenance of law" conclusive withholding ground?

192 Freedom of Information and Protection of Privacy Act [NSBC 1996], c165 315.

Other withholding grounds

7.40 In his research findings Steven Price noted that the confidentiality ground in section 9(2)(ba) was often not properly used. Since its main application is in the commercial sphere we deal with this in chapter 5.

7.41 Another ground which Steven Price found to be often misused was section 9(2)(h), the "legal professional privilege" ground.[193] This is a strong ground, and the Ombudsmen's guidelines state that it will take strong public interest considerations to override it. The major problem with this ground is that it often seems to be treated as conclusive, the public interest test not being applied at all. Again we do not think redrafting will help. Legal privilege is a well understood concept, at least to lawyers. Training and guidance can elucidate it for non-lawyers. And the tendency to overlook the public interest test is not peculiar to this ground. We set out our proposals relating to public interest in chapter 8.

193 Steven Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?* (New Zealand Centre for Public Law, Victoria University of Wellington, Wellington, 2005) at 46–47.

Chapter 8
The public interest test

THE CONCERNS

8.1 Section 9 of the OIA ("other reasons for withholding official information") lists 12 good reasons for withholding. Section 7 of the LGOIMA contains 11. Both sections provide that a good reason for withholding only applies where in the circumstances of the particular case the withholding of that information is not outweighed "by other considerations which render it desirable in the public interest to make that information available." In other words, these withholding grounds are subject to a public interest override.

8.2 This involves officials in undertaking a two-stage approach:

(1) Is the information such that a withholding ground is made out?

(2) If so, is it overridden by the public interest in making that information available?

8.3 This kind of balancing approach is familiar enough to lawyers, as is the phrase "public interest" itself. In fact the phrase appears in over 1000 places in acts of parliament in this country.[194] But it is not straightforward and we received many comments from agencies that they find the public interest test difficult to apply. One said it has had to seek legal advice on its application. Many said they needed help in applying it. They are not sure what "public interest" means nor what weight it should carry in particular circumstances.

8.4 Some find difficulty with the notion that "public interest" plays a part twice. They say that the fundamental principle of the OIA, that information should be made available unless there is a good reason for withholding it, is itself firmly grounded in public interest. However, even if in a particular case there is good reason for withholding, there can still be a second recourse to public interest to override that good reason. We were told that a single test that simply required the two interests (the one favouring disclosure and the other favouring withholding) to be balanced would be more comprehensible.

8.5 Some said, somewhat more worryingly, that sometimes the public interest test is applied only in a token fashion, and that sometimes it is even ignored altogether. In other words, once a withholding ground is made out that is seen as effectively the end of the matter. Respondents put this to us in various ways.

- Sometimes the second part of the test gets lost sight of in the necessary focus on the viability of potential withholding grounds.

194 As revealed by a search of the New Zealand Legislation website. At last count the number was 1019.

- I don't usually consider the second stage if I consider there is a need to withhold.
- With respect to the two stage test, I suspect that once the primary ground for withholding has been established, few agencies would release the information after applying the second stage of the test.

8.6 In his survey of the OIA, Steven Price found that in almost three-quarters of cases he examined agencies did not explicitly balance public interest considerations, and "when they did they rarely provided more than lip service to it".[195]

Current guidance

8.7 Some assistance in applying the public interest test can no doubt be derived from the purpose section of the OIA, which states that a purpose is to increase the availability of official information to the people of New Zealand in order:[196]

> (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:

8.8 That gives some guidance as to the sorts of considerations which constitute the public interest in making information available. The Guidelines of the Ombudsmen make it very clear that the process involves more than one step, and requires a balancing exercise. They prescribe that process as follows:[197]

> (i) Identify whether one of the withholding grounds set out in section 9(2) applies to the information at issue.
>
> (ii) Identify the considerations which render it desirable, in the public interest, for the information to be disclosed.
>
> (iii) Assess the weight of these competing considerations and decide whether, in the particular circumstances of the case, the desirability of disclosing the information, in the public interest, outweighs the interest in withholding the information.

8.9 The Guidelines note that the phrase "public interest" is not restricted, and that in assessing it the *content* of the information, the *context* in which it was generated and the *purpose* of the request are all relevant. The Guidelines conclude:[198]

> There is no easy formula for deciding which interest will be stronger in any particular case. Rather, each case needs to be considered carefully on its own merits.

8.10 Despite this guidance, agencies obviously still struggle.

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195 Steven Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?* (New Zealand Centre for Public Law, Victoria University of Wellington, Wellington, 2005) at 50.

196 OIA, s 4(a); LGOIMA s 4(a) is similar in relation to local authorities.

197 Office of the Ombudsmen *Practice Guidelines* (Wellington, 2002) Part B chapter 5.

198 Ibid, at 3.

POSSIBLE STATUTORY AMENDMENT

8.11 It is clear to us that the concept of "public interest" is appropriate in this context and we would not wish to substitute some narrower test.

8.12 We doubt whether it is possible to frame a simple workable statutory definition of "public interest". In all the references to the concept in statute in New Zealand, we have been unable to find any place where it is defined. Even when cases reach the courts, judges have been notably reluctant to attempt a definition, other than to say it means more than public curiosity but rather conveys that the matter is one in which the public have a legitimate concern. One judge has simply described it as "a yardstick of indeterminate length."[199]

8.13 If one is to deal with the matter by way of amendment to the Act, one approach might be to list a number of factors which are to be considered by agencies when applying the test. This approach has commended itself to the framers of the Right to Information Act 2009 (Queensland). That Act prescribes 19 factors that favour disclosure, and 22 that favour non-disclosure. Those that favour disclosure include:[200]

- disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability;
- disclosure of the information could reasonably be expected to ensure effective oversight of expenditure of public funds;
- disclosure of the information could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety.

8.14 Despite the attractions of this approach, we are not persuaded it is the best path, for at least the following reasons.

- Even if the statutory provision specified that the list of factors was not meant to be exclusive, there would almost inevitably be a tendency for factors not in the list to have more difficulty gaining acceptance. There might also be a tendency to rule out factors which were not clearly analogous to ones which were listed.
- 'Public interest' is a flexible concept which should move with the times and there is a risk that statutory enumerations might freeze the list in time.
- Some of the factors listed in the Queensland formulation are so open-ended as to provide less than clear guidance; the first of those cited above is an example.
- There might be a danger that such a list would detract from the "case-by-case" approach by creating a *likelihood* that once one of the factors was made out that would be decisive in favour of publication: the necessary balancing process might thus be prejudiced.
- The statutory specification of factors might increase the likelihood of challenge by judicial review.

8.15 There may be some other way in which the Act could supply a clearer indication of what "public interest" is and ensure the provision is applied in the decision-making process as intended. We ourselves have not found a solution which is at the same time clear and succinct. But we welcome suggestions.

199 *Attorney-General v Car Haulaways (NZ) Ltd* [1974] 2 NZLR 331 at 335 (HC) Haslam J.

200 Right to Information Act 2009 (Qld) , schedule 4. In addition there are four factors which are irrelevant to disclosure, and 10 categories favouring nondisclosure in the public interest because of public interest harm in disclosure. See also Freedom of Information Act 1982 (Cth), s 11B (added in 2010).

8.16 There is, however, one statutory amendment that would improve matters. We noted above that agencies sometimes fail to apply the public interest properly, or at all. Its current presence in section 9 is not prominent. Section 9(1) reads[201]:

> **Other reasons for withholding official information**
>
> (1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

We received some comment that "public interest" is hidden from view in this rather congested subsection.

8.17 We wonder whether the public interest test might be more likely to be separately and correctly applied if placed in a separate section of the Act with its own marginal note. Appropriate words could be added to section 9(1) to cross-refer to the new provision. A new provision might read to this effect:

> **Public interest in disclosure may outweigh grounds for withholding**
>
> Despite the fact that a good reason for withholding official information exists under section 9, the information will be made available if other considerations render it desirable in the public interest that it be made available.

8.18 A further suggestion is worth consideration. As we noted, Steven Price's research indicated that in many cases agencies do not explicitly balance public interest consideration, and in responses to our survey some agencies confirmed that fear. It would be possible to insert a statutory provision to the effect that when informing requesters of a negative decision based on a section 9 withholding ground, an agency should be required to expressly state that it has considered the public interest. We are less certain whether this would have value, but nonetheless seek comment on it.

Q31 Do you agree that the Acts should not include a codified list of public interest factors? If you disagree, what public interest factors do you suggest should be included?

Q32 Can you suggest any statutory amendment which would clarify what "public interest" means and how it should be applied?

Q33 Do you think the public interest test should be contained in a distinct and separate provision?

Q34 Do you think the Acts should include a requirement for agencies to confirm they have considered the public interest when withholding information and also indicate what public interest grounds they considered?

201 LGOIMA s 7(1)

Guidance

8.19 Rather than a statutory definition of public interest, or a statutory enumeration of factors to be taken into account ion applying it there is, we believe, more profit in the kind of approach we have outlined earlier in this paper in relation to the withholding grounds. It is likely to be possible, on analysis of the Ombudsmen's casenotes, to derive a list of considerations which have commonly been taken into account in assessing the public interest in disclosure. The publication of those factors, and their ready availability, would be very helpful. They will doubtless include such matters as the amount of public money at stake, the source of any money involved, and the extent to which the disclosure of the information would promote the accountability of ministers or officials. Such factors would not be conclusive of decision, but concrete instances of this kind will give substance to the otherwise abstract terms of the legislation. The building up of a bank of such examples will give useful guidance to agencies. Moreover such a set of precedents will be more flexible than statutory prescription. It will enable movement over time, and an acknowledgement that, despite the precedent value, each case would still ultimately depend on its own facts.

8.20 We are in agreement with the comments of Megan Carter in her submission to the Queensland review which led to the enactment of the 2009 Act. Referring to a book she had written on the subject, she said:[202]

> My co-author and I found that best practice from English-speaking Westminster-style jurisdictions is that the phrase "public interest" is not further defined…
>
> I think it is too difficult and overly prescriptive to try and capture the range and nuances of public interest arguments in a legislative form, but this is more achievable in the form of guidelines with examples.

8.21 She noted that a consequence of this approach is that the decision-makers (the Ombudsmen in our case) should be mindful of the need to be as specific as possible about the public interests involved in each case when giving reasons for decision, so that the guidance those decisions produce will be as useful as possible.

8.22 In conclusion, we believe that the system of extra-statutory guidance and precedent to be derived from the case notes of the Ombudsmen is just as appropriate for consideration of the "public interest" as it is for the withholding grounds themselves.

202 FOI Independent Review Panel *The Right to Information: Reviewing Queensland's Freedom of Information Act. Report of the Independent Review Panel, 2008* (Brisbane, June 2008). Ms Carter's submission is quoted at 144.

Chapter 9

Requests – some problems

THE PROBLEMS

9.1 In this chapter we discuss the types of request which can cause problems for agencies. In the responses to our survey there were some widely divergent views between requesters on the one hand and agencies on the other about the handling of requests. Some requesters said that even where they have made requests which they regarded as perfectly reasonable they have sometimes been "given the run around" by agencies who have withheld information without proper grounds, stretched time to the limit, or even denied that they hold the information at all. We have no doubt that this happens from time to time. In those cases it is not surprising that the requesters become persistent, ask the question in different ways, or broaden their request, thus increasing the pressure on agencies.

9.2 On the other hand we are also satisfied from the responses we received that agencies are sometimes put under considerable pressure by unreasonable requests.

9.3 Here are some examples.

- Sometimes a very large number of documents is requested. Examples provided to us by agencies were requests for "all briefing papers to the Minister in the last year" and "all reports issued" between two specified dates. While it is arguable that such a request is of "due particularity" in that there is no doubt what is required, it involves the department concerned in much work. We were told of one case where a request involved over 3000 pages of material.
- Some requests lack particularity and are so broad that they leave the agency in doubt as to what is required. Time can be spent in refining them, and even after that much research may need to be done to find, assess and collate the material. An example might be a request for "all information on climate change".
- Sometimes difficulties of this kind are compounded when the requester sends the same request to a multitude of agencies. We were told of cases where identical requests, usually by email, are sent to all local authorities in New Zealand. In cases such as this the request is sometimes only remotely connected, if at all, with the work of a particular authority, but can still take time to respond to. Time so spent is unproductive. Email has compounded the problem for not only does it enable easy dissemination of a request, it can sometimes lead to the formulation of ill-considered questions which have not been properly thought through.

- Sometimes a persistent requester comes back again and again with questions differing only slightly from questions previously asked, or with a succession of narrow questions which could have been combined in one original request. Sometimes agencies suspect, rightly or wrongly, that the motive is little more than the desire to harass.

9.4 The volume of requests differs from agency to agency, and from time to time within the same agency. It depends on the public interest in the subject matter. But, by way of example, one large agency to which we spoke received 129 Departmental requests in 2009, many of them of significant size, and had to deal as well with a further 46 requests to the Minister.

9.5 Large requests require the expenditure of much resource. The time and resource spent is not just that involved in locating the material: sometimes, for instance, in the "all briefing papers" type of request these papers can be retrieved quite quickly. Much more effort may be expended in a) perusing the documents to decide whether any part of any of them should be withheld; b) consulting with other agencies and third parties; and c) collating and preparing the material for transmission to the requestor. Difficulty can be caused in locating material if it is not filed or catalogued under the categories specified by the requester. A simple example might be material requested for a calendar year when the agency files it according to financial year; another would be a request for "accommodation expenses" when the agency files such details under the general heading of "travel expenses". We were told of several agencies that have brought in contractors at considerable cost to locate, peruse and collate requested material. In another case one request engaged a staff member full time for 3 weeks; in another staff members across the agency spent over 350 hours over and above their normal duties responding to one request.

9.6 Some of this is correctible. No doubt sometimes poor record keeping exacerbates the problem. The Public Records Act 2005, if properly followed, should lead to an improvement. But it still remains true that some agencies run both paper and electronic systems and probably will for many years; others hold information in a number of offices around the country and collecting it together can take time.

9.7 The amount of resource expended in responding to large requests can be very large indeed. The importance of freedom of information is beyond question. But the expenditure of public money on this scale must be questioned. The Cabinet Office told us that the assessment and release of information requested in so called 'fishing expeditions':

> places undue emphasis on the principle of the "progressive availability" of information without an equivalent focus on the rider that this is "thereby to enhance respect for the law and to promote the good government of New Zealand." Tying up policy staff for days reviewing reams of material is not necessarily the best use of taxpayers' money. The Danks Committee and the Act itself realise that there will always need to be a balancing exercise. In some areas, such as fishing expeditions, I think we have reached the tipping point in terms of cost benefit.

9.8 Another response put the matter thus:

> High volume requesters tax resources and patience.

9.9 Difficult requests are often made with perfectly proper motives, and with no intention to harass or embarrass anyone. Sometimes the requester genuinely needs a lot of information; a researcher for example. At other times requesters genuinely do not know exactly what they are looking for, so go wide so as not to miss anything. Sometimes they do know what they want but do not know in exactly what categories of document, or under what classification it is located, so request documents from a wide variety of sources. Sometimes lawyers make wide-ranging requests to assess whether they might have grounds to commence court action: a kind "of pre-proceeding discovery" if you will.

9.10 On other occasions the motive is less worthy: the hope that the requester will find something in a mass of information to embarrass the Government or an adversary. Lobbyists, the media and researchers for political interests can be guilty of this. As one response put it, they are looking for "gotcha moments." In other cases the motive may be no more honourable than to harass and "give a hard time" to an agency with which the requester has had a bad experience. Local authorities are sometimes subject to this.

9.11 It is vitally important that any reforms get the balance right. Steps to relieve agencies of unreasonable burdens must not prejudice or deter genuine requesters, and must not enable agencies to conceal information simply because disclosure would embarrass them. Freedom of information is too important a right. The Danks Committee emphasised this:[203]

> It is evident that there is a price to pay for provision of more ready access to official information. A balance will, in the end, have to be struck between the need for readier access which this Committee endorses and the price of that access. Manpower resources…as well as financial considerations will need constant assessment before the correct balance between the price and the need can be struck.

9.12 We hope that the suggestions we make below will help both sides: requesters to frame their requests properly, and agencies to handle them.

CURRENT SOLUTIONS

9.13 The OIA, as amended in 2003, already contains a number of ways of dealing with problematic requests. In summary they are:

- requests must be specified with "due particularity";[204]
- it is the duty of an agency to give reasonable assistance to a person to make a request in a manner that is in accordance with the Act;[205]
- before a request is refused, the agency should consider whether consulting with the requester would be of assistance;[206]
- if the request is for a large quantity of information, the agency may extend the 20 working day time limit;[207]
- an agency may charge for the supply of official information;[208]

203 Committee on Official Information *Towards Open Government: Supplementary Report* (Government Printer, Wellington, 1981) at 4.40.

204 OIA, s 12(2); LGOIMA, s 10(2).

205 OIA, s 13; LGOIMA, s 11.

206 OIA, s 18B; LGOIMA, s 17B.

207 OIA, s 15A; LGOIMA, s 14.

208 OIA, s 15(1A); LGOIMA, s 13(1A).

- a request may be refused if the information requested cannot be made available without substantial collation or research;[209]
- a request may be refused if it is frivolous or vexatious;[210]
- it is a ground for withholding if withholding is necessary to prevent the disclosure or use of official information for improper gain or improper advantage.[211]

9.14 A good deal can be accomplished now under these existing provisions. Our clear impression is that many agencies are reluctant to use them for fear of being accused of acting contrary to the spirit of the Act. There is room for more rigorous application of the law as it currently stands. We now discuss some of these provisions, and make some suggestions for improvement.

Due particularity

9.15 The Act requires that requests must be specified "with due particularity". This formal and somewhat old-fashioned language may not convey its message clearly enough to requesters, or perhaps, some officials as well. We suggest that it might be redrafted in a little more detail to make it clear what is expected of a requester. A form of words might be:

> The request must be clear, and should refer as precisely as possible to the information that is required.

9.16 A number of agencies told us of successful outcomes as a result of telephoning or meeting with a requester at the outset and agreeing an outcome satisfactory to both parties. Some requesters simply do not understand how much information is held, much of it not relevant to their request, and how much effort will be needed to provide it. Some, after discussion, may be perfectly content with a narrowed-down request, or to receive only a few of the many documents available, or to see a list of titles from which they can choose. The submissions we received give many examples of successful outcomes after discussion of this kind. For example:

- We have had one instance where a large commercial law firm used the OIA to request a large number of documents and plans…and it turned out that when we sought clarification on what was actually required, the client was satisfied with a meeting and briefing and a site visit. In that case we asked the law firm to withdraw its request under the Act.
- The Ministry's general approach to fishing requests is to seek clarification. If the person does not want to narrow the scope of the request an extension or charging is sometimes considered. However, often the purpose of a request is to get some specific information and engagement with the requester to identify the specific information required can lead to the requester getting the right information. There have been instances where a meeting with the requester has been useful to both parties in locating the information that was sought.

9.17 Of course this strategy does not always work. Sometimes requesters are not prepared to modify their requests even after being told of the difficulties.

209 OIA, s 18(f); LGOIMA, s 17(f).

210 OIA, s 18(k); LGOIMA, s 17(h).

211 OIA, s 9(2)(k); LGOIMA s 7(2)(j)..

9.18 Nevertheless, we think there is a case for strengthening the current sections by providing that the agency *should,* where reasonably practicable, consult the requester at the outset in a case where the request is for a large amount of information, rather than (as at present) merely being obliged to *consider this.*[212]

Q35 Do you agree that the phrase "due particularity" should be redrafted in more detail to make it clearer?

Q36 Do you agree that agencies should be required to consult with requesters in the case of requests for large amounts of information?

Extensions of time

9.19 Secondly, extensions of time are commonly taken. They do not lessen the amount of work involved, but they extend it over a more reasonable time period. We deal later in this paper with ways in which the current time provisions could be clarified, but note here one point which is relevant to wide fishing requests. In such a case the Act is not entirely clear when the 20 working days runs from. Section 15 provides that the time is 20 working days after "the day on which the request is received".[213] The question is what happens if the first request is bad for lack of due particularity. Is such a request not a valid request at all so that time runs only from the newly framed and more specific request? Or should the clock be stopped during the period when the request is being refined? We tend to the first of these solutions and suggest that that could usefully be clarified by amendment to the Acts. There is an analogy with the Resource Management Act 1991 section 88, which provides that if a resource consent application is returned as incomplete and is lodged again "that application is to be treated as a new application".

Q37 Do you agree the Acts should clarify that the 20 working day limit for requests delayed by lack of particularity should start when the request has been accepted?

Charging

9.20 Thirdly, charging can be an effective deterrent to requesters who make unreasonably large requests. Yet it should not be used in a way which diminishes the very purpose of the Act by deterring genuine and reasonable requesters. Charging practice is currently very erratic. Many departments and agencies do not charge at all, for fear that it might be seen as being against the spirit of the Act. Some charge commercial enterprises but not other persons such as students. There is also a convention that MPs will not be charged.

212 OIA, s 18B: LGOIMA, s 17B.

213 LGOIMA, s 13.

9.21 In the submissions we received there was a widespread desire for clear and uniform guidelines on when charging is appropriate. There is a set of guidelines from the Ministry of Justice.[214] But they are guidelines only. Nor do they apply to LGOIMA. Matters might be improved if the Act itself provided a list of criteria to be taken into account in deciding whether to charge. Alternatively, the Act might contain a power to make regulations providing such criteria; or it might require a central agency such as the State Services Commission or the Ministry of Justice to issue and keep up-to-date a set of rules to achieve the same end. What is needed is not just a scale of charges, but criteria for *when* to charge.

9.22 Our preference is for regulations. They would apply uniformly to all, and the rules laid down would ensure greater consistency of application. By referring to a "prescribed amount" the OIA itself in fact envisages regulations.

9.23 The criteria laid down by such regulations might be expected to contain such things as the following (without being exhaustive):

- the volume of material asked for;
- the difficulty of locating the material;
- the time spent in reviewing and collating the material;
- the ability of the agency concerned to handle the request within its normal resources;
- whether the subject matter of the request does or does not further the main objectives of the legislation (ie participation and accountability) as set out in the purpose sections of both the OIA and LGOIMA.

9.24 Any such regulations (or other instrument) should make it clear that reasonable and moderate requesters would not be charged. We repeat that the fundamental purpose and spirit of the Act must not be damaged. But the guidance provided should be firm and clear, and it should be uniformly applied. We have wondered whether there might be a charge for research and assessment even if the information is eventually withheld, but have decided that that would not be appropriate as the requester would get nothing for their money. We discuss the issue of charging further in chapter 10.

Refusing the request

9.25 Fourthly, a provision of last resort is that there is a power to refuse the request if it involves "substantial collation or research." Most of the agencies who made submissions to us made it clear that they do indeed regard this as a power of last resort and seldom use it. We believe it could legitimately be used more than it is. We also believe there are two elements in the present drafting of the provision which, at the very least, should be corrected.

9.26 The first element is that *collation* and *research* are specified as the two matters which can be taken into account. One of the most significant and time consuming factors, however, is perusing the material to assess whether it, or any part of it, should be released or withheld. There is some debate as to whether this activity falls within the expression "collation and research", and we think this should be put to rest. We think the words *review* and *assessment* should be added to *collation*

214 Ministry of Justice *Charging Guidelines for Official Information Act 1982 Requests* (18 March 2002).

and *research* as relevant in deciding whether or not the request can reasonably be refused. We emphasise we do not wish to do anything which would undermine or impair the ability to make legitimate requests. But in assessing the size of a request, and its imposition on the agency concerned, it is unrealistic not to take into account the reading time involved.

9.27 The second element is that the present provision does not make it clear whether the term 'substantial' is relative to the resources of the agency. A large agency has a lot of resource and may even have dedicated staff for the purpose of handling OIA requests. A small agency may be much harder pressed to cope. We believe that the relativity element should be spelled out in the section. Some such form of words as "and would place an unreasonable burden on the resources of the agency" might be considered.

9.28 We have wondered whether one ought to go further and re-frame section 18(f) altogether. Interestingly, the Danks Committee foreshadowed this. While they believed that it was unlikely that unwieldy requests would be a problem and thought that the grounds for refusal that they were proposing would be adequate, they did say:[215]

> If, contrary to our expectation, there is any tendency towards significant abuse we would favour amending the legislation along the lines of Clause 23(1) of the Australian Bill.

9.29 The clause to which they referred now appears as section 24 of the Freedom of Information Act (Cth) 1982:

> (1) The agency or Minister dealing with a request may refuse to grant access to documents in accordance with the request, without having caused the processing of the request to have been undertaken, if the agency or Minister is satisfied that the work involved in processing the request:
>
> (a) in the case of an agency – would substantially and unreasonably divert the resources of the agency from its other operations; or
>
> (b) in the case of a Minister – would substantially and unreasonably interfere with the performance of the Minister's functions.
>
> (2) Subject to subsection (3) but without limiting the matters to which the agency or Minister may have regard in deciding whether to refuse under subsection (1) to grant access to the documents to which the request relates, the agency or Minister is to have regard to the resources that would have to be used:
>
> (a) in identifying, locating or collating the documents within the filing system of the agency, or the office of the Minister; or
>
> (b) in deciding whether to grant, refuse or defer access to documents to which the request relates, or to grant access to edited copies of such documents, including resources that would have to be used:
>
> (i) in examining the documents; or
>
> (ii) in consulting with any person or body in relation to the request; or
>
> (c) in making a copy, or an edited copy, of the documents; or
>
> (d) in notifying any interim or final decision on the request.

215 Committee on Official Information, above n 203, at 4.41.

9.30 We presently believe that if section 18(f) is amended as we have suggested it would effect an improvement, but are interested to know whether there would be support for replacing it with something more along the lines of the Australian provision.

Q38 Do you agree that substantial time spent in "review" and "assessment" of material should be taken into account in assessing whether material can be released, and that the Acts should be amended to make that clear?

Q39 Do you agree that "substantial" should be defined with reference to the size and resources of the agency considering the request?

Q40 Do you have any other ideas about reasonable ways to deal with requests that require a substantial amount of time to process?

Frivolous or vexatious

Vexatious requests

9.31 Fifthly, the Acts currently allows for the refusal of a request on the grounds that the request is "frivolous or vexatious". It is the vexatious limb of this ground which seems to give the most trouble so we concentrate on the question – what is a vexatious request? There are no doubt some requesters who abuse the system by asking for the same information, or variants of it, time after time; or by asking a series of questions with the main purpose of harassing the agency concerned. Many submitters said they felt that the current provision was not doing its job adequately in that it focuses attention only on the current *request* and not on the *requester* and his or her motives, and in particular on his or her past conduct. The Ombudsmen rightly insist on a high threshold before a request can be called vexatious. They say that it is not enough merely that a requester has already made numerous, possibly time consuming, requests which in the eyes of an organisation appear to serve no practical purpose. What matters, they say, is:[216]

> the nature of the request made in light of the surrounding circumstances.

9.32 Given the language of the Act which is about *requests* rather than *requesters*, that must be correct. Nevertheless, the Ombudsmen go on to say that the past conduct of the requester is not entirely irrelevant. It is one of the "surrounding circumstances":[217]

> Past experience may indicate that a new request is simply an abuse of the official information rights…That is a judgment that must be made having regard to past dealings with that requester, but having had vexatious requests from a particular individual in the past is not of itself sufficient to conclude that a new request is also automatically vexatious.

9.33 Given that there seems to be some misunderstanding among agencies on this point we think there would be advantage in adding words to 18(h) words making it clear that the past conduct of the requester may be taken into account in assessing the character of the present request. The term "vexatious" is not clear to some agencies

216 Office of the Ombudsmen *Practice Guidelines* (Wellington, 2002) Part B Chapter 2.5 at 13.

217 Ibid, at 13.

either: it is a legalistic term unfamiliar to non-lawyers. We believe it could be usefully defined to make it clear that it includes an element of bad faith. The Ombudsmen's Guidelines use the form of words that "no reasonable person could properly treat it as bona fide (that is, having been made in good faith)".[218] That formulation could readily be included in the Act.

9.34 We also believe there would be merit in inserting two further provisions. One would be similar to that in the Criminal Disclosure Act 2008 to the effect that an agency can decline to disclose information if the same or substantially the same information has been supplied to that requester before. The other would be, as the Law Commission recommended in 1997, that the person has been refused access to the information and no reasonable grounds exist for requesting it again.

Vexatious requesters

9.35 However there is a more contentious question. This is whether, in addition to providing that a vexatious *request* can be refused, the Act should be amended to provide for a particular person to be declared a vexatious *requester*. Some submitters were in favour of this. They cited section 88(b) of the Judicature Act 1908 whereby a litigant can be declared by a court to be vexatious so that further claims by that person will be struck out as an abuse of process unless in a particular case the court declares otherwise. We note with interest that a 2010 amendment to the Australian Freedom of Information Amendment (Reform) Act 2010 enacts such a solution: the Information Commissioner is to have power to make 'vexatious applicant' declarations.[219]

9.36 There are some difficulties with such a solution in this country. There does not exist any equivalent of the Information Commissioner in Australia or a tribunal which could authoritatively make such a declaration (unless such a power were to be conferred on the Ombudsmen or some newly-created body). Moreover we think it would be an extreme step to bar a person from making *any* requests to *any* agency. It would be going a considerable distance to say that a person can be presumptively shut out from receiving any information about matters of government. That should be the right of all citizens.

9.37 Nevertheless it is worthy of consideration whether a particular agency, which is effectively being harassed by a persistent requester, should be given the power to refuse to answer any more questions from that person. We think so. We would support an amendment to the Act which allows an agency to give notice to a requester that it will not answer any more questions if that requester has persistently made requests in such numbers, and of such a nature, that it has unnecessarily interfered with the operations of the agency. On receipt of such a notice the requester could complain to the Ombudsmen, who would have power to confirm the notice, or require it to be withdrawn.

9.38 One reservation we have about this solution relates to its effectiveness. Resourceful "banned" requesters may be able to find friends or associates to continue the questioning on their behalf, or even themselves to continue making requests under a pseudonym. The introduction of penal sanctions for such conduct would transform the nature of the Act, and we do not favour going that far.

218 Ibid, at 12 citing the English case *Norman v Matthews* [1916] 85 LJKB 857/149.

219 Freedom of Information Act 1982 (Cth), s 89(k).

Q41 Do you agree it should be clarified that the past conduct of a requester can be taken into account in assessing whether a request is vexatious?

Q42 Do you agree that the term "vexatious" should be defined in the Acts to include the element of bad faith?

Q43 Do you agree 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?

Q44 Do you think that provision should be made for an agency to declare a requester "vexatious"? If so, how should such a system operate?

Purpose of request

9.39 Sixthly, we received much comment about the concept of purpose. Currently requesters do not have to disclose their purpose in seeking information, nor the use to which they propose to put it. In some cases of course they disclose it voluntarily, and in others the purpose is obvious from the identity of the requester – a journalist for instance – or the nature of the request. But there is no obligation to disclose the requester's purpose. It was pointed out to us that knowledge of the requester's purpose can assist the agency in several ways:

- in determining whether the request is vexatious;
- in determining whether release would be in the public interest;
- in determining whether charging would be appropriate;
- in helping to refine an overbroad request.

9.40 It might even be said that one of the withholding grounds in the Act assumes a knowledge of purpose. Under section 9(2)(k) information may be withheld if that is necessary to "prevent the disclosure or use of official information for improper gain or improper advantage".

9.41 We have wondered whether the Act should require requesters to state their purpose, but have decided against this for several reasons. First, freedom of information is an important right. It would be diminished if the impression were to be given that its importance varies according to purpose. Secondly, it might induce agencies to be less ready to disclose information than the Act requires if they disapproved of a stated purpose. Thirdly, it is likely that some requesters would not be frank in their disclosure of purpose. Indeed, those with malicious or mischievous motives would hardly be likely to disclose them. Fourthly, it is difficult to see how requesters could be held to their disclosed purpose once the information was in their possession.

9.42 So we do not favour the mandatory disclosure of purpose. However, this is not to say that when agencies consult requesters in an effort to refine overly broad requests they should be precluded from asking the purpose. A knowledge of that will usually be very helpful, and genuine requesters are likely to volunteer it anyway. In its 1997 review the Law Commission recommended that it be enacted that a requester may, but is not obliged to, specify their purpose.[220] We agree with the substance of this, but now wonder whether a statutory enactment is necessary.

9.43 We heard another suggestion that anonymous requests should not be entertained and requesters should be required to give their real names. This would enable agencies to know who their most persistent requesters are but, as foreshadowed in our discussion of vexatious requesters, it may be difficult to enforce. Pseudonyms can readily enough be used instead.

Q45 Do you agree that, as at present, requesters should not be required to state the purpose for which they are requesting official information nor to provide their real name?

REQUESTS UNDER THE ACT

9.44 There seems to be a lack of clarity in some quarters as to what a request under the OIA or the LGOIMA is. Some persons apparently believe a request is not an OIA request unless it is in writing and specifically refers to the Act. On the other hand, it has also been suggested that some agencies are more forthcoming in response to an informal request over the phone or in person than they are in response to a formal written request explicitly under the Official Information Act. They feel the latter takes on an adversarial aspect from the outset. One respondent said:

> I know when I worked as public relations practitioner in the state sector I took a formal OIA enquiry as something akin to a declaration of war and so I adhered to the rules only in such as I had to. By contrast, if a journalist just rang up and said, "I want to do a story on subject x, can you help?" the first question I would ask was "when's your deadline?" and then I would try to help. When I did get OIA enquiries I would often say, "we can do this the hard way or you can withdraw the enquiry and I will help you get your story right now". If the reporters agreed, as they often did, I would have them happily on their way with the information they needed on the same day.

9.45 It can work the other way too. Requesters who ring up for information are sometimes told that an oral request will not be actioned and if they want the information they must make a formal request in writing under the Act. That cannot justified.

220 Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997) at para 73.

9.46 This speaks volumes about the need for both requesters and agencies to cooperate in a spirit of reasonableness. The Act does not prescribe that OIA requests have to be made in any particular form. An oral request is just as much a request under the Act as is a written one, and both should be handled in the same way. This is an illustration of the advantages of early personal communication and consultation with the requester, whether the request is made orally or in writing. Cooperation is always better than confrontation. However given that confusion about what a request is seems to be widespread, we suggest that the Act should be explicit on the matter. A provision such as this might assist:

> A request may be made orally or in writing and need not expressly refer to the Act. However if an oral request is not clear the agency may ask that it be put in writing.

Q46 Do you agree the Acts should state that requests can be oral or in writing, and that the requests do not need to refer to the relevant official information legislation?

GUIDANCE

9.47 Many people who wish to request information do not have much knowledge of how best to do so, or even of how the Act works. Nor do some of them understand the sorts of information that the various agencies hold, or the pressures placed on agencies by large requests. We believe there could usefully be a publicly available set of guidelines for requesters. Just as agencies are in need of guidance on how to handle requests, so are many requesters in need of assistance on how to make them. The websites of the Ministry of Justice and the Ombudsmen do have information for requesters but these are not necessarily easy to find and could perhaps be more user-friendly. Requesters need to know the importance of framing requests so that they are manageable, and encouraged to call agencies personally if they are in doubt. Consideration might also be given to having an 0800 number which people can ring for advice on how best to request information that they need. That number might be serviced by the organisation which oversees the operation of the legislation: we discuss this further in chapter 13 where we ask whether the State Services Commission and Department of Internal Affairs might undertake such an oversight function.

9.48 By the same token, easy to follow guidance should be available for agencies on the steps they can and should take when handling requests, particularly requests which are unreasonably wide. The Ombudsmen website currently provides a checklist for agencies.

Q47 Do you agree that more accessible guidance should be available for requesters?

Chapter 10
Processing requests

10.1 In this chapter we examine the mechanics of the official information legislation that set the process for how requests are received, considered and dealt with by agencies. We are concerned with the machinery provisions of the legislation that set out time limits for dealing with requests, allow the transfer of requests to another decision maker and the ability of agencies to charge for meeting requests. We also consider the issue of agency consultation with various parties as part of the decision-making process.

10.2 Some of the machinery provisions have already been discussed in chapter 9, such as the requirement for requests to be expressed with "due particularity" and the grounds for refusing requests where they would require substantial collation or research or where they are frivolous or vexatious.

TIME LIMITS — As soon as reasonably practicable, and not later than 20 working days

10.3 On receiving a request for official information, an agency is obliged to make a decision as soon as reasonably practicable, with a maximum time limit of 20 working days.[221] In reality, this time period is sometimes longer, for example where a request is transferred to another agency, where the time limit is extended for large requests or for consultation, or where the statutory time limit is breached or simply not observed by the agency. One concern is that agencies in practice work to the maximum 20 working day limit, rather than the primary obligation to provide the information as soon as reasonably practicable.

10.4 Suggestions were made by requesters and the media in response to our survey, that the 20 working day maximum limit should be reduced, possibly to 5 or 10 working days, while providing specific reasons for extensions. On the other hand some agencies responding to our survey found it difficult to meet the current timeframes, and suggested that longer timeframes for transfers and extensions of time be considered.

221 OIA, s 15(1); LGOIMA, s 13(1).

10.5 In 1997, the Law Commission recommended that the 20 working day time limit be reviewed in 3 years' time, with a view to reducing it to 15 working days.[222] It was expected that developments in information technology would make it easier to retrieve information and reduce response times. However, information technology is a double-edged sword: while it is a useful tool for information retrieval it has greatly increased the capacity for information creation, collection, storage, distribution and transformation, so contributing to the overall official information workload on agencies. We discuss the challenges of information technology in chapter 1.

10.6 Stephen Price's research data showed that, from his sample, most OIA requests were answered within the maximum 20 working day timeframe, the average being just over 13 working days.[223] About 1/8th of responses were outside the maximum permitted timeframe (without an extension), half of those being less than a week late. About 3 per cent of responses overall were more than two weeks late.

10.7 Most of the officials Nicola White interviewed felt that the legislation sets a reasonable base deadline and she concludes that very often "as soon as reasonably practicable" is much the same as 20 working days in a government organisation of any size.[224] Simple requests can usually be satisfied well within the 20 working day limit, but for anything complicated, the 20 working day limit becomes the real deadline and for hard requests the 20 working day standard will be too short and an extended time period will be required.[225] White points out that part of the problem is that requesters are not aware of the process to be followed within an agency when responding to a request, and that greater transparency by agencies about their internal processes would help manage requesters' perceptions of what is reasonable in terms of response times.

10.8 On balance we agree that it would be problematic to reduce the 20 working day maximum time limit. This would put agencies under further pressure. As there is no statutory maximum time limit for extensions, we think that it is preferable for agencies to endeavour to meet requests within the 20 working day timeframe wherever possible. We also think it would be unrealistic to reduce the maximum timeframe at a time where, for reasons of economic necessity, the public service is required to shoulder its core responsibilities with reduced or no increased resources. Our preference therefore is to retain the current 20 working day maximum time limit, noting that it is a *maximum*, and that in all cases the test of "as soon as reasonably practicable" is the governing test.

222 Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997) at E26 & 173.

223 Steven Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?* (New Zealand Centre for Public Law, Victoria University of Wellington, Wellington, 2005) at 22. Four agencies took longer than 20 working days on average to process requests.

224 Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007) at 284 – 285. White suggests a standard process for agency handling of requests involving 13 steps.

225 White, Ibid, at 228–229, 283.

Release of information within timeframe

10.9 One area of ambiguity is that the time limit relates to making a decision about the request and giving notice of the decision rather than setting the time for the release.[226] In most cases, where a decision is made to release information, it would be desirable for release to occur within the maximum time limit. However in some circumstances the time limit may not be long enough to include preparing material for release, especially where the material to be released is to be redacted[227] or summarised.[228] The advice of the Ombudsmen is that once an agency has reached a decision to make information available, it should endeavour to do so straight away.[229] We note that undue delay in making information available in response to a request is deemed to be a refusal,[230] about which the requester can complain to the Ombudsman. However we wonder if the legislation should be tightened to prompt agencies to *release* information expeditiously.

10.10 One option would be to amend section 15 to clarify that the time period covers release, and an amendment to section 15A to allow agencies to extend the time period where the information cannot feasibly be provided within the original time period. However this could result in agencies routinely working to the 20 working day time limit to make their decision, then relying on the extension provision to extend the time for release of the information. It may also mean that agencies would have to deal with the process issues related to time extensions more often, which may add to the administrative burden of processing requests.

10.11 An alternative option would be to amend section 15 to provide that following a decision to release information, an agency should ensure that release occurs as soon as reasonably practicable. Or, rather than amending the legislation, agencies could continue to rely on the guidance of the Ombudsmen that the expectation is for prompt release, backed by the undue delay ground for complaint.

10.12 On balance, we think that agencies should continue to have a maximum 20 working day period to make a decision, but that section 15 should be amended to require that release of any information in response to the request should occur as soon as reasonably practicable after that.

Q48 Do you agree the 20 working day time limit should be retained for making a decision?

Q49 Do you agree that there should be express provision that the information must be released as soon as reasonably practicable after a decision to release is made?

226 See Office of the Ombudsmen "Official Information Decisions Must Be Made 'As Soon As Reasonably Practicable' " 9 OQR 4.

227 OIA, s 17; LGOIMA, s 16.

228 OIA, s 16(1)(e), LGOIMA, s 15(1)(e).

229 Office of the Ombudsmen, above n 226, 9 OQR 4.

230 OIA, s 28(5); LGOIMA, s 27(5).

Acknowledgement of receipt

10.13 Another issue arises where requesters are unsure when the time limit is triggered and therefore when they may expect a decision. Steven Price's research flagged situations where:[231]

- agencies lose or ignore requests;
- agencies seek clarification of a request and start the time limit from the point of clarification, rather than the time of receiving the original request.

In chapter 9 we also note there is a problem about whether time starts to run from receipt of an overbroad request or on the subsequent receipt of a more specific request. We suggest there that time should not start to run until a request is made that complies with the section 12(2) requirement for due particularity.

10.14 We wonder whether there should be a requirement for agencies to acknowledge receipt of requests, with a failure to acknowledge receipt being grounds for complaint to the Ombudsmen. For example the Australian Freedom of Information Act 1982 (Cth) provides that an agency is to take all reasonable steps to enable the applicant to be notified that the request has been received, as soon as practicable but with a maximum time limit of 14 days.[232]

10.15 We think that acknowledging receipt of a request would be a useful step in the process for requesters, as this would provide confirmation of timeframes and a point of contact for further enquiries. Acknowledgement of receipt by an agency to which a request is transferred would be useful to requesters for the same reasons.

10.16 One question is whether a requirement to acknowledge receipt should be imposed by a statutory amendment, or whether it is more appropriate for this to be dealt with in guidance as a matter of best practice. As we are wary of proposing mandatory measures that would increase the administrative burden on agencies and could result in complaints to the Ombudsmen, we would like to see a requirement to acknowledge official information requests recognised as a matter of best practice.

Q50 Do you agree that, as at present, there should be no statutory requirement to acknowledge receipt of an official information request but this should be encouraged as best practice?

Extension of time limits

10.17 Agencies dealing with requests can extend the maximum time limit, either where the request is for a large quantity of information or requires a large search and the original time limit would unreasonably interfere with the agency's operations; or where the need for consultation means that the response cannot be made

231 Price, above n 223, at 11.

232 Freedom of Information Act 1982 (Cth), s 15(5). One reason for the receipt acknowledgment in the Australian context is that there are time limits on requesters' review and appeal rights.

within the original timeframe.[233] Agencies responding to our survey thought there should be further grounds for extending the original time limit to deal with consultation and transfer issues, which we discuss later in this chapter.

10.18 In its 1997 review, the Law Commission recommended that complexity should be an additional ground for *extending* the time limit, in the same way that complexity is a ground for extending the time limit for *complying* with a request for information from the Ombudsmen under section 29A(2)(c) of the OIA.[234] We maintain the view that complexity of the material being sought should be a ground for a time extension.

10.19 Another question is whether the official information legislation should specifically provide that the agency and requester should be able to mutually agree on an extension of the time limit. The New South Wales Ombudsman has recommended a provision that the time period for dealing with an initial application can be extended by agreement between the agency and the applicant.[235] We invite views on whether a similar provision should be included in the New Zealand official information legislation.

10.20 We have considered whether there should be an outer time limit on the extension. For example the Australian Freedom of Information Act allows for the original 30 day time maximum limit to be extended by a further 30 days.[236] The New South Wales Act allows for the original 21 day period to be extended by further 10 days in certain circumstances.[237]

10.21 The current provision in the New Zealand legislation allows an extension be for a reasonable period of time, having regard to the circumstances. The legislation clearly provides for a requester to be notified of the period of the extension and the reasons for it, and a requester may complain to the Ombudsmen about the length of an extension period.[238] We are mindful of the risk that any stated statutory maximum limit may tend to become the default time limit. Unless we hear that this flexible approach is being widely abused we tend to prefer the flexibility of the current provision. This could be supported by guidance from the Ombudsmen.

Q51 Do you agree that 'complexity of the material being sought' should be a ground for extending the response time limit?

Q52 Do you agree there is no need for an express power to extend the response time limit by agreement?

Q53 Do you agree the maximum extension time should continue to be flexible without a specific time limit set out in statute?

233 OIA, s 15A. LGOIMA, s 12. Only one extension is permitted: Office of the Ombudsmen "Notify Requesters of Likelihood of Delay in Replying to Official Information Requests" 12 OQR 1, March 2006.

234 Law Commission, above n 220, at recommendation 183.

235 New South Wales Ombudsmen *Opening Up Government: Review of the Freedom of Information Act* 198, (Sydney, February 2009), at recommendation 53.

236 Freedom of Information Act 1982 (Cth), s 15(6)(a).

237 Government Information (Public Access) Act 2009 (NSW), s 57.

238 OIA, s 15A(4), s 28(2); LGOIMA, s 14(4), s 27(2).

Urgent requests

10.22 The official information legislation allows a requester to ask that a request be treated as urgent.[239] Agencies may take into account the costs of meeting urgent requests in relation to the setting of charges.[240] The Ombudsmen's Guidelines address other issues raised by urgent requests.[241]

10.23 We have considered whether there should be more detail in the legislation about how agencies should handle urgent requests. While all requests are to be dealt with as soon as reasonably practicable, the issue is whether urgent requests can or should be given priority by agencies, and what criteria should determine whether a request is to be handled on an urgent basis.

10.24 We think it would be difficult to set out procedures in the legislation for handling urgent requests, or to prescribe fixed guidelines. Much depends on the level of co-operation between the requester and the agency, for example in refining broad requests whether the requester discloses the purpose of the request to the agency to assist in expediting the decision-making process. We are therefore inclined to retain the current provision that allows a requester to request an urgent decision, without placing additional timeframes on agencies.

10.25 Agencies are under a duty to assist requesters to frame their request in accordance with section 12.[242] In the case of urgent requests, that duty extends to assisting requesters to give their reasons for seeking the information urgently, as required by the legislation.[243] To meet this responsibility, we think there is an onus on agencies to ensure that requesters are aware of the requirement to give reasons for urgency and to provide an opportunity to give reasons. As a procedural matter, this could be done with the acknowledgement of receipt of a request.

10.26 There are already Ombudsmen's guidelines for dealing with urgent requests. They emphasise the desirability of communication between agency and requester to ensure that the spirit of the legislation is observed. In their guidance, the Ombudsmen's view is that the OIA does not provide authority to investigate complaints about the failure of an agency to accord urgency to a particular request, but that Ombudsmen may be able to investigate under the Ombudsmen Act.[244] We think that this approach is unsatisfactory and that the Ombudsmen should be able to investigate complaints about an unreasonable failure to meet urgent requests under the official information legislation. In chapter 11 we note that undue delay is a ground for complaint, it being treated as if it were a refusal. In our view this is adequate to cover complaints about delay in the treatment of urgent requests: failure to accord proper urgency can be regarded as "undue delay". We return to this matter in chapter 11.

239 OIA, s 12(3); LGOIMA, s 10(3).

240 OIA, s 15(2); LGOIMA, s 13(3).

241 Office of the Ombudsmen "How the Official Information Legislation Works", Part C, ch1.

242 LGOIMA, s 10

243 Law Commission, above n 220, at recommendation 83. The Law Commission recommended that the duty to provide assistance to requesters should include an explicit duty to assist requesters to specify the reasons for urgency.

244 Office of the Ombudsmen, above n 241, Part C, ch 1.

Q54 Do you agree that handling urgent requests should continue to be dealt with by Ombudsmen guidelines and there is no need for further statutory provision?

CONSULTATION

10.27 Consultation is a process that is largely invisible within the official information legislation[245] but it is an important aspect of the process of handling official information requests in a number of ways. It may be necessary for an agency to engage in consultation about the handling of the request:

- with the requester, either to provide assistance to the requester or to refine the scope of a large, unclear or complex request, as we discuss in chapter 9;
- to co-ordinate a response between various government agencies;
- to verify which agency a request should be transferred to;
- to co-ordinate a response with the relevant ministerial office or to inform the minister prior to release of the information;
- to seek the views of third parties who may be affected by the release of information, for example, personal, confidential or commercial information.

The legislation does not generally mandate consultation in any particular case; it is up to the agency to assess the desirability of consultation. One exception is that an agency must consider consulting the requester before refusing a request if this would assist the requester to make the request in a form that would remove the reason for refusal.[246]

10.28 Consultation must take place within the set time period for responding to a request, unless a time extension is necessary. As discussed above, an extension of time may be for a reasonable period of time having regard to the circumstances, provided that notice is given to the requester of the time and reasons for the extension.

Consultation with other agencies

10.29 An agency receiving a request may need to consult with other agencies before making a decision in response to the request, for example where a number of agencies have collaborated on a project, or where a requester sends the same or a similar request to a number of different agencies. Administrative protocols require departments to consult with each other before releasing material contributed by others.[247] An agency may also need to consult to ascertain whether the information requested is more closely connected with the functions of another agency, or to see if the agency holds the information with a view to transferring the request.

10.30 The State Services Commission has issued guidelines about consultation with other departments and with Ministers.[248] The guidelines suggest that consultation is necessary as a courtesy, to make other departments aware of the request and the proposed action, and to check whether similar requests have been made to

245 See however OIA, ss 15A(1)(b) & 18B; LGOIMA, ss14(1)(b), & 17B.

246 OIA, s 18B; LGOIMA, s 17B.

247 White, above n 224 , at 145.

248 State Services Commission *Release of Official Information: Guidelines for Co-ordination*.

other departments so that a stance taken by one department is not undermined by another. The guidelines give examples of situations where consultation with other departments should normally occur.

Consultation with ministerial offices

10.31 While the legislation places responsibility for dealing with requests on the receiving agency, where a request has a political dimension or deals with a matter that a Minister has asked an agency to keep him or her informed about, the reality of the working relationship between an agency and its Minister (whether directly or through ministerial advisers) will necessitate consultation about requests so that the agency complies with the "no surprises" doctrine.[249] The imperative for political consultation on requests is heightened during election periods.

10.32 The State Services Commission guidelines suggest that it is appropriate for departments to consult their Minister when:[250]

- requests are received from the Opposition, the Opposition Research Unit, recognised interest groups or the news media especially where the information is particularly sensitive;
- the subject matter is controversial and likely to lead to questions of Ministers;
- facts, opinions or recommendations in the information are especially quotable or unexpected;
- the information reveals important differences of opinion among Ministers or agencies.

10.33 The difficult issue is the interplay between departmental and ministerial input into the decision-making process.[251] Concern about the delay and resource costs of ministerial consultation around OIA decisions led to an interagency meeting in 2008 convened by the State Services Commission.

10.34 A fundamental question is whether the decision-making framework in the OIA is now less workable in the current political environment. White points out that the conferral of independent decision-making on chief executives for decisions that might have direct political consequences for ministers can be seen as having implications for the minister/department relationship.[252]

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249 White, above n 224, at 134, 148, 150. White's research shows that some agencies are required to run all requests past the Minister's office before responding or are expected to advise the minister's office before contacting an opposition MP on OIA requests. Another practice is for the Minister's office to receive weekly lists of requests so that requests of potential interest to the Minister can be identified.

Some agencies responding to our survey confirmed that they consult with their Minister on all OIA requests, with the Minister being advised of responses and transfers of requests to the Minister being considered on a case by case basis.

See also State Sector Standards Board "The State Sector Ethos – Official Information Act 1982, Privacy Act 1993, Protected Disclosures Act 2000 and Associated Matters" report to the Minister of State Services (April 2002). The State Sector Standards Board found evidence of inappropriate directions from Ministers for all requests under the OIA to be referred to the Minister's Office:

See also the Office of the Ombudsmen *Annual Report 2003* (Wellington, 2003) at 26, commenting on an investigation into delayed responses by Te Puni Kōkiri where delay was partly caused by an instruction that all OIA requests were to be referred to the Minister for his information and clearance.

250 State Services, above n 248.

251 The issue of transfer by an agency to the Minister is discussed further at 10.54.

252 White, above n 224, at 225–6. See also para 1.33 above.

10.35 The political and administrative interface of the official information legislation was one of the strands of Nicola White's research. The question she poses is: what are the appropriate bounds for political management when it meets official information obligations?[253] She notes that there is considerable uncertainty about the relevant principles or rules that should guide behaviour, that the lack of clearly stated norms or conventions is a problem and that this is the most obvious area where suspicion and distrust about the OIA is growing.[254]

10.36 White suggests that the time has come to tackle the reality that ministers and departments will have different perspectives on withholding and release under the OIA, and for general rules or guidelines to be developed to help manage these differences. She proposes that the State Services Commission could develop a framework of general rules or guidelines,[255] supplemented by a specific protocol between an agency and their Minister, which ideally would be made publicly available. She suggests that the rules or guidelines about the relationship between a minister and a department could usefully cover:

- the process by which the department and the minister will interact on any official information request where there is likely to be a political interest, either because of the nature of the information or the nature of the requester;
- who should be responsible for which type of decisions, including decisions on different categories of information;[256]
- when requests should be transferred between the minister and the department and with what supporting process (such as advance discussion);
- time-frames and processes for consultation with the political level of government; and
- the types of factors likely to be relevant to any judgements about the applicability of the withholding provisions in section 9 of the OIA that protect government advice and decision-making processes.

10.37 We support the proposal for clearer guidelines. Clarifying the nature and purpose of ministerial consultation may help to reduce the level of intensity of political consultation and help to make the official information workload of agencies more manageable. Our view is that these guidelines should support the existing decision-making structure contained in the official information legislation, where the agency receiving the request is responsible for making an appropriate response, subject to the grounds for transfer of a request in section 14.

Q55 Do you agree there should be clearer guidelines about consultation with ministerial offices?

253 Ibid, at 215.

254 Ibid, at 215, 225, 267.

255 Specifically, the proposal is that existing guidance such as the State Services Commission *Release of Information: Guidelines for Co-ordination* could be developed and made much more explicit about the political interface.

256 White above n 224, at 265–267. White suggests, for example, that for policy issues working their way through the Cabinet decision-making process including Cabinet papers and documents or information created as part of the process immediately before or after the Cabinet paper or closely connected to it, the Minister should be the final decision-maker.

Consultation with affected third parties

10.38 Consultation is also an issue where the requested information relates to an individual (i.e. personal information) or a commercial enterprise (i.e. commercial information). The official information legislation does not mandate consultation with third parties who may be affected by the release of information; however agencies may choose to consult third parties so that they are sufficiently informed about the various interests involved to decide whether one of the withholding grounds applies and also carry out the public interest balancing exercise under section 9. In some circumstances, the agency may have an administrative law duty to consult where the third party has an expectation that they will be consulted prior to release, or otherwise to satisfy the requirements of procedural fairness. A failure to consult may create a risk of judicial review, although the cost of bringing High Court proceedings is a significant limiting factor on that option, as well as the lack of a suitable remedy where sensitive information has already been released.

10.39 It is worth noting that agencies cannot currently recover the costs they incur (mainly the expenditure of staff time) in consulting with third parties. This may be an indirect disincentive on agencies conducting third party consultation. Cost recovery and charging is an issue we discuss at the end of this chapter.

10.40 But the main question is whether there should be a statutory duty on agencies to consult with third parties who might be affected. This would mean that individuals and organisations can have a say in decisions to release official information that includes information about them, before any such information is released. In New Zealand, consultation with people who might be affected by the release of information is encouraged as best practice where practicable, but is not mandatory.

10.41 Some commercial organisations responding to our survey were concerned that sensitive commercial information they were obligated to provide to regulators, government departments or local councils has been inappropriately released in response to official information requests. These organisations would like some form of mandatory prior consultation so that they have the opportunity to put their case for withholding sensitive information before it is released.

10.42 One model suggested to us would require an agency, as part of its decision-making process, to solicit a third party "submission" on the question of release. The third party would have a limited time, say 10 working days, to provide a submission. The agency would then consult the requester who would have a similar time period to counter the arguments against release, with the agency being the final arbiter. If however the requester or third party objects to the agency's decision, the decision could be referred to the Ombudsmen for an independent determination within a fixed time period, say 20 working days.

10.43 The Australian Freedom of Information Act 1982 provides for a consultation process in relation to business documents and documents affecting personal privacy if it appears to an agency that the third party may reasonably wish to contend that the information should be withheld on public interest grounds, provided that is reasonably practicable for an agency to give the third party a reasonable opportunity to make submissions in support of withholding.[257]

10.44 The New South Wales Government Information (Public Access) Act 2009 also requires reasonably practicable steps to consult in any case where the information concerns the personal affairs of any person, trade secrets or information that has a commercial value or concerns the business, professional, commercial or financial affairs of any person.[258] In New Zealand section 22 of the Public Transport Management Act 2008 imposes a similar obligation to consult in relation to information supplied by a transport service operator to the Transport Agency.

10.45 We think there is merit in considering whether the legislation should specifically signpost the need to take account of third party interests. However, the impact of any legislative change on the official information regime would need to be carefully assessed. Time and resources are a problem. In *Review of the Privacy Act 1993* we noted two very obvious drawbacks to imposing mandatory consultation: it could slow down the official information process and add significantly to the administrative burden on agencies.[259]

10.46 We agree that it is good practice to consult with third parties where significant third party interests are raised. Consultation puts agencies in the best position to weigh up the various public and private interests involved. It should be encouraged. However, we do not support making this sort of consultation mandatory due to the potential for complexity, delay and additional bureaucracy.

10.47 Our preferred option is to supplement best practice with a requirement that agencies give prior notice of a release decision where there are significant third party interests at stake. This would provide third parties with a brief opportunity to submit views on release to the decision-making agency and to take steps to protect their interests such as judicial review of the decision. While decision-making power remains with the relevant agency, an agency receiving a prompt third party submission against release would have the discretion to revise the release decision on the basis of the information received.

10.48 In terms of the mechanics of the notice requirement, issues to consider include the identification of the type of third party interests that would give rise to the notice requirement, as well as establishing the threshold that would trigger the notice requirement. We suggest a 5 working day period of notice but would like to hear views. The requirement should be limited to situations where there are significant third party interests at stake.

257 Freedom of Information Act 1982 (Cth), ss 27 and 27A (amended by the Freedom of Information Amendment (Reform) Act 2010).

258 Government Information (Public Access) Act 2009 (NSW), s 54.

259 Law Commission *Review of Privacy Act 1993* (NZLC IP 17, Wellington, March 2010), at para 11.60.

10.49 Our general proposal is that notice would be required to third parties where there is good reason for withholding information, but the agency considers this to be outweighed by public interest factors.

10.50 In chapter 11 we propose that failure to give prior notice where there are significant third party interests involved, would be grounds for a third party complaint to the Ombudsmen.

Q56 Do you agree there should not be any mandatory requirement to consult with third parties?

Q57 Do you agree there should be a requirement to give prior notice of release where there are significant third party interests at stake?

Q58 How long do you think the notice to third parties should be?

TRANSFER PROVISIONS

10.51 The official information legislation allows for requests to be transferred to another agency where the transferring agency does not hold the requested information or where the request is more closely connected with the transferee agency.[260] Any transfer is to be made promptly, with a maximum time limit of 10 working days from receipt of the request, and the agency is to inform the requester. In Chapter 11 we propose that the Ombudsmen's review function be extended to include complaints about transfers and discuss that matter further there.

Partial transfers

10.52 Where a request relates to information held by a number of agencies, there is no explicit mechanism to allow the transfer of part of the request to another agency. Guidance from the Ombudsmen implies that partial transfers may be made.[261] However we wonder if uncertainty and lack of clarity about partial transfers may be increasing the amount of inter-agency consultation. While consultation is necessary to ensure consistent decision-making, there may be occasions where requests could be split up and handled relatively independently between the relevant agencies, with responses being co-ordinated as necessary.

10.53 We think that the legislation should clearly permit agencies to transfer part of a request that is readily severable, provided that the transfer meets the section 14 criteria and that notice of the transfer is provided to the requester.

Q59 Do you agree there should be provision in the legislation to allow for partial transfers?

260 OIA, s 14; LGOIMA, s 12. White, above n 224, at 265, notes that the administrative protocol is broadly that requests should be transferred to whoever was the primary author of a paper, or had leadership of the issue or process:.

261 Office of the Ombudsmen "Transferring Requests" 8 OQR 1, March 2002.

Transfer to the Minister

10.54 One difficult area is the issue of transfers of requests to Ministers. This issue has been considered on a number of occasions, including the earlier Law Commission review.[262] The Ombudsmen have made it clear that requests may only be transferred on the grounds set out in section 14 and have held that a blanket policy to transfer all media requests to the Minister is not justifiable.[263]

10.55 Nevertheless, difficulties arise when an agency's view about the release of information differs from the view of the Minister or his or her advisers. The complexity is due to the overlay of the public servant's duty to follow ministerial direction. On occasion this may conflict with the public servant's responsibility to release official information under the official information legislation and/or interfere with the public servant's working relationship with his or her Minister. It may be that this issue has been partially resolved. An earlier iteration of the Cabinet Manual said:[264]

> If, after consultation, the Minister takes the view that the information should not be released but the department believes it should, then transfer of the request to the Minister is the only way in which the department can meet its constitutional duty to follow ministerial direction and the obligation to comply with the Official Information Act.

10.56 This provision was amended in the 2008 Cabinet Manual, and we believe it now reflects the requirements of the legislation, making clear that transfers should only be made to Ministerial Offices if the requirements of section 14 (transfers) of the Act are satisfied. It says that:[265]

> On being consulted, the Minister may take the view that information, which the department considers should be released, should not be released. In such a case, transferring the request to the Minister may be an appropriate way forward, *if the requirements of section 14 of the Official Information Act 1982 can be satisfied*. Each case of this kind needs to be carefully handled at a senior level within the department, with reference to the Minister if necessary. [emphasis added].

10.57 We acknowledge that there are difficult situations where the views of a department will conflict with those of the Minister. However we do not support additional transfer grounds as the appropriate means of dealing with these situations. In our view, this would result in a loss of the robust debate on the desirability of withholding or release, to the detriment of freedom of information objectives.

10.58 Our preferred option is for the development of fuller guidelines in relation to consultation between agencies and Ministers, and ability for complaints to be made to the Ombudsmen about transfers under the official information legislation, as we suggest in chapter 11.

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262 Law Commission, above n 222, at ch 5.

263 Office of the Ombudsmen *Report of the Ombudsmen for the Year Ended 30 June 2004* (Wellington, June 2004) at 28.

264 Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) at para 6.34.

265 Cabinet Office *Cabinet Manual 2008* (Wellington, 2008) at para 8.42.

Q60 Do you agree there is no need for further statutory provisions about transfer to ministers?

Q61 Do you have any other comment about the transfer of requests to ministers?

RELEASE OF INFORMATION IN ELECTRONIC FORM

10.59 Section 16 of the OIA provides that "if the information requested by any person is comprised in a document" it can be made available in a number of ways, which include providing the person with a copy, giving a summary or giving an opportunity to inspect. Generally the agency should provide the information in the way preferred by the person. A number of issues arise.

10.60 First some respondents to our survey thought there should be explicit acknowledgement in the Act that documents can be made available in electronic form. That would, of course, save the agency printing costs, and impose them on the recipient. One agency suggests there should be a statutory presumption that supply of information in electronic format should be sufficient to discharge an agency's obligations unless it is impractical or the requester specifies otherwise. Another went so far as to suggest: "Don't give the option to the requester of receiving the material in hard copy."

10.61 It is clear that section 16 already permits release in electronic form. To do so is "providing the person with a copy of the document", and document is defined in section 2 as including

> any information recorded or stored by means of any tape recorder, computer, or other advice: and any material subsequently derived from information so recorded or stored.

We would however be unwilling to impose a mandatory requirement that the requester *must* be content with an electronic version. The clear philosophy of s16 is that where possible the requester should be able to have the information in the form he or she prefers.

10.62 We are sure many people would be satisfied with an electronic version if that option were put to them, and there is no reason why they should not be asked. But we would be reluctant to recommend that the element of choice should be removed. We note however that under section 16(2)(a) the requester's preferred mode of receipt need not be followed if it would "impair efficient administration". It might also be legitimate in some circumstances for the agency to charge for the provision of hard copy if its production incurs significant cost.

10.63 The second issue is, in a sense, the converse of the first. A requester may want an electronic copy, often for quite legitimate reasons but the agency may want to supply only a hard copy, possibly to prevent misleading reuse of the material or to ensure recognition of its authorship. However, electronic documents can be released in a format that is locked from editing and, again, we think there is no need to amend the legislation to take account of this.

10.64 Thirdly, there may be certain types of electronic information that agencies may not be required to provide in response to access requests. They include metadata and information in backup systems. Some of the newer Australian legislation includes provisions about this.

10.65 Section 28 of the Right to Information Act 2009 (Qld) provides that "An access application for a document is taken not to include an application for access to metadata about the document unless the access application expressly states that it does." "Metadata" is defined as including "information about the document's content, author, publication date and physical location". If an access application does expressly state that access to metadata is being sought, access to the metadata does not need to be provided unless it is reasonably practicable.

10.66 Section 29 of the same Act provides that an access application for a document, however expressed, does not require an agency to search for the document in a backup system (although the agency may conduct such a search if it considers it appropriate). Section 53(4) of the Government Information (Public Access) Act 2009 (NSW) and section 10(2) of the Right to Information Act 2009 (Tas) also deal with searching for documents in backup systems. In addition, section 10(1)(a) of the Tasmanian Act provides that, if information is stored in an electronic form, an agency may refuse an access application if the information "cannot be produced using the normal computer hardware and software and technical expertise of the public authority".

10.67 At the same time there are also other obligations in overseas jurisdictions for agencies to adopt systems which ensure data is easily accessible.[266] We are interested to know what provisions, if any, the New Zealand Acts should include to ensure the provision of electronic information is reasonably simple for the provider and accessible for the requester.

Q62 Do you think that whether information is released in electronic form should continue to depend on the preference of the requester?

Q63 Do you think the Acts should make specific provision for metadata, information in backup systems and information inaccessible without specialist expertise?

Q64 Should hard copy costs ever be recoverable if requesters select hard copy over electronic supply of the information?

Re-use

10.68 A requester supplied with information under the OIA is not automatically entitled to publish that information to the world. For one thing, publication might breach a law. It might, for example, be defamatory or in breach of a court suppression order; it might be in breach of copyright. In such a case section 48 of the OIA and section 41 of LGOIMA do not protect the recipient. This point is not as well understood as it should be. Some people appear to think that once information has been released it is, as it were, "public property".

266 See Resolution of Canada's Access to Information and Privacy Commissioners (1 September 2010). The resolutions include the following: "Governments should build access mechanisms into the design and implementation stages of all new programmes and services to facilitate and enhance proactive disclosure of information.

10.69 We note that certain initiatives are afoot to facilitate re-use. Currently agencies releasing material which is not subject to copyright or other intellectual property rights are encouraged to add a statement to this effect:[267]

> To the best of [name of agency]'s knowledge, under New Zealand law:
>
> - There is no copyright or other intellectual property rights in this [identify material in question] in New Zealand; and
> - It may be copied and otherwise re-used in New Zealand without copyright-related restriction.
>
> [Subject to any liability which may not be excluded or limited by law, [name of agency] shall not be liable on any legal basis (including without limitation negligence) and hereby expressly excludes all liability for loss or damage howsoever and whenever caused to you in connection with your use of the material.]

10.70 The development of a New Zealand Government Open Access and Licensing framework (NZGOAL) promotes open licensing of copyright material held by state agencies. We discuss this programme further in chapter 12 on Proactive Disclosure.

10.71 However, the NZGOAL initiative will not deal with other legal prohibitions such as defamation, contempt of court, and so on. Recipients of information under the official information legislation who republish the information will remain liable for these breaches of the law. We have wondered whether, when information is released by agencies, it should be accompanied by a warning to this effect as a matter of course.

10.72 It is implicit in the Act that the agency releasing information may place conditions on its re-use. The OIA does not expressly confer such a right on an agency, but recognises its existence obliquely in section 28 by enabling an appeal to the Ombudsmen against the imposition of such conditions. An example might be the release of sensitive defence information to a trusted researcher. In such a case there might be an agreement between agency and requester that the information will be released only on condition that it be kept confidential, or that it be not used without reference to a contextual statement provided by the agency. In other words, the device is properly used to enable release of information where, without such conditions, there would be a good reason for withholding.

10.73 It has been suggested that this right to impose conditions should be conferred expressly by the Act, rather than being dealt with in an oblique way. It would be difficult to frame precisely a positive provision such as is suggested. The circumstances in which conditions can be imposed would need to be formulated carefully or the impression might be gained that it is legitimate in a wide range of circumstances. There would also be a question of how such conditions might be enforced. Our view is that it is best to leave the matter to operate by agreement as it currently does.

Q65 Do you think that the official information legislation needs to make any further provision for agencies to place conditions on the re-use of information, or are the current provisions sufficient?

267 State Services Commission *New Zealand Government Open Access and Licensing Framework* (1 August, 2010) at 25.

Current framework and issues

10.74 We touched on the topic of charges in chapter 9 and identified a desire for clearer guidance. We suggest there should be legislative criteria to assist agencies in determining when charges may be appropriately applied.

10.75 The OIA and LGOIMA simply provide that agencies may charge requesters for supplying official information.[268] Any charge is to be reasonable and the agency may consider the cost of the labour and materials involved, as well as any costs incurred in making information available on an urgent basis.[269] Charges are reviewable by the Ombudsmen.[270] The OIA authorises the making of regulations to prescribe reasonable charges,[271] but no regulations have ever been made. Instead the Ministry of Justice has produced charging guidelines.[272] There is a widespread view that these guidelines are not achieving their purpose and in any case they do not extend to local authorities.

10.76 When the LGOIMA was enacted, it anticipated the promulgation of regulations to set prescribed charges.[273] However, as no regulations have ever been made, the fall-back position is that charges may be reasonable, having regard to the cost of the labour and materials involved in making the information available and to any costs incurred pursuant to meeting an urgent request.[274] LGOIMA agencies report to us that they tend to use the Ministry of Justice guidelines in the absence of any other guidance.

10.77 It seems there is a high degree of inconsistency between charging practices. Many central government agencies do not generally impose charges that could be perceived as limiting people's access to information. The charging guidelines include grounds for the remission of charges such as hardship and the public interest, or where remission is otherwise in the interests of the agency concerned. On the other hand, LGOIMA agencies tend to make use of the charging provision on a much more liberal basis. One local council is considering changing its current charging policy to charge all costs associated with official information requests, as well as applying a minimum fee.

10.78 Even where agencies do not generally impose charges, they find the discretion to do so a useful reserve power as a tool to help control large and repeat requests, in addition to the other tools at their disposal in such cases. However there is an expectation that agencies do not charge political research units for their requests and it is reported that the largest number of unmanageable requests come from this quarter.

268 OIA, s 15(1A); LGOIMA, s 13(1A).

269 OIA, s 15(2); LGOIMA, s 13(2).

270 OIA, s 28(1)(b); LGOIMA, s28(1).

271 OIA, s 47(d).

272 Ministry of Justice *Charging Guidelines for Official Information Act 1982 Requests* March 2002. The guidelines were first produced in 1992. The 2002 version is not very different from the 1992 version. For a summary of the changes see Paul Roth *Privacy Law and Practice* (looseleaf ed, LexisNexis) at PVA35.7.

273 LGOIMA, s 2(1) definition of "prescribed amount", s 13(2).

274 LGOIMA, s 13(3).

10.79 Nicola White's research identified widespread perceptions among requesters that:[275]

- charging powers are used in an ad hoc fashion, with at times little apparent logic to decisions over who is charged, when or why;
- charging powers are regularly used to 'burn people off' rather than genuinely to manage the bounds of an OIA request, and are often used with a political motive;
- charges that are levied are often unreasonable or hard to understand, and are increasingly hard to justify when information can be provided swiftly and easily through electronic communication.

She also found that agencies:[276]

- are sometimes uncertain of their ground in regard to charging;[277]
- will sometimes try to recognise the public interest by not charging NGOs or other requesters with an element of the public interest to their work.

10.80 Responses to our survey indicate that many central agencies do not charge because the suggested levels are too low to cover the administrative cost, particularly as they do not cover the cost of assessing the material.

10.81 We are mindful of the high cost to agencies of processing official information requests. While this work is now generally treated as "core business", the reality is that most officials dealing with official information requests have, in addition, full workloads, against which the official information requests must be prioritised.[278] One of the major costs for agencies is the diversion of staff away from their day to day workload to manage official information requests. We have discussed the heavy burden that the legislation places on agencies in administrative and resourcing terms in chapter 9.

10.82 It is clear that charging has a role to play in creating a workable balance in the system, and could be used to adjust the level of cost recovery. However there is also a question of balance: any charging regime must not run counter to the freedom of information objectives of accessibility, open government, encouraging citizen participation and the exercise of democratic rights. The balance must be got right between the *public duty* of the agency to supply information and the *private benefit* conferred on the requester by receipt of it.

Reform of charging framework

10.83 A number of suggestions were received from agencies in response to our survey. These included:

- clearer provisions in the legislation;
- standardised charging around staff time and resources;
- the use of upfront deposits where a request is chargeable;[279]

275 White, above n 224, at 277. See also 134–139.

276 White, above n 224, at 278.

277 Ibid, at 139. One public servant noted there was no developed understanding of how to approach charging across the government sector.

278 Some agencies use contractors to deal with the processing official information requests to free up permanent staff, others report that contractors lack the institutional knowledge to properly assess the basis for release or withholding.

279 See Ministry of Justice, above n 272, at para 8.

- mandatory charging for "fishing" requests;
- regulations to update the guidelines;
- software for assessing costs.

A number of agencies also suggest that the discretion to charge requesters should be broadened to include aspects of the decision-making process such as consultation and deliberation.

10.84 In its 1997 review, the Law Commission did not recommend changes to the legislation but recommended that the Ministry of Justice charging guidelines be revised, and that these should take account of the State Services Commission policy framework for government held information.[280]

10.85 The charging framework is an important mechanism in maintaining an appropriate balance in the official information process between promoting the availability of official information and managing the burden on the public sector of processing official information requests. We think the current framework has not been adequately maintained and needs to be overhauled. Agencies do not use the current framework consistently. The guiding principle of the framework is one of reasonableness but it is difficult for agencies to determine what is reasonable in different circumstances. Agencies therefore tend not to charge by default, or conversely may tend to charge as a matter of course. Neither default setting is appropriate; agencies need guidance in identifying the types of request where charging should be used and how the charging framework should be applied.

10.86 We consider the discretion to impose charges to be a necessary reserve power for controlling large requests and encouraging refinement of the scope of such requests. We think that a revised charging framework should take account of the following objectives, that:

- the regime does not act as a disincentive to legitimate requesters and so is not an obstacle to freedom of information objectives;
- the regime acts as an incentive for requesters to tailor their requests so far as possible to reduce the administrative burden on agencies;
- the regime provides an incentive for agencies to maintain efficient information handling practices so that requests can be dealt with as promptly and cost-effectively as possible;
- the regime encourages (or does not discourage) best decision-making practices such as sufficient consultation;
- the regime provides an incentive for agencies to release information proactively as appropriate;
- the regime is not complex nor time-consuming for agencies to apply and does not add unduly to the administrative burden of agencies;
- the regime can be consistently applied by agencies so that it is not a cause of perceived unfairness amongst requesters.

280 State Services Commission *Policy Framework for New Zealand Government-held Information*. See also The Treasury "Guidelines for Setting Charges in the Public Sector" (December 2002); Controller and Auditor-General *Charging Fees for Public Sector Goods and Services* Good Practice Guide (June 2008).

10.87 One of the difficult issues is assessing which aspects of the process should attract a charge (and in which circumstances), and which aspects should not. Currently, the guidelines specify certain kinds of activity where charges may apply (based on a maximum hourly rate), and exclude other activities. At present, the charging regime includes time spent searching for relevant information, except where the information is held in the wrong place. But time-consuming and complicated aspects of the process such as consultation, deliberations over withholding grounds and legal advice are excluded. We think that the various inclusions and exclusions should be examined afresh in terms of the incentive each inclusion or exclusion puts on both agency and requester behaviour.

10.88 A different kind of charging framework is the flat fee model where requesters pay based on what they receive. This type of system is relatively simple and may be easier for agencies to administer than time-based systems. There is also a clear correlation between what a requester is charged and what they receive. For example the Queensland FOI Independent Review Panel recommended a flat-fee model based on the number of pages released with the first 100 pages being provided at no charge. No charge would apply to any page with redacted information. And no charges would apply to the searching for and retrieval of information or for decision-making by agencies.[281] One issue for further consideration, however, is how a flat fee model would apply to the provision of information in electronic form.

10.89 Another model we have seen imposes a fee at the time of making a request, known as an access application fee.[282] Charges are also imposed depending on the nature of the response Such a model may reduce frivolous or ill-thought through requests but in our view this approach is not compatible with our access framework where there is no line between formal or informal requests. It would be inappropriate to suggest that a requester should pay for a request that may only take an official a very short time.

10.90 Yet another option would be to develop a model based on categories. For example under a three categories model:

- category one might attract no charge;
- category two might cover requests estimated to involve a specified number of hours of processing time (say between 20 and 40 hours) and would attract a flat charge in the event of release.
- category three might cover requests estimated to involve more than the highest specified number of hours of processing time (40 hours in our example) which could be charged at a flat hourly rate for the full processing time, in the event of release.

The model could include various exceptions based on categories of requester (on public interest grounds), and separate protocols may be needed for researcher access. There would doubtless be much debate about what the specified number of hours and the acceptable rates should be but we think there

281 FOI Independent Review Panel *The Right to Information: Reviewing Queensland's Freedom of Information Act* (June 2008) at 198–199.

282 Government Information (Public Access) Act 2009 (NSW), s 64.

is merit in considering a "categories" model. A variation would be to set fees based on more categories than just three, for example a charge rising by a specified dollar sum for every 10 hours of time beyond the first 10 hours.

10.91 Another issue is what form the charging framework should take. For example, the framework is currently contained in guidelines. An alternative would be to enact the framework as regulations made under the official information legislation.[283] The legislation already anticipates the making of regulations to set charges although the power has never been used. The advantages of enacting the framework as regulations are that it would be a transparent public process, subject to the regulatory review cycle, and would create a uniform system of rules applicable to all.

10.92 Another issue is whether to create a comprehensive framework that covers both OIA and LGOIMA agencies. This may involve two sets of regulations under the OIA and LGOIMA respectively, depending on whether the official information legislation remains in two separate Acts or is combined, as discussed in chapter 15.

10.93 Consideration will need to be given to the relationship between the proposed encouragement to agencies to proactively release information, discussed further in chapter 12, and the right to charge requesters. If agencies fail to proactively release information where it is reasonably practicable to do so, requiring citizens to request it, we wonder whether it should be open for the requester to complain to the Ombudsmen about being charged for information that should have been proactively released. In the absence of any clear statutory duty to proactively release, this may not be practical.

10.94 Another issue is whether the ability to charge requesters should be tied to meeting the statutory timeframes for responding to requests. This option would involve incentivising agencies to reach greater levels of observance of statutory timeframes by restricting the application of the charging provisions in this way. Such an incentive may be limited by the fact that charging does not apply universally to all requests, and does not represent full recovery of an agency's costs.

10.95 Our preference is for the charging framework to be revised and updated in the form of regulations issued under the official information legislation. We invite views on whether the framework should continue to be based on a maximum hourly rate for certain activities, and, if so, which activities should be included in the charging framework and which should be excluded. Alternatively, we invite views on whether a categories model (based on the length of processing time) or a flat fee model (based on the amount of material released) should be considered.

Q66 Do you agree there should be regulations laying down a clear charging framework for both the OIA and the LGOIMA?

Q67 Do you have any comment as to what the framework should be and who should be responsible for recommending it?

283 See for example the Freedom of Information (Fees and Charges) Regulations 1982 (Cth).

Political research

10.96 The Ministry of Justice charging guidelines suggest that members of parliament may be exempted from charges for official information provided for their own use; and that this discretion may be extended to cover political party parliamentary research units when the request has the endorsement of an MP. In practice, this guideline has developed into an expectation that agencies will not charge for requests made by political research units.

10.97 Nicola White's interviews with ministers and political advisers mentioned the unwritten trade-off that used to exist where the requests from opposition research units (regarded as the most "political" request category) were dealt with without the imposition of charges and went through ministers' offices as a means of managing the politics without embroiling the bureaucracy. That system no longer applies as Ombudsmen do not support a convention of transferring opposition or media requests on certain issues to Minister's offices.[284]

10.98 In the 1997 review, the Law Commission supported the practice of not charging MPs or staff of parliamentary research units and considered it important that it remains unchanged.[285] We maintain our view that access to official information is an important tool for opposition parties to be able to scrutinise government policy, and that parliamentary research units should not usually be charged for reasonable requests. However, a significant proportion of the voluminous and unrefined requests are from parliamentary research units. They can cause a great deal of expenditure of resource. In our view, the charging regime should potentially apply to overly broad requests which create unreasonable administrative burdens on the responding agencies, whether they come from political agencies or not. There is no reason why unreasonable political requests should be completely exempt.

Q68 Do you agree that the charging regime should also apply to political party requests for official information?

284 White, above n 224, at 160.

285 Law Commission, above n 222, at para 146.

Chapter 11

Complaints and remedies

11.1 This chapter briefly summarises key features of the complaints process and suggests that some new grounds for complaint should be added. It also proposes that the Ombudsmen (or other complaints agency) should have the final power of decision and that the 'veto' could be removed for both local and central government. We also discuss the question of sanctions and whether new penalties should be added to the OIA and the LGOIMA.

THE CURRENT COMPLAINTS SYSTEM

11.2 A complaint to the Ombudsmen is the only formal complaint mechanism available to those dissatisfied with the way their official information requests have been handled. In most cases, access to the courts is not available until a complaint has been made and determined by an Ombudsman, and even then judicial review provides the only avenue of redress. Complaints are governed by Part 5 of the OIA and the LGOIMA. There are two processes for complaint. One process is for complaints about decisions made under Part 2 of each Act – which govern access to the majority of official information. The other is for complaints regarding access to information under Parts 3 and 4 of each Act – that is certain information to which access may be had as of right, and personal information about a body corporate making the request.

11.3 The Office of the Ombudsmen received 809 complaints under the OIA in the 2008/2009 year. Over half of these were made by individuals, approximately 15 per cent were from the media, and about 10 per cent were from political research units. In the same year 231 complaints were received under the LGOIMA. The Ombudsmen report that the majority of requests for official information ask for information about why a particular decision was made or why a particular process was followed rather than for any particular document. The majority of complaints led to information initially withheld by the agency or Minister being disclosed to the complainant.[286] All of the Ombudsmen's recommendations made under the OIA in that year were accepted. Similar figures are not available for recommendations made under the LGOIMA.[287]

286 Office of the Ombudsmen Annual Report 2008/2009 (Wellington, July 2009) at 22.

287 In the previous year (2007/2008) all recommendations made under the LGOIMA were accepted.

11.4 The provisions of the OIA and the LGOIMA have rarely been considered in the courts and there has been little judicial direction on key provisions of the Act to date, justifying the Danks Committee's belief that the courts would have a minor role to play in official information matters.

Requests for access to official information under Part 2

Grounds for complaint

11.5 It is possible to make a complaint to an Ombudsman and seek a review of a decision by an agency or Minister[288] that:

- refuses to make official information available to any person in response to a valid request;
- imposes a charge before access will be granted to the official information requested;
- is about the manner in which the information is released;
- imposes conditions upon the use of official information which is released;
- gives notice that it can neither confirm nor deny that official information exists; or
- extends any time limit under section 15A of the OIA or section 14 of the LGOIMA

It is not possible to make a complaint about a decision to release information under either Act.

Complaints process

11.6 Investigations carried out by Ombudsmen are informal, private and inquisitorial in nature. They are relatively unfettered in the processes they follow in investigating complaints, save for some procedural requirements and natural justice safeguards laid down in the legislation. The Ombudsmen are independent decision makers, not there to represent the views of either party.

11.7 When an Ombudsman is of the opinion that the access request should not have been refused, or conditions should not have been imposed, that the decision was unreasonable or should not have been made or otherwise was contrary to law, and that the improper decision should be rectified, the Ombudsman must, subject to certain exceptions, make a report to the relevant agency or Minister and make recommendations for remedial action as he or she thinks fit in the circumstances. The parties must be advised of the outcome of the investigation.[289]

11.8 There is an exception to this requirement if the Attorney-General certifies that making the information available would interfere with the prevention, investigation, or detection of offences.[290] Under the OIA only, the Prime Minister can certify that release would interfere with New Zealand's security, defence, or international relations. In such cases the Ombudsman is prohibited from recommending the release of information that has been so certified, but may recommend that the agency or Minister gives further consideration to making that information available.[291]

288 Any reference to agency or Minister includes local authorities and local authority officials unless otherwise stated.

289 OIA, s 33; LGOIMA, s 36.

290 OIA, s 31; LGOIMA, s 31.

291 Ibid.

11.9 On the commencement of the twenty-first working day after a recommendation is made, the agency or Minister concerned comes under a public duty to comply with that recommendation "unless, before that day, the Governor-General by Order-in-Council otherwise directs."[292] This effectively allows Cabinet to "veto" the recommendation. In the case of LGOIMA the local authority concerned also has a power of "veto", which it can exercise by resolution at a meeting.[293]

11.10 The Order in Council must be gazetted and must include the reasons why a decision was made to override the Ombudsman's recommendation, as well as evidence to support that decision. Importantly, the recommendation can only be overridden on one of the withholding grounds or reasons for refusal that was considered by the Ombudsman. No other reason may be relied on by the Cabinet to justify the withholding of the information.

11.11 Decisions by local authorities to veto ombudsmen's recommendations are the same: they must also be gazetted and give the reasons for the power being exercised. We are only aware of this veto being exercised in two cases.

11.12 Later in this chapter we return to this important topic, and propose the removal of both the Cabinet and local authority veto powers.

Justiciability of decisions

11.13 It is not possible to seek review of an agency's or Minister's decision in a court before, or at the same time, as complaining to an Ombudsman. However upon the Ombudsman making a recommendation it is possible to seek judicial review of the agency's or Minister's decision. Judicial review is the only option to challenge an agency decision to release material as a complaint to the Ombudsmen is not available. No review cases to date have directly involved a review of an agency's or Minister's decision.

11.14 It is also possible to seek review of an Ombudsman's recommendation. The privative clause in the Ombudsmen Act 1975 precluding the bringing of review of a recommendation under that Act does not apply under the OIA or the LGOIMA.[294] Such reviews have been brought on grounds that the decision or recommendation was unreasonable or that it erred in law.[295]

11.15 The ability to review a Cabinet or local authority veto is expressly recognised in the OIA and the LGOIMA.[296] An aggrieved requester has a statutory right to apply to the High Court to review the veto. An application for review can be made on the basis that the decision was beyond the powers of the Cabinet or the local authority, or was otherwise wrong in law. The costs of the bringing of such an application, including those for the solicitor of the complainant, must be paid by the Crown or local authority (unless the Court considers the review has not been reasonably or properly bought). Under both Acts a statutory right of appeal lies to the Court of Appeal.

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292 OIA, s 32(1)(a).

293 LGOIMA, s 32(1).

294 OIA, s 29(2); LGOIMA, s 28(2).

295 See for example *Television New Zealand v Ombudsman* [1992] 1 NZLR 106 and Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council [1991] 2 NZLR 180.

296 OIA, s 32B; LGOIMA, s 34.

Requests made under Part 3 or 4 of the OIA & the LGOIMA

11.16 The complaints process for access decisions about information governed by Part 3 of the OIA and the LGOIMA differs from the process just outlined. Complaints about decisions made under either of these Parts are carried out under the Ombudsmen Act. After completing an investigation the Ombudsman must report his or her opinion to the appropriate Minister or agency and make any recommendations that are necessary in the circumstances, but the agency or Minister does not come under a public duty to comply with the Ombudsman's findings. Failure to implement the recommendation may result in the Ombudsman making a report to the Prime Minister, but again no public duty to comply arises. Distinct from the Part 2 complaints process, if a requester is aggrieved by a decision disallowing access to internal documents or personal information, he or she may seek redress from both the Ombudsmen and the Courts; indeed Court action may be commenced without needing to complain to the Ombudsmen.

11.17 The rationale for separate complaints processes and a limited right of redress regarding access to information under these Parts is founded in the view of Danks Committee that it would not be appropriate for an Ombudsman to receive complaints about legal rights – it felt that the proper avenue to enforce such rights was in the courts.[297] Eagles, Taggart, and Liddell say it is "ironic" that a person entitled to information as of right is required to enforce a decision through costly recourse to the courts.[298] We return to this topic later in the chapter.

ISSUES

Accessibility of the complaints process

11.18 In order to understand the process an Ombudsman follows to investigate an official information complaint it is necessary to look across two pieces of legislation – the OIA or LGOIMA, and the Ombudsmen Act 1975 (OA). The current approach applies some of the provisions of the OA to the Ombudsman's official information processes. In a few areas however the OA and OIA or LGOIMA processes differ: provisions of the OA are inapplicable (such as the privative clause excluding review in section 25 of the OA) and provisions that relate only to official information complaints are added. The resulting composite is a complaints process that is unique to official information matters.

11.19 We believe that for reasons of clarity and accessibility the complaints process that applies under the OIA and LGOIMA should be clearly set out in each of them, particularly since we propose changes below that increase the differences between the official information and OA complaints processes.

Q69 Do you agree that both the OIA and LGOIMA should set out the full procedures followed by the Ombudsmen in reviewing complaints?

297 Committee on Official Information *Towards Open Government: Supplementary Report* (Government Printer, Wellington, 1981) at 86.

298 Ian Eagles, Michael Taggart & Grant Liddell *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992) at 588.

Grounds for complaint

11.20 Some responses to our survey suggest new grounds of complaint.

Urgent requests

11.21 Some responses suggest that a new ground of complaint should be added in relation to failure to deal promptly with urgent requests. We discuss processing urgent requests in chapter 10, where we suggest complaints could be dealt with under section 28(5) which provides that undue delay is treated as a deemed refusal to release the requested information and is a ground of complaint. In our opinion an unreasonable failure to deal promptly with an urgent request can properly be treated as "undue delay."

11.22 On this basis we are of the view that a new ground of complaint is not needed in relation to urgency requests. However, we would be interested to know whether submitters believe that any doubt on this matter should be put to rest by a statutory amendment.

> Q70 Do you think the Acts provide sufficiently at present for failure by agencies to respond appropriately to urgent requests?

Reverse freedom of information complaints

11.23 A possible additional ground of complaint relates to "reverse" freedom of information complaints. In chapter 10 we propose that agencies should give prior notice of release decisions to third parties where their interests are involved. As a related question we have considered whether the official information legislation should provide a complaint or review process in relation to decisions by agencies to *release* information when it should more properly have been withheld under one of the withholding grounds.[299]

11.24 The Danks Committee did not propose a complaints mechanism for improper release of official information. Part 5 of both statutes limit review by the Ombudsmen to decisions to *withhold* information and there is no express process in the official information legislation allowing people affected by a *release* decision to make a complaint. The legislation also protects the Crown and agencies against civil or criminal proceedings where requested official information is released in good faith.[300]

11.25 There may be circumstances, however, where people feel that agencies have not given adequate weight to the withholding grounds that protect private interests or wish to challenge the public interest balancing exercise that an agency has carried out (if it has been carried out at all). On occasion significant loss could result from the release of the information. The person or company affected may be left without any real remedy. Some who responded to our survey suggested this was a significant gap in the legislation.

299 The Law Commission considered this question in relation to the release of personal information under the OIA in *Review of the Privacy Act 1993* (NZLC IP 17, 2010) at paras 11.53–11.58.

300 OIA, s 48; LGOIMA, s 41.

11.26 The Privacy Act 1993 complaints process is not available in relation to release decisions under the official information legislation.[301] But there are some legal avenues for people who wish to complain about a release of official information including (i) an injunction application;[302] (ii) judicial review; or (iii) a complaint to the Ombudsmen about the release as "a matter of administration" under the Ombudsmen Act.[303]

11.27 An application for an injunction or judicial review must be made to the High Court and may involve significant expense for the applicant. An application for an injunction will only be an option where the affected person is aware of the decision to release beforehand, and where some recognised legal ground is available (for example breach of confidence). Moreover in proceedings against the Crown the courts are prevented from awarding an injunction, although they may make a declaratory order as to the rights of the parties.[304] While an injunction may be useful in appropriate circumstances, it is generally unlikely to be a practicable or available remedy.

11.28 The function of the Ombudsmen to investigate releases as matters of administration under the Ombudsmen Act is a more accessible remedy. However this option is not spelled out in the official information legislation, and there is little awareness of it. In addition, not all OIA and LGOIMA agencies are subject to the Ombudsmen Act,[305] and Ombudsmen have no power to investigate decisions to release made by the Police[306]; or Crown legal advisers.[307]

11.29 None of the current avenues of complaint provide a fully comprehensive review mechanism that is comparable with the Ombudsmen's express official information function to review withholding decisions. In Australia, the Freedom of Information Act (Cth) confers power on a person affected by a release of information to complain to the Ombudsmen or to the Administrative Appeals Tribunal.[308]

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301 See *Director of Human Rights Proceedings v Police* (14 August 2008) HC WN CIV-2007-409-002984.

302 See for example, *Veitch v New Zealand Police*, TV Works Limited, Fairfax NZ Ltd and APN NZ Ltd HC WN CIV-2009-485-960 (Mallon J).

303 Ombudsmen Act 1975, s 13. See "The Ombudsmen Act and the Disclosure of Information About Third Parties" 12(1) OQR March 2006.

304 Crown Proceedings Act 1950, s 17.

305 Compare OIA Schedule 1 and OA Schedule 1. The following organisations listed in the OIA Schedule are not covered by the OA: Abortion Supervisory Committee, Airport Companies that are more than 50% publicly owned, Armed Forces Canteen Council, Deer Industry NZ, Education Authorities as defined in the Education Act 1964, Fiordland Marine Guardians, Fisheries Authority, GCSB, NZ Council for Educational Research, NZ Government Property Corporation, NZ Kiwifruit Board, NZ Meat Producers Board, NZ Parole Board, NZ Racing Board, NZSIS, Parliamentary Commissioner for the Environment, Provincial Patriotic Councils, Public Advisory Committee on Disarmament and Arms Control, QEII National Trust, Radiation Protection Advisory Council, Remuneration Authority, Representation Commission, Reserve Bank, Sentencing Council, Survey Board, Temporary Safeguard Authorities under the TSA Act, Testing Laboratory Registration Council, Waitaki Catchment Water Allocation Board, Waitangi National Trust Board, Winston Churchill Memorial Trust Board.

Compare also LGOIMA Schedule 1 and OA Schedule 1. The following local authorities listed in the LGOIMA Schedule are not covered by the OA: administering bodies of reserves (as defined in the Reserves Act 1977); territorial authorities as defined in the Local Government Act 2002; the Hauraki Gulf Forum.

306 OA, s 13(7)(d).

307 OA, s 13(7)(c).

308 Freedom of Information Act 1982 (Cth), ss 57, 58.

11.30 In addition to depriving a person aggrieved by release of a remedy, the absence of a comprehensive complaints mechanism may be a lost opportunity to verify and improve the quality of agencies' release decisions. An express complaints process would provide opportunities to assess decision-making processes and to offer guidance and training, not only to the agency concerned but across the government sector. Additional complaints would mean additional precedents to help guide future agency decision-making. Improved decision-making would also help to ensure the integrity of the official information legislation, thereby contributing towards assuring citizen trust in government.

11.31 Yet there are good policy reasons for limiting the accountability of officials for releases of information. These include encouraging a culture of transparency, openness and the availability of information. If officials were subject to complaint for releasing information, they may be more inclined to withhold when any shadow of doubt existed, thus militating against the Act's policy of openness. It is important for the functioning of the official information legislation to enable timely release and to avoid inhibiting officials from releasing information because of the fear of their decisions being reviewed. We think that, on balance, these reasons are the more persuasive.

11.32 Nevertheless we think it is worth considering whether the current framework achieves the right balance between freedom of information objectives and the protection of the private interests that are recognised in the section 9 withholding grounds.

Possible options for reform

11.33 While our present position is to lean against a "reverse" right of complaint, for the reasons given above, if it were decided there should be a right of "reverse" complaint, there are two ways this could be done. Each would allow complaints to be made to the Ombudsmen against a decision to release information.

11.34 The first option would involve enhancement of the Ombudsmen's current review function in section 13 of the OA so that this function provides a more comprehensive review mechanism for people affected by release decisions. This would involve amendments in order to:

- ensure that the exceptions for Crown legal advisers and the Police in section 13(7) of the OA do not apply to decisions to release under the official information legislation;
- clarify that all OIA and LGOIMA agencies are subject to the OA review function in relation to releases under the official information legislation.

11.35 The second option would involve complaints about release being brought and investigated under the OIA, or the LGOIMA, by extending the Ombudsmen's review functions under the official information legislation to enable them to hear complaints about release as well as withholding information.

11.36 It is not proposed that an individual would necessarily obtain any monetary compensation under either option for a "reverse" complaints process. Relief may be of a declaratory nature only. As under the OA, the Ombudsmen might report findings to the complainant, make recommendations to the agency concerned and the chief executive, and report to the relevant Minister or Mayor. The Ombudsmen might also require the agency to make the Ombudsmen's report available to the public. However in some cases it might even be appropriate for the Ombudsmen to recommend an ex gratia payment.

Conclusion

11.37 This issue is finely balanced and we currently tend against extending the complaint process to cases where information has been released. We do not have evidence of a widespread problem but wish to hear the views of others. If it were decided to introduce such a new system, further decisions will need to be made on its detail.

11.38 We are clear that there should be a right of complaint on one aspect. In chapter 10 we propose that agencies should be required to notify third parties in cases where they have significant interests in the information requested under the OIA. We said this would provide third parties with a brief opportunity to submit views on release to the decision-making agency and to take steps to protect their interests.

11.39 If this proposal becomes law we also suggest that a ground of complaint should be added to allow for third parties who are not notified to bring to the attention of the Ombudsmen the fact that an agency has not complied with its notification obligations.

Q71 Do you agree with the existing situation where a person affected by the release of their information under the OIA or the LGOIMA cannot complain to the Ombudsman?

Q72 Do you agree there should be grounds to complain to the Ombudsmen if sufficient notice of release is not given to third parties when their interests are at stake?

Transfers

11.40 It is possible under the OIA and the LGOIMA to transfer a request to another agency or Minister or local authority if that person or body is better suited to responding to the request. The relevant OIA ground reads:[309]

> Where—
>
> (a) a [valid] request… is made to a department or Minister of the Crown or organisation; and
>
> (b) the information to which the request relates—
>
> (i) is not held by the department or Minister of the Crown or organisation but is believed by the person dealing with the request to be held by another department or Minister of the Crown or organisation, or by a local authority; or
>
> (ii) is believed by the person dealing with the request to be more closely connected with the functions of another department or Minister of the Crown or organisation, or of a local authority,—
>
> the department or Minister of the Crown or organisation to which the request is made shall promptly, and in any case not later than 10 working days after the day on which the request is received, transfer the request to the other department or Minister of the Crown or organisation, or to that local authority, and inform the person making the request accordingly.

11.41 An agency or Minister that wishes to transfer a request must do so promptly and in no case in more than ten days. The circumstances in which transfer must be made are prescribed by the section: transfers are not at the discretion of the agency. If a requester is dissatisfied that a request has been transferred, or that a request has been transferred out of time, he or she is left without any ability to complain to the Ombudsmen under section 28 of the OIA or section 27 of the LGOIMA. Possibly he or she may be able to complain to an Ombudsman under their original jurisdiction, provided that the agency in question is subject to the OA Act.[310]

11.42 In 1997 the Law Commission recommended a new ground of complaint in relation to the fact of a transfer or its timeliness. We remain of that view. Such complaints will provide a valuable means of ensuring Ombudsmen keep abreast of agencies' and Ministers' transfer practices to ensure that they are complying with the rules.

Q73 Do you agree that a transfer complaint ground should be added to the OIA and the LGOIMA?

309 OIA, s 14; LGOIMA, s 12.

310 Office of the Ombudsmen *Report of the Ombudsmen for the year ending 30 June 2004* (Wellington, June 2004) at 28.

The Ombudsman's investigation processes

11.43 We believe that the flexible and inquisitorial nature of the processes followed by the Ombudsmen are effective for resolving official information disputes. We have not become aware of any significant problems with the statutory processes an Ombudsman must follow in investigating a complaint (apart from the length of time the processes take in some cases) but are interested whether there is any contrary view.

> Q74 Do you think there should be any changes to the processes the Ombudsmen's follows in investigating complaints?

The Ombudsman's recommendation and the Cabinet veto

The Ombudsman's power of recommendation

11.44 There is some uncertainty over the precise nature of an Ombudsman's recommendation that information should be released. It is a "recommendation", yet there is a "public duty" to observe it – unless the veto is exercised. This may seem a contradiction in terms.

11.45 This ambiguity is perhaps partly explicable by the fact that before the veto power was circumscribed in 1987 in relation to the OIA, a recommendation could be overruled by an individual Minister. In this sense, it could hardly be said that the recommendation was "binding" on the Minister, or agency, concerned. The veto power can now only be exercised by an Order in Council in relation to the OIA, and the 'recommendation' has become more akin to a truly binding duty. In relation to local authorities, however, there has been no such change: a local authority can itself, by resolution, "veto" an Ombudsmen's recommendation.

11.46 Passages in the Danks Committee report reflect this ambiguity. In its first report the Danks Committee wrote of the recommendation:[311]

> As at present the Ombudsmen would not have a final power of decision; they would investigate, and, if appropriate, recommend a different decision or practice.

11.47 In responding to criticism about the Ministerial veto fettering the Ombudsmen's power of review the Danks Committee wrote:[312]

> We draw attention to the fact that under our proposals the finding of an Ombudsman will have a somewhat higher status than in the Ombudsmen Act itself, where his conclusions are merely recommendatory. In terms of our draft bill his recommendations would be binding unless overridden by a Minister in accordance with our procedure.

11.48 This lack of clarity should be resolved. We believe that the language of the Act should be amended to replace the concept of a 'recommendation' with that of 'a decision' or 'determination'. That terminology would be more clearly in line with the "public duty" which the Act clearly imposes.

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311 Committee on Official Information *Towards Open Government: General Report* (Government Printer, Wellington, 1981) at para 102.

312 Committee on Official Information, above n 297, at 10.

11.49 We propose that the Ombudsmen be given an explicit power to make a binding determination in official information complaints, coupled with a further proposal that the power of veto should be removed.

The history of the veto

> We recognise that the question where the final power should lie to release or withhold official information is likely to be one of the principal areas of contention in relation to any legislation that is introduced subsequent to our report.[313]

11.50 The Danks Committee recognised that the place of the final decision in the official information scheme would be a complex issue. Its opinion was that the final power of decision about release of official information should rest with the Executive branch of Government, both to protect the role of the Ombudsmen and as a matter of constitutional principle.

11.51 The Committee recognised that there was some attraction in the notion that the Executive should not be the final judge of its own cause in deciding to withhold or release information. But it nevertheless believed that such a notion did not properly acknowledge the structures of our constitution and the role of ministerial responsibility to the public and to Parliament in this system. It also believed the notion was based on a misunderstanding of the nature of the Ombudsmen's Office and the proper role of the Executive in our government system and was concerned that giving the Ombudsmen final power of decision would mean they would become the final arbiter over matters of considerable political importance. This role would radically alter the Ombudsmen's jurisdiction, and might even detract from their status as an independent Officer of Parliament.

11.52 The Danks Committee was clear that, subject to the rule of law and its accountability to Parliament, the Executive should have the ability to make decisions about matters of administration or of policy and take responsibility for those decisions. It said:[314]

> To enable an Ombudsman to override the considered judgement of a Minister or of Cabinet would confer on him a far-reaching executive power and essentially alter the character of his office.

The Committee stressed that members of the Executive are accountable to Parliament in a way that no one else can be. Each member is a member of Parliament and must maintain the trust of the house and the voting public. The Committee pointed out that judges and Ombudsmen are not elected and are therefore unaccountable to the people. It emphasised the ultimate sanction for a member of the Executive is that his or her party can be outvoted at the next election and because of this Ministers will be hesitant to act in an inappropriate manner that alienates the public.

313 Ibid at para 2.03.

314 Committee on Official Information, above n 309, at para 311.

11.53 The Danks Committee also believed that the courts in New Zealand should not have the final say over access to official information. It felt that the matters involved in deciding whether to release or withhold are matters of policy in which the courts have little experience and with which they have generally been unwilling to engage.

11.54 During the select committee process that reviewed the Official Information Bill the issue of a final power of decision was discussed at length. It was said at the time to be the "most difficult" issue the committee dealt with.[315] Most submissions to the select committee were reported as being critical of the veto. Scepticism about the veto was voiced by the Opposition during the Bill's passage through the House but it was passed nevertheless. The then Chief Ombudsman opposed a final power of decision on the grounds that such a power would affect the integrity of the Ombudsmen's Office. That view carried weight with the Parliament.

11.55 So, the OIA as originally enacted gave power for an individual minister to veto a recommendation by an ombudsman. That could be done for any reason available under the Act, not just the withholding ground originally relied on. Between 1983 and 1987 the veto was used 14 times.

11.56 As noted, the veto power came under question again in 1987 when significant changes were proposed to the OIA. It was the policy of the Labour party after it came into power to review the OIA with a view to eliminating the veto completely. However, the Bill introduced into the House amended the power of veto, rather than repealing it. Reports of debates in the House at the time of introduction suggest that the changes made to the veto in 1987 were the result of a compromise between the Minister of Justice and the Chief Ombudsman. The Minister wanted to remove the veto but the Ombudsman remained opposed to a power of final decision. It was thought that the alternative of creating a new information commissioner's office was an unattractive one.[316] The resulting amendment removed the power of veto from the individual Minister and provided that it could only be exercised by the Governor-General by Order-in-Council – effectively a Cabinet decision.

The local authority veto

11.57 The Bill that became the LGOIMA was based on a report by the working group on official information in local government.[317] That group recommended that the Minister of Local Government have a power of veto over recommendations of the Ombudsmen addressed to a local authority. The head of the relevant local authority would be able to make representations to the Minister of Local Government who would be able to veto an Ombudsman's recommendation. As enacted however the veto included in the Bill was one exercisable by the local authority itself, not the Minister. This change was based on the views of the Chief Ombudsman at the time who believed that the local authority should have

315 (14 December 1982) 449 NZPD 5589, G Palmer.

316 (12 June 1986) 471 NZPD 2173, G Palmer.

317 *Report of the Working Group on Official Information in Local Government* (report to the Minister of Local Government and the Minister of Justice, 1986).

the final power of determination over official information, on the basis that the Ombudsmen's function is to make recommendations not decisions, and because local government must be accountable to its electors and not central government.

The effect of the veto power – in central Government

11.58 It is difficult to ascertain the precise effect the existence of the veto has on the official information regime given that it has not been used since 1987. On the one hand it may be considered to have a subtle influence on the balance of power between Parliament (represented by the Ombudsmen) and the Executive, underlying every recommendation of an Ombudsman and regarded by Ministers and officials as they consider the consequences of a release. Even as a latent power it may continue to serve an essential function in balancing the powers of the Executive and the Ombudsmen and promoting a sense of comity between those parts of government. Its very presence may sometimes lead to more moderate positions being taken. Its existence, even if it is not used, may be a useful counterbalance and check on the otherwise unconstrained power of the Ombudsmen. The effect of its removal is not entirely predictable.

11.59 On the other hand it may be that long-standing practice, and the potential consequences of using the veto, have rendered it effectively redundant, to the point where it may be considered more transparent in a healthy and mature system to give the Ombudsman a final power of decision without the uncertainty the veto brings into the system. The issue is whether removal of the veto would upset the equilibrium of the official information decision-making system.

11.60 In her research Nicola White considers that the existence of the central government veto is a pragmatic compromise as the alternatives without a veto are less than ideal.[318] She makes the point however that the balance of power now rests with the Ombudsmen, rather than the Executive, presumably as a consequence of the non-use in practice of the veto power. White voices some concern that practically there is currently nowhere to go if there is disagreement with the views of an Ombudsman, as the courts are not a viable option (due to cost and delay and the potential litigious environment that could result). She is also unsure about a direct right of appeal from a recommendation of an Ombudsman as this could slow the process down and introduce an unwanted level of formality.

11.61 Similarly, she is cautious about the creation of a new information authority in New Zealand and points out that this would likely result in more recourse to the courts, something that no one sees as desirable. She also notes that a separate information authority would lose all the benefits that the Ombudsmen currently bring to the role. White considers a change back to an individual ministerial veto to be a retrograde step. In concluding, White acknowledges failings in the current processes but nevertheless suggests the veto power has an important reserve power role to play – in that its existence alone influences all discussions between Ministers, Ombudsmen and officials.

318 Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007) at 291.

11.62 The Law Commission questions how significant an effect the veto has on the balance of power. We wonder whether discussions between Ombudsmen and agencies would ever lead to the Cabinet taking the unprecedented step of vetoing an Ombudsman's recommendation. Given that it has never been used and its use appears to be so fraught with difficulty, it could be said that the Ombudsman is already accepted as the final decision-maker on complaints. If the veto is a threat, it seems little more than an empty one.

The effect of the veto power – in local Government

11.63 The veto at local government level has potentially more teeth. The local authority itself can exercise it. As in the case of central government it may be that the very existence of the power plays an unspoken role in moderating decisions. Yet even in this context it appears to be little more than an empty threat. It has only been exercised twice that we are aware of, by different councils. Partly, no doubt, this is the result of the unwelcome publicity the action would engender: the veto is a public process. We also suspect that the possibility of judicial review, and the imposition of costs that would involve, is a deterrent. Partly also, no doubt, the non-use of the veto is recognition of the authority the Ombudsmen have acquired.

Our proposal to remove the power of veto

11.64 Scepticism about the veto has existed as long as the official information legislation itself. To inject a further level of certainty and to strengthen the official information regime, consistent with our proposal to give the Ombudsmen a final decision-making power, our present view is that the veto power of the Cabinet under the OIA and that of the local authorities under the LGOIMA should be removed. We are unaware of a similar power anywhere else in our statute books.

11.65 Like White and others, the Law Commission is not in favour of proposing a system involving a greater level of involvement in official information matters by the courts. Experience abroad in jurisdictions with a greater level of oversight by the courts shows that this has resulted in a more litigious environment that has been to the detriment of both the Government and requesters alike. Such an approach does little to enhance trust in government and is not supportive of the mutual trust and goodwill that the Danks Committee thought necessary for the official information system to work.

11.66 Officers of Parliament have a special role in New Zealand's constitutional structures. Ombudsmen are not appointed by the Executive but by the Governor-General on the recommendation of the House of Representatives. A consultative process precedes these recommendations and each party in the House has input into the process. The Ombudsmen are in a sense an extension of Parliament in relation to the matters over which they are given jurisdiction. Their primary responsibility is to provide a check on the arbitrary use of power by the Executive. The reason the official information jurisdiction was originally given to the Ombudsmen was because of their regular engagement with matters of government and the Executive's and officials' familiarity with their Office. Removing the veto would be a significant step but we believe there is sufficient confidence in the Ombudsmen to merit it.

11.67 We consider adequate safeguards exist in the OIA currently for the Executive to protect sensitive information traditionally connected with the Government and to retain final say over the release of that information. Section 31 of the OIA allows the Prime Minister to certify that information relating to national defence or security or international relations should not be subject to an Ombudsman's release recommendation. The Attorney-General can similarly certify that if release would be likely to prejudice the prevention, investigation, or detection of offences the information should not be recommended for release by the Ombudsman. The Attorney General can make that certification under both the OIA and the LGOIMA.[319]

11.68 We prefer the view that the power of veto should be abolished, and that the Ombudsmen should make final decisions. As noted in chapter 3 those decisions, written up in the form of casenotes, and published on the Ombudsmen's website, will serve as precedents.

11.69 However, we acknowledge that the issue of the veto is not a simple one and the considerations of the balance of power we have outlined may persuade others to a different view. We seek submissions. We would also note that if it is eventually decided to bring the parliamentary departments under the OIA there will arise a difficult question about who should exercise any right of veto in their case, should the veto be retained. Order-in-Council on the initiative of Ministers would not be appropriate.

Q75 Do you agree that the Ombudsmen should be given a final power of decision when determining an official information request?

Q76 Do you agree that the veto power exercisable by Order in Council through the Cabinet in the OIA should be removed?

Q77 Do you agree that the veto power exercisable by a local authority in the LGOIMA should be removed?

Q78 If you believe the veto power should be retained for the OIA and LGOIMA, do you have any comment or suggestions about its operation?

A statutory right of review

11.70 Consistent with the status quo, and our view that the Ombudsmen should have a final power of decision, we do not propose to add an ability to appeal an Ombudsman's decision to the High Court. Instead their decisions would be subject to judicial review. This will ensure that Ministers and agencies concerned with an Ombudsman's decisions can apply to an independent body which will assess the legality of the decision. We do not propose a court-based merits review of the decision for the same reasons the Danks Committee was against courts getting centrally involved in official information matters.

319 OIA, s 31: LGOIMA, s 31.

11.71 However, as the legislation currently contains no express basis for bringing judicial review of an Ombudsman's decision, we propose that a new ground, similar to section 32B of the OIA, be included in each Act. This would clarify that a complainant or agency or Minister aggrieved by a decision of an Ombudsman can seek judicial review of that decision on the basis that it was beyond the powers of the Ombudsman or otherwise wrong in law.

> Q79 Do you agree that judicial review is an appropriate safeguard in relation to the Ombudsmen's recommendations and there is no need to introduce a statutory right of appeal to the Court?

Enforcing the public duty to comply

11.72 Both the OIA and the LGOIMA are silent as to how the "public duty" in those Acts is to be enforced if an agency or Minister fails to follow the Ombudsman's recommendation. In its previous review of the OIA the Law Commission recommended the following:[320]

> We consider the Solicitor-General should enforce the public duty to comply with an Ombudsman's recommendation on his or her own initiative, in accordance with constitutional practice. We recognise, however, that this will usually require the Ombudsman to draw a breach of the public duty to the attention of the Solicitor General.

11.73 We remain of this view. Under our proposal the Ombudsmen will make a decision. A failure to follow the decision within the time specified in the legislation will amount to a breach of a public duty to follow the decision.

11.74 As we made clear in the 1997 report, the rule of law requires that nobody is above the law. A failure to follow a public duty by an agency or Minister is inconsistent with the rule of law. The public duty having been established, it should be enforced by the Solicitor-General.

> Q80 Do you agree that the public duty to comply with an Ombudsman's decision should be enforceable by the Solicitor-General?

Complaints regarding information under Parts 3 and 4

11.75 As explained earlier in the chapter, the complaints process for those dissatisfied with the outcome of a request for information under Parts 3 and 4 of each Act differs from the general complaints process. Complaints regarding this sort of information are dealt with as if they were recommendations about administration under the Ombudsmen Act 1975. They can only be enforced by action through the Courts. The rationale for this regime was based on the "legal right" of access a person has in relation to that sort of information.

320 Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997) at 127.

11.76 While we appreciate the historical reasons for the distinction we wonder whether the two complaints processes should now be aligned under the official information legislation. We think it would be desirable to deal with all information complaints in a consistent manner. This would mean that a person whose access to Part 3 or 4 information has been denied would have the same access to an inexpensive complaints service via the Ombudsmen. We do not think it fair that such requesters have to go to Court to enforce their right, with costs and delay. Since requests for personal information by individuals were transferred to the Privacy Act 1993, complainants have had an accessible cost-effective method of complaint through the Privacy Commissioner's process.[321] It seems inconsistent that bodies corporate do not have similar accessible rights of redress under the official information legislation.

Q81 Do you agree that the complaints process for Part 3 and 4 official information should be aligned with the complaints process under Part 2?

Sanctions for non-compliance

11.77 If an agency or Minister breaches its obligations under the OIA or LGOIMA there is no effective sanction other than the Ombudsmen's recommendation to release. There has been some suggestion that sanctions are necessary in the official information regime to deter agencies from flagrantly breaching their obligations under these Acts.

11.78 In our survey, we questioned agencies and requesters about their views on sanctions. There was little appetite for them from agencies, but more interest shown by requesters and members of the media. Both agencies and requesters believe the majority of breaches are inadvertent, and arise from misunderstandings of the legislation or genuine mistakes, rather than from intentional acts with the purpose of circumventing the requirements of the legislation. We agree that the great majority of breaches of the OIA and the LGOIMA are the likely results of overworked officials misapplying the legislation or being unable to meet deadlines because of work load issues. The fact that a decision of an agency or a Minister was overturned by an Ombudsman is certainly not necessarily indicative of impropriety. The OIA and the LGOIMA require case-by-case weighing up of a range of competing interests, and it is to be expected that decisions will from time to time fall on the wrong side of the line. This is supported by research carried out by both White and Price.

321 There is also still a right for individuals to go directly to the courts in personal privacy access cases involving public agencies.

11.79 But not all conduct is blameless. There are some cases in which an agency's or Minister's approach to dealing with a request can only lead to the inference that "game playing" is involved. Steven Price says:[322]

> Still, there are plainly occasions in which agencies or Ministers deliberately flout the law to avoid releasing embarrassing information. They stonewall, even after complaints are made to the Ombudsmen. They adopt ridiculously wide interpretations of the withholding provisions. They don't conduct a good-faith balance of the public interest that may be served by releasing information. They impose obstructive charges to deter requests. Should there be punishment for this?

11.80 We think fines or other penal sanctions are inappropriate in a regime of this kind. We note that in the UK the Information Commissioner's Office has recently decided to "take action against those that abuse the system."[323] The range of possible sanctions in the UK includes enforcement notices, undertakings and reports to Parliament. We are currently not inclined to go this far in New Zealand, but would favour a solution to the effect that in cases where an agency flagrantly flouts its responsibilities under the OIA and the LGOIMA, the Ombudsmen should have an express statutory power to report publicly on the conduct of that agency. We are interested, however, in hearing views on whether anything more is needed.

Q82 Do you agree that, rather than financial or penal sanctions, the Ombudsmen should have express statutory power to publicly draw attention to the conduct of an agency?

Q83 Should there be any further enforcement powers, such as exist in the United Kingdom?

322 Steven Price "Should agencies be punished for breaching the OIA?" www.medialawjournal.co.nz.

323 Information Commissioner's Office (UK) "ICO takes tougher approach to FOI enforcement" (press release, 21 July 2010).

Chapter 12
Proactive disclosure

DISCLOSURE

12.1 In this chapter we discuss the important and topical subject of proactive disclosure. We distinguish two different questions. The first is whether there should be categories of information which agencies must make available *on request*. The second is how one encourages truly proactive disclosure, that is to say agency publication of information without the need for it to be requested, and whether agencies should be *required* to publish certain categories of information in this way.

Disclosure on request

12.2 As far as the first question is concerned, we have indicated in an earlier chapter that we do not presently favour a move to prescribing by regulation categories of information that should automatically be released on request. The present system in New Zealand is fact-dependent, and avoids rigid categorisation. Even if regulations were made to require the release of certain categories of information this would still not remove the need to review documents to determine whether they should be published in full, or whether any sensitive private or confidential information should be removed from them. It would be difficult to lay down a rigid rule that every word of every named category of information had to be released.

12.3 This being so, the present policy of the OIA and LGOIMA that all information must be released unless there is good reason for withholding it seems to us to do the job that is required, when coupled with guidance from the Ombudsmen and the system of precedent that we propose. The case-by-case approach is well engrained in our system. Properly applied it means that information that *ought* to be released *is in fact* released, so further prescription seems unnecessary. As we have noted elsewhere, the Ombudsmen have already defined several categories of information that should usually be released as a matter of course; but even there they acknowledge that there may be an exceptional case where other factors militate against release.

Proactive disclosure

12.4 The second question is whether the Act should require proactive disclosure of some documents, that is to say, publication to the world (usually via the internet) without the need for any request. The Commission has no doubt that proactive disclosure is a highly desirable development and much to be encouraged. The question is how far it should be *mandated* in legislation. This is the question with which we deal in the remainder of this chapter.

12.5 A trend in freedom of information and open government internationally is the move away from a model based on making official information available on request to one based, as much as possible, on public sector agencies making information available proactively. This is often described as a move from a "pull" to a "push" model of information availability: agencies "push" information out, rather than waiting for it to be "pulled" out by members of the public.

12.6 While in many ways this is a natural evolution of the principle of freedom of information, it is also a product of developments in technology, and particularly the internet. The internet makes it much easier to make public sector information available to a wide audience, and members of the public increasingly expect to find a wide range of information on government websites. The digitisation of information raises new information-management challenges for agencies, but also creates new opportunities for public sector information to be used in innovative ways by people outside government. Just as Web 2.0 is based on internet users generating their own content for websites and engaging in online dialogue with others, so "FOI 2.0"[324] allows the public to re-use government data in ways that fit with their own needs, interests and skills. For example, a dataset from a government agency can be combined with data from another source in a "mashup" that shows the relationships between the two sets of data.[325]

12.7 In this chapter we note the current position in New Zealand, including the increasing trend towards proactive publication, and compare this with the position in other jurisdictions. We then ask whether, and to what extent, the law requires reform in New Zealand.

324 Rick Snell "Realising the Potential of FOI: Making the Transition from FOI Version 1.0 to Version 2.0" (work in progress, University of Tasmania, November 2008) < ricksnell.com.au > .

325 See the discussion of the ways in which third parties can process and re-present government data in David Robinson, Harlan Yu, William P Zeller and Edward W Felten "Government Data and the Invisible Hand" (2009) 11 Yale JL & Tech 160, at 168–170.

Legislative provisions

12.8 There are already limited provisions for proactive disclosure in the OIA and LGOIMA. Section 20 of the OIA provides that the Ministry of Justice shall regularly publish a publication setting out, in respect of each department and organisation covered by the Act, a description of:[326]

- its structure, functions and responsibilities;
- the categories of documents in holds; and
- all manuals and similar documents which contain policies, principles, rules or guidelines in accordance with which decisions or recommendations are made about any person or body of persons.

Agencies must include information to assist requesters in making official information requests to them.[327] Any person has a right of access to the publication described in section 20,[328] the *Directory of Official Information*, which is available on the Ministry of Justice website.[329]

12.9 The OIA also provides that every person has a right of access on request, to any document held by a department, Minister or organisation, and which contains policies, principles, rules or guidelines for the making of decisions or recommendations in respect of any person or body of persons;[330] and to be given access to categories of official information specified in regulations.[331] While these provisions require a request to be made rather than requiring proactive publication, and may be subject to some withholding grounds or other restrictions, they create a stronger right of access than the access provisions in Part 2 of the Act.

12.10 The LGOIMA used to provide for publication by local authorities of certain matters relating to their structure, functions, and so on.[332] These provisions were repealed by the Local Government Act 2002 and effectively replaced by section 40 of that Act, which requires local authorities to prepare and make available local governance statements. In addition, local authorities must include specified information in their annual reports, including information about the remuneration of councillors and chief executives, and severance payments. Part 7 of LGOIMA (the part that deals with local authority meetings) requires local authorities to make available, free of charge, agendas and associated reports circulated to local authority members for meetings, and minutes of local authority meetings.[333] Although not required to do so by statute, local authorities now routinely make their agendas, associated reports and minutes available on their websites.

326 OIA, s 20(1)(a)–(c).

327 OIA, s 20(1)(d).

328 OIA, s 21(1).

329 Ministry of Justice *Directory of Official Information* (December 2009).

330 OIA, s 22(1).

331 OIA, s 21(2). No such regulations have been made.

332 LGOIMA, ss 19–20, repealed from 1 July 2003 by Local Government Act 2002, s 266.

333 LGOIMA, ss 46A, 51.

12.11 Various other statutes and regulations require public sector organisations to publish specified types of information. There are obligations to report publicly under the Public Finance Act 1989, the Crown Entities Act 2004, the State-Owned Enterprises Act 1986 (and the State-Owned Enterprises Continuous Disclosure Rules), the Crown Research Institutes Act 1992 and the Local Government Act 2002, among other pieces of legislation. Some of these Acts contain detailed requirements as to the types of information that must be published in annual reports: for instance the Crown Entities Act requires information about remuneration and severance payments, and details of insurance cover.

Policy frameworks

12.12 In addition to legislative requirements, there are government policy frameworks in place or in development that promote the proactive disclosure of public sector information. At present these frameworks are focused on central, rather than local government.

12.13 The *Policy Framework for Government-held Information*,[334] released in 1997, is a high-level framework for handling information held by the government. Among other things, it states that government departments should make information available "easily, widely and equitably", and should make certain information increasingly available in electronic form. Such information includes all material already in the public domain; all policies that could be released publicly; all information created or collected on a statutory basis (subject to commercial sensitivity and privacy considerations); all documents that the public may be required to complete; and corporate documents in which the public would be interested. This framework is currently under review.

12.14 *The Digital Strategy 2.0*, which came out in 2008, is a national strategy for New Zealand's digital development, and spells out the government's role in that development. The Strategy states that "The government is committed to making public information available to everyone. Information should be available in the way you want it, when you want it."[335]

12.15 Significant policy and technical work is going on within the e-government programme, guided by the e-government strategy.[336] In particular, the e-government programme has an Open Government Information and Data Re-use project which is developing an approach to opening up government information and encouraging its re-use, while ensuring that the privacy of personal information is protected.[337] This programme is supported by a cross-agency working group and a steering group of chief executives.

334 < http://www.e.govt.nz/policy/information-data/framework.html > .

335 Ministry of Economic Development *The Digital Strategy 2.0* (2008) at 11; see also at 45–46. The Digital Strategy website is at < www.digitalstrategy.govt.nz > .

336 State Services Commission *Enabling Transformation: A Strategy for E-government 2006* (2006) especially at 24. The e-government programme is within the State Services Commission, but from 1 July 2009 the function of delivering government ICT services was transferred to the Government Technology Services Unit of the Department of Internal Affairs. SSC and DIA are collaborating on key initiatives such as the New Zealand Government Open Access and Licensing framework.

337 < http://www.e.govt.nz/policy/information-data > .

12.16 A key initiative is the development of a New Zealand Government Open Access and Licensing framework (NZGOAL). NZGOAL was released in August 2010. Although it is not mandatory, NZGOAL establishes a preferred framework for the public release of copyright and non-copyright information held by state services agencies. It advocates open licensing of copyright material under Creative Commons licences and the use of "no known rights" statements for non-copyright material, in order to make such material available for re-use.[338] The purpose is to realise the potential for individuals and organisations from the wealth of information locked away in state agencies, including copyright works such as geospatial details, commissioned research reports and non-copyright material. NZGOAL does not apply to personal information. Its open licensing and open access principles do not apply where the making available of information would conflict with good reasons for withholding under the OIA or LGOIMA. But the thrust is clear: increasing open access to government information. This introductory statement of principle is in strong terms:[339]

> State Services agencies are strongly encouraged to apply the following principles in relation to:
>
> (a) licensing their copyright works for re-use; and
>
> (b) enabling public access to and re-use of their non-copyright material.

12.17 By providing a consistent approach to dealing with copyright issues, NZGOAL should play an important role in overcoming existing legal barriers to the re-use of public sector information. It is important to note that copyright issues arise regardless of whether information is made available proactively or is released in response to a request under official information legislation. Release of information under the OIA or the LGOIMA does not affect copyright and therefore does not constitute a licence to republish or re-use that information.[340]

The trend towards increased proactive release

12.18 In practice, public sector information is increasingly made available proactively in New Zealand. A wide range of reports, policies, strategies and other documents are available on the websites of central and local government agencies. The websites of most large departments, such as the Ministry of Justice, the Treasury and the Ministry of Economic Development, contain a large number of policy and operational documents. One respondent said:

> · Agencies already have strong incentives to publish certain types of information on the internet. A reason for this is that the internet has opened up many opportunities to communicate more effectively with stakeholders. Agencies publish documents on the internet that the public is interested in; it is a way of reducing the number of requests received.

338 For more on Creative Commons licences see < www.creativecommons.org.nz > .

339 State Services Commission *New Zealand Government Open Access and Licensing Framework* (NZGOAL) (Wellington, 2010) at 8.

340 Geoff McLay *Strategy and Intellectual Property: Scoping the Legal Issues: Research Report Commissioned to Inform the Development of the New Zealand Digital Content Strategy* (National Library of New Zealand, Wellington, 2007) at 49–50. McLay draws attention to Official Information Act 1982, s 48(2) (and the equivalent provision in the LGOIMA), which provides that the making available of official information in response to a request under the Act "shall not be taken, for the purposes of the law relating to … infringement of copyright, to constitute an authorisation or approval of the publication of the document or of its contents by the person to whom the information is made available or the access is given." Sections 26 and 27 of the Copyright Act 1994 deal with Crown copyright.

- These reasons may explain why it has become standard practice for departments to, for example, place discussion document submissions on their websites and usually seek Cabinet approval to place Cabinet papers on their websites. As the Commission notes, agencies are fast realising the enormous advantages of the internet.

12.19 It has become more common for Cabinet papers to be published on departmental websites when a government policy announcement is made. Other examples of agencies releasing information proactively include:

- The National Institute of Water & Atmospheric Research makes access to the National Climate Database, and some other databases, available through its website.[341]
- The New Zealand Transport Agency releases real-time traffic data without cost to others so that they can create useful applications using that data.[342]
- All recent reports by the Education Review Office on individual schools and early childhood services can be found on the Office's website.[343]
- Horizons Regional Council has launched a Water Quality Matters website that provides access to data on water quality in its region, and is also leading a project to develop a national database of water quality data from all regional councils and unitary authorities, to be presented on one website.[344]

12.20 In addition, there are a number of websites that act as directories of or portals to public sector information produced across a range of agencies. For example, Statisphere is a website that helps people to find New Zealand official statistics;[345] open-access research documents produced in New Zealand universities, polytechnics and other research institutions can be accessed via the Kiwi Research Information Service;[346] the website www.data.govt.nz launched in November 2009 is a directory of New Zealand government datasets which invites people to suggest unreleased government datasets that they would like to be made more available.

12.21 While there is already a significant amount of public sector information being made available proactively, there have been calls in recent years for more such information to be routinely released and made available for re-use. Deputy Prime Minister and Minister of Finance Bill English has said that:[347]

> Government holds a wealth of information. Some of it – quite rightly – is sensitive and access should be strictly controlled – tax records for example. But in other areas, I see no reason why we can't turn government inside out, so to speak, and make the same data and information available to those outside of government. Government can tap wider resources in the community to analyse and use government data to help solve problems and produce insights.

341 < www.niwa.co.nz/our-services/databases > .

342 < https://infoconnect.highwayinfo.govt.nz/opencms/opencms/infoconnect > . For examples of projects developed using this information see ACIL Tasman *Spatial Information in the New Zealand Economy: Realising Productivity Gains* (report prepared for Land Information New Zealand, Department of Conservation and Ministry of Economic Development, 2009) at 32.

343 < www.ero.govt.nz > .

344 Parliamentary Commissioner for the Environment *How Clean is New Zealand? Measuring and Reporting on the Health of Our Environment* (2010) at 29; Horizons Regional Council "Water Quality Matters" < www.horizons.govt.nz > .

345 < www.statisphere.govt.nz > .

346 < http://nzresearch.org.nz > .

347 Bill English "Public Policy Challenges Facing New Zealand" (speech to the Institute of Public Administration New Zealand, Wellington, 23 September 2009).

12.22 Representatives of the mainstream media, and bloggers of both the left and the right, have called for more information to be routinely and proactively released by government.[348] A report on the contribution of spatial information to the New Zealand economy called for the government to routinely make government-held spatial data available through the internet for re-use.[349] The Parliamentary Commissioner for the Environment has called for central and local governments to make unsummarised, unaggregated environmental data publicly accessible via the internet.[350] The Office of the Ombudsmen's Statement of Intent for 2010–2013 has identified the promotion of proactive release of official information as a strategic priority.[351]

OTHER JURISDICTIONS

12.23 There is a great deal of activity overseas in the area of proactive release of public sector information, and there is much that New Zealand can learn from developments in other countries. However, it is worth pointing out that, in some respects, the starting point in a number of these jurisdictions has been a freedom of information (FOI) regime that is less liberal than New Zealand's. In particular, some overseas jurisdictions exclude information from the coverage of FOI legislation on a category basis (for example, Cabinet documents are not available under FOI legislation in some jurisdictions); and the FOI process is more bureaucratic in a number of jurisdictions in requiring people to apply in writing and pay a processing fee. While New Zealand's official information legislation compares favourably with legislation overseas, we must nevertheless be aware of the risk that New Zealand might fall behind as other countries modernise their FOI laws and policies.

International

12.24 Various international agencies, including the United Nations Educational, Scientific and Cultural Organisation (UNESCO),[352] have promoted increased availability of public sector information. In May 2010 participants in the UNESCO World Press Freedom Conference issued the "Brisbane Declaration" which strongly endorsed freedom of information and urged Member States to enact legislation laying down, inter alia, "proactive obligations to disclose information." Another key document is a 2008 Recommendation of the Council of the Organisations for Economic Cooperation and Development (OECD), of which New Zealand is a member. This calls on member countries to make it easier to access and re-use public sector information, particularly by making it more accessible in electronic form and via the internet.[353] The European Union also

348 Responses to Law Commission official information review survey from *Dominion Post*, Media Freedom Committee of the Commonwealth Press Union (New Zealand section), *Herald on Sunday*, Fairfax; "An OIA Proposal" (16 March 2010) < www.kiwiblog.co.nz > ; "A Good Idea" (16 March 2010) and "Some Better Ideas" (17 March 2010) < http://norightturn.blogspot.com > .

349 ACIL Tasman *Spatial Information in the New Zealand Economy: Realising Productivity Gains* (report prepared for Land Information New Zealand, Department of Conservation and Ministry of Economic Development, 2009) at 109–112.

350 Parliamentary Commissioner for the Environment, above n 342, at 22, 28–29, 39–40.

351 Office of the Ombudsmen *Statement of Intent for the Period 1 July 2010 to 30 June 2013* (2010), at 11, 13, 18.

352 See, for example, Paul F Uhlir *Policy Guidelines for the Development and Promotion of Public Sector Information* (UNESCO, Paris, 2004).

353 *OECD Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information* (2008) at 36.

adopted a Directive on the re-use of public sector information in 2003,[354] and the requirements of this Directive have been incorporated into law in the EU's member states. The Directive encourages member states to make as much public sector information available for re-use as possible, preferably by electronic means.

United States

Legislation

12.25 The FOI legislation covering the United States Federal Government, the Freedom of Information Act, was amended in 1996 to take account of electronic information. The Act requires Federal agencies to publish certain information about their organisation, functions, activities, procedures, rules and other matters, and to make available for public inspection such information as final opinions on the adjudication of cases, statements of policy and staff manuals.[355] From 1996, such records were required to be made available electronically.

12.26 A particularly significant provision, introduced in the 1996 amendment, is a requirement to make available copies of all records released in response to an access request under the Act, which the agency considers are likely to become the subject of subsequent requests. In addition, agencies are to produce indexes of the records made available under this provision, and are to make the indexes available electronically.[356]

12.27 In practice, the requirement to make certain documents publicly available in electronic form has been accomplished by creating "electronic reading rooms" on departmental websites. Documents of general public interest that have been released under the FOI Act can be found in these reading rooms.[357]

Policy

12.28 United States President Barack Obama, on his first day in office, issued a memorandum to Federal Government departments and agencies stating that they should make information about their operations and decisions readily available online.[358] This commitment was subsequently fleshed out in an Open Government Directive requiring Federal agencies to "take prompt steps to expand access to information by making it available online in open formats",[359] and the website www.data.gov was created to make it easier to find government data.[360]

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354 Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the Re-use of Public Sector Information.

355 5 USC § 552(a)(1) and (2).

356 5 USC § 552(a)(2)(D) and (E).

357 See, for example, United States Department of Justice "FOIA Reading Rooms" < http://www.justice.gov/oip/04_2.html > .

358 Barack Obama, President of the United States "Transparency and Open Government" (memorandum for heads of executive departments and agencies, 21 January 2009).

359 Peter R Orszag, Director, United States Office of Management and Budget "Open Government Directive" (memorandum for the heads of executive departments and agencies, 8 December 2009).

360 See < http://www.whitehouse.gov/open > for more on the United States' Open Government Initiative.

Canada

Federal

12.29 The Canadian Federal FOI legislation, the Access to Information Act (AIA), has been criticised as weak and ineffective compared to legislation in other countries,[361] and contains only limited requirements for proactive publication. The Act requires the production of a publication containing information similar to that contained in the *Directory of Official Information* in New Zealand.[362]

12.30 As a matter of policy rather than law, the Canadian government requires Federal government departments and agencies to publish on their websites information about travel and hospitality expenses of selected officials; contracts entered into for amounts over $10,000; and certain other matters.[363] In addition, a database consisting of an electronic list of all requests made under the AIA was available until 2008, making it possible for members of the public to see what information had already been released and to request it themselves. In 2008 the government announced that the database would no longer be updated, claiming that it was a waste of resources and was little used.[364]

Provincial

12.31 FOI laws in most Canadian provinces require the publication of certain information, along similar lines to the existing publication requirements in the OIA. The province of Québec goes further, providing in its FOI law for documents or information specified in regulations to be made available via public bodies' websites, and for such bodies to implement any other measures promoting access to information prescribed in regulations.[365] Regulations made under the Act require public bodies, from November 2009, to make a range of information available on their websites.[366] As well as standard organisational information, each public body is required to publish on its website documents released in response to an FOI request that are of wider public interest and information relating to contracts entered into by that body.

361 Stanley L Tromp *Fallen Behind: Canada's Access to Information Act in the World Context* (2008); Gil Shochat "The Dark Country" *The Walrus* (Canada, January 2010) < www.walrusmagazine.com > .

362 Access to Information Act RSC 1985 c A-1, s 5. The information published in accordance with this section can be found at < www.infosource.gc.ca > .

363 Treasury Board of Canada Secretariat "Proactive Disclosure" < www.tbs-sct.gc.ca/pd-dp/index-eng.asp > .

364 Stanley L Tromp, above n 361 at 240; Brodie Fenlon "Harper Defends Database Shutdown" *Globe and Mail* (Toronto, 5 May 2008, updated 30 March 2009) < www.theglobeandmail.com > .

365 Act Respecting Access to Documents held by Public Bodies and the Protection of Personal Information RSQ c A-2.1, s 16.1.

366 Regulation Respecting the Distribution of Information and the Protection of Personal Information RQ c A-2.1, r.0.2, s 4.

United Kingdom

Legislation

12.32 The Freedom of Information Act 2000 (UK) requires each public authority covered by the Act to adopt and maintain a scheme for the publication of information by that authority, to publish information in accordance with the scheme and to review the scheme from time to time.[367] Publication schemes must be approved by the Information Commissioner, and the Commissioner can also approve model publication schemes. Model publication schemes may be prepared by the Commissioner or by other persons, and where a public authority falls within the class to which the model publication scheme applies it may adopt the model scheme without any need for further approval by the Commissioner (so long as the scheme is not modified).[368] There are very similar provisions for Scottish public authorities in the equivalent Scottish FOI legislation.[369]

12.33 In 2005 the UK Information Commissioner's Office (ICO) reviewed the effectiveness of publication schemes, and as a result decided to take a different approach in order to promote a more consistent approach to the proactive publication of information across the public sector. Consequently, the Commissioner approved a single new model publication scheme which was to be adopted by all public authorities from 1 January 2009.[370] This is now the only approved publication scheme, and is not to be altered or amended. The scheme itself is brief, and requires public authorities to make available (on a website if possible) information about their functions, expenditure, priorities, decision-making processes, policies and procedures, lists and registers, and services offered.

12.34 The generic model publication scheme is backed up by sector-specific definition documents which provide significantly more detail about the information that the ICO expects to be made available.

12.35 While the UK and Scottish FOI Acts regulate the release of official information, re-use of such information is governed by the Re-use of Public Sector Information Regulations 2005, which implement the EU Directive on the re-use of public sector information. The Regulations do not apply to information unless access to that information has already been provided.[371] Where information is covered by the Regulations, a request for re-use may be made to the public sector body that holds it, and the body has discretion to permit re-use.[372] Public sector bodies

367 Freedom of Information Act 2000 (UK), s 19.

368 Ibid, s 20.

369 Freedom of Information (Scotland) Act 2002, ss 23–24.

370 Information in this paragraph is based on the following documents produced by the Information Commissioner's Office, and available on the ICO website < www.ico.gov.uk > : *Model Publication Scheme: What You Need to Do, Proactive Publication of Official Information: The Publication Scheme Development and Maintenance Initiative (DMI) and Freedom of Information Act Model Publication Scheme 2009: Central Government Sector Monitoring Report*. The Scottish Information Commissioner has not taken the approach of developing a single model publication scheme for Scottish public authorities.

371 Re-use of Public Sector Information Regulations 2005 (UK), reg 5(2). Certain other exclusions also apply under reg 5.

372 Ibid, regs 6–7.

must provide a list of the main documents that are available for re-use, which should be searchable electronically if possible, and which could be included with the information published as part of publication schemes under FOI legislation.[373]

Policy

12.36 The UK Government has recently made significant commitments to making public sector data more widely available. In June 2009, Tim Berners-Lee (the inventor of the World Wide Web) was appointed to advise the government in this area, and in January 2010 the website www.data.gov.uk was launched as an online portal to government data, intended to make that data as easy as possible to find and re-use.[374] In May 2010 the new Conservative/Liberal Democrat Coalition Government announced deadlines by which certain information relating to central and local government spending was to be published and certain other government datasets were to be made available. Government departments and agencies will also be required to make information available in open formats so that it can be re-used by third parties, and a Public Sector Transparency Board has been established. The new Board will work with departments to meet the Government's transparency commitments, set open data standards for the public sector, publish government datasets based on public demand, and develop the legal right to data that is part of the Coalition Agreement.[375]

12.37 Another significant development in the UK is the creation by public authorities of disclosure logs. Disclosure logs provide online access to information that has been released under FOI legislation, so that it can be made available to a wider audience. In addition to material released in response to FOI requests, disclosure logs can also include other information released proactively by public authorities.[376] Public authorities are not required by law or by the model publication scheme to maintain disclosure logs. However, they are considered to be good practice, are recommended in definition documents under the model publication scheme, and are monitored by the ICO as part of its monitoring of the model publication scheme.[377]

373 Ibid, reg 16; Office of Public Sector Information *The Re-use of Public Sector Information: A Guide to the Regulations and Best Practice* (2005) at 7, 26.

374 For background see Tom Chatfield and James Crabtree "Mash the State" Prospect (United Kingdom, 27 January 2010) < www.prospectmagazine.co.uk > .

375 Letter from David Cameron, United Kingdom Prime Minister, to Cabinet Ministers and government departments regarding transparency (31 May 2010); United Kingdom Cabinet Office "Cabinet Office Minister Opens up Corridors of Power" (press release, 31 May 2010); Government of the United Kingdom *The Coalition: Our Programme for Government* (2010) at 20–21.

376 Department for Constitutional Affairs *Best Practice Guidance on Disclosure Logs* (2005).

377 Information Commissioner's Office *Definition Document for Government Departments* (2008) at 6; Information Commissioner's Office *Freedom of Information Act Model Publication Scheme 2009: Central Government Sector Monitoring Report* (2009) at 16–17. See, for example, the Ministry of Defence disclosure log, which includes a search facility and lists of requests received: < www.mod.uk/DefenceInternet/FreedomOfInformation/DisclosureLog > . Other disclosure logs are arranged thematically or chronologically.

Republic of Ireland

12.38 The Freedom of Information Acts 1997 and 2003 (Ireland) contain limited requirements for public bodies to publish information about such matters as their organisation, functions, services and classes of records held; and rules, guidelines and other material used for the purposes of decision-making in relation to rights, obligations and other matters to which members of the public may be entitled or subject.[378] The legislation provides that, in addition to the above requirements, the Information Commissioner "shall foster and encourage the publication by public bodies of information of relevance or interest to the general public in relation to their activities and functions generally."[379] Like the UK, Ireland also has regulations implementing the EU Directive on the re-use of public sector information.

Australia

12.39 There has been considerable legislative and policy activity in Australia recently with regard to the proactive release of government information, both federally and in a number of states.

Federal

Legislation

12.40 The Australian Federal Government has recently engaged in a major reform of FOI legislation, resulting in the passing of the Australian Information Commissioner Act 2010 (Cth) and the Freedom of Information Amendment (Reform) Act 2010 (Cth) in May 2010.

12.41 The Freedom of Information Act 1982 (Cth) already contains some publication requirements, but these are to be significantly extended by the Amendment Act. The amendments require agencies covered by the Act to prepare publication plans and to publish certain specified information, and authorise them to publish other information that they hold.[380] The information that an agency is required to publish includes information about its organisation, functions, arrangements for the public to comment on policy proposals, information to which the agency routinely gives access in response to FOI requests, and information used to assist the agency in making decisions affecting members of the public.[381] The agency must publish the information on its website or via a link to another website, or must publish on the website details of how the information may be obtained.[382] Agencies are required to review their publication schemes at least every five

378 Freedom of Information Acts 1997 and 2003 (Ireland), ss 15–16.

379 Ibid, s 38.

380 Freedom of Information Amendment (Reform) Act 2010, new s 8. New sections relating to publication schemes are inserted by sch 2 of the Act.

381 Ibid, new ss 8(2), 8A.

382 Ibid, new s 8D(3).

years.[383] The Information Commissioner is responsible for reviewing and monitoring agencies' publication schemes,[384] and may issue guidelines in relation to publication schemes, to which agencies must have regard.[385]

12.42 Amendments to the Act also provide that, if a person has been given access to a document in response to an access request, the agency or Minister must, within 10 working days of providing access to the requester, make the information available on a website to members of the public generally. This requirement does not apply to personal or commercial information if it would be unreasonable to publish that information, or to other information that the Information Commissioner has determined it would be unreasonable to publish.[386]

Policy

12.43 In December 2009, the report of the Government 2.0 taskforce was released.[387] This was a report to the Australian Government on how the participatory and collaborative tools of Web 2.0 can be used to improve the openness, effectiveness and accountability of government. Its central recommendation was that the Australian Government should make a declaration of open government which should state, among other things, that:[388]

> public sector information is a national resource and that releasing as much of it on as permissive terms as possible will maximise its economic and social value to Australians and reinforce its contribution to a healthy democracy.

In its response to the taskforce's report, released in May 2010, the Government committed itself to drafting a declaration of open government for presentation to Parliament.[389] The taskforce also made recommendations about making public sector information open, accessible and re-usable, and supported the development of information publication schemes as proposed under the amended FOI legislation.[390] The Government has largely accepted these recommendations.[391] One outcome of the taskforce's report has been the creation of a portal to Australian government datasets (www.data.australia.gov.au).

The States

12.44 A number of Australian states have recently passed legislation requiring or encouraging proactive disclosure. The Queensland Act requires agencies to publish publication schemes setting out the classes of information they hold and the terms on which it will be made available. Ministerial guidelines issued under the Act require agencies to publish information about themselves and their

383 Ibid, new s 9.

384 Ibid, new s 8F.

385 Ibid, new ss 9A(b), 93A(2)(a).

386 Ibid, new s 11C.

387 Government 2.0 *Taskforce Engage: Getting on with Government 2.0* (2009).

388 Ibid, at 22.

389 Australian Government *Government Response to the Report of the Government 2.0 Taskforce: Engage: Getting on with Government 2.0* (2010) at 3.

390 Australian Government 2.0, above n 387, recs 6 and 8 at 58–59, 65, and ch 5 generally.

391 Australian Government, above n 389, at 10–11, 13.

functions and processes – a list of much the same kind as that in the UK legislation. Agencies are advised to make as much information accessible through their websites as possible. Agencies must also publish disclosure logs identifying information disclosed in response to an OIA request so that the public at large may have access to that information.

12.45 The New South Wales Act provides for categories of open access information. These include a publication guide which includes information about the structure and functions of the agency and the information that it holds and will make available. They are also required to publish policy documents broadly defined to include, among other things, documents containing rules, interpretations and guidelines and also particulars of administrative schemes and procedures. As in Queensland, the New South Wales Act also requires the publication of disclosure logs.

12.46 In Tasmania a new Act specifically states that disclosure of information in response to a request should be a method of last resort. There is provision for required disclosure (where the disclosure is required by law or under an agreement) and routine disclosure (where disclosure to the public is made voluntarily). As yet the Act provides no further details about required and routine disclosure.

12.47 Victoria has not recently revised its legislation but a major parliamentary inquiry into improving access to information has recommended that the Victorian Government should make a public statement endorsing open access and develop a whole of Government Information Management Framework (IMF). The government has endorsed the recommendation for a policy of open access and has committed itself to the development of an IMF.

Conclusion about other jurisdictions

12.48 The trend from these overseas developments is clear: it is towards proactive release of information. Some of the mandatory requirements do not go much beyond descriptive information about an agency's organisation, functions and processes and the kinds of information held by it. Some is not unlike the sets of information already required to be disclosed in New Zealand by local authorities in their governance statements and annual reports, and the information which must be included in the Directory of Official Information.

12.49 But some goes beyond this. It is not enough to look just at what appears on the face of the overseas Acts: some of the detail appears in rules and programmes made under the Authority of those Acts. Nor should we underestimate the influence of government directions. The movement towards progressively making information available is undoubted. New Zealand must pay close attention otherwise it will risk falling behind. Disclosure logs and electronic reading rooms, now features of some overseas systems, contain information which has already been released on request; they are a bridge between a "pull" and "push" system, and indicators of the trend to openness.

12.50 The arguments in favour of proactive disclosure are clear. The ideal of open Government is brought closer in that all citizens have the opportunity to be better informed about the workings of government. They all have equal and contemporaneous opportunity to access the information and are spared the need to ask for it. Indeed, they may receive more information than they would under a request, because the proactive disclosure may contain information of whose existence they were unaware. Furthermore, agencies are spared the trouble of having to respond to requests, perhaps many requests on the same matter. They are also relieved of the need to copy documents and transmit them to a requestor. Moreover proactive disclosure enables planned release, whereas requests can lead to unplanned workload. There are economic benefits resulting from such planning and the minimisation of duplication. Given that some agencies now make much information available, there is an argument for saying that the others should come into line.

12.51 However, there are some drawbacks to proactive release. It can lead to supplementary requests for background information, so that the burden on the agency's resources is not much lessened. And, particularly for a small agency, the requirement to proactively release large quantities of information carries its own not insubstantial compliance costs; it also places a burden on agencies to peruse material to see whether all of it can be properly released. We have also heard an argument that an obligation to release information might further inhibit "free and frank" advice. In other words, documents might be written with an eye to safety, and assume a blandness so as not to invite controversy.

12.52 We have noted the initiatives already in place and the progress already being made. The question is whether the legislation should impose further requirements, for example by requiring that certain categories of document must be published, or by requiring agencies to prepare and maintain publication schemes.

Mandatory disclosure

12.53 We have noted above that local authorities are already required to publish a good deal of governance information. Their annual reports must contain certain prescribed information.

12.54 In relation to central government, there is a requirement for the Ministry of Justice to publish a Directory of Official Information. In the days of hardcopy there was point in such a register, but we doubt the need for it in an age where the internet allows immediate access to the websites of each and every agency. We believe the OIA should require that each agency publish on its own website the information specified in section 20. There would then be no need for the Directory.

Q84 Do you agree that the OIA should require each agency to publish on its website the information currently specified in section 20 of the OIA?

12.55 Beyond this, however, we are not in favour of legislating for further categories of information which must be proactively published. This is partly for the same reasons that we do not favour regulations of the kind discussed at the beginning of this chapter, and also because once one gets beyond non-contentious governance statements it would be very difficult accurately to define the categories of document which would have to be disclosed. Different organisations hold different types of information. It would also need to be determined how far the good reasons for withholding would apply to any information contained in the prescribed documents. Difficult questions of timing would also arise: whether, for example, certain documents should be released immediately they are issued, or whether in some cases there should be a delay before those documents are published.

12.56 One of the agencies which responded to our survey questionnaire put the matter thus:

> While supporting open government, there needs to be some consideration of the level of public benefit to be gained against the public loss of spending taxpayer funded time preparing and publishing large amounts of information. This is considered to be more appropriately an organisational rather than legislative decision.

At present we agree with this statement.

Q85 Do you think there should be any further mandatory categories of information subject to a proactive disclosure requirement in the OIA or LGOIMA?

The expectation of disclosure

12.57 However we strongly believe it is desirable for agencies to progressively make more material publicly available. That is in line with one of the purposes of the OIA *to progressively make available official information*. It is also congruent with the objectives of NZGOAL. As we have pointed out incentives already exist, customer satisfaction among them. The question is whether, and if so how, the Act should encourage this. One option is to require each agency to publish, at regular intervals, a *publication scheme* whereby the agency lists the types of document that it will proactively release to the public via the internet or in some other way. We have noted that this solution is being tried in other jurisdictions.

12.58 However we lean against this somewhat bureaucratic solution at the present time. The preparation of such a scheme involves yet more time and effort for agencies which may not be adequately resourced for it. We also note that the scheme solution has not been without difficulty in the UK. There we understand that different departments have taken different approaches, to the point that the ICO has mandated a standard type of scheme for all agencies. So our present position is not to support the idea of a publication scheme but we nonetheless welcome the views of submitters on it. It may be something which can be reconsidered in the fullness of time.

12.59 We currently favour a statutory provision which places a duty on agencies to take all reasonably practicable steps to proactively make information publicly available, taking into account the type of information held by the agency and the public interest in it, and the resources of that agency. Proactive release of official information would still be subject to consideration of the withholding grounds and public interest test.

12.60 We have noted that proactive disclosure is not without its costs, and one cannot expect all agencies large and small to move at the same pace. Nevertheless we believe an "all reasonable steps" provision would incentivise agencies to move progressively towards more open availability. It aligns with the "strong encouragement" focus of NZGOAL, discussed in at 12.16. The agency monitoring the operation of the two Acts should have oversight of this development with an express statutory function of promoting and encouraging proactive disclosure. Agencies might be required in their annual report to describe the steps they have taken in the relevant year.

12.61 There would, however, remain a question of which agencies should be covered by such a requirement. Agencies subject to the OIA cover a wide range, from Ministers and Government Departments at one end to small entities such as School Boards of Trustees at the other. We are inclined to think that, at least in the early stages, the requirement should be confined to Departments, Crown Entities and the local authorities in Part 1 of the first schedule of LGOIMA. Even in the less directive form we propose, it is difficult to see that there would be much benefit in requiring all agencies, however small, to undertake this kind of exercise.

12.62 However persuasion may in the end not work as well as we hope. In that case it may be necessary to resort to legislative compulsion of some kind. One option would be to require review of the relevant provision of the Act after a period of, say, three years with a view to seeing whether mandatory requirements should be inserted. Another would be to include a provision in the present legislation empowering the making of regulations prescribing certain types of specific information which must be published. This would be not unlike the provision in the Crown Entities Act 2004 containing a power to add by regulation to the items which must be included in an entity's annual report. This way, if ever circumstances arise making the public availability of certain specific items of information desirable, the matter could be attended to by creating, and adding to, a list in regulations. We favour the first of these two options, but are interested in hearing views on both.

Q86 Do you agree that the OIA and LGOIMA should require agencies to take all reasonably practicable steps to proactively release official information?

Q87 Should such a requirement apply to all central and local agencies covered by the OI legislation?

Q88 What contingent provision should the legislation make in case the "reasonably practicable steps" provision proves inadequate? For example, should there be a statutory review or regulation making powers relating to proactive release of information?

Q89 Do you think agencies should be required to have explicit publication schemes for the information they hold, as in other jurisdictions?

Disclosure logs

12.63 A number of overseas jurisdictions require agencies to keep "disclosure logs" showing what items of information they have released under the OIA. This then enables persons other than the original requester to know that that information is available to be disclosed and how they might obtain it; in some cases the "log" provides a direct link to the information. If disclosure logs are required agencies would also need discretion not to include all information released under the official information legislation: disclosure logs should be restricted to information that has a wider public interest and should generally exclude personal information. There may also be questions about whether requesters should be able to ask that their request not be listed in the disclosure log.

12.64 We are interested to know what submitters think of this but currently we are not inclined to propose it as a mandatory requirement for New Zealand. Once again we are conscious of the resource pressures under which many agencies work, and are reluctant to impose further administrative burdens on them unless it is clear that such a move is necessary or highly desirable. Even without a disclosure log requirement, some agencies may decide to publicly release material provided in response to requests and we support this as a matter of good practice. If ever we adopt a "disclosure log" regime it would be necessary to revisit the subject of charging: it is hardly reasonable to charge the original requester when persons who become interested later can get the information for nothing.

Q90 Do you agree that disclosure logs should not be mandatory?

Access Impact Assessment

12.65 An expert on official information has suggested a requirement:[392]

> that there be access impact assessments (just as there are privacy impact assessments) before new databases are constructed by governments eg will the database be configured to allow reasonable access to data fields? That is especially important with contractor-supplied database programmes. Does the procured software anticipate public access as one of the business needs for the database?

12.66 Interestingly this idea has been taken up by the New Zealand Ombudsmen in their latest SOI where they state their promotion of proactive disclosure will include:[393]

> consideration of access impact assessments to be undertaken as government programmes and services are developed and implemented to identify appropriate opportunities for proactive disclosure of official information pertaining to the programme or service.

392 Rick Snell "Realising the Potential of FOI: Making the Transition from FOI Version 1.0 to Version 2.0" (work in progress, University of Tasmania, November 2008) < ricksnell.com.au > .

393 Office of the Ombudsmen *Statement of Intent for the Period 1 July 2010 to 30 June 2013* (2010) at 18.

12.67 The idea is a new one, and as far as we know untested. So at this stage we are not inclined to recommend a legislative requirement about it. Nevertheless, it is an idea with potential which should be kept under consideration.

Relationship between proactive disclosure and access requests

12.68 There could never be expected to be proactive disclosure of all information held by an agency. While it may well be reasonable to expect many reports, cabinet papers and discussion documents to be published in this way, this will only be a fraction of information held by the agency. There will also be much correspondence, minutes of meetings, documents providing advice, internal memoranda and preliminary drafts. It would be unrealistic, and indeed undesirable, to expect all of this to be freely available on the agency's website.

12.69 As has been noted, proactive publication can often lead to requests for further background information. Requesters may also request information that has been withheld from proactively released documents. So the traditional process of requesting under the OIA and LGOIMA will always constitute a significant activity. However, it should be noted that the Acts already provide that information that has been proactively released does not need to be provided separately to requesters.[394]

Protections against civil and criminal liability

12.70 Section 48 of the OIA provides as follows:[395]

> **48 Protection against certain actions**
>
> (1) Where any official information is made available in good faith pursuant to this Act, –
>
> (a) no proceedings, civil or criminal, shall lie against the Crown or any other person in respect of the making available of that information, or for any consequences that follow from the making available of that information; and
>
> (b) no proceedings, civil or criminal, in respect of any publication involved in, or resulting from, the making available of that information shall lie against the author of the information or any other person by reason of that author or other person having supplied the information to a department or Minister of the Crown or organisation.
>
> (2) The making available of, or the giving of access to, any official information in consequence of a request made under this Act shall not be taken, for the purposes of the law relating to defamation or breach of confidence or infringement of copyright, to constitute an authorisation or approval of the publication of the document or of its contents by the person to whom the information is made available or the access is given.

394 OIA, s 18(d); LGOIMA, s 17(d).

395 LGOIMA, s 41.

12.71 This provides protection to agencies that release information under the Act, but not to recipients of that information who then wish to disclose or otherwise use it. The question is whether such far-reaching protection should apply to information which is proactively released without request. That would be a significant step beyond the present law. It would effectively accord privilege against defamation claims, and defences to actions for such matters of breach of privacy and breach of confidence, to a government agency which has decided to publish the information.

12.72 The law of defamation has to date never been prepared to go this far. While certain privileges are codified in the schedule of the Defamation Act 1992, they stop short of conferring as wide a privilege as this.

12.73 We think there are significant differences between releasing information in response to a request and proactively releasing it. First, the OIA and LGOIMA *require* release of the information if it is requested, provided there is no good reason for withholding it. In such a case some protection from legal consequences is justified. On the other hand proactive release presupposes an active and voluntary decision to publish, and we think that such decisions should involve a consideration of the legal consequences of doing so.

12.74 Secondly, where information is released on request it is released only to the requester. This may be somewhat less true with electronic release but it is still true that with proactive release the publication is to all the world and the potential damage to any person whose interests are affected is much greater. Thirdly, if information is released on request the aggrieved person has no legal recourse against the agency but does at least retain the right to sue any recipient who publishes it to the world. If there were protection for any agency who published information proactively to all the world, the individual would have no legal recourse at all in relation to such general publication.

12.75 So we conclude that while section 48 should remain in relation to information released in response to a request, it should not apply to proactive disclosure. Nevertheless we look forward to the advancement of the NZGOAL project which would allow licensing to deal with at least copyright, and perhaps other intellectual property issues.

Q91 Do you agree that section 48 of the OIA and section 41 of the LGOIMA which protect agencies from court proceedings should not apply to proactive release?

Chapter 13

Oversight and other functions

PROBLEMS WITH CURRENT STRUCTURE

13.1 The current New Zealand legislation provides for the exercise by the Ombudsmen of a complaints jurisdiction. It prescribes very few other functions. In particular there is no provision for any guidance, training or oversight roles. One person who responded to our survey wrote the following about the role of the Ombudsmen:

> The work done to date has been useful, particularly in the publications made available online over recent years. Perhaps there is a wider training role for the SSC somewhere? After the Information Authority was phased out we seem to lack a more central and authoritative coordinating and advisory body than that offered by an overstretched Office of the Ombudsmen. Have they, in effect, become 'ambulancemen'?

13.2 Former Justice of the High Court of Australia, Michael Kirby, has been a strong advocate for independent oversight of freedom of information matters. He said in relation to the Australian FOI Act:[396]

> It is vital that someone or some agency…should be more closely monitoring the experience under the FOI Act… Otherwise, the preventative value of legislation of this character would be lost, in a concentration of effort on simply responding to individual claims. We should aggregate experience and draw lessons from it.

13.3 These statements sum up some of our system's problems: a lack of strategic oversight, an overstretched Ombudsmen Office, and a lacuna left by the demise of the Information Authority. There are no formal structures in place to improve practice and understanding.

396 Justice M Kirby "Information and Freedom" (The Housden Lecture, Melbourne, 6 September 1983) at 11.

13.4 The following problems result from the paucity of functions and structures.

- There is no government "owner" of official information. While the SSC may consider the OIA as part of the *Policy Framework for Government held Information*, it does so only tangentially.
- There is no body responsible for championing open government or acting as a watchdog of the underlying principles. The Ombudsmen do not have a mandate to do so and it is questionable whether they should carry out a promotion role in any case.
- There is no central set of statistics relating to OIA or LGOIMA requests to provide an overview of how either Act is operating in practice.
- There is little ability to pool or share knowledge across government or share common issues or problems. This results in agencies working in silos.
- The provision of assistance and advice is ad hoc and informal and not widely known or used.
- There is no explicit requirement to issue guidance and material to agencies and requesters to enhance their understanding of the Act or to provide training.

13.5 In its 1997 review of the OIA the Law Commission considered there was a strong case for systemic review and oversight, and thought the Ministry of Justice was the best body to do it.[397] That recommendation was not adopted. In this chapter we discuss the matter further.

A SNAPSHOT OF THE PRESENT

The original scheme

13.6 The Danks Committee, aware of the part oversight and education should play in ensuring the official information system operated effectively, proposed responsibilities for three key institutions. The SSC was to have an advisory and coordinating role through a dedicated information unit; the Ombudsmen to receive and investigate complaints about official information access decisions; and the Information Authority to be responsible to Parliament for keeping the operation of the Act under review and also for recommending regulations enlarging the categories of official information to which access may be had as of right.

13.7 Only the Ombudsmen's complaints role still exists, and the oversight and monitoring functions are no longer carried out. The functions of the Information Authority were not transferred to any other agency upon its expiration but expired with it.[398]

397 Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997) at para 50.

398 A fuller explanation of the roles played by various agencies in supporting the OIA can be found in Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007), at chapter 6.

State Services Commission

13.8 The SSC no longer has specific statutory functions under the OIA, although it played a pivotal role in the early life of the Act. When first enacted the SSC was the administrator of the OIA and had responsibilities to produce the Directory of Official Information and provide assistance and advice to other agencies. The Commission set up a dedicated information unit which produced extensive guidance for agencies.[399]

13.9 Some of these functions were transferred to the Ministry of Justice in 1988. Since then the SSC has played a limited role in official information issues, acting only when its mandate as overseer of the public service has required it. With one exception, most of its guidance has been limited to certain events, such as general elections, and has been sporadic in nature. A more important and enduring guideline was issued in 2000 on the topic of consultation and transfer of requests between Ministers and Departments.[400]

The Ministry of Justice

13.10 When responsibility for the OIA was transferred to the then Department of Justice in 1988 an official information unit was set up, later disestablished in the Ministry of Justice's 1995 restructure. Responsibility for administration of the OIA and policy advice functions is currently with the Ministry's Public Law Group. The Ministry also has two other statutory functions under the OIA.

13.11 It is required to maintain the Directory of Official Information and update it at two-yearly intervals; this is maintained on the Ministry's website. [401] The Ministry also has the power to provide advice and assistance to other agencies. The relevant provision reads:[402]

> The Ministry of Justice may, for the purpose of assisting any other department or any organisation to act in accordance with this Act, furnish advice or assistance or both to that other department or that organisation.

This provision was not raised in the responses received to our survey. White found that the provision "has not been treated…as giving any particular mandate or responsibility to engage in general training or education work across the state sector."[403]

13.12 The Ministry also promulgates charging guidelines, the most recent dated 2002. These do not have the force of law but are administrative guidelines approved by Cabinet. A power exists to make regulations prescribing reasonable charges for the purposes of the OIA but this has never been used.[404]

399 White, above n 398, at 44.

400 State Services Commission *Release of Official Information: Guidelines for Coordination* (Wellington, October 2000).

401 OIA, s 20. The latest Directory is 2009; we discuss the Directory further in chapter 12 in the context of proactive disclosure.

402 OIA, s 46.

403 White, above n 398, at 46.

404 OIA, s 47(d). Charging is discussed in more detail in chapter 10.

Department of Internal Affairs

13.13 The Department of Internal Affairs (DIA) manages the central Government's relationship with local government bodies and administers the LGOIMA and the Local Government Act 2002.

13.14 The DIA tells us it exercises a very limited role in relation to the LGOIMA. While it administers the Act, it plays little part in the day-to-day running of local government, reflecting the approach of the Local Government Act 2002 which saw a greater devolution of authority to local government bodies. The Department is not required to offer training or support in official information matters to local government and does not do so.

The Ombudsmen

13.15 The Office of the Ombudsmen was established under the Ombudsmen Act 1975. The OIA grafts a complaints jurisdiction on to the Ombudsmen's original jurisdiction which is their sole statutory responsibility under the OIA and the LGOIMA. Further discussion of the complaints process is found in chapter 11.

13.16 However, in addition to its statutory functions the Office of the Ombudsmen in fact carries out a range of activities to support the official information system. The Ombudsmen's most recent Annual Report states that "in addition to investigating and resolving complaints…., [the Office] undertakes a substantial growing programme of work under development in relation to: policy, advice, training, communications, research and evaluation, and professional practice."[405] Unlike the Privacy Commissioner in relation to the Privacy Act 1993,[406] the Ombudsmen do not have any specific functions that require them to carry out promotion, oversight, support or training. They have assumed these functions by default, as it were, out of recognition that the work needs to be done.

13.17 In order to carry out this policy work and strengthen the processes within the Ombudsmen Office, the Ombudsmen have a dedicated advisory group, headed by an Assistant Ombudsman (Policy and Professional Practice), tasked with providing policy, professional practice and knowledge management advice, and carrying out training, communications and outreach initiatives. A Practice Leadership team, led by a Deputy Ombudsman, is intended to ensure that the Ombudsmen have improved capability for "improving trends, systemic issues and developments in policy and legislation".[407]

405 Office of the Ombudsmen *Annual Report 2008/2009* (Wellington, July 2009) at 33.

406 Privacy Act 1993, see for example ss 13(1)(a) and 13(1)(g).

407 Office of the Ombudsmen, above n 405, at 12.

13.18 In its Annual Report for the 2008/2009 year the Office of the Ombudsmen noted that it has commented on legislative, policy and administrative proposals to ensure that proper consideration is given to the Acts it oversees, including the OIA and the LGOIMA.[408] The Ombudsmen report that their Office carries out an advisory role to government agencies, including the preparation of in-house guidelines for processing official information requests, and good record keeping and administrative practices.[409] They also offer training and assistance to agencies covered by the OIA and the LGOIMA. The Ombudsmen carry out training as:[410]

> [a]n improved understanding of the Ombudsmen's role and associated legislation is expected to contribute to better decision-making and to fewer complaints being lodged with government agencies and our office.

13.19 The Office carried out 20 workshops and training seminars throughout New Zealand in the 2008/2009 year. The Office report that media organisations, Government Ministers, local authorities and central government agencies, universities and private organisations are amongst those who requested assistance. This included group training and one-on-one assistance for some new public sector employees. The Office provides this service free of charge. The Ombudsmen report that they expect that demand for training services will continue to rise.[411]

13.20 In the absence of other support for the OIA, the Office of the Ombudsmen has gone well beyond its statutory duties to fill the gap and support the legislation. It is necessary as part of this review to ask whether the Office is the most appropriate body to carry out all these additional functions or whether they should be carried out by another body.

The Information Authority

13.21 The Information Authority was a crucial element of the official information regime designed by the architects of the OIA. The Danks Committee was strongly in favour of setting up an "independent body of sufficient status" to be responsible for oversight of the new official information regime.[412] The Danks Committee saw it as "integral" that an agency outside the normal administration and executive government should keep the OIA under review and report on its progress to Parliament. Despite speeches in the House of Representatives at the time the Bill was introduced suggesting some hesitation at the prospect of

408 In a previous year, for example, the Ombudsmen commented on the Immigration Bill 2007. The Ombudsmen's submission resulted in the select committee recommending changes to the provision that would otherwise have limited the application of the Ombudsmen and Official Information Acts. See also Mai Chen "Does New Zealand's Ombudsmen legislation need amending after (almost) 50 Years? (Wellington, 2010) at 37.

409 Office of the Ombudsmen, above n 405, at 35.

410 < www.ombudsmen.parliament.nz >

411 Office of the Ombudsmen, above n 405, at 37.

412 Committee on Official Information *Towards Open Government: General Report* (Government Printer, Wellington, 1981) at 31.

creating another "quango",[413] the initial need for the Authority was recognised but it was established only for a period of five years.[414] The Authority and all provisions relating to it in the OIA expired at the close of 30 June 1988.[415]

13.22 One of the Authority's functions was to keep under review the working of the OIA, the manner in which access was being given to official information, and the manner in which it was supplied.[416] It was charged with providing recommendations to any Department or Minister suggesting that changes be made to the manner in which access was allowed or information was supplied.[417] It had the following further functions:

- to receive and invite representations from members of the public, and from Ministers of the Crown, Departments, and organisations, in relation to any matter affecting access to or the supply of official information;[418]
- to inquire into and report on the question whether this Act should be extended to cover information held by bodies other than Departments, Ministers, Ministers of the Crown, and organisations;[419]
- to inquire generally into and report on any matter, including any enactment of law, or any practice or procedure, affecting areas of access to or the supply or presentation of official information.[420]

13.23 During its six year life the Authority produced a considerable body of work for an office of its size. The fruits of the Authority's work are reflected in amendments to the OIA and repeals and amendments to various other existing legislation that contained secrecy provisions.[421] As envisaged by the Danks Committee, the Information Authority carried out research on aspects of the OIA that touched on the personal information of individuals. It published an issues paper and later a report which included various recommendations on how the OIA should deal with personal information.[422] It made recommendations relating to the scope of the OIA which resulted in hospitals, schools and universities coming under the Act. It also worked on remission of charges, criminal sanctions and third party access rights.

13.24 It is worth noting that an equivalent body has never existed to oversee the implementation of the LGOIMA. It has therefore never benefitted from dedicated monitoring or systematic review, other than indirectly through the work of the Information Authority on the OIA.

413 Paul East (30 November 1982) 449 NZPD 5043.

414 OIA, Part 6.

415 OIA, s 53.

416 OIA, s 38(2)(a) (expired).

417 OIA, s 38(2)(b) (expired).

418 OIA, s 38(2)(c) (expired).

419 OIA, s 38(2)(d) (expired).

420 OIA, s 38(2)(e) (expired).

421 Ian Eagles, Michael Taggart & Grant Liddell *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992) at 478 and 514.

422 The Information Authority *Personal Information and the Official Information Act: An examination of the Issues* (The copying machine, Wellington, 1985).

Other bodies

13.25 The Cabinet Office and Archives New Zealand have an indirect influence on the way official information is handled. The Cabinet Manual contains guidance on aspects of the OIA that relate to Cabinet related material and Ministers.[423] The Manual provides a broad overview of sources of further information (including the Practice Guidelines and Ombudsmen Quarterly Review) as well as its own substantive information about the release of official information that has been to or come from the Cabinet.

13.26 Archives New Zealand is a new addition to the various actors in the official information framework. It has increased involvement since the enactment of the Public Records Act 2005 (PRA). The relationship between the PRA and the official information legislation is discussed in chapter 15.

A SET OF STATUTORY FUNCTIONS

13.27 We propose that new functions should be included in the OIA and LGOIMA to improve the operation of the legislation. We discuss those functions in this section and in the next section discuss the most appropriate agency to exercise them.

Complaints

13.28 We discuss the complaints process and some proposals for changes to it in chapter 11. We propose later in this chapter that the Ombudsmen should remain responsible for receiving and investigating complaints.

Guidance

13.29 We believe there should be a more explicit and directive provision relating to guidance in both statutes.

Formal guidance

13.30 In chapter 3 we noted that two forms of guidance can be accessed on the Office of the Ombudsmen's website – practice guidelines and case notes. There was an overwhelming call in the responses to our survey for more specific and targeted guidance, particularly in regard to commonly recurring situations. Chapter 3 includes a discussion on the form such guidance might take. To ensure this guidance role is carried out, we believe a statutory function should be included in the legislation. As we pointed out earlier, such a system of precedent and guidance based on it is the substance which supports the open-textured provision of the legislation, and it should be clearly provided for in the Acts themselves.

423 Cabinet Office *The Cabinet Manual* (Department of Prime Minister and Cabinet, Wellington, 2008) Part 8.

Advice

13.31 As well as resorting to written guidance we think an agency or Minister should have the ability to ask questions in advance of making a decision. Advice given in response to such requests would also be general not specific to the actual case. The Privacy Commissioner is obliged to provide such an information service and it is used widely by bodies covered by the Privacy Act 1993.[424]

13.32 We believe that a function along the lines set out in the following draft provision should be inserted into both the OIA and the LGOIMA:

> It will be the function of [ ] to –
>
> (X) issue and maintain guidance to assist agencies in interpreting the provisions of this Act in response to official information requests;
>
> (X) issue and maintain guidance to assist requesters who wish to make official information requests; and
>
> (X) provide general advice (whether with or without a request) to a Minister or agency on any matter relevant to the operation of the Act.

Q92 Do you agree that the OIA and the LGOIMA should expressly include a function of providing advice and guidance to agencies and requesters?

Promotion and education

13.33 The Privacy Act 1993, Health and Disability Commissioner Act 1994, and Human Rights Act 1993 all include a promotion and education function. We consider the OIA and LGOIMA would also benefit from this function being introduced. The relevant provision in the Privacy Act provides that is it a function of the Privacy Commissioner to:[425]

> promote, by education and publicity, an understanding and acceptance of the information privacy principles and of the objectives of those principles.

She is also required:[426]

> for the purpose of promoting the protection of individual privacy, to undertake educational programmes on the Commissioner's own behalf or in cooperation with other persons or authorities

424 Privacy Act 1993 s 13(1)(i)

425 Privacy Act 1993, s 13(1)(a).

426 Ibid, s 13(1)(g).

13.34 The Privacy Commissioner carries out a wide range of activities to fulfil her promotion function:[427]

> Meeting with opinion leaders, the news media, government, business leaders and civil society groups; providing training programmes for agencies; answering media enquiries; making statements and media releases; maintaining a website; making public speeches; conducting a privacy issues forum at least every two years; and producing written education materials.
>
> on behalf of the Commissioner.

13.35 The Health and Disability Commissioner Act 1994 provides it is that Commissioner's function to:[428]

> promote, by education and publicity, respect for and observance of the rights of health consumers and disability service consumers, and, in particular, to promote awareness, among health consumers, disability service consumers, health care providers, and disability service providers of the rights of the health consumers and disability services consumers and of the means by which those rights may be enforced.

13.36 We believe a functions along the lines set out in the following draft provision should be inserted into both the OIA and the LGOIMA:

> It will be the function of [ ] to –
>
> (X) promote awareness and understanding of this Act and its operation.
>
> (X) arrange for the provision of programmes of education and training for agencies subject to this Act.

Q93 Do you agree that the OIA and LGOIMA should include a function of promoting awareness and understanding and encouraging education and training?

Oversight

13.37 An oversight function might encompass four separate matters: a *monitoring* function; a *policy* function; a *review* function; and a *promotion* function.

427 Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC IP17, 2010) at 149.

428 Health and Disability Commissioner Act 1994, s 14(1)(c).

Monitoring function

13.38 The statutory provision of a monitoring function allocated to a body or bodies would ensure there are assessments of whether the Act is working well, whether amendments are needed, and whether other measures are required to enhance its efficacy. Similar functions exist in other New Zealand legislation. The Health and Disability Commissioner, for example, has a number of such functions. They include:[429]

> To report to the Minister from time to time on the need for, or desirability of, legislative, administrative, or other action to give protection or better protection to the rights of health consumers or disability services consumers or both:
>
> To receive and invite representations from members of the public and from any other body, organisation, or agency on matters relating to the rights of health consumers or disability services consumers or both:

13.39 The Human Rights Commission and the Children's Commissioner are under similar obligations to review the Acts they administer and to report to Parliament if there is a need for reform.

13.40 In addition, and to enable effective monitoring, the oversight agency should gather statistics about official information matters across government. Little data and few statistics currently exist about the official information regime. As Nicola White indicates, statistics gathered by the Ombudsmen are limited to numbers of complaints and as such only provide part of the picture – they only give a sense of "the way in which the dispute resolution system is working, rather than an overview of the way in which government information is being made available to citizens."[430]

13.41 To facilitate this task, public agencies subject to either Act should be required to regularly provide statistics of requests to the oversight body.[431] These statistics should include, for example, the number of requests received and responded to, whether information was withheld and what withholding ground or grounds were relied upon in each case. Some agencies already include some of these statistics in their Annual Reports. A requirement to maintain statistics about official information requests conforms with agencies' obligations to create and maintain full and accurate records of their affairs under the Public Records Act 2005.[432]

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429 Ibid, s 14(1)(k)(i)

430 White, above n 398 at 51.

431 In the United Kingdom certain agencies are required to keep statistics on non-routine requests for information. While the definition is not scientific, the latest Annual Report on FOI produced by the Ministry of Justice states that 'non-routine' requests are those for which it was necessary to take a considered view on how to handle the request under the terms of the FOI legislation and the FOI officer in the agency was notified of the request and it was logged as such. Ministry of Justice (UK) *Freedom of Information Act 2000 – Fourth Annual Report on the operation of the FOI Act in Government in 2008* (London, June 2009) at 37.

432 Public Records Act 2005, s 17(1).

13.42 To further enable the oversight body to ascertain as full a picture as possible of the operation of the two Acts, it should be enabled to receive representations from members of the public on the Act's operation or any systemic issues within an agency. This is not a specific complaints function such as that which the Ombudsmen already have. It is about providing members of the public with ability to notify the oversight body of systemic issues within an agency, or their general concerns about access to information, or even about the working of the complaints process.

13.43 We believe that functions along the lines set out in the following draft provision should be inserted into both the OIA and the LGOIMA:

> It will be the function of [ ] to –
>
> (X) monitor the operation of the Act;
>
> (X) collect information and statistics from agencies and Ministers about the operation of the Act;
>
> (X) report annually to Parliament on the operation of the Act;
>
> (X) receive and invite representations from members of the public on any matter relating to the operation of the Act.

Q94 Do you agree that an oversight agency should be required to monitor the operation of the OIA and LGOIMA, collect statistics on use, and report findings to Parliament annually?

Q95 Do you agree that agencies should be required to submit statistics relating to official information requests to the oversight body so as to facilitate this monitoring function?

13.44 A common function amongst Information Commissioners overseas is to monitor individual agencies' compliance with freedom of information legislation.

13.45 We currently see little value in assigning an agency a specific statutory power to undertake mandatory audits of agencies' compliance with the OIA or the LGOIMA. Where systemic issues are identified through complaints or representations made to the oversight body those could be reported annually to the responsible Minister who might in appropriate cases wish to undertake a further enquiry.

Q96 Do you agree that an explicit audit function does not need to be included in the OIA or the LGOIMA?

Policy function

13.46 The oversight body should also be responsible for making reports on prospective legislation or policy relating to access to official information. If, for example a secrecy provision is proposed in a draft Bill, the oversight body would be required to report to Parliament. If a new public agency is proposed, it would report on whether or not it should be subject to the OIA or LGOIMA. The Privacy Commissioner has a similar function in the Privacy Act.

13.47 Such a policy function would impose on the agency a positive obligation to provide policy advice to Government on matters affecting access to government information. This recognises the links between access rights in the OIA and LGOIMA and information management more generally.

13.48 We believe a function along the lines set out in the following draft provision should be inserted into both the OIA and the LGOIMA:

> (X) examine any proposed legislation or proposed policy of the Government that may affect the right to access to official information, and report to the responsible Minister the results of that examination.

Review function

13.49 As well as an annual reporting requirement we consider the oversight body should be required to carry out a review of the legislation periodically. In our review of the Privacy Act we wrote:[433]

> In our view, periodic reviews of all statutes are desirable. Reviewing legislation has a number of benefits including assessing how well legislation is working in practice, contributing to better regulation and improving implementation of the legislation.

13.50 The Privacy Commissioner is required to undertake reviews of the operation of the Privacy Act at intervals of not more than five years. To date, a total of five such reports have been made to the responsible Minister, each proposing a significant number of legislative changes.[434]

13.51 In our issues paper on the Privacy Act we propose this review should be carried out by a person other than the Privacy Commissioner as we believe an agency other than the complaints body, one step removed from the day-to-day issues, should carry out such a function.[435] We also suggested that that Act be reviewed at the same time as the OIA and the LGOIMA and the Public Records Act 2005, given their close interrelationship.[436] There could be liaison between the reviewing agencies. We remain of this view.

433 Law Commission *Review of the Privacy Act 1993* (NZLC IP17, Wellington, 2010) at 159.

434 See Office of the Privacy Commissioner *Necessary and Desirable: Privacy Act 1993 Review* (Wellington 1998) its and subsequent supplements.

435 Law Commission, above n 433, at 159.

436 Ibid, at 160.

13.52 We believe a function along the lines set out in the following draft provision should be inserted into both the OIA and the LGOIMA:

> At intervals of not more than five years after the commencement of this section, the [ ] shall –
>
> (a) Review the operation of this Act;
>
> (b) Consider whether any amendments to this Act are necessary or desirable; and
>
> (c) Report the findings to the responsible Minister.

Promotion function

13.53 We have proposed in chapter 12 that agencies should be encouraged to proactively release official information held by them. We think the oversight agency should also be charged with strongly promoting proactive release. We discuss this matter more fully in chapter 12.

13.54 We suggest a function along the lines set out in the following draft provision should be inserted into both the OIA and the LGOIMA:

> It will be the function of [ ] to –
>
> (X) promote and encourage the public availability of official information, including the proactive release of information.

Q97 Do you agree that the OIA and LGOIMA should enact an oversight function which includes monitoring the operation of the Acts, a policy function, a review function, and a promotion function?

THE OVERSEAS POSITION

13.55 Before asking which agencies should exercise the functions we have described, it will be useful to examine the position in several overseas jurisdictions. Virtually all those we analysed allocate their freedom of information functions across agencies differently.

Australia

13.56 Law reform of their freedom of information legislation is very recent in Australia, arising from substantive reviews. For this reason we discuss the new structures in some detail here.

13.57 In five jurisdictions in Australia, freedom of information matters are (or very shortly will be) overseen by an independent Information Commissioner (Commonwealth, New South Wales, Northern Territory, Queensland and Western Australia). In each jurisdiction the Information Commissioner's functions include complaints and review, oversight and monitoring, and the provision of advice and assistance. In the remaining four state jurisdictions (South Australia, Tasmania, Victoria and the Australian Capital Territory (ACT)), freedom of information matters are overseen by an Ombudsman. Only in Tasmania does the Ombudsman have enhanced functions relating to guidance and advice. In South Australia, Victoria and the ACT the Ombudsmen have limited roles similar to our situation.

13.58 In terms of federal government oversight, the Department of Prime Minister and Cabinet is responsible for FOI matters in the Commonwealth. The Departments of Premier and Cabinet are responsible for the legislation in Queensland and New South Wales. In Victoria and the Northern Territory the Department of Justice is responsible for the legislation. The Attorney-General is responsible in Western Australia. State Records of South Australia administers the legislation in that jurisdiction.

Recent changes to Australian Commonwealth arrangements

13.59 As discussed also in chapter 12, the Australian Information Commissioner Act 2010 creates a dedicated Freedom of Information Commissioner responsible for carrying out functions that can be categorised as adjudicative, oversight and monitoring, and advisory. There will be separate Freedom of Information and Privacy Commissioners, each with their own statutory functions but operating from a combined Information Commissioner office.

13.60 Until the Act comes into force in November 2010 complaints will continue to be heard by the Federal Ombudsman who has been responsible for this function since the early 1980s. The large scale reforms of the FOI Act were driven by election commitments made by the Labor Government which wanted to "restore trust and integrity" in the handling of government information.[437] As part of this, it was thought necessary to create an independent Information Commissioner to carry out oversight of the new regime. During the second reading of the *Freedom of Information Amendment (Reform) Bill 2009* it was said that:[438]

> The establishment of an Information Commissioner and an FOI Commissioner, as independent officers, will address a long standing lacuna in effective FOI administration.

13.61 It was thought that the role carried out by the Ombudsman reviewing individual decisions was reactive in its approach and was insufficient to support an effective freedom of information regime. The Australian Ombudsman echoed these calls, saying that a major shortcoming of Australia's FOI regime:[439]

> …is that it lacks an FOI champion, who is independent of government, has a dedicated role and powers, adequate funding, and a secure power base.

13.62 The new Commissioner's functions are comprehensive and purport to ensure that freedom of information in Australia is given greater prominence than it has had to date. The Commissioner will be responsible for promoting awareness and understanding of the Freedom of Information Act 1982 and its objects, assisting agencies to publish information in accordance with information publication schemes, providing information, advice, assistance and training to any person or agency about the Act, issuing guidelines, making reports and recommendation to Ministers, monitoring and reporting on compliance and reviewing the decisions of agencies, amongst others.[440]

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437 Australian Labor Party *Government Information: Restoring Trust and Integrity* (October 2007).

438 (26 November 2009) Australian Senate Hansard 12972.

439 Professor John McMillan, Commonwealth Ombudsman "FOI and Privacy Reform" (Presentation to a joint seminar of the Commonwealth FOI Practitioners' Forum and the Privacy Contact Officer Network, Canberra, 26 June 2009) at 1.

440 Australian Information Commissioner Act 2010 (Cth), s 8.

The Queensland reforms

13.63 In July 2009 the Queensland Parliament repealed its Freedom of Information Act and replaced it with the Right to Information Act 2009 (Qld). This Act retains the Office of Information Commissioner, which already oversees privacy matters, but creates a role dedicated to freedom of information matters. The Freedom of Information Commissioner is deputy to the Information Commissioner and responsible for matters concerning freedom of information. As well as being responsible for complaints, the Commissioner will have responsibility to carry out:

- support functions, including the provision of advice about interpretation and administration of the Act, giving information to agencies and requesters, promoting awareness of the Act within the community and within government through such activities as training and education programmes, and identifying and commenting on legislative changes that would improve the Act; and
- performance-monitoring functions such as auditing and reporting on agencies' compliance with the Act, publishing performance standards and best practice for agencies, and reporting to Parliament the outcome of any review.[441]

13.64 The Office of the Information Commissioner maintains a website referring to various publications and guidance material for agencies and requesters, comments on matters affecting freedom of information and provides training to agencies.

13.65 The Minister responsible for the Act is required to review the Act two years after it comes into operation and also required to produce annual reports to Parliament on the Act. The Queensland Government provides a website (www.rti.qld.gov.au) which contains guidance about the FOI legislation, the privacy legislation, and the access rights of users.

Changes in New South Wales

13.66 Following Queensland's review of its freedom of information law, the NSW Ombudsman carried out an extensive review of the NSW FOI laws and made over 80 recommendations for change.[442] This resulted in a Bill proposing the creation of a new Office of Information Commissioner. The Bill passed through both Houses and was enacted as the Government Information (Public Access) Act 2009. Its provisions came into effect on 1 July 2010.

441 No performance monitoring reports are yet available online making it unclear which functions have been carried out under that head.

442 New South Wales Ombudsman *Opening Up Government: Review of the Freedom of Information Act 1989* (Sydney, 2009).

13.67 The Commissioner is a statutory officer of Parliament independent from the Executive. The Commissioner is required to promote public awareness and understanding of the new laws, as well as provide information, advice, assistance and training to agencies and the public. The Commissioner also has a monitoring role over agencies' functions and may report to the Minister if legislative or administrative change is necessary.[443] The NSW Information Commissioner Office and Privacy Commissioner Office are now co-located, but each still exists under its own statute.

13.68 To enable users of the old FOI Act to use it effectively, the Department has produced, in conjunction with the Ombudsmen, an FOI manual containing a combination of guidance from the Ombudsman and official Government policy which state agencies must follow. Where there is inconsistency between Ombudsman's guidance and Government policy, the Government's view prevails. It is intended that the new Information Commissioner will issue guidance about the new Act in due course.[444]

The new Tasmanian Act

13.69 The Tasmanian Government has chosen to retain the Ombudsman as its complaint body, but has given the office an enhanced role with a number of additional oversight and reporting functions.

13.70 Under the Right to Information Act 2009 the Ombudsman is required to issue and maintain guidelines relating to processes and provisions of the legislation. The Ombudsman may, on his or her own motion or in response to a request, provide oral or written advice to a public authority or Minister on the operation of the Act and must maintain a related manual. The Ombudsman is also responsible for reporting to Parliament annually on the operation of the Act and related matters.

13.71 The responsible Minister is the Minister for Justice. He or she is required to report annually to both Houses of Parliament on the operation of the legislation. The Department's website contains general guidance information for users and requesters. There is no dedicated FOI website in Tasmania.

The United Kingdom

13.72 An Information Commissioner oversees freedom of information matters in England under the Freedom of Information Act 2000, as well as matters under the UK equivalent of our Privacy Act 1993.[445] The Commissioner is responsible for complaints, oversight and monitoring, and training and assistance on matters affecting access to information. The Ministry of Justice (UK) is responsible for the implementation of the Freedom of Information Act 2000 within Government.

443 Judge K V Taylor *Right to Information in NSW: A Guide* (Office of the Information Commissioner, September 2009).

444 < http://www.oic.nsw.gov.au > .

445 Data Protection Act 1998.

13.73 The Commissioner has several functions in the Freedom of Information Act 2000 that relate to oversight and monitoring, and training and assistance. He or she is responsible for approving model publication schemes, promotion of good practice by agencies, the promotion and dissemination of information about the Act, voluntary audits of agencies' compliance, and reporting to Parliament annually on these matters. Reports are made regularly to Parliament about compliance across the sectors. Reports have also been made in response to specific instances such as the Ministerial veto of the decision to release cabinet documents relating to military action against Iraq.

13.74 The Ministry of Justice (UK) administers the Freedom of Information Act 2000 through a Data Access and Compliance Unit in the Ministry, and is responsible for the implementation of the Freedom of Information Act 2000 within government. It produces guidance for requesters and public bodies subject to the Act. It also produces quarterly reports on monitored bodies and is responsible for the production of the *Annual Report on the operation of the Freedom of Information Act in Central Government*. The Reports include statistics on request numbers and the proportion which result in information being released or withheld; comments on the legislative framework and outreach work, such as education. They also comment on key trends and issues for the future.

13.75 An Information Commissioner in Scotland is responsible for the promotion and enforcement of separate freedom of information legislation for the Scottish government.[446] The Commissioner undertakes a programme of activity to inform people about their rights under freedom of information laws and to promote best practice to public authorities, and publishes much of this information on its website www.itspublicknowledge.info.

Ireland

13.76 Amongst the jurisdictions we have analysed, Ireland is the only jurisdiction where the Information Commissioner can be a presiding Ombudsman. Each Office is governed by its own piece of legislation, and the functions and powers of each Officer differ, but they are carried out by the same person. The Information Commissioner's functions include reviewing complaints, oversight and monitoring and education and guidance.

13.77 A Freedom of Information Central Policy Unit within the Ministry of Finance oversees freedom of information within Government. The Unit maintains the website (www.foi.gov.ie) which contains information, guidelines, and other resources relevant to both requesters and officials on freedom of information in Ireland.

13.78 Under the Irish Freedom of Information Act 1997, the Minister of Finance is required to report annually to both Houses of the Oireachtas about the implementation and operation of the FOI Act, including training in Government agencies, organisational arrangements and any other matters the Minister believes affects the Act's implementation.[447] The Report includes the number of requests received in a given year, and general and specific statistics on the use and operation of the Act.

446 Freedom of Information (Scotland) Act 2002

447 Freedom of Information Act 1997 (Ire), s 15.

Canada

13.79 In Canada, at federal level, there is an Information Commissioner and a separate Privacy Commissioner. There is no Ombudsman at this level with a general jurisdiction. The Treasury Board Secretariat is responsible for issuing direction and guidance to government institutions with respect to the administration and interpretation of the Access to Information Act. The Department of Justice supports the Minister of Justice in the role of designated minister for specific provisions of the FOI legislation.

13.80 At a provincial level, nine Provinces have offices of Information and Privacy, with Commissioners who have jurisdiction across both freedom of information and privacy. The Manitoba Ombudsman has an Access and Privacy Division within his or her Office. New Brunswick is in the process of appointing its first Information and Privacy Commissioner. Nova Scotia has a Freedom of Information and Privacy Review Office.

ASSIGNING STATUTORY FUNCTIONS IN NEW ZEALAND

13.81 We now discuss how the functions discussed in this chapter could be assigned within New Zealand, and ask about the possible creation of an Information Commissioner for New Zealand. We are very interested to receive submissions on these matters.

13.82 The functions that we propose should be included fall into the following categories, as outlined above:

- complaints;
- guidance;
- promotion and education; and
- oversight.

13.83 Existing possible agencies include the following:

- Office of the Ombudsmen;
- State Services Commission;
- Department of Internal Affairs;
- a new Information Commissioner; and
- other, e.g. Local Government New Zealand.

Complaints

13.84 We propose that the Ombudsmen retain the official information complaints jurisdiction they currently have, subject to the changes we propose to their complaints process in chapter 11.

13.85 In the responses to our survey there was strong endorsement of the Ombudsmen as the official information complaints body and there is no need to upset the status quo. Such negative comments as there were concerned resourcing issues and timing, with concerns expressed by several respondents about delays in the complaints process. But overall the comments we received were very positive. Removing the Ombudsmen as the complaints body would mean that the institutional knowledge and awareness built up over more than 25 years of dealing with official information complaints would be lost.

Q98 Do you agree that the Ombudsmen should continue to receive and investigate complaints under the OIA and the LGOIMA?

Guidance

The Ombudsmen

13.86 We propose that the Ombudsmen should be responsible for producing and issuing written guidance of a general nature about official information matters for both officials who apply the Act and for requesters, and also for responding orally to such questions.

13.87 In our survey we asked whether or not it was appropriate for a complaints body that makes rulings over legal rights also to issue guidance on how the rules governing those rights are to be applied. The responses suggest that it is. One response said the following about both of these roles:

> They are two sides of the same coin. The Ombudsmen are well placed to issue guidance because they see the types of issues that arise across the public sector. They are therefore in a good position too, to take a view on compliance or otherwise on a case by case basis.

Another said:

> We are comfortable with the dual role of the Ombudsmen. We find their advice invaluable. We find no conflict between the advice role and the investigation role of the office.

13.88 In our review of the framework for the sale and supply of liquor we discussed the propriety of a body that adjudicates disputes having parallel functions in the form of responsibility for guidance and practice notes, and found that it does not offend against constitutional practice.[448] Given the exposure to complex official information problems and the experience gained from dealing with both complainants (requesters or third parties) and officials, we believe the Ombudsmen are best placed to develop formal guidelines and practice notes that take account of considerations that weigh for and against release.

13.89 In chapter 3 we discussed the increased use that might be made of the casenotes of the Ombudsmen in the production of more specific guidelines. This would support the case for the Ombudsmen remaining responsible for the guidance function.

448 Law Commission *Alcohol in our lives: Curbing the harm* (NZLC R114, Wellington, 2010) at para 10.49.

Another body

13.90 It would be possible for another agency to undertake the guidance role. White for example has suggested a greater role for the SSC in developing and issuing guidance.[449] If the SSC were to undertake this role, two issues would arise.

13.91 The first is a practical one concerning the LGOIMA: who should be responsible for developing guidelines for LGOIMA users? To avoid unnecessary duplication local authorities could simply tap into guidance produced by the SSC. But there are differences between the OIA and LGOIMA, and one would need to be sure that the specific needs of local authorities were adequately taken into account.

13.92 The DIA might be responsible for developing guidance concerning LGOIMA, or might have a consultation function in assisting the SSC in the development of guidance. This would ensure the voice of local government was reflected in guidance developed by SSC. Alternatively, or in addition to, DIA's role, Local Government New Zealand or the Local Government Commission could have input into guidance.

13.93 The second issue to be considered relates to possible tension between the Ombudsmen and the oversight body, if a body other than the Ombudsmen were responsible for guidance. We understand that in some overseas jurisdictions tensions have arisen between the Government and the Information Commissioner's Office, stemming from differing views on the interpretation and the operation of the legislation. We note that the New South Wales legislation states that the government view prevails over previous Ombudsmen guidance. We think it unwise to set up potential for such conflict of views.

Our view

13.94 Our preference, as we noted in 13.86, is for a general guidance role to be carried out by the Ombudsmen for the reasons we have stated. The body with day-to-day experience of investigating complaints is best placed to give detailed and practical guidance.

> Q99 Do you agree that the Ombudsmen should be responsible for the provision of general guidance and advice?

449 Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007) at 253.

Promotion and education

13.95 Earlier in the chapter we suggested that a function such as the following be inserted in the OIA and the LGOIMA:

> It will be the function of [ ] to –
>
> (X) promote awareness and understanding of this Act and its operation.
>
> (X) arrange for the provision of programmes of education and training for agencies subject to this Act.

13.96 While we are clear in our view that the Ombudsmen should retain the complaints jurisdiction, and think they should have the formal role of providing guidance and advice, we are less clear about the body or bodies that should be responsible for training of agencies and promotion of the Act. We are unsure whether this should be a function of the Ombudsmen or of the oversight body we discuss in the next section.

13.97 We note that there would be advantages in the Ombudsmen being involved at least in the provision of training, even if not in the promotion or organisation of it. They do the work on the ground, and have the detailed knowledge. But it seems to us that there would be advantages in the oversight body having responsibility for setting up programmes of training, and monitoring attendance and effectiveness. This would align well with the oversight functions we are about to discuss.

Oversight

13.98 The oversight functions we propose earlier in the chapter cover monitoring the operation of the Acts, collecting related data and statistics, providing policy advice, promoting open government reporting to Parliament annually on matters relating to access to official information, and possibly monitoring individual agencies' compliance. These roles are important to ensure that the OIA and the LGOIMA are working as they should, and to ensure that Parliament remains abreast of the Executive's compliance with its obligations under the Act.

13.99 Our current preference is for oversight of the OIA to be undertaken by the State Services Commission and of LGOIMA by the Department of Internal Affairs. However we also discuss other possibilities and in particular the possibility of an Information Commissioner.

The Ombudsmen

13.100 The Ombudsman could be given the oversight function. This would not be the only situation in which a single agency has combined complaint resolution, the giving of guidance and general oversight, the Privacy Commissioner being an example of this. However this would not be our preference. We feel that oversight could more profitably be carried out by an agency at arm's length from the day-to-day workings of the legislation, and which could see freedom of information as part of Government's wider information strategy.

The State Services Commission

13.101 The SSC could well assume the oversight role in relation to the OIA as one of the four central government agencies overseeing the entire state sector. It could be the "owner" of this legislation, as the principles of the OIA support the SSC vision that:[450]

> New Zealanders have a high performing, trusted and accessible State sector, delivering the right services in the right way at the right prices.

It is responsible for ensuring that the state sector is efficient, provides value for money, and effectively delivers services to the New Zealand public. The functions we propose in relation to the OIA sit neatly with these functions.

13.102 More strategically, benefits may be gained through placing the oversight role with the SSC given its leadership role of the E-government programmes across the state sector, including its role developing the overall E-government strategy. E-government is about delivering 'better results by adapting government to the environment of the information age and the internet'. It is also responsible for developing and reviewing the policy framework for New Zealand Government – held information. This is policy 'concerned with the responsibility of public servants in relation to information held by their departments.' The SSC is also jointly responsible for developing the New Zealand Government Open Access and Licensing framework (NZGOAL) in conjunction with the DIA. There are obvious synergies between these information related programmes and the oversight and monitoring of the OIA.

13.103 We are aware that a wider body of agencies than the 'state sector' is subject to the OIA (tertiary education institutions, for instance) but we do not see this as an insuperable obstacle. While such bodies may not be subject to the oversight of the SSC generally, they could be for the purposes of official information. Many of the agencies in this category are crown entities and the SSC is one of the departments responsible for the administration of the Crown Entities Act 2004. We suggest that any involvement by the SSC in matters of official information should apply to core state sector agencies and other central agencies subject to the Act.

13.104 It would be possible to create in legislation a requirement for establishment of a special position or dedicated unit within SSC if the decision were taken to give them oversight of the Act. There is, for example, power in the Financial Advisers Act 2008 to set up the position of a Commissioner for Financial Advisers within the Securities Commission. We favour a similar solution in the SSC in relation to the OIA.

450 < www.ssc.govt.nz >

The Department of Internal Affairs

13.105 In relation to the LGOIMA, we have seen that the DIA currently takes a limited role. We can envisage that role being expanded, so that DIA would oversee local authorities in official information matters, monitoring the legislation in practice, and reporting to Parliament on the Act's operation. As in the case of SSC, the Act could contain provisions for a special position within the Department to undertake such a role. It could also be responsible for the provision of training and education, probably in conjunction with SSC to ensure that there is no duplication.

13.106 The DIA already works closely with Local Government New Zealand (LGNZ) in developing programmes for elected members of local government. DIA could have a particular role to play in ensuring the voice of local authorities is taken into account in the development of training programmes on the LGOIMA. It might organise the delivery of such programmes through the Society of Local Government Managers, or the Local Government Industry Training Organisation.

13.107 The DIA could work as a conduit for local government to make representations to central government about official information matters. We think it would be unobjectionable in relation to LGOIMA for the DIA to have oversight over the "particular local authorities" listed in the schedule to LGOIMA as well as the more generic local authorities.

13.108 If a decision were made to give oversight roles to the DIA and the SSC, a provision requiring consultation with LGNZ would be desirable to ensure local government is given an opportunity to feed into this work. SSC and DIA would also need to consult on policies and proposals to ensure consistency.

A new office of Information Commissioner

13.109 Many jurisdictions abroad now have an Information Commissioner, and this option must also be considered seriously here.

13.110 In New South Wales the reasons put forward in favour of creating a position of Information Commissioner related to independence, accountability, and guardianship in that he or she will be the public proponent of the objects and intentions of the official information system.[451] Moreover, it was said that the establishment of an independent office raises the profile of official information amongst agencies and the community, and incentivises agencies to accord higher priority to official information matters.

451 New South Wales Ombudsmen *Opening Up Government: Review of the Freedom of Information Act 1989* (Sydney, February 2009) at ch 9.

13.111 One obvious benefit of creating a role of Information Commissioner is that it could have oversight of both the OIA and the LGOIMA. The suggestion that SSC and DIA oversee the OIA and LGOIMA respectively risks duplication, and runs the risk that the two agencies might take different views on some questions. It also involves the conferment of new functions on both departments. One way to avoid splitting the oversight functions in relation to two very similar statutes would be to create an independent office holder to oversee them both.

13.112 Another argument that supports the creation of a statutory office relates to independence and being at arm's length from the Executive. An independent office holder that can speak out on matters of access to official information, and promote its cause, could be more effective than any other solution. An oversight body housed within a government agency may be less willing, and indeed constitutionally less able, to hold the government to account. A new, independent office could heighten the profile of freedom of information.

13.113 A third reason favouring the creation of a new statutory Commissioner is the greater likelihood of long term commitment. The Information Authority expired after 5 years; a dedicated unit in the Ministry of Justice was disestablished on restructuring; there is no longer an office of Government Chief Information Officer at the SSC. A new office established by statute would have a greater assurance of permanence than adding new functions to existing agencies.

13.114 On the other hand some significant factors point against the creation of a new office. The most obvious is the financial cost of setting up and maintaining the new office when its proposed functions might be carried out by existing bodies in government.[452] The need for an Information Commissioner may not be as great here as it is in some other jurisdictions where there may be stronger embedded resistance to opening up government. While we must not be guilty of complacency, a number of overseas commentators have compared New Zealand's progress favourably with that elsewhere. A further factor tending against the creation of a separate office is the issue of proliferation of agencies in the New Zealand state sector. Concerns exist about this.[453]

13.115 The option of an Information Commissioner raises two separate questions. Should an Office of Information Commissioner be established in New Zealand, and if the answer is yes, what should its functions be? Should the Office undertake just the proposed new oversight functions or a much wider range of functions, perhaps including the provision of guidance and the handling of complaints. A further question (also asked in our Issues Paper and Review of the Privacy Act 1993) is whether an Information Commissioner, if one were established, should also have functions in relation to information privacy.

452 It should however be noted that the NSW government elected to create an independent office of Commissioner, contrary to the recommendations of the Ombudsman who had recommended that the Commissioner be located in the Ombudsmen's Office on the basis of cost. Above n 451, at 98.

453 See "Report of the Advisory Group on the *Review of the Centre,* presented to the Minister of State Services and Finance, November 2001. This is cited in State Services Commission *Reviewing the Machinery of Government* (Wellington, February 2007) at 18.

Local Government Commission

13.116 The Local Government Commission is established by the Local Government Act 2002. One of its functions is to promote good practice relating to a local authority or to local government generally.[454] Within this formulation the Local Government Commission could in theory carry out a role in relation to the LGOIMA.

13.117 However in practice the Commission's work is more limited than its statutory functions suggest, with the majority relating to setting the boundaries for local authority electorates, constituting new districts and establishing communities. Access to information held by local authorities has little to do with this role. The Commission is primarily concerned with the structures and representation requirements of local government. Its processes involve the creation of local authorities rather than their day to day organisation and operation.

13.118 Given this function, we do not suggest the Local Government Commission should take an oversight role in official information matters in local government.

Local Government New Zealand

13.119 Local Government New Zealand (LGNZ) should also be considered in any decision about oversight of the LGOIMA or any training and education role. LGNZ is not a statutory being and it would be unusual to give such a body statutory functions under the LGOIMA. However, although not constituted by statute, LGNZ is recognised by it. It would not be inappropriate for an oversight body to be required to consult with LGNZ on matters affecting local government, which would create some assurance that the voice of local government is adequately taken into account in decisions. Such a technique is used in other Acts (the Land Transport Management Act 2003 and the Government Roading Powers Act 1989 for example).

Q100 What agency should be responsible for promoting awareness and understanding of the OIA and the LGOIMA and arranging for programmes of education and training for agencies subject to the Acts?

Q101 What agency should be responsible for administrative oversight of the OIA and the LGOIMA? What should be included in the oversight functions?

Q102 Do you think an Information Commissioner Office should be established in New Zealand? If so, what should its functions be?

Q103 If you think an Information Commissioner Office should be established, should it be standalone or part of another agency?

454 Local Government Act 2002, s 30(2).

Chapter 14

Local Government Official Information and Meetings Act 1987

14.1 We were initially asked to review only the Official Information Act 1982. However, very early in the piece it became apparent that we needed also to examine the official information provisions of the LGOIMA. Both deal with access to information held by Government, whether central or local. The important issues are similar in both and most of the reforms we propose for the OIA apply equally to the LGOIMA. So we extended our review to both Acts.

14.2 We do not, however, cover part 7 of the LGOIMA (the meetings provision) or section 44A relating to Local Information Memorandum. Local authorities were surveyed by us in the same questionnaire we used for central government agencies and the responses we received revealed many of the same issues.

DIFFERENCES

14.3 The great majority of provisions in both Acts are identical, with references to Ministers and Departments in OIA being substituted by the relevant local government personnel in the case of the LGOIMA. However there are also significant differences.

Constitutional

14.4 The most significant differences between the OIA and the LGOIMA result from the different constitutional arrangements as between national and local government. National government has a unitary structure culminating in Cabinet. Local government is just that, and involves a large number of separate authorities each governing their own area. These differences are reflected in the Acts in a number of ways.

14.5 First, the grounds of withholding in the LGOIMA do not include grounds relating to the security or defence of New Zealand, New Zealand's international relations and the New Zealand economy. Nor is it necessary to have measures to protect the constitutional conventions involving ministerial responsibility and the like. The "free and frank" provisions are in both Acts however, although the personnel whose disclosures are protected obviously differ in each instance.

Conversely, there is one ground in the LGOIMA which does not appear in the OIA: it relates to the need for a local authority in determining applications under the Resource Management Act to avoid serious offence to tikanga Māori, and to avoid the disclosure of the location of waahi tapu. (We discuss in chapter 7 whether there should be any similar ground in the OIA.)

14.6 Secondly, the differing constitutional arrangements are also reflected in the definition of "official information" in the two Acts. In the OIA that definition is much longer because it needs to take account of Universities, information about Courts and Tribunals, Royal Commissions and a wide range of national bodies.

14.7 Thirdly, the most significant difference relates to the so-called power of veto. In 1987 the power of veto over Ombudsmen's recommendations under the OIA was transferred from the individual Minister to Cabinet. In the absence of any central coordinating body for local government, the veto power in the LGOIMA remains now, as it did from its enactment in 1987, with the local authority which is itself the subject of a recommendation. The nature of the duty imposed by the recommendation thus differs in kind in the two contexts: a duty which is defeasible by the organisation subject to it is different in kind from a duty which is defeasible by another agency. Possibly because of this, the process for exercising a veto in the LGOIMA differs slightly from that in the OIA, in that not only must the reasons for the decision be set out, but so in addition must "the source and purport of any advice on which the decision is based." This further element of transparency is not present in the OIA. For reasons we explain in chapter 11 we propose the abolition of the veto in both Acts. The impact of that on local authorities will, for the reasons we have stated above, be different from that on national government.

14.8 Fourthly, sanctions for breaches of duty differ between the two statutes. If an agency of central government fails to comply with an Ombudsmen's direction to furnish information to the Ombudsmen, the Ombudsmen can report such a failure to the Prime Minister and also make a report to the House of Representatives. There is no equivalent sanction in the LGOIMA. Where the Ombudsmen deem it fit to make a report on the conduct of a Minister or other agency for some other reason, a report about a central government agency can once again be sent to the Prime Minister and House of Representatives. However in relation to a local authority, the LGOIMA provides that such a report is to be sent to the local authority itself, which is then required to publicise its existence and notify the public of the place where it can be inspected. In both instances therefore, publicity is the deterrent, but in the case of the local authority that publicity is undertaken by the offending local authority itself.

14.9 Fifthly, the Ministry of Justice has powers and duties under the OIA. It is required to publish the Directory of Official Information, a publication setting out the functions of departments and organisations. In the LGOIMA as originally passed that function was, in respect of each local authority, imposed on the authority itself. It was required to publish information about itself, its functions and processes, and the documents it held. That requirement is no longer part of the LGOIMA but a very similar provision in the Local Government Act 2002 requires the publication of governance statements by local authorities.[455] Once again the distributive nature of local government stands in contrast to the more unitary nature of central government. Our proposal for agencies to publish information and no longer have an MoJ Directory would make the OIA and LGOIMA similar in this respect.

14.10 The other role of the Ministry of Justice in the OIA is that it is charged with a power to furnish advice or assistance to other departments and organisations to enable them to act in accordance with the OIA. No equivalent function rests with any agency in relation to the LGOIMA.

14.11 We discuss in chapter 13 the need for effective oversight of the official information regime in relation to central government. That need may be thought to be even greater in relation to local government. Its highly individualised character means that in many matters each local authority substantially controls its own destiny, subject of course to the important controls exercised by the Ombudsmen. In chapter 13 we discuss a suggestion that the Department of Internal Affairs, which is presently responsible for the administration of the Act, should take a greater oversight role, or that a new information authority be set up to exercise oversight of the official information activities of both central and local government.

Other differences

14.12 The differences between the OIA and the LGOIMA that we have just been discussing are inevitable given the essentially different character of local and central government. However there are other differences between the two Acts which are more difficult to explain. First, the persons who can request information are differently defined in the two Acts. Under the OIA the power to request is confined to persons who are citizens of New Zealand, or are resident or actually present in New Zealand. Under the LGOIMA there is no such restriction. Any person can make requests.

14.13 Whether this distinction makes much difference in practice is doubtful. It may well be that requests coming from outside the jurisdiction are not within the scope of the LGOIMA according to ordinary jurisdictional principles. But the difference in wording between the two is noticeable, and there seems no reason for it. We do not think the point is a major one, but can see no reason for the difference in drafting. We think the two provisions should be brought into line, and favour the stricter jurisdictional approach of the OIA.

455 Local Government Act 2002, s 40.

14.14 It is of interest that the Privacy Amendment Act 2010 amends the equivalent access provisions of the Privacy Act 1993 by removing the existing requirements of connection with New Zealand, thus enabling requests from persons outside the country. However, the situations are not similar: to allow persons outside New Zealand access to information about themselves is very different from allowing anyone outside New Zealand access to any information whatever.

14.15 Secondly, the purpose sections of the two Acts are different. The OIA has, as a primary purpose, "to increase progressively the availability of official information". By contrast in the LGOIMA, the equivalent provision is "to provide for the availability to the public of official information". Thus an underlying assumption of the OIA was that there would be continual advances in the openness of Government. This same assumption does not appear, at least expressly, in the LGOIMA. Consistently with this, there is no equivalent in LGOMA to the (never used) provision in the OIA providing a right to be given access to categories of information declared by regulation to be available as of right.[456] In the LGOIMA there never was such a power to regulate for open categories of information.

14.16 The reason for the distinction between the two Acts eludes us. It may well just be a reflection of the fact that the LGOIMA was passed in 1987, the year of the expiry of the Information Authority. Openness of government is as important in local government as it is centrally. In an age of advancing technology, making information openly available is easier than ever before. It makes sense to progressively increase access at all levels of Government. Chapter 12 speaks in more detail of proactive disclosure. We can see no distinction between the two types of government in this respect and think that the purpose sections in both Acts should be the same. Both should emphasise *progressive* availability.

14.17 Thirdly, there is one final difference between the two Acts, this time relatively minor. Under OIA section 2(5) information held by an independent contractor in that person's capacity as a contractor is deemed to be held by the relevant agency; under LGOIMA section 2(6) the local authority must have *access* to the information held by the contractor before it is deemed to hold the information. Again we can see no reason for the distinction. We are interested to hear views on whether there is a reason for the difference.

Q104 Do you agree that the LGOIMA should be aligned with the OIA in terms of who can make requests and the purpose of the legislation?

Q105 Is the difference between the OIA and LGOIMA about the status of information held by contractors justified? Which version is to be preferred?

456 OIA, s 21(2).

Chapter 15
Other issues

15.1 In this chapter we deal with some miscellaneous issues: the need for redrafting the Acts; whether the OIA and LGOIMA should be combined in one Act; and the interface between the Public Records Act 2005 and the official information legislation.

REDRAFTING

15.2 There is a question whether the OIA should be redrafted and reenacted in its entirety. There are generally two situations where, on review of an Act, complete redrafting is desirable. The first is where amendments are proposed of such substance or in such number that amending the original act would render it less than desirably coherent or understandable. The second situation is where the original Act is already difficult for its intended audience to read and understand by nature of its language and structure, and where redrafting would render it more accessible.

15.3 We shall take both these matters in turn in relation to the OIA and LGOIMA.

Proposed amendments

15.4 We propose a number of substantive amendments to the OIA and LGOIMA in this paper.

- In relation to the withholding grounds and reasons for refusal there are few amendments proposed, for reasons we gave in chapter 3. But we are suggesting some changes of wording, in particular the "good government" grounds and the "soon to be publicly available" reason for refusal.
- We propose a number of changes to the provisions governing requests and requesters, in particular in relation to charging, calculating time limits, substantial collation and research and vexatious requests.
- We suggest some significant additions to the Acts relating to institutional reform and the need for more proactive disclosure.
- A change is needed to the purpose sections of the Acts to catch up with the fact that individuals now request information about themselves under the Privacy Act 1993, not the OIA or the LGOIMA.
- We also propose revision of the schedules to make it easier to know which organisations are covered by the Acts.

15.5 As we currently envisage these proposed amendments they are probably not extensive enough to require a complete redraft. It might be different if any of them, for example new proactive disclosure provisions, effectively changed the philosophy of the Act.

Accessibility

Language

15.6 The expression of the Act as it currently stands is generally clear enough. There are a few archaisms ("shall", "deemed" and "subject to") but overall the Act is not characterised by the tortuous expression and over-long sentences which are a feature of many of our older Acts of Parliament.

15.7 There are, however, a few provisions which are unduly complicated, and which could do with some reorganisation. The main one is section 2, the definition section, on which a number of submitters commented. We think this section in particular could benefit from a modern drafter's attention. Confusion is caused by the large number of paragraphs in the definition of 'official information' and also by the later subsections of section 2 which deem various kinds of arrangement to be or not to be the holding of official information. We think much could be done by moving these important provisions to a separate section and getting rid of the constant reference to deeming.

15.8 However we do not think the Act is a serious offender in terms of its language, even given the fact that it has to be read and applied by non-lawyers as well as the legally qualified. The view of many respondents was that the Act is not very difficult to read, although newcomers can take a while to get used to it. One put it this way:

> We believe the OI Act is not too difficult to read and understand and we do not advocate change for change's sake. After training and experience, the OIA is no more difficult than any other statute.

Structure

15.9 There was, however, more criticism of the order and structure of the Acts. Many felt that the sections are not currently arranged in logical order. As one respondent put it colloquially:

> There is a fair bit of jumping around and cross-referencing between sections which makes it difficult to follow.

15.10 Related provisions are sometimes separated in the Acts, and there is no attempt to follow a natural chronological order.

15.11 In particular there were comments that section 18 (reasons for refusal) tends to get forgotten and should be more prominently placed adjacent to the grounds for withholding in section 6 to 9. Also, section 52, which contains important provisions about withholding material which could be in contempt, and about other enactments which override the OIA, tends to be out of sight in a section titled 'savings' and should be more upfront. It was also noted that some key

provisions are hidden in the middle of sections where they do not sufficiently stand out. This is particularly so of the public interest override in section 9. Another example was given to us in the following words:

> Another example is the ability to charge for requests which is currently hidden in a wordy section 15(1). It would be useful if these key parts of the OIA regime could be redrafted into stand-alone provisions in Part 1 or Part 2 of the OIA.

15.12 We are inclined to agree that the current order in which the provisions appear in the Acts is not logical and that it should be possible to reorder those provisions in a way which proceeds in a linear progression: making a request; dealing with the request (including the time for doing so); reasons for refusal (including grounds for withholding); process to be followed in both disclosing and withholding information; complaints. Key provisions should be placed where they are clear and prominent.

15.13 Overall, then, mainly for reasons of order and structure rather than language, we think there would be merit in redrafting and re-enacting the OIA. In such a redraft the other difficulties we have just outlined could also be attended to: the language could be modernised where appropriate, and infelicities eliminated.

Q106 Do you agree that the official information legislation should be redrafted and re-enacted?

Combining the OIA and LGOIMA

15.14 Some respondents to our survey believe that the provisions of the OIA and the official information provisions of LGOIMA should be combined in one Act. There was a relatively even split between respondents on this question. In favour of combining the Act are the following arguments.

- Both Acts relate to information about Government. They have the same rationale and the same principle. Bringing them together could enhance and strengthen the message of open Government.
- Many of their provisions are identical, or nearly so.
- Members of the public who are aware of the disclosure regime of local government often do not know the difference between the two Acts, and they often refer to both as "the OIA".
- The fact that local government is subject to a disclosure regime is sometimes not well enough understood. It is sometimes forgotten in discussion of the official information regime. Combining the two Acts could help to raise the profile of the local government regime.
- The same oversight body could be responsible for monitoring and reporting on the operation of the two statutes.
- The Ombudsmen hear complaints under both and the jurisprudence developed through their casenotes is equally applicable to both.

15.15 If the two were to be rolled together, the meetings provisions of LGOIMA could either be incorporated into the new composite Act or moved to the Local Government Act 2002.

15.16 The arguments against combining the Acts are as follows.

- Local and central Government are different, and are overseen by different Government agencies. The Department of Internal Affairs administers the LGOIMA. Local Government New Zealand, which is not a statutory body but is nevertheless recognised by statute, plays a role also. The Ministry of Justice administers the OIA, and the State Services Commission also has some involvement in the provision of guidance. The merging of the two together in the same Act could complicate the question of oversight, depending on which body is to take on that function.
- As we have seen in chapter 14 there are significant differences between LGOIMA and OIA. This is inevitable given the differences between national and local government. For example, some of the withholding grounds are different: for example LGOIMA is not concerned with matters of national security or the national economy nor with confidential communications with other Governments. Conversely, one ground applies to LGOIMA but not to the OIA. Definitions of "official information" currently differ significantly in both Acts. This means that local government officials would need to sift through a new composite Act, picking out the parts that apply to them, and vice versa with national government officials.
- A large number of provisions of the OIA which impose powers and duties on Ministers and officials would have to be amended by adding words appropriate to local government executives and officers. It may be that this could be accomplished by the use of a generic term defined in the interpretation section, but either way there would be awkwardness.
- Since the meeting provisions of the LGOIMA are closely linked to the official information provisions (the grounds for excluding the public from meetings being essentially the same as the official information withholding grounds) it makes sense to have both in an Act specific to local government.

15.17 No doubt all of these difficulties are soluble, perhaps by having separate parts in the same Act. But we have concerns that any combination of the two Acts could result in a more complex piece of legislation than we have now. This was also the view of some of those who responded to our survey:

> Given that it is likely that people only work with one or the other of the two Acts, it would be annoying if the two were combined, resulting in one unwieldy piece of legislation.
>
> It is considered that one Act for both sectors would be less readable and clear and would be confusing, and that the OIA and LGOIMA should remain separate Acts.

15.18 A number made the point that, as far at least as officials are concerned, they work only with one Act or the other, and not both. Merging would have no advantages for them. Currently we are not in favour of combining the two Acts but would welcome views.

Q107 Do you agree that the OIA and the LGOIMA should remain as separate Acts?

THE INTERFACE WITH THE PUBLIC RECORDS ACT 2005

The legislative scheme

15.19 The Public Records Act 2005 (PRA) sets up a recordkeeping framework for Government agencies and local authorities to manage and archive their records. The ambit of the Act is broad. It covers all information a body holds. A record is defined as being:

> Information, whether in its original form or otherwise, including (without limitation) a document, a signature, a seal, text, images, sound, speech, or data compiled, recorded, or stored, as the case may be, –
>
> (a) in written form on any material; or
>
> (b) on film, negative, tape, or other medium so as to be capable of being reproduced; or
>
> (c) by means of any recording device or process, computer, or other electronic device or process

15.20 The definition of 'record' is technology neutral. The PRA as a whole draws no distinction between paper and electronic documents and does not *require* that information be held in one form or the other.

15.21 The PRA imposes an obligation on every public office and local authority to "create and maintain full and accurate records of its affairs, in accordance with normal, prudent business practice, including the records of any matter that is contracted out to an independent contractor."[457] These offices and authorities are required to maintain their records in an accessible form until destruction is authorised under the PRA or another enactment.

15.22 An important aspect of the Act's requirements is that agencies subject to the Act retain records in a format that is accessible now and in the future. Archives New Zealand has developed policies to ensure that electronic records are maintained in a format that allows access to them in the long term. For example emails can be problematic in that they are usually addressed to an individual rather than to an agency so their management can involve particular difficulties.

15.23 Agencies are required to retain records for 25 years, unless disposal is authorised in writing in advance by the Chief Archivist. Archives 25 years old must be transferred to the possession of Archives New Zealand or an authorised repository.

15.24 One of the purposes of the PRA is to ensure good record management, in order to enable the public to hold government to account. This is elaborated on in the Archives New Zealand's 2008/2009 Annual Report:[458]

> One of the indicators of a strong society is having evidence of decisions and actions of government. By keeping good government records, and making those records accessible, the public can be confident that the government is accountable and records of their rights and entitlements are available when needed.

457 Public Records Act 2005, s 17(1).

458 Archives New Zealand *Annual Report 2008/2009* (Wellington, 2009) at 8.

15.25 The PRA and OIA and LGOIMA interact in two significant ways. First, as reflected in the statement above, the PRA supports the official information legislation by ensuring that there is evidence of Government actions and decisions, forming the basis of the 'information' which can be requested. Compliance with a good records management system should improve the experience of officials having to reply to requests for official information. One agency said:

> Ensuring that all [our authority's] information is recorded inside its recordkeeping framework with its requisite metadata not only goes a long way towards PRA compliance, it makes assessment and completion of each OIA request a more efficient and effective process.

Another said:

> Compliance with the Public Records Act 2005 is highly relevant to compliance with the Official Information Act; the two are intertwined. Where documents are well managed and there is a high level of compliance with the Public Records Act, it is much easier to respond to requests.

15.26 Secondly, and probably more importantly, given that the PRA defines what agencies must keep and what can be disposed of, the PRA defines the boundaries of information held by an agency, thereby setting the boundaries of what information can be requested. If it has not been kept, it is not available under the OIA or LGOIMA.

Compliance

15.27 In the responses to our survey we noted considerable variation in agency awareness of the requirements of the PRA. Few report a belief that their agency is already in full compliance with the Act. Some local bodies complain about the implementation costs the PRA imposed on them. Agencies who report that they have sound information management systems in place tend to say that this assists their ability to respond to requests. Many agencies seem to be in a period of transition towards full compliance. Archives New Zealand's latest Annual Report confirms that "agencies are increasingly meeting their recordkeeping accountabilities."[459] So compliance with the PRA is continually improving.

15.28 The Government Recordkeeping survey 2009, carried out by the Archives New Zealand the lead agency responsible for the PRA, found that since the 2008 year, agencies' compliance with the Act improved in a number of ways, but issues in some areas remain, most notably in relation to records that were held in formats that are no longer accessible.

15.29 To meet its obligations under the PRA, Archives New Zealand is currently developing an audit programme to audit the recordkeeping of central government bodies subject to the Act. Local Authorities are not yet subject to audit. It is expected that audits will be carried out in approximately forty agencies per year over a five year cycle. The audit programme will reportedly start in mid-2010.

459 Ibid, at 13.

Reform issues

15.30 In our survey, we did not sense that the interface between those Acts requires legislative change. However some survey responses did suggest that there might be greater alignment.

Aligning the definition of record and information

15.31 One agency said:

> Information and record have different definitions in the OIA and PRA respectively. Greater alignment of definitions for material that is kept by government agencies and material subject to OIA would be desirable.

15.32 The concept of 'official information' in the OIA and LGOIMA is a wide one, befitting the purpose of both Acts. Information is not limited to paper documents; the Acts envisage information being held in electronic and other formats. It even includes 'knowledge' – information that has not yet been reduced to paper.

15.33 As we have seen above, the definition of 'record' in the PRA could hardly be wider – it covers information held in all formats.

15.34 The Select Committee that reported on the Public Records Bill addressed the issue of the definition of "record", responding to concern from some quarters that it could require agencies to retain "every draft of a document, every 'post-it' note or text message for 25 years". The Committee was satisfied that adequate mechanisms were built into the Bill to allow irrelevant and trivial information to be disposed of. The Committee did note however that the broad definition had been retained to ensure "comprehensive coverage" of the new Act.

15.35 We are not currently convinced that the interaction between the definition of "record" in the PRA and the concept of "information" in the OIA and LGOIMA is problematic. They are both wide and all-encompassing. In effect, official information that can be disposed of under the PRA will be disposed of and that will limit what official information is available.

Requesting information that has been destroyed

15.36 One requester had the following complaint:

> It was disappointing to ask for some records under the OIA, find out they had been deleted, complain to the Chief Archivist, and then find that basically nothing happened. There should be some form of sanctions that can be taken against government departments that hide information through deleting it.

Another agency had the following to say:

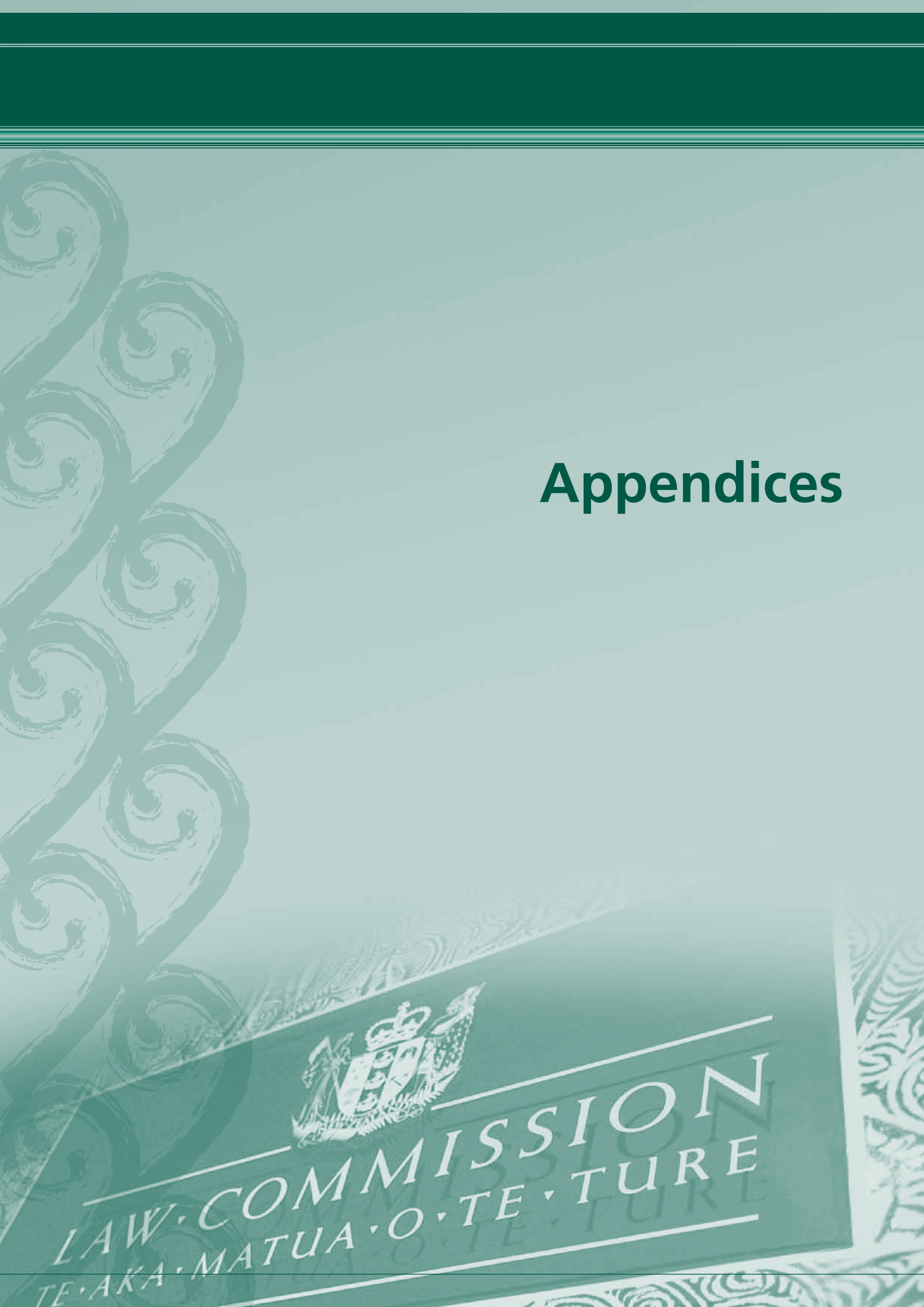
> To the extent that any public organisation is not compliant with its record keeping, it is reasonable (and in accordance with the MOJ guidelines) that no charge should be made for locating information that is not where it should be. There have been instances where Customs has been unable to provide requests for old information because it has been destroyed in accordance with Archives policy.

15.37 White has noted that the OIA governs the processes for releasing information when it exists. The prior question, what information needs to be retained by an agency, is governed by the PRA. White notes that the "power of the OIA is critically dependent on the quality of the public record, including both the information itself and its accessibility."[460] The proper functioning of the OIA thus depends on proper compliance with the PRA. When the PRA has bedded in and agencies have had time to adjust their practices to comply with it, the question may have to be asked whether there should be a ground of complaint to the Ombudsmen (or some other body) that an agency has not kept information in accordance with the PRA. Such non-compliance with the PRA would likely mean an inability to comply with the OIA and LGOIMA.

Q108 Do you have any comment on the interaction between the PRA and the OI legislation? Are any statutory amendments required in your view?

460 Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007) at 119.

Appendices



Appendix A
Discussion questions

CHAPTER 2	Q1	Do you agree that the schedules to each Act (OIA and LGOIMA) should list every agency that they cover?
	Q2	Do you agree that the schedules to the OIA and LGOIMA should be examined to eliminate anomalies and ensure that all relevant bodies are included?
	Q3	Do you agree that SOEs and other crown entity companies should remain within the scope of the OIA?
	Q4	Do you agree that council controlled organisations should remain within the scope of the LGOIMA?
	Q5	Do you agree that the Parliamentary Counsel Office should be brought within the scope of the OIA?
	Q6	Do you agree that the OIA should specify what information relating to the operation of the Courts is covered by the Act?
	Q7	Should any further categories of information be expressly excluded from the OIA and the LGOIMA?
CHAPTER 3	Q8	Do you agree that the OIA and the LGOIMA should continue to be based on a case-by-case model?
	Q9	Do you agree that more clarity and certainty about the official information withholding grounds can be gained through enhanced guidance rather than through prescriptive rules, redrafting the grounds or prescribing what information should be released in regulations?
	Q10	Do you agree there should be a compilation, analysis of, and commentary on, the casenotes of the Ombudsmen?
	Q11	Do you agree there should be greater access to, and reliance on, the casenotes as precedents?
	Q12	Do you agree there should be a reformulation of the guidelines with greater use of case examples?
	Q13	Do you agree there should be a dedicated and accessible official information website?

CHAPTER 4	Q14	Do you agree that the "good government" withholding grounds should be redrafted?
	Q15	What are your views on the proposed reformulated provisions relating to the "good government" grounds?
CHAPTER 5	Q16	Do you think the commercial withholding ground should continue to be confined to situations where the purpose is to make a profit?
	Q17	If you favour a broader interpretation, should there be a statutory amendment to clarify when the commercial withholding ground applies?
	Q18	Do you think the trade secrets and confidentiality withholding grounds should be amended for clarification?
	Q19	Do you agree that the official information legislation should continue to apply to information in which intellectual property is held by a third party?
	Q20	Do you have any comment on the application of the OIA to research work, particularly that commissioned by third parties?
	Q21	Do you think the public interest factors relevant to disclosure of commercial information should be included in guidelines or in the legislation?
	Q22	Do you experience any other problems with the commercial withholding grounds?
CHAPTER 6	Q23	Which option do you support for improving the privacy withholding ground: Option 1 – guidance only, or; Option 2 – an "unreasonable disclosure of information" amendment while retaining the public interest balancing test, or; Option 3 – an amendment to align with principle 11 of the Privacy Act 1993 while retaining the public interest test, or; Option 4 – any other solutions?
	Q24	Do you think there should be amendments to the Acts in relation to the privacy interests of: (a) deceased persons? (b) children?
	Q25	Do you have any views on public sector agencies using the OIA to gather personal information about individuals?

CHAPTER 7

Q26 Do you agree that no withholding grounds should be moved between the conclusive and non-conclusive withholding provisions in either the OIA or LGOIMA?

Q27 Do you think there should be new withholding grounds to cover:

(a) harassment;

(b) the protection of cultural values;

(c) anything else?

Q28 Do you agree that the "will soon be publicly available" ground should be amended as proposed?

Q29 Do you agree that there should be a new non-conclusive withholding ground for information supplied in the course of an investigation?

Q30 Do you have any comments on, or suggestions about, the "maintenance of law" conclusive withholding ground?

CHAPTER 8

Q31 Do you agree that the Acts should not include a codified list of public interest factors? If you disagree, what public interest factors do you suggest should be included?

Q32 Can you suggest any statutory amendment which would clarify what "public interest" means and how it should be applied?

Q33 Do you think the public interest test should be contained in a distinct and separate provision?

Q34 Do you think the Acts should include a requirement for agencies to confirm they have considered the public interest when withholding information and also indicate what public interest grounds they considered?

CHAPTER 9

Q35 Do you agree that the phrase "due particularity" should be redrafted in more detail to make it clearer?

Q36 Do you agree that agencies should be required to consult with requesters in the case of requests for large amounts of information?

Q37 Do you agree the Acts should clarify that the 20 working day limit for requests delayed by lack of particularity should start when the request has been accepted?

Q38 Do you agree that substantial time spent in "review" and "assessment" of material should be taken into account in assessing whether material can be released, and that the Acts should be amended to make that clear?

Q39 Do you agree that "substantial" should be defined with reference to the size and resources of the agency considering the request?

Q40 Do you have any other ideas about reasonable ways to deal with requests that require a substantial amount of time to process?

Q41 Do you agree it should be clarified that the past conduct of a requester can be taken into account in assessing whether a request is vexatious?

Q42 Do you agree that the term "vexatious" should be defined in the Acts to include the element of bad faith?

Q43 Do you agree 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?

Q44 Do you think that provision should be made for an agency to declare a requester "vexatious"? If so, how should such a system operate?

Q45 Do you agree that, as at present, requesters should not be required to state the purpose for which they are requesting official information nor to provide their real name?

Q46 Do you agree the Acts should state that requests can be oral or in writing, and that the requests do not need to refer to the relevant official information legislation?

Q47 Do you agree that more accessible guidance should be available for requesters?

CHAPTER 10

Q48 Do you agree the 20 working day time limit should be retained for making a decision?

Q49 Do you agree that there should be express provision that the information must be released as soon as reasonably practicable after a decision to release is made?

Q50 Do you agree that, as at present, there should be no statutory requirement to acknowledge receipt of an official information request but this should be encouraged as best practice?

Q51 Do you agree that 'complexity of the material being sought' should be a ground for extending the response time limit?

Q52 Do you agree there is no need for an express power to extend the response time limit by agreement?

Q53 Do you agree the maximum extension time should continue to be flexible without a specific time limit set out in statute?

Q54 Do you agree that handling urgent requests should continue to be dealt with by Ombudsmen guidelines and there is no need for further statutory provision?

Q55 Do you agree there should be clearer guidelines about consultation with ministerial offices?

Q56 Do you agree there should not be any mandatory requirement to consult with third parties?

Q57 Do you agree there should be a requirement to give prior notice of release where there are significant third party interests at stake?

Q58 How long do you think the notice to third parties should be?

Q59 Do you agree there should be provision in the legislation to allow for partial transfers?

Q60 Do you agree there is no need for further statutory provisions about transfer to ministers?

Q61 Do you have any other comment about the transfer of requests to ministers?

Q62 Do you think that whether information is released in electronic form should continue to depend on the preference of the requester?

Q63 Do you think the Acts should make specific provision for metadata, information in backup systems and information inaccessible without specialist expertise?

Q64 Should hard copy costs ever be recoverable if requesters select hard copy over electronic supply of the information?

Q65 Do you think that the official information legislation needs to make any further provision for agencies to place conditions on the re-use of information, or are the current provisions sufficient?

Q66 Do you agree there should be regulations laying down a clear charging framework for both the OIA and the LGOIMA?

Q67 Do you have any comment as to what the framework should be and who should be responsible for recommending it?

Q68 Do you agree that the charging regime should also apply to political party requests for official information?

CHAPTER 11

Q69 Do you agree that both the OIA and LGOIMA should set out the full procedures followed by the Ombudsmen in reviewing complaints?

Q70 Do you think the Acts provide sufficiently at present for failure by agencies to respond appropriately to urgent requests?

Q71 Do you agree with the existing situation where a person affected by the release of their information under the OIA or the LGOIMA cannot complain to the Ombudsman?

Q72 Do you agree there should be grounds to complain to the Ombudsmen if sufficient notice of release is not given to third parties when their interests are at stake?

Q73 Do you agree that a transfer complaint ground should be added to the OIA and the LGOIMA?

Q74 Do you think there should be any changes to the processes the Ombudsmen's follows in investigating complaints?

Q75 Do you agree that the Ombudsmen should be given a final power of decision when determining an official information request?

Q76 Do you agree that the veto power exercisable by Order in Council through the Cabinet in the OIA should be removed?

Q77 Do you agree that the veto power exercisable by a local authority in the LGOIMA should be removed?

Q78 If you believe the veto power should be retained for the OIA and LGOIMA, do you have any comment or suggestions about its operation?

Q79 Do you agree that judicial review is an appropriate safeguard in relation to the Ombudsmen's recommendations and there is no need to introduce a statutory right of appeal to the Court?

Q80 Do you agree that the public duty to comply with an Ombudsman's decision should be enforceable by the Solicitor-General?

Q81 Do you agree that the complaints process for Part 3 and 4 official information should be aligned with the complaints process under Part 2?

Q82 Do you agree that, rather than financial or penal sanctions, the Ombudsmen should have express statutory power to publicly draw attention to the conduct of an agency?

Q83 Should there be any further enforcement powers, such as exist in the United Kingdom?

CHAPTER 12

Q84 Do you agree that the OIA should require each agency to publish on its website the information currently specified in section 20 of the OIA?

Q85 Do you think there should be any further mandatory categories of information subject to a proactive disclosure requirement in the OIA or LGOIMA?

Q86 Do you agree that the OIA and LGOIMA should require agencies to take all reasonably practicable steps to proactively release official information?

Q87 Should such a requirement apply to all central and local agencies covered by the OI legislation?

Q88 What contingent provision should the legislation make in case the "reasonably practicable steps" provision proves inadequate? For example, should there be a statutory review or regulation making powers relating to proactive release of information?

Q89 Do you think agencies should be required to have explicit publication schemes for the information they hold, as in other jurisdictions?

Q90 Do you agree that disclosure logs should not be mandatory?

Q91 Do you agree that section 48 of the OIA and section 41 of the LGOIMA which protect agencies from court proceedings should not apply to proactive release?

CHAPTER 13

Q92 Do you agree that the OIA and the LGOIMA should expressly include a function of providing advice and guidance to agencies and requesters?

Q93 Do you agree that the OIA and LGOIMA should include a function of promoting awareness and understanding and encouraging education and training?

Q94 Do you agree that an oversight agency should be required to monitor the operation of the OIA and LGOIMA, collect statistics on use, and report findings to Parliament annually?

Q95 Do you agree that agencies should be required to submit statistics relating to official information requests to the oversight body so as to facilitate this monitoring function?

Q96 Do you agree that an explicit audit function does not need to be included in the OIA or the LGOIMA?

Q97 Do you agree that the OIA and LGOIMA should enact an oversight function which includes monitoring the operation of the Acts, a policy function, a review function, and a promotion function?

Q98 Do you agree that the Ombudsmen should continue to receive and investigate complaints under the OIA and the LGOIMA?

Q99 Do you agree that the Ombudsmen should be responsible for the provision of general guidance and advice?

Q100 What agency should be responsible for promoting awareness and understanding of the OIA and the LGOIMA and arranging for programmes of education and training for agencies subject to the Acts?

Q101 What agency should be responsible for administrative oversight of the OIA and the LGOIMA? What should be included in the oversight functions?

Q102 Do you think an Information Commissioner Office should be established in New Zealand? If so, what should its functions be?

Q103 If you think an Information Commissioner Office should be established, should it be standalone or part of another agency?

CHAPTER 14

Q104 Do you agree that the LGOIMA should be aligned with the OIA in terms of who can make requests and the purpose of the legislation?

Q105 Is the difference between the OIA and LGOIMA about the status of information held by contractors justified? Which version is to be preferred?

CHAPTER 15

Q106 Do you agree that the official information legislation should be redrafted and re-enacted?

Q107 Do you agree that the OIA and the LGOIMA should remain as separate Acts?

Q108 Do you have any comment on the interaction between the PRA and the OI legislation? Are any statutory amendments required in your view?

Appendix B
Glossary

This glossary contains a list of acronyms and abbreviations that are used regularly throughout this issues paper, and their corresponding meanings or full citations.

CCO	Council Controlled Entity
CRI	Crown Research Institute
Danks Committee	Committee on Official Information established in 1978
DIA	Department of Internal Affairs
ICO	Information Commissioner's Office (UK)
Information Authority	Information Authority established under Part 8 of the OIA (expired 1987).
LGNZ	Local Government New Zealand
LGOIMA	Local Government Official Information and Meetings Act 1987
LIM	Land Information Memorandum
MOJ	Ministry of Justice
OA	Ombudsmen Act 1975
OIA	Official Information Act 1982
PRA	Public Records Act 2005
SOE	State-Owned Enterprise
SSC	State Services Commission

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