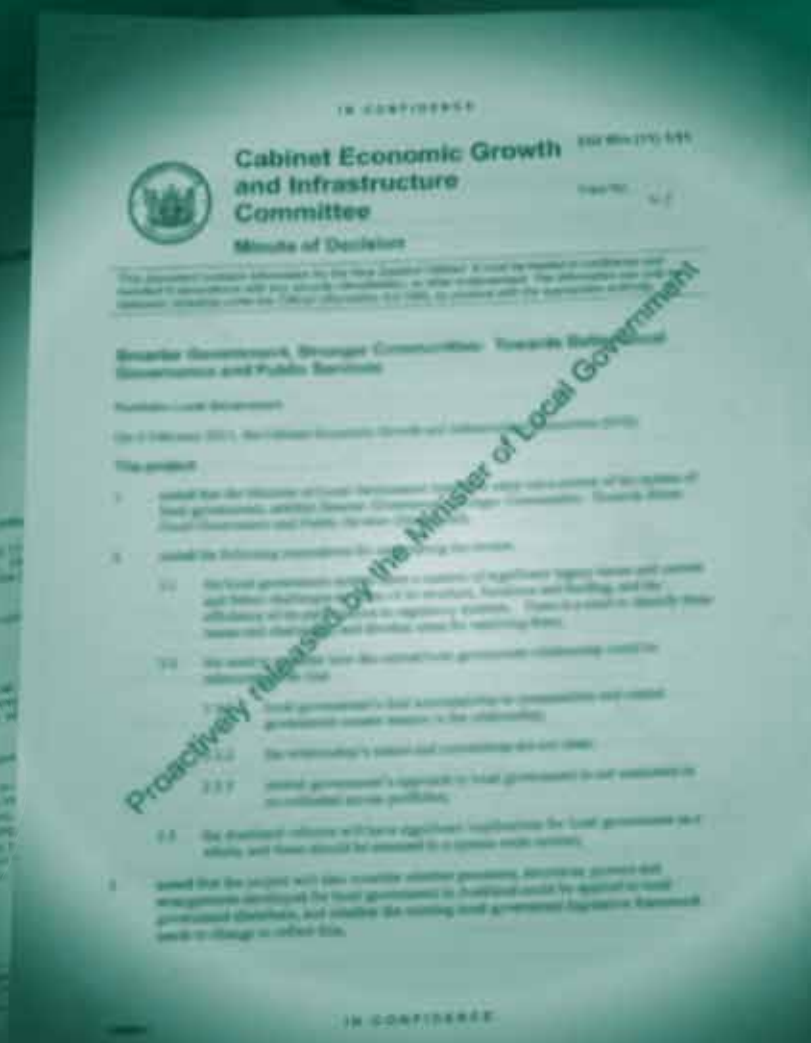




THE PUBLIC'S RIGHT TO KNOW

REVIEW OF THE OFFICIAL INFORMATION LEGISLATION





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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 expression “knowledge is power” is usually attributed to Francis Bacon. The implications of that expression in the political domain have been much debated over the centuries. There is however a clear acceptance today, on a worldwide basis and in international law, that access to information held by government is vital insofar as it enables better participation in the democratic process; helps to promote trust in government; and, if necessary, enables government to be held to account.

Further, the State holds huge amounts of information which can and should be able to be resorted to by researchers, businesses, and citizens, for all sorts of purposes outside government. In short, the State itself is perhaps the major repository of information of general public utility in any given society.

In the 1980s New Zealand passed the Official Information Act and the Local Government Information and Meetings Act to enable citizens to resort to this repository, as of right. If a request was made, the information thereafter had to be made available, unless there was good and sufficient reason for the declination of the request. That was a sea change from the philosophy which had prevailed to that point of time in our history.

There is no question that has been a development of the greatest political importance and utility to New Zealanders. The fundamental premises of official information legislation have been vindicated. Indeed, so much is this policy part of the everyday lives of New Zealanders now that it is not easy to recall a time when it did not prevail.

As always, no legislation is ever entirely perfect. And over a quarter of a century of marked social and economic developments there have been many changes in context. There have been huge developments in technology and the management of information; the commercial context has itself shifted markedly with information itself acquiring intrinsic value and commodity-like characteristics; public expectations – buoyed by the very success of the initial legislation – have grown as to a culture of openness and availability of information.

At the same time, some operational difficulties have revealed themselves; and some aspects of the exceptions to the legislation have been shown to require renewed attention.

There had been limited reviews of some specific sections of the Act by this Commission in 1997, and some research projects in New Zealand. But it was timely to undertake a full scale review.

The Commission received such a reference in 2009. The Commission published an Issues Paper (*The Public's Right to Know*) in September 2010. And it has, since that time, carried out wide-ranging consultations. Based on those submissions and further consideration by the Commission, it has now prepared its Final Report for tabling in Parliament, in accordance with the usual processes. It is hoped that this Report will help to sustain and advance this beneficial legislation through a future of successful operation in this country.

The Law Commissioner responsible for this report was John Burrows, and the Legal and Policy Advisers were Margaret Thompson, Joanna Hayward, Mihiata Pirini and Andrea King.

A handwritten signature in blue ink, appearing to read 'G Hammond'.

Hon Sir Grant Hammond KNZM
President

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We particularly wish to thank the following people and organisations whom we met or consulted with in preparing this final report. Their generous contribution is greatly appreciated.

Office of the Ombudsmen

Office of the Privacy Commissioner

Chief Justice of New Zealand

Speaker of the House of Representatives

Office of the Clerk of the House of Representatives

Department of the Prime Minister and Cabinet

Office of the Auditor-General

Cabinet Office

Ministry of Justice

Department of Internal Affairs

State Services Commission

Local Government Commission

The Treasury

Data and Information Re-Use Chief Executives Steering Group

Keitha Booth, Programme Leader, NZ Open Government Data and Information Programme

Better Public Services Taskforce

Nicola White

Brook Barrington

Glossary

This glossary contains a list of terms, acronyms and abbreviations that are used regularly throughout this report, and their corresponding meanings or full citations.

Agency	A public entity that is subject to the OIA or LGOIMA.
CCO	Council Controlled Organisation
CRI	Crown Research Institute
Danks Committee	Committee on Official Information established in 1978, which produced reports resulting in the passage of the OIA
DIA	Department of Internal Affairs
Information Authority	Information Authority established under Part 6 of the OIA (expired 1988)
Issues Paper	Law Commission <i>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</i> (NZLC IP 18, 2010)
LGOIMA	Local Government Official Information and Meetings Act 1987 – see extracts in Appendix C
MMP	Mixed Member Proportional electoral system
NZGOAL	New Zealand Government Open Access and Licensing Framework (2010)
OIA	Official Information Act 1982 – see extracts in Appendix C
Official information legislation	The OIA and LGOIMA
OQR	Ombudsmen Quarterly Review

Oversight office	The office or office holder to have oversight of the official information legislation, proposed in chapter 13
PRA	Public Records Act 2005
SSC	State Services Commission
Survey	Law Commission survey seeking the views of agencies and requesters about the official information legislation (2009–2010)

Discussion in this report usually relates equally to the operation of the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987. Where there are identical or almost identical provisions in both the OIA and 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

1. The Official Information Act 1982 (the OIA) and the Local Government Official Information Amendment Act 1987 (the LGOIMA) establish a regime of openness in central and local government respectively. They are based on the principle that if information is requested from public agencies, the information must be disclosed unless a good reason for withholding can be established. The only available good reasons are those provided for in the Acts.
2. The context has changed dramatically since the Acts were originally passed. The technology revolution has made information much more readily available. This has increased public expectations of openness and has made a reality the proactive release of information without the necessity of anyone asking for it.
3. The commercial setting has changed too. Many state agencies and local authority entities now operate in the marketplace where they deal with, or are in competition with, private organisations.
4. The legislative landscape in which the official information legislation operates continues to shift. The Privacy Act 1993 and Public Records Act 2005, for example, impact directly on the official information regime, and the MMP electoral system has fundamentally altered the dynamics of New Zealand politics.
5. Official information legislation has been the subject of review and consideration overseas as well as in New Zealand. This review has been informed by the thrust of reform in those other places.
6. We have been very aware in conducting this review of the resource stringencies which currently affect government agencies as much as the private sector. There is no doubt that official information requests impose real burdens on agencies and this has been an important consideration in the way we have approached this review.
7. The range of recommendations in this final report is wide. In addition to legislative amendment many recommendations propose development of guidance and best practice models.

The Act's principles (chapter 2)

8. We conclude that the fundamental principles on which the Acts are based remain sound. The presumption in favour of openness has had very positive results and the culture in government has changed markedly since the Acts were passed. We also support the fundamental approach of the Act that each case must be assessed on its merits: our regime leans against laying down rules about categories of information as other jurisdictions do. However while the fundamentals remain sound, time and experience, and the changes in context to which we have alluded, have made reform necessary.

The withholding grounds (chapters 3–8)

9. Of necessity the withholding grounds in the Acts are stated at a broad level of generality. Difficulty can sometimes arise when applying them to particular fact situations. This can be especially problematic for small agencies who have not had frequent experience in applying the legislation. We think that for the most part legislative amendment of the withholding grounds would achieve little, and that what is necessary is improved guidance on how to apply those grounds.

Guidance

10. We recommend that the Ombudsmen maintain a database of decided cases which can serve as examples and precedents, and that they revise the current guidelines about the withholding grounds, using decided cases as examples to provide more clarity. This is one of our key recommendations. We think it is particularly important in relation to the maintenance of the law, privacy, commercial interest and good government grounds. In relation to the last, uncertainty can arise about the respective roles of ministers and their departments in relation to OIA requests, and we recommend specific guidance on this relationship, in particular on which matters are more closely connected with the functions of Ministers so as to justify the transfer of requests to them.

Public interest

11. Many of the withholding grounds are subject to a public interest override. In other words, even if such a withholding ground is made out, it can sometimes be overridden by the greater public interest in releasing the information. That override is sometimes not applied as well as it might be and again we think it would benefit from careful guidance with plenty of examples. We recommend a recasting of the relevant provision of the legislation in order to give the public interest requirement more prominence.

Changes to the withholding grounds

12. In a few cases, though, we think that more than improved guidance is needed and that statutory amendment of the grounds is required. Feedback from submitters is to the effect that the good government grounds are currently obscurely and confusingly framed. We have carefully considered and consulted on these provisions and recommend a particular redrafting of them.
13. We also recommend legislative measures to give clearer protection to commercial interests and third party information. That area is presently the focus of some controversy and dissatisfaction. We recommend the following measures:
 - adding a new withholding ground based on the protection of financial and competitive position;
 - where third party information is held by an agency, and the agency decides that the public interest requires its release to a requester, notice should be given in advance to the third party;
 - in cases where information is released without properly considering the legislative criteria, the aggrieved person should have a right to complain to the Ombudsmen.
14. We propose the addition of two new withholding grounds. One relates to information supplied in the course of a statutory investigation or inquiry. We recommend a withholding ground to cover information provided to investigations or inquiries authorised by statute where disclosure is likely to prejudice the outcome. The second proposal relates to cultural matters. There is currently a limited provision for this in LGOIMA but nothing equivalent in the OIA. We recommend that further work and consultation be undertaken to develop a withholding ground to protect sensitive cultural information.

Requests and resources (chapter 9)

15. There is no doubt that handling requests can create a burden on agencies: communicating with requesters, finding the information and properly assessing it for release takes time and expertise. It is important that a correct balance be drawn between the freedom of information which is at the heart of the legislation, and the resources available to meet requests. Particularly troublesome are large ill-defined fishing requests which can require days, even weeks, of work. We think legislative change is necessary. We recommend amendments to clarify when a request may be refused because the information is publicly available, and deal also with the following matters.

Due particularity

16. We think the term “due particularity” as used in the legislation in relation to requests needs clearer definition. There should be a duty on agencies to help requesters clarify requests which are insufficiently “particular”, but if that cannot be achieved the request will be of no effect.

Substantial collation and research

17. We believe that the current ground for refusal of a request that the request requires substantial collation and research should be extended by explicitly recognising that the time taken in requisite consultation, and in assessing the documents, should be taken into account in determining whether the request places unreasonable burdens on the agency. We propose a test that the request can be refused if it substantially and unreasonably diverts the resources of the agency. Nevertheless, to ensure that there is a proper balance with the requirements of openness, we also recommend that a request should not be refused on this ground unless the agency has first attempted to consult with the requester.

“Vexatious” requests

18. Frequent requesters can also be problematic for resource-strapped agencies. There currently appears to be some uncertainty as to what constitutes a vexatious request. We recommend a plain English definition of the term “vexatious” and a requirement that in determining whether a particular request is vexatious, the agency is entitled to look at the past conduct of the requester.

Processing requests (chapter 10)

19. In Chapter 10 we examine some issues about processing requests. Some of these are quite technical but important nonetheless.
20. In practice the 20 working days which the Act allows for making a decision on requests is also generally the time in which the information is released and we recommend this should be reflected in the legislation. We recommend clarification of the extension of time provisions to recognise that there can be one further extension of time beyond the initial extension and also clarification of the transfer provisions, to recognise in particular that partial transfers are permitted.

21. The Act is currently very unclear about the process for handling requests which are said by the requester to be urgent. Provided reasons for urgency are given, we recommend that an agency should afford a request urgency if it is reasonably practicable in the circumstances to do so. We also recommend that third parties should be notified if the agency decides that the public interest requires release of their private, confidential or commercially sensitive information.
22. Finally, we recommend that there be regulations about charging for the supply of information. This is to ensure consistency and regularity among agencies on a matter where there is currently considerable variation in practice. However we identify that further work is needed to develop a comprehensive charging framework.

Complaints and remedies (chapter 11)

Alignment of process

23. Currently the OIA provides for two quite distinct processes for review of decisions. Decisions on requests for access to official information under Part 2 of the Act are reviewed by the Ombudsmen using the processes specifically provided for by the OIA. Parts 3 and 4 are different. They relate to information to which there is a right of access, and access by bodies corporate to information that relates to them. Requests under Part 3 and 4 are currently seen as of a different order to requests under Part 2, and are dealt with by the Ombudsmen under the Ombudsmen Act rather than under the OIA. This duality is confusing and unsatisfactory. We recommend that the processes be aligned and that the prescribed process be contained exclusively within the OIA.

New grounds of complaint

24. This chapter also recommends that there be additional grounds of complaint to the Ombudsmen to cover unsatisfactory agency processes such as lack of timeliness, decisions on transfer, and failure to give notice to third parties where required.
25. More significantly, we also recommend that just as failure to release information can be a ground of complaint, so should there be a right for persons to complain if they feel information has been wrongly released. This would not be an appeal as such. The damage will already have been done. But it is an opportunity for the Ombudsmen to pronounce on review that proper considerations were not taken into account and that the agency did not apply the statutory requirements satisfactorily. It would, in other words, be a further incentive for agencies to apply the provisions of the Act with proper care, and the Ombudsmen's decisions would serve as further valuable guidance on the proper application of the Act.

Enforceability

26. The chapter also deals with the enforceability of Ombudsmen recommendations. Such recommendations are declared by the Act to create a public duty unless they are vetoed, but the legislation leaves open how that public duty is to be enforced. We recommend that that gap be filled by providing that the individual concerned can bring proceedings against the agency.

The veto

27. At present the Ombudsmen can recommend release of information which an agency has wrongly withheld. That recommendation can effectively be vetoed by Order in Council in the case of central government, and by the Local Authority itself in the case of local government. In the Issues Paper we gave careful consideration as to whether the right of veto should be retained, given that it is almost never used.
28. We have concluded, as the result of submissions, that, in the case of central government in particular, the veto serves a valuable role in delineating the relationship between the Ombudsmen and the Executive. Its very existence serves to maintain the appropriate equilibrium even if the veto is never used. We have decided to recommend its retention.
29. We have decided similarly in the case of local government, but recommend that there should be an alignment there with central government by providing that it should not be the local authority itself which exercises the veto power, but rather that it should be done by Order in Council. That is already the case in relation to a number of bodies which, although they are of a local character, are subject to the OIA.

Proactive release (chapter 12)

30. The subject matter of Chapter 12 is among the most important in the report. Digital technology now enables much information to be proactively released to the public without any need to ask for it. That is already happening on two fronts.
31. First, the 2011 Cabinet *Declaration on Open and Transparent Government* directs central government agencies and encourages others to proactively release high value data. The *New Zealand Government Open Access and Licensing Framework* (NZGOAL) policy encourages agencies releasing data in this way to license its reuse by members of the public.

32. Secondly, there is a growing trend for departments and other agencies to release important policy documents publicly and place them on their website. Many Cabinet papers are now made available in this way. The rationales for these two parallel initiatives are different, but their thrust is the same: namely that government-held information should be made freely available. This is in line with a purpose of the OIA which is stated in section 4 to be “to increase progressively the availability of official information to the people of New Zealand.”
33. The benefits of proactive release are obvious, not least that it removes the need for individuals to request information and absolves the agency from the need to deal with multiple requests. We believe that the official information legislation should recognise the value of this practice, and while stopping short of requiring specific *categories* of information to be released, it should impose a duty on agencies to take reasonable steps to proactively release material. What is reasonable, of course, would depend on the nature of the information and the nature and resources of the agency. This, we believe, is the way of the future: increasing transparency and availability of information. Such a development should alleviate to some degree the present concern about the workload engendered in dealing with requests.
34. Confusion also appears to be developing around how the withholding grounds in the OIA relate to proactive release. We believe the legislation should clarify that relationship. Currently, the withholding grounds are limited to cases where information is requested by a particular requester. Proactive release does not fall within that mantra. Nevertheless it is desirable that in proactively releasing information the agency should at least have regard to the withholding grounds, as they are designed to protect important public and private interests. Of particular concern are cases where the grounds protect third party interests. In the case of personal information, we believe it is the Privacy Act which should continue to govern, and that if sensitive personal information is inappropriately released proactively, a complaint may be made to the Privacy Commissioner. Where the information is of a commercial nature or is confidential and affects third parties, it should not be proactively released without the consent of those third persons.
35. We also discuss the role of section 48 of the OIA, which exempts agencies from legal liability for the good faith release of information in response to an OIA request. Some agencies advocated that this protection from liability should apply also to proactive release. We believe that would go too far and cannot be justified. We recommend that section 48 should not apply in the context of proactive release of information to the world. Otherwise individual rights such as those to reputation, intellectual property and privacy would be inappropriately prejudiced. So might the public interest in such matters as the administration of justice.

Oversight and other functions (chapter 13)

36. In striking contrast to legislation such as the Privacy Act 1993, the Public Records Act 2005 and the Human Rights Act 1993 which assign clear leadership functions, the OIA and LGOIMA confer very few functions on any agency. There is indeed only a complaints function, which is conferred on the Ombudsmen. The Ombudsmen have gone beyond the call of their statutory duties in trying to fill the void since the work of the Information Authority finished in 1988.
37. In an age when transparency and openness are so important, and the pressure for access to information so demanding, we consider the policy issues require dedicated and balanced leadership. There is a strong relationship between our review and Government's strategic objectives in bringing the public service into the digital age. Streamlining the operation of the official information function and encouraging more proactive disclosure of official information will potentially reduce the transaction costs of individual requests. We recommend the oversight functions which we believe are necessary to achieve these objectives. They should result in cost benefits.
38. We recommend that the legislation should expressly provide for functions to ensure the proper working of the legislation and its continuing fitness for purpose, including its interaction with other legislation and policy relating to government information. We recommend that oversight could incorporate the following statutory functions; policy advice, review, promotion of best practice, statistical oversight, oversight of training for officials, oversight of guidance for requesters, and preparation of an annual report.
39. We recommend that the guidance function should lie with the Ombudsmen, who are exercising it anyway in the absence of a statutory mandate to do so. We recommend that the oversight functions should lie with a statutory office or office holder. In its policy role, the office would not only lead and advocate good practice under the OIA and the LGOIMA, it would oversee the co-ordination of the official information legislation with the Public Records Act, which also covers both central and local government agencies. It would also facilitate and encourage the proactive release of information.
40. In principle we are attracted to the idea of an Information Commissioner as exists in several other jurisdictions, but we recognise that it may not be practical to move to this model in the current fiscal climate. If this is the case, where the oversight functions should be otherwise placed within the State Services will depend on a number of organisational factors that go beyond the scope of this report.

41. Nevertheless, we endorse further planning to develop an integrated management framework that can provide strategic oversight, leadership and co-ordination of all government held information. The location of that framework should take account of the fact that both central and local government are involved, that the functions are truly cross-government, and that they involve more than just the OIA but encompass the whole question of management and access to information.

Scope (chapter 14)

42. One of the most difficult questions in all jurisdictions is which agencies should be subject to the official information legislation. The existence of state funding and state control are obviously two criteria. But they alone are not conclusive. We suggest that the criteria contained in the Legislation Advisory Committee Guidelines provide a useful starting point, although we suggest some additions to that list. We note that at present it is often not easy to determine which agencies are, and which are not, within the scope of the official information legislation, because currently one needs to refer to several acts of Parliament to get an answer to that question. We recommend that all the agencies subject to the OIA and LGOIMA should be comprehensively stated in the schedules to those two Acts. There should be no need to cross-refer elsewhere.
43. More than that, we note some anomalies, or apparent anomalies, in the present schedules. Organisations which one might have thought should be there, sometimes are not, for no apparent reason. We recommend that a working party be set up to review the present schedules and to rationalise them in accordance with the criteria we have suggested to ensure that all agencies which should be within the scope of the legislation are included.
44. We recommend that a number of specific agencies should be included within scope.
 - (a) The Officers of Parliament should be included with special exemptions in relation to their investigatory functions. These are the Office of the Ombudsmen, Office of the Controller and Auditor General and the Parliamentary Commissioner for the Environment. (At present only the Commissioner for the Environment is included and without the appropriate exemptions.)
 - (b) The Parliamentary Counsel Office should be included.
 - (c) Information about the courts should be included with regard to administrative matters but not judicial functions. Rather than use the general language of “judicial” and “administrative”, we specify the types of information which should be disclosable, and those which should not be. The judges are not part of the executive, and their special position must be recognised.

- (d) Similarly certain information held by the Office of the Clerk and Parliamentary Service should be included, and also the Speaker in his role as Responsible Minister for the parliamentary agencies under the Public Finance Act. It is necessary to itemise the types of information which should be disclosable, and to specifically exclude some types which should not, particularly information which could affect the proceedings of Parliament. Parliament must remain in control of its own proceedings.

Legislation (chapters 15–16)

45. There is a close relationship between the official information legislation and the Public Records Act 2005. The one prescribes what information should be maintained by agencies and the record-keeping practices which are necessary to maintain it. The other prescribes the making available of that information. We examine the inter-relationship between these two Acts, and recommend amendments where they are presently not entirely congruent. We also recommend that if an agency is unable to supply information for a reason which can be attributed to poor record keeping, the Ombudsmen should be able to refer the matter to the Chief Archivist who has authority to investigate further.
46. There are some also inexplicable differences between the LGOIMA and OIA and we recommend alignment of those provisions.
47. While some improvements can be made to the present position by guidance, education and improved practice, legislation is necessary to achieve proper reform. In some areas that need is urgent: the commercial interest withholding ground and the management of unreasonable and time-consuming requests are but two examples. The suite of reforms we recommend will conduce to better and appropriate flows of information in a modern society, and align with current government priorities as outlined in the 2011 report of the Advisory Group on Better Public Services. A recurring theme of that report is that citizens and businesses expect to have a say in State Services and that the direct influence of citizens and businesses on service delivery must be at the heart of State Sector reform. To accomplish this, more information must be available - but with the necessary boundaries imposed by resource constraints.
48. We believe that the reforms we advocate can best be achieved by a new Act, rather than by piecemeal amendments to the old Acts. Things have moved on substantially in the 30 years since the OIA was passed, and it is time for a repeal and re-enactment. We also favour combining the OIA and LGOIMA, given the similarity between them. The message of openness may be thought to be strengthened by stating the overarching principles in one Act. But we are aware that this may create drafting complexities, and while a single Act is our preference, we leave that decision to the drafting experts.



Chapter 1

Introduction

BACKGROUND

1.1 Over the past three decades there has been a worldwide trend towards legislating for freedom of access to official information. The importance of citizens having access to government information is also recognised in international law.¹

1.2 The rationales in favour of open government and access to official information are clear and well-rehearsed. They include:

- enabling participation in the democratic process;
- allowing government to be held to account; and
- promoting trust in government, rather than engendering suspicion through secrecy.

In addition, the release of official information can have benefits for wider society. Government collects and holds much information that can be analysed and used by businesses, researchers, and others outside government.

1.3 In recognition of these benefits the Official Information Act was passed in 1982, and the Local Government Official Information and Meetings Act in 1987. Both Acts are based on the fundamental premise that if a citizen requests information from a government agency the information “shall be made available unless there is good reason for withholding it”. That was a sea-change from the policy of the Official Secrets Act 1951 which preceded them.

1.4 It will be helpful at this point to summarise the scheme of the present legislation.

THE SCHEME OF THE ACTS

- 1.5 The OIA and LGOIMA provide a mechanism for citizens to access government information. Both Acts list the agencies which are subject to them. The great majority are listed by name, others are referred to by category, and others by reference to schedules of other Acts. Only the agencies thus listed are subject to the legislation. As we shall show later in chapter 14, there are anomalies in some of the lists.
- 1.6 Official information is any information *held* by one of these agencies. It is the fact that the information is held which is important, not the origins or authorship of the information. The fundamental principle of the Acts is the presumption of availability of information. Information shall be made available unless there is good reason for withholding it.
- 1.7 To be provided with information a person must request it from the agency that holds it, either in writing or orally. They must do so with “due particularity” so that the agency can readily 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 and research” and for other administrative reasons.
- 1.8 Agencies are required to respond to requests as soon as reasonably practicable, but in any case not later than 20 working days after the day the request is received. Both the OIA and the LGOIMA make provision for transferring requests to other agencies or Ministers in certain cases. Agencies and Ministers can impose reasonable charges.
- 1.9 Both Acts are based on a presumption that information will be disclosed, but both recognise that particular interests exist that need to be protected, and provide 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, while others can be overridden where the public interest in the release of the information outweighs the protected interest.
- 1.10 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 other publications of the Ombudsmen such as the Ombudsmen Quarterly Review.

- 1.11 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,” either by an Order in Council (under the OIA) or by a local authority resolution (under the LGOIMA).
- 1.12 The courts have a limited role to play under each Act. Provision is made for bringing judicial review of decisions but this is almost always postponed until an Ombudsman has investigated a decision and made a recommendation.

THE CONTEXT OF THIS REVIEW

- 1.13 Both the OIA and LGOIMA have had a significant impact. The climate of openness has developed beyond recognition since the 1980s. Huge amounts of information are now requested and released. What distinguishes the New Zealand system from those in some other places is that the legal changes brought about by the legislation have been matched by a degree of official and political acceptance.² The continuing work of the Ombudsmen, who hear complaints about the handling of requests, has also played a significant part in ensuring proper and balanced compliance by agencies.
- 1.14 However, time has wrought significant changes to the surrounding context in which the Acts operate. Those changes have created tensions. We now discuss the more important of those changes. Some of them raise questions about future directions; the legislation must keep pace with them.

Developments in technology

- 1.15 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 kept 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.

- 1.16 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. In some ways technology has made the management of official information easier. It can be readily stored and retrieved. Yet in another way technology has made things more difficult. The public service now has to deal with more and more information. Email “trails” and numerous early drafts of documents mean there is more material to collate, scrutinise and assess – much of it repetitive, some of it of minimal relevance.

Public expectations

- 1.17 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. The expectation of availability is not limited to government information. The internet in particular, through the rise of search engines, has helped to create an expectation of a very wide variety of information being 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.
- 1.18 Perhaps linked to this facility for releasing more and more information, people’s attitudes towards government are also changing. People seem 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. Freely available information contributes to the climate of expectation in the public.

Proactive release

- 1.19 This development flows from the first two. One of the benefits of the new technology is that government information can now be proactively released on the internet for all to see, rather than having to be asked for by individual requesters. To use a common metaphor, there is a growing expectation that much information will become available through a “push” rather than a “pull” model. We describe in chapter 12 the various policy initiatives underway to make important and useful government data and information available to everyone via the internet.

- 1.20 These initiatives are the result of several drivers. Some of them are economic: data of high value can be used by individuals and groups to produce a social benefit. Another driver is resource consideration: if information is readily and publicly available it does not have to be asked for and released on an individual basis. The open society should be truly open, without the need to ask. This has clear implications for the OIA and LGOIMA, which need to recognise this new development. The interface between the legislation and some of these policy initiatives raises some important questions.

The commercial setting

- 1.21 The last two decades have seen extensive growth in commercially oriented public organisations. State Owned Enterprises, Crown Research Institutes, Crown financial institutions, Crown companies and other statutory entities are responsible for significant assets. They deal in the marketplace in competition with private organisations which are not subject to the same constraints. Council-controlled trading organisations undertake business. Their structures can vary widely but they again operate in the marketplace.
- 1.22 The official information legislation is seen by some as an unfair restraint on those who deal in this volatile environment. How can commercial sensitivity and competitive position be properly safeguarded in the context of an open system? Public-private partnerships and contracts raise yet further issues. Some have asked whether the legislation should be modified to better take account of this reality. Should a public agency which holds commercial information of a third party be required to disclose it to a requester? What measures should be in place to give such information appropriate protection?

Resources

- 1.23 This review has taken place during a period when the government is operating under significant fiscal constraints. We are aware that sometimes large requests for information can impose considerable burdens on the resources of an agency: finding, collecting and making decisions about the release of this information can be a time-consuming exercise. We must try to find ways of controlling requests which place unreasonable burdens on an agency, but never at the expense of the fundamental principle of openness which underlies the legislation. This is a particularly challenging question: striking the right balance between the right to know and the excessive exercise of it.

Overseas developments

- 1.24 A further aspect of the context in which this review has taken place is developments in freedom of information internationally. The United Kingdom 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 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.

The legislative landscape

- 1.25 The official information legislation sits within a wider and constantly changing legislative landscape. Many Acts have been passed since the OIA. First, the philosophy of the official information legislation is supported by the overarching provision in 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 or opinions of any kind in any form.³
- 1.26 Secondly, some of these other statutes deal with the *management and handling of information*. The most important of these is the Public Records Act 2005 which lays down requirements for record-keeping in the public sector and regulates which documents must be kept and which may be disposed of. The inter-dependence of the two Acts is clear: the Public Records Act provides for proper recording practices, which facilitates and regulates compliance with official information legislation. Likewise there are synergies and contrasts with the Privacy Act 1993 which was the subject of a recent Law Commission review.⁴ A Privacy Amendment Bill before Parliament at the time of writing facilitates, but also controls, the sharing of information between government agencies.⁵
- 1.27 Thirdly, another part of the context is a group of Acts which require *certain types of information to be published or otherwise made available*. The Public Finance Act 1989 requires the Government to report on its fiscal and economic policies. Likewise 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 impose reporting requirements.

- 1.28 Fourthly, other legislation has brought *structural change*. Privatisation has seen some organisations leave the public sector, while others have remained within it but radically changed their forms and mandates. New entities have been created. The State Sector Act 1988 replaced a unified public sector with relatively autonomous government departments, and more clearly delineated the responsibilities of Ministers and heads of departments. Local government has also undergone major restructuring through the Local Government Act 2002. These changes at both national and local level may have increased the potential for tensions over the release of information. This shifting structural context raises some very difficult and important questions as to which entities should be subject to the OIA (and LGOIMA) regime. One of the hardest questions is the criteria by which it is decided who should be in, and who out.
- 1.29 Fifthly, changes in our *electoral* legislation have also raised issues. The move to a mixed member proportional (MMP) electoral system has fundamentally altered New Zealand politics. The extensive use of the OIA by members of Parliament and researchers for opposition parties was not anticipated by the Danks Committee on Official Information which originally proposed the OIA, but is now a major feature of the OIA landscape. While this development is not a product of MMP alone, it has certainly been accelerated by the competition between the increased number of political parties. The coalitions and support arrangements which have become a feature of MMP can also create complications for the application of the OIA.

Better Public Services

- 1.30 Shortly before the completion of this report, the Government released the report of an Advisory Group on Better Public Services.⁶ A recurring theme of that Report is that citizens and businesses expect to have a say on state services, and that the direct influence of citizens and businesses on service delivery must be at the heart of state sector reform. But to accomplish this more information must be made available to citizens. The Better Public Services Report finds that presently, information on state services in New Zealand is not made routinely available, and “citizens and businesses find government confusing and costly to deal with”.⁷ It notes a reluctance to open up areas of information and decision-making that have traditionally been out of bounds.
- 1.31 In other words, a focus of the Better Public Services Report is the ready availability of information to citizens. That is what the official information legislation has always been about. We now need to ensure that we move to the next level, and that there are sufficient incentives “to increase progressively the availability of official information to the people of New Zealand” as the purpose of the OIA requires.
- 1.32 These, then are the strands which intertwine to create the rich and complex context to this review.

THE APPROACH OF THIS REVIEW

The fundamentals of the legislation

- 1.33 Our initial impressions were that the OIA and LGOIMA are central to New Zealand's constitutional arrangements and that their underlying principles are sound and that they are generally working well. These have been confirmed as the review has progressed. We therefore endorse the fundamentals of the legislation, such as: the case-by-case approach to decision-making;⁸ the current time limits for responding to requesters;⁹ the role of the Ombudsmen as the arbiter of complaints about decisions made under the OIA and LGOIMA;¹⁰ the role of guidance in assisting agencies in their decision-making;¹¹ and, with one exception, the general framing of the conclusive and non-conclusive grounds for withholding official information.¹²
- 1.34 However, the Commission has reached the view that much could be done to improve the operation and efficiency of the official information legislation, through a mix of both legislative and non-legislative means.

Legislative amendment

- 1.35 When we embarked on this review we were of the preliminary view that the legislation required only minor modification and that much could be achieved simply by additional guidance in relation to the withholding grounds. As we investigated further, however, it became clear that while additional guidance is needed, and has a very valuable part to play, legislative change is also required to obviate problems in the working of the legislation and to obtain the necessary balance between openness and the interests which need to be protected in a modern age. More and more it became clear that the official information legislation is one important part of the wider environment of information management and citizen involvement. Integration with the various laws, practices and government policies already operating in that environment is increasingly important.
- 1.36 Our report therefore recommends significantly more legislative change than we had at first anticipated. We list the significant changes in chapter 16, but as a brief summary the main ones are:
- (a) Reformulation of withholding grounds which are presently unclear and confusing – in particular the so-called “good government” grounds (chapter 3);
 - (b) New grounds for protecting commercial information, in particular third party information (chapter 5);
 - (c) New grounds for protecting information provided in the course of an investigation or inquiry that might be prejudiced by disclosure (chapter 7);

- (d) Additions to the grounds for refusing requests which impose too great a workload on agencies (chapter 9);
 - (e) Enhancements to process such as expressly providing for urgent requests, partial transfers, and notifying third parties prior to release where privacy, commercial, confidentiality or cultural interests are at stake (chapter 10);
 - (f) Alignment of the legislation with government policy about the proactive release of information (chapter 12);
 - (g) New and critical leadership, oversight and coordination functions in the field of government information (chapter 13);
 - (h) Increasing the reach of the legislation by including additional agencies within its scope (chapter 14); and
 - (i) Alignment between the OIA and LGOIMA, and clarification of their relationship with each other and other legislation (chapters 15 and 16).
- 1.37 Amending the legislation would also provide an opportunity to reinforce the current cornerstones of the legislation, such as giving greater prominence to the public interest test that applies to the non-conclusive withholding grounds;¹³ and rationalising the Ombudsmen's complaints process and filling gaps in the complaints jurisdiction.¹⁴

Non-legislative reforms

- 1.38 In other areas however, we consider that guidance should be the main tool to achieve greater certainty and consistency. As a general matter we recommend that guidance could be greatly enhanced if the Ombudsmen's cases were more consistently and routinely published, if firmer and more specific guidelines using case examples and elucidated principles and presumptions were published to replace the Ombudsmen's existing Practice Guidelines, and if a full commentary analysing the Ombudsmen's decisions were produced.¹⁵
- 1.39 We further recommend that enhanced guidance is desirable in the specific areas of:
- (a) The public interest test, as it applies to the non-conclusive withholding grounds (chapter 8);
 - (b) Consultation and transfers of requests between departments and ministerial offices (chapter 4);
 - (c) Planning information releases as part of the policy development process (chapter 4);
 - (d) The public interest factors relevant to the commercial withholding grounds (chapter 5);

- (e) The operation of the privacy withholding ground, as well as specific privacy issues such as public interest balancing where the interests of children are involved, and the anonymity of officials (chapter 6);
- (f) The operation of the maintenance of the law withholding ground (chapter 7);
- (g) Informing requesters about the operation of the legislation (chapter 9);
- (h) Processing issues for agencies such as dealing with urgent requests and interactions between agencies over requests (chapter 10);
- (i) Categories and examples of information that should be proactively released unless there are good reasons not to (chapter 12); and
- (j) Some aspects of the interaction of the legislation with the Public Records Act (chapter 10).

Further work

1.40 As part of the review we identified some areas where further work is desirable to develop aspects of the official information legislation:

- (a) A working party should be established to formulate the parameters of a withholding ground relating to tikanga Māori (currently included in the LGOIMA but not in the OIA) (chapter 7);
- (b) A review of charging policy should be undertaken to establish a new charging framework that is cohesive, consistent and principled (chapter 10);
- (c) The interaction between the official information legislation and government release and reuse policy (NZGOAL) should be addressed with a view to producing guidance for agencies (chapter 10);
- (d) A working party should be convened to examine the current schedules to the OIA and the LGOIMA to eliminate anomalies and bring within coverage organisations with such a relationship to central or local government that they should be included (chapter 14).

A side-effect of the legislation

1.41 There is some anecdotal evidence that sometimes individuals subject to the official information legislation are tempted not to record reasons or advice but rather to convey it orally with the objective of avoiding disclosure. Mai Chen, in her book *Public Law Toolbox*, calls it “driving work off-paper”.¹⁶ It is not clear how serious a problem it is (some say in fact that there is very little evidence of it)¹⁷ but to the extent that it happens it is obviously undesirable. It can lead to deficient policy development because the discipline of writing requires more rigorous analysis. It also means that the agency itself lacks an adequate record for the guidance of its own officials in the future.

- 1.42 One cannot of course solve everything by legislation. Part of the remedy lies in education and better understanding. But we hope that some of this report's recommendations in relation to withholding grounds, particularly the "good government" grounds, may give officials greater confidence that they can rely on them to protect sensitive material. The Public Records Act 2005 will also contribute to better record-keeping, and we note our recommendations in chapter 15 that in cases where requests are refused because the information is not held by the agency, the Ombudsmen may refer the matter to the Chief Archivist.¹⁸

Conclusion

- 1.43 We have no doubt that the changes we recommend are needed to enable New Zealand to keep pace with the rest of the world and have a system which will be fit for purpose in a fast-moving environment. Opportunities for review and reform do not arise frequently, perhaps once in a generation. There has not been a full review for 30 years, and there may not be another for some considerable time. It is not enough to legislate for the present moment: we need something which will last into the future, and anticipate future developments. In a context which changes so quickly, the law must be fit for that future.

PREVIOUS WORK

- 1.44 We now outline work previously done in New Zealand which has informed our review.

1997 Law Commission review

- 1.45 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 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:¹⁹

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.

- 1.46 The Commission's report made a number of recommendations for specific amendments to the official information legislation, 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.
- 1.47 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 operation. The Commission noted that most of the issues raised in its terms of reference also related to the parallel provisions of the LGOIMA.²⁰ 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.²¹

Research projects

- 1.48 In the past few years there have been two research studies on the OIA. (Both studies focused solely on the OIA, and did not consider the LGOIMA). These studies provided important sources of data for our review.
- 1.49 Steven Price from the Faculty of Law at Victoria University of Wellington undertook research in 2002.²² 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).²³ 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; often 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.²⁴
- 1.50 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 responders. Her research and conclusions were published as a book.

1.51 White identified 10 key themes from her review:²⁵

- 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.

These themes were largely confirmed by data from White's interviews.²⁶

1.52 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.²⁷

1.53 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.²⁸

1.54 White makes a number of suggestions for responding to the challenges facing the Act, and we discussed some of these suggestions in our Issues Paper. Overall, she sees a need for clearer rules about the Act, and for a stronger leadership role in relation to the OIA.²⁹

- 1.55 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, illuminating though it was, involved relatively small numbers of interviewees and did not cover the LGOIMA, which is why we supplemented it with our own survey, discussed below.
- 1.56 In the final stages of preparation of this report two other books were published. One is *Access to Information* by Graham Taylor and Paul Roth.³⁰ This book is largely based on a chapter in Graham Taylor's earlier book on judicial review,³¹ but is considerably expanded. It refers to many Ombudsmen case-notes, and contains analysis of the OIA's and LGOIMA's provisions. The other is Mai Chen's *Public Law Toolbox* which contains a helpful and practical section on the OIA.³²

THE PROCESS OF THIS REVIEW

- 1.57 In 2009 the Law Commission received a reference to review the OIA. As work proceeded it became clear that the official information provisions of LGOIMA must necessarily be included in the scope of this review. The provisions of the two Acts and the issues arising from them are virtually identical.
- 1.58 In December 2009 the Law Commission released a survey on the operation of the OIA and the LGOIMA. The survey sought the views both of officials who respond to requests under the two Acts and of people who make requests under the Acts. 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. The survey asked a series of questions about various aspects of the official information statutes, with the aim of identifying key issues and concerns. More than 130 responses were received, over 90 per cent of them from organisations that respond to official information requests.
- 1.59 Informed by the responses to this survey we engaged in our own research and consulted with a wide range of bodies, and produced an issues paper, *The Public's Right to Know*, which was published in September 2010. In that paper we examined a large number of questions and took a tentative position on many of them. We sought submissions from the public, most of them from central and local government agencies but a number from the media, academics and members of the public. Based on those submissions, further research, and further consultations, we have prepared this report which offers our final recommendations for reform.

Chapter 1 Footnotes

- 1 See Universal Declaration of Human Rights (1948) Art 19; International Covenant on Civil and Political Rights (1966) Art 19.
- 2 See Robert Hazell, Ben Worthy and Mark Glover *The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI Work?* (Palgrave Macmillan, Basingstoke, 2010) at 273.
- 3 New Zealand Bill of Rights Act 1990, s 14.
- 4 Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC 123, 2011).
- 5 Privacy (Information Sharing) Bill 2011 (318-1).
- 6 Advisory Group Report on Better Public Services (November 2011).
- 7 At [2.3].
- 8 See chapter 2.
- 9 See chapter 10.
- 10 See chapter 11.
- 11 See chapter 2.
- 12 See chapter 7.
- 13 See chapter 8.
- 14 See chapter 11.
- 15 See chapter 2.
- 16 Mai Chen *Public Law Toolbox* (LexisNexis, Wellington, 2012) at [10.4.6].
- 17 Hazell, Worthy and Glover, above n 2, at 262–263.
- 18 See chapter 15 at R133.
- 19 Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997) at [E4].
- 20 At xiii.
- 21 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).
- 22 The results were published as 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).
- 23 At 7. Price submitted OIA requests to all national-level agencies subject to the OIA, asking for copies of their 10 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 10 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.
- 24 At 50.
- 25 Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007) at 91–93.

- 26 At ch 21.
- 27 At ch 22.
- 28 At ch 23.
- 29 White, above n 25, at chs 25–32 makes proposals for change. Other useful commentary is contained in papers delivered at the Information Law Conference *Marking 25 Years of the Official Information Act* (Wellington, 15 May 2007).
- 30 Graham Taylor and Paul Roth *Access to Information* (LexisNexis, Wellington, 2011).
- 31 GDS Taylor (assisted by JK Gorman) *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010).
- 32 Chen, above n 16.

Chapter 2

Decision-making

INTRODUCTION: THE CASE-BY-CASE SYSTEM

- 2.1 Under the OIA and LGOIMA, whether official information is to be made available is to be determined:³³

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

- 2.2 This presumption in favour of openness has worked well and over a period of 30 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, has said that the OIA:³⁴

... 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.

- 2.3 The “good reasons” for withholding are set out in sections 6 to 9 of the OIA.³⁵ Some are conclusive: they include prejudice to the security or defence of New Zealand, and prejudice to maintenance of the law. Others (those in section 9) may be overridden if there is a public interest in disclosure: they include protection of privacy, protection of obligations of confidence, and prejudice to commercial position. The reasons are for the most part expressed (as they must be) in broad and open-ended terms.
- 2.4 The assessment of whether a good reason exists in a particular case requires an exercise of judgement on the facts of that case. 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.³⁶ 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.

- 2.5 The New Zealand OIA is well regarded overseas. In particular, Australian commentators have compared it favourably with the Australian system under which certain categories of document are exempted from disclosure (although these commentaries were written before recent amendments to the Australian legislation).³⁷ In New Zealand it is the *content* of the information in the document in each case that matters, rather than the *category* of document.
- 2.6 Two English authors, writing in 2010, compared freedom of information legislation in Australia, Canada, Ireland, New Zealand and the United Kingdom. Taking into account not just the legislation but also the political and official support for it, they conclude that “the New Zealand FOI regime probably fares best”.³⁸
- 2.7 The responses to our survey and submissions on the issues paper demonstrate strong support for continuing the case-by-case system. Indeed of 54 submissions, 46 supported it. Among the comments made by those in favour were that any system of categorisation by rule would not address the substance of the information; that the case-by-case system allows the Act to adapt to political and social change; that it makes allowance for the different types of document held by different agencies; and that it supports third party consultation.
- 2.8 We do not recommend any change from the case-by-case system.

DIFFICULTIES

- 2.9 However that is not to say that the case-by-case system is free from difficulties, and many who responded to our survey drew our attention to them – even those who supported the system.
- 2.10 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.
- 2.11 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.
- 2.12 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 if they do not have access to in-house legal advice, or if 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” grounds are notable examples.³⁹

- 2.13 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 it too readily releases 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.
- 2.14 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 occasion. Many agencies have, over time, developed their own consistent practices internally for dealing with frequently recurring requests, but the consistent practice of one agency may not be the same as that of another.
- 2.15 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.
- 2.16 It was clear from the submissions to us that the agencies, even the great majority in support of the case-by-case system, would greatly welcome firmer guidance to assist their decision-making, and that requesters would welcome more consistency of outcome.

CURRENT GUIDANCE

- 2.17 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, filled the gap. Most submitters commended that initiative. The guidance that is available is of four main kinds.

2.18 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 that they do not so clearly point the way to the answer to even frequently recurring problems. One submitter 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.

2.19 Secondly, there are guidelines published by government entities other than the Ombudsmen. The Ministry of Justice has a set of guidelines on charging.⁴⁰ The Cabinet Manual has a section on the OIA, containing, in particular, practical notes about consultation on OIA requests, especially consultation by a department with its Minister.⁴¹ A 2008 Cabinet Circular sets out the principles that guide the handling of requests for the Cabinet records of a previous administration.⁴² The State Services Commission has also produced a set of guidelines about consultation on, and transfer of, OIA requests.⁴³

2.20 Thirdly, the case notes of the Ombudsmen summarise decisions reached by them after investigating complaints about the alleged wrongful withholding of information. Some case notes 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 case notes published on the website also stop at that point. The published case notes are, and always have been, merely a selection of the Ombudsmen's cases. Many cases do not make it to publication at all. Of those that do, not all draw attention to commonly occurring issues: some are published for their novelty more than because of any precedent value. The case notes are not indexed.

2.21 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.

2.22 Some submitters commented that the Ombudsmen's website is not intuitive, and it is possible for a newcomer to the OIA to be unaware of the very existence of the case notes or even the guidelines, and not to realise the usefulness of the Quarterly Review.

THE FUTURE

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

Amending the Act

- 2.24 We have considered whether amending, or redrafting, the withholding grounds would help. In theory there are two possible types of amendment.
- 2.25 First, a small number of responses to our survey suggested 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, as the statutory rule would be likely to operate too rigidly. Such codification could also reduce flexibility, and freeze the present practice in time. As we have noted elsewhere,⁴⁴ international commentators regard New Zealand's lack of codification as a strength. The Commission has no inclination to replace the case-by-case system with a system of rules.
- 2.26 A second method of statutory amendment is to attempt to redraft troublesome withholding grounds in plainer and simpler language. The objective would not be to change the substance of the grounds, but to convey their 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.
- 2.27 The main difficulty is not that the grounds are hard to read or understand. It is that applying them to a multitude of different circumstances is often not an easy task. In most cases, redrafted grounds would not be guaranteed to serve any better than the present ones. Difficult marginal cases will arise whatever the form of words. One submitter 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).
- 2.28 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.

- 2.29 So we are of the view that most of the withholding grounds should not be redrafted. However there may be a few that should. A small number of grounds have given particular difficulty, among them the “good government” and “commercial” grounds. In later 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, or leads to a result which is clearly unsatisfactory in practice. It should only be done if the redrafted version would be clearly better.

Making regulations

- 2.30 It is noteworthy that in the OIA as originally enacted, it was envisaged that the Information Authority would recommend the making of regulations prescribing categories of information which should be available as of right, although not categories which should be immune from disclosure.⁴⁵ 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.
- 2.31 In chapter 12, where we discuss proactive release and publication, we explore whether there may be a role for regulation, or another form of directive, to prescribe certain types of information which should be published proactively without the need for a request. Even then such prescription should not be absolute: care would need to be taken in each case that the material proactively published did not contain items which should properly be withheld, for example because they might prejudice the maintenance of the law or because they had been received in confidence.
- 2.32 While there may indeed be a case for directives prescribing the *release* of certain types of information we do not favour the converse position – directives enabling the withholding of defined categories of information. 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 to a system of withholding based on categories of document, which we do not support.

Cases, guidelines and commentary

- 2.33 Rather than prescribe by regulation, or attempt widespread statutory amendment, we think the solution lies in better guidance. We believe that it would be desirable to have a set of firmer guidelines than currently exists, to supplement the case-by-case approach. Given the open-textured nature of the Act, it is important to have a detailed system of guidelines underlying and supporting its principles. In her book, Nicola White reached a very similar conclusion.⁴⁶ While not advocating a system of formal rule-making she did support 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.
- 2.34 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 agencies for 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.⁴⁷
- 2.35 The solution we propose contains three elements. *First*, we believe that as many as possible of the Ombudsmen’s case determinations should be publicly accessible. The case notes presently on the website, although they number in the hundreds, are far from a complete set. It may be possible to fill some of the gaps retrospectively. Even if it is not, we recommend that for the future, significant opinions of the Ombudsmen should be routinely and consistently published.⁴⁸ Preferably these should not be brief summaries, but the full opinions. They should be readily accessible. They should be searchable, and they should also be indexed, not just under the relevant sections of the Act but also according to the type of information involved.
- 2.36 If this is done, officials considering whether to withhold information under one of the withholding grounds in the Act will be able to check to see whether there have been comparable cases, and the decisions which were reached in them. The public will also be able to hold the officials to account against published decisions. The Ombudsmen are supportive of the idea, noting that it would significantly expand the pool of available case records and increase transparency.
- 2.37 Consideration might in due course be given to uploading the case database to NZLII, and possibly from there to an international freedom of information resource website. We note that the Privacy Commissioner’s case notes are currently available on NZLII,⁴⁹ and also on the International Privacy Law Library.⁵⁰ The cross-fertilisation of materials from other jurisdictions can provide useful insights and comparisons.

- 2.38 It may be thought that section 21 of the Ombudsmen Act 1975, which requires the Ombudsmen and their staff to maintain secrecy in respect of all matters coming to their knowledge in the exercise of their functions, is an impediment to the publication of opinions. However it has not been regarded as such. Rule 2 of the Ombudsmen Rules 1989 provides that the Ombudsmen may publish “reports relating to any particular case or cases investigated by an Ombudsman”. This authorises the publication of case notes, and probably full opinions as well. But to put the matter beyond doubt we recommend that the OIA itself be amended to empower the publication of opinions. This would not only make it clear that the secrecy provision is qualified in that regard, but would make publication of decisions a statutory power of the Ombudsmen. If confidentiality were ever to be a difficulty, they could be made anonymous.
- 2.39 *Secondly*, and perhaps most importantly, we recommend that the Ombudsmen publish guidelines on the application of the Act which are firmer and, where possible, more specific than the current Practice Guidelines. They would replace those current Guidelines. The new guidelines should make frequent reference to real case examples to “put flesh on the bones”. They could contain links to the case database. As the Ombudsmen said in their submission to the issues paper, the focus should be “on providing practical and succinct advice illustrated by real-life examples.”
- 2.40 Those real-life examples would serve two purposes. One is that officials might see an analogy between one of the examples in the Guidelines and the problem with which they are confronted. Also, real-life examples will enable the reader to better understand the abstract and open-ended propositions in the Act.⁵¹ The examples will, as it were, help to give shape to the abstract withholding grounds. We are reminded of the words of Lord Denning:⁵²
- 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.
- 2.41 The responses to our survey and submissions to our issues paper confirm that the 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.
- [There] could be examples of what not to withhold.
- Scenarios as well as cases would be helpful.
- 2.42 In addition to the case examples, however, the Guidelines should also, where possible, state *principles* and *presumptions*. A line of cases may establish a clear and consistent trend of decision-making. If it does, the principle which thus emerges could be stated in the Guidelines. It would operate as a presumption for future decisions.

- 2.43 In recent years the Ombudsmen themselves have been moving in precisely this direction. In their 2009 Annual Report they cite two such areas. They say:⁵³

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.

- 2.44 They reached a similar conclusion about severance payments:

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.

- 2.45 In a 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.⁵⁴
- 2.46 In their submission to our issues paper, the Ombudsmen list areas where it would be possible to lay down “principles of general application in relation to frequently recurring requests and types of information”. They instance officials’ names, public sector salaries, severance payments, draft documents and informant identities. We support such a development.
- 2.47 The Ombudsmen are the obvious agency to develop and publish these Guidelines. They have practical experience of the working of the OIA which is unmatched by anyone else. They decide the cases on which the Guidelines are based. Above all, they are independent. They already publish Guidelines and other guiding material, and there is no reason to remove that task from them. Submissions on our issues paper strongly supported their continuing with this function. But given that accessibility and ease of use are important considerations, we suggest that it would be helpful if, in preparing the Guidelines, the Ombudsmen consult with the oversight office we recommend in chapter 13.
- 2.48 *Thirdly*, we believe that, once the case database is properly operative, it would be beneficial to produce a commentary on the cases. The commentary would analyse all the available cases from 1982 until the present, and be updated periodically. It would note any trends in decision-making from which it would be possible to deduce principles.

- 2.49 Moreover, the commentary would analyse not just the facts and the decisions of the cases, but also the reasoning in them. It may be able to draw attention to considerations which have regularly been taken into account in deciding whether information should be released. 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 controversy, and so on. Officials uncertain whether to release information in a particular case might find guidance in such discussion even if there is no case whose facts are directly similar to their own.
- 2.50 We envisage that such a commentary would serve several purposes. First, in presenting the available case law it would enable what is effectively a body of jurisprudence to be seen as a whole, and its underlying philosophies to be made apparent. By contextualising the cases it would facilitate better understanding. Secondly, it could feed into the Ombudsmen's Guidelines. It might reveal consistent themes or principles which could be introduced into the Guidelines. Thirdly, even though the Guidelines might provide no guidance on a particular issue, material in the commentary might. Finally, the commentary should assist navigation of the case database.
- 2.51 The recent book *Access to Information* now provides commentary on the Ombudsmen's case notes that have been published to date, and makes a useful contribution towards fulfilling these three purposes.⁵⁵ There are examples of similar undertakings in other areas of the law. The Broadcasting Standards Authority and the Press Council have built up a substantial number of cases over the years. Access to them, and understanding of them, has been significantly increased by analytical work done by Steven Price in his book *Media Minefield*.⁵⁶ Likewise, the digest of the reports of Parliament's Regulations Review Committee available on the website of the Centre for Public Law is a most valuable resource.⁵⁷ One might also mention here, although the exercise is not quite the same, the valuable analyses of case notes of the Privacy Commissioner by Professor Paul Roth in his continually updated annotations to the Privacy Act.⁵⁸
- 2.52 These authors show that commentary can transform an otherwise indigestible collection of individual cases into a body of jurisprudence. The new book *Access to Information* could be further expanded if more detailed case notes were made publicly available and if the Ombudsmen's Guidelines were republished as suggested above. As more material becomes available for analysis, there might be sufficient demand for a loose-leaf publication that can be periodically updated, and that can be made available online. While this may be something an official in the Ombudsmen's Office could do, we think there is much to be said for an independent person undertaking such an exercise. The commentary need not necessarily be on the Ombudsmen's website. It would not have the same "quasi-official" standing as the case notes themselves or the Guidelines. But the website might usefully draw attention to the existence of the commentary.

2.53 So, we recommend a three-pronged solution to the present problem of uncertainty:

- (a) A published, readily accessible database of opinions and case notes;
- (b) A new set of Guidelines prepared by the Ombudsmen's Office which (i) refer to case examples; and (ii) where appropriate state presumptions and principles derived from past cases;
- (c) A commentary analysing the opinions and case notes.

2.54 A response to our survey advocates the methodology we are recommending:

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.

Statutory functions

2.55 The publication of cases and Guidelines is an important function. We believe the Ombudsmen should perform it, and that the Act should expressly confer it on them. The Act currently confers very few functions on anyone. In that regard it forms an interesting contrast to the Privacy Act 1993, which confers a large number of functions, including education and guidance, on the Privacy Commissioner, and the Public Records Act 2005, which confers a similar range of functions on the Chief Archivist. We return to this topic in chapter 13.

R1 A new provision in the OIA and LGOIMA should expressly confer on the Ombudsmen the function of publishing opinions and guidelines on the official information legislation.

R2 Significant case notes and opinions on the OIA and LGOIMA should be compiled and published in a readily accessible database. They should be indexed and searchable. The Ombudsmen should have power to make them anonymous where confidentiality is an issue.

R3 The database of case notes should be accompanied by a regularly updated analytical commentary.

R4 The Ombudsmen's Guidelines should give specific examples drawn from previously decided cases, and, where appropriate, state presumptions and principles deriving from them.

R5 In preparing the Guidelines the Ombudsmen should consult with the oversight office.

The advantages and disadvantages

- 2.56 The advantages of such a system may be thus summarised.
- 2.57 First, the Guidelines would 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.
- 2.58 Secondly, the guidance provided would be derived from the experience of actual cases. Attempting to create rules without that grounded experience can lead to insufficiently precise formulations.
- 2.59 Thirdly, it would encourage 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.”⁵⁹
- 2.60 Fourthly, 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 an incentive to explain reasons for a decision in the Ombudsmen’s case notes.
- 2.61 However some of the submissions to the issues paper, even though expressing support for such a system, noted reservations. These mainly centred around the fear that a system of rigid precedent might develop. There might be a tendency simply to follow earlier cases blindly, or to assume that principles were binding, admitting of no departure.
- 2.62 This is certainly not what is intended. It would effectively undermine the case-by-case approach. It would need to be made clear that the cases, and the principles, were starting points only, and would always be subject to the particular facts of each case. The system must enable different nuances in different fact situations to be recognised, and must also enable rulings to move with the times, and take into account changing expectations. The earlier cases and principles would, in other words, be persuasive only.
- 2.63 Some submitters also worried that the system we propose might become too legalistic. They feared that officials without legal training would be expected to argue the toss as to whether an earlier case could be distinguished from the present one. Provided earlier cases are not seen as binding precedents, and provided it is clear that each case must be judged on its own merits, we do not think that such legalism need develop. We are trying to achieve a workable middle way between consistency and reasonable certainty on the one hand, and flexibility on the other.

Accessibility

- 2.64 To operate as an effective determinant of behaviour, case notes and the guidance based on them should be accessible and prominent. We noted above that some submitters commented that they do not find the Ombudsmen's website, and the OIA-related material on it, easy to navigate. Some said the website is "not intuitive".
- 2.65 There was very strong support in submissions for an accessible, easily navigable website. Points made included that the website must be current, with obsolete information removed or qualified. If a case has become redundant it could be linked to the more recent case. Searchability was also strongly emphasised: one submission said the site should be searchable by section, ground, keyword example, and date. Others mentioned the desirability of interactivity with other websites.
- 2.66 We said in the issues paper that we favoured a dedicated official information website which, in addition to all the material provided by the Ombudsmen, would incorporate the guidance provided by other agencies involved in the Act's administration – in particular the Ministry of Justice and the State Services Commission. The Ombudsmen, in their submission to our issues paper, acknowledge that the current website requires updating and reorganisation for ease of use, but are not convinced that a separate official information website is necessary at this point. We still have a preference for a separate, "one-stop shop" website to assist agencies. If this site were maintained and overseen, its links to other sites would remain up to date and user-friendly. However, that preference is not a rigid one. The main thing is that the website be clear and accessible, leading the officials easily to all information they may require.
- 2.67 Not everyone is yet comfortable using the internet. Given the importance of the expanded Guidelines we are advocating, we also believe there should be a hard copy manual containing them. It should be readily available at a reasonable cost.

R6 An accessible and easily navigable website should incorporate all guidance on the OIA and LGOIMA prepared by the Ombudsmen and by other agencies involved in administering these Acts.

R7 The Ombudsmen's Guidelines should be available in hard copy as well as electronically.

CONCLUSION

- 2.68 In summary, we believe that the best way of attaining better understanding and more certainty and consistency in the application of the legislation is to have better access to cases, and better and clearer guidance, making use of real case examples and statements of principle.
- 2.69 However it may be that, in addition to such assistance, statutory amendment may assist in the case of a few of the withholding grounds. In the next few chapters we shall examine some that seem to have caused particular problems to see if anything could be done by way of statutory amendment to clarify their meaning and application. They are the “good government” grounds, the “commercial sensitivity” grounds, the privacy ground, and the “maintenance of the law” ground.

Chapter 2 Footnotes

- 33 OIA, s 5; LGOIMA, s 5.
- 34 Television interview with Dr Mark Prebble, former State Services Commissioner (The Nation, TV3, 3 April 2010).
- 35 LGOIMA, ss 6 – 7.
- 36 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.”
- 37 See for example Rick Snell “The Kiwi Paradox – A Comparison of Freedom of Information in Australia and New Zealand” (2000) 28 FL Rev 575; Jana Woodward “Trans-Tasman Freedom of Information” (A paper submitted for Honours Thesis, ANU College of Law, 10 June 2008).
- 38 R Hazell and B Worthy “Assessing the Performance of Freedom of Information” (2010) 27 Government Information Quarterly 352.
- 39 See chapters 3 and 5 respectively.
- 40 Ministry of Justice “Charging Guidelines for Official Information Act 1982 Requests” (March 2002).
- 41 Cabinet Office *Cabinet Manual* (Department of the Prime Minister and Cabinet, Wellington, 2008) at ch 8.
- 42 Cabinet Office “Access to Information of a Previous Administration” (4 December 2008) CO(08) 12.
- 43 State Services Commission “Release of Official Information: Guidelines for Co-ordination” (October 2000, last updated 4 August 2002). Available at < www.ssc.govt.nz > .
- 44 See above at [2.5]–[2.6].
- 45 See OIA, s 38(1)(c) (expired 1 July 1988).
- 46 White, above n 36, at 241.
- 47 Committee on Official Information *Towards Open Government: Supplementary Report* (Government Printer, Wellington, 1981) at [3.05].
- 48 See, for example, Office of the Ombudsman “Requests for Documents Concerning the Government’s Mixed Ownership Programme” (Ombudsmen reference 318858, 319224, 319684, 24 November 2011), accessible under “Publications” on the Ombudsmen’s website.
- 49 New Zealand Legal Information Institute at < www.nzlii.org > .
- 50 Accessible at < www.worldlii.org/int/special/privacy/ > .
- 51 See for example Information Commissioner’s Office (England and Wales) *The Guide to Freedom of Information* (in plain English).
- 52 *Escoigne Properties Ltd v IRC* [1958] AC 549 at 566.
- 53 Office of the Ombudsmen *Annual Report for Year Ended 30 June 2009* (Wellington, 2009) at 25.
- 54 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, above n 53, at 27.

- 55 Graham Taylor and Paul Roth *Access to Information* (LexisNexis, Wellington, 2011).
- 56 Steven Price “Media Minefield – A Journalist’s Guide to Media Regulation in New Zealand” (New Zealand Journalists Training Organisation, 2007) Part I.
- 57 Ryan Malone and Tim Miller *Regulations Review Committee Digest* (3rd ed, Wellington, 2009) available online.
- 58 Paul Roth *Privacy Law and Practice* (looseleaf and online eds, LexisNexis).
- 59 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.

Chapter 3

Protecting good government

INTRODUCTION

- 3.1 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.
- 3.2 These grounds can be overridden by the public interest in disclosure in a particular case. Along with the grounds which allow information to be withheld to protect commercial interests (discussed in chapter 5), they are the grounds which cause the most difficulty for those who request and who hold official information.
- 3.3 The responses to our initial survey and submissions on our issues paper acknowledged the importance of the good government grounds but suggest that 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.
- 3.4 The Law Commission considered these grounds in its 1997 review of the OIA.⁶⁰ 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:⁶¹

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.

- 3.5 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.
- 3.6 The enduring nature of these problems has led us to make recommendations in this report for a redrafted set of grounds. With some minor exceptions, the intention is not substantially to change the substance of the grounds but, rather, to improve the expression of the grounds to better reflect the interests that they are intended to protect. The guidance and case notes of the Ombudsmen in relation to the existing grounds will therefore continue to be applicable.

THE CASE FOR THE GOOD GOVERNMENT GROUNDS

- 3.7 We have no doubt that there is a proper place for withholding grounds that protect good government and effective administration. The interests underlying the grounds are as worthy of protection today as they were when the OIA was first enacted.
- 3.8 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.
- 3.9 The legislation must also recognise that some room for deliberation and some forms of confidentiality are necessary for our model of government to work. The ability of the government to govern requires some room for deliberation in private to develop and consider ideas without fear of adverse consequence. 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.

- 3.10 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.⁶² 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 LGOIMA, are a necessary reminder that complete openness is sometimes damaging to government and therefore society as a whole.

SUBMITTERS’ VIEWS ABOUT THE GOOD GOVERNMENT GROUNDS

- 3.11 Although no submitter questioned the need for the good government grounds, it is clear from submissions on the issues paper (and our initial survey) that the appropriate balance between the interests the grounds are intended to protect and the public interest in disclosure is hotly contested.
- 3.12 All submitters except one agreed that the good government grounds required some redrafting. However, there was much less agreement about whether this redrafting should simply strive to maintain the substance of the current grounds or whether the opportunity should be taken to narrow or broaden their scope.
- 3.13 On the one hand, some submitters (predominantly holders of official information) considered that the grounds did not always provide sufficient protection or certainty about what information could be withheld and had led to some adverse impacts on the policy-making process. These included a reluctance to commit advice to paper and some undermining of the ability or willingness of agencies to provide free and frank advice. As argued by the Public Service Association:
- Our perception is that the Act has led gradually to the development of a “verbal culture” within policy agencies where as much discussion as possible is undertaken face-to-face or by telephone and “sensitive” issues and views are not written down and obviously not disclosed when such information is requested. Not only does this risk undermining the intent of the Act, but the lack of written expression of some information may also lead to less rigorous and precise debate in some cases, and may impair the institutional memory of the public service.
- 3.14 On the other hand, other submitters (predominantly requesters of official information) considered that the grounds made it “too easy” for information to be withheld. In particular, some submitters gave examples from personal experience of situations where they considered that the grounds had been relied on erroneously to prevent the release of controversial or embarrassing information.

- 3.15 We share the concern that there is potential for the good government grounds to be used merely to withhold embarrassing or controversial information. But we also acknowledge the concerns raised by the Public Service Association, which have been recognised and discussed elsewhere.⁶³ In some respects, all of these concerns are the inevitable consequences of an information disclosure regime. However, as we discuss below, we think there are some changes that could be made to the good government grounds to minimise their current complexity and clarify their application. The increasing moves towards proactive disclosure of official information may also assist to remove some of the tension in this area, as will the development of robust guidance on how the grounds are to be applied.

THE ISSUES

Constitutional conventions

- 3.16 Section 9(2)(f) of the OIA provides that, subject to release in the public interest, information can be withheld if it is necessary to:⁶⁴
- (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;
- 3.17 There is a general sense of confusion with aspects of this provision amongst all users of the OIA. The following features of the constitutional convention ground in section 9(2)(f) seem to be particularly problematic:
- (a) the reference to “constitutional conventions;”
 - (b) the mixed list of references to conventions, interests, and relationships in sub-paragraphs (i), (ii), (iii), and (iv); and
 - (c) the reference to “maintain.”

(a) Reference to “constitutional conventions”

- 3.18 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”.⁶⁵ They have an important role to play in making our system of government work because they are seen as binding even though they 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. By their nature they are contestable and debatable. The reference to “constitutional conventions” therefore creates a problem for requesters and officials.
- 3.19 The section does make 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. Even these have been strained by recent coalition agreements under MMP. Beyond those two conventions, there is a great deal of uncertainty about which other constitutional conventions the ground is intended to protect.
- 3.20 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. There is little support for officials who are trying to apply statutory provisions in a politically charged environment.

(b) The nature of the interests involved

- 3.21 Of more concern is the mixed list of purposes and conventions contained in section 9(2)(f), a list that Eagles, Taggart and Liddell call “conceptually incoherent” and which introduces unnecessary complexities into the interpretation of the section.⁶⁶
- 3.22 Contrary to popular belief, the section does not provide a list of constitutional conventions that are to be protected. Only one subparagraph ((f)(ii)) contains conventions as that term is generally understood. The other subparagraphs are the relationships or interests protected by certain constitutional conventions. For example, 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.⁶⁷

- 3.23 As currently drafted, an official is required to understand what the constitutional conventions are that protect these particular interests. A link must be identified between the listed interest and the convention that is being relied upon before a decision to withhold can be made. This scrambling of conventions and the interests they exist to protect creates confusion and obscurity, and undermines the effectiveness of the provision. We believe that, as far as possible, the interests or relationships to be protected should be explicitly and clearly stated in the Act.

(c) “Maintaining” a constitutional convention

- 3.24 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 requirement introduces an unfortunate complication into the decision making process. It 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 cause some detriment to it. This is a very high threshold. There is support for this in the Ombudsmen’s Guidelines:⁶⁸

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

- 3.25 Eagles, Taggart and Liddell comment further:⁶⁹

... it 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.

Free and frank expression of opinion

- 3.26 Provisions to protect the free and frank expression of opinion exist in both Acts. Section 9(2)(g) of the OIA allows, subject to the public interest in release, information to be withheld if it is necessary to:⁷⁰

(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

- 3.27 The equivalent LGOIMA provision covers members or officers or employees of any local authority.⁷¹

- 3.28 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."⁷² 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.
- 3.29 When deciding whether information can be withheld under this provision the Ombudsmen consider three questions:⁷³
- (a) How would disclosure of the information at issue inhibit the free and frank expression of opinions in future?
 - (b) How would the inhibition of such free and frank expression of opinions prejudice the effective conduct of public affairs?
 - (c) Why is this predicted prejudice so likely to occur that it is necessary to withhold the information in the circumstances of the particular case?
- 3.30 It is this ground, in particular, that raises questions about the appropriate balance between the public interest in disclosure of information and the need for information sometimes to be withheld. The Danks Committee explained the potential negative consequences that could flow from a transparency model that went too far:⁷⁴
- 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.
- 3.31 It goes on to say that if provision is not included to protect good government:⁷⁵
- The 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 officials became the subject of public debate, mutual recriminations could all too often develop.
- 3.32 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. As noted above, this view was also taken by some submitters on our issues paper. It is also reflected in a recent empirical study in the United Kingdom.⁷⁶

3.33 Some of the consequences White identified are that:⁷⁷

- 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;⁷⁸
- many people working at the centre or at sensitive levels of government work largely without creating records and, for example, will avoid e-mail completely because of lack of any assurance that their comments could be protected.

3.34 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. As discussed below, we also consider that the “free and frank” grounds would benefit from redrafting.

(a) Maintenance of the effective conduct of public affairs

3.35 The term “to maintain the effective conduct of public affairs” is not defined further in the Act. Eagles, Taggart and Liddell 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.⁷⁹ The degree to which this must occur is not stated on the face of the provision.

3.36 We have considered whether this terminology should be removed from the Act, but on reflection think there is reason to retain 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.

(b) Scope

3.37 In our issues paper we queried the applicability of this ground to bodies outside the core of government.

- 3.38 Eagles, Taggart and Liddell 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, Crown research institutes and tertiary education institutions, for example.⁸⁰ These grounds were drafted and enacted before the significant restructurings and reforms of the 1980s, which were not in the minds of the Danks Committee or the Acts’ drafters when the provisions were created.
- 3.39 No submitters argued for the exclusion of any of these agencies from the grounds. As noted in the submission of one Crown research institute, these agencies may be involved in advising government on sensitive matters and the grounds should therefore apply to them in the ordinary way. Given that all these bodies have relationships with Ministers, we consider that the good government grounds (and the OIA itself) should continue to apply.

(c) Advice versus opinion

- 3.40 Both Acts refer to “opinions” rather than “advice” in the free and frank ground. However, “advice” and “opinion” are sometimes used interchangeably, and at best the line between them is blurred.
- 3.41 The relevant provision in United Kingdom’s Freedom of Information Act 2000 covers both advice and opinion, so as to remove any distinction between the two:⁸¹

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.

REDRAFTED GOOD GOVERNMENT GROUNDS

- 3.42 Submitters universally supported the view expressed in our issues paper that the good government grounds are so confusing and unclear that some redrafting of them was desirable. We recommend accordingly. The intention is not substantially to change the substance of the existing grounds, merely to clarify their expression, and to address the concerns we have identified above.

The proposed redraft in the issues paper

- 3.43 In the issues paper we proposed a redrafted provision which would combine sections 9(2)(f) and (g) as follows:⁸²

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.

3.44 Most of this redraft attempts to restate, more clearly, what is in the current provisions. It also attempts to address the order of the grounds which, as has regularly been noted by the Ombudsmen and was noted by the Law Commission in its earlier review,⁸³ do not reflect the chronological order in which opinions and advice are generated. The redraft attempts to reflect the natural order of the policy process.

3.45 We also asked for views on whether a simpler approach was more desirable, based on the relevant provision in the United Kingdom's Freedom of Information Act 2000, reproduced above at paragraph 3.41.

Submitters' views on the redraft

3.46 Submitters made a number of useful comments on the proposed draft which, while not leading to us reconsidering the approach to the redraft entirely, has led us to make a number of changes to it. We consider these comments in detail before recommending an amended redraft, below.

3.47 A small number of submitters preferred the simplicity of the United Kingdom approach. However, others considered that its simplicity would itself lead to difficulty and may increase debate about what should be withheld and what should be released. While the economy of expression of the United Kingdom approach has some attractions, we remain unconvinced that it conveys all the nuances of the required protection and prefer our own proposal.

- 3.48 While supporting the need to redraft the good government grounds, the Ombudsmen raised some general issues with the proposed redraft. These included that some of the identified interests (for example, (iii), (iv) and (v)) were better framed as prejudices to be avoided rather than interests to be protected. This would be consistent with the Ombudsmen's approach to interpreting these grounds, which requires holders of official information to identify the harm that release of the information would cause. The Ombudsmen were also concerned that identifying interests to be protected rather than prejudices to be avoided may "tip the balance" towards the withholding of information rather than its release.
- 3.49 We accept that it is preferable to be transparent on this matter. Providing that transparency would reinforce our intention not to disturb the underlying approach to how these grounds currently apply. We think that the desirability of a prejudice-based assessment can be made clear by referring to the need to "avoid prejudice to" the effective conduct of public affairs, rather than referring to the need to "maintain" it.

Issues paper grounds (i) and (ii)

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

- 3.50 Grounds (i) and (ii) are reformulations of the current provisions, but which omit the reference to "constitutional conventions" while attempting to catch the required substance.
- 3.51 One submitter considered that both grounds should be rewritten to explain what the concepts within them meant. However, we think that this issue is best addressed by guidance, rather than by attempting to elaborate on the grounds in the statute.

Issues paper ground (iii)

The withholding of the information is necessary to maintain the effective conduct of public affairs by protecting:

- (iii) negotiations and the free and frank expression of opinion between the parties that form the government

- 3.52 Ground (iii) is new. It reflects the fact that, post-MMP, the Government can be made up of multiple parties. The ability for these parties to communicate with each other confidentially is necessary and worthy of protection.

- 3.53 The Ombudsmen (and the New Zealand Law Society) thought that the interests this ground would protect were already covered by other grounds. In past cases, the Ombudsmen have found that this type of information is protected by section 9(2)(f)(iv). In the interests of providing greater certainty and clarity, we remain of the view that proposed ground (iii) is a useful addition to the good government grounds.
- 3.54 It may be that much of the information generated or used in such exchanges would not be official information at all in that it would be held by political parties rather than by agencies subject to the OIA. But it seems desirable to have protection for information of this kind which is, or becomes, subject to the OIA by virtue of the agency which holds it.
- 3.55 However, a number of submitters argued that the draft was too narrow in a number of respects. First, it was solely directed at the government formation process rather than ongoing support arrangements between the parties that formed the Government. Secondly, it did not cater for situations where a political party was in a support role to the Government and not formally part of the Government itself. Thirdly, it applied only to political parties and not situations where an individual MP was negotiating to be, or was, part of the Government.
- 3.56 A number of other drafting suggestions were made. These included that it was not clear that the reference to parties was a reference to “political parties”. It was also suggested that, if a reference to advice was included in ground (iv), it should also be included in this ground. Alternatively, the Ombudsmen suggested that a preferable approach was to focus the grounds on the negotiations context so that the reference to the free and frank expression of opinion (or advice) became unnecessary. We agree that this is the preferable approach.

Issues paper ground (iv)

The withholding of the information is necessary to maintain the effective conduct of public affairs by protecting:

- (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

- 3.57 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. A reference to “advice” is included. It also spells 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.

- 3.58 Most submitters who commented on this ground supported its reference to “advice” as well as “opinion”, although there was some confusion about the implications of doing so. For example, while some submitters considered that it would simply clarify the current approach, another submitter considered that it would “raise the bar” significantly in terms of finding reasons to withhold, while yet other submitters considered that it would expand the information that could be withheld. The Ombudsmen did not object to the inclusion of “advice” but did not see it as necessary because, in their view, “advice” was already covered by the reference to “opinion”.
- 3.59 We continue to support the inclusion of “advice” in any redrafted ground. Given the current confusion about the difference between “advice” and “opinion” and submitters’ calls for greater certainty in this area, we think that explicitly referring to “advice” will provide some much needed clarity. Including advice in this ground may also mitigate some of the concern amongst submitters about the narrowness of proposed ground (v).
- 3.60 Another concern arising in submissions was that sometimes, in the course of giving advice to Ministers, officials impart or receive confidential *information*. Sometimes, indeed, it may be of a sensitive kind, relating even to personal matters. Advice and opinions tend to interact with, and be based on, information in such a way that they are entwined and not readily severable. We agree that information imparted or received as part of advice or opinions should be protected, and in case other provisions may be thought inadequate to meet all cases, we recommend that “information” be added to “opinions” and “advice” in a redrafted ground (iv).
- 3.61 A number of other drafting suggestions were made in relation to ground (iv). One submitter thought that the reference to “similar” did not add anything and could lead to ambiguity – for example, because it was unclear whether it was to be read in a generic sense or specifically to the particular type or subject-matter of the advice or opinion that was the subject of the current request. Other submitters considered that the ground could be simplified. Submitters also pointed out that the redraft omitted the provision of opinions “to” Ministers (for example, by those outside government), in contrast to the current section 9(2)(g)(i). We agree with these suggestions, which we have attempted to address in the proposed redraft below.

Issues paper ground (v)

The withholding of the information is necessary to maintain the effective conduct of public affairs by protecting:

- (v) the ability of Ministers properly to consider advice tendered before a decision is made

- 3.62 Ground (v) is a substantial reformulation of section 9(2)(f)(iv). It reflects the Ombudsmen's approach to the current ground, but in a clearer and more transparent way. Its purpose is to give Ministers some room to consider advice they receive. It gives space for what we have heard described as "orderly decision making".
- 3.63 However some submitters thought that, as phrased, it was too narrow. The Ombudsmen noted that it would not apply to advice that does not relate to conventional ministerial decision-making processes – for example, draft answers to parliamentary questions, CAB 100 forms and advice from the Department of the Prime Minister and Cabinet to the Prime Minister.
- 3.64 The Ombudsmen also referred to the complexity of government processes where there can be multiple stages to a project with no real end point in sight. This might make the ground difficult to apply in some situations. The Ombudsmen also noted that the provision of advice will not necessarily lead to a decision being made – it might, for example, simply be provided for the Minister's information or the Minister, for whatever reason, may choose not to make a decision in relation to advice that has been provided.
- 3.65 Information provided in some of the situations identified by the Ombudsmen is likely to fall within proposed ground (iv). Nevertheless, we agree that reconsideration of the proposed ground (v) is necessary. In particular, we propose, for the reasons given, to remove the limitation on protecting the confidentiality of advice "before a decision is made".
- 3.66 It has also been queried whether "tender" covers all advice, whether requested or not. We think it should, and that the legislative provision should make that clear, to remove any possible argument.
- 3.67 A concern was expressed by some agencies that the proposed new formulation does not quite cover all the ground in the present section 9(2)(f)(iv): "the confidentiality of advice tendered by Ministers of the Crown and officials". However we think that any residual matters which fall outside this suggested new ground (v) will fall within, and be protected by, the new ground (iv) which we have explained above.

Issues paper ground (vi)

The withholding of the information is necessary to maintain the effective conduct of public affairs by protecting:

- (vi) Ministers, members of organisations, officers and employees of any department or organisation from improper pressure or harassment

- 3.68 Ground (vi) is a reformulation of the current provision.

- 3.69 The Ombudsmen considered that, in order to maintain the current approach to the ground, it should include a reference to the effective conduct of public affairs. However, we consider that this is adequately covered by the opening sentence of the provision and do not think it is necessary to include a further reference to the effective conduct of public affairs in the ground itself.

Issues paper ground (vii)

The withholding of the information is necessary to maintain the effective conduct of public affairs by protecting:

- (vii) the confidentiality of communications by or with or about the Sovereign or her representative.

- 3.70 Ground (vii) is a reformulation of section 9(2)(f)(i), save for the addition of the word “about”. That word was added at the suggestion of the Cabinet Office, who asked us to consider whether communications about the Sovereign and her representative should be protected. We consider that they should be. We also agree that “the Sovereign’s representative” should not be confined to the Governor-General, but should extend also to a member of the royal family who visits New Zealand on behalf of Her Majesty.

Recommended good government grounds

- 3.71 In light of these submissions, we have amended the draft proposed in the issues paper, and our recommended good government grounds for insertion in the OIA are now as follows:

The withholding of the information is necessary to avoid prejudice to the effective conduct of public affairs by protecting:

- (i) collective and individual ministerial responsibility;
- (ii) the political neutrality of officials;
- (iii) negotiations between political parties or members of parliament for the purpose of forming or supporting the government;
- (iv) the free and frank expression of opinions and provision of advice or information by, 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;
- (v) the ability of Ministers properly to consider advice tendered, whether that advice was requested or not;
- (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.

- 3.72 A much simpler version of these grounds is appropriate for LGOIMA, which includes no equivalent provision to section 9(2)(f) of the OIA. We recommend that the LGOIMA provision be as follows:

The withholding of the information is necessary to avoid prejudice to the effective conduct of public affairs by protecting:

- (i) the free and frank expression of opinions and provision of advice or information by, between or to members or officers or employees of any local authority, in the course of their duty;
- (ii) such members, officers and employees from improper pressure or harassment;
- (iii) the ability of a local authority properly to consider advice tendered, whether that advice was requested or not.

Guidance

- 3.73 Although we propose that the good government grounds be reformulated, we also believe that assistance in the form of better guidance remains crucial to these grounds being understood and consistently applied.⁸⁴ There was notable confusion and misunderstanding amongst submitters about how these grounds were to be applied. Submitters supported the need for greater guidance in this area.
- 3.74 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.

R8 Sections 9(2)(f) and 9(2)(g) of the OIA (the “good government” grounds) should be replaced by a provision stating that:

The withholding of the information is necessary to avoid prejudice to the effective conduct of public affairs by protecting:

- (i) collective and individual ministerial responsibility;
- (ii) the political neutrality of officials;
- (iii) negotiations between political parties or Members of Parliament for the purpose of forming or supporting the government;
- (iv) the free and frank expression of opinions and provision of advice or information by, 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;
- (v) the ability of Ministers properly to consider advice tendered, whether that advice was requested or not;
- (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.

R9 Section 7(2)(f) of the LGOIMA should be replaced by a provision stating that:

The withholding of the information is necessary to avoid prejudice to the effective conduct of public affairs by protecting:

- (i) the free and frank expression of opinions and provision of advice or information by, between or to members or officers or employees of any local authority, in the course of their duty;
- (ii) such members, officers and employees from improper pressure or harassment;
- (iii) the ability of a local authority properly to consider advice tendered, whether that advice was requested or not.

Chapter 3 Footnotes

- 60 Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997) at ch 6.
- 61 At [247].
- 62 Australian Law Reform Commission *Secrecy Laws and Open Government in Australia* (ALRC R112, 2009) at [2.5].
- 63 See Steven Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?* (New Zealand Centre for Public Law, 2005) and Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007).
- 64 OIA, s 9(2)(f). There is no equivalent ground in LGOIMA.
- 65 AV Dicey *Introduction to the Law of the Constitution* (10th ed, Macmillan & Co Ltd, New York, 1962) at 417.
- 66 Ian Eagles, Michael Taggart and Grant Liddell *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992) at 339.
- 67 At 339.
- 68 Office of the Ombudsmen *Practice Guidelines – Official Information* (Wellington, 2002) at Part B, ch 4.5 “Constitutional Conventions”.
- 69 Eagles, Taggart and Liddell, above n 66, at 364.
- 70 OIA, s 9(2)(g)(i).
- 71 LGOIMA, s 7(2)(f)(i).
- 72 Office of the Ombudsmen, above n 68, at Part B, ch 4.6 “Free and Frank Expression of Opinion”.
- 73 At 2-3.
- 74 Committee on Official Information *Towards Open Government: General Report* (Government Printer, Wellington, 1980) at [47].
- 75 At [48].
- 76 Peter Waller, R.M. Thomas, Duncan Simpson and Robert Hazell *Understanding the Formulation and Development of Government Policy in the Context of FOI* (The Constitution Unit, University College, London, 2009).
- 77 White, above n 63, at 271.
- 78 Even though this may contravene the spirit of the Public Records Act 2005.
- 79 Eagles, Taggart and Liddell, above n 66, at 367.
- 80 At 367.
- 81 Freedom of Information Act 2000 (UK), s 26(2)(b) and (c).
- 82 Issues Paper at [4.46].
- 83 Law Commission, above n 60, at [234].
- 84 See [4.79]–[4.84].



Chapter 4

Politically sensitive requests

- 4.1 A particular area of our review has been an examination of the issues that arise in relation to politically sensitive requests. Sensitivity may arise due to the nature of the material being requested (i.e. whether one of the withholding grounds protecting the interests of government applies), the nature of the requester (i.e. media or Opposition Party requests), or the nature of the decision-making process (i.e. whether the request requires a decision by or input from a Cabinet Minister).

ALLOCATION OF DECISION-MAKING

- 4.2 The OIA contemplates dialogue between officials and ministers in relation to official information requests, as does official guidance for agencies.⁸⁵ One purpose of this dialogue is for the proper processing of requests through adequate consideration of potential withholding grounds and assessment of the balance of the public interest. Requests may raise issues about the protection of government interests under the conclusive withholding grounds in section 6, or under certain section 9 withholding grounds such as the good government grounds, the confidentiality ground or grounds that protect the Crown's commercial activities or negotiations.
- 4.3 Consultation between a department and its Minister may be appropriate so that the department can assess all relevant factors in reaching a decision on release. Requests made to a number of departments or Ministers may require consultation for co-ordination purposes,⁸⁶ as may requests being handled by a department on behalf of its Minister.
- 4.4 Another purpose of departmental/ministerial communication is to keep a Minister informed of any particular request that may give rise to issues of interest or accountability, given that the Minister may be answerable to Parliament for matters disclosed by the release of the requested information. This is known as the “no surprises” doctrine.

- 4.5 The issue of decision making rules for Ministers and officials has been the subject of discussion since the very early days of the OIA. The allocation of decision-making was not altogether clear right at the outset of the legislation and it was anticipated that support mechanisms such as a code, or even an amendment to the Act might be needed.

- 4.6 The Danks Committee, summarising the rationale for what would become the “good government” withholding grounds, noted:⁸⁷

To run the country effectively the government of the day needs nevertheless to be able to take advice and to deliberate on it, in private, and without fear of premature disclosure. 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....

A new and sharper definition of areas of responsibility at senior levels, and the development of new and perhaps more explicit codes governing the relationship between Ministers and officials might be required. The importance of careful adjustments in this area does point yet again to an evolutionary approach to openness.

- 4.7 A State Services Commission leaflet published before the OIA came into force commented on the effect of the OIA on the relationship between public servants and Ministers.⁸⁸ It noted that the free and frank withholding ground articulates for the first time in statutory form some of the constitutional conventions that underlie the relationship between officials and Ministers, and that decisions about the release of information must be based on the new statutory criteria:

However, it would be both prudent and fair, in cases where the public servant considers the Minister would wish to be involved because of the significance of the matter, to refer it for decision by the Minister. Even so, the public servant must make a recommendation and that recommendation must be made in terms of the Act.

Therefore it may well be that, as a result of experience with the operation of the Act, in the future there might need to be a more precise definition of areas of responsibility at the senior level, and the development of new, and perhaps more explicit, codes governing the relationship between Ministers of the Crown and officials...

It is clear that the relationship must be handled with some sensitivity, and with a good understanding on both sides, if it is to work well; further, it requires a high degree of trust between the political arm and the administrative arm of Government.

The new Official Information Act builds on, but does not undermine, the basis of the relationship that exists between the two arms of Government...

- 4.8 A paper prepared for the Information Authority in 1984 addressed the relationship of the Minister and the department in this way:⁸⁹

Should the Minister take part in the initial decision on the request for information? The answer is yes if the request is made to the Minister. But what if the request is made to the department or organisation? No doubt it can consult with its Minister about its proposed action when it thinks that appropriate. But can the Minister actually make the decision at that point? The legal position is not that clear. The Act itself indicates that it is the recipient that is to respond, but the general law relating to the relationship between Ministers and officials and some of the provisions of departmental statutes relating to that relationship require the permanent head and department to act under the direction and control of the Minister. It is not clear whether the latter provisions affect the Official Information Act. What *should* the answer be? In principle the department or organisation should make the decision: the system of the Act looks to a later voice for the Minister which should, if possible, not be compromised by an early decision. But what of the case of a request to a department for a Cabinet paper or a paper actually prepared by the Minister and held by the department? Should not the Minister (in the former case in consultation with members of the Cabinet) make the decision? I suggest that the answer is yes: the Minister should. That situation is already adequately dealt with by section 14 of the Act which provides for the prompt transfer of requests by a recipient to the Minister, department or organisation more closely connected with the function in issue. I accordingly recommend that the Act make it clear that only the body or person dealing with the request make the decision on it.

- 4.9 In 1987, the Official Information Amendment Bill replaced and expanded on section 15 by adding subsections (4) and (5) which provide for decision-making on requests made or transferred to departments, and for consultation on requests by departments. Introducing the Amendment Bill, Sir Geoffrey Palmer, then Minister of Justice stated:⁹⁰

Clause 8 spells out that a Minister cannot make the initial decision on a request properly made to the Minister's department. That avoids the possibility of prejudgment, and there have been examples of that. Of course, the Minister can still be consulted by the department; the Bill makes that clear.

- 4.10 Despite this clarification, there is on-going confusion as to the nature of departmental-ministerial dialogue and the extent of ministerial involvement in OIA decisions which are taken by departments. This relates to the circumstances in which a Minister may take primary responsibility for OIA decision-making from the department to whom the request was initially directed (by use of the transfer provision), and the extent to which the Minister may influence a department's decision-making, whether formally by a ministerial direction or informally through the consultation process.

THE PROBLEMS

4.11 The lack of clarity about decision-making has given rise to problems in practice. The problems appear to fall into three areas:

- (a) a perception amongst requesters of political interference in the handling of sensitive requests where there is consultation with or transfer of the request to a Minister's office;
- (b) a lack of trust at ministerial level that officials will properly apply the relevant withholding grounds that are designed to protect governmental interests (the good government grounds, in particular); and
- (c) confusion as to the basis and proper procedures for departmental-Ministerial interactions in relation to OIA requests, potentially undermining departmental-Ministerial relationships.

All three types of problem share a common theme: a degree of suspicion and mistrust amongst OIA participants in relation to requests that have a sensitive political aspect.

4.12 Former Law Commission President Sir Geoffrey Palmer has noted that doubts and suspicions in the handling of sensitive requests, even if anecdotal rather than empirical, are a serious matter:⁹¹

The aim of the Act is not just open government, but surely that it should be clearly and observably open. Both openness and the appearance of openness are necessary for requesters and the wider public to be confident that the principle of open government is actually operating.

4.13 Examining problems for requesters, Steven Price's interviews suggested that, in practice, there are two processing tracks: the first is the set of rules that apply to straightforward requests – these comprise the bulk of requests and usually proceed well within the 20 working day time limit, with little or no information withheld, and no charge. The second track however, is the set of rules that apply to difficult or politically sensitive requests – often from journalists or opposition MPs, which take much longer to process, and are more likely to be transferred to the minister's office, sometimes with questionable or no justification. Many of these requests are refused or more information is withheld than is necessary under the Act's criteria and many agencies deferred to the wishes of their ministers rather than taking the decisions themselves.⁹²

4.14 This is confirmed by Rick Snell, an Australian academic who has studied comparative approaches to freedom of information processes. Snell found that requests for politically sensitive information attract more attention from government information managers, thereby creating less chance that the information will be released, and thus implicitly recognising the existence of information management within political affairs.⁹³

- 4.15 From the ministerial perspective, Nicola White identified a degree of mistrust about the use of the good government grounds by officials to protect sensitive information.⁹⁴ The issue here is that there is room for genuine disagreement about the application of these withholding grounds, both on grounds of vagueness⁹⁵ but also because officials may bring a narrower view to the good government grounds, being at a further remove from government than Ministers. The good government grounds inevitably have a political component to them, which Ministers may view differently to officials. The political aspects can be heightened in relation to requests from political parties.
- 4.16 For agencies, the application of the good government withholding grounds in particular, is by no means straightforward. They are acknowledged to be the most difficult of all the grounds for withholding official information.⁹⁶ We discuss some of the difficulties with the drafting of these grounds in chapter 3. But these grounds are also different in nature to some of the other withholding grounds. Reliance on them has the potential to be idiosyncratic, highly context-specific and temporal, compared to reliance on other withholding grounds, adding complexity to whether they apply in any particular circumstances. While some sensitive policy development processes are run or assumed to be operating in a closed manner, in reliance on the operation of the good government withholding grounds, some are deliberately run in an open manner with disclosure of policy development papers along the way. The information management of policy development is essentially a political decision, although it may be developed collaboratively between department and Minister, or with departmental advice.⁹⁷
- 4.17 The Ombudsmen have sometimes taken the opportunity, as circumstances allow, to recommend proactive approaches to the release of information where accountability, transparency and participation require an organised and orderly release of information to the public, and where individual requests could be affected by political sensitivities.⁹⁸ The time at which information is requested can also be crucial – the good government grounds may only protect information for a temporary period, for example to allow for a policy development phase, and will not provide on-going protection once that period has passed.⁹⁹
- 4.18 Another issue is a tension between the goal of increasing public participation (highlighted in the purpose section of the Act) and the protection of government processes in the withholding grounds. These must be balanced by applying the public interest test. Decisions of the Ombudsmen indicate that the availability or lack of other accountability measures or opportunities for participation may swing the balance in any particular case.
- 4.19 Nicola White concluded that the protection afforded by the good government grounds is perceived by officials as difficult to achieve, given the process involved. The decisions of the Ombudsmen are case specific and do not necessarily provide certainty about the grounds for protection in a generic manner:¹⁰⁰

Without any clear sense of where the limits were, there was no particular comfort about what information could be protected and when, and therefore people adopted preventative strategies to avoid risk. Such strategies might include limiting the amount on paper at the most sensitive end of the system, and trying to change the way papers were written across the public service more generally. Arguing issues through fully with the Ombudsmen took too much time and energy, and could in itself become political fodder.

- 4.20 On issues of process, Nicola White's research also found that issues of consultation with ministerial offices and the transfer of requests to Ministers can be problematic.¹⁰¹ 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. In her view this highlights the broader challenge of administering the OIA in a neutral manner while in a political environment.
- 4.21 White's research showed 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 she found is for the Minister's office to receive weekly lists of requests so that requests of potential interest to the Minister can be identified.
- 4.22 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 with transfers of requests to the Minister being considered on a case by case basis.
- 4.23 These practices are not new. In a 2002 review, 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.¹⁰² And investigations by the Ombudsmen have found agency delays caused in part by an instruction that all OIA requests were to be referred to the Minister for the Minister's information and clearance;¹⁰³ and by an instruction to transfer all requests on a particular matter to the Minister.¹⁰⁴
- 4.24 The issue of political management of information requests was discussed in a 2009 review of the New South Wales Act by the NSW Ombudsman.¹⁰⁵ The practice under review was for all 'contentious' requests, such as requests from opposition MPs and journalists, plus individual requests from special interest groups that are identified on an ad hoc basis, to be notified to ministerial offices and then reported on a fortnightly basis to the Department of Premier and Cabinet. The NSW Ombudsmen commented:¹⁰⁶

It is not unreasonable for a government or Minister to want to be made aware of applications that could result in it having to deal with a controversial issue when the documents are released. The danger is in the detail, or lack thereof, of the process used and the failure to make absolutely clear that the communication flow should be in one direction only – from the agency up the reporting chain.

While some agencies have a clearly documented and well understood practice of both how and why applications are notified on receipt and copies of finalised determinations are sent to their Minister's office, others are much less clear. Alarming we came across a number of agencies where copies of determinations are not sent to applicants until the agency has heard back from the Minister's office. FOI staff were often unclear what they are waiting for and delays could run into weeks. This is not appropriate and raises questions about the role Ministers' offices are playing in the FOI process. Of even more serious concern is the practice of sending draft determinations to a Minister's office. We have recently had cause to make such conduct the subject of a formal investigation under the Ombudsman Act and have made a series of recommendations about the inappropriateness of such a practice including that it should cease immediately.

VIEWS OF SUBMITTERS

- 4.25 A perception of political management of sensitive requests, and a lack of clear process were confirmed in responses to our survey and submissions to the issues paper. It was reported to us that consultation in the political context can create delay and can impact on the decision-making process that is required by the Act. We received comments that this is an area of frustration, consultation creates a conflict of duties, and that the media are distrustful when ministerial offices are seen as influencing release decisions. Others have commented that changes to the political environment mean that guidelines about consultation and areas of responsibility would be useful.¹⁰⁷
- 4.26 In the issues paper we asked whether there should be clearer guidelines about consultation with ministerial offices and asked for views about whether there is any need for further statutory provisions about transfers to ministers.¹⁰⁸ In submissions, only the Treasury disagreed that there should be clearer guidelines about consultation with ministerial offices, commenting that consultation is a relationship matter that should be worked out on a case by case basis.
- 4.27 All other submitters who commented (21) supported clearer guidelines. The Ombudsmen noted that this is an area that agencies and officials struggle with and that generates suspicion and distrust among requesters. Other submitters commented that the political environment has changed and that guidelines about consultation and areas of responsibility would be useful and are needed to avoid any possible perception of political interference in the way departments respond to requests.
- 4.28 There was little support in submissions for further statutory provisions about transfers of requests to Ministers. 15 submitters thought that there should be no change to the transfer provision. The Ombudsmen's view was that the existing grounds for transfer are appropriate and should not be amended to take account of situations where agencies and Ministers disagree on the decision to be made about a request.

- 4.29 However three submitters disagreed, one commenting that while fuller guidance may help, it will not rectify the problem. Another thought that where there is disagreement about release, the idea of transferring the request to the minister is a good solution to ensure there is proper accountability for the decision to withhold.
- 4.30 Some participants in Nicola White's research suggested that the transfer provision should be more flexible in relation to political requests from the media and the opposition:¹⁰⁹
- the Ombudsman has made it very clear that you can't have a convention whereby opposition or media requests on certain issues are transferred to the minister's office, which ultimately means that you do end up in a position where the public service is subject to a greater level of political scrutiny by the opposition and the media than would be the case were it the minister releasing the information.
- 4.31 Other interviewees at the political level of government wanted a return to a much clearer understanding that it is appropriate for ministers to be making the decisions on the release of some papers, in particular Cabinet papers and advice to them as ministers.¹¹⁰

DISCUSSION

Allocation of decision-making

1997 Law Commission review

- 4.32 One of the issues the Law Commission was asked to report on in 1997 was the appropriateness of the decision making rules for Ministers and officials set out in section 15(4) and 15(5) of the OIA.¹¹¹ These provisions require the chief executive of a department, or an authorised officer, to make the decision (if the request is not transferred) and state that the decision maker may consult a Minister of the Crown or any other person over a proposed decision.
- 4.33 The Law Commission's initial view was that both these provisions were incomplete and that they should either be repealed or, alternatively, be given wider application. In its report, the Law Commission concluded that section 15(4) should be repealed (as being unnecessary given the change to the veto provision), and that section 15(5) should be broadened to cover consultation by all agencies that are subject to the OIA.¹¹² If there was any doubt about whether the transfer provision was wide enough to allow for transfers in this context, the Law Commission thought the legislation should be clarified.

- 4.34 The change to the veto provision in 1987 that put the power of veto of an Ombudsman's recommendation in the hands of the Governor-General in Council rather than in the hands of individual Ministers,¹¹³ was seen as reducing concerns and difficulties about ministerial consultation. While the Law Commission noted the potential for conflict between an agency's decision-making with the Minister's power of direction, the transfer provision was seen as the relevant mechanism for resolving disputes, in accordance with the view at that time of the Ombudsmen and the advice contained in the Cabinet Office Manual.
- 4.35 Since the 1997 Law Commission report, the Cabinet Office Manual advice on transfers to Ministers has been revised,¹¹⁴ and the Ombudsmen take a stricter view of section 14 (the transfer provision).¹¹⁵ The legislative provisions themselves (section 15(4) and (5)), however, have not been altered since they were introduced in 1987.

Current review

- 4.36 There are tensions evident in the operation of the legislation as to how decision-making is allocated. One aspect of this is the multiplicity of accountabilities that potentially arise.
- 4.37 The concept of accountability arises in a variety of guises as officials process official information requests. Sir Geoffrey Palmer has noted that there is an ambiguity about the term "accountability" within Westminster systems of government:¹¹⁶

There is the political accountability of public servants to elected politicians. There is accountability of ministers to Parliament. There is accountability to the law. There is accountability to the general public in the sense that decisions have to be explained and defended. But whatever form of accountability is being discussed, it cannot be effective without information.

- 4.38 Promoting the accountability of Ministers and officials, in order to enhance respect for the law and to promote good government, is an express purpose of the OIA.¹¹⁷ Improved accountability is therefore a direct goal of the legislation. However, furthering that goal can raise difficult related issues for officials and Ministers. Generally, departmental officials are accountable to their Minister, who in turn is accountable to Parliament.
- 4.39 The Danks Committee assumed that a delegation of authority from the government to officials would be the mechanism used to allocate decision making.¹¹⁸

One basic point needs to be made at the outset. Responsibility for administering the proposed legislation rests primarily on the Government as such, rather than on its individual officers. The principle that official information should be made available to the public unless there is good reason to withhold it should guide officials at every level, as well as Ministers, and the decision whether any given information should be released or withheld should be based on it. This decision is, however, one for the Government to take, not the individual officer. Authority to decide will no doubt be delegated to permanent heads, who will in turn need to delegate it to officials at lower levels. As we have noted in our General Report, these may often be the people who have functional responsibility for the area in question. But whatever the level at which the actual decision is taken, it must be duly authorised, and the officer taking it will be accountable for his actions.

However, the addition of section 15(4) in 1987 instead gave statutory authority to heads of departments and their authorised officers and employees.

4.40 Guidance from the State Services Commission confirms the powers of Ministers to issue directions to their departments:¹¹⁹

There is a close and hierarchical relationship between Ministers and departments, with the governance arrangements centred on a direct Minister-chief executive relationship. Ministers have extensive powers to direct departments, as long as such directions are consistent with the law (e.g. there are relatively numerous statutory requirements for officials to act independently in some matters – which can be quite significant).

4.41 An important question is whether the OIA is one of these statutory provisions that requires officials to act independently of ministerial direction. The Act is not entirely clear about this, despite the 1987 amendment to section 15, but there are a number of factors which indicate that there is a separation of responsibility between department and Minister:¹²⁰

- (a) The State Sector Act 1988 introduced the notion of separate spheres of responsibility of ministers and chief executives and of independent departmental control rather than a unified public service;¹²¹
- (b) Section 15(4) of the OIA provides that decisions on requests made to a department are to be made by the chief executive of the department, or an authorised officer or employee, unless the request is transferred to another department, organisation or to a Minister;
- (c) Section 15(5) of the OIA expressly confirms that a chief executive, employee or officer of a department may consult with a Minister of the Crown in relation to the decision that the chief executive, employee or officer proposes to make on any request received;
- (d) The Cabinet Manual confirms that a department should advise its Minister of the release of particularly sensitive or potentially controversial information, although the decision to release should be made by the department “in accordance with the OIA”;

- (e) The OIA includes an express mechanism for the transfer of requests from department to Minister and vice versa on fairly limited grounds and the Cabinet Manual confirms where there is a difference of views about release, a transfer can be considered *if the section 14 requirements can be met* [emphasis added];
 - (f) As noted above, practices that involve referring all OIA requests, or particular types of requests, such as media requests to the Minister's Office, have met with disapproval from oversight agencies such as the State Sector Standards Board and the Ombudsmen.
- 4.42 One view is that it is appropriate for Ministers, who are accountable to Parliament, to take the final decision on contentious matters. However, there are strong policy reasons for departmental OIA decision-making not to be subject to ministerial direction, such as to reduce the perception of political influence in the outcome and potential conflicts of interest, as well as greater process efficiency.
- 4.43 A risk with departmental decision-making on contentious matters is whether this will always achieve a full and proper assessment of governmental interests as reflected in the relevant withholding grounds; however other available mechanisms for addressing this risk are ministerial consultation (to ensure that these grounds are fully considered) and use of the transfer provision where it applies to transfer requests to the Minister. Clarification of the withholding grounds themselves would also assist to alleviate this risk. Nevertheless, it may be unrealistic to strive to completely remove all political tension from the operation of the legislation:¹²²

Freedom of Information never settles down. In terms of bureaucratic routine and a body of case law FOI does begin to settle down after the early years. But at a wider political level it never does. White's study shows the strong tensions still evident in New Zealand after 25 years, especially around politically sensitive requests. In all systems there have been periodic reviews, reflecting continuing political discomfort with the legislation...There is permanent institutionalised tension built into the system. It provides a set of rules for regulating an inherently conflictual game.

The transfer provision

- 4.44 The transfer provision is the mechanism by which responsibility for decision-making under the OIA can be shifted. However the OIA limits transfers to cases where the information is more closely connected with the functions of another entity, in this context the Minister. Whether a request is better dealt with by the Minister or the department, on the basis of connection to functions, is not a clear-cut decision. As White notes:¹²³

[the minister and the department] are alter egos of each other in substantive terms, and for many aspects of state sector administration and constitutional relationships they are indistinguishable.

This makes it difficult to say that the request is more closely connected with either the department or the Minister, and transfer may therefore not be a legitimate option.

4.45 An earlier iteration of the Cabinet Manual suggested that where a 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 OIA.¹²⁴

4.46 However 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 of the Act are satisfied. It says that:¹²⁵

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].

4.47 The Ombudsmen have made it clear that requests may only be transferred on the grounds set out in section 14. The Ombudsmen have assessed a blanket policy to transfer all media requests to the Minister as not justifiable.¹²⁶ The Ombudsmen also disapproved of a blanket policy to transfer all requests on a particular matter to the Minister.¹²⁷

4.48 In another decision, the Ombudsmen upheld the transfer by the Ministry of Justice of a request for information sought in relation to the Civil Union Bill as being more closely connected with the functions of the Associate Minister.¹²⁸ Considering the SSC guidance on the relationship between the Public Service and Ministers, the Ombudsmen said:

This suggested to the Ombudsman that information related to “policy decisions” was more closely connected to the functions of a Minister whereas information related to “policy advice and implementation” was more closely connected to the functions of a Department. However, whilst in theory the division appeared clear, the Ombudsman acknowledged that in practice the distinction may be more difficult to draw. In general terms, the Ombudsman accepted that a recipient of a request should transfer that request to a Minister if the information relates to the Minister’s (or Cabinet’s) decision-making function, and release of the information could prejudice the Minister’s ability to perform that function. Where no possible prejudice to a Minister’s decision-making function could result, the recipient of the request should be responsible for deciding it.

- 4.49 Some of the difficulties in relation to the limits around transfers to Ministers could be alleviated through clearer drafting of the good government withholding grounds. In chapter 3 we recommend that one of the good government withholding grounds should better protect the ability of Ministers properly to consider advice tendered.¹²⁹ In our view, this would provide clearer grounds for the protection of advice from premature release, which may reduce reliance on the transfer mechanism to try to achieve appropriate protection.

Consultation or notification

- 4.50 Currently, guidance about ministerial consultation is spread across a number of documents and is not always consistent. One issue that is not altogether clear is when a department must *consult* its Minister before releasing information, or when it must *notify* the Minister prior to release. The OIA simply says that nothing prevents a department consulting with a Minister or anyone else. As one of Nicola White's interview subjects noted:¹³⁰

I don't see a problem with ministers knowing what's being released. I do have a problem with ministers saying what can be released. That's a different thing altogether.

- 4.51 A journalist speaking to Nicola White put it this way:

Most of the time I believe that if the department refers a decision up to the minister although they might be allowed, the effect will be to undermine the Official Information Act doing its work properly. Most of the time there are probably a small number of cases where a minister is actually involved in the information where maybe you could make a case that [it] is reasonable and just that they have a say. But as soon as you put it up to the minister's office the priorities – are not those of the Official Information Act and that's where it's just so murky. It's difficult.

- 4.52 The State Services Commission guidance for State servants on the Code of Conduct specifically addresses the need to keep Ministers informed about sensitive official information requests, while balancing the information needs of the public:¹³¹

The availability of official information has become a foundation of our democracy. We must recognise the importance of giving effect to our organisation's procedures when responding to information requests, and be alert to the interest that our Minister also has in information held by our organisation. When we receive requests to release politically sensitive information, we must notify our Minister well in advance of any release....

We must appreciate the importance of a well-informed electorate at the time of a general election and our responsibility for facilitating speedy responses to information requests. We must not delay responding to information requests in the lead-up to an election, in a misguided sense of obligation to our Minister.

4.53 The guidance also discusses the “no surprises” principle.¹³²

We are expected to advise Ministers in advance of circumstances likely to impinge on the Government’s responsibilities, any major strategic initiatives, and issues that may attract public interest or political comment.

A “no surprises” way of working does not interfere with an organisation’s independent decision-making role or its operational responsibilities, but reflects the part all organisations play in executive government.

4.54 The Cabinet Manual clearly signals that there is a distinction between notification and consultation:¹³³

The style of relationship and frequency of contact between Minister and department will develop according to the Minister’s personal preference. The following guidance may be helpful.

- (a) In their relationship with Ministers, officials should be guided by a “no surprises” principle. They should inform Ministers promptly of matters of significance within their portfolio responsibilities, particularly where these matters may be controversial or may become the subject of public debate.
- (b) A chief executive should exercise judgement when deciding whether to inform a Minister of any matter for which the chief executive has statutory responsibility. Generally a briefing of this kind is provided for the Minister’s information only, although occasionally the Minister’s views may be a relevant factor for the chief executive to take into account. In all cases, the chief executive should ensure that the Minister knows why the matter is being raised, and both the Minister and the chief executive should act to maintain the independence of the chief executive’s decision-making process.
- (c) It would clearly be improper for Ministers to instruct their departments to act in an unlawful manner. Ministers should take care to ensure that their actions could not be construed as improper intervention in administrative, financial, operational, or contractual decisions that are the responsibility of the chief executive.

4.55 Specifically on the OIA, the Cabinet Manual requires a department to:¹³⁴

- (a) consult its Minister in relation to the release of Cabinet material, because this material relates to his or her activities as a Minister;¹³⁵ and
- (b) advise its Minister if it intends to release any information that is particularly sensitive or potentially controversial, although the response decision should be made by the department “in accordance with the Official Information Act.”

4.56 Another State Services Commission guidance document suggests rather broader consultation provisions:¹³⁶

It would be appropriate for departments to consult their Minister when:

- 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 to Ministers;
 - facts, opinions or recommendations in the information are especially quotable or unexpected;
 - the information reveals important differences of opinion among Ministers or agencies.
- 4.57 The Ombudsmen's guidance encourages consultation as a matter of best practice where agencies deliberate on whether one or more of the withholding grounds may apply to protect information from release, but does not specifically address practices of departmental-ministerial consultation.
- 4.58 In our assessment, guidance about departmental-ministerial consultation and notification is not altogether clear and would benefit from clarification and further development, including reference to decisions of the Ombudsmen that discuss the nature of consultation. Commentary on this topic that discusses and links the various guidance material would also be useful.

RECOMMENDATIONS FOR REFORM

- 4.59 We have examined a number of available options for addressing the problems that have arisen in relation to sensitive political requests.

Protocols

- 4.60 We have considered Nicola White's call for specific protocols between departments and ministers as to areas of engagement on OIA issues but do not make recommendations about the use of such protocols across government in this report. This does not restrict agencies and Ministers adopting protocols of this kind where they find them to be useful. Where they are used, we recommend that they should be published by the agency concerned to ensure transparency.
- 4.61 Our preferred approach and priority for reform however is the range of measures outlined below and in the preceding chapter. Nevertheless, if significant difficulties remain, following the implementation of the measures we recommend, consideration could be given to the systematic use of protocols in a future review.

Legislative change

- 4.62 We have considered whether any legislative change is warranted. In particular we have examined the approach in Australia to the allocation of decision-making between officials and Ministers.

- 4.63 The New South Wales Act contains a provision that an agency is not subject to the direction or control of any Minister in the exercise of the agency's functions in dealing with a particular request.¹³⁷ It creates offences for making a decision known to be contrary to the Act, directing an official to make a decision known not to be permitted or required by the Act, and improperly influencing a decision.¹³⁸ This approach must be assessed however in light of the conclusive withholding grounds in the New South Wales Act for "Cabinet information" and "Executive Council information."¹³⁹ These provide a list of specific rules about classes of documents that qualify for conclusive protection from release and thereby reduce the level of contestability about release decisions in relation to sensitive government information. This is a structural difference to New Zealand's case by case approach.
- 4.64 We have also examined Australian provisions, both at Commonwealth and State level, which attempt to define the information in the domain of an agency, and the information in the domain of the Minister, for the purpose of processing information requests. "Documents of a Minister" are defined to include documents relating to the affairs of an agency while excluding any documents in the category of "documents of an agency."¹⁴⁰ The provisions do not, in our view, provide much greater clarity, and the Australian Acts are not consistent on whether a Minister may assume responsibility for a request made to an agency.¹⁴¹
- 4.65 On balance our conclusion is that the OIA's decision-making framework is sound and that legislative change is not necessary.
- 4.66 We do however recommend a minor amendment to the OIA's transfer provision. While we do not support any broadening of the provision to expand the grounds on which requests may be transferred to Ministers, we believe that the wording of the transfer provision could be clearer. While section 15(4) clearly contemplates transfers by departments to a Minister and is generally treated as permitting such transfers, one reading of section 14 suggests that a department may only transfer to another department and a Minister may only transfer to another Minister.¹⁴² The wording of the transfer provision in the LGOIMA is preferable in this respect.¹⁴³

Guidance

- 4.67 In our consultation with central agencies, the development of guidance was preferred to legislative change as it would retain flexibility and a case-by-case approach to individual requests.
- 4.68 We consider that guidance is critical in three respects. First, the current guidance about transfers of requests to a Minister should be reviewed, clarified and further developed to provide agencies with a clearer sense of when information is more closely connected to the functions of the Minister.

- 4.69 Secondly, there is room for clarification and development of guidance about consultation with Ministers and notification under the “no surprises” doctrine. We recommend that guidance in both cases be developed by a working party including the official information oversight office we discuss in chapter 13, the State Services Commission, the Ombudsmen and the Department of the Prime Minister and Cabinet, including the Cabinet Office.
- 4.70 Thirdly, more developed guidance is needed about the application of the withholding grounds and the public interest test, with case examples from the decisions of the Ombudsmen. In particular, developed guidance about the good government grounds (as reformed in line with our recommendations in chapter 3) should address uncertainty about their scope and application.

Transfer

- 4.71 We recommend that the State Services Commission Guidelines for Co-ordination be reviewed, clarified and further developed in relation to transfers of requests to Ministers. The current guidelines suggest that a transfer may be appropriate after consultation where a request is received from the Opposition, Opposition Research Unit or recognised interest group. In our view this is an overly broad view of the transfer provision as it suggests that transfers should be made on the basis of the nature of the requester, rather than on the basis of the nature of the material requested. The Guidelines should be revised.
- 4.72 Guidance about the fundamental question of when information is more closely related to the functions of a department or Minister would also be useful. While this may be difficult to pin down, the use of examples with reference to decisions of the Ombudsmen would be helpful. Two factors which might be influential in this regard are (i) authorship, so that decisions on release of information written by the Minister or in the Minister’s name, such as Cabinet documents, are made at the ministerial level, and (ii) the extent to which the information relates to the Minister’s decision-making function.
- 4.73 As noted above, we think that a working party of relevant central agencies should be convened to develop and update this guidance.

Consultation and notification

- 4.74 Currently there is conflict in the guidance about the extent to which interaction with ministerial offices should take the form of consultation or notification. Consultation implies ministerial input into the decision-making process in a way that notification does not, although even notification may prompt a conflicting exchange of views on a proposed decision in response to a request.

- 4.75 The State Services Commission Guidelines for Co-ordination suggest a greater level of consultation than may strictly be necessary and the distinction between consultation and notification should be made clearer. We also note that section 15(5) of the OIA creates a broad discretion for agencies to consult on any decision they propose to make, including with Ministers. The absence of criteria in the provision or in guidance raises the risk of more frequent or routine consultation with ministerial offices than may be warranted.
- 4.76 We recommend that existing guidelines about consultation between departments and ministerial offices should be reviewed and clarified as to the circumstances in which consultation is desirable, while confirming that it may be appropriate to keep Ministers informed about responses to requests through notification. The guidance should take account of applicable case law that discusses the nature and objectives of consultation.¹⁴⁴
- 4.77 For example *consultation* should be undertaken:
- (a) where there are potential grounds for transfer to the Minister, given the nature of the information requested; or
 - (b) where there is a level of shared responsibility for the information requested, or to co-ordinate a cross-government request; or
 - (c) where government interests are at stake that may properly give rise to protection of the information under one or more of the withholding grounds (such as the free and frank withholding ground).
- 4.78 Prior *notification* of a release decision may be required in any particular case in observance of the “no surprises” principle.

Further development of administrative guidance

- 4.79 One of the central conclusions to Nicola White’s work is that more rules should be introduced into the OIA system, particularly to deal with the political-administrative interface. In her view, this is an area where the flexibility of the case by case system needs to be balanced with clearer rules or guidelines to produce greater certainty and reduce uncertainty and dissatisfaction. White’s preferred approach is that the Ombudsmen develop a more overt system of precedent from its decisions, with the State Services Commission assuming administrative responsibility for developing rules and guidelines that draw on decisions of the Ombudsmen
- 4.80 In chapter 2 we reach a similar conclusion where we recommend a 3-prong solution to the present problem of uncertainty in the case-by-case approach for the application of difficult withholding grounds that includes more accessible case-notes, more fully developed guidelines and a commentary analysing the case-notes.¹⁴⁵

- 4.81 We think that this approach will be of particular benefit in relation to the operation of the good government withholding grounds. We discuss difficulties with the good government grounds in chapter 3 and recommend redrafting of these grounds. It is also clear that guidance about the grounds is vital and we recommend that the Ombudsmen's cases should be analysed and a summary provided to indicate to agencies the circumstances in which they will provide protection. Such guidance is also likely to be useful to requesters as well in indicating how the withholding grounds may apply in any particular case.
- 4.82 Guidance might refer to decisions where sensitive information was withheld under the good government grounds, such as in the following examples:¹⁴⁶
- (a) The recent asset sales decision (balancing voters' rights to be informed against the risk of harm to the development of assets sales policy from disclosure);¹⁴⁷
 - (b) The protection of material generated by the Treasury for purposes of the budget process;¹⁴⁸
 - (c) The protection of material within the Department of the Prime Minister and Cabinet relating to a Special Committee on Nuclear Propulsion;¹⁴⁹
 - (d) The protection of confidential ministerial briefings to industry sector groups;¹⁵⁰
 - (e) The protection of communications between the Minister of Finance and the Reserve Bank regarding economic growth, monetary policy and inflation outlook;¹⁵¹
 - (f) The protection of Cabinet discussions regarding a policy announcement about Television New Zealand;¹⁵²
 - (g) The protection of Treasury advice on social assistance policy;¹⁵³
 - (h) The protection of draft answers to Parliamentary questions prepared by the Department of the Prime Minister and Cabinet for the Prime Minister;¹⁵⁴
 - (i) The protection of advice to the government regarding its election promise as to the pre-funding of New Zealand superannuation;¹⁵⁵
 - (j) The protection of drafts of Treasury's 2005 briefing to the incoming Government (the final briefing being downloadable from the Treasury's website).¹⁵⁶
- 4.83 These can be compared with decisions recommending release of sensitive information sought such as:
- (a) Electricity Corporation (ECNZ) pricing information presented to Cabinet (strong public interest factors favouring disclosure);¹⁵⁷
 - (b) Police review on the importation of firearms (principle of public safety required greatest possible transparency);¹⁵⁸

- (c) Treasury report to Cabinet on producer board reform (protection did not continue to apply at particular stage of policy process, and presence of a public interest in accountability);¹⁵⁹
 - (d) Release of names of eminent New Zealanders consulted in the preparation of the Intelligence and Security Agencies Bill (but not views expressed);¹⁶⁰
 - (e) Release of draft Cabinet Paper (already released in error);¹⁶¹
 - (f) Information relating to policy being debated between government coalition partners (information not characteristic of free and frank expression of opinion, and did not contain opinion or recommendations).¹⁶²
- 4.84 In chapter 3 we recommend guidance on other grounds which potentially protect government interests should also be developed with reference to the Ombudsmen's decisions, such as the confidentiality ground, and the ground protecting government negotiations.

Strategy and the goal of increased participation

- 4.85 The official information legislation produced a dramatic cultural shift within government and the public service as much as a legal reform. The presumption of openness and availability of official information has fundamentally changed the way officials share information with the public.
- 4.86 In reviewing the legislation, it is worth asking what further changes might be needed to the culture and mind-set of those operating the legislation in order to achieve its aims, and how these might be encouraged. In chapter 12 we examine approaches to proactive disclosure of information and the change of mind-set that may be needed to achieve greater openness in official information.
- 4.87 Another theme that may be worthy of further consideration in the political context is the goal of citizen participation in government processes. This is an express purpose of the Acts. We see the encouragement of further cultural change as a means of progress towards the goal of the legislation as an important element of any reform package.
- 4.88 In 2001, Sir Brian Elwood who was at that time the Chief Ombudsmen, in a speech about the culture of the official information legislation, noted that the application of the OIA has focussed more on the accountability of ministers and officials than it has on the effective participation in the making and administration of laws and policies.¹⁶³

In fact, what is of more long term significance and benefit to New Zealanders is the ability to participate in the making and administration of laws and policies by being empowered with the ability to gain access to official information and provide an informed basis for alternative advice to the decision makers within the governmental system, independently of the advice available through official channels...

The area of greatest opportunity for extending the openness of our system of government lies in increasing accessibility to advice about issues of significant public policy or programmes prior to decisions being made so that one of the purposes of the Official Information Act (participation by New Zealanders in the making of laws and policies) can be better achieved.

Information management planning

4.89 Some of the difficulties arising in relation to requests for information on sensitive topics or at sensitive points in the policy development cycle could be managed by formulating an information management plan as a component of the policy development process. This would plan the way in which release and withholding will be managed at various stages.¹⁶⁴ Addressing the goals and purposes of the OIA proactively in this way may ease the processing of sensitive requests when they arise.

4.90 Marie Shroff, former Secretary to the Cabinet, describes this interaction between the OIA and political processes:¹⁶⁵

Where the government is developing a politically sensitive policy, it will now try to structure and manage an overall process for developing the issue. Consultation stages, discussion with industry groups, and in some cases separate taskforces are becoming increasingly common. This dissemination of information to interested recipients throughout the policy process can contribute significantly both to the quality and to public acceptance of government policy...

Timing the release of information may also be vital from a management perspective when reacting to a difficult political situation that has arisen. The Act has the desirable effect of encouraging Ministers to consider releasing the relevant documents about a sensitive issue before receiving an Official Information Act request.

4.91 Designing and planning a policy process with the OIA's legislative framework in mind is likely to lead to better outcomes both for the protection of information as may be necessary for good government, and for the progressive availability of information, once the need for protection has diminished or passed. Policy design that includes and anticipates appropriate accountability and participatory features; and scopes the limits of the period during which policy proposals should be embargoed, can also be expected to improve the strength of the case for a reasonable period of protection of sensitive advice under the good government grounds.

4.92 Protection in accordance with the withholding grounds would turn on the particular circumstances of any request and the balance of the public interest. Decisions on release or withholding cannot be prejudged. Nevertheless, for large and complex projects in particular, having an information management plan for the release of information as the work develops is likely to provide guidance for officials and Ministers on responding to information requests as they are received.

- 4.93 Such a strategic approach may help to generate a clearer understanding of expectations between officials and Ministers, greater certainty as to how the goals of accountability and participation will be met as a policy process unfolds, and the extent to which information can be expected to be protected or shared at various points in the process. It would also lead to processing advantages as an information management plan would anticipate appropriate withholding grounds and their applicability, leading to reduced time in assessment as requests are received, although responses would need case by case assessment and could not be automated. It would fit with the strategic approach we recommend in chapter 12 to the increasing use of proactive disclosure.
- 4.94 Further, such a strategic approach could contribute to a more optimal balancing of the goals of the OIA and the protection of sensitive information. Ideally, sensitive information would continue to receive the protection that is needed over any critical period so that prejudice to government processes is avoided, without overlooking fundamental issues of government accountability and citizen participation that are enshrined in the OIA. The cost of failing to provide adequate protection for information at key points in the policy process is starkly described by Nicola White: a dilution in the quality and frankness of advice, and a dilution of the public record with less being committed to writing.¹⁶⁶ The challenge therefore is tailoring each policy process in order to reach an appropriate balance between openness and reticence, with a view to generating the best possible policy advice to inform government decision-making.
- 4.95 Take-up of this approach would also continue the culture shift towards greater openness. Focussing on the core purposes of the OIA at the front-end of the process could be expected to increase citizen opportunities for participation, in the manner envisaged by former Ombudsman, Sir Brian Elwood. The development of guidance in this area by the working party of central agencies we recommend above would be desirable.

R10 Any protocol between an agency and a Minister in relation to engagement on official information matters should be published on the agency's website.

R11 As a drafting matter, section 14 of the OIA should follow section 12 of the LGOIMA to remove any technical ambiguity about transfers between Ministers and departments and vice versa.

R12 No further statutory provisions about transfers to Ministers should be introduced, but existing guidelines about transfers of requests to Ministers should be reviewed, clarified and further developed by a working party of central agencies including the State Services Commission, the Ombudsmen, the Department of the Prime Minister and Cabinet including the Cabinet Office, and the oversight office.

R13 Existing guidelines about consultation between departments and ministerial offices should be clarified and developed by the working party, in particular clarifying the distinction between consultation and notification and the circumstances in which each is appropriate.

R14 Guidance for agencies on how an information management strategy can be used to plan the way in which release and withholding will be managed at various stages of the policy development process would be desirable.

Chapter 4 Footnotes

- 85 OIA, s 15(5), s 15A.
- 86 See for example, requests made to both the Minister of Finance and the Treasury: Office of the Ombudsman “Requests for Documents Concerning the Government’s Mixed Ownership Programme” (Ombudsmen reference 318858, 319224, 319684, 24 November 2011). See also Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997) at 196–199.
- 87 Committee on Official Information *Towards Open Government: General Report* (Government Printer, Wellington, 1980) at 19–20.
- 88 State Services Commission “The Public Service and Ministers” (Management Leaflet No 6, June 1983).
- 89 Professor Ken Keith “Resolution of Disputes under the Official Information Act 1982” (Information Authority Occasional Paper No 1, 1984) at [3.2(1)]. Professor Keith was a member of the Danks Committee on Official Information that prepared the Danks Report: Committee on Official Information, above n 87.
- 90 (12 June 1986) 471 NZPD 2166.
- 91 Rt Hon Sir Geoffrey Palmer, President, Law Commission “A Hard Look at the New Zealand Experience with the Official Information Act after 25 Years” (address to International Conference of Information Commissioners, Wellington, 27 November 2007) at 15–16.
- 92 Steven Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?* (New Zealand Centre for Public Law, Victoria University of Wellington, 2005). See also Palmer, above n 91, at 14; Rick Snell “Using Comparative Studies to Improve Freedom of Information Analysis. Insights from Australia, Canada and New Zealand” (Conference Paper, 6th National and 2nd International Congress on the Right to Information, Mexico, 8–11 November 2005) at 33, 46; and Graham Taylor and Paul Roth *Access to Information* (LexisNexis, Wellington, 2011) at 53, 81.
- 93 Snell, above n 92, at 49.
- 94 Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007) at 149–150. The issue of trusting officials to properly apply withholding grounds has also arisen in the commercial context: see Katherine O’Regan (10 February 1987) 477 NZPD 6909–6910, (17 February 1987) 478 NZPD 7077.
- 95 The good government grounds have been described by one commentator as “so vague as to defy any principled legal analysis”: see “Asset Sales, Ombudsmen, Elections and Official Information #voteNZ” (24 November 2011) < www.jcelaw.posterous.com > .
- 96 White, above n 94, at 230.
- 97 For discussion of the impact of freedom of information legislation on policy development see Peter Waller, RM Morris, Duncan Simpson and Robert Hazell, “Understanding the Formulation and Development of Policy in the Context of FOI” (The Constitution Unit, University College London, 2009) at ch 7. See also Annex D for a comparison of the New Zealand and United Kingdom legislation in this area.
- 98 Leo Donnelly, Deputy Ombudsmen “Access to Policy Advice Held by Government Agencies Using FOI Legislation (What New Zealand has learned from its 25 years’ experience)” Paper presented to 5th International Conference of Information Commissioners (Wellington, November 2007).
- 99 See Taylor and Roth, above n 92, at 129.
- 100 White, above n 94, at 160.
- 101 At 146–153.

- 102 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).
- 103 Office of the Ombudsmen *Annual Report 2003* at 26.
- 104 Office of the Ombudsmen *Case Notes* (14th Compendium, 2007) at 172–174.
- 105 New South Wales Ombudsman *Opening Up Government: Review of the Freedom of Information Act 1989* (Sydney, 2009).
- 106 At 38.
- 107 See White, above n 94, at 147–148 citing an interviewee commenting that the OIA now operates in a much more politicised environment than when it was first passed. See also 151, 155–157, 162.
- 108 Issues Paper at Q55, Q60, Q61.
- 109 White, above n 94, at 160.
- 110 At 161.
- 111 OIA, s 15(4) and (5) were inserted by the Official Information Amendment Act 1987, in response to concerns that Ministers were improperly directing departmental officials on requests and that such a direction went beyond appropriate consultation; see Ian Eagles, Michael Taggart and Grant Liddell *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992) at 79 [n 65].
- 112 Law Commission, above n 86, at [205].
- 113 Official Information Amendment Act 1987, s 18 (replacing OIA, s 32).
- 114 Cabinet Office *Cabinet Manual* (Department of the Prime Minister and Cabinet, Wellington, 2008) at [8.42].
- 115 The transfer provision is further discussed at [4.44] below.
- 116 Palmer, above n 91, at 32.
- 117 OIA, s 4(a). The equivalent provision in the LGOIMA, s 4(a) is to promote the accountability of local authority members and officials.
- 118 Committee on Official Information *Towards Open Government: Supplementary Report* (Government Printer, Wellington, 1981) at 28. The delegation approach is used in Canada under section 73 of the Access to Information Act. See Treasury Board of Canada *Policies for Ministers’ Offices* (2011) at 61. Issues with political scrutiny of information requests are discussed in Stanley L. Tromp *Fallen Behind: Canada’s Access to Information Act in the World Context* (2008) at 209–211. See also Ken Kernaghan, “Ministerial Responsibility: Interpretations, Implications and Information Access” (Access to Information Review Task Force, 2001).
- 119 State Services Commission “Reviewing the Machinery of Government” (2007) at 13.
- 120 See White, above n 94, at 265, noting that the Act sees the Minister and department as different, and places separate decision-making responsibility on each of them.
- 121 At 154. See also Eagles, Taggart and Liddell, above n 111, at 79, n 66.
- 122 Robert Hazell, Ben Worthy and Mark Glover *The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI Work?* (Palgrave Macmillan, Basingstoke, 2010) at 259.
- 123 At 265. See also 150.
- 124 Cabinet Office *Cabinet Manual* (Department of the Prime Minister and Cabinet, Wellington, 2001) at [6.34].

- 125 *Cabinet Manual*, above n 114, at [8.42].
- 126 Office of the Ombudsmen *Report of the Ombudsmen for the Year Ended 30 June 2004* (Wellington, June 2004), at 28.
- 127 Office of the Ombudsmen *Case Notes* (14th Compendium, 2007) at 172–174.
- 128 At 167–170.
- 129 See chapter 3 at [3.71], ground (v).
- 130 White, above n 94, at 151.
- 131 State Services Commission “Understanding the Code of Conduct – Guidance for State Servants” (2007) at 21.
- 132 At 16.
- 133 *Cabinet Manual*, above n 114, at [3.16].
- 134 At [8.41].
- 135 However, see White, above n 94, at 154, noting that the release of Cabinet decisions by chief executives on their own authority has become so normalised that some question whether it is appropriate for a Minister to be involved in a decision to release a Cabinet paper.
- 136 State Services Commission “Release of Official Information: Guidelines for Co-ordination” (October 2000, last updated 4 August 2002), available at < www.ssc.govt.nz > .
- 137 Government Information (Public Access) Act 2009 (NSW), s 9(2).
- 138 Ss 116–118.
- 139 Schedule 1, clauses 2–3.
- 140 Freedom of Information Act 1982 (Cth), s 4; Freedom of Information Act 1989 (ACT), Dictionary; Freedom of Information Act 1982 (Vic), s 5; Right to Information Act 2009 (Tas), s 5; Right to Information Act 2009 (Qld), ss 12, 13; Freedom of Information Act 1992 (WA), Glossary, s 4; Freedom of Information Act 1991 (SA), s 4(3), s 4(4).
- 141 Freedom of Information Act 1982 (Cth), s 23. See also Freedom of Information Act 1989 (ACT), s 22; Freedom of Information Act 1982 (Vic), s 26; Right to Information Act 2009 (Tas), s 21; Freedom of Information Act 1992 (WA), s 13.
- 142 See use of the word “other” in section 14.
- 143 LGOIMA, s 12: “transfer the request to the other local authority or the appropriate Department, Minister of the Crown, or organisation”.
- 144 *Wellington Airport Ltd v Air New Zealand Ltd* [1993] 1 NZLR 671 (CA) is the leading authority. See also a useful summary of the principles in *Julian v Air New Zealand Ltd* [1994] 2 ERNZ 612, 637–638.
- 145 Chapter 2, R2, R3, R4.
- 146 For further examples see Taylor and Roth, above n 92, at 133–134.
- 147 Office of the Ombudsman, above n 86.
- 148 Office of the Ombudsmen *Case Notes* (10th Compendium, Vol 2, 1992) at 54–48.
- 149 At 48–50.
- 150 At 36–39.

- 151 Office of the Ombudsmen *Case Notes* (11th Compendium, 1998) at 92–93.
- 152 Office of the Ombudsmen *Case Notes* (12th Compendium, 2001) at 145–147.
- 153 Office of the Ombudsmen *Case Notes* (13th Compendium, 2003) at 90–91.
- 154 At 88–90.
- 155 At 85–56.
- 156 Donnelly, above n 98.
- 157 Office of the Ombudsmen *Case Notes* (10th Compendium, Vol 2, 1992) at 51–54.
- 158 At 43–45.
- 159 At 33–36.
- 160 Office of the Ombudsmen *Case Notes* (11th Compendium, 1998) at 97–99.
- 161 Office of the Ombudsmen *Case Notes* (13th Compendium, 2003) at 87–88.
- 162 At 83–85.
- 163 Sir Brian Elwood “The Need for an Official Information Culture” (address to the Institute for International Research Public Law Conference, Wellington, 2001).
- 164 For a categorisation of the stages of the policy process, see The Treasury “Reorganisation of Appropriations for Policy Advice: A Guide for Departments” (2011).
- 165 Marie Shroff “Behind the Official Information Act: Politics, Power and Procedure” in *The Official Information Act: papers presented at a seminar held by the Legal Research Foundation and the New Zealand Institute of Public Law* (1997).
- 166 White, above n 94, at 231.

Chapter 5

Protecting commercial interests

INTRODUCTION

- 5.1 This chapter deals with the reasons for which information may be withheld on commercial grounds, sometimes broadly referred to as the “commercial sensitivity” grounds.
- 5.2 Two of the grounds in section 9(2) are specifically targeted at commercial activity. They are paragraphs (b) and (i):
- 9(2) [T]his 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;¹⁶⁷ or
- (ii) would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information;¹⁶⁸ 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;¹⁶⁹
- 5.3 In addition, there are two other grounds, (ba) and (j), which go much wider than commercial information, but can clearly be used to protect it:
- (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;¹⁷⁰ or
- (ii) would be likely otherwise to damage the public interest;¹⁷¹ 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).¹⁷²

- 5.4 None of these grounds are conclusive, and all are able to be overridden by the public interest in disclosure in a particular case.
- 5.5 In 1980 the Danks Committee accepted the need for protection of 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.¹⁷³ Although the Danks Committee report pre-dated these developments, it recognised the web of interests involved in publicly supported business enterprises, which distinguishes them from enterprises exposed fully to market forces.¹⁷⁴

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.

- 5.6 The late 1980s and 1990s saw extensive growth in commercially-oriented public organisations. The range of activities is potentially vast. An indicative list of situations where a public authority 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).
- 5.7 In 2010 the Crown Owned Monitoring Unit in the Treasury (COMU), which provides strategic ownership advice to the Government on its commercial assets, and monitors the performance of entities responsible for those assets, oversaw central government business to the value of \$60 billion. These entities report to Ministers and are also subject to a financial reporting regime 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 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.¹⁷⁵

- 5.8 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.^x
- 5.9 The 2010 Auckland City governance model amalgamates some existing commercial enterprises and initiates 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

Introduction

- 5.10 The Ombudsmen's Guidelines set out the steps which need to be gone through 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 point out that direct consultation with affected third parties may sometimes be needed to establish the nature of any prejudice to them.¹⁷⁶
- 5.11 We noted in the issues paper that some concern has been expressed as to the substance and application of the withholding grounds. Nicola White notes that "commercial interests" is one of the most frequently used grounds and notes that there is "some uncertainty at the margins".¹⁷⁷ Steven Price notes, commenting on the confidentiality ground:¹⁷⁸

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.

- 5.12 The responses to our 2009 survey, and, more particularly, the submissions to our issues paper confirmed that these grounds are problematic. Responses and submissions divide fairly clearly into two groups.

- 5.13 On the one hand, the agencies holding information, and also the persons and organisations whose information is held by agencies, almost unanimously felt the grounds were (i) uncertain and difficult to apply; and (ii) not sufficiently broad to cover all information that needs to be protected. They wanted further guidance and/or definition. They also felt that “commercial” should be broadly interpreted and not confined to activities designed to make a profit. A number felt that information *held* by an agency but *owned* by a third party should be outside the reach of the Act altogether.
- 5.14 On the other hand, those who use the Act (researchers, members of the media and citizens) unanimously asserted that agencies are using the lack of clarity in the “commercial” grounds to illegitimately withhold much information of real public interest. We have no doubt that this happens, and that “commercial sensitivity” is sometimes used to conceal information which it would merely be embarrassing to release. Submissions provided some quite worrying examples. These submitters also wanted more clarity, but certainly did not want any expansion of the commercial grounds.
- 5.15 Getting the right balance, therefore, is not going to be easy. Nor is redrafting, or even guidance, going to be a complete answer. Attitudes cannot be reversed so easily.

The variety of activities

- 5.16 The “commercial” grounds cover a potentially large variety of activities, and protect a number of differing interests. Here are some examples: the list is by no means exhaustive.

Prejudice to holding agency

- 5.17 Sometimes it is the interests of the agency holding the information which is protected by the withholding grounds.
- 5.18 First, delicate contractual negotiations between an agency and a private sector organisation might be prejudiced by the premature disclosure of the negotiating stance of one or both parties. As merely one example, knowledge of an agency’s fall-back position on an item in the negotiation would clearly put the agency at a bargaining disadvantage.
- 5.19 Secondly, where an agency is competing in the market with a range of organisations, whether public or private, disclosure of its trade secrets – including customer lists – could place it at a disadvantage with its competitors, some of whom have no corresponding duty of disclosure.

- 5.20 Thirdly, local authorities sometimes compete with others to attract events to their areas. They may be concerned that disclosure of details could put them at a disadvantage with competing venues, and also in future negotiations. They might well allege not only that other practical venue funders would be given an insight into the funding positions of local authorities that had secured events in the past; but also that promoters might be reluctant to deal with that local authority again.
- 5.21 Fourthly, an agency might commission and pay for a research report to use as a basis for making decisions on an important projected development. The agency would no doubt deem it unacceptable if a competitor were able to have access to that research at little or no cost under the OIA and use it for its own purposes.

Prejudice to third party

- 5.22 The OIA applies to all information *held* by an agency, even if that information is about a third party, or was generated or supplied by that third party. Sometimes it is the third party's interests which are protected by the withholding grounds. Here are two examples.
- 5.23 First, an agency such as a university or Crown research institute (CRI) may do research under contract for a third party. As like as not there will be an express confidentiality contract, but even where there is not, confidentiality will usually be able to be implied. It would often be unreasonable if another organisation could have access under the OIA to the research findings generated by the agency.
- 5.24 Secondly, persons or organisations who are applying for a decision (for example on a licence or consent) from an agency may have to supply information to the agency – indeed sometimes they may be statutorily required to do so. If the information supplied were to be available to a competitor under the OIA, their commercial position might well be prejudiced.*
- 5.25 As a result of the developments we have outlined at paragraphs 5.6 to 5.9, much more third party information is now held by government agencies than was the case in 1982. The application of the OIA to it is one of the most misunderstood and contentious aspects of its operation. We return to this matter shortly.

Prejudice to holding agency and third party

- 5.26 In some instances, including some of those already given as examples, it may be alleged that the interests of *both* the holding agency *and* a third party are affected.
- 5.27 First, if details of negotiations are released, the interests of both the agency and the other party to the negotiations may allegedly be compromised.

- 5.28 Secondly, if an agency discloses information about, or belonging to, a third party it may make the third party less willing to deal with the agency in future. In a competitive market this might prejudice government agencies such as CRIs and universities.
- 5.29 Thirdly, reinforcing the point, it has been said that in some instances the release of third party information can cause a diminution of trust in government.

Countervailing public interest

- 5.30 So these are some examples of fact situations, and the interests often alleged to be at stake. Those interests are usually protected by one of the withholding grounds in the legislation. On the other side of the ledger, however valid those interests and arguments may be, there may be a public interest in disclosure against which they need to be balanced. The submissions of the requesters emphasised some of those countervailing public interests. The following points were made.
- 5.31 First, sometimes agencies spend a very large amount of taxpayer or ratepayer money on large projects. Some of those projects may turn out in hindsight to have been ill-advised, and not the best use of resources. It may turn out for example that outsourcing was not the cheapest or most cost-effective option. Agencies should not be able to conceal such hard facts behind the shield of a commercial withholding ground.
- 5.32 Secondly, public-private partnerships, and contracts between public and private organisations, need as much, and perhaps more, scrutiny than pure public agency activity. There may be conflicts of interest; allegations of favouritism are not uncommon.
- 5.33 Thirdly, under the Local Government Act 2002, local authorities have obligations to consult their communities in the course of decision-making. If there is to be effective consultation, the community needs to know the facts. One submitter told us of cases where, under the cloak of a commercial withholding ground, a local authority would not provide information which was necessary for those being consulted to fully assess a proposal.
- 5.34 Fourthly, information from privately contracted research may be highly relevant to public participation in central or local government decision making, or even raise a risk of harm to communities. In such situations the public interest in disclosure should be taken into account.
- 5.35 A fifth possible argument is that studies conducted for and by a public agency often have the public benefit as their purpose, and should thus “belong” to the public.

- 5.36 A point which has been raised by submitters and others is that it may be difficult to assess, in a particular case, what actual harm will be caused by a disclosure. It is easy to assert that a commercial position will be damaged by the disclosure of information; it can sometimes be much harder to prove it. Steven Price made this point in the passage quoted earlier in this chapter. The Ombudsmen's Guidelines also note that, when dealing with the "prejudice to the commercial position" ground in section 9(2)(b)(ii), it is not enough to recognise potential commercial sensitivity: it must be established *what* prejudice might follow from disclosure, and *why* that level of prejudice would be unreasonable. That is often not easy to do.

REFORM

- 5.37 So what should be done to ameliorate the present dissatisfaction? We have explained earlier in this report that we think, in general, improved guidance in applying the Act will make a difference. Such guidance is particularly important in this area. There are already a number of Ombudsmen case notes on the "commercial" grounds, and some of the Ombudsmen's recent expositions of principle are in relation to those grounds: tenders and local authority events funding are among them. Given the commonly recurring nature of some fact situations, we believe it should be possible to construct principled guidance, supported by examples from the Ombudsmen's case notes.

Statutory amendment

- 5.38 The question is whether the area would benefit from statutory amendment as well. We shall deal with three possible sorts of amendment.

A special status for third party information

- 5.39 Some submitters believed that third party information, or at least some types of it, should be exempt from the Act altogether: in other words that such information should be carved out of the Act. If that is to be done there would need to be a very good reason for it, because it is contrary to the philosophy of the OIA, and its case-by-case approach, to exempt entire categories of information.
- 5.40 The strongest form of such a suggestion was that any material in which a third party has intellectual property should be exempt, with perhaps a very few narrowly defined exceptions to cover extreme situations such as illegal conduct. But that would not be workable. Intellectual property can exist in any sort of written material – even letters. As one submitter said:

Intellectual property rights could be claimed (rightly or wrongly) in respect of many communications with government departments by the drafters of those communications. For that reason alone, the public interest test should apply.

It would not make sense if one side of a trail of correspondence was able to be disclosed and not the other.

- 5.41 A modified version of the view that third party information should occupy a special position is that there should be a conclusive withholding ground to protect it. However, we must emphasise that at present various types of third party information are often not required to be disclosed. Usually they will be protected effectively by the confidentiality or commercial grounds. That is perhaps not well enough understood.
- 5.42 Yet public money, and the proper operation of government agencies, is at issue in these cases. There can be circumstances where the public interest might require disclosure regardless of contract, commercial interest or intellectual property rights. The situations will be relatively unusual, but allowance needs to be made for them. They might include cases where the subject matter of the information was illegal; or where it revealed a danger to public safety; or where there has been an unjustifiable expenditure of public money. It is well established that even a confidentiality contract does not conclusively mean that information cannot be disclosed. In *Wyatt Co Ltd v Queenstown Lakes District Council*, Jeffries J denounced the idea of “a kind of commercial Alsatia beyond the reach of statute”.¹⁷⁹
- 5.43 Perhaps the strongest case for an exemption would be the situation where an agency such as a university or CRI has done research commissioned and paid for by a third party. It would be very unusual indeed to find that the public interest required disclosure in such a case, but even then there could be situations, however unlikely, when it did: for example research which involved the use of unlawful methodology, or where the findings demonstrated a major threat to public safety.
- 5.44 *Properly applied*, the existing withholding grounds (particularly paragraphs (b) and (ba)) are, we believe, sufficient to protect the interests of the third party in such a case. They involve a balancing exercise, and the stronger the third party interests involved the stronger will need to be the public interest to justify disclosure.
- 5.45 A case heard by the Ombudsmen, dealing with the research situation we have just been discussing, makes this point. The Ombudsmen said:¹⁸⁰

Section 9(2)(i) is always likely to apply where a CRI has entered into a commercial contractual arrangement to undertake research for a client. Disclosure of that research to another party without the specific consent of the client would prejudice the CRI's ability to obtain further contracts. ... As a matter of law, a blanket assurance cannot be given that the countervailing public interest will never be strong enough to outweigh the need to avoid prejudice of disadvantage to a CRI's commercial activities. However, CRIs can reasonably advise potential clients that in cases where a Crown agency is acting in a purely commercial activity, completely separate from any regulatory or social policy function, there is likely to be little countervailing public interest in disclosure.¹⁸¹
- 5.46 We therefore do not favour any special legislative exemption for third party information. In the great majority of cases it is safe now.

5.47 However given the shifting context of government's relationships with the private sector, we think an added measure of confidence would be gained by amending paragraphs (i) and (j) to bring them into better alignment with (b) and (ba). In their current form (i) and (j) protect the commercial activities and negotiations only of Ministers and government agencies. There is no clear reason for so confining them. We believe they should be changed to cover third parties as well. Both paragraphs should be amended to cover "any person, including a Minister of the Crown or any department or organisation that holds the information". In paragraphs 5.66 to 5.69 of this chapter we also summarise recommendations made in other parts of this report which are aimed at giving greater protection to third parties.

R15 Information about third parties held by agencies subject to the OIA and LGOIMA should not form a category of information excluded from the Acts.

R16 Section 9(2)(i) and 9(2)(j) of the OIA should be amended to cover the commercial activities of "any person, including a Minister of the Crown or any department or organisation holding the information". Section 7(2)(h) and 7(2)(i) of the LGOIMA should be amended to cover the commercial activities of "any person, including a local authority holding the information".

The meaning of "commercial"

5.48 There is much concern about one aspect of the statutory provisions. The concern has been expressed particularly by public agencies and relates to the question of whether "commercial" requires a profit-making purpose. As we noted in the issues paper, the Ombudsmen have taken the view that to be "commercial", activities must be undertaken for the purpose of making a profit. The Ombudsmen's Guidelines say:¹⁸²

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.

- 5.49 The submissions to our issues paper demonstrated widespread unhappiness amongst agencies with this interpretation, although requesters of information tended to support it. A number of points were made by the agencies. One was that many agencies – local authorities for example – do not exist to make a profit; their main purpose is to provide for their communities. Other submissions noted that while agencies obviously must have regard to financial considerations, for some of them breaking even rather than making a profit is their major concern. The Ministry of Economic Development gave examples from outside the public sector to emphasise that having a profit motive does not necessarily coincide with the concept of “commercial”. They said, by way of example: “Industrial and provident societies do not have a profit motive but it is difficult to assert that their activities are not commercial in nature.”¹⁸³ Another submission said:

We acknowledge that to qualify as “commercial”, an activity needs to be driven by some kind of financial incentive, but a strict *profit*-making threshold is unnecessary. To draw the line between commercial activities that are carried out for other financial gain is arbitrary and unjustified.

- 5.50 We think that some of the submissions may have misunderstood the essence of the Ombudsmen’s interpretation. The Ombudsmen’s Guidelines acknowledge that the *status* of a body does not determine every kind of activity it may carry out.¹⁸⁴ For example a University may have a commercial position with respect to research contracts for which it tenders to make financial gains, notwithstanding that by its nature it is not a commercial enterprise.
- 5.51 However, we are persuaded that there is such misunderstanding of the scope of “commercial” that legislative amendment would be an advantage. One option would be to define the term “commercial” as not requiring a profit motive. However, as the Ombudsmen note in their submission to the issues paper, there is a good deal of case law establishing that “commercial” does have the sense, in law, of profit-making. We believe that, rather than disturb that established legal meaning, a new withholding ground should be added to section 9(2) to make it clear that competitive position and financial interests are to be protected. It might read that information can be withheld:

[W]here the making available of information would be likely to cause material prejudice to the competitive position or financial interests of any person, including the agency that holds the information.

- 5.52 This ground would be *in addition to*, and not *in substitution for*, the existing commercial grounds. The Ombudsmen, in their submission on the issues paper, say that they are not opposed to the addition of such a ground.¹⁸⁵

- 5.53 Provisions protecting “competitive position” and ensuring the avoidance of financial detriment appear in the freedom of information legislation of other jurisdictions: Canada is an example.¹⁸⁶ The new ground would not require a profit-making motive. The words are wide enough to protect a range of situations, among them the interest in securing goods and services at the best price.
- 5.54 We think that this suggestion would provide a sensible solution to the current difficulties, except that we would wish to make it clear that the “competitive position” or “financial interests” in question might be those of either the agency holding the information or a third party who has supplied it or for whom it is held, or who is the subject of it.
- 5.55 We do not think that such an addition to the withholding grounds will unreasonably increase the amount of information which can be withheld. Rather it will mitigate the present level of uncertainty.¹⁸⁷

Other possible amendments

- 5.56 We have considered other possible amendments to the commercial grounds.
- 5.57 At first we wondered whether the withholding grounds in section 9(2) clearly enough cover the situation where the information has not been supplied to the holding agency, but has, rather, been *generated* by it for a third party. A research report generated by a CRI for a commissioning third party would be an example. A few submissions echoed this concern. But we now think that paragraph (ba) is sufficient as it stands. The Ombudsmen in their submission agree. Paragraph (ba) deals simply with “information which *is subject* to an obligation of confidence”, and both the qualifications in (i) and (ii) are capable of applying to the situation we are considering. We note that paragraph (b) could also on occasion be used in this context. So we do not think amendment is required to cover information generated by the holding agency.
- 5.58 It was also suggested to us in one submission that the test of “unreasonable” prejudice in section 9(2)(b)(ii) sets the bar too high, and that *any* prejudice should be enough. Yet the qualifier does serve a purpose. It lessens the possibility of fanciful or imagined claims of prejudice. We are not inclined to amend this longstanding provision in this way.

Possible clarification of provisions

- 5.59 There is a question of whether there is a case for another sort of amendment: amendment to clarify and increase understanding of these grounds, without altering their substance. There are a few possible candidates:

- (a) Section 9(2)(ba) combines two slightly different concepts: information which is *subject to an obligation of confidence*; and information the provision of which has been, or could be, *required*. It has been suggested that section 9(2)(ba)(i) does not fit entirely happily with the second of these things, although it can have some application (in that if information is *required* to be supplied the threat of disclosure may in future lead to its being supplied in unsatisfactory form).
 - (b) The distinction between “commercial position” in section 9(2)(b)(ii) and “commercial activities” in section 9(2)(i) is subtle.
 - (c) There are possible overlaps between some of the paragraphs. It may at times be possible to rely on either or both of section 9(2)(b) and section 9(2)(ba); or either or both of section 9(2)(i) and section 9(2)(j).
 - (d) Some terms used in the paragraphs of section 9 may not be readily understood by persons coming to them for the first time. The term “trade secrets” was identified as one of them, and it was suggested that it might be worth defining it, perhaps using the definition in the Crimes Act.
- 5.60 We think there is not a strong case for what would amount to little more than adjusting language. The withholding grounds are couched in brief and flexible terms. They have been in much the same form for nearly 30 years. They are familiar. We fear that to change them would open new ambiguity and room for doubt. It could unsettle such established understandings as have developed. Moreover it would be most unlikely to change behaviour stemming from ingrained resistance to disclosure.
- 5.61 We believe that the best way of increasing certainty is the solution we propose in chapter 2: improved guidance, enhanced by the inclusion of principles and real-life examples. Perhaps the strongest case for legislative attention is a possible definition of “trade secret”. But even there it will be difficult to capture the concept in a brief form of words. There are legal textbooks which explain the term in considerable detail. Once again we prefer guidance to a legislative solution which could affect the balance of the provision.

R17 The term “commercial” should not be defined in the legislation. Instead, a new withholding ground should be added to section 9(2) of the OIA and section 7(2) of the LGOIMA, stating that good reason for withholding official information exists (subject to the public interest override) where the making available of the information would be likely to cause material prejudice to the competitive position or financial interests of any person, including the agency that holds the information.

The public interest in disclosure

- 5.62 In the commercial context, as in others, the balancing exercise which is carried out to determine whether the public interest warrants disclosure can be quite difficult. It is particularly so here because there also needs 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:
- (a) the need for trust and good relationships with third parties that provide commercial information;
 - (b) oversight of, and accountability for, public expenditure;
 - (c) the citizen's right to know how taxpayer or ratepayer funds are being used;
 - (d) ensuring that agencies can compete fairly on a level playing field;
 - (e) the contribution of the information to a wider public policy debate;
 - (f) the return of a profit to the Crown or local government;
 - (g) the promotion of ethical yet profitable commerce;
 - (h) the potential impact of the enterprise on people's lives.
- 5.63 We asked in the issues paper whether it might be worth listing such factors in the legislation, specifically in relation to the commercial withholding grounds. In light of the uncertainty surrounding the commercial withholding grounds there may be a stronger argument for legislating public interest criteria in relation to them than in relation to other grounds.
- 5.64 But we expressed the reservation that to do so would be subject to the same disadvantages as apply to legislating for public interest more generally: namely that legislative lists of factors can give rise to rigidity and the appearance of exclusivity. In such a complex and dynamic area that would be unsatisfactory.
- 5.65 The great majority of submissions on the issues paper agreed. They welcomed guidelines on the subject, particularly with examples, but feared that legislating the factors to be taken into account would be too rigid. On balance we agree, but would urge that the Guidelines be as comprehensive as possible.

R18 The public interest factors relevant to the commercial withholding grounds should not be included in the legislation, but should be the subject of more guidance, with examples.

Other protections in this report

- 5.66 Given the number of submissions which expressed a degree of concern about the application of the OIA in the commercial arena we here reiterate recommendations we make elsewhere in this report which might impact on the commercial withholding grounds (as well as on others).
- 5.67 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. This ground would be able to be overridden by the public interest.
- 5.68 Secondly, in chapter 10 we strongly support the practice of consulting with third parties who might be affected before disclosure is made, although we do not go so far as to require that to be mandatory. Some say that in the commercial arena 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 strongly advisable. In chapter 10 we recommend 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.
- 5.69 Thirdly, in chapter 11 we recommend that the Ombudsmen be able to hear complaints from third parties that the decision to release information about them was wrongly made, due to a failure to properly apply the withholding grounds or carry out the public interest balancing exercise.

Chapter 5 Footnotes

- 167 LGOIMA, s 7(2)(b)(i).
- 168 Section 7(2)(b)(ii).
- 169 Section 7(2)(h).
- 170 Section 7(2)(c)(i).
- 171 Section 7(2)(c)(ii).
- 172 Section 7(2)(i).
- 173 For example in the State Owned Enterprise Act 1986; State Sector Act 1988; Public Finance Act 1989; Crown Entities Act 2004 and Local Government Act 2002.
- 174 Committee on Official Information *Towards Open Government: General Report* (Government Printer, Wellington, 1980) at [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 Protect Commercial Information, Together with Proposals for the Amendment of the Act* (Wellington, 1984).
- 175 MWH Consultants *Council Controlled Organisations: Analysis of LCTCCPs and Annual Reports* (Report 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 report notes that there were limits on the information made available to them in the course of their study.
- 176 Local Government Act 2002, s 74(1).
- 177 Office of the Ombudsmen *Practice Guidelines – Official Information* (Wellington, 2002) Part B at [4.2].
- 178 Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007). White did not research the operation of the LGOIMA.
- 179 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.
- 180 See Mai Chen *Public Law Toolbox* (LexisNexis, Wellington, 2012) at [10.4.13] advising third parties at the time of supplying information to make clear their view about the grounds for withholding it if requested.
- 181 [1991] 2 NZLR 180 at 191.
- 182 Office of the Ombudsmen, *Case Notes* (11th Compendium, 1998, W35177) at 112.
- 183 It has been said to us that the argument for non-disclosure may be stronger in the scientific context than in the social science context. We are not entirely sure this is necessarily the case.
- 184 Office of the Ombudsmen, above n 177, at 7. See also Office of the Ombudsmen “Grounds for Withholding Commercial Information” (June 2007) 13 OQR 2.
- 185 See also Law Commission *Reforming the Incorporated Societies Act 1908* (NZLC IP 24, 2011) at ch 1.
- 186 Office of the Ombudsmen, above n 177.
- 187 Office of the Ombudsmen “Submissions of the Ombudsmen – The Public’s Right to Know” (17 December 2010) available under the “Publications” heading on the Ombudsmen’s website.
- 188 Access to Information Act (RSC 1985 cA-1), s 20.
- 189 See also Paul Quirke “Drawing Back the Corporate Veil: Reforming the Commercial Activities Exception in s 9(2)(i) of the Official Information Act 1982” (LLM Research Paper, Victoria University of Wellington, 2005).

Chapter 6

Protecting privacy

INTRODUCTION

- 6.1 A request under the official information legislation may involve the release of information that has implications for a person's privacy, for example where the official information is also personal information. The protection of privacy is a good reason to withhold information under the official information legislation,¹⁹⁰ although in any particular case, public interest considerations can outweigh this in favour of making the information available.¹⁹¹
- 6.2 The OIA's explicit recognition of the need for privacy protection is one of the legislative forerunners to the Privacy Act.¹⁹² The privacy withholding ground represents an early legislative expression of privacy protection which stands out as being fairly broad and undefined, when compared to other statutory and legal formulations that have now developed.
- 6.3 While any decision about release is to take account of the principle of availability, the decision must also be made in accordance with the purposes of the Act.¹⁹³ Of all the withholding grounds, it is privacy that is explicitly acknowledged in the purpose section:¹⁹⁴
- (c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.
- 6.4 The purpose provision, along with the privacy withholding ground, reflects the public interest in protecting privacy. The divergent public interests in the release of official information on the one hand and the protection of privacy on the other hand are to be reconciled through the operation of the public interest test as discussed in chapter 9. In weighing the privacy interest, a public interest in disclosure must be particularly strong if it is to prevail.¹⁹⁵

THE PROBLEM

- 6.5 The problem we have identified from responses to the survey and submissions to the issues paper is one of confusion amongst agencies about how the privacy withholding ground operates. The Ombudsmen suggested the complexity of this withholding ground was overstated in the issues paper; however other submissions we received confirmed our initial view that agencies find the privacy withholding ground confusing. Crown Law, agreeing that the interface between the OIA and Privacy Act is problematic, expressed the view that both the OIA and the Privacy Act 1993 are engaged when an OIA request involves personal information about someone other than the requester, and that information privacy principle 11 should be considered as part of the decision-making process. That does not seem to be the usual approach however. The Ombudsmen's guidelines on the withholding ground make no mention of privacy principle 11.¹⁹⁶
- 6.6 Other agencies reported that they use a Privacy Act approach when faced with withholding and release decisions under the official information legislation, and it seems that on occasion, some agencies omit to apply the public interest balancing test before reaching a final decision. We suspect that this may be partly because the generalised expression of privacy in the current withholding ground means that agencies reach for tools from the Privacy Act to try to make sense of it.
- 6.7 Officials are expected to be familiar with and expert in two distinct disclosure frameworks: the Privacy Act and the official information legislation. Where agencies are responding to a request for official information, any privacy considerations are assessed against the privacy withholding ground, rather than the Privacy Act. However, where agencies publish information proactively, in the absence of a request for it, they must comply with the privacy principles contained in the Privacy Act.¹⁹⁷
- 6.8 While both statutes deal with the withholding and release of information, the Privacy Act has a different emphasis to the official information legislation and deals with the nature of the privacy interest, disclosure and withholding, and the role of the public interest in a way that is quite different to the official information legislation. Agencies sometimes seem to struggle to reconcile the different requirements, namely the requirement of the Privacy Act not to disclose personal information except in certain circumstances,¹⁹⁸ and the requirement of the official information legislation to disclose official information that is requested unless there is a good reason to withhold it. As we noted in the issues paper, we are concerned that the extent of the conceptual differences between the two approaches creates potential for confusion in the decision-making process.

- 6.9 The Ombudsmen and the Privacy Commissioner have not indicated a high degree of concern with the situation, and each is satisfied that the interface works well once users become familiar with it. As expert users themselves, these bodies are skilled at explaining the interface and providing training to agencies on it, from their respective perspectives. Nevertheless, we think it would be desirable and useful to take a holistic view of the information legislation and to see whether the complexity can be reduced.
- 6.10 In the issues paper we explored options for improving the OIA withholding ground to make it easier for users to interpret on a more consistent basis. We examined the approach taken in other jurisdictions such as Australia and the United Kingdom. Our aim has been to identify options that would make the withholding ground more conceptually consistent with the Privacy Act, so that it might be more user-friendly for the agencies that apply it, without detracting from the key objective of the official information legislation, namely the principle of availability in the public interest.
- 6.11 We are mindful of the move towards greater proactive disclosure.¹⁹⁹ This may increase the extent to which agencies are required to switch between the different disclosure frameworks in assessing privacy interests: the Privacy Act for proactive release and the official information legislation for reactive release. We think that this development strengthens the need for greater coherence in the legislative framework.
- 6.12 Another factor we are mindful of is the related topic of notification to affected third parties. In chapter 10 we recommend that agencies should be required to give prior notice of release where there are certain important third party interests at stake such as privacy. This also strengthens the need for a clearer privacy withholding ground so that agencies can readily recognise what amounts to a third party interest that would trigger this requirement.

THE OPTIONS PRESENTED IN THE ISSUES PAPER

- 6.13 Three substantive options were put forward in the issues paper.²⁰⁰ We also asked for alternatives. However, submitters on the whole responded to the three options identified and none identified any different alternatives.
- 6.14 Option 1 proposed improving the privacy withholding ground through clearer and firmer guidance from the Ombudsmen supplemented by case examples to assist agencies to identify and then balance privacy and public interest factors. This option met with a high level of approval. Submitters thought that guidance currently is not clear enough about the public interest balancing required, that guidance should clarify the statutory interface between the Privacy Act and the official information legislation, that in particular it should include guidance on consultation with people having a privacy interest in the requested information and it should allow the withholding of the names of junior officials.

- 6.15 Options 2 and 3 proposed legislative change to the withholding ground. The level of support for legislative change (24 submitters supporting either option 2 or 3) was slightly less than the level of support for the non-legislative option (27 submitters supporting option 1).
- 6.16 Option 2 proposed a restatement of the privacy withholding ground with a formulation used in the Privacy Act as an access withholding ground,²⁰¹ which has been adopted in Australia for freedom of information purposes.²⁰² Agencies would initially determine whether release of the requested information 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 could be released, even where it would amount to an unreasonable disclosure, where desirable in the public interest.
- 6.17 There was a small level of support for this restatement option, including from the Privacy Commissioner, although the Ombudsmen thought that the restated ground would not be much simpler than the current withholding ground. There was also concern that this option would involve subjective decision-making and time-consuming disputes.
- 6.18 Option 3 received a significantly higher degree of support than option 2. This option proposed restating the withholding ground so that agencies would initially determine *whether the disclosure of personal information would be prohibited under principle 11 of the Privacy Act*. Agencies would then apply the public interest balancing test so that information could be released, even in breach of principle 11, where desirable overall in the public interest.²⁰³ This approach is used in the United Kingdom and in New South Wales.
- 6.19 Reasons stated in support of option 3 were that it would enhance consistency between the statutes, it would create a uniform base privacy standard and it would contribute to a more “seamless” approach between the legislation. Crown Law favoured the option to make it clear that privacy principle 11 is to be considered in official information privacy withholding decisions. Some responses also felt that guidance alone is not sufficient. Against option 3 was the view that it would introduce a more complex and prescriptive test, although others thought that the greater integration of the legislation would outweigh this disadvantage. The Ombudsmen were concerned that this option would represent a shift from a necessity test to a breach test and that this could weaken freedom of information rights as it may be less flexible than the current withholding ground.

FURTHER OPTION

- 6.20 We continue to hold the view expressed in the issues paper that clearer guidance and case examples illustrating the privacy withholding ground are needed.²⁰⁴
- 6.21 Based on the level of support for legislative change and the concerns expressed in submissions, we continued to explore ways in which the privacy withholding ground might be restated in the interests of clarity and greater consistency. Submissions revealed that neither option 2 nor option 3 is the ideal answer. Feedback on both options was that they would introduce a more complex and prescriptive test than the current privacy withholding ground. The introduction of “unreasonableness” under option 2 would not provide sufficient clarity, while the alignment with privacy principle 11 by option 3 would introduce undue complexity.
- 6.22 We therefore developed a revised formulation, that drew on aspects of both options 2 and 3, and which aimed for greater conceptual consistency with the Privacy Act while retaining sufficient clarity and simplicity. We then consulted with a number of central agencies (including the Privacy Commissioner and the Ombudsmen) on the following revised privacy withholding ground:
- Protect information where the making available of the information would be an interference with the privacy of the individual, whether living or deceased.
- For the purposes of section 9(2)(a), the making available of information is an interference with the privacy of an individual if,
- (a) It would disclose personal information about that individual; and
 - (b) There are reasonable grounds to believe that the disclosure:
 - (i) May cause loss, detriment, damage or injury to that individual or, in the case of a deceased individual, to that individual or a close relative;²⁰⁵
 - (ii) May adversely affect the rights, benefits, privileges, obligations, or interests of that individual or, in the case of a deceased individual, to that individual or a close relative; or
 - (iii) May result in significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual or, in the case of a deceased individual, to that individual or a close relative.
- 6.23 This used the concept of “personal information”, a term that is central to the Privacy Act, and is also used in the official information legislation (currently for the purpose of access to personal information under Part 4) and the concept of “disclosure”. The revised formulation also adapted the Privacy Act concept of “an interference with privacy,”²⁰⁶ to the official information context.

- 6.24 The aim of the revised provision was to offer more certainty than the issues paper's option 2 by providing a clear statement of the sorts of disclosure that justify withholding, rather than relying on the more general test of unreasonableness. It is less complex than option 3 as it does not import a technical principle 11 analysis. It would meet the aim of improving legislative coherence by drawing on concepts that are central to the privacy legislation and adapting these for the purpose of the official information legislation's privacy withholding ground.
- 6.25 The concept of "harm" would introduce a filter for the purposes of the public interest balancing test. Where no form of harm could reasonably be expected to result from the release, the privacy withholding ground would not apply and the requested information could be released without an agency having to apply the public interest balancing test. However, the range of harm is reasonably broad, and it was not intended that the new filter would reduce the extent to which privacy is protected by the withholding ground, except possibly in relation to very minor privacy interests.
- 6.26 One agency we consulted however felt that introducing the concepts of "reasonable grounds" and "harm" would complicate the task for agencies, and that the current withholding ground is sufficiently flexible. The Privacy Commissioner did not favour this approach either, regarding it as potentially weakening privacy protection under the legislation by requiring agencies to predict what harm might arise from a disclosure, a potentially speculative endeavour. On balance therefore, given that any statutory alteration of the privacy withholding ground would carry its own disadvantages, we have decided not to recommend any amendment to the provision.
- 6.27 We do however recommend that the development of new and comprehensive guidance on the privacy withholding ground is essential, given the difficulties with the provision that were outlined to us in submissions. This is essentially option 1 as expressed in the issues paper and which received a significant degree of support in submissions. Guidance in this area should be developed jointly by the Office of the Ombudsmen and the Office of the Privacy Commissioner, in consultation with any other appropriate agencies.

R19 The privacy withholding ground should not be amended, but new and comprehensive guidance on this withholding ground should be developed as a matter of priority by the Office of the Ombudsmen and the Office of the Privacy Commissioner.

PRIVACY INTEREST OF THE DECEASED

- 6.28 In the issues paper we noted that the official information legislation protects the privacy interest of the deceased.²⁰⁷ This is in contrast to the Privacy Act which does not generally recognise the privacy interest of the deceased except in certain circumstances.²⁰⁸ We noted that because of the presumption in the official information legislation in favour of release, it is appropriate for the privacy withholding ground to protect the privacy interest of the deceased, subject to countervailing public interest factors. A couple of submitters challenged the express recognition of the privacy interest of the deceased; but a large majority supported the current position.
- 6.29 We also noted that some jurisdictions are explicit about how long the privacy interest of the deceased is protected. New South Wales specifies that the period is 30 years. Only three submitters supported a change to introduce a specific period of privacy protection for the deceased: two submitters supported a 30 year period, while Archives New Zealand supported a 25 year period.
- 6.30 We maintain our initial view against introducing a specific time period. There was not a high level of support, and we think that one risk of using a bright-line is that information within the stated period would tend to be automatically withheld, without due attention to any public interest factors favouring release. The appropriate place for a bright-line period is the Public Records Act 2005 where there is an obligation on agencies to classify public records as having either open access or restricted access after 25 years.²⁰⁹ This requirement will involve an assessment of whether the privacy interest of the deceased has faded at that point. The case by case approach however remains appropriate for the official information legislation.

R20 The privacy withholding ground should continue to protect the privacy interest of the deceased, as it does at present.

PRIVACY INTERESTS OF CHILDREN

- 6.31 In the issues paper we asked whether the privacy withholding ground should provide any express protection for the privacy interests of children.²¹⁰ There was some degree of support for specific protection for children's interests, such as through a "best interests of the child" withholding ground. However the level of opposition to further legislative provision was higher.
- 6.32 Two submissions, including one from the Children's Commissioner, supported further guidance about the special position of children. The Media Freedom Committee suggested that the relevant Press Council guideline may be instructive. This guideline requires an exceptional public interest to outweigh the interests of the child.

- 6.33 The Ombudsmen confirmed that requests for personal information about children can be very complicated, citing issues such as the status of the requester (i.e. custodial parent, non-custodial parent, legal guardian, relative, caregiver), the age and capacity of the child (i.e. whether able to act for themselves or not), any court decisions about custody and access and whether there are safety issues.
- 6.34 The Ministry of Social Development gave examples of problems with the misuse of released information. In chapter 10 we note that one option could be the placing of conditions to control the re-use of information that is released, to address the risk that it is inappropriately posted on the internet.²¹¹
- 6.35 We do not recommend any change to the privacy withholding ground to deal specifically with the privacy interest of children. However, given the particular vulnerabilities of children and young people where privacy is concerned, we think that guidance about the issues that can arise, including consideration of public interests, would be valuable in highlighting the interests to be taken into account and their respective weight. This would be consistent with the approach taken in other contexts where the special position of children in relation to privacy issues is highlighted. For example, as well as the Press Council guideline, one of the privacy principles of the Broadcasting Standards Authority provides:²¹²
- Children’s vulnerability must be a prime concern to broadcasters, even where informed consent has been obtained. Where a broadcast breaches a child’s privacy, broadcasters shall satisfy themselves that the broadcast is in the child’s best interests, regardless of whether consent has been obtained.
- 6.36 As another example, in the review of the Privacy Act 1993, the Law Commission recommended that the special interests of children be taken into account in an amendment to information privacy principle 4 so that a person’s age would be taken into account in considering whether the collection of personal information is unfair or unreasonably intrusive, and that the Privacy Commissioner develop guidance about this new development.²¹³
- 6.37 In developing guidance about children’s privacy interests under the official information legislation, consideration could be given to the Press Council guideline and reference should be made to New Zealand’s international obligations concerning the rights and best interests of the child. The Children’s Commissioner should be consulted in developing guidance in this area.

R21 Guidance on the privacy withholding ground should deal with public interest considerations where the privacy interests of children are involved.

ANONYMITY OF OFFICIALS

- 6.38 One of the agencies with which we consulted felt that the anonymity of officials is an area that should be clarified in guidance as practice amongst agencies varies. While it has become common for information referring to the role of senior officials, such as chief executives or deputy secretaries, to be released, the practice in relation to the release of information referring to junior officials is less consistent.
- 6.39 The Ombudsmen have suggested that anonymity should be reserved for special circumstances such as where the safety of individuals is at issue,²¹⁴ or withholding is necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions²¹⁵ or protection of officials from improper pressure or harassment.²¹⁶ Generally however, they consider that public officials' names should be available when requested as the information released would normally only disclose the fact of an individual's employment in the public sector, and perhaps, what they are doing as part of their employment.²¹⁷
- 6.40 As this is an issue that is common to many official information releases, we agree that it should be canvassed in the development of new and comprehensive guidance supporting the privacy withholding ground, to facilitate more consistent and accepted practices amongst agencies.

R22 Guidance on the privacy withholding ground should deal with the extent to which the anonymity of officials may be maintained where information is released.

INFORMATION SHARING: REQUESTS BETWEEN PUBLIC SECTOR AGENCIES

- 6.41 In the issues paper we raised a question about the extent to which government agencies should be permitted or restricted from using the OIA to obtain or share personal information about citizens.²¹⁸
- 6.42 A small number of submitters did not think that any legislative change is needed. Some agencies didn't think that such requests can be made under the OIA. The Department of Internal Affairs expressed the view that section 12 of the OIA does not extend to the Crown, although the Department notes that there are Crown agencies that attempt to use and are often successful in using the OIA to gain access to information (both personal information about citizens and more general information). The Ombudsmen's view is that the definition of "person" is broad enough for section 12 to include requests from public sector agencies. Crown Law drew our attention to section 19 of the Protected Disclosures Act 2000. Subsection (2) anticipates that official information requests may be made by the Police:

(2) A request for information under the Official Information Act or under the Local Government Official Information and Meetings Act 1987 (other than one made by a constable for the purpose of investigating an offence) may be refused, as contrary to this Act, if it might identify a person who has made a protected disclosure.

- 6.43 Given the divergence of views, we think that it would be desirable for the ambiguity about whether public sector agencies can make any OIA and LGOIMA requests to be resolved. This could be addressed in the redrafting of the legislation, as discussed in chapter 16, to confirm that agencies can themselves make official information requests.
- 6.44 The remaining question is whether any requests from public sector agencies should extend to personal information. 16 submitters expressed a high degree or at least some degree of concern about the issue raised. Concerns included that the use of the OIA in this way does nothing to promote the OIA's aims of transparency and good government; it is inconsistent with the privacy principles that information made available for one purpose can be made available to another agency for unrelated purposes; and the need to maintain trust in government. Some expressed the view that the Privacy Act, rather than the official information legislation should cover this issue.
- 6.45 The Ombudsmen expressed concern about the scope of any proposed limitation, pointing out that some agencies will have legitimate reasons for requesting official information that includes personal information, and suggesting that only requests by central public service departments²¹⁹ with the principal purpose of obtaining personal information about identifiable individuals should be restricted.
- 6.46 We agree that it is the potential for information sharing about citizens that raises the particular concern. Since the release of the issues paper, the Privacy (Information Sharing) Amendment Bill 2011 (the "Information Sharing Bill") has been introduced into Parliament.²²⁰ The Bill proposes the creation of a new Part 9A of the Privacy Act that allows for the sharing of personal information between public sector agencies in accordance with approved information sharing agreements.
- 6.47 Upon enactment, the Information Sharing Bill would provide another avenue by which public sector agencies may obtain personal information from other agencies. The Privacy Act already provides a number of options for information sharing between agencies, i.e.:
- (a) Discretionary release of personal information under privacy principle 11;
 - (b) Release in accordance with an authority issued by the Privacy Commissioner;²²¹
 - (c) Release in accordance with an information matching agreement;²²²
 - (d) Release in accordance with Schedule 5 to the Privacy Act (in relation to those agencies who are subject to Schedule 5).

- 6.48 In our view it is appropriate for the disclosure of personal information about citizens between public sector agencies to be governed by one of the measures in the Privacy Act, with the necessary checks and balances, rather than under the official information legislation. Otherwise there is a risk of Privacy Act processes, including the new process for information sharing that is contemplated by the Bill, being undermined.
- 6.49 However, surveying the range of personal information that could potentially be requested, we think a limitation that sought to restrict public sector agencies from obtaining any personal information under the official information legislation would be overly broad.
- 6.50 Personal information that might be sought in an OIA request could include personal information about:
- (a) Officials (in their official capacity), either officials of the agency to whom the request is directed or officials of other public sector agencies;
 - (b) Officials in their personal capacity (i.e. employment information);
 - (c) Ministers of the Crown in their official capacity;
 - (d) Personnel of corporate and unincorporated entities acting in a professional capacity; and
 - (e) Citizens in their personal capacity.
- 6.51 The difficulty with a purpose limitation as suggested by the Ombudsmen is that as we do not recommend that a requester be required to state the purpose of their request,²²³ it would be problematic to structure a limitation on this basis.
- 6.52 We also considered the suggestion of the Ombudsmen that only central government departments should be subject to any limitation on using the official information legislation to obtain personal information. However, as the scope of the Information Sharing Bill potentially covers a wide range of public sector agencies, we consider that for consistency, any limitation should apply to the same range of public sector agencies.
- 6.53 We think a more workable limitation would be to draw a distinction based on the nature of the personal information, i.e. whether it relates to a person in their personal or their official or professional capacity. We believe that this distinction is at the crux of the concern. Personal information about a person in their personal capacity should not be shared by public sector agencies through the vehicle of official information requests: the appropriate mechanisms for this activity are those provided by the Privacy Act (including the Information Sharing Bill). However personal information about people in their official or professional capacity should remain within the scope of official information requests from public sector agencies, on freedom of information grounds. This is where the interests of transparency and accountability remain in play.

6.54 We recommend that the official information legislation be amended by the inclusion of provisions clarifying that requests from public sector agencies (including local government) for personal information about individuals in their personal capacity are outside the scope of the official information legislation.²²⁴

6.55 One option would be to include a new sub-clause along the following lines:²²⁵

Nothing in this Act authorises or permits the making available of any personal information to a Department, Minister of the Crown, organisation or local authority.

“Personal information” could be defined for this purpose as:

“official information held about an identifiable individual in their personal capacity”.

6.56 There will be some grey areas as to whether personal information relates to a person’s personal capacity or to their official or professional capacity, for example employment information relating to terms of employment and salary. Guidance will be important in helping to clarify where the boundaries lie.


6.57 The creation of a limit on use of the official information legislation by public sector agencies in this way would not limit other avenues of obtaining personal information in appropriate circumstances. As noted above there are a range of mechanisms in the Privacy Act for releasing or sharing personal information subject to applicable safeguards, as well as the new regime proposed in the Information Sharing Bill.

R23 A new provision in the OIA and LGOIMA should make it explicit that OIA and LGOIMA requests may be made by public agencies, subject to the limitation that personal information about individuals in their personal capacity is outside the scope of these requests.

Chapter 6 Footnotes

- 190 OIA, s 9(2)(a); LGOIMA, s 7(2)(a).
- 191 The public interest test is the subject of chapter 8.
- 192 For example, a natural person's right to access personal information about themselves was first enacted in the OIA as a forerunner of privacy principle 6.
- 193 OIA, s 5; LGOIMA, s 5.
- 194 OIA, s 4; LGOIMA, s 4.
- 195 Graham Taylor and Paul Roth *Access to Information* (LexisNexis, Wellington, 2011) at 82–83.
- 196 Office of the Ombudsmen *Practice Guidelines – Official Information* (Wellington, 2002) Part B 4.1.
- 197 Proactive release and the boundary between the official information legislation and the Privacy Act are discussed in chapter 12.
- 198 Privacy Act 1993, s 6, information privacy principle 11.
- 199 See chapter 12.
- 200 Issues Paper at [6.18]–[6.37]; Q23. See also Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC IP 17, 2009) at [11.43] – [11.49].
- 201 Privacy Act 1993, s 29(1)(a).
- 202 Freedom of Information Act 1982 (Cth), s 47F.
- 203 A few submitters suggested that the public interest test should not apply to the privacy withholding ground and that it should be a conclusive withholding ground.
- 204 Chapter 2, R4.
- 205 For a definition of “close relative” see Income Tax Act 2007 s FC1 where this term means:
- (a) A surviving spouse, civil union partner or de facto partner of the deceased person; or
 - (b) A person who is within the second degree of relationship to the deceased person.
- Cf Financial Markets Conduct Bill, cl 117(3) definition of “immediate family member” means the person's spouse, civil union partner, de facto partner, parent, child, step-parent or stepchild.
- 206 Privacy Act 1993, s 66(1).
- 207 Issues Paper at [6.38].
- 208 See Law Commission, *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC R123, 2011) at [2.56]–[2.69].
- 209 Public Records Act 2005, s 43, s 45.
- 210 Issues Paper at Q24.
- 211 Chapter 10 at [10.131].
- 212 Broadcasting Standards Authority, *Privacy Principles*, principle 6.
- 213 Law Commission, above n 208, at R120.
- 214 OIA, s 6(d); LGOIMA, s 6(b).

- 215 OIA, s 9(g)(i); LGOIMA, s 7(f)(i).
- 216 OIA, s 9(g)(ii); LGOIMA, s 7(f)(ii).
- 217 Office of the Ombudsmen “Anonymity of Officials” (2002) 8 OQR 3. See also Information Commissioner’s Office (England and Wales) Data Protection Technical Guidance: Freedom of Information “Access to Information about Public Authorities’ Employees” (25 April 2007); Freedom of Information Act Environmental Information Regulations Practical Guidance “When Should Names Be Disclosed” (15 August 2008).
- 218 Issues Paper at Q25. The Law Commission also raised this issue, above n 200, at [11.62] – [11.66]; above n 208, at [8.18].
- 219 I.e. those agencies listed in the first schedule to the Ombudsmen Act 1975.
- 220 The Privacy (Information Sharing) Amendment Bill draws on the Law Commission’s information sharing proposals arising out of the review of the Privacy Act: Law Commission *Information Sharing* (Ministerial Briefing, 29 March 2011); contained also in Law Commission, above n 208, Appendix 1.
- 221 Privacy Act 1993, s 54.
- 222 Part 10.
- 223 Chapter 9.
- 224 Personal capacity is a concept that is used in the official information legislation for other purposes, see OIA, ss 20(1)(c), 22(1), 23(1); LGOIMA ss 21(1), 22(1). See also Ombudsmen Act 1975, s 13(1).
- 225 This could be included as s 52(2A) of the OIA and s 44(1A) of the LGOIMA.



Chapter 7

Other withholding grounds and reasons for refusal

- 7.1 In this chapter we consider miscellaneous matters relating to grounds for withholding and reasons for refusal. We also ask whether any further grounds or reasons should be added to the Acts.

THE DISTINCTION BETWEEN THE SECTION 6 AND SECTION 9 WITHHOLDING GROUNDS

- 7.2 The withholding grounds in section 6 of both the OIA and the LGOIMA 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 making further inquiry. The grounds in section 9 of the OIA,²²⁶ on the other hand, are subject to overriding public interest. If one of them is made out a further inquiry is necessary as to whether other considerations make it desirable in the public interest to make the information available.
- 7.3 Yet it is certainly not true to say that the *conclusive* grounds in section 6 remove the elements of judgment from decision-making. For instance, section 6(a) provides that good reason to withhold official information exists if the making available of that information would be likely “to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand”. It is not enough for the agency to show that the subject matter of a request relates to security, defence or international relations. It must also show that disclosure would be *likely* to *prejudice* those matters. That may include weighing up a range of factors. Would disclosure adversely affect New Zealand’s trade and foreign relations? Would disclosure detrimentally affect a foreign partner country? Would disclosure prejudice the future provision of information from another country? Would disclosure affect the future giving of advice by officials? Has the need for confidentiality lessened with time?

- 7.4 In some Ministries, such as Defence, a system of classification of documents is in place. But even classifications such as “confidential” or “restricted” do not remove the need for a case-by-case examination of the requested information. Sometimes documents can be released with the deletion of certain parts.
- 7.5 So the section 6 withholding grounds still require careful consideration of each request, and a decision on whether the criteria in the ground are made out. But, unlike the grounds in section 9, once a ground in section 6 has been made out there is no consideration of whether the public interest nevertheless requires release. There is no “public interest override”.
- 7.6 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, where 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 [6 specified matters including exchange rates, taxation, Government borrowing and the entry into overseas trade agreements].
- 7.7 On the other hand, section 9(2)(d) of that Act makes it a rebuttable ground, able to be overridden by the public interest, that withholding is necessary to:
- ... avoid prejudice to the substantial economic interests of New Zealand.
- 7.8 Although the distinction between serious damage to the economy and prejudice to the substantial economic interests of New Zealand is subtle, the provisions apply in different fact situations and different reasoning processes are required.
- 7.9 In the same vein, section 6(d) states it is a conclusive ground for withholding where disclosure would be likely:
- ... to endanger the safety of any person.
- 7.10 On the other hand, section 9(2)(c) provides a rebuttable ground for withholding information where doing so is necessary:
- ... to avoid prejudice to measures protecting the health or safety of members of the public.
- 7.11 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.

- 7.12 Examples such as these illustrate the different approaches which the Act can require to similar matters, and the resulting difficulties for officials. A small number of submitters to our issues paper could not see why any of the grounds in section 6 should be conclusive, and suggested that the public interest override should apply to both section 6 and section 9. We disagree. Some interests are so important that they should be absolute. The security or defence of New Zealand²²⁷ is clearly one. We believe “maintenance of the law”²²⁸ is another. 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”.²²⁹
- 7.13 Accepting, then, that some withholding grounds should be conclusive, 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. 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 moving items between categories unless the need to do so has been clearly demonstrated. Provided that the more detailed guidance which we suggest elsewhere in this report is forthcoming, we think that, generally speaking, there is not a strong case for moving from the established position with which people are familiar. The great majority of submitters who answered this question agreed.

AMENDMENTS TO WITHHOLDING AND REFUSAL GROUNDS

- 7.14 We now consider possible amendments to some of the statutory provisions, and ask whether any new withholding grounds are needed.

Withholding ground: maintenance of the law

- 7.15 The important but difficult withholding ground in section 6(c) of the OIA has already been briefly mentioned above. Section 6(c) provides that it is a conclusive reason for withholding information, where 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.

7.16 The question is exactly what is meant by “maintenance of the law”. The wording in paragraph (c) is boilerplate, and appears in many other Acts of Parliament. In our review of the Privacy Act 1993 we noted the difficulties it has caused in that context as well.²³⁰ The internal context of the provision, and its references to offences, suggests that its main focus is the criminal justice system. 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 use it in this way, for example Police and Customs, and also local authorities investigating matters which may lead to a prosecution.

7.17 The Customs service said:

We apply this ground to information relating to the investigation of an offence where informations have 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.

7.18 It is also no doubt properly used to prevent the disclosure of information which might facilitate the commission of crime (about, for example, the manufacture of drugs or explosive devices) or information which reveals methods of investigation used by Police.

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

7.20 The question is how far beyond the court process the maintenance of the law ground can extend. A number of agencies indicated that they use it to prevent prejudice to an inquiry or investigation which they are undertaking. The Education Review Office have used it 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. We have doubts, which 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 use.

7.21 Yet we have sympathy for the view that there is a case for protection in these situations. So we asked in the issues paper whether there might be merit in having a separate withholding ground, to cover information supplied in the course of an inquiry or investigation, and where disclosure of that material might prejudice the inquiry or investigation. The great majority of submitters who answered this question agreed, with 33 in favour and 3 against.

- 7.22 It should be noted that some of the information sought in this situation is likely to be protected from disclosure under existing grounds. Section 9(2)(ba) covers information supplied in confidence, or which the supplier could have been compelled to provide, where release would prejudice the ongoing supply of information or otherwise damage the public interest (which would presumably include causing prejudice to the effective conduct of investigations and inquiries). Section 9(2)(g)(i) protects information the disclosure of which would prejudice the free and frank expression of opinions necessary for the effective conduct of public affairs (which would also presumably include the effective conduct of investigations and inquiries). But there is a strong feeling that more is needed. The Ombudsmen put it this way:

It seems to us that the additional interest agencies are concerned to protect is the ability of decision-makers to close the door at a particular point in time and deliberate in private on advice and other pertinent material received.

- 7.23 This was put in different ways in different submissions. Thus, the Health and Disability Commissioner 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.

- 7.24 The Department of Building and Housing said:

We think it would be useful for a new withholding ground to be created for information supplied in the course of an investigation, and where that investigation is still ongoing. While the current provisions of the Act can be applied in this way, this is not made clear in the way the Act is drafted. It is important to be able to carry out statutory functions such as investigations without compromising the process through inappropriate sharing of information, and there is merit in the Act explicitly recognising this importance.

- 7.25 The Inland Revenue Department said:

While any person who is the subject of an investigation may well have rights to obtain information about an ongoing investigation we do not agree that the public should have equal rights or that the public would be best served by providing partial information about an ongoing investigation. Surely this can only lead to supposition and uninformed comment about a matter where no decision has yet been reached. Investigations are often difficult and fraught for those involved [;] it would be extremely unfortunate and counter to natural justice for uninvolved parties to be given information about an investigation where no decision had been reached.

- 7.26 Two media organisations agreed. The Media Freedom Committee said, in response to the question of whether they would agree with such a new withholding ground:

Reluctantly. Editors who have had to undertake their own in-house inquiries understand that in some circumstances, it is unhelpful to a fair result to have information that is only partially complete made public.

- 7.27 To put it another way, the rationale for such a ground is to protect orderly decision-making. We noted in the issues paper that a similar rationale lies behind a number of exemptions already provided for elsewhere in the OIA. Material provided to a court, tribunals in their judicial function, commissions of inquiry and the Judicial Conduct Commissioner is outside the scope of the OIA.²³¹ 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.²³²
- 7.28 Other agencies are able to use secrecy provisions in their own legislation to the same end: the IRD is the most well-known example. But most agencies do not have such provisions available to them, even though inquiries and investigations conducted by them would benefit from analogous protection.
- 7.29 We conclude, then, that the OIA and LGOIMA should be amended to confer such protection. The question is how best to do that. Some thought that section 6(c) could be amended to make it clear that it extends beyond the criminal law and the court system to cases like the ones we are now considering. We are reluctant to do that. Section 6(c) is a conclusive ground, not subject to a public interest override. It protects the criminal justice system and the integrity of the courts, and should admit of no exception. There is little justification for going that far in relation to the proposed new ground. We believe it should be subject to the public interest override.
- 7.30 The Ombudsmen thought it might be possible to extend section 9(2)(f)(iv) which protects the confidentiality of advice tendered by Ministers and officials beyond executive decision-making. However, given the current degree of uncertainty, we think that a specific new withholding ground is warranted.
- 7.31 We conclude that the best way is to add a new withholding ground to section 9 of the OIA and section 7 of the LGOIMA. In the issues paper we proposed a ground in the following terms:
- 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.
- 7.32 We continue to support such a ground. However the formula will need to be refined and expanded when the Bill is drafted. First, the term “investigation or inquiry” needs to be clearly circumscribed to make it clear that it refers only to investigations and inquiries *authorised by or under statute*. Otherwise it could open the door to informal investigations about any matters.

- 7.33 Secondly, the withholding ground should only apply during the course of the investigation or inquiry, and not after its determination. When it is over, the information may be protected by some other ground – one of the commercial or confidentiality grounds for instance – but not the new ground that we are recommending.
- 7.34 Thirdly, the ground, as drafted in the issues paper, applies only to information provided to the agency in question. That should be expanded to include information generated by, or obtained in any way by, the agency in question. The interest to be protected by orderly decision-making extends to any information or advice necessary for the process of decision-making.
- 7.35 Fourthly, it would be desirable to make it clear that the new withholding ground is not to restrict, or adversely affect, the existing “maintenance of the law” ground in section 6(c).
- 7.36 We received one submission to the effect that the new withholding ground should extend beyond inquiries or investigations, to cover any information acquired by a body exercising a supervisory or oversight role in relation to another organisation: for example, the role of the Financial Markets Authority in relation to financial organisations, or of the Crown Ownership Monitoring Unit of Treasury in relation to State Owned Enterprises. But the rationale of that suggested extension is different from the rationale of our proposed withholding ground, which is to facilitate orderly decision-making. We think the commercial and confidentiality withholding grounds adequately cover the situation of supervision and oversight.

R24 A new withholding ground should be added to section 9 of the OIA and section 7 of the LGOIMA, stating that good reason for withholding information exists where it is necessary to protect information which has been provided to an agency in the course of an investigation or inquiry, and disclosure is likely to prejudice the conduct or outcome of that investigation or inquiry. The new withholding ground should expressly provide that:

- (a) it covers only investigations or inquiries authorised by or under statute;
- (b) it applies only during the course of an investigation or inquiry, and not once it has been determined;
- (c) it covers information supplied to, generated or obtained by the agency in the course of an investigation or inquiry;
- (d) it does not restrict or otherwise affect the existing “maintenance of the law” withholding ground.

Existing maintenance of the law withholding ground

7.37 If a ground such as the one we have recommended is added, we do not think there is any need to amend the wording of the existing “maintenance of the law” withholding ground. In some other jurisdictions similar provisions are defined rather more fully. For example the one in British Columbia exempts information from disclosure where (among other things) such disclosure could reasonably be expected to:²³³

- 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.

7.38 We do not think we need to go so far. The main problem with the New Zealand “maintenance of the law” ground at the moment is its dubious use to deal with investigations and inquiries. If a new and more appropriate ground is found for that situation, as we propose, we think the present wording can stay as it is. But in that case clear guidance will be needed as to its scope.

7.39 In our review of the Privacy Act we have raised a similar question in relation to the “maintenance of the law” provisions in that Act. We concluded in our Privacy Act report that redrafting was not the answer. We supported, however, a call for more detailed guidance on the operation of the phrase.²³⁴ Given the level of uncertainty, we think that more guidance would be helpful in relation to the OIA as well. The Ombudsmen’s Guidelines on section 6(c) of the OIA could usefully be expanded to explain in more detail, and with examples, the proper use of the “maintenance of the law” ground. We recommend accordingly.

R25 The Ombudsmen’s Guidelines should address in detail, and with examples, the proper use of the “maintenance of the law” withholding ground.

Reason for refusal: soon to be publicly available

7.40 Section 18 lists a number of reasons for which requests for information may be refused.²³⁵ 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)²³⁶ which relates to the requirements of other laws, the other reasons in section 18 may be characterised as “administrative reasons”. This is what the Ombudsmen call them in their Guidelines.²³⁷

- 7.41 One of these other reasons merits discussion here because submissions on the issues paper revealed some dissatisfaction with how it works. Paragraph (d) provides that it is a reason for refusal that:

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

- 7.42 This paragraph deals with two different situations: the *first* where the information is *already* publicly available; the *second* where the information *will soon be* publicly available.
- 7.43 Where the information is publicly available the agency which has been asked for it does not need to provide it: the requester can find it at the public source. The phrase “publicly available” is not defined. Often there will be no doubt about it: if the information is freely available on a website, for example. But other situations may not be so clear. What, for instance (as in one case we were told about), if the information had appeared in a magazine some months ago, and the magazine is not archived online? The information was once publicly available, but is it now? What, again, of information which is contained in a book of which there are only two copies in New Zealand, both in libraries in towns distant from the requester? Interloan may solve the problem sometimes, but not always.
- 7.44 It seems to us that the statutory provision could benefit from definition and amendment. It should be made clear that the reason for refusal relates to information which is both publicly available *and* reasonably accessible to a member of the public wishing to find it.²³⁸ Material published on a website would always satisfy that test; a person without internet access can seek assistance from others to find it. We take it for granted that any agency declining to supply information on this ground would tell the requester the public source where it can be found: we doubt whether there is any need to include an express obligation to that effect in the Act.
- 7.45 However, reliance on this refusal ground should not be limited only to situations where the information is freely available from elsewhere. The information may only be publicly available to someone who pays to obtain the information, for example by subscription. Defining the term “publicly available” would therefore be helpful in confirming that may include information even if its availability is subject to payment of a fee.²³⁹
- 7.46 The second situation is where the information will soon be publicly available. There was evidence in responses to our survey and submissions on the issues paper that requesters feel this provision is sometimes misused. It is sometimes used to decline to supply draft documents when one of the good government grounds would be more appropriate. Moreover a number of respondents and submitters thought the elasticity of the word “soon” allows too much scope for manipulation, and that the provision is sometimes used in apparent justification for a long delay in publishing the information.

7.47 The following are among the comments we received:

- (a) 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.
- (b) 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.
- (c) It would be very helpful to the mainstream media if this ground were to be narrowly defined.
- (d) An example ... would be where a government agency intends to release a report after an election or by-election, but the information in that report could have a bearing on decisions made by the public at the ballot box.

7.48 The majority of submissions endorsed amending the provision, but there was little agreement on what the change should be. Our original suggestion of “within a very short time” received some support, but others said it was just as subjective as “soon”, and would not be much of an improvement. “Imminent” was also proposed, but probably conveys an unrealistic urgency. Other submitters proposed fixed times, but they ranged from seven days to 90 days. Moreover a fixed time tends to become the default period. Nor does a fixed time take account of the different contexts in which the question may arise.

7.49 This ground for refusal can be legitimately used in a number of contexts. The Ombudsmen give some in their Guidelines:²⁴⁰

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 is being 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.

7.50 Other examples we were given included where a document is to be released after a meeting of the relevant agency (say a local authority) in which case the meeting cycle is determinative; where a report is to be tabled in Parliament at a future time; where an article or book is to be published, and the agency does not wish to pre-empt the publisher’s right to release it; where the agency is preparing a managed release to the media and does not wish one person to have an advantage over anyone else; and where, as one submission puts it, “a report has been worked up for months or even years and is weeks away from publication” and “it is unnecessarily burdensome to have to make the report available because some people want a sneak peek or want a scoop”.

7.51 We therefore prefer a formulation which, rather than fixing arbitrary time limits, emphasises the *reasons* for the delay. We recommend:

The information requested ... will soon be publicly available, and to require its release before that time is unnecessary, or would be unreasonable in the circumstances.

- 7.52 There is some elasticity in this formulation, of course, but we think it is less open to abuse than the present. Before an agency can use this ground it would need to know *what* information is to be released, and should have a clear timeframe for *when* it will be released. Guidance should make that clear.

R26 Section 18(d) of the OIA and section 17(d) of the LGOIMA should be amended to state that a request may be refused where the information requested is either:

- (a) publicly available and reasonably accessible to a member of the public; or
- (b) will soon be publicly available, and to require its release before that time is unnecessary, or would be unreasonable in the circumstances.

R27 The OIA and LGOIMA should define the term “publicly available” and should confirm that it may include information that is available on payment of a fee.

Withholding ground: legal professional privilege

- 7.53 Section 9(2)(h) provides that good reason for withholding exists if the withholding of the information is necessary to:²⁴¹

(h) maintain legal professional privilege.

- 7.54 A few submitters expressed concerns about this.²⁴² One said that the ground as expressed could be interpreted to mean that legal professional privilege lasts indefinitely, whereas in the case of the Government, as opposed to a private citizen, it is “needed only to prevent the disclosure of legal advice for a short window where disclosure of the advice would be adverse for the Crown in litigation or to protect its position”. This is a valid point. Unlike many of the other grounds in section 9, legal professional privilege is protected as a *concept*, however important or unimportant the matter on which the advice was given, or, apparently, however long ago it was given.

- 7.55 That is not very satisfactory. Historians (and others) are properly interested in the reasons for government action, and sometimes legal advice is an important part of those reasons. We have considered whether the provision might be redrafted to allow greater access, but have decided against this course of action for two reasons.

7.56 First, if a matter of real public importance is contained in the advice, the public interest override should suffice to ensure that disclosure will be made. Secondly, the matter may be better dealt with under the Public Records Act 2005. That Act requires material to be placed in Archives after 25 years. Access may be restricted “for good reasons”, “having regard to any relevant standard or advice issued by the Chief Archivist”. The advice of the Chief Archivist provides that legal professional privilege is a legitimate ground for restricting access. However the advice further states, in relation to all grounds, that “restrictions should always be for a finite period”. Currently an appropriate period is being negotiated with the Crown Law Office. The Law Commission hopes that the proper interests of historians and other researchers will be met in fixing the time.

7.57 The Ombudsmen made two different points. First, they noted that the Evidence Act 2006 codifies legal professional privilege. But section 53(5) of the Evidence Act provides that that Act does not affect the general law governing legal professional privilege outside the context of court proceedings. This means that as far as the OIA is concerned it is the common law that applies. The Ombudsmen note that this could be problematic in judicial review proceedings: which standard would apply? They also say:

Questions are also likely to arise as to what are the differences, if any, between LPP at common law and LPP under the Evidence Act. It is likely that most jurisprudence in the future will be generated under the Act without adverting to any difference at common law.

7.58 Other jurisdictions, for instance Victoria,²⁴³ have adopted provisions which align the definitions of legal professional privilege for court proceedings and the freedom of information principles. We recommend that that happen in New Zealand, and that the OIA expressly provide that legal professional privilege for the purposes of that Act means legal professional privilege as provided in the Evidence Act.²⁴⁴

7.59 The other point raised by the Ombudsmen is that in the withholding ground under Part 2 of the OIA it must be necessary *to maintain* legal professional privilege; whereas under Part 4 (relating to access to information by a body corporate) the equivalent withholding ground refers to *a breach* of legal professional privilege. Those two grounds should be aligned, and we recommend that Part 2 be made consistent with Part 4. That would also maintain consistency with the equivalent provisions of the Privacy Act 1993.²⁴⁵

R28 The OIA and LGOIMA should state that legal professional privilege for the purpose of those Acts means legal professional privilege as defined in the Evidence Act 2006.

R29 As a drafting matter, the legal professional privilege withholding ground in section 9(2)(h) of the OIA and section 7(2)(g) of the LGOIMA should be amended for consistency with section 27(1)(g) of the OIA and section 26(1)(g) of the LGOIMA, so that an agency may withhold requested official information if “withholding the information is necessary to avoid a breach of legal professional privilege”.

POSSIBLE NEW WITHHOLDING GROUNDS

7.60 In the issues paper we asked whether there should be any new withholding grounds. We asked in particular whether there should be grounds relating to harassment or cultural matters.

Harassment

7.61 In the issues paper we asked whether there should be grounds to withhold where that is necessary to protect an individual or individuals from harassment. We said that we were 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 where this is necessary to:²⁴⁶

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.

7.62 This ground is limited to cases where the effective conduct of public affairs would be prejudiced by the harassment. However, in cases where the sole concern is the protection of an individual employee from harassment we still believe, as we said in the issues paper,²⁴⁷ that the privacy withholding ground could be used. The privacy ground is not confined to informational privacy, but is capable also of dealing with unreasonable intrusion into another’s affairs. The possibility of harassment would seem to be a legitimate ground for declining to provide the name of a person, or other personal information about them, under the privacy ground.

7.63 We do not recommend the addition of a new “harassment” withholding ground.

R30 The OIA and LGOIMA should not include, as a further reason for withholding information, that the withholding of the information is necessary to protect an individual or individuals from harassment.

Cultural matters

7.64 We raised in the issues paper the question of whether there should be a new ground in the OIA relating to the protection of cultural matters.

7.65 In LGOIMA there is already a ground justifying withholding:²⁴⁸

... 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 wāhi tapu ...

7.66 That ground is narrow, being confined to certain named applications or requirements within the purview of local government. There is a question about whether it may be too narrow. It also raises the question of whether there should be recognition of such grounds at national level. The NZGOAL framework, released in August 2010, which promotes open access and licensing of non-personal government materials, does recognise 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.”²⁴⁹

7.67 Archives pointed out that their Guidelines advise that protection of traditional knowledge is a good reason to restrict access, and note the absence in the OIA of such a basis for withholding.²⁵⁰

7.68 Submissions to the issues paper were fairly evenly divided (13 for and 11 against). Local bodies were more supportive of the proposed amendment than the state sector, and several councils said the existing LGOIMA protection was narrower than desirable. We were given examples of reluctance on the part of iwi to have local authorities disclose information relating to such matters as burial sites, food gathering sites, middens or way stations. Often such information is supplied to a local authority on an understanding of confidence, and it is likely that the existing withholding ground in section 7(2)(c)(i) of LGOIMA would apply. Yet there is a question whether that ground will always be sufficient, and a more explicit provision might give more certainty.

7.69 We support in principle the addition to both the OIA and LGOIMA of a new non-conclusive withholding ground relating to cultural matters. But several submitters to the issues paper who were broadly in support of such an initiative thought that more work is needed before formulating the ground to determine its coverage and extent. We recommend that the Government set up a working party to examine the matter and consider the exact terms of such a withholding ground.

R31 The Government should establish a working party to examine whether there should be a new ground in the OIA relating to the protection of cultural matters, and if so, what its terms should be; and whether such a ground should also be included in the LGOIMA to supplement or extend the existing ground in that Act relating to the protection of tikanga Māori or wāhi tapu (in relation to certain matters under the Resource Management Act 1991).

Court proceedings

7.70 The OIA and LGOIMA are sometimes used in connection with court proceedings, actual or prospective.²⁵¹ In the case of criminal proceedings a provision was inserted in each Act in 2009²⁵² to the effect that it is a reason for refusing a request under those Acts:

(da) that the request is made by a defendant or a person acting on behalf of a defendant and is –

(i) for information that could be sought by the defendant under the Criminal Disclosure Act 2008; or

(ii) for information that could be sought by the defendant under that Act and that has been disclosed to, or withheld from, the defendant under the Act:

7.71 The question is whether there should be a mirror provision in relation to civil proceedings. Legal firms acting for commercial interests, NGOs and community groups sometimes use the OIA to obtain information which may be of relevance in civil proceedings to which they are party, or to obtain information with a view to determining whether there may be grounds for commencing proceedings. The latter sometimes assume the characteristics of a “fishing” expedition. Information for use in litigation can also be obtained through discovery under the rules of court. Those rules also allow for pre-trial discovery. If that route is chosen, the discovery is subject to the scrutiny of the court; less information may be disclosed than is available under an OIA request, and the cost may be greater.

7.72 The question, therefore, is whether the use of the OIA in litigation should be curtailed if the same information could be obtained by discovery. Should there continue to be two routes? The problem with attempting to close off the OIA route is that information held by government must be disclosed unless there is a good reason for withholding it. The purpose for which it is requested is irrelevant. At least in the case of pre-trial requests it is difficult to see how one could impose the mooted restriction unless it were mandatory for a requester to disclose the purpose for which it was being requested, a course we have elsewhere in this report decided not to recommend.²⁵³ Moreover the use of the OIA in this way is commonplace, and judges have not questioned it. It can save a litigant considerable expense. As current Ombudsman Dr David McGee has said in a published article:²⁵⁴

There are many cases in which the facts set out in the judgments are drawn seamlessly from material elicited under the OIA and from discovery. Judges seem to have no problem with using such material regardless of its provenance.

- 7.73 The dual route is available in other jurisdictions as well. We have concluded that we should not disturb what has been a long, and judicially sanctioned, practice. The main concern of those who object to the practice is the burden of time and expense it puts on the agency, as occurs with any such “fishing” expeditions. Stricter use of the reasons for refusal in the Act, and a review of charging practice that we recommend in chapter 10, are a means of mitigating these concerns.

Chapter 7 Footnotes

- 226 The relevant grounds in the LGOIMA can be found in section 7. References to section 9 of the OIA should also be read as references to section 7 of the LGOIMA, where applicable.
- 227 OIA, s 6(a).
- 228 OIA, s 6(c); LGOIMA, s 6(a).
- 229 *R v Burns (Travis)* [2002] 1 NZLR 387 (CA) at 404 [10].
- 230 Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC R123, 2011) at ch 9.
- 231 OIA, s 2(1) definition of “official information” paras (h) and (l); and OIA, s 2(6).
- 232 OIA, s 2(1) definition of “official information” paras (i) and (j).
- 233 Freedom of Information and Protection of Privacy Act [NSBC 1996], cl 65 315.
- 234 Law Commission, above n 230, at R94–R96.
- 235 LGOIMA, s 17.
- 236 LGOIMA, s 17(c).
- 237 Office of the Ombudsmen *Practice Guidelines – Official Information* (Wellington, 2002) at Part B, ch 2.
- 238 Compare the Criminal Disclosure Act 2008, s 16(1)(l).
- 239 See, for example the definition of “publicly available information” in the Privacy Act 1993, s 2, as “information that is contained in a publicly available publication.” “Publicly available publication” is then defined as “a magazine, book, newspaper, or other publication that is or will be generally available to members of the public”. The Law Commission has recommended that this latter definition be updated so that it also includes information available from a website, and clarification that it can include a publication that is available on payment of a fee: above n 230, at R8.
- 240 Office of the Ombudsmen, above n 237, at Part B, ch 2.2.
- 241 LGOIMA, s 7(2)(g).
- 242 See also Steven Price *Official Information Act 1982: A Window on Government or Curtains Drawn?* (NZ Centre for Public Law, 2005) at 46–47.
- 243 Freedom of Information Act 1982 (Vic), s 32(1).
- 244 See for example Search and Surveillance Act 2012, s 136(1).
- 245 Section 29(1)(f).
- 246 LGOIMA, s 7(2)(f)(ii).
- 247 Issues Paper at [7.12] – [7.13].
- 248 LGOIMA, s 7(2)(ba). Compare the Government Information (Public Access) Act 2009 (NSW), s 14, providing that there is a public interest consideration against disclosure of information if disclosure could reasonably be expected to have one or more of the following effects: “(b) prejudice the conservation of any place or object of natural, cultural or heritage value or reveal any information relating to Aboriginal or Torres Strait Islander traditional knowledge.”
- 249 State Services Commission *New Zealand Government Open Access and Licensing Framework* (NZGOAL) (August 2010) at [29(g)].

250 Archives New Zealand *Making Access Decisions under the Public Records Act* (issued 2003, revised December 2005) at [5.1].

251 See Mai Chen *Public Law Toolbox* (LexisNexis, Wellington, 2012) at [10.4.19(a)].

252 OIA, s 18(da); LGOIMA, s 17(da).

253 See [9.76] – [9.81].

254 David McGee “The OIA as a Law Tool” [2009] NZLJ 128.

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. This involves officials asking:
- (a) Is the information such that a withholding ground exists?
 - (b) If so, is it overridden by the public interest in making that information available?
- 8.2 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.²⁵⁵ 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.
- 8.3 Some were confused by the fact that “public interest” plays a part on several levels. First, the fundamental principle of the OIA, that information should be made available unless there is good reason for withholding it, is itself grounded in the public interest that government should be transparent and accountable. Secondly, some of the withholding grounds are also based on public interest – the security and defence of New Zealand, maintenance of the law and the health and safety of members of the public are very obvious examples. Thirdly, there is the public interest with which we are now concerned: the public interest in making available specific information even though it falls within one of the withholding grounds in section 9.

8.4 Yet this is not quite as complicated as it looks. In applying the Act, officials need only consider the “public interest” once. Once it has been established that one of the withholding reasons expressly set out in section 9 applies, the question is whether it is outweighed in the particular case by the public interest in disclosure. The test may be thus defined: “There is only good reason to withhold official information where one of the paragraphs in section 9(2) applies and the need to withhold is not outweighed by the public interest in disclosure.”

8.5 However it is clear that the two elements in the process, and the balancing exercise involving them, create difficulty for some agencies.

8.6 Some submitters 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 sometimes seen as effectively the end of the matter. Respondents to the survey, and submitters on the issues paper, 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.

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.

The test is entirely counter-intuitive as agencies are asked to reconsider after they have decided there are grounds to withhold, and it is unrealistic to expect they will do this rigorously.

8.7 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 paid more than lip service to it”.²⁵⁶

Current guidance

8.8 Some assistance in applying the public interest test can perhaps be derived from the purpose section of the OIA, which states that a purpose of the Act is to increase the availability of official information to the people of New Zealand in order:²⁵⁷

(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:

- 8.9 That gives some guidance as to the sorts of considerations which constitute the public interest in making information available. Nevertheless, as was pointed out in submissions, it would be a mistake to assume that these are the only elements of “public interest” to be considered when deciding whether the public interest in disclosure overrides a withholding ground in a particular case.
- 8.10 The Ombudsmen’s Guidelines also assist in applying section 9. They make it very clear that the process involves more than one element, and requires a balancing exercise. They prescribe that process as follows:²⁵⁸
- (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.
- 8.11 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 (if known) are all relevant. The Guidelines conclude:
- 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.
- 8.12 Despite this assistance, agencies obviously still struggle.

OPTIONS FOR STATUTORY AMENDMENT

- 8.13 Given the wide range of circumstances in which the question may arise, it is clear to us that, despite its open-ended nature, the test of “public interest” is appropriate in this context and we would not wish to substitute a test with another name which may well have a narrower ambit. The current terminology is well-known and flexible enough to meet circumstances as they arise.

Defining “public interest”

- 8.14 We have considered whether “public interest” should be defined in the Act, but we doubt whether it is possible to frame a simple workable statutory definition. 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.”²⁵⁹

- 8.15 One submission offered a definition in the following terms: “A matter capable of affecting the people at large so that they might be legitimately interested in, or concerned about, what is going on, or what may happen to them or to others.” We think this is too narrow, in that it suggests that the public at large will learn of the information, whereas some requests for official information are made by one person who may not intend to publish it more widely. It also suggests that the people “at large” must be capable of being “affected”. It does not recognise that private interests can serve and reflect wider public interests.
- 8.16 In the end we think it is not desirable to constrain decision makers by propounding a statutory definition.

Statutory list of factors

- 8.17 If one is to deal with the matter by way of amendment to the Act, a more promising 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 Queensland Right to Information Act 2009. That Act prescribes 19 factors that favour disclosure and 22 that favour non-disclosure. Those that favour disclosure include where:²⁶⁰
- 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.
- 8.18 Despite the attractions of this approach, we are nevertheless not persuaded that it is the best path, for at least the following reasons:
- (a) 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.
 - (b) “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.
 - (c) 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.
 - (d) 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.

- (e) The statutory specification of factors might also increase the likelihood of challenge by judicial review.
- 8.19 Of 47 submissions to the issues paper on this point, 45 agreed with this view and opposed a legislative list. The main concern was that, even if the list was expressly declared not to be exhaustive, “giving it the force of law would invariably create that impression”.
- 8.20 We doubt whether there is any way in which the Act could supply a clearer indication of what “public interest” is. We ourselves have not found a solution which is at the same time clear and succinct. As we shall explain later in this chapter, we think improved guidance offers a better way forward.

The need to apply the test

- 8.21 In its submission to the issues paper, Fairfax Media made the point that the vital concern is the need for agencies to *apply* the test, however it is defined. We agree. We are concerned at the number of assertions in submissions that it is often not applied at all, or is accorded only lip service. We have therefore turned our minds to whether any statutory reformulation might make the requirement to consider the public interest override clearer than it is now. The reference to public interest in the current section 9 is not prominent. Section 9(1) reads:

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.
- 8.22 We have considered ways in which the requirement to consider the public interest might be brought to light more clearly.

Redrafting the provision

- 8.23 In our issues paper we suggested placing the public interest requirement in a separate section of the Act with its own section heading. Appropriate words could be added to section 9(1) to cross-refer to the new provision. That new provision might read as follows:

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 so made available.

- 8.24 While supportive of the idea of presenting public interest in a separate provision, the Ombudsmen had some reservations about this approach, based on their concern that a good reason for withholding cannot be made out before considering the public interest, but only *after* weighing it in the balance.

- 8.25 It may, therefore, be that a better way of achieving the end would be to retain the public interest requirement in section 9 (or its equivalent), in a form such as the following:

Non-conclusive reasons for withholding official information

- (1) Good reason for withholding official information exists where both (a) and (b) are met:
 - (a) Subsection (2) applies; and
 - (b) The withholding of the information is not outweighed by other considerations which render it desirable, in the public interest, to make that information available.
- (2) This subsection applies if the withholding of the information is necessary to:
[there follow the section 9 withholding grounds]

- 8.26 This formulation has two advantages. The *first* is that the new section heading makes it clear immediately that the reasons listed are different from those in section 6 in that they are non-conclusive. Even if nothing else is done we think this change would be worthwhile. The *second* advantage is that the drafting, by separating out paragraphs (a) and (b), makes it clear that there are two steps to the process.
- 8.27 We thus recommend this formulation for redrafting a new section 9. We think it will make matters clearer, but nevertheless acknowledge that to achieve the attitudinal change that is required it will need to be supplemented by strong guidance.

Express confirmation

- 8.28 We asked in the issues paper whether 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 confirm that it has considered the public interest.
- 8.29 We ourselves indicated reservations about how well this would work. Submissions were split on the suggestion: there was not strong support for it. Those who disagreed said that it would effectively amount to a “box-ticking” exercise which would not change behaviour. Going further and providing reasons to the requester of why the public interest was not seen as sufficient to outweigh withholding received even less support. It was seen as being too bureaucratic and adding to compliance costs; it might also risk disclosing the information which has been withheld. We do not pursue this suggestion.

Guidance

- 8.30 Rather than a statutory definition of public interest, or a statutory enumeration of factors to be taken into account in applying it, and in addition to redrafting the statutory provisions in the way we have suggested, we think, once again, that guidance holds the most promise.

- 8.31 We are in agreement with the comments of Ms Megan Carter in her submission to the Queensland review, which led to the enactment of their 2009 Act. Referring to a book she had written on the subject, she said:²⁶¹

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.

- 8.32 The Ombudsmen’s Guidelines could be supplemented, we think, by examples from real cases of the kinds of consideration which have led to findings of sufficient, or insufficient, public interest to outweigh withholding grounds. Analysis of the cases of the Ombudsmen should bring to light enough examples to give a much clearer picture to agencies. Factors might include such matters as the amount of public money at stake; the source of any money involved; the seniority of any officials or executives concerned; the degree of political involvement; and many other matters. Such factors would not be conclusive, but concrete examples in the Guidelines 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. They will be more flexible than statutory prescription. They will enable movement over time, and an acknowledgement that each case would still ultimately depend on its own facts.
- 8.33 As Megan Carter indicated in the submission referred to above, a consequence of the existence of such Guidelines would be to remind decision-makers (the Ombudsmen in our case) of the need to be as specific as possible about the public interests involved in each case when giving reasons for a decision, so that the cases will be as useful as possible.
- 8.34 We believe that the system of extra-statutory guidance drawing on real examples from cases of the Ombudsmen is just as appropriate for the “public interest” test as it is for the withholding grounds themselves.²⁶² There was strong support in submissions for such a solution. Comments included:

More specific guidance from Ombudsmen re relevant public interest considerations [would be useful].

I agree that better guidelines and better recording and reporting of Ombudsmen’s opinions would help clarify the meaning of the public interest.

We support any guidance or case studies that would help in interpreting the phrase, and, in particular, instances of when the public interest would outweigh one of the withholding grounds.

- 8.35 We propose in chapter 13 that there be an office to assume oversight of the OIA with one of its functions being to monitor its operation. If that office were to find that there remain significant problems with the application of the public interest override, it could invest resources into delivering further education on the subject.

R32 The requirement to consider the public interest in making information available should continue to be a feature of the OIA and LGOIMA. This should be made more prominent by redrafting section 9 of the OIA and section 7 of the LGOIMA along the following lines:

Non-conclusive reasons for withholding official information

- (1) Good reason for withholding official information exists where both (a) and (b) are met:
 - (a) Subsection (2) applies; and
 - (b) The withholding of the information is not outweighed by other considerations which render it desirable, in the public interest, to make that information available.

R33 The term “public interest” should not be statutorily defined or limited by a list of factors to be taken into account. Instead, the Ombudsmen’s Guidelines should provide clear examples of previous cases in which the public interest in disclosure has, and has not, been sufficient to justify overriding a withholding ground.

R34 The oversight office should monitor how agencies are considering the public interest as part of the decision to withhold or release requested information under section 9 of the OIA or section 7 of the LGOIMA.

Chapter 8 Footnotes

- 255 As revealed by a search of a New Zealand statutes website. At last count the number was 1106.
- 256 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.
- 257 OIA, s 4(a); and (with appropriate variations) LGOIMA, s 4(a).
- 258 Office of the Ombudsmen *Practice Guidelines – Official Information* (Wellington, 2002) at Part B, ch 5.
- 259 *Attorney-General v Car Haulways (NZ) Ltd* [1974] 2 NZLR 331 (Haslam J) at 335.
- 260 Right to Information Act 2009 (Qld), schedule 4. In addition there are four factors which are irrelevant to disclosure, and 10 categories favouring nondisclosure. See also Freedom of Information Act 1982 (Cth), s 11B (added in 2010).
- 261 FOI Independent Review Panel *The Right to Information: Reviewing Queensland's Freedom of Information Act* (Brisbane, June 2008). Ms Carter's submission is quoted at 144.
- 262 See chapter 2 of this report.



Chapter 9

Requests and resources

THE PROBLEMS

- 9.1 In both the responses to our survey and the submissions on our issues paper there were some widely divergent views between requesters on the one hand and agencies on the other about the handling of requests.
- 9.2 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 (on rare occasions) denied that they hold the information at all. We have no doubt that this does sometimes happen. In those cases it is not surprising that the requesters become persistent and ask the question in different ways, thus increasing the pressure on agencies.
- 9.3 On the other hand we are also satisfied that agencies are sometimes put under considerable pressure by certain types of requests, and rightly wonder whether something can be done to keep within reasonable bounds the resources they need to expend in meeting those requests. In this chapter we look at the types of request which can cause problems for agencies, and at solutions the OIA and the LGOIMA currently provide, or might provide in future.

Large requests and “fishing”

- 9.4 The first, and major, problem is the request for very large amounts of material, such as: “all briefing papers to the Minister over the past five years”; “all information about climate change”; “all information about delays on the XY commuter rail service over the past two years”. Some such requests are colloquially known as “fishing” requests: they ask for large volumes of material in the hope of finding something of interest. Such large requests require the expenditure of much time and resource. Sometimes just locating the material is time consuming, particularly if it is not all filed in one place (or even in one office) or if it is not filed or catalogued under the categories specified by the requester. A simple example of the latter 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”.
- 9.5 But locating the material is just one aspect. Decisions may need to be made as to what parts of it are relevant to the request. And then much more effort may have to 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 requester.
- 9.6 Some requests involve thousands of pages of material. We were told of several agencies that have brought in contractors at considerable cost to locate, examine and collate requested material. In one case a request engaged a staff member full time for three weeks. In another, staff members across the agency spent over 350 hours over and above their normal duties responding to one request. Sometimes, no doubt, poor record-keeping exacerbates the problem. The Public Records Act 2005, if properly followed, may lead to improvement. However, even with the best record-keeping in the world, some requests take a lot of time to satisfy.
- 9.7 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 also had to deal with a further 46 requests to the Minister.
- 9.8 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.

9.9 Another response put the matter in these simple terms:

High volume requesters tax resources and patience.

- 9.10 Large requests are often made with perfectly proper motives, and with no intention to harass 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. If they are too narrow they will not get what they want.
- 9.11 On other occasions the motive is the hope that the requester will find in a mass of information something negative about the government or an adversary. Lobbyists and researchers for political interests commonly do this. As one submitter put it to us, they are looking for “gotcha” moments. At other times, the motive may be to harass or make life difficult for an agency.

“Due particularity”

- 9.12 A second problem, which is sometimes linked to the first, is when the request is insufficiently precise to give the agency a clear idea of what information is wanted. “All information about climate change” suffers from that vice, in addition to being unmanageably broad. The Act requires that requests be made with “due particularity”. This is meant to ensure that requests are not unclear, but as we shall see shortly it does not always succeed in doing so. Time can be taken up trying to persuade the requester to clarify or narrow the request.

Frequent requests

- 9.13 A third problem is the frequent and persistent requester. Sometimes a 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.

- 9.14 Local authorities and school boards seem to experience this problem more than central government agencies. Dissatisfaction can manifest itself disproportionately in a small local community.

Multi-agency requests

- 9.15 A fourth problem which can compound the other difficulties is when the requester sends the same request to a multitude of agencies. We were told of cases where identical requests are sent, usually by email, 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 questions which have not been properly thought through and which therefore raise issues of due particularity.
- 9.16 As we have already indicated, the motives of people who make requests perceived as being unreasonable vary. Usually the motives are perfectly proper, and the requester is acting in a spirit of genuine inquiry – but not always.
- 9.17 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:²⁶³

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.

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

CURRENT SOLUTIONS

- 9.19 The OIA, as amended in 2003, already contains a number of ways of dealing with problematic requests. In summary they are:
- (a) requests must be specified with “due particularity”;²⁶⁴
 - (b) 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;²⁶⁵
 - (c) before a request is refused, the agency should consider whether consulting with the requester would be of assistance;²⁶⁶
 - (d) if the request is for a large quantity of information, the agency may extend the 20 working day time limit;²⁶⁷

- (e) an agency may charge for the supply of official information;²⁶⁸
 - (f) a request may be refused if the information requested cannot be made available without substantial collation or research;²⁶⁹
 - (g) a request may be refused if it is frivolous or vexatious;²⁷⁰
 - (h) 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.²⁷¹
- 9.20 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.
- 9.21 In our issues paper we discussed these provisions, and proposed certain amendments to either clarify or augment them. We received many helpful submissions on those proposals. Having carefully read the submissions and considered the arguments put forward in them, we have in some instances moved from the position we took in the issues paper.

RECOMMENDATIONS FOR IMPROVEMENT

“Due particularity”

- 9.22 Section 12(2) of the OIA²⁷² requires that the information requested must be specified with “due particularity” in the request. While lack of due particularity is not specified in section 18 as a reason for refusing a request, the clear implication of section 12(2) is that a request is not valid unless it makes clear what information is being sought.
- 9.23 Section 12(2) is not aimed at the *quantity* of information requested. As the Ombudsmen have consistently held, its purpose is to ensure that the recipient agency must reasonably be able to identify the information requested.
- 9.24 A large majority of submissions agreed that section 12(2) might be more clearly expressed. “Due particularity” is antiquated language. We received a number of suggestions for alternative wording, some based on equivalent provisions in overseas legislation. All of them emphasise that the essence of the requirement is for the agency to be able to *identify* what is wanted: that is, it must be able to know what it is that is being asked for. We prefer the following wording, which was an option put forward by the Ombudsmen:

The requester must provide sufficient detail to enable the agency to identify the information requested.

- 9.25 A number of agencies have told us that more should be done here. They have given us examples of requests for “lists of all briefings provided to the Minister between [certain named dates]”. They say such requests take an inordinate amount of time, and suggest that all requests should specify a subject-matter. We have concluded that this would be very difficult to do. “Subject-matter” is itself a nebulous concept. “Climate change” is a subject-matter, but so large as to be virtually unmanageable unless refined. So is “all briefing documents”. There may be good reason why an inquirer wants to know the kinds of things with which a Minister has to deal.
- 9.26 It seems to us that the crux of the matter is the expenditure of time which is involved in meeting such requests. We think that is best dealt with in other ways which we describe later in this chapter, in particular in the “substantial collation and research” ground.

Reasonable assistance

- 9.27 Section 13 of the OIA²⁷³ provides that it is the *duty* of an agency to give reasonable assistance to a person who “in making a request under section 12, has not made that request in accordance with that section”. This clearly links to the “due particularity” requirement that we have just discussed.
- 9.28 The Ombudsmen told us that in their opinion agencies do not always comply with the letter and spirit of section 13. The Ombudsmen suggested a number of ways of improving the situation. They are:
- (a) The ability to declare a request invalid under section 12 could be made contingent on meeting the requirements of section 13.
 - (b) Section 13 could be amended to make clear that the duty to assist the requester includes a duty to assist him or her to frame the request with “due particularity” (or whatever terminology replaces it). (The Law Commission effectively so recommended in 1997.)²⁷⁴
 - (c) The legislation could spell out what constitutes reasonable assistance, such as providing an opportunity to speak with an agency contact person.
 - (d) The legislation might provide that a failure to provide assistance is itself a ground of complaint to the Ombudsmen under the OIA. (It may be possible to address the failure now under the Ombudsmen Act 1975, but there should be a right specific to the OIA, given that some agencies subject to the OIA are not within the Ombudsmen Act.)

- 9.29 We think the Act should be clear that there is a link between the “due particularity” requirement in section 12 and the duty to provide assistance in section 13. It is not in accord with the spirit of the OIA that an agency should be able to declare a request invalid because it is insufficiently clear without first trying to help the requester clarify what he or she wants. Of the solutions proposed by the Ombudsmen we endorse the first and the fourth. We think that the Act should provide that: (i) an agency should not treat a request as invalid for lack of due particularity unless it has first tried to assist the requester under section 12 to refine the request; and (ii) it should be a ground of complaint to the Ombudsmen that the agency has failed to provide such assistance.
- 9.30 We continue to support the Law Commission’s 1997 recommendation that section 13 should be clarified by expressly linking it to section 12(2). We believe that what should be required by way of reasonable assistance should be a matter of guidance rather than legislative prescription.
- 9.31 We agree, however, with the sentiments of several submitters that if attempts to assist fail and the requester maintains the request in its original form, the agency should be able to treat the request as invalid.

R35 The requirement for due particularity in section 12(2) of the OIA and section 10(2) of the LGOIMA should be replaced with the following statement: “The requester must provide sufficient detail to enable the agency to identify the information requested.”

R36 The OIA and LGOIMA should state that, where a request is insufficiently clear, the agency may not treat the request as invalid unless it has reasonably attempted to fulfil its duty of assistance under section 13 of the OIA and section 11 of the LGOIMA. The Ombudsmen’s Guidelines should give examples, if possible drawn from prior cases, as to what generally constitutes reasonable assistance.

R37 Section 28 of the OIA and section 27 of the LGOIMA should provide for the Ombudsmen to hear complaints that an agency has failed to offer reasonable assistance to a requester under section 13 of the OIA and section 11 of the LGOIMA.

R38 Section 13 of the OIA and section 11 of the LGOIMA should state that if, despite reasonable attempts by the agency to provide assistance, the requester maintains the request in a form which does not comply with section 12(2) of the OIA or section 10(2) of LGOIMA, the agency may treat the request as invalid.

“Substantial collation or research”

- 9.32 Under section 18(f) it is a ground for refusing a request if “the information requested cannot be made available without substantial collation or research”. The threshold is rightly set high. Yet we have the impression that many agencies are reluctant to use the ground for fear of being accused of acting contrary to the spirit of the Act. We are aware of some cases where the time the agency spent retrieving and collating information was quite disproportionate to their resources, and where the criteria in section 18(f) may well have been satisfied. Many agencies treat section 18(f) as a measure of very last resort.
- 9.33 In the issues paper we considered a number of ways in which this ground might be modified to provide more control over unreasonably large requests.
- 9.34 First, section 18(f) specifies *collation* and *research* as the only two matters which can be taken into account. Yet finding the material and collating it are not the only activities which take time. One of the most significant and time-consuming activities is perusing the material to assess whether it, or any part of it, should be withheld. There is some debate whether this activity does or does not fall within the expression “collation and research” and the Ombudsmen said that the meaning of the phrase is frequently contested. We think this should be clarified.
- 9.35 In the issues paper we suggested that the words “review and assessment” should be added to section 18(f). We also set out the equivalent provision in the Australian legislation which was referred to in the original Danks Report as a model which might be used if requests became unwieldy. What is now section 24AA of the Freedom of Information Act 1982 (Cth) provides that it is a ground for refusal if the work involved in *processing* the request “would substantially and unreasonably divert the resources of the agency from its other operations”. In making this decision the agency is to have regard to the resources that would have to be used:
- (a) *identifying, locating or collating* the documents within the filing system of the agency, or the office of the Minister; or
 - (b) *deciding whether to grant, refuse or defer access* to documents to which the request relates, or to grant access to an edited copy of a document, including resources that would have to be used for:
 - (i) *examining* the documents; or
 - (ii) *consulting* with any person or body in relation to the request;
 - (c) making a copy, or an edited copy, of the documents; or
 - (d) notifying any interim or final decision on the request.

- 9.36 The Australian version spells out in more detail the kinds of activities we had in mind when we suggested including the terms “review and assessment” in section 18(f). There was overwhelming support in submissions for our suggested amendment. However some of the arguments in the submissions which opposed our proposal have given us cause to reflect.
- 9.37 It is important that no amendment to the legislation unduly impairs the ability of legitimate requesters to get the information they want. That would be contrary to the purpose of the Act.
- 9.38 A few submissions made the point that our suggested amendment might well do that. While the time needed for locating, collating and reading material is objectively assessable, the processes for, and time spent in, deciding whether or not to release are much more subjective. They vary between agencies and depend on the type of information in question. There could be much room for arguing whether in a particular case it was necessary or reasonable to spend so much time deciding whether to release the information. The Ombudsmen said:
- There is a risk that if substantial time spent reviewing and assessing information provides a reason for refusing requests, then high risk requests stand a greater chance of being refused. It is often the high risk requests that raise the strongest public interest considerations favouring disclosure, and for this reason we think the proposed amendment could significantly undermine access rights.
- 9.39 We are persuaded by this reasoning, and have decided not to add *review* or *assessment* to the list of activities which can be regarded to determine whether the burden on the agency is “substantial”. But we believe that the time spent *reading* the material should be able to be taken into account. That activity will always be necessary, and is capable of objective assessment. It is not obviously included in section 18(f) as currently framed.
- 9.40 We have also considered whether the time and resource which would be spent consulting other agencies can legitimately be taken into account in deciding whether to refuse the request. The Australian provision does allow for this. As we shall discuss shortly, consultation is not mandatory under the New Zealand legislation, and we do not recommend that it should be made so. However it is good practice, and agencies often, quite rightly, engage in it. Consultation between agencies is supported by the Cabinet Manual. Given that it is to be encouraged, we think the burden it can impose is a legitimate factor to be considered in determining whether a request is unreasonably large. Yet it would not be acceptable if agencies used this ground to take into account projected consultation which was greater than necessary. We would therefore wish to qualify this factor by providing that the consultation must be “appropriate”.

- 9.41 So we recommend that section 18(f) should be amended to provide that it is a ground for refusal where to make the information available would require substantial time:
- (a) identifying, locating and collating the information;
 - (b) reading and examining it;
 - (c) undertaking appropriate consultation; and
 - (d) editing and copying the information.
- 9.42 This will add further clarity, and will meet the objection that reading, examination and consultation are not obviously included at present.
- 9.43 The second question relates to whether the term “substantial” needs further definition. We suggested in the issues paper that the section might define “substantial” with reference to the size and resources of the agency in question. A majority of submissions opposed this change. Among the reasons given were that it would mean smaller agencies could be more secretive; that it could create a perverse incentive to under-resource large agencies; and that the mere fact that an agency is large does not always mean it is better able to handle requests, because it is likely to get more, and larger, requests. We are persuaded by these arguments and no longer support this solution.
- 9.44 However we do think that the expression “substantial” would benefit from further definition, and are attracted to the formulation in the Australian legislation that the work involved:
- ... would substantially and unreasonably divert the resources of the agency from its other operations.
- 9.45 We recommend the adoption of this, or similar, wording in New Zealand.
- 9.46 We think that this, together with the other changes we recommend in this section, will go some distance in containing “fishing” requests.

R39 Section 18(f) of the OIA and section 17(f) of the LGOIMA should be amended to state that an agency may refuse a request where substantial time would be required to:

- (a) identify, locate, and collate the information;
- (b) read and examine the information;
- (c) undertake appropriate consultation; and
- (d) edit and copy the information.

“Substantial” should be defined in the OIA and LGOIMA to mean that the work involved would substantially and unreasonably divert resources from the agency’s other operations.

Consultation

- 9.47 We now elaborate on the matter of consultation which we introduced at paragraph 9.40. Presently section 18B of the OIA²⁷⁵ places a duty on an agency to *consider* consultation in certain circumstances. The section reads:

If a request is likely to be refused under section 18(e) or (f), the department, Minister of the Crown, or organisation must, before that request is refused, consider whether consulting with the person who made the request would assist that person to make the request in a form that would remove the reason for the refusal.

- 9.48 In the issues paper we referred to the fact that consultation with a requester in the early stages can often be a way of refining an apparently unmanageable request so that it is able to be met.

- 9.49 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.

- 9.50 Of course this strategy does not always work. Sometimes requesters are not prepared to modify their requests even after being told of the difficulties. However, as we said in the issues paper, there is surely a case for strengthening the present provision by providing that, where reasonably practicable, the agency *must* consult the requester before refusing the request rather than just *considering* consultation. This is equivalent to the duty in section 13 to provide assistance if a request lacks particularity.

- 9.51 A majority of submissions to the issues paper strongly disagreed with the imposition of a *duty* to consult. They said it was a matter of common sense and best practice rather than something which should be legislated for. Not all those disagreeing were public sector agencies. One advocate of open government simply said:

No. It is in their best interest to do so. If they don't choose to, then that is their problem.

- 9.52 Others were worried that there might be difficulty knowing what would trigger the duty, and that consultation could be used by officials to delay a response. It was also suggested that such a requirement could put requesters in a bargaining position.
- 9.53 Yet consultation often proves valuable. One media group said that direct talks were helpful, and another that although they sometimes do make broad requests they are amenable to narrowing the scope if they are shown that the request in its original form is unreasonable.
- 9.54 In our view it is unreasonable for an agency to refuse a request outright under section 18(f) if they have made no effort to discuss the matter with the requester. We believe the Act should provide that a request should not be refused under s18(f) unless there has first been a reasonable attempt by the agency to consult the requester. A refusal without such an attempt should be the basis of a complaint to the Ombudsmen.

R40 Section 18B of the OIA and section 17B of the LGOIMA should be amended to state that an agency may not refuse a request under section 18(f) of the OIA or section 17(f) of the LGOIMA unless it has first made a reasonable attempt to consult the requester.

R41 Section 28 of the OIA and section 27 of the LGOIMA should provide for the Ombudsmen to hear complaints that an agency has not made a reasonable attempt to consult with the requester before refusing a request under section 18(f) of the OIA or section 17(f) of LGOIMA.

Time limits

- 9.55 The Act provides that an agency has 20 working days after “the day on which the request is received” to notify the requester of the decision to release or not.²⁷⁶ That time can be extended if the request is for a large quantity of information or necessitates searching through a large quantity of information; or if long consultations are necessary before making a decision. This allows large agencies to meet requests without placing unreasonable strains on its resources. This solution must be considered before refusing the request.²⁷⁷

- 9.56 There is, however, one question about which there is a lack of clarity in some quarters. It is relevant to the matters we have been discussing in this chapter. If a request, when first received, either lacks due particularity or requires “substantial collation and research”, but is then refined so that it is manageable, from which date does time run: the date of receipt of the original flawed request, or the date of the amended one? Common sense suggests the latter. Indeed the Ombudsmen submitted that no statutory amendment was necessary at least in relation to the “due particularity” ground. However we believe it would avoid doubt if the Act were amended. The amendment should be to the effect that if a request is revised after consultation, the revised request is to be treated as a new request for the purpose of the running of time. This reflects the position taken in section 88 of the Resource Management Act 1989.
- 9.57 The overwhelming majority of submissions to the issues paper agreed. Agencies should not be penalised for good faith consultation. However in so recommending we are alive to the fact that the provision should not allow agencies to “buy time” by waiting an unreasonable time after receipt of the original request before beginning the process of consultation which leads to the amended request. We therefore also recommend that an agency should not be able to take advantage of the new time limit unless it has made a demonstrable effort to clarify the request within seven working days of receiving it.

R42 The OIA and LGOIMA should provide that, if a request for information is revised after consultation, the revised request is to be treated as a new request for the purpose of the 20-working day time limit in section 15 of the OIA and section 13 of the LGOIMA. An agency should not receive the benefit of this provision unless it has made a demonstrable effort to clarify the request within seven working days of receiving it.

Charging

- 9.58 Charging can be an effective deterrent to requesters making unreasonably large requests. 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. There is also a convention that MPs will not be charged.
- 9.59 The Ministry of Justice has issued guidelines on charging,²⁷⁸ but they are only guidelines, and do not apply to LGOIMA. In the responses to our survey there was a widespread desire for clear, uniform and authoritative guidance on when charging is appropriate. We believe that the Acts should continue to empower the making of regulations prescribing charges, and that regulations should provide much firmer guidance than exists at the moment. Uniform charging practices would not only enable agencies to recover overheads when that was appropriate but would also act as a deterrent to requesters making unreasonable requests.

- 9.60 Yet much care will be needed to ensure that the charging regime does not deter reasonable requesters. That would be to diminish the very purpose of the Act: increasing the availability of official information. We return to this difficult question in chapter 10.

Vexatious requests

- 9.61 A few requesters make frequent and persistent requests with little more elevated purpose than to annoy an agency with which they have had differences of opinion.

- 9.62 Submissions on the issues paper gave some interesting illustrations:

[We] have previously received a number of requests under the OIA from an individual who appeared to be motivated not by a genuine desire for the information itself, but, rather, by an apparent grievance against a Board member.

[The organisation] has experienced incidents in the past, where certain parties sought to overwhelm the organisation's overall administrative and management capability by overloading it with OIA requests. In some instances the organisation received the same request, differing in minor ways, from hundreds of persons.

- 9.63 There clearly needs to be power to reject requests made with motives of this kind. Section 18(h) of the OIA allows refusal of a request if it is "frivolous or vexatious".²⁷⁹ 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 is it not enough merely that a requester has already made numerous, possibly time consuming, requests. What matters, they say, is:²⁸⁰

... the nature of the request made in light of the surrounding circumstances.

- 9.64 Given the language of the Act, which focuses on *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".²⁸¹

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.

- 9.65 Given that there seems to be some misunderstanding among agencies on this point we think there would be advantage in adding to paragraph (h) of section 18 words making it clear that the past conduct of the requester may be taken into account in assessing the character of the present request. That past conduct may include the fact that the requester has made a number of previous requests.

9.66 The term “vexatious” is simply not clear to some agencies: it is a legalistic and somewhat archaic term. Agencies seem afraid to apply it, believing that the threshold is almost unattainably high. We think it would benefit from definition, and in the issues paper put forward the suggestion that any definition should be centred on the concept of bad faith. Most submitters agreed that a definition would be helpful, but some doubted whether bad faith is adequate as a touchstone: it is not a particularly clear term itself, and may not adequately cover all cases, particularly those where the requester purports to be unable to understand an answer supplied and continues to ask the same or similar questions.

9.67 We are attracted to the definition of “vexatious” given by the Scottish Information Commissioner:²⁸²

A request may be considered vexatious where it would impose a significant burden on the agency and:

- it does not have a serious purpose or value; and/or
- it is designed to cause disruption or annoyance to the agency; and/or
- it has the effect of harassing the agency; and/or
- it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

9.68 Those criteria could be contained in guidance or in the Act itself. Given that they have the effect of *defining* an otherwise unclear term we would prefer that they appear in the Act. We think that this would give agencies more certainty, and that they may be rather more ready than they presently are to use the power to declare a request vexatious.

9.69 We think two further, related provisions would be useful. The first is similar to that in the Criminal Disclosure Act 2008 to the effect that an agency can decline to provide information if the same or substantially the same information has been supplied to that requester before, provided there is no good reason for requesting again.²⁸³ (Sometimes there may be a good reason in that the information previously supplied has been lost, or that there is reason to suppose that additional information may now be available.)

9.70 The second proposed provision is that the agency can decline to provide information if a request for the same or substantially the same information has been declined previously. This is to stop a requester making repeat requests for the same information, or aiming at the same target from different angles. We are told that some requesters do this. Again it would be necessary to provide a qualification that there be no good reason for asking again: circumstances may have changed since the first request, and a further attempt to get the information now may not be unreasonable.

9.71 There was overwhelming support in submissions for these amendments, even though a few thought the “vexatious” ground is already sufficient to deal with the problem.

- 9.72 The issues paper then asked a much more difficult question: whether, in addition to a power to reject a request as vexatious, there should also be power in an agency to declare a *requester* to be vexatious, so that it might decline to answer any further questions from that person. Section 88(b) of the Judicature Act 1908 provides that 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 an amendment to the Australian Freedom of Information Act in 2010 enacts such a solution: the Information Commissioner is to have the power to make “vexatious applicant” declarations.²⁸⁴
- 9.73 Adopting this approach would be going a long way. It would allow an agency to “shut out” a particular requester, effectively banning that person from the right to which he or she would otherwise be entitled to get information under the Act. It would apply only in the most extreme circumstances; it would have to be subject to appeal, probably to the Ombudsmen; and it would presumably have to be subject to revocation or expiry after a period of time (to ban a person forever would obviously be too extreme).
- 9.74 While a majority of submitters supported such a power it was not a large majority, and some of that majority expressed reservations. Those who disagreed thought the remedy was too extreme, and that even the most unreasonable requester might occasionally make a request which is reasonable and deserves to be answered. Others thought such a solution would simply enlarge the scope for conflict and add to the costs of the agency. Others noted that it would not be difficult for the person to circumvent the “vexatious” label by making requests under an alias, or via someone else.
- 9.75 We have decided not to pursue this proposal. If the vexatious request route is clarified as we have recommended it should serve the ends appropriately.

R43 Section 18(h) of the OIA and section 17(h) of the LGOIMA should be amended to make it clear that, in determining whether a request is frivolous or vexatious, the past conduct of a requester may be taken into account.

R44 The OIA and LGOIMA should state that a request may be considered vexatious where it would impose a significant burden on the agency and it:

- (a) does not have a serious purpose or value; and/or
- (b) is designed to cause disruption or annoyance to the agency; and/or
- (c) has the effect of harassing the agency; and/or
- (d) would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

R45 The OIA and LGOIMA should include new provisions stating that:

- (a) an agency may decline to provide information if the same, or substantially the same, information has been supplied to the requester before, provided there is no good reason for requesting it again;
- (b) an agency may decline to provide information if a request for the same or substantially the same information has been declined previously, provided there is no good reason for requesting it again.

R46 The OIA and LGOIMA should not give agencies the power to declare a requester vexatious with a view to declining future requests from that person.

PURPOSE AND NAME OF REQUESTER

Requester's purpose

9.76 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 has been pointed out to us that knowledge of the requester's purpose can assist the agency in several ways:

- (a) in determining whether the request is vexatious;
- (b) in determining whether release would be in the public interest;
- (c) in determining whether charging would be appropriate;
- (d) in handling an urgent request;
- (e) in helping to refine an overbroad request.

9.77 It might even be said that one of the withholding grounds in the OIA assumes a knowledge of purpose: under section 9(2)(k)²⁸⁵ information may be withheld if that is necessary to “prevent the disclosure or use of official information for improper gain or improper advantage”.

- 9.78 We have wondered whether the Act should require requesters to state their purpose, but in the issues paper 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 disclose information less readily than required, if a stated purpose was one of which they did not approve. 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.
- 9.79 Most of the submissions on the issues paper agreed. We therefore recommend that requesters of official information should not be required to state their purpose.
- 9.80 However it is undoubtedly true that knowledge of purpose can sometimes be useful to an agency, in particular when it is assisting a requester to refine a request which is over-broad or insufficiently particular. In that situation requesters will generally volunteer it anyway. Nor should agencies be afraid to inquire about purpose where knowledge of it would help decision-making. Several agencies which made submissions to the issues paper made that point.
- 9.81 In its 1997 review the Law Commission recommended that it be enacted that a requester may, but is not obliged to, specify their purpose.²⁸⁶ We agree with the substance of this, but now think that such advice might belong better in guidance for requesters than in the Act itself. Treasury made that suggestion in its submission, and we agree with it.

R47 The Acts should not require requesters of official information to state their purpose. However, guidance for requesters should make it clear that it can be useful for agencies to know the purpose of a request and that they may be asked for it.

Requester's name

- 9.82 We have had it suggested that anonymous requests should not be entertained, and that requesters should be obliged to give their real names. This would help agencies to identify their persistent requesters, and would also be a demonstration of good faith on the part of the requester.
- 9.83 A great majority of agencies submitted that real names should be provided, and a number of people who fell into the "requester" category themselves (including one media organisation) agreed.

9.84 However we do not detect that this is a major issue at the moment. The huge majority of requesters already do give their names – simply so that they can be communicated with. There is also nothing to stop an agency asking those who do not, although a refusal to answer would not be grounds for the agency to refuse to supply the requested information. It is also acknowledged that if names were required it would be difficult to detect whether a name supplied was a pseudonym, or whether the person making the request was doing so on behalf of someone else.

9.85 We have decided to make no recommendation on this matter.

WHAT CONSTITUTES A REQUEST?

9.86 There seems to be a lack of clarity in some quarters as to what constitutes a request under the OIA (or the LGOIMA). Some persons apparently believe a request is not an OIA request unless it is in writing and specifically refers to the Act. It has been suggested that some agencies are likely to be more forthcoming in response to an informal request over the phone or in person than they are to a formal written request explicitly stated to be made under the OIA. They feel the latter takes on an adversarial aspect from the outset. One submitter said this to us:

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.

9.87 It can work the other way too. Requesters who ring up for information are sometimes told that the oral request will not be actioned and that if they want the information they must make a formal request in writing under the Act. That probably cannot be justified under the Act as it stands, although one can see the practical sense in recording requests in writing, particularly where they are not straightforward: memory of what was said over the phone can fade fairly quickly.

9.88 We recommend that the Act provide expressly that requests may be made in any form: in hard copy, electronically, or orally; and they do not need to refer expressly to the official information legislation.

9.89 Nevertheless we think the provision should also state that if an oral request is made the agency can ask the requester to put it in writing if that is reasonably necessary to achieve clarity. If the requester declines, or is unable, to reduce his or her request to writing, the agency should record its understanding of the request, and a copy should be provided to the requester.

R48 A new provision in the OIA and LGOIMA should state that:

- (a) requests may be made in any form (in hard copy, electronically, or orally);
- (b) requests do not need to make express reference to official information legislation;
- (c) where it is reasonably necessary to clarify an oral request, agencies may ask for it to be put in writing;
- (d) if the requester declines or is unable to put an oral request in writing, the agency should record its understanding of the request and provide a copy of it to the requester.

GUIDANCE FOR REQUESTERS

- 9.90 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 it would be useful for a set of guidelines for requesters to be made publicly available. Just as agencies are in need of guidance as to how to handle requests, so are many requesters in need of assistance as to how to make them. The websites of the Ministry of Justice and the Ombudsmen do have information for requesters now, but these are not particularly 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 should be 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 could best be serviced by the office which oversees the operation of the legislation.
- 9.91 We also note here the advent of the website www.fyi.org.nz. It is a site run by volunteers who send questions to the appropriate agency on behalf of requesters. It publishes the question on the website, and in due course also publishes the responses, and notifies the requester.

R49 There should be a set of publicly available, readily accessible, user-friendly guidelines for persons wishing to request official information. Consideration should be given to creating a dedicated 0800 number, administered by the oversight office, to provide assistance to requesters.

Chapter 9 Footnotes

- 263 Committee on Official Information *Towards Open Government: Supplementary Report* (Government Printer, Wellington, 1981) at [4.40].
- 264 OIA, s 12(2); LGOIMA, s 10(2).
- 265 OIA, s 13; LGOIMA, s 11.
- 266 OIA, s 18B; LGOIMA, s 17B.
- 267 OIA, s 15A; LGOIMA, s 14.
- 268 OIA, s 15(1A); LGOIMA, s 13(1A).
- 269 OIA, s 18(f); LGOIMA, s 17(f).
- 270 OIA, s 18(k); LGOIMA, s 17(h).
- 271 OIA, s 9(2)(k); LGOIMA, s 7(2)(j).
- 272 OIA, s 12(2); LGOIMA, s 10(2).
- 273 LGOIMA, s 11.
- 274 Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997) at [83].
- 275 LGOIMA, s 17B.
- 276 OIA, s 15; LGOIMA, s 13.
- 277 OIA, s 18A; LGOIMA, s 17A.
- 278 Ministry of Justice *Charging Guidelines for Official Information Act 1982 Requests* (18 March 2002). Available at < www.justice.govt.nz > .
- 279 OIA, s 18(h); LGOIMA, s 17(h).
- 280 Office of the Ombudsmen *Practice Guidelines – Official Information* (Wellington, 2002) Part B Chapter 2.5 at 13.
- 281 At 13.
- 282 Scottish Information Commissioner *Vexatious or Repeated Requests: Part 2*, accessible at < www.itspublicknowledge.info > . The UK Information Commissioner has adopted the following guidance:
- To help you identify a vexatious request, we recommend that you consider the following questions, taking into account the context and history of the request:
- (a) Can the request fairly be seen as obsessive?
 - (b) Is the request harassing the authority or causing distress to staff?
 - (c) Would complying with the request impose a significant burden in terms of expense and distraction?
 - (d) Is the request designed to cause disruption or annoyance?
 - (e) Does the request lack any serious purpose or value?
- To judge a request vexatious, you should usually be able to make relatively strong arguments under more than one of these headings.

The questions are likely to overlap, and the weight you can place on each will depend on the circumstances. You do not need to be able to answer yes to every question, and may also consider other case-specific factors. However, if you consider each of the questions in turn, you should be able to more easily and consistently assess the overall balance of the case.

Compare the Freedom of Information Act 1982 (Cth), s 99LL.

283 Section 16(1)(m). See also the Law Commission's recommendation for an equivalent provision in the Privacy Act 1993: Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC R123, 2011) at R27.

284 Freedom of Information Act 1982 (Cth), s 89K.

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

286 Law Commission, above n 274, at [73].

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 here 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 the cost of 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 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.²⁸⁷ 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 respond to a request as soon as reasonably practicable.

- 10.4 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.²⁸⁸ It was expected that developments in information technology would make it easier to retrieve information and reduce response times. However, information technology has proved to be 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, contributing to a significant official information workload for agencies that must search for relevant information and then assess whether it can be released. We discuss the challenges of information technology in chapter 1.
- 10.5 Steven Price's research data showed that, from his sample, most OIA requests were processed within the maximum 20 working day timeframe, the average being just over 13 working days.²⁸⁹ About one in eight responses were outside the maximum permitted timeframe (without an extension), half of those being less than a week late. About three per cent of responses overall were more than two weeks late.²⁹⁰
- 10.6 Most of the officials Nicola White interviewed felt that the legislation sets a reasonable base deadline and she concluded that very often "as soon as reasonably practicable" is much the same as 20 working days in a government organisation of any size.²⁹¹ 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.²⁹²
- 10.7 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 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 five 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. All submitters who responded to this question in our issues paper favoured retaining the current 20 working day time limit.²⁹³
- 10.9 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 recommendation 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.

Release of information within timeframe

- 10.10 The time limit for processing requests requires a decision to be made within 20 working days but does not expressly require information to be released within that timeframe. Nevertheless, the time limit tends to be interpreted by agencies and requesters as including the release of information. In his research, Steven Price found that, almost invariably, any information to be released is provided to the requester at the same time as the release decision.²⁹⁴
- 10.11 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.²⁹⁵ We note that undue delay in making information available in response to a request is deemed to be a refusal,²⁹⁶ about which the requester can complain to the Ombudsmen. However in the issues paper we wondered if the legislation should be tightened to prompt agencies to *release* information expeditiously.²⁹⁷
- 10.12 A large majority of submitters (including the Ombudsmen) favoured an express provision that information must be released as soon as reasonably practicable after a decision to release is made. Submitters commented that this would make it clear to requesters that the release of information is dealt with separately from the decision to release it, and it would protect against agencies misusing the current absence of a time limit for release and promote quicker responses. This would require an amendment to section 15 of the OIA and section 13 of the LGOIMA to require that the release of information should occur as soon as reasonably practicable after the decision to release is given to the requester.
- 10.13 Our concern is that this change could result in delays in processing requests as a de facto extension to the 20 working day time limit for decision-making. Our preference is to clarify that this time limit covers both the decision and release of information.²⁹⁸ This would accord with current agency practice. In circumstances where significant work is required to prepare information for release, consideration could be given to using the time extension provision, where applicable.

R50 Section 15(1) of the OIA and section 13(1) of the LGOIMA should retain the standard 20-working day time limit for responding to requests. However, the sections should be amended so that it is explicit that this time limit covers both (i) the agency's decision about release or withholding; and (ii) the release of any information in response to a request.

Acknowledgement of receipt

- 10.14 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:²⁹⁹
- (a) agencies lose or ignore requests;
 - (b) 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.
- 10.15 In chapter 9, we deal with the problem of whether time starts to run from receipt of an overbroad request or a request that may require substantial collation or research, or on the subsequent receipt of a more targeted request. We recommend an appropriate clarification that time should not start to run until receipt of the refined request.³⁰⁰
- 10.16 In the issues paper we wondered 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.³⁰¹ For example the Australian Act 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.³⁰²
- 10.17 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. This is important in the case of urgent requests. Acknowledgement of receipt by an agency to which a request is transferred would be useful to requesters for the same reasons.
- 10.18 The question is whether a statutory requirement to acknowledge receipt should be introduced, or whether it is more appropriate for this to be dealt with in guidance as a matter of best practice. A large majority of submitters supported best practice in preference to a statutory requirement. As we are wary of proposing mandatory measures that may increase the administrative burden on agencies, we recommend that the requirement to acknowledge receipt of official information requests be handled as a matter of best practice.

R51 Acknowledging receipt of official information requests should be encouraged as best practice, rather than introducing a statutory requirement to do so.

Extension of time limits

Maximum extension period

- 10.19 We have considered whether there should be an outer time limit on the extension period. For example the Australian Act allows for the original 30 day maximum time limit to be extended by a further 30 days.³⁰³ The New South Wales Act allows for the original 21 day period to be extended by a further 10 days in certain circumstances.³⁰⁴
- 10.20 The New Zealand legislation provides that the extension be for a reasonable period of time, having regard to the circumstances. The requester must be notified of the period of the extension and the reasons for it, and a requester may complain to the Ombudsmen about the extension.³⁰⁵
- 10.21 A large majority of submitters (including the Ombudsmen) supported the current provision, with submitters valuing its flexibility as every request is different and “no one size fits all.” It was noted that a number of factors influence the time needed such as the nature and size of the request, the availability of staff, competing priorities, the complexity of the information and the extent of consultation required.
- 10.22 Further, it was noted that imposing a maximum extension period might result in more requests being refused on the grounds of substantial collation and research and the Ombudsmen confirmed that agencies currently comply with requests that might otherwise be refused if a maximum extension period applied. The ability to complain to the Ombudsmen about extension periods was seen by some submitters as a control on unreasonable extensions.
- 10.23 We are mindful of the risk that any stated statutory maximum limit may tend to become the default time limit and we prefer the flexibility of the current provision. This could be supported by guidance from the Ombudsmen about grounds for extension and what may be considered to be a reasonable or unreasonable period of extension.
- 10.24 Another change was suggested by a submission to the issues paper. This is to clarify that the extension provision can be used on more than one occasion in relation to the same request. While an extension period can be further extended at any time within the initial 20 working day period set by section 15 (or section 13 of the LGOIMA), there is no capacity for further extension outside that initial period.
- 10.25 We think that it is not unreasonable for an agency to make further use of the extension provision during the initial extension period, based on the test of whether the further extension period is reasonable in the circumstances; however agencies should be limited to just one such further extension, with the requester having the ability to complain to the Ombudsmen about the initial or further extension.

- 10.26 We expect that it would be more difficult for agencies to meet the test of whether a further extension is reasonable in the circumstances than for the initial extension, as there would need to be special reasons why the request could not be met under the initial extension. Use of further extensions would therefore be limited to unusual or difficult requests.

R52 The maximum extension time in section 15A of the OIA and section 14 of the LGOIMA should continue to be flexible, without introducing a specific time limit.

R53 Section 15A of the OIA and section 14 of the LGOIMA should be amended to allow a further extension of the time limit during the initial extension period, for a reasonable period having regard to the circumstances.

Extensions by agreement

- 10.27 Another question is whether the official information legislation should specifically allow the agency and requester to mutually agree on an extension of the time limit, such as the New South Wales Act allows.³⁰⁶ In his research, Steven Price found it not unusual for requesters to informally agree to relax deadlines.³⁰⁷
- 10.28 The large majority of submitters to this question in the issues paper (including the Ombudsmen) did not support a new provision to allow for extensions by agreement.³⁰⁸ One view was that extensions by agreement can already happen and so it is unnecessary to add a provision about it, although a different view was that an agency might breach the statutory time limits if the Acts do not expressly authorise extensions by agreement. Our view is that such agreements are probably not of legal binding effect; however they represent a form of consultation between agency and requester that can lead to sensible arrangements being reached.
- 10.29 A statutory provision may have certain benefits. It might encourage dialogue between agencies and requesters. It might also promote the object of availability by allowing agencies the time to provide fuller and more expansive responses than under the statutory timeframes. And it might help to relieve the administrative burden on agencies where requesters are amenable to their requests being handled under longer timeframes.

10.30 The difficulty is that the Acts currently allow an agency to unilaterally impose a time extension (based on reasonableness). This trumps any informal agreement reached by agency and requester. For the Acts to recognise extensions by agreement would require the creation of a new processing track to allow for requests where different time limits have been agreed. On balance however, we think that this could introduce additional complexity that is not justified by the potential benefits. An important objective is for the official information legislation to be user-friendly for the agencies who apply it. We therefore lean against overcomplicating the process by introducing alternative processing mechanisms except where clearly warranted. Our preference is for extensions by agreement to continue to be used as an informal practice outside the formal statutory requirements of the Acts.

10.31 We therefore do not recommend a new provision allowing for the extension of statutory timeframes by agreement with the requester.

R54 No provision should be introduced allowing for the extension of statutory timeframes by agreement with the requester; however, extensions by agreement should be encouraged on an informal basis as part of the dialogue between agency and requester.

Complexity

10.32 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 within the original timeframe.³⁰⁹ 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.³¹⁰

10.33 A large majority of submitters to the issues paper who responded to the question of whether complexity should be an additional ground for extending the time limit were in favour (42 to two).³¹¹ The Ombudsmen's submission queried whether there is a real need for a new provision, noting that expanding the extension grounds will not improve the perception of unreasonable delays in meeting official information requests, although the Ombudsmen are not opposed to complexity becoming a new ground for extending the time limit.

- 10.34 The extension provisions already deal with matters likely to raise complexity such as large requests and requests requiring consultation. There is also a refusal ground for requests requiring substantial collation and research. The potential gap currently is that there is no ability to extend for complexity in the assessment of withholding grounds and public interest factors in difficult cases. There are also requests where the information sought or potentially within the scope of the request is complex and difficult to analyse which can present a challenge in meeting the 20 working day timeframe.
- 10.35 We have some reservations about adding an additional complexity extension ground and foresee that this could unnecessarily increase the risk of delay in response times. Complexity is a subjective concept and there may be a risk that a new provision might be used indiscriminately or without proper justification if the request seems too hard. There may be greater reliance on a complexity provision by small agencies with limited resources or agencies with less experienced staff.
- 10.36 While we acknowledge that some requests throw up difficult questions and analysis, we think it is important for agencies to be incentivised to develop processes to anticipate and allow for those difficulties. Complex requests should be handled by officials with appropriate levels of seniority and expertise. This is also an area where additional guidance and case examples, which we recommend in this report, will be useful for agencies. We also expect that the recommended clarification and redrafting of withholding grounds will assist in dealing with complex requests.
- 10.37 Our preference is for priority to be given to clarifying the withholding grounds and providing greater guidance about them as a means of reducing the current levels of complexity experienced by agencies. The need for an additional extension ground could be reassessed in a future review of the legislation.

R55 Complexity should not be added as a further ground for extending the 20-working day time limit in section 15A of the OIA and section 14 of the LGOIMA.

Urgent requests

- 10.38 The official information legislation allows a requester to ask that a request be treated as urgent, if the requester gives reasons for seeking the information urgently.³¹² Agencies may take into account the costs of meeting urgent requests in relation to the setting of charges.³¹³ The Ombudsmen's Guidelines address other issues raised by urgent requests.³¹⁴ The Guidelines emphasise the desirability of communication between agency and requester to ensure that the spirit of the legislation is observed.

- 10.39 Agencies are under a duty to assist requesters to frame their request in accordance with section 12.³¹⁵ 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.³¹⁶ 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 when acknowledging receipt of a request.
- 10.40 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.
- 10.41 Most submitters preferred guidance about urgency rather than additional statutory provisions, although a few submitters (including the Ombudsmen) supported changes to the legislation to enhance clarity and reduce delay. The Ombudsmen proposed a new self-contained provision in the legislation dealing with urgency, which would confirm a requester's right to seek urgency provided that reasons were given and clarify the legal obligations on agencies in relation to urgent requests and the applicable charging provisions. The Ombudsmen suggested that agencies be required to let requesters who have sought urgency know within 10 working days whether the request can be handled on an urgent basis.
- 10.42 We agree that it would be helpful to clarify the obligations on agencies in dealing with urgent requests. It should be best practice for agencies to have procedures in place that triage official information requests on the basis of their relative urgency and importance. In addition, while an agency should not be obliged to afford urgency to every request made on an urgent basis, there should be an obligation to consider whether a request can be granted urgency and to do so if it would be reasonably practicable in the circumstances. This reflects the current position that the requester's need for urgency is one of several factors that must be taken into account by the agency handling the request.³¹⁷
- 10.43 Other factors that an agency may need to take into account might include:
- (a) the public importance of the request and the impact on the public of not meeting the request on an urgent basis;³¹⁸
 - (b) the size, scope and complexity of the request and whether it can be met on an urgent basis;
 - (c) the level of consultation required; and
 - (d) the workload and resources of the agency and the number of other requests being dealt with.

- 10.44 A response to a request that is processed on an urgent basis should be notified promptly and, where the decision is in favour of release, the information should be provided to the requester as soon as reasonably practicable in the circumstances of the request.

R56 A new provision in the OIA and LGOIMA should provide the following:

- (a) a requester may make an urgent request provided that reasons for urgency are given;
- (b) an agency must treat such a request as urgent if it would be reasonably practicable in the circumstances to do so; and
- (c) a response to a request treated as urgent should be notified promptly and, where the decision is in favour of release, the information should be provided to the requester as soon as reasonably practicable in the circumstances.

CONSULTATION

- 10.45 Consultation is a process that is largely invisible within the official information legislation³¹⁹ but it is an important aspect of the process of handling official information requests in a number of ways. It may be necessary or desirable for an agency to engage in consultation about the handling of a request:
- (a) with the requester, either to provide assistance to the requester or to refine the scope of a large, unclear or complex request;³²⁰
 - (b) to co-ordinate a response between various government agencies;
 - (c) to verify which agency a request should be transferred to;
 - (d) to co-ordinate a response with the relevant ministerial office or to inform the Minister prior to release of the information;³²¹
 - (e) to seek the views of third parties who may be affected by the release of information about them, for example, personal, commercial or culturally sensitive information.
- 10.46 The legislation does not generally mandate consultation in any particular case; it is up to the agency to assess its desirability. 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.³²²
- 10.47 Consultation must take place within the statutory time limit 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

- 10.48 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. An agency may also need to consult to ascertain whether the information requested is more closely connected with the functions of another agency, with a view to transferring the request.
- 10.49 The State Services Commission has issued guidelines about consultation with other departments and with Ministers.³²³ 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 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.
- 10.50 Administrative protocols also require departments to consult with each other before releasing material contributed by others.³²⁴ In her research, Nicola White found that most requesters were largely unaware of the interaction that might take place within the bureaucracy in the course of answering a request, and that, without an awareness of these protocols, a requester is unlikely to take account of these steps in forming an expectation of the response time.³²⁵
- 10.51 We recommend that the administrative protocols which departments (and other agencies) observe in the processing of information requests be elevated to the status of guidance. This would assist both transparency of consultation processes and consistency of agency practices. This would require the State Services Commission guidance in this area to be reviewed and revised as necessary. We see this as a task for the oversight office discussed in chapter 13.

R57 Guidance about inter-agency consultation processes should be reviewed and revised as necessary. This guidance should be an information resource for both agencies and requesters to promote understanding of the processing framework.

Consultation with affected third parties

- 10.52 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). 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 necessarily mandatory, although an agency may be subject to a contractual obligation to consult contractual partners before releasing certain information.

- 10.53 In addition, 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, as well as the lack of a suitable remedy where sensitive information has already been released.
- 10.54 In the absence of any contractual obligation or public duty, agencies may nevertheless choose as a discretionary matter to consult third parties prior to releasing information so that they can reach a proper decision on any particular withholding ground and on the balance of the public interest. 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.
- 10.55 But the main question is whether there should be a statutory duty on agencies to consult with third parties who might be affected by a release. This would mean that individuals and businesses could have a say in decisions to release official information relating to them, before any such information is released.
- 10.56 Some commercial organisations responding to our survey were concerned that sensitive commercial information they were obliged 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.
- 10.57 In the issues paper, we discussed two forms of consultation.³²⁶ One option is a consultation process where a third party would be given a period of time to make a submission supporting withholding the information requested on privacy or commercial grounds. The Australian Act contains this sort of consultation provision.³²⁷
- 10.58 A model along these lines was suggested to us in a submission and 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.

10.59 The other option we discussed in the issues paper is a more limited form of consultation where a third party would receive notification and be given a very short time to respond before the information is released. A form of this model is already used in New Zealand legislation such as the Public Transport Management Act 2008, where there is an obligation to notify the provider of information to the Transport Agency of its potential release under the OIA.³²⁸

22(6) If the Agency receives a request under the Official Information Act 1982 to release any [commercially sensitive] information described in subsection (5),–

- (a) The Agency must make all reasonable efforts to notify immediately the person who provided the information to the regional council that a request to release the information has been received by the Agency; and
- (b) The person must, within 10 working days after receiving the notice, advise the Agency whether that person believes that the information should be withheld under section 9(2)(b) of that Act and give reasons for that belief; and
- (c) The Agency may release the information after the expiry of the period specified in paragraph (b) if, having complied with its obligations under this subsection and having regard to the person's response (if any), the Agency cannot identify any reason that would permit it to refuse the request under that Act.

10.60 In the issues paper we expressed our preference for this option based on notification, over the fuller consultation option. This was on the basis that a fuller consultation process would be likely to create delays in the process and could increase the administrative burden on agencies.³²⁹ The majority of submitters (36) agreed that a mandatory requirement for full consultation with third parties should not be introduced into the legislation, with four submitters disagreeing.

10.61 On the notification option, submitters were fairly evenly divided between those who supported the proposal (18, including the Ombudsmen)³³⁰ and those who opposed it (20). Submissions expressing disagreement were concerned about the potential for delay, additional complication to the process, additional cost and administrative burden, and the difficulty of assessing “significant third party interests”. On the other hand, the Ombudsmen thought that this option seems a workable way of addressing legitimate third party interests while minimising the administrative burden and ensuring timely compliance.

10.62 We agree that it is good practice to consult with third parties where significant third party interests are raised. Consultation can be seen as supporting the protection of third party interests that are recognised by the withholding grounds, as it informs agencies about the various public and private interests involved to enable good decision-making about release or withholding. It should be encouraged. However, on balance, we do not support making full third party consultation mandatory.

- 10.63 We maintain our preference for a provision mandating a limited form of consultation (based on pre-release notification) where there are important third party interests at stake, although feedback from submitters has assisted us to refine the preferred option. We now recommend that pre-release notice to third parties³³¹ should be required in certain specific circumstances.
- 10.64 A relevant legislative model is that contained in the Northern Territories Information Act which requires consultation in relation to the release of certain information about third parties. Under section 30, information is considered to be about a third party if disclosure might:
- (b) be an interference with a person's privacy;
 - (c) disclose information about an Aboriginal sacred site³³² or Aboriginal tradition;³³³ or
 - (d) disclose information obtained by a public sector organisation from a business, commercial or financial undertaking that is:
 - (i) a trade secret; or
 - (ii) other information of a business, commercial or financial nature and the disclosure is likely to expose the undertaking unreasonably to disadvantage.
- 10.65 We consider that this model identifies the particular third party interests that should give rise to a notification obligation prior to release. Accordingly we recommend that where reasonably practicable agencies must notify a third party prior to release of requested third party information, where the withholding of the information would be justified on the grounds of:
- (a) privacy;
 - (b) confidentiality, disclosure of a trade secret or unreasonable prejudice to commercial or competitive position (in relation to information obtained from a third party);³³⁴ or
 - (c) in the case of LGOIMA, to avoid serious offence to tikanga Māori or to avoid the disclosure of the location of wāhi tapu;³³⁵
- but the agency considers the need to withhold to be outweighed by the public interest in disclosure.
- 10.66 This should be qualified by a rider that the requirement would only apply where prior notice is reasonably practicable.³³⁶ This would ensure that agencies are not unduly burdened by the requirement in situations where third parties are unknown or difficult to contact, or the requirement would otherwise be impractical to comply with.³³⁷

- 10.67 Notification should include details of the information proposed to be released. We are less certain about whether the third party should be notified of the identity of the requester. On the one hand, the identity of the requester may have a bearing on the strength of the relevant withholding ground i.e. where the requester is a commercial competitor. On the other hand, a requester's purpose is generally irrelevant to the decision-making process under the official information legislation and it could be argued that the identity of the requester should be immaterial.
- 10.68 On balance however we think that the third party should usually be notified of the requester's identity. We consider that where there is a need to withhold on each of the grounds we have identified (i.e. privacy grounds,³³⁸ commercial grounds or tikanga Māori), an affected third party would have a legitimate interest in being informed of the requester's identity. Where information is released, this would allow the affected third party to take any available steps to reduce or manage the impact of the release.
- 10.69 The recommended provision 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 or injunctive relief. While decision-making power remains with the agency, on receiving a prompt third party submission against release the agency would have a duty to take account of that submission before releasing the information.
- 10.70 Our recommendations for third party consultation are based to some extent on the existing notification model used in the Public Transport Management Act 2008 (PTMA) and other New Zealand legislation. While the PTMA model and our recommended model are both forms of limited consultation based on notification, the two models are not identical. The PTMA model is concerned with commercial third party information in particular, while our recommended model also includes other specific categories of third party information. Under the PTMA, notification is required on receipt of a request whereas our recommendation is for mandatory notification to occur once the agency has made a provisional decision to release, so that the notification obligation is confined to those situations where it is most critical, in order to minimise any additional administrative burden on agencies. We also recommend a shorter notice period than the PTMA's 10 working day notice period so as to reduce the potential for delay.
- 10.71 In the issues paper we asked how much notice should be given to a third party prior to release.³³⁹ 13 submitters supported five working days, six submitters supported 10 working days and one submitter supported 15 working days. We recommend that notice be at least five working days.
- 10.72 In chapter 11 we propose that failure to give prior notice under this requirement would be grounds for a third party complaint to the Ombudsmen.

- 10.73 As noted above, we consider that consultation should be encouraged as a matter of best practice. The intent is that the introduction of a notification requirement would be in addition to agency consultation with third parties and not replace it. We recommend that guidance about the nature and objectives of third party consultation be developed, taking account of relevant case law.³⁴⁰

R58 A new provision in the OIA and the LGOIMA should provide that where reasonably practicable, agencies must notify a third party prior to the release of requested third party information, where the withholding of the information would be justified on the grounds of:

- (a) privacy;
- (b) confidentiality, disclosure of a trade secret or unreasonable prejudice to commercial or competitive position (in relation to information obtained from a third party); or
- (c) in the case of LGOIMA, tikanga Māori;

but the agency considers the need to withhold to be outweighed by the public interest in disclosure.

R59 The period for pre-release notification to third parties should be a minimum of five working days.

R60 Following pre-release notification to a third party, the agency should have a duty to take into account any submission in favour of withholding made within the five working day time period, before finalising a decision to release the requested third party information.

R61 Subject to the new statutory pre-release notification requirement, consultation with affected third parties should continue to be encouraged as a matter of best practice. Guidance about third party consultation should be developed, covering both the recommended notification requirement, as well as the nature and objectives of third party consultation more generally.

TRANSFER PROVISIONS

- 10.74 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.³⁴¹ 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.³⁴²

Transferring information along with the request

- 10.75 The Ombudsmen submitted that consideration should be given to requiring agencies when transferring requests to transfer any relevant information to the transferee agency along with the request. The Ombudsmen report that one of the key concerns for requesters is that the transfer of a request can change or limit the scope of the information that is captured by their request. Steven Price also commented on this issue:³⁴³

It was clear in many instances, and seemed likely in many others, that the transferring agencies themselves possessed documents relevant to the request. Sometimes, these would be supplied and the balance of the request would be transferred. Occasionally, the agency would note that it was enclosing the documents it possessed in the letter of transfer. In other cases, however, it was not clear that these documents were even considered for release after a transfer.

- 10.76 We agree that the transfer of a request (where the information requested is more closely connected with the functions of another agency) should not negate the original agency's obligation to release relevant information. Forwarding information to the transferee agency is one means of ensuring that the original agency meets its obligations.
- 10.77 However we are not persuaded that this should be mandated in every case. An agency may not have time to complete a search and reach a decision on release or withholding to identify the information to be transferred within the 10 working day time limit for the transfer of a request. It may be more flexible and efficient for the transferee and transferor agencies to consult and co-ordinate on release. Partial transfers of requests (discussed below) would be another means of handling this issue. We also note that an agency is required to provide a requester with assistance to direct a request to the appropriate body.³⁴⁴

Partial transfers

- 10.78 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.³⁴⁵ However in the issues paper we wondered if uncertainty and lack of clarity about partial transfers may be increasing the amount of inter-agency consultation.³⁴⁶ 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.

- 10.79 Most submitters (30) agreed that there should be a provision in the legislation for partial transfers, with the Ombudsmen agreeing that it would be helpful if the legislation explicitly mandated them. Five submitters disagreed that any provision should be made for partial transfers, primarily because these submitters did not see any problem with partial transfers under the current provision.
- 10.80 We recommend 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. The severability of a request could be assessed by reference to any categories of information identified by a requester (for example where the request covers a number of topics or information types) or by reference to categories of information that fall within the scope of a request, as identified by the agency receiving the request.

Time limit

- 10.81 The 10 day time limit for transfers can be tight, especially where consultation between a number of agencies is required. One of the agencies we consulted advocated that time periods around transfers requires some flexibility, particularly for partial transfers, noting that time limits should not prevent appropriate decisions being reached. We do not recommend any change to the length of the 10 day time limit for transfers as the ability to extend the time limit (as clarified to allow a second extension where reasonable in the circumstances), should provide agencies with sufficient flexibility to allow for appropriate decisions to be taken.
- 10.82 One issue with the transfer provision the Ombudsmen raised with us is that the expression of the time limit for transfer (“promptly, and in any case not later than 10 working days after the day on which the request is received”) may have the implication that transfers outside the 10 working day time limit could be invalid. While the time limit is stated as a firm rule, we do not think it likely that the time limit could be interpreted in this way as this could result in an agency being precluded from transferring a request for information that it does not hold. We agree however that the redrafting of the legislation would be an opportunity to deal with this ambiguity.
- 10.83 We considered whether the time limit for transfer could be simplified so that a transfer is required “promptly,” however there is some value in a specified limit (10 working days) as a flag for agencies as to the acceptable outer limit of the time period.
- 10.84 A related problem is that transfer decisions are not expressly reviewable by the Ombudsmen under the OIA or LGOIMA; however in the following chapter we recommend that the Ombudsmen’s functions be extended to review complaints about transfers. We recommend framing the Ombudsmen’s review function in sufficiently broad terms to allow the Ombudsmen to hold agencies accountable for transfer decisions that impact on the scope of searchable information.

- 10.85 The Ombudsmen raised another issue in relation to an anomaly in the interaction between the extension provision³⁴⁷ and the transfer provision.³⁴⁸ The effect of the extension provision is to require notification of the extension of both the 20 working day limit for responding to requests, and the 10 working day time limit for transferring requests, within 20 working days. The Ombudsmen suggested that in the case of extension of the time limit for transfers, notification within a shorter timeframe such as 10 working days may be more appropriate. We agree, as the current timeframe is inconsistent with the requirement in the transfer provision that requests be transferred promptly. We recommend that this should be addressed in the redrafting of the legislation.

R62 Section 14 of the OIA and section 12 of the LGOIMA should be amended to explicitly allow for partial transfers of requests.

R63 The time limit for notification provided in section 15A(3) of the OIA and section 14(3) of the LGOIMA should be reduced to 10 working days, where a time limit has been extended to allow a request to be transferred.

RELEASE OF INFORMATION IN ELECTRONIC FORM

Electronic format versus hard copy

- 10.86 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.³⁴⁹ Generally the agency should provide the information in the way preferred by the person. A number of issues arise.
- 10.87 First some respondents to our survey and issues paper³⁵⁰ 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, although it may shift those costs to the recipient. Some agencies suggested that there should be a statutory presumption or default position that information be released in electronic form 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.”
- 10.88 It is clear that the section already permits release in electronic form. To do so is “providing the person with a copy of the document,”³⁵¹ and “document” is defined in section 2 of each Act as including:

Any information recorded or stored by means of any tape recorder, computer, or other device; and any material subsequently derived from information so recorded or stored.

Nevertheless, the Ombudsmen have suggested that it would be clearer if electronic release was expressly mentioned in the section. We have no difficulty with an update of the section to provide for electronic release. For example, providing the person with a copy of the document³⁵² could be expanded to provide that this may be either by providing a hard copy or an electronic version of the document.

- 10.89 We are sure that many if not most people would be satisfied with an electronic version of the official information they are seeking to access. But we do not recommend a mandatory requirement that the requester must be content with an electronic version. The clear philosophy of the section is that where possible the requester should be able to have the information in the form he or she prefers.
- 10.90 We acknowledge that there needs to be a balance between the requester's right to receive the requested information in a form that the requester can access, with the public interest in providing official information to requesters in the most efficient manner and at the least cost to agencies. This imperative has strengthened at a time of budget restrictions and cut-backs.
- 10.91 The legislation currently strikes the balance by allowing an agency to disregard the requester's preferred form of access to the information if it would "impair efficient administration".³⁵³ It might also be legitimate in some circumstances for the agency to charge for the provision of hard copy information if its production incurs significant cost. This is an issue that should be addressed in the review of charging policy that we recommend below.
- 10.92 The United Kingdom Freedom of Information Act 2000 requires an agency to give effect to a requester's preference "so far as reasonably practicable."³⁵⁴ In determining whether a particular means is reasonably practicable, an agency may have regard to all the circumstances, including cost.³⁵⁵ Where an agency determines that it is not reasonably practicable to comply with the requester's preference, the agency must notify the requester of its reasons.³⁵⁶
- 10.93 It is worth asking whether this approach would provide more flexibility for agencies. It sets a lower threshold at which agencies must give effect to requester preference than the New Zealand threshold of impairing efficient administration; and the express reference to cost may be helpful to agencies in order to recover any additional costs of meeting a requester's preference. While the Ombudsmen agree that this may be a suitable approach to the issue of electronic versus hard copy, they have concerns that the UK threshold may be too low if a requester prefers one of the other forms that the legislation provides for, such as providing a summary or an oral briefing.
- 10.94 One of the strong messages we have heard from agencies in this review is the burden of balancing their obligations to meet official information requests with the rest of their workload and with shrinking resources. In our view, the current threshold that requires impairment to efficient administration does not allow agencies sufficient opportunity to reduce their administrative burden.

- 10.95 Although they may be able to recover some costs through charging, the charging regime is significantly out of date and incomplete, as discussed later in this chapter. An adjustment to the balance between requester and agency preference as to the form of release could assist agencies to perform their official information role more efficiently; however it remains important to bear in mind the overall objectives and purpose of the legislation to make official information more freely available.
- 10.96 On balance we recommend a more flexible approach by requiring an agency to observe requester preference so long as this is reasonable in the circumstances. The intent is that this approach would not simply look at what is reasonably practicable for the agency, but would require an assessment, where the agency wishes to depart from the stated requester preference, of what is reasonable, taking into account the circumstances of both the agency and the requester. Where a requester objects to a departure from the stated preference, the requester should have the option of making a complaint to the Ombudsmen.
- 10.97 The second issue is, in a sense, the converse of the first. A requester may prefer to receive an electronic copy, but the agency may want to supply only a hard copy, possibly to control reuse of the material or to ensure recognition of its authorship. Another option would be to release the document in a format that is locked from editing. This may be problematic where a requester seeks access to the metadata associated with certain information.³⁵⁷ For example, in the 2009 scandal over the expenses of UK Members of Parliament, official releases of the details were in PDF format, making it difficult to analyse the information.³⁵⁸
- 10.98 We discuss the issue of metadata below. However we note here that where the scope of a request includes metadata, the information should be provided in a way that allows access to the metadata unless relevant withholding grounds apply to protect it. We discuss further below some of the issues associated with re-use and options available to agencies such as the use of creative commons licences and the imposition of conditions.

R64 Section 16(2) of the OIA and section 15(2) of the LGOIMA should continue to require the release of information in the form preferred by the requester, subject however to a new condition that the requester's preference is reasonable in the circumstances, in place of the condition in section 16(2)(a) of the OIA and section 15(2)(a) of the LGOIMA that the requester's preference not "impair efficient administration".

R65 Section 16 of the OIA and section 15 of the LGOIMA should be updated to include electronic release of information.

Metadata and backup systems

- 10.99 In relation to information held in electronic form, there are issues about whether (a) agencies should be required to include associated information such as metadata in responses to information requests, and (b) whether the obligation to search for requested information extends to information in backup systems.
- 10.100 Metadata³⁵⁹ falls under the statutory definition of “document” as “any label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means.”³⁶⁰ Requests for “all documents” on a certain topic would therefore include metadata within their scope. Some of the newer Australian freedom of information statutes include presumptions against having to provide metadata, or search for information that is stored in backup systems.
- 10.101 The Queensland Act 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.”³⁶¹ 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.³⁶²
- 10.102 The Queensland Act also 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).³⁶³ The New South Wales³⁶⁴ and Tasmanian³⁶⁵ Acts also deal with searching for documents in backup systems.
- 10.103 In addition, 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”.³⁶⁶ The intention behind such provisions is to deal with the issue that information deleted from an agency’s main records systems may survive on the back-up tapes of servers for disaster recovery purposes.³⁶⁷
- 10.104 At the same time there are obligations in overseas jurisdictions for agencies to adopt systems which ensure data is easily accessible.³⁶⁸ In New Zealand, the Public Records Act 2005 requires every public office to maintain all public records in its control in an accessible form until disposal is authorised by the Public Records Act or another Act.³⁶⁹ Similarly, every local authority must maintain all protected records in its control, in an accessible form, until disposal is authorised.³⁷⁰

- 10.105 In the issues paper we asked whether the Acts should make specific provision to limit the availability of metadata, information in backup systems and information not accessible without specialist expertise.³⁷¹ Comments in favour of these provisions noted issues of cost, resourcing and the administrative reasonableness of searches. Comments against provisions of this kind suggested that there is no reason to exclude this type of information which should be available for the public to request.
- 10.106 The Ombudsmen emphasised that what is important is whether this type of information falls within the scope of the request, and that there may be grounds for refusal of the request under section 18(f) (substantial collation and research), or for the costs of meeting the request to be passed on to the requester.
- 10.107 We agree that the scope of searchable material should depend on the scope of the request and what is reasonable in the circumstances. We think that this is a more flexible approach than applying or rebutting a statutory presumption. We agree that charges and the section 18 grounds are appropriate mechanisms to control searches that impose an unreasonable burden on agencies.
- 10.108 Agencies may also need guidance on minimising the perceived administrative burden of requests that include metadata and, to improve efficiency, may need to develop or supplement information management processes and policies that take account of issues such as releasing or withholding metadata.³⁷²
- 10.109 We are therefore not persuaded that there is a need to create a statutory presumption about metadata. While a presumption may have the benefit of providing certainty to agencies, a presumption that a request does not include metadata unless expressly stated may effectively result in many more requesters expressly including metadata in their requests so as not to unduly limit their scope.
- 10.110 Our preference is for metadata to continue to be considered in relation to the scope of the request and the “due particularity” requirement. This is consistent with the case by case approach that underpins the legislation. Requests for “all documents” may need discussion with the requester as to whether the information sought includes metadata and the form in which the requester seeks release of the information.
- 10.111 We also think that a presumption that a request does not include metadata does not send the right message to agencies who are obliged under the Public Records Act 2005 to:³⁷³

[C]reate full and accurate records of their activities in accordance with normal, prudent business practice, and ensure that those records are captured into systems that will maintain them in an accessible form for so long as they are required. These systems include recordkeeping metadata.

We discuss the relationship between the official information legislation and the Public Records Act in chapter 15.

- 10.112 A statutory presumption could also be seen as inconsistent with the Cabinet direction to agencies to release useful high value public data for purposes of reuse.³⁷⁴ The growing emphasis on making data available for reuse as a public resource means that metadata may be an integral part of particular information releases.
- 10.113 We are not persuaded that a statutory presumption against release is required in relation to information in backup systems or information that is not recoverable without specialist expertise. The Public Records Act requirements should provide some control against information being stored in inaccessible formats, at least to the extent that the information is contained in a “public record”. If public records are held in inaccessible forms, there is a strong argument that agencies should bear the cost of retrieving those records when they are requested.
- 10.114 But we agree that where information is culled by an agency in accordance with an appropriate information management strategy, that agency should not be put to the additional effort and cost of recalling or reconstituting that information should it be requested.³⁷⁵
- 10.115 In our view, the grounds for refusal in section 18 of the OIA and section 17 of the LGOIMA are the appropriate mechanism for dealing with this issue. However we think an amendment would be desirable to provide further clarity as to an agencies search obligations. We think that either:
- (a) section 18(e) should be amended so that an agency may refuse a request where the information requested does not exist or cannot be found “after taking reasonable steps to locate the information”; or
 - (b) section 18(f) should be amended to extend the concept of “substantial collation and research” to include the concept of “extensive search” so that an agency may refuse a request where a search for the information would involve an unreasonable diversion of resources from the agency’s functions.
- 10.116 On balance we prefer an amendment to section 18(e). The amended provision could be supported by guidance to indicate what may be reasonable steps to search for the requested information in any particular circumstances, and confirm that searches of backup systems are not required where the information has been disposed of in accordance with an authorised document disposal policy. Searches of backup systems may however be required where information has been disposed of without adequate authorisation or justification.
- 10.117 General guidance that addresses the interaction of the information management requirements of the Public Records Act and the official information legislation would also be useful.³⁷⁶ We see this guidance as a task for the oversight office discussed in chapter 13.

R66 Requests for metadata and information in backup systems should continue to be dealt with on a case by case basis, and therefore no legislative change is required.

R67 Section 18(e) of the OIA and section 17(e) of the LGOIMA should be amended to state that an agency may refuse a request where the information requested does not exist or cannot be found “after taking reasonable steps to locate the information”.

R68 Guidance should be developed that addresses the interaction of the information management requirements of the Public Records Act 2005 and the official information legislation, including how agencies should deal with requests for metadata and information that is difficult or costly to access.

Re-use

- 10.118 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, breach another person’s privacy or breach a court suppression order; it might be in breach of copyright or other intellectual property rights. In such a case section 48 of the OIA and section 41 of LGOIMA (which protect an agency from liability for good faith releases) 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”.
- 10.119 In this section we discuss three different sets of issues that arise in relation to the re-use of released information: intellectual property; legal restrictions; and agency-imposed conditions on the use or re-use of released information.

Intellectual property issues and NZGOAL

- 10.120 The New Zealand Government Open Access and Licensing framework (NZGOAL) promotes open licensing of copyright material held by state agencies to facilitate re-use.³⁷⁷ This initiative deals with the intellectual property issues like copyright in information that is released to requesters or more generally to the public that might limit the use or re-use of that material.³⁷⁸

In essence, NZGOAL:

- (a) sets out a series of open licensing and open access principles, for copyright works and non-copyright material respectively;
- (b) advocates the use of:
 - (i) Creative Commons licences for those State Services agencies' copyright works which are appropriate for release and re-use; and
 - (ii) clear "no known rights" statements for non-copyright material released for re-use; and
- (c) sets out a review and release process to guide agencies through the review of works and other material they consider ought to be released for re-use.

10.121 There is guidance available for agencies on the NZGOAL website that is administered by Creative Commons.³⁷⁹ We think that it would be useful for agencies for guidance to be developed that discusses the role of NZGOAL in relation to releases of official information under the OIA and LGOIMA. A submitter to our issues paper thought that this is an area where further work should be carried out to address the interaction between freedom of information and government release reuse policy so that the issue can be considered from a whole-of government information policy perspective. We agree. One option would be for the oversight body to co-ordinate with the policy work programme on re-use of government information.³⁸⁰

10.122 One of the issues that could be considered as part of this work is whether requesters should be able to request any particular creative commons licence for information that is released in response to a request. For example, in the United Kingdom, the Protection of Freedoms Bill specifies that requests for datasets to be released in electronic form must be met by ensuring that the data is released in a form that is capable of re-use, and that requesters may seek licensing for re-use.³⁸¹

10.123 The Re-use of Public Sector Information Regulations 2005 (UK) allows for applications to be made requesting permission to re-use a document held by a public sector body.³⁸² The request is to specify a document and the purpose for which it is to be re-used.³⁸³ Requests can be made in respect of documents that have been identified by the public sector body as being available for re-use, documents that have been provided to the applicant, or other accessible documents.³⁸⁴ There are certain exceptions such as for documents held by public service broadcasters, educational and research institutions and cultural establishments including museums, libraries and archives.³⁸⁵ The regulations allow for the imposition of both conditions³⁸⁶ and charges.³⁸⁷

R69 Further work should be undertaken to address the interaction between the official information legislation and the New Zealand Government Open Access Licensing framework, with a view to producing guidance for agencies.

Other legal restrictions

- 10.124 The NZGOAL initiative will not deal with other legal prohibitions such as defamation, privacy, contempt of court, and so on. Recipients of information under the official information legislation who republish the information will remain liable under the law for any breach. We have wondered whether, when information is released by agencies, it should not be accompanied by a warning to this effect as a matter of course.
- 10.125 Our preference however is for readily available guidance to be developed for requesters that would cover common legal prohibitions and restrictions, so that there is greater awareness of the legal position. Agencies could then bring this to the attention of requesters in appropriate cases or include a link to the guidance in their response. We see the task of producing this guidance as one for the oversight office we discuss in chapter 13.

R70 Guidance for requesters should be developed to explain common legal restrictions that may apply to the use and re-use of released information, including defamation, copyright, privacy and contempt of court.

Conditions imposed by agency

- 10.126 Another form of restriction on re-use is where an agency releases requested information subject to express conditions on the use and re-use of that information. For example, there may be specific circumstances in which the public interest favours the release of certain information for a certain purpose (for example, research purposes) or to a certain person (for example a trusted researcher who is known to the agency). It is implicit in the Act that the agency releasing information may place conditions on its use and re-use. While the OIA is not express on this point, it is recognised obliquely by enabling an appeal to the Ombudsmen against the imposition of any such conditions.³⁸⁸
- 10.127 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 not be 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. Another example is the use of conditions to enable an urgent request to be met prior to the scheduled release of the information.³⁸⁹ From time to time the Ombudsmen have commented about the use of conditions.³⁹⁰

- 10.128 In the issues paper we asked whether the official information legislation needs to make any further provision for agencies to place conditions on the re-use of information, or whether the current provisions are sufficient.³⁹¹ Our initial view was that it might be best to leave the matter to operate by agreement as it currently does. More than half the submitters (19) were against any further provisions while 14 submitters supported provisions about conditions, including the Ombudsmen, who favoured an express provision encapsulating current practice, and signalling to agencies that this is a potential tool for managing information releases.
- 10.129 Comments in support of new provisions included views that the current provisions are not sufficiently clear; that greater clarity would be helpful; and that agencies may be more willing to release if the legislation is clearer that conditions can be imposed. Comments against new provisions included concerns that they may add cost and extend timeframes.
- 10.130 A range of other comments on this issue suggested that this is an area that is not well understood and that further guidance and education may be needed. One submitter noted that it is unclear in what circumstances an agency can require a requester to keep information confidential. Another view expressed was that conditions on re-use should be kept to a minimum and should not clog freedom of information by restricting re-use, although it was acknowledged that the ability to impose conditions may be useful where information may be shared for some purposes but not others. Some submitters noted the difficulty of enforcing conditions where they were breached.

Functions of a new provision

- 10.131 We see the use of conditions as having the following dual functions:
- (a) The first function is “increased availability”, by potentially allowing information to be released on a conditional basis that would not otherwise be released, due to a good reason to withhold, or an administrative reason for refusal.
 - (b) The second function is “re-use control”, by allowing information that must be released (where the reason to withhold is insufficiently strong to prevail) to be released in such a way that the interests underlying the relevant withholding grounds are better protected in relation to re-use of the information. In other words, it could provide a middle path between unconditional release and withholding. This issue is becoming acute in an era when the internet and social media are pervasive in many people’s lives, making it much easier for released information to be shared publicly in ways that can have a significant impact on the subjects of that information.

Issues to consider

- 10.132 In our assessment, the desirability of codifying the use of conditions on release is a finely balanced one. There are potential advantages; however, formulating a new provision is not without its difficulties. Firstly, while a new provision has the potential to increase the availability of information, there is a counterbalancing concern that it has the potential to fetter requester entitlements to information.
- 10.133 Secondly, there may be a conceptual difficulty in introducing a conditions provision to a legislative framework that is otherwise not concerned with requester purpose.³⁹²
- 10.134 Thirdly, the issue of enforcement of conditions is a difficult one. Generally, we do not think that the legislation should include complex enforcement mechanisms; rather we believe that agencies will need to weigh up the risk that conditions may not be observed when reaching a release decision. The negative impact of a breach of conditions on on-going relationships (and on-going discretionary access) is likely to provide an incentive for compliance.³⁹³
- 10.135 The release of third party information raises particular considerations however. It may not be desirable for such information to be released subject to conditions that are not enforceable. That could undermine the careful legislative balance that has been constructed between the protection of a particular interest like privacy, on the one hand, and the presumption of availability, on the other hand.
- 10.136 Finally, it may be difficult to create a conditions framework that is not overly complicated. Any new provision must be user-friendly for the agencies that administer and work with the legislation.

Conclusion

- 10.137 On balance, we conclude that further policy work and consultation with agencies would be needed to design an optimal approach that addresses the issues outlined above and integrates the use of conditions into the established legislative framework. A first step would be for guidance to be developed in greater depth as to current good practice, including examples for agencies. This exercise may assist in working through some of the issues involved in developing a possible legislative provision.
- 10.138 In the meantime, available controls in the general law will continue to provide some check on the risk of misuse of released information, such as the law of privacy and confidentiality, and defamation. The Law Commission is also giving consideration to the adequacy of legal remedies for free speech abuses such as cyber-bullying, harassment, harm to reputation and invasions of privacy in its new media project.³⁹⁴

CHARGING

10.139 Charging policy and practice is an area where we conclude that a fresh rethink of policy settings would be highly desirable, in light of a range of developments since the official information legislation was last reviewed.

10.140 The mix of public and private interests involved in the provision of official information makes charging policy a complex policy equation. A review in the United Kingdom described the benefits of freedom of information as having three elements: the private benefit to an individual of the information they receive; the public benefit of that information being made available; and the aggregate benefits that derive from a more open and transparent decision-making process.³⁹⁵ As the Law Commission identified in 1997, while there are inherent costs in disseminating public information, two of the benefits are improved quality of policy and law making by means of increased participation and the meeting of accountability expectations.³⁹⁶

10.141 Research has suggested further study is needed into how much freedom of information legislation is used by powerful and organised interests or by “private interest” as opposed to “public interest” groups, because the size of these categories could have significant implications for policy on fees and charges.³⁹⁷

The rhetoric of FOI is predicated on the man in the street making requests of wider public interest to his fellow citizens. If in reality FOI is used by a lot of organisations making private interest requests, it is harder to justify a fees regime under which almost all FOI requests are made free of charge. Some FOI requesters are certainly well resourced ... But we do not know whether they are a small minority, or whether many requesters are well resourced. This gap in our knowledge hampers any sensible debate about revising the current fees regime.

10.142 Current practice is highly variable and there is uncertainty about when it is appropriate to apply charges, given the overarching purpose of the legislation to make official information more available to citizens. It can be difficult to apply charges in a way that does not hinder this aim.

10.143 The role of charging in the official information process has never been a full cost-recovery exercise.³⁹⁸ Where charges are applied they represent a partial recovery of some aspects of agency time and other costs incurred in responding to requests. The objective of the legislation to increase the availability of official information, the broad agency discretion to waive or reduce charges, and the limits on which activities may attract a charge means that, rather than being a primarily a cost recovery mechanism, charging largely operates as a defence mechanism for agencies in relation to outlier requests that consume a great deal of agency time and resource.

10.144 In a recent review, the Australian Information Commissioner found that while full cost-recovery would be incompatible with the objects of the Freedom of Information Act, it is appropriate that requesters can be required in some instances to contribute to the substantial cost to government of meeting individual requests, and that charges play a role in balancing demand, by focussing attention on the scope of requests and regulating those that are complex or voluminous and burdensome to process.³⁹⁹

10.145 While there is a lack of New Zealand statistics as to the overall cost of the official information regime, there is substantial anecdotal evidence from agencies that they are required to devote significant resource to this activity.⁴⁰⁰ Attempts have been made in other jurisdictions to capture statistics as to cost, which also provide indicative evidence in the absence of New Zealand statistics.⁴⁰¹

10.146 An investigation into the cost of freedom of information by the Constitution Unit of University College London compiled statistics from a number of countries:⁴⁰²

Despite the differences in methodologies, a common finding in each report was the financial impact of administering a small number of disproportionately expensive requests. For examples in the U.K., although only 5% of requests cost more than £1,000 of officials' time, they tended to take 7 times longer to process than average requests and accounted for 45% of total costs.

10.147 As resourcing pressures mount, there are questions about whether charging should be used more consistently as a lever to control more extreme requester behaviour, and whether the costs of a wider range of official information related tasks should be chargeable.

10.148 Assessing whether a stronger charging mechanism is needed requires a survey of the other "defence" mechanisms available to agencies, such as the "substantial collation and research" refusal ground. In chapter 9 we recommend defining "substantial" to mean that the work involved would substantially and unreasonably divert resources from the agency's other operations.⁴⁰³ We also recommend stronger provisions to assist agencies to deal with "vexatious" requests that impose a significant burden.⁴⁰⁴

10.149 Another consideration is the potential benefit and opportunities offered by the current approach. Setting limits on what agencies can charge for may provide an opportunity to influence agency behaviour, by incentivising improvements in efficiency. For example, agencies may be incentivised to invest in training and technology and management systems to control their workload. This approach may also incentivise proactive release of official information, possibly at lower cost.

10.150 The trend towards proactive publication and release of official information by agencies (discussed in chapter 12) raises issues about the role of charging in that context, and the fairness of charging a requester for providing official information which is subsequently or simultaneously released to the wider public for no charge.

- 10.151 Broader government information policy has created certain presumptions about charging: the New Zealand Data and Information Management Principles (NZDIMP) discourage it and create an expectation that the use and re-use of government held data and information will be free. If a charge is applied, it should be transparent, consistent, reasonable, and the same cost to all requesters. NZGOAL also discourages charging for use and re-use, while listing matters that should be taken into account before applying a charge.⁴⁰⁵
- 10.152 There is a need for the interplay between these more recent principles and the charging guidelines to be clarified and rationalised. This exercise is broader than reviewing charging policy under the official information legislation alone; it must include these related areas of information policy, so that a cohesive, consistent and principled charging framework is created and applied.
- 10.153 This exercise also needs to include appropriate economic and socio-political analysis. A New South Wales review found it can be difficult to find a balance between economic and socio-political objectives in this area:⁴⁰⁶
- Low charges would result in more extensive use of FOI [freedom of information] by the community, but the cost to the general taxpayer would be high.
- Higher charges would mean that FOI applicants would pay more of the costs associated with FOI, but would also have the effect of depressing the use of FOI.
- 10.154 As this task is broader than we can undertake as part of the specific review of the official information legislation, we make no firm recommendations about the design of a new charging framework. Instead we recommend that further work be done to develop a suitable framework. Ideally this work would be carried out by the oversight office we discuss in chapter 13. We outline here the responses we received to questions we asked in the issues paper about charging and our research findings in this area.

Current framework and issues

- 10.155 The OIA and LGOIMA simply provide that agencies may charge requesters for supplying official information.⁴⁰⁷ 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.⁴⁰⁸ Charges are reviewable by the Ombudsmen.⁴⁰⁹ The OIA authorises the making of regulations to prescribe reasonable charges,⁴¹⁰ but no regulations have ever been made. Instead the Ministry of Justice has produced charging guidelines.⁴¹¹ There is a widespread view that these guidelines are less useful than they should be in the current environment and in any case they do not extend to local authorities.

10.156 When the LGOIMA was enacted, it anticipated the promulgation of regulations to set prescribed charges.⁴¹² However, as no regulations have ever been made, the fall-back position is that charges have to 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.⁴¹³ LGOIMA agencies report to us that they tend to use the Ministry of Justice guidelines in the absence of any other guidance.

10.157 Nicola White's research identified widespread perceptions among requesters that:⁴¹⁴

- (a) charging powers are used in an ad hoc fashion, with at times little apparent logic to decisions over who is charged, when or why;
- (b) 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;
- (c) 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.

10.158 She also found that agencies:⁴¹⁵

- (a) are sometimes uncertain of their ground in regard to charging;⁴¹⁶
- (b) will sometimes try to recognise the public interest by not charging non-governmental organisations or other requesters with an element of public interest to their work.

10.159 From our consultation and research we have also noted a lack of consistency in charging practices. Uncertainty about charging was confirmed in submissions to the issues paper. One submitter felt that charging is one of the most troublesome areas of the legislation; another noted that the arbitrary nature of current charging policy means that requesters are not clear whether they have to pay.

10.160 Many OIA 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 regular basis. We heard that 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.

10.161 Even where agencies do not generally impose charges, they find the discretion to do so a useful tool to help control large and repeat requests, in addition to the other tools at their disposal in such cases. It is reported that the largest number of unmanageable requests come from political party research units which are largely exempt from the imposition of charges.⁴¹⁷

- 10.162 Responses to our initial survey indicated 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.
- 10.163 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 the receipt of it.
- 10.164 We are mindful of the reportedly high cost to agencies of processing official information requests. While responding to official information requests 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.⁴¹⁸ 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 discuss the sizeable burden that the legislation places on agencies in administrative and resourcing terms in chapter 9.

Reform of charging framework

Some issues

- 10.165 It is clear that the current framework is in need of an overhaul and that agencies are in need of guidance to readily identify the types of request where charging should be used and how the charging framework should be applied. The guiding principle of the framework is one of reasonableness but this can be difficult for agencies to determine in different circumstances. The discretion to waive or reduce charges in the public interest is a broad one that can pose consistency issues for agencies who either tend not to charge by default, or conversely may tend to charge as a matter of course.⁴¹⁹
- 10.166 The Danks Committee recognised that any system of charging will involve some arbitrariness and will require levels to be monitored, guidelines to be issued and practice to be modified in light of experience and in pursuit of consistency.⁴²⁰ It was envisaged that this would be a role for the information unit of the State Services Commission.⁴²¹
- 10.167 One question is what form a revised 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.⁴²² 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 that would be subject to certain safeguards,⁴²³ and would create a uniform system of rules applicable to all.

- 10.168 A related 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 16.
- 10.169 Consideration will need to be given to the relationship between the recommended duty on agencies to proactively release information, discussed in chapter 12, and the power to charge requesters. If agencies fail to proactively release information as part of any required release strategy, which means that citizens must request it, this may reduce the likelihood that charging for providing such information could be considered to be “reasonable.”
- 10.170 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. Time spent searching for relevant information is included, 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.
- 10.171 The impact of our recommendations in this report should also be assessed: the clarification of difficult withholding grounds and additional guidance and examples for agencies may assist to reduce or streamline the time agencies spend on decision-making, which in turn may reduce the burden on agency resources.

Some options

- 10.172 An analysis of the approaches to charging and fees in other jurisdictions shows that there is a range of possible models to consider in redesigning a charging framework.⁴²⁴

Flat fee model

- 10.173 The flat fee model 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 (set out in regulations based on the recommendations of the Information Commissioner).⁴²⁵ Under this model a specified charge would apply 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.

10.174 However, this model was not adopted in Queensland's new Right to Information legislation, which instead provides for time-based charging; an access charge to recover the actual costs of providing access to the information requested in any particular form; and an application fee.⁴²⁶

Application fee

10.175 The application fee model imposes a fee at the time of making a request. All the Australian states impose an application fee⁴²⁷ (as well as other potential charges) except the Australian Capital Territory, but application fees have now been removed at Commonwealth level.⁴²⁸ In Tasmania, a \$35.00 application fee is the only charge applied. Such a model may reduce frivolous or ill thought-through requests but this may not be suitable in the New Zealand context, where there is no line drawn between formal or informal requests. It would be inappropriate to suggest that a requester should have to pay for a request that may only take an official a very short time to respond to.

Categories approach

10.176 A further option would be to develop a model based on categories. For example, under a three-categories model:

- (a) category one (requests that take a relatively short time to respond to) might attract no charge;
- (b) 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;
- (c) 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.

10.177 The model could also include various exceptions based on categories of requester (on public interest grounds). For example, the charging categories might not apply to researcher access. A variation would be to set fees based on a larger number of 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.

10.178 The Australian Information Commissioner has recommended that no charge apply to the first five hours of processing time (which includes search, retrieval, decision-making, redaction and electronic processing). The charge for processing requests that take five to ten hours should be \$50.00 per hour, and the cost for each hour after the first 10 hours should be \$30.00 per hour, up to a ceiling of 40 hours. Charges would be indexed to the Consumer Price Index and adjusted every two years to match the change in the CPI over that period, rounded to the nearest multiple of \$5.00.⁴²⁹

Cost limits

- 10.179 The model used in the United Kingdom is to apply a cost limit of £600.00 for central government departments and £450.00 for other public authorities.⁴³⁰ If the public authority estimates that complying with a request would exceed the cost limit (estimated at a rate of £25.00 per staff hour, but only for some FOI activities), the agency is released from having to meet the request. There have been calls for the hourly rate to be increased and for a wider range of FOI activities to be included for purposes of the cost limit, such as reading, consideration and consultation time. These changes have not been accepted to date, although the Freedom of Information Act 2000 is currently under review.⁴³¹
- 10.180 In Australia, the Information Commissioner has recommended a ceiling on processing time so that an agency would not be required to fulfil a request estimated to take more than 40 hours to process.⁴³² Concerns have been expressed that this may limit investigations by the media, community organisations and politicians into complex policy and programmes.⁴³³

Public interest fee waivers or reductions

- 10.181 A common feature of charging regimes is for charges to be waived or reduced where it is in the public interest to do so. The provision of any official information can at one level be considered to be in the public interest, as it furthers the stated goal of making official information more freely available. What is not altogether clear is whether the public interest element in this context simply confers discretion on agencies as to the circumstances in which charging will apply, or whether a “special” public interest must be present before a charge may be waived or reduced. While agency discretion provides flexibility, it may be inconsistent, especially without further guidance.
- 10.182 The Ministry of Justice charging guidelines currently provide for charges to be modified or waived at the discretion of the agency receiving a request.⁴³⁴ The guidelines suggest that it would be appropriate to consider exercising this discretion where:
- (a) the application of charges might cause hardship to the requester; or
 - (b) the remission or reduction of the charge might facilitate good relations with the public or otherwise assist the agency carry out its work; or
 - (c) the remission or reduction of the charge would be in the public interest, i.e. because it is likely to contribute significantly to public understanding of, or effective participation in, the operations or activities of the government, and the disclosure of the information is not primarily in the commercial interest of the requester.⁴³⁵
- 10.183 In Australia, the Freedom of Information Act contains a “lowest reasonable cost” objective which influences charging policy.⁴³⁶ Agencies must take into account whether charges would cause financial hardship to the requester, and whether release of the information is in the public interest.⁴³⁷

10.184 In New South Wales, agencies have the discretion to waive, reduce or refund application fees or processing charges in any case that the agency thinks is appropriate.⁴³⁸ Section 3 of the NSW Act records Parliament's intention that discretions conferred by the Act are to be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information. Requesters can also seek a 50 per cent reduction in processing fees on the basis that the requested information is of special benefit to the public generally.⁴³⁹ A guidance checklist prompts agencies to ask the following questions:⁴⁴⁰

- (a) Does the information relate to an issue of public debate?
- (b) Does the information relate to an issue of public significance (for example, the environment, health, safety, civil liberties, social welfare, public funds, etc)?
- (c) Does it interest or benefit the public in some other way? (for example by assisting public understanding about government functions)?
- (d) Would release of the information likely result in further analysis or research?
- (e) Would the information add to the public's knowledge of the issues of public interest?

10.185 New South Wales agencies are required to reduce processing charges by 50 per cent if the requester provides evidence that they are a pensioner, full-time student or non-profit organisation.⁴⁴¹ A requester can also apply for a 50 per cent reduction of the processing charge on the basis of financial hardship.⁴⁴²

Type of requester

10.186 Charging regimes sometimes make special provision for certain types of requester such as the media, Members of Parliament, non-government organisations, and academics.⁴⁴³ These types of requesters are seen as having strong public interest grounds for requesting government information and consequently charges may be reduced or waived. On the other hand, these users often make demanding information requests that create a large workload for agencies.

10.187 Some regimes distinguish between commercial and non-commercial requests. There is sometimes debate about the role of the media and whether media requests are always clearly in the public interest, given the commercial imperatives under which the media operate.

10.188 In the issues paper we asked for views about the application of the charging regime to requests from Members of Parliament.⁴⁴⁴ 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.⁴⁴⁵ In practice, this guideline has developed into an expectation that agencies will not charge for requests made by political research units.

- 10.189 Nicola White's interviews with Ministers and political advisers mentioned the unwritten trade-off that used to exist where requests from opposition research units were handled without charge, but all went through Ministers' offices as a means of managing the politics without embroiling the bureaucracy. That system however no longer applies, as Ombudsmen do not support a convention of transferring opposition or media requests on certain issues to a Minister's office.⁴⁴⁶
- 10.190 In its 1997 review, the Law Commission supported the practice of not charging MPs or staff of parliamentary research units and considered it important that it remain unchanged.⁴⁴⁷ We maintain the 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, there is no reason why unreasonable political requests should be completely exempt. Voluminous and unrefined requests from parliamentary research units can cause a great deal of expenditure of resources. The charging mechanism should be available to agencies as a defence mechanism in appropriate cases, regardless of the source of the request.
- 10.191 The public interest waiver should provide the flexibility for appropriate charging of MPs and incentivise these requesters to ensure that requests have a sufficient public interest basis in order to qualify for a waiver of charges. For requests that do not fulfil the public interest criteria, there is no reason, with the move to bulk funding of parliamentary support, that political parties should not take costs into account when making OIA requests to public agencies.

Views of submitters

- 10.192 A number of suggestions were received from agencies in response to our survey. These included:
- (a) clearer provisions in the legislation;
 - (b) standardised charging around staff time and resources;
 - (c) the use of upfront deposits where a request is chargeable;⁴⁴⁸
 - (d) mandatory charging for "fishing" requests;
 - (e) regulations to update the guidelines;
 - (f) software for assessing costs.

A number of agencies suggested that the discretion to charge requesters should be broadened to include aspects of the decision-making process, such as consultation and deliberation.

- 10.193 In submissions to the issues paper, 28 submitters (including strong support from the Ombudsmen) favoured a charging framework contained in regulations, which were seen as providing greater certainty and consistency. However, nine submitters opposed this option. Two departments felt that the Ministry of Justice charging guidelines are sufficient, although submitters favouring the status quo were a small minority. Other Ministries favoured clearer guidance about charging, or a fees framework established by the oversight office. Some of these submitters felt that establishing a charging framework by regulations may be overly restrictive or prescriptive and that agency discretion should be retained.
- 10.194 Submissions also showed a divergence as to which principles or presumptions should prevail in establishing a new charging framework. Some submitters favoured a presumption against charging with the discretion to charge in certain circumstances. Others supported the opposite: a presumption in favour of charging with the discretion not to in certain circumstances. One non-government organisation submitted that any charging that restricts reasonable public access should be avoided.
- 10.195 There was also a range of views as to the extent to which charges should be used to recover costs. Some submissions advocated for full cost recovery; the charging of commercial rates (at least for requests for commercially useful information); and the ability to charge for all activities involved in responding to requests, such as the assessment of withholding grounds and consultation. Other submitters were opposed to expanding charging policy along these lines and were concerned that charges should not be set at levels that would discourage requests.
- 10.196 A range of comments were made about possible models such as time-based charging, a flat fee model or a categories approach. One submitter supported the flat fee model on the basis that it is simple, transparent and administratively easier than other models, although another submitter noted that it would not take into account significant agency time taken to release a small amount of information. There was support for a categories approach based on size and complexity of the request and the nature of the requester; one submitter thought this made the most sense and would be the most flexible to apply. Another submitter suggested a hybrid approach, with a flat fee for requests taking no longer than four hours to respond to, and a categories framework for requests that take longer to deal with.
- 10.197 Some submitters supported further work to develop a preferred model being undertaken either by the Ombudsmen or the State Services Commission (in consultation with official information providers). The Ombudsmen thought that all three options warrant further investigation and the relative advantages and disadvantages assessed. Regardless of which model is adopted, the Ombudsmen thought that it should contain the following elements:

- (a) Requesters should only be charged where information is released;
- (b) The discretion to waive or remit charges based on financial hardship and the public interest should be retained, and possibly included in the official information legislation (as it is in the Australian Freedom of Information Act);⁴⁴⁹ and
- (c) Requesters should not be charged where the information ought to have been proactively released to the general public, or where there is a right of access to the information.⁴⁵⁰

10.198 A range of views about whether the purpose of a request should be taken into account in setting charges was evident in submissions. The Ministry of Economic Development thought this should be a significant factor so that a public interest purpose would reduce the justification for charging. The contrary view of one regional council was that this could encourage requesters to mislead agencies about purpose and identity.

10.199 There was also a discrepancy in views as to whether a new charging framework should cover both OIA and LGOIMA agencies, or whether local government should be able to fix charges under its own cost structures.

10.200 On the question about whether the charging regime should apply equally to political party requests,⁴⁵¹ submitters clearly supported equal treatment of requesters in terms of charging (26 in favour and two against), and no special treatment for requests from political parties. Charging is seen as a useful tool to manage requests that involve a significant burden; however several submissions (including that of the Ombudsmen) suggested that charges for MPs could be waived in appropriate cases under a public interest exemption.

Conclusion and objectives

10.201 Rather than acting primarily as a cost recovery mechanism, we view the discretion to impose charges as a necessary reserve power for agencies to control large requests and encourage the refinement of their scope. The charging framework is an important mechanism for keeping an appropriate balance in the official information process, between promoting the availability of official information; and managing the public sector burden of processing the small percentage of official information requests that disproportionately tie up agency resources.

10.202 Developing a revised charging framework should, in our view, be based on the following objectives:⁴⁵²

- (a) charging does not act as a disincentive to legitimate requesters and so does not pose an obstacle to freedom of information objectives;
- (b) charging acts as an incentive on requesters to tailor their requests so far as reasonably possible to reduce the administrative burden on agencies;⁴⁵³
- (c) the charging regime provides an incentive on agencies to maintain efficient information handling practices so that requests can be dealt with as promptly and cost-effectively as possible;
- (d) the charging regime incentivises (or does not dis-incentivise) best decision-making practices (such as sufficient consultation);
- (e) the charging regime provides an incentive on agencies to release information proactively as appropriate;
- (f) the charging regime is not unduly complex or time-consuming for agencies to apply and so does not increase the administrative burden of the official information legislation on agencies;
- (g) charging can be consistently applied by agencies so that it is not a cause of perceived unfairness amongst requesters; and
- (h) there is appropriate transparency as to agency charging practice.

10.203 A possible addition to this list is incentivising timely performance by agencies by linking the ability to charge with meeting the statutory response timeframes.⁴⁵⁴ However, one concern is whether this approach would have a negative impact by reducing the incentive for requesters to co-operate with agencies (in the hope that exceeding the time limit might result in remission of the charge).⁴⁵⁵

10.204 The review of charging policy should cover not only charging policy under the official information legislation, but also other government information policy including the release of datasets.⁴⁵⁶ This is necessary in our view to ensure that the new charging framework is comprehensive and consistent.

R71 A review of charging policy based on the objectives listed at [10.202] should be undertaken in order to establish a charging framework that is cohesive, consistent and principled. The review should include charging policy under the official information legislation, the *Declaration on Open and Transparent Government*, the *New Zealand Data and Information Management Principles* and the *New Zealand Government Open Access and Licensing* framework, and any other relevant government information policy.

Chapter 10 Footnotes

- 287 OIA, s 15(1); LGOIMA, s 13(1).
- 288 Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997) at [173] and [E26] (executive summary).
- 289 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.
- 290 By comparison, in the United Kingdom, Ministry of Justice statistics cited in Robert Hazell and Ben Worthy “Assessing the Performance of Freedom of Information” (2010) 27 *Government Information Quarterly* 352 at 355 showed roughly one in five requests delayed in central government beyond 20 days and one in 10 by other agencies.
- 291 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.
- 292 At 228–229, 283.
- 293 Issues Paper at Q48.
- 294 Price, above n 289, at [fn 62].
- 295 Office of the Ombudsmen “Official Information Decisions Must Be Made ‘As Soon As Reasonably Practicable’ ” (December 2003) 9 OQR 4.
- 296 OIA, s 28(5); LGOIMA, s 27(5).
- 297 Issues Paper at Q49.
- 298 In chapter 11 we recommend that failing to decide or release within the time limit should be grounds for making a complaint to the Ombudsmen.
- 299 Price, above n 289, at 11.
- 300 Chapter 9 at R42.
- 301 Issues Paper at [10.14].
- 302 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. See also Government Information (Public Access) Act 2009 (NSW), s 51.
- 303 Freedom of Information Act 1982 (Cth), s 15(6)(a).
- 304 Government Information (Public Access) Act 2009 (NSW), s 57.
- 305 OIA, s 15A(4), s 28(2); LGOIMA, s 14(4), s 27(2).
- 306 Government Information (Public Access) Act 2009 (NSW), s 57(4).
- 307 Price, above n 289, at [fn 62].
- 308 Issues Paper at Q52.
- 309 Official Information Act 1982, s 15A; LGOIMA s 12.
- 310 Law Commission, above n 288, at [183].
- 311 Issues Paper at Q51.

- 312 OIA, s 12(3); LGOIMA, s 10(3).
- 313 OIA, s 15(2); LGOIMA, s 13(3).
- 314 Office of the Ombudsmen *Practice Guidelines – Official Information* (Wellington, 2002) at Part C, ch 1.
- 315 LGOIMA, s 10.
- 316 See Law Commission, above n 288, at [83] recommending that the duty to provide assistance to requesters should include an explicit duty to assist requesters to specify the reasons for urgency.
- 317 Graham Taylor and Paul Roth *Access to Information* (LexisNexis, Wellington, 2011) at 46. See also the Ombudsmen’s checklist for public sector agencies considering urgent requests: Office of the Ombudsmen, above n 314.
- 318 For examples of important interests that may justify urgency, see United States Justice Department *Freedom of Information Regulations: Proposed Rule* (21 March 2011) 76(54) Federal Register 15236, which allows for expedited processing in cases where there is an imminent threat to life or physical safety; a need to inform the public (in the case of media requests); the loss of substantial due process rights; or a matter of widespread and exceptional media interest raising issues about government integrity.
- 319 See however OIA, ss 15(5), 15A(1)(b) and 18B; LGOIMA, ss 13(6), 14(1)(b) and 17B.
- 320 In chapter 9 at R40 we recommend strengthening the requirement for consultation between an agency and requester before a request can be refused on the ground that it would require “substantial collation and research.”
- 321 The particular issue of consultation between departments and ministerial offices is discussed in chapter 4.
- 322 OIA, s 18B; LGOIMA, s 17B.
- 323 State Services Commission *Release of Official Information: Guidelines for Co-ordination* (2002).
- 324 White, above n 291, at 145.
- 325 At 145–146.
- 326 Issues Paper at [10.38]–[10.50].
- 327 Freedom of Information Act 1982 (Cth), ss 27 and 27A (amended by the Freedom of Information Amendment (Reform) Act 2010). See also Government Information (Public Access) Act 2009 (NSW), s 54; Right to Information Act (Qld), s 37.
- 328 Public Transport Management Act 2008, ss 22 (6), (8). See also Agricultural Compounds and Veterinary Medicines Act 1997, s 12; Hazardous Substances and New Organisms Act 1996, s 57.
- 329 See also Law Commission *Review of the Privacy Act 1993* (NZLC IP 17, 2010) at [11.60].
- 330 In addition, other submitters expressed tentative support, depending on the scope of the requirement.
- 331 The intent is that this mandatory requirement would apply in relation to the information of third parties other than public sector entities; however agencies would retain the discretion to consult more extensively than the notification provision would require, including with public sector entities.
- 332 Defined in s 4 as meaning “a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.”
- 333 Defined in s 4 as meaning “the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.”

- 334 OIA, s 9(2)(b) and (ba); LGOIMA, s 7(2)(b) and (c). See also the additional commercial withholding ground recommended in chapter 5 at R17.
- 335 LGOIMA, s 7(2)(ba). This provision specifically applies in relation to certain applications and orders under the Resource Management Act 1991. See Taylor and Roth, above n 317, at 142. In chapter 7 at [7.69] we support the inclusion of protection for cultural matters in the OIA, subject to further work being undertaken on this issue by a working party.
- 336 See Freedom of Information Act 1982 (Cth), s 27(5), s 27A(4).
- 337 Consideration could be given to requiring notification to the Privacy Commissioner in a representative capacity in circumstances where it is otherwise impractical to notify individuals who may be affected by the release of personal information.
- 338 For example, the Privacy Act 1993 (information privacy principle 6) provides any person with a right of access to personal information held about them. A person can only exercise this right if they know who holds personal information about them.
- 339 Issues Paper at Q58.
- 340 See *Wellington Airport Ltd v Air New Zealand Ltd* [1993] 1 NZLR 671; *Julian v Air New Zealand Limited* [1994] 2 ERNZ 612, 637–638.
- 341 OIA, s 14; LGOIMA, s 12. White, above n 291, at 265, notes that the administrative protocol is broadly that the request should be transferred to whoever was the primary author of a paper, or had leadership of the relevant issue or process.
- 342 The particular issue of transfers between agencies and Ministers is discussed in chapter 4.
- 343 Price, above n 289, at 36.
- 344 OIA, s 13; LGOIMA, s 11.
- 345 Office of the Ombudsmen “Transferring Requests” (March 2002) 8 OQR 1.
- 346 Issues Paper at [10.52].
- 347 OIA, s 15A; LGOIMA, s 14.
- 348 OIA, s 14; LGOIMA, s 12.
- 349 OIA, s 16; LGOIMA, s 15.
- 350 Issues Paper at Q62, Q64.
- 351 OIA, s 16(1)(b); LGOIMA, s 15(1)(b).
- 352 OIA, s 16(1)(b); LGOIMA, s 15(1)(b).
- 353 OIA, s 16(2)(a); LGOIMA, s 15(2)(a).
- 354 Freedom of Information Act 2000 (UK), s 11(1).
- 355 Section 11(2).
- 356 Section 11(3).
- 357 See White, above n 291, at 263, discussing releasing information in electronic form.
- 358 The issue was discussed by Simon Morton with technology correspondent Bill Thompson on “This Way Up” (27 June 2009) < www.radionz.co.nz >. See also Mark Harris “Properly Public: It’s Our Information” (10 February 2012) < <http://publicaddress.net> >.

- 359 Metadata is information about a document, such as who the author is, when it was written and a short summary of what it contains: < www.techterms.com > .
- 360 OIA, s 2(1); LGOIMA, s 2(1).
- 361 Right to Information Act 2009 (Qld), s 28(1). “Metadata” is defined in s 28(3) as including “information about the document’s content, author, publication data and physical location”.
- 362 Section 28(2).
- 363 Right to Information Act 2009 (Qld), s 29.
- 364 Government Information (Public Access) Act 2009 (NSW), s 53(4).
- 365 Right to Information Act 2009 (Tas), s 10(2).
- 366 Section 10(1)(a).
- 367 NSW Ombudsman *Opening Up Government: Review of the Freedom of Information Act 1989* (February 2009) at [4.7.6].
- 368 See Office of the Information Commissioner of Canada “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”.
- 369 Public Records Act 2005, s 17(2).
- 370 Section 17(3).
- 371 Issues Paper at Q63.
- 372 This is related to the issue of the adequacy of agency information technology systems to efficiently access and release information, whether in response to requests or as part of a proactive disclosure programme, as we discuss in chapter 12.
- 373 Archives New Zealand “Electronic Recordkeeping Metadata Standard” (2008), section 1.
- 374 Cabinet Minute of Decision (8 August 2011) CAB Min (11) 29/12, available at < www.ict.govt.nz > . See further chapter 12.
- 375 See NSW Ombudsman, above n 367. Information that is due for destruction however should not be disposed of until any relevant official information requests have been dealt with: see United Kingdom “Lord Chancellor’s Code of Practice on the management of records issued under section 46 of the Freedom of Information Act 2000” (16 July 2009).
- 376 See for example Lord Chancellor, above n 375.
- 377 There is further discussion of NZGOAL in chapter 12.
- 378 State Services Commission *New Zealand Government Open Access and Licensing framework* (NZGOAL) (August 2010) at [4].
- 379 Creative Commons Aotearoa New Zealand NZGOAL < <http://nzgoal.info> > .
- 380 See further chapters 12 and 13.
- 381 Protection of Freedoms Bill (UK), cl 100. The Bill received the Royal Assent on 1 May 2012.
- 382 The Regulations implement Directive 2003/98/EC of the European Parliament and the Council on the Re-use of Public Sector Information (O.J. No. L 345).
- 383 Regulation 6.

- 384 Regulation 5(2).
- 385 Regulation 5(3).
- 386 Regulation 12.
- 387 Regulation 15.
- 388 OIA, s 28(1)(c); LGOIMA, s 27(1)(c).
- 389 Office of the Ombudsmen “Release Subject to Conditions Resolves Urgent OIA Request” (March 2005) 11 OQR 1.
- 390 See Office of the Ombudsmen “Advising the Requester of the Agency’s Decision” (May 2008) 14 OQR 1; “Conditions on Use of Official Information” (March 2003) 9(1) OQR 1; “Identity Conditional on Release of Official Information” (December 1999) 5 OQR 4.
- 391 Issues Paper at Q65.
- 392 See chapter 9.
- 393 See Taylor and Roth, above n 317, at 64.
- 394 Law Commission *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP 27, 2011).
- 395 Frontier Economics Pty Ltd *Independent Review of the Impact of the Freedom of Information Act* (Report prepared for the Department of Constitutional Affairs, London, 2006) at 10.
- 396 Law Commission, above n 288, at [115]–[116].
- 397 Robert Hazell, Ben Worthy and Mark Glover *The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI Work?* (Palgrave Macmillan, Basingstoke, 2010) at 264.
- 398 See HM Treasury (UK) *Managing Public Money* (2007) at 41, citing information services such as freedom of information requests as an exception to full cost charging on public policy grounds.
- 399 Office of the Australian Information Commissioner *Review of Charges under the Freedom of Information Act 1982* (2012) at 5.
- 400 See White, above n 291, at ch 14; and chapter 9 of this report.
- 401 See for example, Office of the Australian Information Commissioner *Review of Charges Under the Freedom of Information Act 1982: Discussion Paper* (2011), at Part 4; Anna Colquhoun “The Cost of Freedom of Information” (Constitution Unit, University College London, 2010); and Scottish Government *Freedom of Information Costing Exercise 2009–2010: Final Report* (November 2010).
- 402 Colquhoun at 3. The countries studied included the United Kingdom, Scotland, Ireland, Canada, Australia and the United States but did not include New Zealand.
- 403 Chapter 9, R39.
- 404 Chapter 9, R44.
- 405 State Services Commission, above n 378, at [55]–[57]. See chapter 12 of this report at [12.126]–[12.129].
- 406 FOI unit of NSW Premier’s Department, cited by the NSW Ombudsman *Discussion Paper: Review of the Freedom of Information Act 1989* (September 2008) at 30.
- 407 OIA, s 15(1A); LGOIMA, s 13(1A).
- 408 OIA, s 15(2); LGOIMA, s 13(2).

- 409 OIA, s 28(1)(b); LGOIMA, s 28(1).
- 410 OIA, s 47(d).
- 411 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]. See also The Treasury *Guidelines for Setting Charges in the Public Sector* (December 2002); and Office of the Controller and Auditor-General *Charging Fees for Public Sector Goods and Services: Good Practice Guide* (June 2008).
- 412 LGOIMA, s 2(1) definition of “prescribed amount,” and s 13(2).
- 413 Section 13(3).
- 414 White, above n 291, at 277. See also 134–139.
- 415 At 278.
- 416 At 139. One public servant noted that there was no developed understanding of how to approach charging across the government sector.
- 417 Ministry of Justice, above n 411, at [7.4].
- 418 Some agencies use contractors to deal with 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.
- 419 See further below at [10.181]–[10.185].
- 420 Committee on Official Information *Towards Open Government: Supplementary Report* (Government Printer, Wellington, 1981) at [4.57].
- 421 At [4.03]. See also chapter 13 of this report at [13.15].
- 422 See for example the Freedom of Information (Fees and Charges) Regulations 1982 (Cth).
- 423 See Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2001 ed and amendments) Appendix 5: Controls Over Regulations.
- 424 For an overview of charging practices in other jurisdictions, see Office of the Australian Information Commissioner, above n 401, at Part 5.
- 425 FOI Independent Review Panel *The Right to Information: Reviewing Queensland’s Freedom of Information Act* (June 2008) at 198–199.
- 426 Right to Information Act 2009 (Qld), Part 6; Right to Information Regulation 2009 (Qld), regs 5–6.
- 427 See for example Government Information (Public Access) Act 2009 (NSW), s 64.
- 428 There have been calls for application fees to be reinstated and increased: Sean Parnell “Counting the Cost of New FOI” *The Australian* (11 February 2011). For a summary of the charging practices in the Australian states, see Office of the Australian Information Commissioner, above n 401, at Part 5.
- 429 Office of the Australian Information Commissioner, above n 399, at 6–7 (executive summary).
- 430 Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (UK).
- 431 Ministry of Justice *Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Freedom of Information Act 2000* (December 2011, Cm 8236).
- 432 Office of the Australian Information Commissioner, above n 399, at 68.

- 433 Media, Entertainment and Arts Alliance *Kicking at the Cornerstone of Democracy: The State of Press Freedom in Australia* (2012 Australian Press Freedom Report, NSW, 2012) at 27–28.
- 434 Ministry of Justice, above n 411, at [7].
- 435 See also United States Justice Department *Freedom of Information Act Regulations: Proposed Rule*, above n 318, at [16.10].
- 436 Freedom of Information Act 1982 (Cth), s 3(4).
- 437 Office of the Australian Information Commissioner *Guide to the Freedom of Information Act 1982* (2011) at 43. See also Office of the Australian Information Commissioner *Understanding the Value of Public Sector Information in Australia: Issues Paper 2* (November 2011) at 33, suggesting that a minimum cost approach best supports the objects of the FOI Act.
- 438 Government Information (Public Access) Act 2009 (NSW), s 127.
- 439 Section 66.
- 440 Office of the Information Commissioner New South Wales *Guideline 2: Discounting charges – Special benefit to the public generally* (March 2011), at Appendix A.
- 441 Government Information (Public Access) Regulation 2009 (NSW), reg 9.
- 442 Government Information (Public Access) Act 2009 (NSW), s 65(1).
- 443 See for example US Justice Department, above n 318, at [16.10], exempting search fees for requests by educational institutions, non-commercial scientific institutions, and the news media.
- 444 Issues Paper at Q68.
- 445 Ministry of Justice, above n 411, at [7.4].
- 446 White, above n 291, at 160. See chapter 4 for further discussion of politically sensitive requests.
- 447 Law Commission, above n 288, at [146].
- 448 See Ministry of Justice, above n 411, at [8].
- 449 Freedom of Information Act (Cth), s 29(4)–(5).
- 450 See for example OIA, s 22; LGOIMA, s 21.
- 451 Issues Paper at Q68.
- 452 See also the four principles proposed by the Australian Information Commissioner, above n 399, at 6.
- 453 Meeting this objective will require clear information for requesters about the cost implications of requests, such as through examples, precedents and cost estimates. See Office of the Ombudsmen *Practice Guidelines – Official Information* (Wellington, 2002) at Part A, chapter 3, suggesting it is appropriate for an agency to advise the requester in advance of the likely charge, so that the requester can narrow the request or discontinue it.
- 454 See for example Freedom of Information (Fees and Charges) Amendment Regulations (No 1) 2010 (Cth), where no charges are payable where an agency fails to notify a decision within the time limit. See also Office of the Australian Information Commissioner, above n 399, at 7; United States Justice Department, above n 318, at [16.10(d)(1)].
- 455 Office of the Australian Information Commissioner, above n 399, submission of Megan Carter.
- 456 See PriceWaterhouseCoopers *Economic Assessment of Spatial Data Pricing and Access: Stage 2 report: cost benefit analysis of alternative models* (ANZLIC Spatial Information Council, November 2010).

Chapter 11

Complaints and remedies

- 11.1 In this chapter we examine what happens when someone has a complaint about the way their request for information has been handled by an agency. The Ombudsmen play a central role, as in almost all cases they are the first port of call for people with complaints. The belief of the Danks Committee that the courts would have only a minor role to play in official information matters has been borne out, with few cases brought before the courts so far and, accordingly, minimal judicial direction on the legislation.
- 11.2 The Office of the Ombudsmen received 992 complaints under the OIA and 256 under the LGOIMA in the 2010/2011 year. Of the OIA complaints, 58.4 per cent came from individuals, 17 per cent from the media and 6.3 per cent from Members of Parliament and political party research units.
- 11.3 The Ombudsmen formed final opinions in 366 OIA and LGOIMA cases.⁴⁵⁷ In 132 cases they found that the decision or action complained of was wrong or unreasonable. They made 17 recommendations under the OIA and one under the LGOIMA. All of these were accepted by the relevant agency, and the information which was originally withheld was disclosed to the complainant or the problematic conduct was remedied.⁴⁵⁸
- 11.4 Complaints to the Ombudsmen may be made orally or in writing. Their investigations are informal, private and inquisitorial in nature. They are relatively unfettered in the processes they follow, save for some procedural requirements and natural justice safeguards laid down in the legislation. The Ombudsmen are impartial decision makers and do not represent the views of either party.
- 11.5 We think that the broad processes employed by the Ombudsmen are working well. Our recommendations mainly involve some adjustments to the troublesome intersection between the OIA and the Ombudsmen Act 1975 in this area; the grounds for complaint under the OIA; and the outcomes of complaints. In this chapter we also discuss our recommended reforms to enforcement processes and to the “veto” contained in section 32(1) of the LGOIMA.⁴⁵⁹

TWO KINDS OF COMPLAINT UNDER THE OIA

- 11.6 Complaints made under the OIA are of two distinct kinds: (i) complaints about requests for access to official information; and (ii) complaints about requests for personal information, or information about the reasons for or rules by which a decision was made “in respect of any person or body of persons in his or its personal capacity.”⁴⁶⁰ The two kinds of information are quite distinct, and this is reflected in their place in the Act. Requests for information of the first kind are covered in Part 2, while requests for information of the second kind are covered in Parts 3 and 4.
- 11.7 It is also reflected in the way complaints are handled, with complaints based on Part 2 requests dealt with by the Ombudsmen under their OIA jurisdiction; and complaints based on Part 3/4 requests dealt with by the Ombudsmen under their Ombudsmen Act jurisdiction.⁴⁶¹ But certain provisions from each Act apply to *both* kinds of complaint. This creates a complex interface between the two Acts and some potential difficulties for complainants.
- 11.8 The underlying differences between the two kinds of information can be found in the Danks Committee commentary to its draft Bill and in the purpose provision of the OIA. Part 2 requests may be made by any person⁴⁶² for “any specified official information”. This reflects and upholds the purpose of the Act “to increase progressively the availability of official information to the people of New Zealand” in order to enable citizen participation in government and to enhance the government’s accountability.⁴⁶³
- 11.9 In contrast, Parts 3 and 4 requests are more concerned with the effect of government on the individual. The relevant provisions are sections 22 and 23⁴⁶⁴ (Part 3) and section 24⁴⁶⁵ (Part 4). Section 22(1) confers a right of access to:
- ... any document (including a manual) which is held by a department or Minister of the Crown or organisation and which contains policies, principles, rules, or guidelines in accordance with which decisions or recommendations are made in respect of any person or body of persons in his or its personal capacity.
- 11.10 Section 23(1) confers a right to a written statement of findings and reasons where an agency makes a decision or recommendation affecting an individual in his or her personal capacity.⁴⁶⁶
- 11.11 Accordingly, sections 22 and 23 are concerned with:⁴⁶⁷
- ... “informal administrative law” or “internal law” – the body of rules and criteria which is applied by agencies and statutory officers in making decisions affecting the rights, privileges, or liabilities of individuals.

They reflect the underlying premise that “the individual has a right to know the law that does or may affect him personally.”⁴⁶⁸

- 11.12 Finally, section 24 confers a right on body corporates to access their personal information. Notably, the right of an individual to access their personal information held by government agencies used to be dealt with under the OIA, but is now handled under the Privacy Act 1993 (which establishes its own process for dealing with complaints made by individuals).⁴⁶⁹

How complaints are currently handled

- 11.13 Although dealt with in two separate jurisdictions, the procedures employed for the two kinds of complaint are broadly similar. A complaint is received by the Ombudsmen based on a request for information, which the Ombudsmen may investigate in order to determine whether they believe the request was dealt with by the agency appropriately. If the Ombudsmen believe the original request should not have been refused, or that some part of the agency's response was otherwise wrong or unreasonable, they must report their opinion to the relevant agency and Minister/s. They may also make such recommendations as they think fit to the agency concerned, including that the requested information be released.
- 11.14 There are key procedural differences, however, between the grounds on which a complaint may be made; and the possible outcomes of an Ombudsman's recommendations. Complaints based on Part 2 requests must be made on one of a list of specific grounds in section 28:⁴⁷⁰
- (a) A refusal to release the information;
 - (b) A decision to release the information for a charge;
 - (c) A decision about how to make the information available;
 - (d) Conditions imposed on the use, communication or publication of the information to be released;
 - (e) A notice under section 10 which neither confirms nor denies that information exists; or
 - (f) A decision to extend a time limit for dealing with a request.
- 11.15 In contrast, complaints based on Part 3/4 requests can be brought on the broad basis set out in section 35 of the OIA.⁴⁷¹ This creates a general right of complaint about "any decision made under Part 3 or 4".

- 11.16 Secondly, and perhaps most importantly, the outcomes of an Ombudsman's recommendation (where one is made) are different for each kind of complaint. In the OIA jurisdiction, applying to complaints based on Part 2 requests, the Ombudsmen's recommendations are binding, as on the twenty-first working day following that recommendation the agency comes under a public duty to comply. However, section 32(1) provides that the duty does not arise if, before the twenty-first day following the day the recommendation was made, the Governor-General by Order in Council directs otherwise. This enables the Executive Council to "veto" the Ombudsmen's otherwise binding recommendations. In the case of the LGOIMA, the relevant local authority may exercise the veto itself by resolution at a meeting.⁴⁷² (Note that, in addition to or instead of exercising the veto power, an agency may also apply for an Ombudsman's decision to be judicially reviewed.)⁴⁷³
- 11.17 In the Ombudsmen Act jurisdiction, for complaints based on Part 3/4 requests, the Ombudsmen's recommendations are not binding. The agency in question may simply choose not to adopt them. Hence, no public duty to comply arises and the veto power in section 32(1) does not apply.
- 11.18 The reason for the different procedure was also stated by the Danks Committee which said that "it is inappropriate that an Ombudsman should be able to make what is in effect a binding recommendation on a question of legal right".⁴⁷⁴ They were concerned that this would impute judicial characteristics to the Ombudsmen's Office. The classical conception of the Office of the Ombudsmen is not as a judicial body, but as an Office of Parliament, separate and distinct from the administrative process and acting as an avenue of last resort for the aggrieved citizen.⁴⁷⁵
- 11.19 The Danks Committee believed that the Court was the most appropriate legal body to determine access issues under Part 3/4 requests. Complainants could still approach the Ombudsmen if they wished, but not within the Ombudsmen's OIA jurisdiction.

PROPOSALS FOR ALIGNMENT AND SIMPLIFICATION

- 11.20 The OIA operates on the basis of the underlying distinction discussed above, and we think this is a distinction that continues to be important. There is an inherent difference between enabling people to access their personal information or information about administrative action that is unique to them, and enabling New Zealand citizens to access official information in order to hold government to account in a general sense. But the continued treatment under the Ombudsmen Act of complaints arising from sections 22, 23 and 24 causes two adverse consequences for requesters.

- 11.21 First, complainants under sections 22, 23 and 24 are disadvantaged. The following quote from the Danks Committee itself identifies the underlying cause of the disadvantage:⁴⁷⁶

[U]nder our proposals the finding of an Ombudsman will have a somewhat higher status [under the OIA] than in the Ombudsmen Act itself, where his conclusions are *merely recommendatory*. [Under the OIA] his recommendations would be *binding* unless overridden by [veto].

- 11.22 So, if a Part 2 complainant approaches the Ombudsmen, he or she will have the benefit of the stronger powers accorded to that Office in its OIA jurisdiction: effectively, a power of final determination. In contrast, complainants under sections 22, 23 or 24 only have recourse to the Ombudsmen's recommendatory powers. The agency holding the information could in principle refuse to release the information without the need to seek an Order in Council veto or (in the case of the LGOIMA) to exercise the local authority veto. There is none of the political risk associated with breaching a public duty to release the information, since no such duty arises in the Ombudsmen Act jurisdiction.
- 11.23 The Danks Committee envisaged requesters in this position approaching the High Court to enforce their right of access. But going to court is certainly a more expensive and slower process. We think it unlikely that this will be a real option for many requesters. This puts them at a real disadvantage compared to Part 2 requesters. Paradoxically, the Danks Committee's desire to better uphold and protect the rights contained within sections 22, 23 and 24 in fact leads to a remedial imbalance that disadvantages these requesters.⁴⁷⁷ It leaves those who do not have the resources to approach the court in a vulnerable position.
- 11.24 A second adverse consequence of handling these complaints under the Ombudsmen Act is that it creates a complex inter-relationship between the OIA and the Ombudsmen Act that may be difficult for requesters to understand. The complaint is made under the OIA, so some requesters might struggle to understand why their complaint has been dealt with under a different Act. It is also difficult to determine what legal rules apply to the resolution of the complaint, because it is necessary to cross-refer between many different provisions of the two Acts. At times we found it difficult to understand these cross-references, so requesters are likely to as well. This does not lend itself to greater citizen participation in and oversight of administrative decision-making.

Proposed new approach

- 11.25 We think both these problems could be addressed relatively simply, by bringing the treatment of complaints under sections 22, 23 and 24 within the Ombudsmen's OIA jurisdiction as set out in Part 2. The existing process for Part 2 complaints would be applied to those sections, with one exception: where an Ombudsman makes a recommendation to release information requested under those sections, it would not be exposed to the veto power in section 32(1).

- 11.26 This effectively means the Ombudsmen would make binding recommendations about complaints under sections 22 to 24. We note the concerns the Danks Committee expressed about this.⁴⁷⁸ But we think the advantages to be gained in terms of simplicity from treating the two kinds of OIA complaint in a consistent fashion, procedurally speaking, is justified in this context. In this regard we return to the importance of sections 22 to 24 in upholding people's legal rights to access information uniquely concerning them; legal rights that were emphasised by the Danks Committee itself. The Order in Council veto is a heavy and, we think, unnecessary weapon to use against these rights. Where a veto of sorts is thought absolutely necessary, section 31 will still be available.⁴⁷⁹ That section allows the Prime Minister or Attorney-General (or, under the LGOIMA, only the Attorney-General) to prevent the release of the information in *advance* of the Ombudsmen making any binding determination, in the small number of circumstances where the requirements of that section are fulfilled.⁴⁸⁰
- 11.27 Later in this chapter we recommend retaining the Order in Council veto in respect of the Ombudsmen's recommendations for Part 2 requests, taking into account submitters' concerns about altering the traditional Ombudsmen model and affecting the Ombudsmen's relationships with government agencies.⁴⁸¹ While we found those arguments convincing in respect of Part 2 requests, we think they are less so in the present context of sections 22 to 24, which concern fundamental legal rights to information about or affecting the requester. This is a difficult issue, but on balance we think this approach is justified by the increased simplicity and consistency of handling all OIA complaints under the OIA jurisdiction.
- 11.28 It also means that these complainants must first approach the Ombudsmen for a determination of their right to the information, rather than approaching the High Court directly. The Danks Committee thought the Court was best placed to adjudicate on such matters. But we think it is justifiable to "postpone" the Court's jurisdiction over complaints under sections 22, 23 and 24. This is based on the likelihood that very few requesters will want to go directly to the High Court given the option of seeking a binding determination from the Ombudsmen, and the associated advantages in time, cost and accessibility.⁴⁸² However, if there are real concerns about this there could be a mechanism by which complainants could seek leave to approach the High Court directly.
- 11.29 We note in further support of this point that section 24 now only deals with body corporates' rights to their personal information, since the same rights in respect of individuals were shifted out of the OIA and into the Privacy Act.⁴⁸³ In fact Sir Kenneth Keith, who sat on the Danks Committee, commented after the OIA was enacted that he was surprised by the final inclusion of body corporates' rights in Part 4. They did not appear in the Committee's draft Bill and he was not aware of any submissions calling for their inclusion.⁴⁸⁴ Perhaps today their presence there remains slightly incongruous. In any case, natural persons will be unaffected by this new approach as regards section 24, as requests for personal information are dealt with under the Privacy Act.

11.30 The tables below summarise how the existing position would change:

Existing position:

	Part 2	Sections 22, 23, 24
Governing Act	OIA.	Ombudsmen Act.
Grounds for complaint	Specific grounds listed in section 28.	"Any decision."
Effect of recommendation to release	Binding, subject to veto.	Non-binding.
Complainant's access to court	Only after Ombudsmen review.	Direct.

After amendments:

	Part 2	Sections 22, 23, 24
Governing Act	OIA.	OIA.
Grounds for complaint	Specific grounds listed in section 28.	"Any decision."
Effect of recommendation to release	Binding, subject to veto.	Binding, but subject to section 31.
Complainant's access to court	Only after Ombudsmen review.	Only after Ombudsmen review, unless the complainant has been granted leave to approach the court in the first instance.

11.31 We think it is significant that the enactment of the OIA conferred an additional jurisdiction on the Ombudsmen that was specifically designed to deal with OIA complaints. We believe that complaints based on sections 22 to 24 are properly viewed as OIA complaints to be dealt with, as far as possible, within the Ombudsmen's unique OIA jurisdiction. It is the OIA that states the relevant rights and provides the gateway for hearing the complaints under sections 22, 23 and 24. The High Court has made the point that the Ombudsmen do not "walk out" of the OIA entirely when operating under their imported Ombudsmen Act jurisdiction.⁴⁸⁵ These are OIA complaints, even though procedurally they are dealt with under the Ombudsmen Act.

11.32 This new approach would remove many of the complexities currently created by the OIA/Ombudsmen Act overlap. The Ombudsmen would be operating within their OIA jurisdiction when determining all OIA complaints. It would then also be possible for the OIA to state comprehensively all the legal rules relevant to determining a complaint, whatever its underlying nature. Complainants would no longer have to cross-refer to relevant provisions of the Ombudsmen Act.

- 11.33 We recognise there is a limit to the extent to which we can and should make the two kinds of complaints subject to the same procedure. Our aim is to better protect the rights set out in the OIA, given the reality that most complainants faced with an agency refusing to release relevant information will not commence court action. We have attempted to address the remedial imbalance that currently exists between the two complaint processes, while maintaining their important underlying distinctions.

R72 The complaint-handling process contained in Parts 3 and 4 of the OIA and LGOIMA should be amended to achieve consistency with the complaint-handling process contained in Part 2 of each Act. However, this should not be at the expense of recognising the distinct nature of requests for information under the existing sections 22, 23 and 24 of the OIA and sections 21, 22 and 23 of the LGOIMA.

Our recommended legislative approach

- 11.34 The proposed new approach could be enacted quite simply within the OIA and LGOIMA. The two kinds of information could continue to be dealt with in separate Parts, if desired. Where provisions of the Ombudsmen Act are relevant to either Part, these could be reproduced in full within the OIA, either in a schedule or in the body of the Act. It would create a complete code that complainants can access in its entirety to understand the legal rules that apply to their complaint. This will make the procedure by which the Ombudsmen deal with complaints more transparent and more accessible. Currently, section 29 provides that the Ombudsmen Act applies to investigations under the OIA, except where the OIA states otherwise.⁴⁸⁶ But if there are provisions of the Ombudsmen Act that are thought relevant to the official information legislation, ideally they should be reproduced in the legislation as and where it is thought appropriate, rather than using a general cross-reference provision.
- 11.35 This also gives an opportunity to reconsider which provisions of the Ombudsmen Act should and should not apply to the Ombudsmen's OIA investigations. Currently for example sections 13, 14 and 25 of the Ombudsmen Act do not apply to the OIA;⁴⁸⁷ we suggest that section 20 should be added to that list. That section allows the Attorney-General to prevent the Ombudsmen requiring certain information, answers or documents in an investigation where that would prejudice the security, defence or international relations or might disclose the deliberations or proceedings of Cabinet. The Attorney-General has a more prescribed certification power by virtue of section 31, which we discuss above at paragraph 11.26. Given that section 31 has been expressly crafted for the OIA, we think it is unnecessary for section 20 of the Ombudsmen Act to also apply.

- 11.36 Section 17 of the Ombudsmen Act also warrants further thought as to whether it should apply to OIA investigations. That section permits the Ombudsmen to refuse to investigate a complaint further if they believe further investigation is unnecessary. There is a question about the extent of its applicability to OIA investigations. We make no comment on this either way but suggest further thought should be given to the issue.

OTHER ALIGNMENTS

- 11.37 We also propose some other minor alignments to introduce greater consistency within the OIA; and between the OIA and the Privacy Act.

Aligning reasons for refusal

- 11.38 We considered whether the reasons to refuse requests in Part 4, for body corporates' personal information, and in Part 2, for official information, should be more closely aligned. Reasons for refusing a Part 2 request are listed in section 18 of the OIA and section 17 of LGOIMA. The following reasons to refuse do not apply to Part 4 requests:⁴⁸⁸
- Section 18(c)(i) and (ii): requests may be refused where making the information available would be contrary to an enactment or would constitute contempt of Court or of the House of Representatives;
 - Section 18(d): requests may be refused where the information requested is or will soon be publicly available;
 - Section 18(e): requests may be refused where the document alleged to contain the information does not exist or cannot be found; and
 - Section 18(f): requests may be refused where the information requested cannot be made available without substantial collation or research.
- 11.39 Arguably, sections 18(c)(i) and (ii) are already covered by section 52 of the OIA, currently titled "Savings". Section 52(1)⁴⁸⁹ provides that nothing in the OIA authorises making information available where that would constitute contempt of court or of the House of Representatives. Section 52(3)(a)⁴⁹⁰ provides that nothing in the OIA derogates from any provision contained in any other enactment which authorises or requires official information to be made available. However, in their current location in the savings provision these act as an interpretive aid to the Act, rather than as grounds for refusal of a particular request. We believe they would benefit from being placed in section 27, alongside the other reasons for refusing a Part 4 request.

11.40 The Law Commission considered the final three grounds (sections 18(d), (e) and (f)) in its 1997 review of the OIA.⁴⁹¹ The Commission concluded that sections 18(e) and (f) are already covered by the requirement in Part 4 that personal information be “readily retrievable”. It also concluded that extending section 18(d) to personal information might prevent someone from proposing corrections to the information at the critical time – before the information is made public. The right to seek to make corrections to personal information is an important feature of Part 4 which distinguishes it from Part 2.⁴⁹² We remain of the view that the three reasons for refusal in sections 18(d), (e) and (f) should not apply to requests for a body corporate’s personal information under the official information legislation.

11.41 A fuller exercise into the differences between Part 2 and Part 3/4 may be required at some point in the future.⁴⁹³ While we recommend in this report that some of those existing differences should be minimised, we are conscious of the need to maintain the distinctive character of the different Parts where there is a principled basis to do so, and believe that any future review should take this into account.

R73 Section 27(1) of the OIA and section 26(1) of the LGOIMA should include as a reason for refusal in relation to a request for information under Part 4, that making the information available would be contrary to an enactment or would constitute contempt of court or of the House of Representatives.

Aligning Privacy Act reasons for refusal

11.42 The Privacy Act 1993 deals with requests to any agency, including a public body, for an individual’s personal information. It contains two reasons for refusal which do not apply to body corporates’ requests for personal information under the OIA:

- The Privacy Act section 29(1)(g) provides that in the case of a request made to Radio New Zealand Limited or Television New Zealand, it is a reason for refusal if releasing the information would be likely to reveal the source of a news media journalist and either the information is subject to an obligation of confidence, or releasing the information would prejudice the supply of similar information from the same source;
- The Privacy Act section 29(1)(h) provides that where the information is contained in material placed in any library or museum or archive, it is a reason for refusal if releasing it would breach a condition under which it was placed there.

- 11.43 The Law Commission recently recommended in its review of the Privacy Act 1993, that section 29(1)(g) be deleted from that Act (in light of the recommendation that those two agencies should not be subject to the access and correction principles under the Privacy Act).⁴⁹⁴ If this provision is deleted from the Privacy Act then the desired consistency with the OIA will be achieved. If not, we think that a similar provision should apply to body corporates' requests for their personal information.
- 11.44 It is possible that the omission of similar grounds in the OIA and LGOIMA is an oversight. We cannot discern any justifiable reasons not to apply these two withholding grounds to body corporates' requests, and we think they should be incorporated into section 27(1) of the OIA (reasons for refusal of requests for personal information).

R74 The reasons for refusing a request for personal information under section 27 of the OIA and section 26 of the LGOIMA and under the Privacy Act 1993 should be kept in alignment as far as possible.

PROVIDING ADDITIONAL GROUNDS FOR COMPLAINT

- 11.45 In this section we recommend that the Ombudsmen's functions in section 28 of the OIA (section 27 of the LGOIMA) be extended to provide for some additional grounds for complaint. We also recommend additional grounds for complaint in chapter 9 (two grounds) and chapter 12 (one ground), which we discuss further in those chapters.⁴⁹⁵
- 11.46 It is relevant to the following discussion that some bodies subject to the OIA are not covered by the Ombudsmen Act 1975 (although the Crown Entities Act 2004 closed some of these gaps).⁴⁹⁶ If certain complaints not able to be made under the OIA would instead usually be heard under the Ombudsmen Act, these anomalies in coverage will affect those complaints where the relevant agency is not covered by the Ombudsmen Act – leaving potential complainants without a remedy.
- 11.47 We would point out also that it is quite difficult to identify the gaps in coverage between the Ombudsmen Act and the OIA. For example, the OIA covers a range of separately named bodies which are listed in Schedule 1. Some of these are listed in the Ombudsmen Act Schedule under the collective designation of "Crown entities". To determine whether a body named in the OIA is a Crown entity covered by the Ombudsmen Act, complainants must cross-refer to quite detailed interpretation provisions of the Crown Entities Act 2004. As we discuss more fully in chapter 14, the OIA should contain a comprehensive list of bodies covered by it.

Failure to respond within time limits⁴⁹⁷

- 11.48 Under the OIA an agency must decide whether to grant a request for information “as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received”.⁴⁹⁸ Section 28(4) provides a ground for complaint to the Ombudsmen if an agency has failed to make its decision “within the time limit fixed by section 15(1)” (by deeming this to be a refusal to make the information available).⁴⁹⁹ But there is a degree of ambiguity in section 28(4). It is not clear whether it confers on requesters only the right to complain that a decision has not been made within 20 working days; or whether requesters may also complain that a request has not been made as soon as reasonably practicable, even if 20 working days have not yet passed. For this reason, complaints that a decision has not been made as soon as reasonably practicable are currently handled under the Ombudsmen Act, provided the agency in question is subject to that Act.⁵⁰⁰
- 11.49 We think these are clearly complaints about official information, properly within the Ombudsmen’s OIA jurisdiction, and we think they should be dealt with under the OIA rather than the Ombudsmen Act. Where a request has not been dealt with as soon as reasonably practicable, there should be grounds to complain.⁵⁰¹ Perhaps the best way to do this is to remove section 28(4) and its reference to “deeming” and create a new complaint ground in section 28, stating that it is a function of the Ombudsmen to investigate and review an agency’s failure to make a decision within the time limit fixed by the legislation, or any extended time limit, or as soon as reasonably practicable. The new complaint ground will then be worded consistently with other existing complaint grounds in section 28.
- 11.50 There is also some ambiguity around section 28(5).⁵⁰² That section deems that “undue delay” in *making information available* amounts to a refusal of a request, and thereby a ground of complaint to the Ombudsmen. This is intended to address those situations where an agency has made a decision within the legislative time limits, but has unduly delayed the actual release of the information. However, the section does not specify what period of time amounts to “undue delay”. Currently, an agency could potentially make a decision within 20 days to release specified information, but then fail to release it for another 20 days. It is not clear whether or not this would constitute “undue delay”.
- 11.51 In chapter 10 we recommend that it be made explicit in the legislation that the 20 working day time limit covers both (i) an agency’s decision about release or withholding; and (ii) the release of any information in response to the request. Currently the legislation is not clear whether the 20 working day time period covers both elements of a request (although most agencies and requesters do tend to interpret it in this way).

- 11.52 There should be a ground to complain to the Ombudsmen under the OIA if an agency has failed to do either of these things within the time limits required by the legislation. This could be achieved by removing section 28(5), and its somewhat ambiguous reference to undue delay, and inserting a new complaint ground making it a function of the Ombudsmen to investigate and review any decision by which an agency fails to make official information available in response to a request within 20 working days or “as soon as reasonably practicable”.

R75 To improve the clarity of the complaint grounds, section 28(4) of the OIA and section 27(4) of the LGOIMA should be removed and replaced with a new ground providing for the Ombudsmen to hear complaints that an agency has failed to make a decision in response to a request for official information within 20 working days (or a properly extended time limit) or “as soon as reasonably practicable”.

R76 To improve the clarity of the complaint grounds, section 28(5) of the OIA and section 27(5) of the LGOIMA should be removed and replaced with a new ground providing for the Ombudsmen to hear complaints that an agency has failed to make official information available in response to a request within 20 working days (or a properly extended time limit) or “as soon as reasonably practicable”.

Failure to comply with transfer requirements

- 11.53 An agency that receives an information request must transfer that request to another agency if that other agency is better suited to responding to the request.⁵⁰³ An agency that is required to transfer a request must do so promptly and within 10 working days at the latest. The circumstances in which transfer must be made are prescribed by the section – transfers are not at the discretion of the agency.
- 11.54 In chapter 10, we discuss the problems that transfers can sometimes cause. For example, a transferring agency may also have relevant documents which they inadvertently fail to release once they have transferred the request. This can prejudice requesters by narrowing the scope of information available to answer the request.
- 11.55 We believe that a requester should be able to complain under the OIA if this occurs. Currently, such complaints can only be dealt with under the Ombudsmen Act, provided that the agency in question is subject to that Act. The Ombudsmen observed that this could be remedied by making it clear that requesters may complain about the fact of a transfer to the Ombudsmen in their OIA jurisdiction. The Law Commission recommended this in its 1997 review of the OIA and we remain of that view.⁵⁰⁴ The majority of submissions we received (18 to seven) also supported adding such a ground.

- 11.56 We emphasise that the intention is not to second-guess an agency's decision to transfer a request, but to ensure that transfers are done in a timely manner and do not inadvertently cause prejudice to requesters.

R77 Section 28 of the OIA and section 27 of the LGOIMA should provide for the Ombudsmen to hear complaints that an agency has not properly transferred a request for information, whether fully or partially; and that an agency has not complied with designated time limits for transfers.

Complaints by third parties

- 11.57 In this section we discuss the possibility of extending the Ombudsmen's functions to hear complaints not just by the person who requested the information, but by third parties who may be affected by the release of that information.

Failure to notify third parties before release of their information

- 11.58 In chapter 10 we discuss consultation under the official information legislation, and the desirability of seeking the views of third parties who may be affected by the release of their information or information about them. We recommend that, where reasonably practicable, agencies should be required to notify a third party prior to the release of its information, where there is otherwise good reason to withhold on privacy, confidentiality or commercial grounds or (for requests under the LGOIMA) to avoid causing serious offence to tikanga Māori or the disclosure of the location of wāhi tapu. The agency would have to give the third party at least five working days' notice and take into account any submission made in favour of withholding within that time.
- 11.59 As we note in chapter 10, this provision will give affected third parties an opportunity to submit their views and to take steps to protect their interests if the agency does proceed to release the information, for example by applying for judicial review or an injunction. Ultimate decision-making power would rest with the agency but submissions received within the timeframe would have to be taken into account.
- 11.60 If an agency fails to notify a third party in circumstances where it otherwise would be expected to do so, we recommend the third party have a ground to complain to the Ombudsmen. This will act as an incentive for agencies to be aware of, and to fulfil, their notification obligations. As complaint precedents accumulate, they may be used to provide guidance to agencies about who they should notify and in what circumstances.

R78 Section 28 of the OIA and section 27 of the LGOIMA should provide for the Ombudsmen to hear complaints that an agency has not complied with its obligations to notify affected third parties prior to releasing their information.

Failure to properly apply the withholding grounds or balance the public interest in cases where information is released

- 11.61 We have considered whether the OIA and LGOIMA should provide a ground for complaint where someone disagrees with an agency's decision to release information and believes it should more properly have been withheld under one of the withholding grounds.⁵⁰⁵ These might be described as "reverse" freedom of information complaints. Currently the legislation only enables the Ombudsmen to review decisions to withhold information. There is no process within the OIA or LGOIMA for reviewing decisions to release information, nor did the Danks Committee propose one.
- 11.62 Under the OIA, civil or criminal proceedings may not be brought against the Crown or agencies where they have released requested official information in good faith.⁵⁰⁶ However, some other legal avenues are available to prevent or review decisions to release, including: (i) an injunction to prevent release;⁵⁰⁷ (ii) judicial review of the decision to release; or (iii) a complaint to the Ombudsmen about the release as "a matter of administration" under the Ombudsmen Act.⁵⁰⁸ These have limitations. Injunctions will be available in limited circumstances, since the Court cannot award an injunction against the Crown or its servants,⁵⁰⁹ which will encompass many of the bodies subject to the OIA. The Court may however make a declaratory order as to the rights of the parties. Also, an injunction will only be useful where the complainant is aware of the decision to release in advance – for example, if they have been consulted as an affected third party. So while an injunction is useful in the right circumstances, it will not always be a practicable or available remedy.
- 11.63 Judicial review applications take time and can be expensive. The third option, seeking review under the Ombudsmen Act, is more accessible. However this option is not made obvious within the current legislation and there is little awareness of it. In addition, it is not an option for all OIA and LGOIMA complainants, because not all OIA and LGOIMA agencies are subject to the Ombudsmen Act.⁵¹⁰ Also, the Ombudsmen Act explicitly excludes decisions of the Police⁵¹¹ and Crown legal advisers⁵¹² from its ambit. This creates an anomalous position between those who may complain under the Ombudsmen Act and those who may not.
- 11.64 Finally, it is also possible that the release of information would give rise to a breach of a third party's privacy. But the High Court has held that the complaints process under the Privacy Act 1993 is not available in respect of decisions to release under the official information legislation.⁵¹³

- 11.65 In summary, none of the current avenues of complaint provide a comprehensive review mechanism that would otherwise be available if the Ombudsmen could hear “reverse” freedom of information complaints. This contrasts with the position in Australia, where a person affected by a decision to “grant access” to information may apply to the Information Commissioner to review the decision under the federal Freedom of Information Act 1982.⁵¹⁴ Some submitters suggested this was a significant gap in our legislation. Significant loss or damage could be caused by releasing the information and the affected person or entity may feel they have no way to make their objections heard.⁵¹⁵ They may have valid reason to wish to challenge how an agency assessed the weight of the withholding grounds protecting private interests, or the way that an agency applied the public interest balancing exercise, if indeed it was carried out in a meaningful way.⁵¹⁶
- 11.66 We recognise, however, that there are good policy reasons for limiting the accountability of officials for releases of information. If officials were exposed to complaints about their decisions to release, they may be more inclined to withhold when there is any shadow of doubt, thus controverting the Act’s objective of creating a culture of transparency, openness and the progressive availability of information. The legislation will not function as it should if officials are hesitant to release information for fear of their decisions being reviewed. We do not want any complaint ground to have a chilling effect on the release of information. This would also be directly contrary to the purpose of section 48 of the OIA, which protects agencies and Ministers from legal proceedings where they release information under the Act in good faith.⁵¹⁷
- 11.67 We also note that any legal basis on which a person might complain about a decision to release could not be that the decision itself was wrong, but rather that the withholding grounds were not correctly applied. This is because the OIA does not place a legal *duty* on agencies and Ministers to withhold information, even if a withholding ground is made out. They may still choose to release it, and where this is done in good faith they cannot be subject to legal proceedings, by virtue of section 48. Because there is no *duty* to withhold, no corresponding *right* to have that information withheld can arise. Therefore the complaint cannot be on the basis that a right has been breached, and that the agency or Minister should have withheld the information. The complaint can only be on the grounds that the agency or Minister did not properly apply the withholding grounds in their decision-making process. Any complainant would therefore be asking the Ombudsman to review the decision-making process, rather than the decision itself.

- 11.68 From a practical perspective, this may mean that few complaints about release will have a directly useful outcome for the complainant. The information will already have been released, so any complaint would serve primarily to draw attention after the fact to failures in the agency's decision-making process. Nonetheless, in some cases this alone fulfils a valuable function. Agencies may hold much information about a particular person or entity – for example, commercial bodies performing contracted services. If they disagree with a decision to release some of their information, bringing a complaint enables them to comment on the decision-making process before further information is disclosed through later requests.
- 11.69 Another key justification for allowing these kinds of complaints concerns the broader operation and administration of the official information scheme. Complaints can enable agencies to assess how well they are applying the requirements of the OIA. The conclusions reached can serve to improve that process by providing better guidance, both to the original decision-makers and across the government sector. As the recipient body of the complaints, the Ombudsmen would be better placed to monitor the decision-making process, and if necessary draw attention to an agency's failure to give adequate weight to withholding grounds, or shortcomings in its public interest balancing exercise. This acts as an incentive for agencies to carry out that process thoroughly and carefully, but without exposing them to legal proceedings.
- 11.70 In the long term, improved decision-making helps ensure the integrity of the official information legislation, thereby improving citizens' trust in the transparency and accountability of government. From the complainant's perspective, the ability to complain may also benefit them directly by serving a cathartic function. They are able to air their concerns where they feel their interests have been adversely affected, even if doing so cannot reverse any damage directly resulting from the release of the information. Moreover they may succeed in improving the agency's processes in the future. For all these reasons we support the concept of the "reverse complaint".

Reverse freedom of information complaints: options for reform

- 11.71 In the issues paper we canvassed two options for dealing with complaints about release.⁵¹⁸ The first option was to continue to deal with these complaints under the Ombudsmen Act, but to extend that Act, for the purpose of official information complaints, to those bodies covered by the OIA but not by the Ombudsmen Act, including Ministers.⁵¹⁹
- 11.72 The second option was to extend the Ombudsmen's review functions to enable them to hear reverse freedom of information complaints under the OIA.

- 11.73 We received few submissions expressing a clear preference either way, but we prefer the second option. Earlier in this chapter we recommend that the procedure for dealing with Part 3/4 complaints, which largely occurs under the Ombudsmen Act, be brought under the Ombudsmen's OIA jurisdiction. We think complaints about decisions to release should also be dealt with under the OIA. These are essentially the "flipside" of complaints about decisions to withhold, so should be dealt with under the same piece of legislation. This is also consistent with creating a comprehensive, independent review function for the Ombudsmen under the OIA and LGOIMA, within which they are able to address most complaints that arise in relation to official information requests.⁵²⁰
- 11.74 Extending the Ombudsmen's functions in this way is subject to an important qualification – namely, that the Ombudsmen can only hear complaints where the information in question has already been released. There may be a scenario where a third party is notified of an intention to release their information where it would otherwise be withheld, for example on commercial grounds. The third party may have the right to be heard by the agency and, if they wish, to seek an injunction or judicial review within a limited time period. They should not be able to pre-emptively complain to the Ombudsmen, in the period between notification and release, that the withholding grounds or the public interest exercise have not been properly carried out. This could be used to exploit the Ombudsmen's review function and to introduce uncertainty and delay into the process. The reverse right of complaint should be confined to cases where the information has already been released.

R79 Section 28 of the OIA and section 27 of the LGOIMA should provide for the Ombudsmen to hear complaints that an agency has not followed proper process before deciding to release information. The complaint ground should only become available after the information has been released.

THE VETO POWER

- 11.75 In the issues paper we considered whether the Ombudsmen should be given a final power of decision over the release of information. This would involve removing the existing capacity for the Governor-General by Order in Council, and local authorities by resolution at a meeting, to "veto" the Ombudsmen's recommendations to release their information, which otherwise would give rise to a public duty to release after 21 working days.

- 11.76 Most submitters were not in favour of removing the power of veto. A clear view emerged that the OIA veto is important to ensure the comity of the relationship between the Ombudsmen and the Executive. We found these arguments persuasive and do not recommend removing the Order in Council veto power under the OIA. However, we recommend that the operation of the veto in LGOIMA should be made consistent with the OIA veto: namely, that it should only be exercisable by Order in Council on the recommendation of the relevant Minister (usually, the Minister for Local Government).

History and operation of the two vetoes

- 11.77 The OIA and LGOIMA vetoes operate somewhat differently. Under the OIA, the veto is exercised by Order in Council. Therefore if an agency or Minister wishes to exercise the veto, they must effectively persuade the Executive Council to do so. In contrast, under LGOIMA, the local authority that is the subject of the recommendation can veto simply by way of resolution passed at a meeting of the authority.⁵²¹
- 11.78 Certain procedural requirements apply to the exercise of the veto under both Acts. The veto can only be exercised on the basis of the same withholding ground or reason for refusal that was originally considered by the Ombudsman.⁵²² The fact that the veto was used must be published in the *New Zealand Gazette*, stating why the Ombudsman's recommendation was overridden and giving evidence to support that decision. In addition, for the LGOIMA veto, the *Gazette* notice must include "the source and purport of any advice on which the decision is based".⁵²³
- 11.79 The veto power is, in fact, very rarely used. The Order in Council veto has never been exercised and the local authority veto has been used twice.⁵²⁴
- 11.80 We note that a potential deterrent against using the veto is found in section 32B of the OIA and section 34 of LGOIMA. These sections expressly state that the person who made the original request, which is now the subject of the veto, can apply to the High Court for the Order in Council (under the OIA) or the local authority resolution (under LGOIMA) to be reviewed.
- 11.81 The Court may make an order confirming the Order in Council or the resolution, or may make an order declaring it was beyond the powers conferred by the legislation or was otherwise wrong in law. In addition, the relevant sections provide that:
- (4) Unless the High Court is satisfied that an application brought under subsection (1) has not been reasonably or properly brought, it shall, in determining the application and irrespective of the result of the application, order that the costs of the applicant on a solicitor and client basis shall be paid by the Crown
- or, in the case of LGOIMA, "by the local authority that made the decision in respect of which the application is brought".

- 11.82 This prevents agencies from exercising the veto in the knowledge that requesters will be unable to afford to bring proceedings in judicial review. Moreover, the Crown or the local authority must fund those proceedings on a solicitor and client basis, *regardless* of whether the Court finds the veto was properly exercised or not. We suspect this is an effective deterrent against use of the veto, evidenced perhaps by the infrequency of its use.

Our recommendations for the Order in Council veto

- 11.83 In our issues paper we suggested removing the veto in the OIA in order to inject a further level of certainty and to strengthen the official information regime.⁵²⁵ We also wondered whether it serves a clear purpose, given that in that form it has never been exercised.
- 11.84 The majority of submitters believed that removing the Order in Council veto would upset the equilibrium of the official information decision-making system. A strong view emerged that the veto is important to preserve the final decision-making power and authority of the Executive, even if it is never used. Removing it might adversely affect the Ombudsmen's relationship with the Executive. Currently its very existence serves to moderate decision-making. It permits the Ombudsmen to make recommendations to release where required, but with a kind of "safety valve" for the Executive if required.
- 11.85 Accordingly, we do not recommend removing the Order in Council veto.

R80 The "veto" of an Ombudsman's recommendation by Order in Council under section 32(1)(a) of the OIA should be retained.

Our recommendations for the local authority veto

- 11.86 There is a difference between the OIA veto and the LGOIMA veto. The first is exercisable by Order in Council, and involves a different body from the body which is the subject of the recommendation. But the second is exercisable by the *same* body which is the subject of the recommendation.
- 11.87 There is a risk that this gives rise to a perception of self-interest in relation to the exercise of the LGOIMA veto, whether real or apparent. We considered whether the local authority veto should be removed altogether, but thought this went too far. It would make the Ombudsmen the final decision-maker of whether to release official information, without a right of appeal by which the local authority could contest the merits of the decision.

- 11.88 We prefer to address the possible perception of self-interest by introducing the same element of separation into the LGOIMA veto as currently exists for the OIA veto. We note that this separation has not always been present in the OIA: prior to 1987 the OIA veto was exercisable by individual Ministers with responsibility for the portfolio where requests were made, in a parallel of sorts to the existing situation under LGOIMA. In that form it was exercised seven times by individual Ministers.⁵²⁶ Then in 1987, by legislative amendment, the OIA veto power was transferred to the Executive Council, and since then it has never been used.⁵²⁷
- 11.89 Removing the veto from the hands of the body that is subject to the recommendation has proved an effective deterrent against its use under the OIA, and one which makes sense to apply to the LGOIMA as well. While there are already some safeguards against the improper use of the LGOIMA veto – for example, that the source of any advice taken by the local authority must be published in the *Gazette*, and that the local authority must pay the cost of a person's application to review the use of the veto – the separation we propose will strengthen those existing safeguards and contribute to greater public confidence.
- 11.90 If it is thought inappropriate to subject local government to a central government control in this way, it should be noted that a number of bodies of essentially local character have for many years been under the OIA, and thus subject to the Order in Council veto: district health boards, school boards of trustees, and tertiary education institutions are among them.
- 11.91 Accordingly, we have concluded that, just as in the case of central government agencies, the veto should be exercised by Order in Council in the case of local government. A local authority faced with an Ombudsmen recommendation it feels it ought not to comply with could make a resolution to that effect; and approach the relevant Minister (usually the Minister of Local Government) to recommend to the Executive Council that the power of veto be exercised. This should be done in a timely manner, to prevent local authorities stalling release inappropriately.

R81 Section 32(1) of the LGOIMA should be amended so that the “veto” of an Ombudsman’s recommendation under the LGOIMA is only exercisable by Order in Council.

THE OMBUDSMEN’S ROLE UNDER THE OIA

- 11.92 In the issues paper we looked briefly at some aspects of the Ombudsmen’s role under the OIA. For the most part we think it is functioning well, and we make only one recommendation intended to clarify the Ombudsmen’s reporting powers under the OIA.

The Ombudsmen's reporting powers

- 11.93 The Ombudsmen play a key role in the OIA and LGOIMA. As the recipient body for complaints about information requests, their recommendations are central to the effective operation of the scheme. But their ability to respond to non-compliant conduct by agencies is limited to making recommendations. The OIA or LGOIMA contain no additional tools the Ombudsmen may use to actively sanction any egregious failures to comply with the legislation.
- 11.94 We note that the majority of breaches arise from misunderstandings of the legislation or genuine mistakes, rather than from intentional acts designed to circumvent the requirements of the legislation. They may be the result of officials being unable to meet deadlines because of workload issues. Also, the fact that a decision of an agency was overturned by an Ombudsman is not necessarily indicative of impropriety. Making decisions about whether to release or withhold information requires weighing up competing and often finely-balanced interests, and it is to be expected that the Ombudsmen will from time to time find that some decisions fell on the wrong side of the line.⁵²⁸
- 11.95 But there are also cases in which an agency's approach to dealing with a request can only lead to the inference that "game playing" is involved. Steven Price says:⁵²⁹
- [T]here 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?
- 11.96 We asked in our issues paper whether the Ombudsmen should be able to use sanctions in cases of non-compliance, or should have more direct enforcement powers where their recommendations are not followed. The majority of submissions did not support this. The general view was that the most effective and efficient way to ensure agencies do not flout their official information obligations is through public scrutiny – namely, the Ombudsmen's ability to draw attention to cases of flagrant breach.
- 11.97 We agree. Increased public scrutiny accords well with the Act's purpose of encouraging public participation in the law and policy process and promoting the accountability of Ministers and officials.⁵³⁰ Conferring punishment or enforcement powers on the Ombudsmen is less reflective of this underlying purpose. The Ombudsmen also submitted that they have found public reporting to be an extremely effective tool.

- 11.98 The Ombudsmen Rules 1989 enable the Ombudsmen to publicly report on cases under the OIA or LGOIMA. They provide that the Ombudsmen may from time to time publish reports relating generally to the exercise of their functions under the Ombudsmen Act, the OIA or LGOIMA, or any particular case or cases investigated by them.⁵³¹ However, we think it would be desirable for such a statement to also appear in the OIA and LGOIMA. This is consistent with making the OIA a complete code under which investigations of complaints are carried out.

R82 A new provision in the OIA and LGOIMA should state that the Ombudsmen can report publicly on an agency's failure to comply with its statutory obligations under those Acts.

Appealing the Ombudsmen's recommendations

- 11.99 We also asked whether it was desirable to introduce an additional right to appeal the Ombudsmen's decisions, which would make the merits of their decisions subject to scrutiny and hence more open to be contested by both requesters and agencies. We were concerned to seek submitters' views on this, partly because we originally suggested that the Ombudsmen have final decision-making power by abolishing the veto power in section 32.⁵³²
- 11.100 Some submitters stated that appeal on the merits should only be available if the Ombudsmen had full and final decision-making power. The Ombudsmen submitted that introducing statutory appeal rights would sacrifice many of the advantages of the Ombudsmen model and would introduce unnecessary uncertainty and expense into the resolution of complaints about official information. We agree, and do not recommend legislating for the right to appeal the Ombudsmen's recommendations.
- 11.101 We considered, however, whether a provision in the OIA and LGOIMA should make it clear that the Ombudsman's recommendations are open to judicial review. In our view this is unnecessary. Legislating for the right to apply to the court's supervisory review jurisdiction could inadvertently distort or erode the nature of that right, which is already available without an express legislative statement.

The Ombudsmen's investigation processes

- 11.102 In our issues paper we requested submitters' views on whether there are any significant problems with the statutory processes the Ombudsmen follow when investigating a complaint.⁵³³ The majority of submissions we received (22 to 3) were happy with the existing process. We believe no statutory changes should be made. The flexible and inquisitorial nature of the processes followed by the Ombudsmen is effective for resolving official information disputes.

11.103 We note that some submissions presented concerns regarding the length of time an Ombudsman takes to complete his or her investigation and the extent to which the Ombudsmen inform or consult with the agency which is the subject of the complaint. We consider these are points the Office of the Ombudsmen may wish to take into account as part of future investigations and we refer these comments to them.

ENFORCING THE PUBLIC DUTY TO RELEASE INFORMATION

11.104 If the Ombudsmen make a recommendation to release information and the OIA or LGOIMA veto is not exercised, then on the twenty-first day following the recommendation the agency comes under a public duty to comply with that recommendation. We think that the failure to comply with the duty is, as a rule, unjustifiable – unless the agency promptly commences judicial review proceedings in respect of the recommendation.⁵³⁴ But if it does not, and simply ignores the Ombudsmen's recommendation, the OIA does not state how that public duty may be enforced.

11.105 This situation is relatively rare, because in most cases the agency would seek to have the veto exercised, or failing that might apply for judicial review of the recommendation. Assuming neither of those avenues applied and there was still a public duty, the agency would be refusing to comply with it. Nonetheless, this kind of situation has in fact occurred on at least one occasion.⁵³⁵

11.106 If that happens, enforcing the public duty is problematic. The Attorney-General may bring relator proceedings to enforce the public duty on behalf of the individual seeking the information. In practice, such proceedings are carried out by the Solicitor-General through the Crown Law Office. We asked in our issues paper whether this is an appropriate role for the Solicitor-General and a majority of submitters thought it was (16 to 10). This was also the solution the Law Commission recommended in its 1997 review of the OIA.⁵³⁶

11.107 However, leaving enforcement up to the Solicitor-General raises the spectre of a possible conflict of interest. The Ombudsmen and the Crown Law Office pointed out that in such a case the Solicitor-General may be acting against a Crown agency. This is an uncomfortable position given its usual role as the Crown's legal adviser and advocate in the courts. The Solicitor-General may previously have provided advice to the agency concerning the right to withhold the information, but now must act against it to enforce the public duty to release. This places him or her in an untenable position. Such being the case, the Attorney-General may refuse to give his or her approval to the relator proceedings, and the public duty will not be enforced.

11.108 If this happens it is not clear whether the aggrieved individual can bring proceedings on their own behalf, without the Solicitor-General acting as a party. The requester would have to argue that the failure to release the information was not just a breach of a public duty, but also amounted to an interference with his or her private *right* to have access to the information.

- 11.109 This is a somewhat murky area of the law which we believe should be clarified. Failure to comply with the public duty created by OIA and LGOIMA is as a rule unjustifiable. Where a public duty exists, the law should provide a clear path to enforce it. The agency's failure to release the information, being in breach of a duty to do so, may seriously affect the requester by depriving them of a valid right or entitlement to access specified information. The legislation should make it clear that they are able to approach the court for a declaration of their rights on the issue. We note that relief might be limited by the common law rule that an injunction for mandamus (directing the agency to release the information) cannot be sought against the Crown or its servants, which would probably encompass many of the decision-makers under the OIA and LGOIMA.
- 11.110 We further recommend that a solicitor-client costs indemnity provision, similar to that which applies where a complainant wishes to challenge an Order in Council or local authority veto, could be used here to distribute the balance of power more evenly. If an agency breaches its public duty, the Crown would have to cover the cost of the complainant bringing court proceedings, as long as the proceedings were reasonably and properly brought. This means that an agency could, if it chose, maintain its stance and insist on withholding the information, but at a financial cost to the Crown. It would also be at a political cost to the agency, if the Ombudsmen chose to draw public attention to the breach of the duty by way of their reporting powers.

R83 A new provision in the OIA and LGOIMA should state that, where an agency is under a public duty to release specified official or other information, the requester may bring court proceedings for such relief as is available on his or her own behalf.

R84 A new provision in the OIA and LGOIMA should state that the requester's costs of bringing such proceedings should be met by the Crown on a solicitor-client basis, unless the court is satisfied that the proceedings have not been reasonably or properly brought.

Chapter 11 Footnotes

- 457 The rest were informally resolved in the reporting year (302) or were formally investigated but resolved without the Ombudsmen needing to form a final opinion or recommendation (202).
- 458 Office of the Ombudsmen “Report of the Ombudsmen for the year ended 30 June 2011” (Wellington, July 2011) at 33–34. In many cases where the Ombudsmen formed the opinion that the decision was wrong or unreasonable, the agency took remedial action voluntarily, so no formal recommendation was made.
- 459 Where we refer to the “local authority veto” or “LGOIMA veto” in this chapter we are referring to the veto exercisable by the various public bodies subject to the LGOIMA. Where we refer to the “Order in Council veto” or the “OIA veto” we are referring to the veto exercisable by the Executive Council under the OIA.
- 460 OIA, s 22; LGOIMA, s 21.
- 461 See OIA, s 35(1) which provides that “[i]t shall be a function of the Ombudsmen to investigate, pursuant to the Ombudsmen Act 1975, any decision made under Part 3 or Part 4 ...”. LGOIMA, s 38(1).
- 462 Being a New Zealand citizen; a permanent resident of New Zealand; a person who is in New Zealand or a body corporate incorporated in, or with a place of business in, New Zealand: OIA, s 12. These restrictions do not apply to requesters under LGOIMA: s 10.
- 463 OIA, s 4; LGOIMA, s 4.
- 464 LGOIMA, ss 21–22.
- 465 LGOIMA, s 23.
- 466 See Mai Chen *Public Law Toolbox* (LexisNexis, Wellington, 2012) at [10.4.15] and Graham Taylor and Paul Roth *Access to Information* (Lexis Nexis, Wellington, 2011) at [4.31] – [4.38] for discussion of the importance of the right to reasons.
- 467 Committee on Official Information *Towards Open Government: Supplementary Report* (Government Printer, Wellington, 1981) at 76.
- 468 At 75.
- 469 Part 3 of the OIA also confirms a person’s right to: (i) a Ministry of Justice publication describing the information held by all agencies subject to the OIA (currently published in the form of the Ministry of Justice’s *Directory of Official Information*: OIA, s 21(1)); and (ii) categories of official information set out in regulations to the OIA (although no such regulations were ever made): OIA, s 21(2). We make recommendations in chapter 12 that, if accepted, would replace the *Directory of Official Information*. Therefore in this chapter we focus on sections 22 to 24 of the OIA only.
- 470 LGOIMA, s 27. Later in this chapter we suggest adding further grounds for complaint dealing with (i) time limits; (ii) transfers; (iii) failures to notify third parties of release; and (iv) failures to properly apply the withholding grounds or balance the public interest in release.
- 471 LGOIMA, s 38.
- 472 LGOIMA, s 32(1).
- 473 The privative clause in section 25 of the Ombudsmen Act 1975, which precludes review of the Ombudsmen’s decisions, does not apply to the Ombudsmen’s OIA jurisdiction: OIA, s 29(2); LGOIMA, s 28(2).
- 474 Committee on Official Information, above n 467, at 78.

- 475 I Eagles and M Taggart “Submission to the Justice and Law Reform Committee on the Official Information Amendment Bill 1986” (May 1986) at 17.
- 476 Committee on Official Information *Towards Open Government: General Report* (Government Printer, Wellington, 1980) at 10 (emphasis added).
- 477 Ian Eagles, Michael Taggart and Grant Liddell *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992) at 588.
- 478 See [11.18] above.
- 479 LGOIMA, s 31.
- 480 Under the OIA, where release would be likely to prejudice: the security or defence of New Zealand; its international relations; the interests protected by section 7 of the OIA; or the prevention, investigation or detection of offences. Under LGOIMA, where release would be likely to prejudice the prevention, investigation, or detection of offences.
- 481 See discussion of the veto power, from [11.75] below.
- 482 See Chen, above n 466, at [15.5].
- 483 Privacy Act 1993, s 6, Principle 6.
- 484 RJ Gregory (ed) *The Official Information Act: A Beginning* (New Zealand Institute of Public Administration, Wellington, 1984) at 45.
- 485 *Commissioner of Police v Ombudsman* [1985] 1 NZLR 578 (HC) at 588.
- 486 LGOIMA, s 28.
- 487 OIA, s 29(2); LGOIMA, s 28(2).
- 488 OIA, s 27; LGOIMA, s 26.
- 489 LGOIMA, s 44(1).
- 490 LGOIMA, s 44(2).
- 491 Law Commission *Review of the Official Information Act 1982* (NZLC R40, 1997) at ch 8.
- 492 OIA, s 26; LGOIMA, s 25.
- 493 For example, not all the section 6 and 9 withholding grounds apply to Part 4 requests: OIA, s 27(1).
- 494 Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC R123, 2011) at R38 and R39.
- 495 See chapter 9 at R37 and R41, and chapter 12 at R99.

496 The following organisations are subject to the OIA but are not listed in Schedule 1 of the Ombudsmen Act (and we note that they are not Crown entities under the Crown Entities Act 2004, which are subject to the Ombudsmen Act): Abortion Supervisory Committee, Armed Forces Canteen Council, Deer Industry NZ, Fiordland Marine Guardians, Fisheries Authority, Government Communications Security Bureau, NZ Council for Educational Research, NZ Government Property Corporation, NZ Kiwifruit Board, NZ Meat Board, NZ Parole Board, NZ Racing Board, NZ Security Intelligence Service, Parliamentary Commissioner for the Environment, Public Advisory Committee on Disarmament and Arms Control, Queen Elizabeth the Second National Trust, Radiation Protection Advisory Council, Remuneration Authority, Representation Commission, Reserve Bank of NZ, Sentencing Council, Survey Board of NZ, Temporary Safeguard Authorities under the Temporary Safeguard Authorities Act 1987, Waitaki Catchment Water Allocation Board, Waitangi National Trust Board, Winston Churchill Memorial Trust Board. OIA, Schedule 1, also covers “Education Authorities as defined in the Education Act 1964” but these are now deemed to be boards constituted under Part 9 of the Education Act 1989, which are Crown entities covered by the Ombudsmen Act: Education Amendment Act 1990, s 2.

Also, the following local authorities are subject to the LGOIMA but are not listed in Schedule 1 of the Ombudsmen Act: administering bodies of reserves (as defined in the Reserves Act 1977) and the Hauraki Gulf Forum (although the “Hauraki Gulf Marine Park Board” is listed in Schedule 1).

497 OIA, s 28(4), s 28(5); LGOIMA, s 27(4), s 27(5).

498 OIA, s 15(1)(a); LGOIMA, s 13(1)(a).

499 LGOIMA, s 27(4).

500 For a full list of bodies covered by the OIA or LGOIMA but not by the Ombudsmen Act, see above n 496.

501 This ambiguity is perhaps most likely to cause difficulties for requesters with urgent requests. If an agency has waited until the end of 20 working days to decide whether to release, the period of urgency may be well past. But it may have been reasonably practicable for the agency to make its decision earlier. We also address this in chapter 10 where we recommend that, where urgency is afforded to a request, the decision should be made and the information released as soon as reasonably practicable in the circumstances: see chapter 10, R56.

502 LGOIMA, s 27(5).

503 OIA, s 14; LGOIMA, s 12.

504 Law Commission, above n 491, at [189].

505 The Law Commission considered this question in the context of the release of personal information under the OIA in its Issues Paper *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC IP 17, 2010) at [11.53] – [11.58].

506 OIA, s 48; LGOIMA, s 41.

507 See for example *Veitch v New Zealand Police*, *TV Works Limited*, *Fairfax NZ Ltd* and *APN NZ Ltd* HC WN CIV-2009-485-960.

508 Ombudsmen Act 1975, s 13. See Office of the Ombudsmen “The Ombudsmen Act and the Disclosure of Information about Third Parties” (March 2006) 12(1) OQR.

509 Crown Proceedings Act 1950, s 17. The prohibition on awarding an injunction against the Crown is currently being examined by the Law Commission as part of its review of the Crown Proceedings Act. More information about the review is available at < www.lawcom.govt.nz > .

- 510 Compare OIA, Schedule 1, LGOIMA, Schedule 1 and Ombudsmen Act, Schedule 1, above n 496. Crown Ministers are also not listed in the Ombudsmen Act schedule, although the decision of a Minister could potentially be the subject of a reverse freedom of information complaint under the OIA.
- 511 Ombudsmen Act, s 13(7)(d).
- 512 Ombudsmen Act, s 13(7)(c).
- 513 See *Director of Human Rights Proceedings v Police* HC Wellington CIV-2007-409-002984, 14 August 2008.
- 514 Section 54M.
- 515 Where a person has suffered real harm, the agency in question might consider making an ex gratia payment, but we do not propose this be provided for in the legislation.
- 516 Some agencies' responses to our initial survey indicated that sometimes the public interest test is applied in a "token" fashion and that sometimes it is ignored altogether: Issues Paper at [8.5].
- 517 LGOIMA, s 41.
- 518 Issues Paper at [11.34].
- 519 See above n 496, for a list of bodies subject to the OIA but not covered by the Ombudsmen Act.
- 520 We considered the view that complaints about decisions to release more closely resemble complaints received by the Ombudsmen under their Ombudsmen Act jurisdiction – ie, complaints about an administrative decision affecting someone in a personal capacity. But ultimately we believe this is outweighed by the need for consistent treatment of these complaints which mirror those that are currently dealt with under the OIA.
- 521 LGOIMA, s 32(1).
- 522 OIA, s 32A(3); LGOIMA, s 33(3).
- 523 LGOIMA, s 33.
- 524 Issues Paper at [11.44] – [11.69]. Although in its previous form, when the OIA veto was exercised by individual Ministers, it was used seven times: see below, n 526.
- 525 Issues Paper at [11.64].
- 526 For case notes which set out the text of the vetoes see Office of the Ombudsmen *Case Notes* (5th Compendium, 1983, case numbers 13 & 69, 28, 58 & 60) at 34, 44, 80; (6th Compendium, 1984, case numbers 23, 228) at 75, 118; (7th Compendium, 1986, case number 730) at 250; (8th Compendium, 1987, case numbers 879 & 907) at 73.
- 527 Official Information Amendment Act 1987, s 18.
- 528 Issues Paper at [11.78].
- 529 Steven Price "Should agencies be punished for breaching the OIA?" (20 March 2009) Media Law Journal < www.medialawjournal.co.nz > .
- 530 OIA, s 4; LGOIMA, s 4.
- 531 Ombudsmen Rules 1989, r 2.
- 532 Issues Paper at [11.70]. We now recommend the Order in Council veto in section 32(1) of the OIA be retained: see R80.
- 533 At [11.43].

534 There have been two reported cases in which agencies have sought judicial review of an Ombudsman's recommendation to release information: *Commissioner of Police v Ombudsmen* [1985] 1 NZLR 578 and *Television New Zealand Limited v Ombudsmen* [1992] 1 NZLR 106. See Law Commission, above n 491, at [367] – [368].

535 For example, a 1994 case concerned a failure by a school principal to release information requested by a group of parents. The Ombudsmen invited the Solicitor-General to enforce the public duty imposed on the principal by section 32 of the Act. The proceedings were eventually settled after the principal agreed to release the information: Office of the Ombudsmen *Report of the Ombudsmen for the year ended 30 June 1995* AJHR A3 at 40. In 1995 the Ombudsmen also reported that three Crown Health Enterprises had ignored recommendations to release certain salary information. The Solicitor-General issued proceedings to enforce the public duty and all three CHEs later released the information.

536 Law Commission, above n 491, at [382].



Chapter 12

Proactive release and publication

INTRODUCTION

- 12.1 The question we examine in this chapter is whether the official information legislation should require public bodies to proactively release official information. This could be through:
- (a) publication to the world (usually via the internet) at the agency's discretion, without the need for any request from the public;
 - (b) publication to the world in response to public demand, including individual requests for that information to be published (rather than a request for the information to be provided exclusively to the requester);⁵³⁷ or
 - (c) publication to the world of the same (or edited) information that is released to an individual requester.
- 12.2 There is an important conceptual difference between (i) reactive release to a single individual in response to a request; and (ii) proactive release at the instigation of the responsible public body. The current structure of the official information legislation is largely predicated on meeting specific requests for information on a reactive basis.
- 12.3 The Commission has no doubt that proactive release is a highly desirable development and much to be encouraged. The question is how this mechanism should be reflected in the legislation, to what extent it should be mandated, and what supporting provisions would be needed to move to a model that embraces both reactive and proactive release. 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 requests from members of the public.

12.4 Although many agencies now proactively publish a wide range of official information on their websites, there is no legislative requirement to deploy this channel for releasing official information. Currently, any obligation to publish official information is limited to specific types or categories of information.⁵³⁸

12.5 In a recent opinion,⁵³⁹ the Chief Ombudsman noted that proactive release has a role to play in realising the intent of the official information legislation to make more information available to the public and that this is consistent with what was originally envisaged by the Danks Committee.⁵⁴⁰

But the approach we recommend also requires a means of systematically enlarging the range and scope of information available to the public. ...

[A]n independent Information Authority would be the instrument for the progressive enlargement of the area of information which is to be publicly available, not only through the issue of guidelines and the audit of progress, but also through recommendations, to be put into effect by government decisions, identifying additional categories of material which should be released or accessible after due consideration of claims for exemption.

12.6 The Information Authority played a significant role in the establishment of the official information legislation;⁵⁴¹ however its role was not a permanent one and its authority expired in 1988. In this chapter we consider the case for a legislative mandate for systematic proactive release by agencies, in light of the legislation's purpose and in light of technological advances since 1982.

OPEN GOVERNMENT AND OPEN DATA ⁵⁴²

12.7 A noticeable trend in freedom of information and open government internationally is the growing prominence of the open data movement: the concept of making data publicly available for use and re-use by the public in different forms and applications.⁵⁴³

If people put data on the web – government data, scientific data, community data, whatever it is – it will be used by other people to do wonderful things in ways they would never have imagined. The cry of 'raw data now' has spread around the world.

12.8 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 Economist* reports that there is a cultural change in what people expect from government, fuelled by the experience of shopping on the internet and having real-time access to financial information.⁵⁴⁴ Technology has also provided the opportunity to leverage the value of government information:⁵⁴⁵

“Government as platform” means exposing the core information that makes government function, information that is of tremendous economic value to society. Government information – patents, corporate filings, agriculture research, maps, weather, medical research – is the raw material of innovation, creating a wealth of business opportunities that drive our economy forward. Government information is a form of infrastructure, no less important to our modern life than our roads, electrical grid, or water systems.

- 12.9 The internet enables public sector information to be made available to a large 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. For example, a government agency generated dataset can be combined with data from another source in a “mash up” that shows the relationships between the two sets of data:⁵⁴⁶

We are only starting to understand the ways in which governments can leverage data to improve performance. But we know that the potential for using mashups, crowdsourcing, analytics and other techniques to transform data into meaningful knowledge – for average citizens, government managers, legislators, business owners and other stakeholders – is tremendous.

- 12.10 Another factor in the popularity of this new model is the impact of the Global Financial Crisis on economic conditions. Governments have recognised that public data released to the public for re-use can provide a useful resource and potentially boost economic performance through the contributions of small data handlers.⁵⁴⁷ As both central and local governments are forced to do more for less cost, these conditions incentivise greater participation and consultation between public agencies and citizens, the community, education and research, and the private sector. While there are agency costs associated with releasing data, research indicates that these are generally outweighed by the benefits:⁵⁴⁸

Different approaches to estimating the value of [public sector information] produce very different answers, but the common feature of these and many other studies is that the economic and social value can be high, often far outweighing the costs of collection and dissemination.

- 12.11 Proponents of open government also insist that providing more information can make government more efficient. *The Economist* reports that information disclosure can prove more effective and cheaper than traditional regulation, and may relieve pressure on government to provide services.⁵⁴⁹ For example, the development of applications and websites by the private sector and the community can help to meet citizen needs for information that otherwise might have been seen as the role of government to provide.

12.12 Transparency and opening up government data have become themes in public sector reform, driven by the goal of greater efficiency in the state sector, releasing the potential of data stores held within the state sector thereby creating economic opportunities, and enhancing the accountability of the state sector for service delivery.⁵⁵⁰ Open data is seen as contributing both towards transparency and accountability in government, as well as economic and service delivery transformation.

12.13 Rationalising the various factors at play is complex. The evolution of government information policy has been described as involving two main strands of thinking:⁵⁵¹

One is that government should be more open; and this has given rise to freedom of information (FOI) regimes. This is about providing access to information. The other strand is that public sector information (PSI) can and should be re-used where benefits can accrue. FOI and PSI together are the fundamental building blocks of government in the Internet age.

12.14 Another article analyses the ambiguities of the term “open government data”, identifying two strands with different underlying purposes: the first relating to politically important or “accountable” disclosures (described as “(open government) data”), the second relating to politically neutral or unimportant but nevertheless useful disclosures (described as “open (government data)”), while accepting the potential for intersection between the two:⁵⁵²

This new ambiguity might be helpful: A government could commit to an open data program for economic reasons – creating, say, a new online clearinghouse for public contracting opportunities – only to discover that the same systems make it easier for observers to document and rectify corruption. In any case, there is much to like about economic opportunity, innovation, and efficiency, and a convenient label could be a good way of promoting them all. Also, the new breadth of “open government” creates a natural cognitive association between civic accountability and the Internet, which may be for the best. Transparency policies that embrace the Internet are often a great deal more effective than those that do not. (It might even make sense to say that if a government is not transparent through the Internet, it is effectively not transparent at all.)

12.15 There has also been some debate about the extent to which the open data agenda is dominated by corporate, economic or service oriented goals, and the extent to which open data can also serve the goals of democratic accountability, with consensus emerging that open data has the potential to serve a range of purposes:⁵⁵³

a good Open Data strategy should support Open Government goals, by making structured data that relates to accountability and ethics like spending data, contracts, staff salaries, elections, political contributions, program effectiveness...etc. available in machine- and human-readable formats.

- 12.16 Open government and open data have been at the heart of major policy initiatives in the United States,⁵⁵⁴ the United Kingdom and Australia. At an international level, the Open Government Partnership has been established, described as a sort of support group for countries willing to operate in a more open and participatory way.⁵⁵⁵ In New Zealand, Cabinet has released the *Declaration on Open and Transparent Government*, directing central public bodies to commit to releasing high value public data for re-use and inviting and encouraging other public bodies to do the same.⁵⁵⁶

THE TREND TOWARDS PROACTIVE RELEASE AND OPEN DATA

Current practice

- 12.17 Although there is no legislative requirement to do so, 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.⁵⁵⁷ Some of the advantages of proactive release as good administrative practice are outlined in an Ombudsmen editorial: reduction of the administrative effort to collate information for individual requests, and simplifying the review process for requested material which is protected by ensuring that material that can be released is publicly available.⁵⁵⁸

- 12.18 One respondent to our survey 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.

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 As noted by this respondent, it is becoming more common for Cabinet papers and ministerial briefing papers to be published on departmental websites.⁵⁵⁹ The Cabinet Manual provides for proactive release of Cabinet material in accordance with key principles including:⁵⁶⁰

- (a) the approval of Ministers;
- (b) assessment of the material in light of the principles of the OIA, the Privacy Act 1993 and the Security in the Government Sector manual;
- (c) publication of background papers and relevant minutes; and
- (d) following the *New Zealand Government Web Standards*.

12.20 Other examples of agencies releasing information proactively include the following:⁵⁶¹

- (a) The online Charities Register provides information about over 25,000 registered charities including details about areas of operation, sector categories, activities, beneficiaries, financial position and performance, officers, and charities they are associated with.⁵⁶²
- (b) The Ministry for the Environment has released the Land Cover Database, a digital map of the land surface of the country that can be used to make different maps.⁵⁶³
- (c) Geospatial imagery was released by Land Information New Zealand and film footage was released by Civil Defence after the Christchurch earthquake.⁵⁶⁴
- (d) Information about social services funded by the government (including data from the Ministries of Social Development, Justice, Health and Education and Te Puni Kōkiri) has been released showing where the money goes (by region), who gets the money and how it is spent.⁵⁶⁵
- (e) The National Institute of Water & Atmospheric Research (NIWA) makes access to the National Climate Database, and some other databases, available through its website.⁵⁶⁶
- (f) The New Zealand Transport Agency releases real-time traffic data without cost to others so that they can create useful applications using that data.⁵⁶⁷
- (g) All recent reports by the Education Review Office on individual schools and early childhood services can be found on the Office's website.⁵⁶⁸
- (h) Horizons Regional Council has launched a Water Quality Matters website that provides access to data on water quality in the 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.⁵⁶⁹

Expansion of proactive release and open government data

12.21 While a significant amount of public sector information is being made available proactively, 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.⁵⁷⁰ The issue also arises in reports to government on matters relating to the public sector.

Policy proposals

Report of Expenditure on Policy Advice

12.22 The committee reviewing public expenditure on policy advice has recommended greater proactive release of Cabinet and supporting material as follows:⁵⁷¹

- (a) Cabinet should direct agencies to publish background data, analysis, research findings and models routinely and under appropriate procedures, particularly on cross-portfolio and/or long term issues and big questions;⁵⁷²
- (b) Cabinet should develop a policy that makes decisions about disclosure under the OIA routinely at the time that papers are prepared and reduces the costs of making disclosure decisions later, including:⁵⁷³
 - a directive to agencies to routinely release to the public all material provided to requesters under the OIA;
 - a directive to agencies to routinely release briefing papers and supporting documents under the OIA after a Cabinet decision has been made;⁵⁷⁴ and
 - the routine release of Cabinet papers after a Cabinet decision has been made.

Better Public Services

- 12.23 The report of the Better Public Services Advisory Group noted that information on state services in New Zealand is not made available routinely, that citizens and businesses find government confusing and costly to deal with, and that a powerful driver to improve the quality and cost of public services is to make more information available to citizens.⁵⁷⁵ The report recommended that chief executives be required to proactively make plain English information available to citizens and businesses and actively seek feedback on services.⁵⁷⁶
- 12.24 The resulting Better Public Services programme has identified 10 result areas, the tenth being that “New Zealanders can complete their transactions with the Government easily in the digital environment.” To deliver on the Government’s expectations, the programme is seeking to implement a number of changes in the public sector including “greater responsiveness to the needs and expectations of New Zealanders, and a willingness to do things differently, including more open and transparent government through access to more information.”⁵⁷⁷

Open government data

- 12.25 Deputy Prime Minister and Minister of Finance, Hon Bill English has observed that:⁵⁷⁸

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.

- 12.26 Significant work has been undertaken under the Open Government Information and Data Work Programme to open up government held data and information to the wider public including the business community.⁵⁷⁹ Completed projects include the release of the *Declaration on Open and Transparent Government*; the New Zealand Data and Information Management Principles; the website www.data.govt.nz; and the New Zealand Government Open Access and Licensing Framework (NZGOAL) (each described below). Current projects include the development of policy and guidance to bring into effect Direction Two of the “Directions and Priorities for Government ICT”: supporting open and transparent government.⁵⁸⁰ A key focus of the programme has been the opening up of geospatial data which is seen as contributing towards significant productivity gains for New Zealand.⁵⁸¹
- 12.27 These developments have been welcomed by the open data movement in New Zealand which is represented by Open New Zealand, a group that has organised an Open Government Data Day in Wellington in June 2011 (attended by 150 people) and hosts open government tools on its website such as consultations.org.nz (to track and discuss council policies and consultation documents) and the open data catalogue (a directory of government and council data sources).⁵⁸²
- 12.28 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, Statsphere is a website that helps people to find New Zealand official statistics;⁵⁸³ open-access research documents produced in New Zealand universities, polytechnics and other research institutions can be accessed via the Kiwi Research Information Service.⁵⁸⁴
- 12.29 The www.data.govt.nz website launched in November 2009, and is a directory of New Zealand government datasets. Agencies provide listings of their publicly released datasets and people are invited to suggest unreleased government datasets that they would like to see made more available.⁵⁸⁵ This online data directory currently lists 1821 datasets from different government agencies across the public sector including geospatial and environmental, financial accountability, and demographic data.⁵⁸⁶
- 12.30 Demand is also growing for high value information held by local government. Many local authorities are considering business cases for developing information databases for public access on a user-pays basis, although some have decided to make information freely available where there is insufficient demand to make a user-pays approach financially viable.⁵⁸⁷

Cabinet Declaration on Open and Transparent Government

- 12.31 On 8 August 2011, the Cabinet released the *Declaration on Open and Transparent Government*.⁵⁸⁸ Nathan Guy as Minister of Internal Affairs said in a press release:⁵⁸⁹

These steps build on New Zealand’s long history of openness and recognise that this data effectively belongs to the public.

12.32 The first part of the *Declaration* reads:

Building on New Zealand's democratic tradition, the government commits to actively releasing high value public data.⁵⁹⁰

The government holds data on behalf of the New Zealand public. We release it to enable the private and community sectors to use it to grow the economy, strengthen our social and cultural fabric, and sustain our environment. We release it to encourage business and community involvement in government decision-making.

Through this commitment New Zealand citizens and businesses can expect a more efficient and accountable public sector, more services tailored to their needs, and a greater level of participation in shaping government decisions.

12.33 Cabinet has directed all departments⁵⁹¹ to commit to releasing high value public data actively for re-use, in accordance with the *Declaration*, the New Zealand Data and Information Management Principles, and the NZGOAL review and release process. The Cabinet paper notes that what is proposed is a culture shift within government: that agencies actively move towards making public data available for re-use, based on tests of high value⁵⁹² and user demand.⁵⁹³

12.34 Fundamentally, agencies will be required to develop a methodology for incorporating regular releases of data into their core business planning and operations. While agencies will have to meet a timeline for committing to this and reporting on progress, they will have autonomy to decide how they incorporate data releases into their core business activities. The Cabinet paper recognises that some agencies will be able to undertake this work within baselines, while for others, additional funding may be needed.

12.35 The benefits of releasing high value public data are expected to include:⁵⁹⁴

- (a) Stimulating economic growth and increasing the value of government data through the development of new products, services and businesses;
- (b) Assisting educational, research and scientific communities to build on existing data to gain knowledge and expertise and use it for new purposes, and increase the value derived from publicly funded research data;
- (c) Increasing the quality of government policy development through external insights on and expert analysis of supporting data;
- (d) Better aligning central, regional and local government programmes and business initiatives through a coordinated national view of government data;
- (e) Creating more effective government through more external engagement;
- (f) Strengthening trust in government by increasing transparency and allowing external scrutiny; and
- (g) Reducing OIA requests through active release of government data.

New Zealand Data and Information Management Principles (NZDIMP)

- 12.36 The Cabinet also approved the New Zealand Data and Information Management Principles.⁵⁹⁵ These principles replace the 1997 Policy Framework for Government held Information and provide that:
- (a) Government data should be released in accessible formats and licensed for re-use unless there are good reasons not to;
 - (b) Released data should be readily available and accessible through online release;
 - (c) Information should be well managed, trusted and authoritative;
 - (d) Data should be free, or where fees are necessary, reasonably priced;
 - (e) Personal and classified data or information will remain protected.

New Zealand Government Open Access and Licensing Framework (NZGOAL)

- 12.37 Another key initiative has been the development of the New Zealand Government Open Access and Licensing framework (NZGOAL) released in August 2010.⁵⁹⁶ NZGOAL establishes a preferred framework for the public release of copyright and non-copyright information held by state services agencies.⁵⁹⁷ 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.⁵⁹⁸ The purpose is to realise the potential for individuals and organisations of the wealth of information locked away in state agencies, including copyright works such as geospatial datasets and commissioned research reports, as well as non-copyright material.
- 12.38 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.
- 12.39 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.⁵⁹⁹

Other jurisdictions

- 12.40 There has also been significant activity overseas in the area of proactive release of public sector information, both at international and domestic levels. We outlined these developments in some detail in the issues paper.⁶⁰⁰ These include the idea of publication schemes in the United Kingdom and Australia, where public authorities are required to adopt a scheme for the publication of information by that authority, as well as the concept of disclosure logs that provide online access to information released in response to specific requests, so that it can be made available to a wider audience. 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.
- 12.41 Like New Zealand, these countries have also embarked on open government initiatives such as initiatives to release more government data. There has also been activity in promoting open local government in overseas countries.⁶⁰¹
- 12.42 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*.⁶⁰²
- 12.43 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 we risk falling behind.

REFORM: JUSTIFICATION, IMPACTS AND OPTIONS

Justification for a legislative provision

- 12.44 We strongly believe that it is desirable for agencies progressively to take steps to proactively release official information where appropriate. Our considered view is that the official information legislation, as the central legislation promoting freedom of information, should include a clear statement about the use of proactive release as a disclosure method. The official information legislation is our preferred vehicle for expressing the concept of proactive release in legislative terms. It would ensure that proactive release serves the broadest range of purposes for accessing and releasing public information. The official information legislation does not create any conditions on disclosure based on the purpose for which the information is sought and is therefore a suitable legislative framework for proactive release.
- 12.45 This is in line with the purpose of the legislation to make official information more freely available. Legislating for proactive release would further strengthen the central pillars of the official information legislation such as the principle of availability⁶⁰³ and the purpose of progressively increasing the availability of official information to the people of New Zealand.⁶⁰⁴
- 12.46 It is also congruent with the objectives of both the *Declaration on Open and Transparent Government* and NZGOAL. A legislative obligation would provide a legislative push and a statutory mandate for the open government agenda to ensure that it reaches its potential. A civil servant interviewed for a study of the UK open data experiences said that:⁶⁰⁵
- There's no legal obligation to publish open data, and until then it's not going to happen uniformly or successfully. Until that happens, we won't see the real benefits. That's where we should be focussing.
- 12.47 Given the broad purpose of the legislation, it would seem odd if it continues to be structured primarily around individual requests as the key release mechanism, leaving proactive release to be dealt with solely at a policy level. While proactive release could be dealt with primarily as a matter of government policy without being specifically addressed in the official information legislation, we believe that this would be a missed opportunity. If the legislation lags behind government policy, there is the potential for confusion as to expectations.
- 12.48 Expressly bringing proactive release under the official information legislation would provide a more comprehensive framework as it would help both public agencies, and members of the public, to understand the connections and distinctions between the two disclosure methods. Some of these issues we discuss later in this chapter. An integrated legislative framework could also provide consistent oversight of agency practice in this area.

- 12.49 The openness of government information, subject to appropriate protections, is a highly relevant contextual cornerstone for the various cross-government information strategies such as the Digital Continuity Action Plan⁶⁰⁶ and the Justice Sector Information Strategy.⁶⁰⁷ An explicit proactive release provision would therefore be of value as a linkage between information policy and the official information framework.
- 12.50 We note the trend in overseas jurisdictions for proactive release to be included as a disclosure method in freedom of information legislation. There is a variety of proactive release provisions ranging from publication schemes⁶⁰⁸ to broader provisions authorising proactive release.⁶⁰⁹ A study of open data policies in the United Kingdom concluded that open data and its objectives should be addressed as a part of the freedom of information continuum.⁶¹⁰
- 12.51 Finally, one of the suggested indicators for measuring government openness is whether officials have a legal obligation to proactively publish information and documents.⁶¹¹ An express legislative provision would therefore meet this aspect of good legislative design to promote open government.

Potential impacts of reform

- 12.52 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 they were unaware existed. 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.
- 12.53 Proactive release may also help to reduce some of the difficulty associated with “due particularity” and fishing requests as greater proactive release of official information may help to crystallise for requesters any specific additional information they are seeking and provide a framework for these requests.⁶¹² The strategy, management and decision-making processes involved in proactive release may also provide a clearer framework for dealing with requests. If the issues relating to withholding versus release (including inter-agency consultation) have been assessed and canvassed within agencies at the point of proactive release, the subsequent process for handling requests should be clearer and facilitate more streamlined decision-making.⁶¹³

- 12.54 Yet, while proactive release may be a means of reducing the administrative burden on agencies responding to requests for official information, it is clear that proactive release could never remove the workload associated with reactive release entirely. While it may well be reasonable to expect many reports, Cabinet papers and discussion documents to be published proactively, this will certainly not be all the 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. So the traditional process of requesting under the OIA and LGOIMA will always constitute a significant activity.
- 12.55 Proactive release can lead to supplementary requests for background information and for information that has been withheld from proactively released documents.⁶¹⁴ And, particularly for a small agency, the requirement to proactively release large quantities of information carries its own not insubstantial compliance costs. 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.⁶¹⁵
- 12.56 In our assessment however, there are likely to be observable improvements in the management of the official information workload through greater proactive release. We would expect routine requests for official information to be reduced, as the Acts provide that information that has been proactively released does not need to be provided separately to requesters.⁶¹⁶ Proactive release should therefore replace reactive release in relation to many cases, but still leaving others to be handled as reactive requests.⁶¹⁷
- 12.57 Using proactive release to successfully reduce the current burden of dealing with OIA requests will also depend on the larger issues of improving interaction between the disciplines of records management, information technology and data publishing, and clarifying roles and responsibilities within information management. Enabling proactive release may require some additional investment in organisational systems, planning and strategy development to the extent that current systems are suboptimal. Resourcing in these areas however, could be expected to reduce some of the burden currently falling on senior staff in responding to individual requests for the reasons outlined above.
- 12.58 Proactive release will give rise to ancillary issues and challenges for agencies such as helping individuals to find relevant information across multiple websites through indexing and search tools. Another challenge is ensuring that the information released is understandable and readily useable by the public (in terms of the quality of the content of the information, associated metadata, and the format of the information).⁶¹⁸ In addition, are the challenges of ensuring that information published on the web is accessible to everyone, including people with disabilities.⁶¹⁹ Further policy work assisting agencies to assess their information and data holdings and to make and be accountable for release assessments will be needed.⁶²⁰ These issues will require education and guidance.

Legislative options

- 12.59 We have no doubt that proactive release is the way of the future. We have noted the initiatives already in place and the progress already being made. The question is how the shift towards proactive release should now be reflected in the official information legislation. The principal options are:
- (a) Including a level of prescription as to what information agencies should release proactively; or
 - (b) A more general “best efforts” type of provision that would require agencies to take what steps they can to proactively release official information, tailored to departmental circumstances; or
 - (c) A publication scheme approach, where agencies list the type of information that they will proactively release.
- 12.60 In preference to a provision mandating proactive release in any particular way, we favour the second option, a statutory provision that would place a duty on agencies to take all reasonably practicable steps to proactively make information publicly available, tailored to departmental circumstances. Although this approach would place an obligation on agencies to develop a release strategy, agencies would retain the discretion to determine the priorities for proactive release, taking into account matters such as the type of information held by the agency and the public interest in it, the resources of that agency, and any relevant government policy such as the *Declaration on Open and Transparent Government* which directs, invites or encourages the agency to release information. A duty to take reasonable steps would allow agencies the flexibility to develop their own proactive release strategy that is particular to the agency’s role, functions and resources. Guidance in this area will also be needed, as we discuss further below.
- 12.61 While a legislative duty as to proactive release was supported by some submitters on the basis that this is the obvious next step in the evolution of freedom of information and open government, and as being preferable to more bureaucratic approaches, the majority of submissions from agencies that would be subject to the duty did not endorse this proposal in the issues paper.⁶²¹ There were concerns about whether this sort of provision is necessary to encourage greater proactive release, the financial implications for agencies and how such a provision might be enforced. The proposal did receive support however from submitters representing requesters and freedom of information interests such as the media.

- 12.62 We have noted that proactive release 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. We have also noted that it aligns with current government policy as expressed in the *Declaration on Open and Transparent Government* and NZGOAL. The Better Public Services Advisory Group Report noted that the government’s commitment to releasing high value public data as reflected in the Declaration “is a good start that can be built from.”⁶²² A positive duty to take a planned and systematic approach towards proactive release, would, in our assessment, fit this objective to build on and support the government’s demonstrated commitment to the release of public sector information.
- 12.63 Although the proposed statutory provision to take all reasonably practicable steps towards proactive release is not a particularly strong one as it does not mandate any particular requirements, we think it strikes the appropriate balance between government and public expectations that agencies will progressively release useful official information, on the one hand, and allowing agencies the flexibility and autonomy to create their own proactive release strategies as priorities, resources and other circumstances allow, on the other hand. We also believe that agencies will be best placed to assess the value of the information they hold, to assess public demand for it and to prioritise proactive release accordingly.
- 12.64 We further recommend that agencies include proactive release strategies and progress reporting in their annual accountability documents (i.e. Statement of Intent, Annual Report or equivalent). This aligns with the *Declaration on Open and Transparent Government* which asks agencies to report regularly to their Ministers on their progress in releasing high value public data for re-use.

R85 A new provision in the OIA and LGOIMA should place a duty on agencies to take all reasonably practicable steps to proactively make official information publicly available, taking into account matters such as the type of information held by the agency and the public interest in it, the agency’s resources and any relevant government policy.

R86 Agencies should include proactive release strategies and progress reports in their annual accountability documents.

Which agencies should be subject to a proactive release duty?

- 12.65 One threshold question is which agencies should be subject to a proactive release duty. We see the policy choice in relation to legislative coverage as being between:
- (a) An umbrella provision that would apply to all agencies within the legislation's ambit; or
 - (b) A more staged approach with a provision targeted to some key agencies initially, with a view to expanding coverage to other agencies at some future point.
- 12.66 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. In the issues paper we were inclined to think that the duty should be confined to Departments, Crown entities and local authorities in Part 1 of the first schedule of LGOIMA to begin with.⁶²³ Some submitters agreed with this, although a smaller number thought that the same rules should apply to all. It was suggested that it may be easier for small agencies to comply and important that they do so where they play an important role in their communities (for example, school boards).
- 12.67 The new provision we recommend is a flexible one, so that each agency will be able to develop its own reasonable standard of release, rather than having to meet an externally imposed requirement. This means that some larger central agencies will be required to take meaningful steps to implement a proactive release strategy, in light of the government directive, while some smaller agencies such as school boards may not have to do much at all in present circumstances.
- 12.68 An umbrella provision would essentially provide a statement of principle as to the desirability of proactive release, which agencies could implement as their particular circumstances allow. It would send a clear signal to all public agencies about the expectation that proactive release will be increasingly used as a channel to release official information and encourage agencies to do what they can to improve the availability of official information in this way.
- 12.69 In legislative terms, an umbrella provision may be less complex than differentiating between agencies under a staged approach, as it would be clear that the legislation applies to all agencies without carve-outs, although the strength of the obligation may vary depending on the circumstances of the particular agency and the information they hold. An umbrella provision would also ensure that there are no gaps in coverage between the official information legislation as it relates to proactive release and the *Declaration on Open and Transparent Government* or NZGOAL. An additional factor that supports an umbrella provision is ensuring that New Zealand does not fall behind comparable overseas jurisdictions that have opted to introduce mandatory proactive release requirements.

- 12.70 We are now persuaded that an umbrella provision that places a proactive release duty on all agencies is a principled basis on which to introduce the duty. We consider the provision that we recommend is sufficiently flexible to take account of agency concerns that it could impose an undue administrative burden.
- 12.71 Should there be a high level of agency concern, one option would be to defer the provision coming into force for a period of six or 12 months. This would allow agencies a lead time to plan for the implementation of the new requirement. It would also allow the oversight agency a period of time to explain the provision to agencies and provide support to agencies in the implementation of the new requirement.
- 12.72 Any deferment of the new provision taking effect should only be in relation to particular types of agency where such a deferment is necessary. A general deferment is not required given that government departments have now reported on their adoption of the *Declaration on Open and Transparent Government* as directed by the Cabinet.⁶²⁴

R87 The new statutory duty to proactively release information should apply to all agencies that are subject to the OIA and LGOIMA.

Contingent measures

- 12.73 A duty to take reasonable steps to proactively release official information may in the end not work as well as we hope. In that case it may be necessary to resort to stronger legislative compulsion of some kind. In the issues paper, we asked what contingent provision should be made in the legislation in case the “reasonably practicable steps” provision proves inadequate.⁶²⁵ One option would be to require review of the new provision after a period of, say, three years with a view to seeing whether stronger mandatory requirements should be inserted.
- 12.74 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.⁶²⁶ This way, if ever circumstances arise making the public availability of certain specific items of information strongly desirable, the matter could be attended to by creating, and adding to, a list in regulations.
- 12.75 We favour the option of a statutory review in the first instance. This was also the most widely supported option amongst submitters, with no-one supporting a regulation making power.

- 12.76 A key advantage of a review is that this option would have the flexibility to look at agency progress in using proactive release in terms of both the official information legislation and the *Declaration on Open and Transparent Government*. The review could include consideration of the uptake and impact of the *Declaration* amongst agencies, the general effectiveness of the new legislative requirement to take all reasonable steps to proactively release official information, whether the legislative requirement has worked to improve levels of proactive release, and, if not, whether more stringent mandatory disclosure provisions are required.
- 12.77 The review should be undertaken by the oversight office (discussed in chapter 13) in the exercise of its review function.

R88 The new statutory duty to proactively release information should be reviewed three years after it comes into force.

Publication schemes and disclosure logs

- 12.78 One of the policy options would be 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. In the issues paper we asked whether agencies should be required to have explicit publication schemes for the information they hold⁶²⁷ as they do in other jurisdictions such as the United Kingdom. In Australia, the Information Publication Scheme (IPS) began on 1 May 2011 and requires government agencies to publish an agency plan, publish specified categories of information and consider proactively publishing other government information.⁶²⁸
- 12.79 There was very little support for mandatory publication schemes among submitters. We too 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 United Kingdom.⁶²⁹ There we understand that different departments have taken different approaches, to the point that the Information Commissioner's Office has mandated a standard type of scheme for all agencies. So our present position is not to support the idea of a publication scheme. However this is an issue that could be reconsidered at the time of the recommended three year statutory review.
- 12.80 A number of overseas jurisdictions including Australia require agencies to keep "disclosure logs" showing what items of information they have released in response to requests. This then enables the general public to know that the information is available to be disclosed and how they might obtain it; in some cases the "log" provides a direct link to the information.

- 12.81 While not inclined to propose a requirement for disclosure logs as a mandatory requirement for New Zealand, we asked for the view of submitters.⁶³⁰ There was almost no support for introducing such a requirement. 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. Again, we think this is a topic that could be reconsidered in the recommended three year statutory review.
- 12.82 Another option would be for disclosure logs and publication schemes to form part of an agency's proactive release strategy under the proposed duty to take reasonable steps we recommend above. For example an agency may consider establishing a process under which responses to certain requests (such as requests for datasets) are made available to the wider public. This would be consistent with the *Declaration on Open and Transparent Government*. These tools could be adopted by agencies on a voluntary basis where they are perceived to have value. We support this as a matter of good practice.
- 12.83 Wider release of official information must not be automatic however. Agencies need to exercise discretion about how much information is published. The content 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 that initiated the release should be able to ask that their request not be disclosed.

Mandatory disclosure of categories of official information

- 12.84 In addition to discretionary proactive release by public agencies, a related issue is whether the official information legislation should mandate that certain categories of information be released proactively.
- 12.85 Various statutes and regulations require public sector organisations to publish specific types of information.⁶³¹ Some 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.
- 12.86 The Local Government Act 2002 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 the LGOIMA (the part that deals with local authority meetings) also requires local authorities to make available for inspection, free of charge, agendas and associated reports circulated to local authority members for meetings, and minutes of local authority meetings.⁶³²

Directory of Official Information

- 12.87 In relation to central government, there is a requirement for the Ministry of Justice to publish a *Directory of Official Information*.⁶³³ 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 20.⁶³⁴ There would then be no need for the *Directory*.
- 12.88 When we asked about this in the issues paper, more submitters agreed than disagreed.⁶³⁵ Submitters in favour noted that it would be easier for the information to be kept up to date, it would be more accessible and consistent with how users now expect to find information, and it may result in more requests going to the correct agency in the first place and therefore reducing the numbers of transferred requests.
- 12.89 The Ombudsmen agreed that the existence and location of the *Directory* is not currently well known and that the accuracy and accessibility of the information it contains is likely to improve if individual agencies are responsible for maintaining and publicising it. The Ombudsmen also saw potential in a centralised repository for the information if its profile and accessibility was boosted, possibly on the www.newzealand.govt.nz website.⁶³⁶
- 12.90 Some submissions queried the continued need for section 20. One option would be to repeal section 20 in favour of a generic proactive disclosure duty. Guidance could then cover the sorts of information covered by section 20. Our preference is to retain the section 20 requirement but create an obligation on agencies to publish their own information, in place of the current obligation on the Ministry of Justice to publish the *Directory*. This issue could be re-examined if necessary as part of the three year statutory review that we recommend.

Other rights of access

- 12.91 In addition to the *Directory*, Part 3 of each Act contains a mechanism to provide the public with rights of access to certain types of official information based on a categories approach. This mechanism is of a fairly limited and specific kind and has never been expanded through the promulgation of regulations as it might have been. The rights of access relate to:
- (a) Internal rules affecting decisions about people (subject to some of the withholding grounds);⁶³⁷ and
 - (b) Reasons for decisions affecting people (subject to some of the withholding grounds).⁶³⁸

- 12.92 In each case a request needs to be made to exercise the right of access, although the *Directory of Official Information* has been made available on the internet. The Ombudsmen, in their submission, identified the information to which there is a right of access under section 22 of the OIA⁶³⁹ as a category of information that should be released proactively rather in response to a request, noting that some agencies such as the Department of Corrections, Immigration New Zealand and Work and Income New Zealand already release their manuals and procedures proactively.

Other categories of official information

- 12.93 Beyond this, however, we do not favour legislating for further categories of information which must be proactively published. This is partly for the same reasons that we reject a categories approach to decision-making in favour of the case by case approach,⁶⁴⁰ but 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.

- 12.94 One of the agencies which submitted 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.

- 12.95 The large majority of submitters to the issues paper agreed that proactive disclosure of certain categories of information should not be required,⁶⁴¹ noting the potential burden and cost on agencies, potential risks to “free and frank advice” if information is automatically released without due consideration of relevant withholding grounds, and the range of disclosure provisions that already apply.
- 12.96 Some considered that given the trend towards proactive release, it ought to be allowed to evolve naturally, and that agencies should retain the discretion to decide what to release, both to protect information which should be withheld, but also to ensure that efforts are put into releasing information that meets the needs of users and is of interest to the public. Others suggested that this should be dealt with as a matter of guidance. The Council for Civil Liberties suggested that the Ombudsmen should maintain a list of categories of information that should be released unless there are good reasons not to, and this list should be reviewed periodically with a view to expanding it where possible.

- 12.97 We agree that guidance is the preferable approach to mandating the proactive release of particular categories of information. We think that guidance should prove a fairly powerful tool in providing examples to agencies of the sorts of information that should be eligible for proactive release and in promoting consistency in release between similar types of agency.
- 12.98 We therefore recommend the development of guidance in this area by the oversight office (discussed in chapter 13). A project should be undertaken to identify categories of information that agencies should ordinarily publish proactively. These categories will need to be targeted to different types of organisation, rather than trying to develop a “one size fits all”. The guidance should be seen as a work in progress with updates issued as additional categories are added to the guidance.

R89 Section 20 of the OIA should be amended to require every agency to publish on its own website the information specified in that section, in place of the obligation on the Ministry of Justice to publish the *Directory of Official Information*.

R90 The new statutory duty to proactively release information should not mandate particular categories of information that must be proactively released. Rather, guidance should be developed for agencies including examples of information that should be released unless there are good reasons not to. This list should be reviewed periodically with a view to expanding it where possible.

Access impact assessment / Open by default

- 12.99 An important issue is the question of agencies’ technology infrastructure and whether there are adequate incentives in place to encourage agencies to ensure that their information technology systems will support the trend towards proactive release. If the technology makes it difficult as a practical matter to release information, then this potentially reduces the effectiveness of placing a positive duty on agencies to take steps towards increased proactive release.

- 12.100 An expert on official information has suggested a requirement:⁶⁴²

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?

- 12.101 The United Kingdom government is investigating the possibility of introducing an “Open by Default” presumption for procurement of government information and communications technologies (ICT) systems.⁶⁴³ The Australian Information Commissioner has noted that practical strategies are required to ensure that public sector information is “open by default” which it is working to provide to Australian agencies.⁶⁴⁴

- 12.102 One of the implications for agencies noted in the Cabinet paper supporting the *Declaration on Open and Transparent Government* was that agencies will need to develop a methodology for incorporating regular release of data into their core business planning and operations.⁶⁴⁵ One relevant agency planning document is an information systems strategic plan (ISSP). The Data and Information Re-use Chief Executives Steering Group is to provide guidance and advice on adoption of the *Declaration* and the Data and Information Management Principles into core business activities.⁶⁴⁶ We expect that such guidance and advice will support agencies to assess their technology infrastructure and identify steps to improve systems to meet the goals of the *Declaration*.
- 12.103 We think that agency ISSPs should be provided to the oversight office that we recommend in chapter 13 so that it is informed about the state of play on this issue and the extent to which there are obstacles in agency systems to improving performance in the area of proactive release. This would put the oversight office in a position to provide advice and guidance to agencies and to report to government. We are informed that the format of agency ISSPs varies widely and that some are particularly technology-centric and do not deal with information management issues to any large extent. The oversight office may wish to encourage agencies to include an information management component to their ISSP or to provide this as a separate strategy.
- 12.104 We also note the Open Door to Innovation trial being undertaken by the Government ICT Supply Management Office within the Department of Internal Affairs, which aims to engage with suppliers of information and communication technologies (ICT) to government in order to improve ICT investment and management.⁶⁴⁷ This may provide an opportunity to encourage innovation in ICT that supports agency obligations to maintain and release information and data under the official information legislation and the *Declaration*.

R91 Agencies that produce information systems strategic plans (ISSPs) should provide them to the oversight office.

LEGISLATIVE IMPACT OF PROACTIVE PUBLICATION

New Part to OIA and LGOIMA

- 12.105 We recommend that the agency duty to take reasonably practicable steps to proactively make official information publicly available be introduced in a new Part of each Act that would include supplementary provisions that expand on and support the primary obligation. We have not developed a legislative vehicle that is comprehensive in respect of all matters of detail, but we raise some of the considerations below and make recommendations as to our preferred approach.

R92 The new statutory duty to proactively release information should be placed in a new Part to each Act that also sets out provisions governing proactive release.

How will the official information process apply to proactive release?

12.106 The expansion of the official information legislation to expressly provide for proactive publication will require a number of structural issues to be addressed. The conceptual differences between reactive and proactive release will have implications for agency processes. Essentially, agencies will need to be clear about the process to be applied as the factors to be considered will differ depending of the disclosure context.

Requests for official information

12.107 The official information legislation is currently configured to deal with one-off requests for information and release to a specified individual or organisation.⁶⁴⁸ Agencies may also receive requests for information to be released to the public as a whole. The limits of the legislation mean that a request for broader publication of official information is not an “OIA request.”

12.108 The broadening of the legislation to encompass proactive publication, as well as other steps towards open data, is likely to mean that there will be a broader range of requests for information from citizens. There may be requests to agencies for the publication of information with appropriate licensing under the NZGOAL framework so that it can be re-used by the requester. There are also “demands for data.” The www.data.govt.nz portal allows members of the public to register their request or demand for the release of particular datasets for re-use. The registration of demand for a dataset however is a request to the agency to publish the particular information to the public or to make a particular dataset publicly available, rather than a request for the information to be provided specifically to the requester under section 12.

12.109 A requester may opt to demand data at the www.data.govt.nz portal and simultaneously make a section 12 official information request to seek release of the same public data. Each request however, would be processed somewhat differently. For example, the time limits that apply to processing section 12 requests would not apply where an agency is asked to publicly release a dataset. An agency would have significantly more autonomy and discretion in deciding what information should be published in response to a request for public release. A section 12 request would require an agency to release a dataset, unless there is a good reason for not making it available to the requester (such as a withholding ground or an administrative reason to refuse such as substantial collation and research).⁶⁴⁹ Release of the data to meet a section 12 request may be subject to conditions, whereas the publication of open data is directed to be in a form that is freely re-useable by members of the public who access it.

12.110 We recommend that the current scope of an official information request in section 12 be retained, and continue to establish the threshold for citizen entitlements to official information, namely an entitlement to the release of specified information to the individual requester, subject to an assessment of the withholding grounds, public interest test, and other provisions of the legislation.

- 12.111 However, we think that the legislation should also recognise other kinds of information requests from the public for the wider release and publication of official information. Such requests should be taken into account by agencies as part of their proactive release strategies as indicating public demand for the information requested.
- 12.112 It is worth noting that “official information” is defined in section 2 of each Act as meaning information “held” by a relevant public entity. This means that the scope of the official information legislation is limited to providing access to information in existence at the time of the request and does not extend to information that will be created or updated at some time in the future. Requests for on-going access to real-time information for example would be outside the scope of the official information legislation and could not be considered as a section 12 request; although there may be grounds for reviewing a refusal to provide access under the Ombudsmen Act.
- 12.113 For example in 2007, the Ombudsmen considered a request for public access to the Ministry of Education’s SchoolSMART website, but found that this amounted to a standing request for both existing and future information that may at some time become available on the website which extends beyond the scope of the OIA.⁶⁵⁰ The investigation of the decision to deny access nevertheless proceeded under the Ombudsmen Act 1975, with the decision being found not to be unreasonable.
- 12.114 It may not always be clear whether a request is a section 12 request or a publication request, for example, where information is made available to citizens online subject to payment of a charge. In some cases, the information may be specifically tailored to the particular requester (such as property information). We understand that local authorities in particular, make or plan to make certain types of official information available in this way.
- 12.115 Our view is that where the information released is tailored to the particular requester, it should be regarded as a section 12 request. Where however, the same information is released, regardless of who requests it, on condition of payment, that information should be treated as published information and therefore outside the scope of section 12. Information being publicly available is already a ground for refusing section 12 requests.⁶⁵¹ In chapter 7 we recommend adopting a statutory definition of the concept of “publicly available information,” that confirms that information may be publicly available, even if subject to payment of a fee. This would be a helpful aid to interpreting the scope of this refusal ground.

R93 An official information request should continue to be a request for the provision of information to an individual requester (for the purposes of section 12 of the OIA and section 10 of the LGOIMA) and no legislative change is required.

R94 The new Part to each Act that regulates proactive release should recognise public requests that official information be published and require agencies to take such requests into account in developing their proactive release strategies.

Withholding grounds and public interest test

- 12.116 An assessment of the withholding grounds and the balancing of the public interest are key steps in processing a section 12 request for official information. An important question is the extent to which these steps should also apply to the discretionary proactive publication of official information.
- 12.117 We consider that the revised legislation and guidance should require agencies to take account of the OIA and LGOIMA withholding grounds in making decisions about proactive publication. This is consistent with current Cabinet guidance,⁶⁵² the New Zealand Data and Information Management Principles,⁶⁵³ and NZGOAL.⁶⁵⁴
- 12.118 This is also reflected to some extent in other legislative provisions.⁶⁵⁵ For example, the Public Transport Management Act 2008 provides that in relation to information that regional councils can require from operators of commercial public transport services and submissions from those operators on district plans, where the regional council believes that the commercial withholding grounds may apply, or the operator has described the information as “commercially sensitive”, there are restrictions on disclosure of the information by the Council.⁶⁵⁶ Similar restrictions also apply where such information is held by the New Zealand Transport Agency.⁶⁵⁷
- 12.119 We therefore recommend that agencies should take account of the various interests protected by the withholding grounds in reaching decisions about the proactive publication of official information. One way to express this in the legislation might be to place a duty on agencies to ensure that proactive publication does not prejudice the interests protected by the withholding grounds, and in relation to the non-conclusive withholding grounds, there are no countervailing public interest factors. We recommend below a different approach to the privacy withholding ground however, as we believe that the protection of privacy in this context should sit within the Privacy Act framework.
- 12.120 The balancing required by the public interest test may be different in relation to proactive publication. Because publication involves making the information available to everyone, the damage or prejudice to the interest protected by the relevant withholding ground may be greater, so that the public interest grounds favouring proactive release may need to be stronger than they would be to justify release to a particular requester. On the other hand, there may be a stronger public interest in making information publicly available to everyone, than making it available just to one requester. We recommend that the Ombudsmen’s guidance on the public interest test include commentary about application of the test in relation to proactive release.

R95 The new Part to each Act that regulates proactive release should require agencies to take account of the interests protected by the respective withholding grounds in each Act in reaching decisions about the proactive release of official information.

R96 The Ombudsmen's Guidelines should address how the public interest test is applied before information is proactively released.

Privacy

12.121 The expansion of the official information legislation to include proactive publication raises an issue as to how that legislation should intersect with the Privacy Act 1993. Currently, where official information is made available in response to a request, the question of giving adequate protection to privacy depends on the privacy withholding ground and whether there are countervailing public interest factors that justify release.⁶⁵⁸ Otherwise agencies must observe the restrictions on disclosure contained in the Privacy Act.⁶⁵⁹

12.122 While generally, an agency undertaking proactive release should observe the withholding grounds and protect material accordingly, in the specific case of the privacy withholding ground, we conclude that the applicable disclosure standards to be applied should be those contained in the Privacy Act.⁶⁶⁰ Otherwise, public agencies would effectively move outside the scope of the Privacy Act in relation to such publication.

12.123 In a report on privacy and transparency for the UK government, an independent reviewer noted:⁶⁶¹

There are many important factors in the maintenance of trust, but privacy is central to the concerns of this review. If citizens come to believe that an effect of the release of public data will be a significant decrease in privacy, then the result will inevitably be a withdrawal of support and a reduction in the democratic legitimacy of the programme.

12.124 The potential impact on privacy was also noted by Senator Faulkner in an address to the Information Policy Conference in Australia:⁶⁶²

As attractive as the simplistic notion of absolute government transparency may be in the abstract, in practice much of the information amassed by any government belongs in fact to individuals, and the unfettered release of all government documents would be a breach of privacy of those millions of Australians.

12.125 We recommend that the current boundaries between the official information legislation and the Privacy Act should be maintained. This would mean that where agencies make official information available as a matter of proactive publication, the requirements of the Privacy Act should be observed. This demarcation should be taken into account in any redraft of the official information legislation to incorporate legislative provisions about proactive release.

R97 The protection of privacy in the context of proactive publication programmes should continue to be covered by the Privacy Act 1993.

Charging

- 12.126 Under the official information legislation, charging practices for responding to requests vary. As a matter of practice, a presumption against charging has developed under the OIA, although agencies report that the ability to charge is a useful mechanism in the case of large or unwieldy requests. There is much greater willingness by local authorities to charge for requests under the LGOIMA to meet the costs involved.
- 12.127 The provision of official information in response to a request may be subject to a charge that is set by statute or regulation, such as the cost of a birth or death certificate⁶⁶³ or the cost of a land information memorandum.⁶⁶⁴ Other official information that is proactively released by agencies may be subject to a charge where there is a cost to provide or print the information, such as government publications. There is also the potential for charges to apply to the use of information, even if it is provided for free.⁶⁶⁵
- 12.128 A relevant factor in relation to the proactive publication of datasets is the New Zealand Data and Information Management Principle that data will be reasonably priced:⁶⁶⁶
- Use and re-use of government held data and information is expected to be free. Charging for access is discouraged.
- Pricing to cover the costs of dissemination is only appropriate where it can be clearly demonstrated that this pricing will not act as a barrier to the use or re-use of the data. If a charge is applied for access to data, it should be transparent, consistent, reasonable and the same cost to all requestors.
- 12.129 In summary, charging policies are currently piecemeal, spread across a number of policy documents and are not always consistent. In chapter 10 we recommend that work be undertaken to develop a charging regime for the release of official information. This work should examine the appropriate charging mechanisms for both reactive and proactive release.

Complaints

- 12.130 The broadening of the legislation to encompass the proactive publication of information would extend agency obligations, in pursuance of the objectives of the legislation. We do not see this as an expansion of formal citizen rights to information, given the largely discretionary nature of the proactive publication duty. Therefore there would be no specific complaint rights in relation to proactive release, if citizens wished to complain about an agency's failure to publish particular information.

12.131 Nevertheless, there should, we think, be a degree of oversight as discussed further below. There would also be jurisdiction for the Ombudsmen to review the reasonableness of agency decisions in relation to proactive release under the Ombudsmen Act.⁶⁶⁷ The three year statutory review we recommend would be another opportunity to review agency release efforts including responsiveness to demand.

Third party information

12.132 We have considered the position of third parties where information provided by them or about them is published under an agency's proactive release strategy. Should third parties have the right to object to or complain about the publication of such information? In chapter 10 we recommend that agencies should be required to notify third parties about the release of their information to requesters, where certain withholding grounds (privacy, commercial and confidentiality grounds, and the tikanga Māori ground in the LGOIMA) are considered to be outweighed by public interest factors favouring release⁶⁶⁸ and in chapter 11 we recommend that third parties should be able to bring complaints about the release of their information to requesters.⁶⁶⁹

12.133 In our view there should be protection for third party information, regardless of whether the information is released to an individual requester or published to the world in accordance with a proactive release strategy. The publication of this information may cause similar or greater harm than release to an individual requester. There is also a risk that limiting third party rights only to cases where the information is released to individual requesters, may create an incentive for agencies to publish the information to avoid triggering their obligations to third parties.

12.134 As recommended above, the Privacy Act should apply in relation to privacy complaints resulting from proactive publication. The Privacy Act provides for complaints to be referred to the Privacy Commissioner where breach of a privacy principle amounts to an interference with the privacy of an individual.⁶⁷⁰

12.135 In relation to the other withholding grounds that protect third party interests, we have identified two options:

- (a) Restricting an agency from publishing any third party information where the commercial and confidentiality withholding grounds (and, in the case of LGOIMA, the tikanga Māori withholding ground) are engaged, unless the third party consents; or
- (b) Placing a duty on agencies to consult with third parties before publishing their information where the relevant withholding grounds are engaged.

- 12.136 In chapter 10, we recommend a tightly limited form of consultation in relation to the release of third party information to meet a request, in order to avoid unduly delaying responses to requests. We recommend there that agencies give third parties five working days' notice of an impending release to a requester, so that there is a short opportunity to object to the release. A proactive release strategy will be developed over a longer period and the imperative of avoiding undue delay is not as strong in this context. Therefore, any third party consultation prior to proactive release should be of a fuller kind.
- 12.137 We do not have a particularly strong view about which option should be adopted, but are inclined, to avoid unnecessary complexity in the new framework, to prefer the first option. This would limit agencies from publishing third party information where the relevant third party withholding grounds are engaged, unless the consent of the third party is obtained. A complaint provision would be necessary to allow third parties to bring a complaint where an agency fails to gain the necessary third party consent.

R98 The new Part to each Act that regulates proactive release should make the proactive release of third party information that would otherwise be protected by the commercial and confidentiality withholding grounds and, in the case of the LGOIMA, the tikanga Māori ground, conditional on the prior consent of the relevant third party.

R99 The proactive release of such third party information without consent should be a new ground of complaint to the Ombudsmen in section 28 of the OIA and section 27 of the LGOIMA.

Issues of liability

- 12.138 Section 48 of the OIA⁶⁷¹ protects agencies from liability incurred in releasing official information in response to requests. The question is whether such far-reaching protection should apply where agencies proactively publish information. That would be a significant step beyond the present law. It would effectively accord protection 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. The law of defamation has to date not 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 protection as this.
- 12.139 We think there are significant differences between releasing information in response to a request and proactively publishing 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 publication presupposes an active and voluntary decision to publish, and we think that such decision should involve a consideration of the legal consequences of doing so.

- 12.140 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 a significant number of people and the damage to any person whose interests are affected is potentially much greater.
- 12.141 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.
- 12.142 The response to this issue amongst submitters to the issues paper was divided.⁶⁷² A slight majority agreed that section 48 should not apply to proactive release. However some key state agencies took the view that potential subsection to liability would act as a disincentive to proactive release, and urged strongly that the section 48 protection should apply. They emphasised the good faith qualification in the section. One option suggested to us was that protection from liability should depend on a high level sign-off for the disclosure from within an agency.
- 12.143 We continue to hold our view that while section 48 should remain in relation to information released in response to a request, it should not apply to proactive disclosure. While section 48 protection can continue to be justified in relation to one-off releases of information on a case by case basis, it is not appropriate to exempt more systematic proactive release strategies from liability. The emphasis should be on greater proactive release by agencies of official information and public data that is appropriate for release, without an unjustifiable overriding of legitimate third party interests.
- 12.144 It seems to us to be important that individual rights, particularly in relation to defamation and privacy, should continue to be protected, and that matters such as contempt of court and name suppression should not be overridden simply because an agency has decided to publish without taking sufficient care to check content first. The Government should not be above the law in this. Having said that, we think the risks involved are fairly low. The kinds of documents which are likely to be released are seldom going to contain such material.
- 12.145 The approach taken in NZGOAL is to encourage agencies to undertake a review and release process so that they can be confident that there are no copyright or other intellectual property right restrictions in the material and no contractual or other restriction that would prevent release and/or re-use.⁶⁷³ Agencies are also encouraged to use one of six Creative Commons licences when releasing data, which include the following disclaimer:

Except as required by law or as otherwise agreed in writing between the parties, the Work or any Adaptation is licensed by the Licensor on an "as is" and "as available" basis without any warranty of any kind, either express or implied.

Subject to any liability which may not be excluded or limited by law the Licensor shall not be liable on any legal basis (including without limitation negligence) and hereby expressly excludes liability for loss or damage howsoever and whenever caused to you.

12.146 Our view is that, given the proposed level of agency discretion as to proactive publication, tools such as due diligence and contractual disclaimers (as promoted by NZGOAL and Creative Commons) are the appropriate measures in this context, in preference to a full exclusion of liability such as that afforded by section 48.

12.147 We recommend that liability issues and best practice due diligence processes for managing them be addressed in guidance provided by the official information oversight office we discuss in chapter 13.

R100 Section 48 of the OIA and section 41 of the LGOIMA should continue to apply to the release of official information in response to specific requests, but should not be extended to the broader proactive publication of official information.

R101 Liability issues in relation to proactive release and best practice due diligence processes for managing them should be addressed in guidance.

Oversight

12.148 As the proactive release duty we recommend is a relatively light-handed one, we think it is important that there be a degree of oversight of agency efforts to progressively increase their proactive release of official information and support for these efforts. We believe oversight encompasses a monitoring function, a policy function, a review function and a promotion of best practice function.⁶⁷⁴ All these facets of oversight are critical in the developing field of proactive disclosure by public agencies, and we favour centralising the formulation of information policy under the auspices of a new oversight office, as discussed in chapter 13.

12.149 Oversight of proactive release has been assigned in various ways in other jurisdictions:

- (a) In Australia and the United Kingdom, the respective Information Commissioners oversee the operation of information publication schemes.

- (b) In the United Kingdom, a Public Sector Transparency Board has been established in the Cabinet Office to oversee the implementation of the government's commitment to release key datasets and to oversee sector transparency boards for Health, Crime and Justice, Transport, and Education and Welfare.⁶⁷⁵ A Data Strategy Board is being created to work with the Public Data Group (the four trading funds of the Met Office, Ordnance Survey, Land Registry and Companies House) with the aim of improving access to public information and the consistency of access. An Open Data User Group is also to be established to advise the Data Strategy Board on public sector data that should be prioritised for release.⁶⁷⁶ And a Local Public Data Panel has been established to identify local public data and its potential uses that are likely to have the greatest impact on empowering citizens or improving local service delivery.
- (c) In the United States, various responsibilities are shared among the Office of Management and Budget (OMB) (instructing agencies on developing Open Government Plans), the federal Chief Technology Officer and Chief Information Officer (establishing an Open Government Dashboard for the development of Open Government Plans by agencies) and the Justice Department's Office of Information Policy (establishing the FOIA.Gov website for monitoring FOIA compliance and providing FOIA resources and support).⁶⁷⁷
- (d) In Canada the government has appointed an Advisory Panel on Open Government to consult on and help prioritise the development and implementation of its Open Government Action Plan.

12.150 In the following chapter we discuss oversight functions in relation to the official information legislation more generally. We recommend that this should include oversight of agencies' proactive release activity. In consultation with central agencies this was regarded as a sensible approach that should result in administrative efficiencies.⁶⁷⁸

12.151 In addition, the oversight office would have an important role to play in the area of providing guidance about proactive release. In relation to the release of datasets in particular, guidance would also be provided by the Data and Information Re-use Chief Executives Steering Group leading New Zealand's Open Government Information and Data Work Programme.⁶⁷⁹

12.152 The Cabinet paper supporting the *Declaration on Open and Transparent Government* sets out the level of ministerial oversight for agency compliance with the stated government policy directing the release of high value public data:⁶⁸⁰

- (a) Departments are directed to report back annually to their Ministers with their plans for the release of high value public data;
- (b) The Steering Group is to report annually the aggregate plans to the Ministerial Committee on information and communications technologies (ICT).

- 12.153 To ensure co-ordination of the oversight functions in relation to proactive release generally and the release of high value public datasets in particular, we recommend that the oversight office contribute to the work of the Steering Group, in an advisory capacity.

R102 Oversight functions in relation to the official information legislation should include oversight of proactive release activities in the public sector including monitoring, policy, review and promotion of best practice.

R103 The oversight office should contribute to the work of the Data and Information Re-use Chief Executives Steering Group, in an advisory capacity.

Privacy

- 12.154 Attention also needs to be paid to the oversight of privacy issues in relation to proactive release. Although the *Declaration on Open and Transparent Government* is framed in terms that it excludes personal data, consideration of privacy issues in releasing datasets should not be overlooked. There may be some grey areas as to whether a dataset indirectly conveys personal information or provides the potential for identifiability of data subjects.⁶⁸¹ There will also be privacy issues to consider where datasets are anonymised to facilitate release.⁶⁸²

- 12.155 As noted in a review for the United Kingdom government:⁶⁸³

Privacy is extremely important to transparency. The political legitimacy of a transparency programme will depend crucially on its ability to retain public confidence. Privacy protection should therefore be embedded in any transparency programme, rather than bolted on as an afterthought.

We think this is a particularly important consideration in the New Zealand context; as a small country with a highly connected population, the privacy impacts from the release of information can be significant.

- 12.156 We recommend that the Privacy Commissioner have an oversight role in relation to the privacy aspects of proactive release. This would include:
- (a) consultation between the official information oversight office and the Privacy Commissioner,
 - (b) the Privacy Commissioner contributing to the work of the Data and Information Chief Executives Steering Group as an expert adviser; and
 - (c) the Privacy Commissioner having the power to recommend that a Privacy Impact Assessment be completed prior to proactive release.⁶⁸⁴

R104 The Privacy Commissioner should have an oversight role in relation to the privacy aspects of proactive release, including:

- (a) consulting with the oversight office;
- (b) contributing to the work of the Data and Information Re-use Chief Executives Steering Group as an expert adviser; and
- (c) having the power to recommend a Privacy Impact Assessment prior to proactive release.

Chapter 12 Footnotes

- 537 For example, a requester may prefer requested information to be published with appropriate licensing under the NZGOAL framework (discussed later in this chapter) so that the requester can re-use the information without restriction.
- 538 See discussion at [12.84]–[12.92].
- 539 Office of the Ombudsmen “Office of the Leader of the Opposition and the Minister of Finance” (W61169, 17 February 2012).
- 540 Committee on Official Information *Towards Open Government: General Report* (Government Printer, Wellington, 1980) at 6 and 11.
- 541 See ch 13 at [13.27]–[13.33].
- 542 For the conceptual origins of “open government” and “open data” and their convergence see Harlan Yu and David G Robinson “The New Ambiguity of ‘Open Government’ ” (Princeton CITP/Yale ISP Working Paper, 28 February 2012) forthcoming in *UCLA Law Review Discourse*. See also Antti Halonen “Being Open About Data: Analysis of the UK Open Data Policies and Applicability of Open Data” (The Finnish Institute in London, 2012).
- 543 Sir Tim Berners-Lee, cited by United Kingdom Government in “Making Open Data Real: A Public Consultation” (August 2011) at 35.
- 544 The Economist “The Open Society: Governments are Letting in the Light” (25 February 2010).
- 545 Carl Malamud “By the People” (address to the Gov 2.0 Summit, Washington D.C., 10 September 2009) in Daniel Lathrop and Laurel Ruma (eds) *Open Government: Collaboration, Transparency and Participation in Practice* (O’Reilly Media, Inc., 2010) at 44.
- 546 Deloitte “Unlocking Government: How Data Transforms Democracy” (2011). 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. See also The Great New Zealand Remix and Mashup Competition < www.mixandmash.org.nz > .
- 547 The Economist “Of Government and Geeks” (4 February 2010).
- 548 John Houghton “Costs and Benefits of Data Provision: Report to the Australian National Data Service” (Centre for Strategic Economic Studies, Victoria University, Melbourne, September 2011) at 3. See also Chris Taggart “The Cost of Closed Data & the Economics of Open Data” (Open Knowledge Foundation Blog, 17 October 2011) < <http://blog.okfn.org> > .
- 549 The Economist, above n 544.
- 550 See Tom McLean “Not with a Bang but a Whimper: the Politics of Accountability and Open Data in the UK” (draft of 15 August 2011 prepared for the American Political Science Association Annual Meeting (Seattle, Washington, 1–4 September 2011); Halonen, above n 542, at 24–29; United Kingdom Government, above n 543, at 10.
- 551 Richard Susskind “Realising the Value of Public Information” (Publius Project, Berkman Center for Internet & Society at Harvard University, 17 April 2009).
- 552 Yu and Robinson, above n 542, at 19. See also Arturo Muent-Kunigami “Differences Between ‘(Open Government) Data’ and ‘Open (Government Data)’ ” (21 March 2012) < <http://blogs.worldbank.org/ic4d/node/547> >; David Tallan “Three Dimensions of Open Government” (30 April 2012) < www.govloop.com >; Emily Badger “In ‘Open Government Data,’ What’s Really Open?” (6 March 2012) < www.psmag.com >; Halonen, above n 542, at 9–10, 21.

- 553 Kevin Merritt “Reinventing Government with Open Data is No Joke” (accessed 8 May 2012) < www.socrata.com > . See also Tom Slee “Why the ‘Open Data Movement’ is a Joke” (1 May 2012) < <http://whimsley.typepad.com> > ; Alex Howard “No Joke: Open Data Fuels Transparency, Civic Utility and Economic Activity” (2 May 2012) < <http://gov20.govfresh.com> > ; David Eaves “Open Data Movement is a Joke?” (2 May 2012) < <http://eaves.ca> > ; Tom Lee “Defending the Big Tent: Open Data, Inclusivity and Activism” (2 May 2012) Sunlight Foundation < <http://sunlight.foundation.com> > ; Nat Torkington “Gov 2.0 as Means not End” (5 August 2010) < <http://radar.o'reilly.com> > .
- 554 See The White House “The Obama Administration’s Commitment to Open Government: A Status Report” (September 2011).
- 555 The partnership was launched in September 2011 and is led by steering committee of 8 countries: United States (co-chair), Brazil (co-chair), South Africa, United Kingdom, Norway, Mexico, Indonesia and the Philippines. Participating countries are required to put together action plans for open government and transparency. See Transparency and Accountability Initiative “Opening Government: A Guide to Best Practice in Transparency, Accountability and Civic Engagement Across the Public Sector” < www.transparency-initiative.org > .
- 556 Cabinet Minute of Decision (8 August 2011) CAB Min (11) 29/12, available at < www.ict.govt.nz > .
- 557 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.
- 558 Office of the Ombudsmen “Proactive Release and Good Administration – Making the Task Easier” (editorial, March 2007) 13 OQR 1. The Office of the Ombudsmen’s *Statement of Intent* has identified the promotion of proactive release of official information as a strategic priority: *Statement of Intent for the Period 1 July 2011 to 30 June 2014* (2011), at 14.
- 559 See for example the release of Cabinet papers on the Department of Internal Affairs website relating to the review of the local government system (February 2011) under the stamp “Proactively released by the Minister of Local Government.”
- 560 Cabinet Office *Cabinet Manual* (Department of the Prime Minister and Cabinet, Wellington, 2008) at [8.4]. For further guidance see the CabGuide and Cabinet Office Notice “Publishing Cabinet Material on the Web: Approval Process and Publication Requirements” (7 August 2009) CO Notice (09) 5.
- 561 See further Open Data Stories (a repository of open data success stories built in New Zealand but with an international scope) and Dan Randow and Julian Carver “Open Data Mini Case Studies” (June 2011) prepared in support of the *Declaration on Open and Transparent Government*, above n 556, both at < www.open.org.nz > .
- 562 Charities Register < www.register.charities.govt.nz > .
- 563 The Land Cover Database is available through Koordinates.com and Terralink International.
- 564 “Post-quake Imagery of Christchurch Carries CC licence” < www.creativecommons.org.nz > .
- 565 Contract Mapping < www.contractmapping.govt.nz > .
- 566 The National Climate Database < www.cliflo.niwa.co.nz > . See also < www.niwa.co.nz/our-services/databases > .
- 567 Info Connect < <https://infoconnect.highwayinfo.govt.nz> > . 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.
- 568 Education Review Office < www.ero.govt.nz > .

- 569 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 >.
- 570 Responses to the Law Commission’s official information review survey from *Dominion Post*, Media Freedom Committee of the Commonwealth Press Union (New Zealand section), *Herald on Sunday* and Fairfax; “An OIA Proposal” (16 March 2010) < www.kiwiblog.co.nz > (proposing that all papers and reports considered by Cabinet or Cabinet Committee be automatically placed on the internet within six months); “A Good Idea” (16 March 2010) and “Some Better Ideas” (17 March 2010) < <http://norightturn.blogspot.com> >.
- 571 Review of Expenditure on Policy Advice *Findings of the Committee Appointed by the Government to Review Expenditure on Policy Advice* (Wellington, 2010).
- 572 Recommendation 30.
- 573 Recommendation 31. The Cabinet Office is reviewing the benefits, costs and risks associated with the systematic, managed release of most routine Cabinet papers: see Treasury update (30 April 2012).
- 574 This would seem to anticipate provision being made in the OIA for proactive release, rather than expecting this information to be released in response to specific OIA requests.
- 575 Better Public Services Advisory Report (November 2011) at 7, 19. See also UK Government “Open Public Services” White Paper (2011) at 19, discussing the purpose of open data in public services to give people the information they need to make informed decisions and to drive up standards.
- 576 Better Public Services Advisory Report, at 11. A diagram at 54, summarising what better state services will look like includes more public reporting and information as a key element.
- 577 State Services Commission “Papers Released on Better Public Services Programme” (media release, 4 May 2012).
- 578 Hon Bill English “Public Policy Challenges Facing New Zealand” (speech to the Institute of Public Administration New Zealand, Wellington, 23 September 2009). The Deputy Prime Minister also spoke in favour of open data at the inaugural Nethui organised by InternetNZ held in Auckland on 29 June–1 July 2011, see Tim McNamara “Some Things I Learned at NetHui” (4 July 2011) < www.notebook.okfn.org >.
- 579 The Work Programme is led by the Data and Information Re-use Chief Executives Steering Group, supported by an officials working group. The Steering Group includes representatives from Land Information New Zealand, Science & Innovation, Statistics New Zealand, Parliamentary Counsel Office, Ministry for the Environment, Ministry of Education, Standards New Zealand, and the Department for Internal Affairs. For terms of reference see < www.ict.govt.nz >. See also Keitha Booth “New Zealand Moves to Embrace PSI Re-use and Open Data” (13 August 2010) European Public Sector Information Platform Topic Report No. 15.
- 580 The first two priorities for Direction 2 of the Directions and Priorities for Government ICT coincide with the purposes of the official information legislation: improve public access to government data and information; and support the public, communities and business to contribute to policy development and performance improvement. The third priority is to create market opportunities and services through the re-use of government data and information.
- 581 For an overview see European Public Sector Information Platform “Spatial Information Adds Hundreds of Millions to New Zealand’s Economy” (25 August 2009) < <http://epsiplatform.eu> >.
- 582 Open New Zealand < www.open.org.nz >.
- 583 Statisphere < www.statisphere.govt.nz >.
- 584 Kiwi Research Information Service < <http://nzresearch.org.nz> >.

- 585 Similar open data portals have been launched in the United States (< www.data.gov >), the United Kingdom (< www.data.gov.uk >), Australia (< www.data.gov.au >) and Canada (< www.data.gc.ca >). See also < <http://openlylocal.com> >, an open data portal specifically for British local authorities, including an open data scoreboard.
- 586 As at 6 June 2012. One dataset category is for local and regional government, and currently includes datasets from Statistics New Zealand, the Department for Internal Affairs, and Environment Canterbury.
- 587 Minister of Finance Cabinet Paper, Appendix One (8 August 2011) available at < www.ict.govt.nz >.
- 588 Cabinet Minute of Decision, above n 556. Compare Australian Government *Declaration of Open Government* (16 July 2010) < www.finance.gov.au >; Prime Minister (United Kingdom) *Letter to Government Departments on Opening Up Data* (31 May 2010); President of the United States *Transparency and Open Government* (memorandum for heads of executive departments and agencies, 21 January 2009), Director, United States Office of Management and Budget *Open Government Directive* (memorandum for the heads of executive departments and agencies, 8 December 2009); Open Government Partnership *Open Government Declaration* < www.opengovpartnership.org >.
- 589 Hon Bill English, Hon Nathan Guy “Open Data will Benefit Public, Economy” (media release 15 August 2011).
- 590 Public data refers to non-personal and unclassified data.
- 591 This applies to public service departments, as well as non-public service departments such as the Office of the Clerk of the House of Representatives, the New Zealand Police, the New Zealand Defence Force, the New Zealand Security Intelligence Service, Parliamentary Counsel Office and the Parliamentary Service. In addition, State Services agencies are encouraged and state sector agencies and local authorities are invited to commit to the proactive release of eligible data.
- 592 Data is considered to be of high value if its release for re-use has one or more economic and social, transparency and democratic or efficiency outcomes: Appendix 3 to letter dated 26 January 2012 from Data and Information Re-Use Chief Executives Steering Group Chair to Agency Data Champions.
- 593 Cabinet Paper, above n 587, at [5].
- 594 At [35].
- 595 New Zealand Data and Information Management Principles, see Appendix 2 to Cabinet Minute of Decision, above n 556. Compare Office of the Australian Information Commissioner “Principles on Open Public Sector Information: Report on Review and Development of Principles” (May 2011).
- 596 State Services Commission *New Zealand Government Open Access and Licensing framework (NZGOAL)* (August 2010).
- 597 The NZGOAL Cabinet Minute of Decision (5 July 2010) CAB Min (10) 24/5A, directs Departments, strongly encourages State Services agencies and invites the Police, the Defence Force, the Parliamentary Counsel Office and the Security Intelligence Service to take account of NZGOAL when releasing material to the public for re-use. The Minister of Education is also invited to invite school boards of trustees to do the same.
- 598 For more on Creative Commons licences see < www.creativecommons.org.nz >.
- 599 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.
- 600 Issues Paper at [12.23] – [12.49]. See also Rachel Spalding “Open Public Sector Information: the International Context” presentation to the Information Policy Conference, Canberra (November 2011).

- 601 See for example, Martin Ferguson “The Vital Role of Local Councils in Embracing Open Data” (The Guardian, 7 November 2011); Department for Communities and Local Government (UK) “Code of Recommended Practice for Local Authorities on Data Transparency” (February 2011).
- 602 OIA, s 20.
- 603 OIA, s 5; LGOIMA, s 5.
- 604 OIA, s 4; LGOIMA, s 4.
- 605 Halonen, above n 542, at 101–102.
- 606 Archives New Zealand *Digital Continuity Action Plan* (2009) < www.archives.govt.nz > .
- 607 Ministry of Justice, New Zealand Police, Department of Corrections and Ministry of Social Development *Justice Sector Information Strategy 2006–2011* < www.justice.govt.nz/jsis > at 18. An enabling principle under Theme 5 is for justice sector agencies to be as open as possible in terms of information provision, while working within the constraints imposed by law.
- 608 See for example Freedom of Information Act 1982 (Cth) Part II.
- 609 See for example Government Information (Public Access) Act 2009 (NSW), s 7 (authorised proactive release of government information); Right to Information Act 2009 (Tas), s 12(3) (providing that disclosure in response to a request for it is the disclosure method of last resort and that agencies must ensure that there are adequate procedures in place so that there is appropriate proactive disclosure).
- 610 Halonen, above n 542. See also Cabinet Office (UK) “Making Open Data Real: A Government Summary of Responses” (30 January 2012).
- 611 Karin Gavelin, Simon Burall and Richard Wilson “Open Government: Beyond Static Measures” (Involve, paper produced for the OECD, July 2009).
- 612 Due particularity and fishing requests are discussed in chapter 9.
- 613 See Halonen, above n 542, at 84.
- 614 In the United Kingdom, initial findings on the publishing of expenditure data indicate that this has not increased the number of freedom of information requests as some feared it would do; those who are interested are likely to request the information regardless of whether the data is published proactively or not: Halonen, above n 542, at 77–78.
- 615 See R95, recommending that the OIA withholding grounds should be taken into account in making proactive release decisions. See also Chris Yiu “A Right to Data: Fulfilling the Promise of Open Public Data in the UK” Policy Exchange Research Note (March 2012) at 24–25.
- 616 OIA, s 18(d); LGOIMA, s 17(d).
- 617 The White House, above n 554, at 25–26.
- 618 See Dr James Popple, Australian Freedom of Information Commissioner “Freedom of Information: A Government Perspective” (2011) 19 ALL 4, 256, at 260; David S. Levine “The Social Layer of Information Law” (2012) 90 N. C. L. Rev 101 < <http://ssrn.com/abstract=2013465> > .
- 619 Popple, at 260. See NZ Government Web Standards 2.0 < <http://webstandards.govt.nz> > .
- 620 See John Wonderlich “The Missing Open Data Policy” (22 March 2012) < <http://sunlightfoundation.com> > ; Tom Lee, above n 553.
- 621 Issues Paper at Q86.
- 622 Better Public Services Advisory Group Report, above n 575, at 35.
- 623 Issues Paper at [12.61].

- 624 Data and Information Re-use Chief Executives Steering Group “Report on Agency Adoption of the New Zealand Declaration on Open and Transparent Government” (June 2012).
- 625 Issues Paper at Q88.
- 626 Crown Entities Act 2004, s 173(1)(a).
- 627 Issues Paper at Q89.
- 628 Freedom of Information Act 1982 (Cth) Part II; Popple, above n 618, at 260.
- 629 Robert Hazell, Ben Worthy and Mark Glover *The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI Work?* (Palgrave Macmillan, Basingstoke, 2010) at 94–96.
- 630 Issues Paper at Q90.
- 631 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.
- 632 LGOIMA, ss 46A, 51. In practice, local authorities now routinely make this material available on their websites.
- 633 OIA, s 20. The equivalent provision in the LGOIMA was 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.
- 634 OIA, s 20 requires publication of a description of each organisation’s structure, functions and responsibilities, the categories of documents it holds, all manuals and documents that contain policies, principles, rules, or guidelines in accordance with which decisions or recommendations are made in respect of any person in their personal capacity. This is essentially information about official information.
- 635 Issues Paper at Q84.
- 636 The Department of Internal Affairs is currently working on several Rethink Online initiatives, including the collaboration with other agencies on common approaches to web services to allow agencies managing information-based websites to cluster around a smaller number of web publishing platforms or content management systems. See < www.ict.govt.nz > .
- 637 OIA, s 22; LGOIMA, s 21.
- 638 OIA, s 23; LGOIMA, s 22.
- 639 OIA, s 22; LGOIMA, s 21: any document that contains policies, principles, rules or guidelines in accordance with which decisions or recommendations are made in respect of any person or body of persons in their personal capacity.
- 640 See chapter 2.
- 641 Issues Paper at Q85.
- 642 Rick Snell (acknowledging Alasdair Roberts) “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 > .
- 643 United Kingdom Government, above n 543, at 25.
- 644 Office of the Australian Information Commissioner *Annual Report 2010–11* at ch 4.
- 645 Cabinet Paper, above n 587, at [38].

- 646 At [33].
- 647 See Government ICT Directions and Priorities “Getting Innovation into Government ICT” < www.ict.govt.nz > .
- 648 OIA, s 12; LGOIMA, s 10.
- 649 The term “substantial collation and research” is discussed in chapter 9, where we recommend that “substantial” should be defined to mean that the work would substantially and unreasonably divert resources from the agency’s other operations.
- 650 Office of the Ombudsmen “Refusal to provide open and ongoing public access to the SchoolSMART website” (W56378, 2007).
- 651 OIA, s 18(d); LGOIMA, s 17(d). See further [7.40]–[7.52].
- 652 See *Cabinet Manual*, above n 560, at [8.4(b)]: “The person administering the release of the material should consider deleting any information that would have been withheld if the information had been requested under the Official Information Act 1982”; Cabinet Office Notice, above n 560, at [7.2]: “Before approving publication, the Minister should consider whether the document contains any information that would have been withheld if the information had been requested under the Official Information Act 1982.”
- 653 The openness principle provides that “Data and information held by government should be open for public access unless grounds for refusal or limitations exist under the Official Information Act or other government policy. In such cases they should be protected.”
- 654 See State Services Commission, above n 596, at [29].
- 655 See for example s 36YC of the Securities Markets Act 1988 (to be re-enacted by cl 338 of the Financial Markets Conduct Bill 2011), that allows the Financial Markets Authority to omit from the written report of a review of a registered exchange that it is required to publish, any information for which it considers there would be good reason for withholding under the OIA if a request for that information was made under the OIA.
- 656 Public Transport Management Act 2008, s 14(3), s 20(3).
- 657 Section 22(3).
- 658 OIA, s 9(2)(a).
- 659 Privacy Act 1993, s 6, information privacy principle 11.
- 660 See Office of the Australian Information Commissioner, above n 595, at 6, reminding agencies of their obligations under the Australian Privacy Act 1988 when publishing public sector information.
- 661 Dr Kieron O’Hara “Transparent Government, Not Transparent Citizens: a Report on Transparency and Privacy for the Cabinet Office” (2011, UK) at 27. A review of the UK government’s transparency agenda has recommended that the government set out governance structures and processes required to manage risks to the protection of personal data: National Audit Office Cross-government review “Implementing Transparency” (2012) at 11.
- 662 Senator John Faulkner (address to Information Policy Conference, Canberra 14 November 2011).
- 663 Births, Deaths, Marriages and Relationships Registration Act 1995, s 72.
- 664 LGOIMA, s 44A(4).
- 665 State Services Commission, above n 596, at 14–15.
- 666 Cabinet Minute of Decision, above n 556.
- 667 See, for example, Office of the Ombudsmen, above n 650.

- 668 Ch 10 at R58.
- 669 Ch 11 at R79.
- 670 Privacy Act 1993, s 66.
- 671 LGOIMA, s 41.
- 672 Issues Paper at Q91.
- 673 State Services Commission, above n 596, at [90].
- 674 See further chapter 13.
- 675 Prime Minister (United Kingdom) *Letter to Government Departments on Opening Up Data* (31 May 2010).
- 676 Sam Jardine, Evershed LLP “Government Promises £7 million in Drive to Improve Openness of Public Sector Data” (5 April 2012) < www.lexology.com > .
- 677 The White House, above n 554. In addition other agencies involved include the Office of Government Information Services (OGIS) (providing help with complex requests to both requesters and agencies), the National Archives and Records Administration (NARA) (reviewing categories of controlled information), and the Office of Personnel Management (OPM) (enhancing professionalism of individuals working in the freedom of information field).
- 678 Letter from Colin MacDonald, Chair, Data and Information Re-use Chief Executives Steering Group, to the Law Commission (16 March 2012).
- 679 Cabinet paper, above n 587, at [33].
- 680 At [31].
- 681 O’Hara, above n 661, at 25–26.
- 682 State Services Commission, above n 596 at 23, 34–36; O’Hara, at Part 4; Glyn Moody “Making Open Data Real: A Response” (19 September 2011) < <http://blogs.computerworld.co.uk> > ; Office of the Australian Information Commissioner, above n 595, at 5-6, citing the submission of the Information Commissioner, Queensland noting that the potential for data-matching and aggregation makes it increasingly difficult to be confident that information has been effectively de-identified. See also Information Commissioner “Summary of ICO Privacy and Data Anonymisation Seminar” London (30 March 2011), noting the problems of “jigsaw identification” whereby data from a number of sources can be combined to enable identification of individuals; Graham Smith “Britain Juggles Right to Know with Privacy Concerns” *Calgary Herald* (27 September 2011); Halonen, above n 542, at 103–104; Yiu, above n 615 at 25–26.
- 683 O’Hara, at 1.
- 684 See also Law Commission *Review of the Privacy Act 1993* (NZLC R123, 2011) at R104, recommending that the Government should adopt a policy and issue a Cabinet Office circular setting out the circumstances in which public sector agencies are expected to produce a privacy impact assessment.

Chapter 13

Oversight of official information legislation

THE PROBLEM

- 13.1 The current New Zealand official information legislation (OIA and LGOIMA) prescribes very few functions for agencies other than the complaints jurisdiction of the Ombudsmen.⁶⁸⁵ In particular there is no provision for any oversight, guidance, or training roles. Our review found that the lack of any statutory oversight in New Zealand for the last 30 years has resulted in some gaps and inefficiencies, as summarised below.
- (a) There is no government “owner” of the official information function. The Ministry of Justice administers the OIA and the State Services Commission and Department of Internal Affairs have provided supporting advice and material but there has been no whole-of-government oversight of the operation of the two statutes.
 - (b) No organisation has explicit responsibility to provide guidance to assist understanding of the legislation by officials and requesters. Some training advice is provided by the overstretched Office of the Ombudsmen without legislative mandate.
 - (c) There is no central co-ordination or oversight of internal management systems for dealing with official information requests and little sharing of common issues or problems, which results in agencies working in silos.
 - (d) There is no central set of statistics or other information relating to the operation of the OIA or LGOIMA to provide a context for monitoring the routine effectiveness of either Act.

- (e) Management of official information has been transformed by the new opportunities for pro-active release resulting from information technology developments but significant government policy initiatives in this direction have not always been integrated with official information legislation and best practice.
 - (f) There is no body to manage the interface between the official information legislation and other Acts regulating information management, particularly the Public Records Act 2005.
 - (g) Finally, there is no oversight of the purposes of the legislation and therefore no body responsible for championing open government. The first purpose of the OIA is “to increase progressively the availability of official information to the people of New Zealand- -”.⁶⁸⁶
- 13.2 In its 1997 review of the OIA, the Law Commission considered there was a strong case for systemic review and oversight of the OIA, and thought the Ministry of Justice was an appropriate body to take on that function. That recommendation was not accepted. The lack of oversight contrasts with more recent information statutes that impose such functions on statutory officers, such as the Privacy Commissioner in relation to the Privacy Act 1993 and the Chief Archivist in relation to the Public Records Act 2005, and also with the Human Rights Commission in relation to the Human Rights Act 1993.
- 13.3 When we started this review we knew that the official information framework, designed for a paper world, had been left behind by new technology. We found that to be only one aspect of the information transformation taking place. The options for sharing and reusing information are still expanding exponentially in our rapidly evolving digital working environment, as we have seen in chapter 12. Management of public information, including oversight of the official information function, is a more complex whole-of-government operation than in 1982 when the OIA was passed.
- 13.4 We believe the need to establish a high level leadership role for official information within Government’s information management structure is now compelling in order to avoid problems and take advantage of opportunities. That is the primary recommendation in this chapter and appears to be in accord with Government’s direction for information management generally.

Alignment with Government Objectives

13.5 This review is therefore timely in considering which statutory functions are desirable to assist efficiency, not just for the operation of OIA and LGOIMA but also in fitting that legislation into the wider government information management landscape, with strong emphasis on pro-active release. It is critical, in our view, for the oversight framework to include co-ordination with whole-of-government information policy. Our task in considering an appropriate structural framework for official information legislation is therefore twofold:

- (a) to propose a way to ensure there can be improved capacity to carry out functions inadequately carried out at present; and
- (b) to ensure seamless integration of the OIA and LGOIMA with new Government information management initiatives.

13.6 We see the second objective as necessary both for the success of new initiatives and to carry official information principles into the future. Feedback from submissions, which highlight the gaps and inefficiencies summarised at the start of this chapter, reinforce our conclusion that a more formal structure than at present is required. Continued fragmented management of the official information function will limit the potential for co-ordination with related Government information initiatives in our view.

13.7 A key component of current Government economic strategy is to lift productivity and improve services in the public sector – to deliver “better, smarter public services for less”.⁶⁸⁷ Streamlining the operation of the official information function and the promotion of proactive disclosure of official information, potentially reducing the transaction costs of individual requests, will contribute to that goal. We see overall cost benefits in establishing leadership of the official information function.

13.8 We have observed that the encompassing purposes of official information legislation are sometimes overlooked by officials.⁶⁸⁸ These purposes align with the expectations and result areas set by Government under the Better Public Services Programme.⁶⁸⁹ The fifth expectation is:

Greater responsiveness to the needs and expectations of New Zealanders and a willingness to do things differently, including more open and transparent government through access to more information.

13.9 Result Area 10, which is a key priority for the next three to five years is:

New Zealanders can complete their transactions with the Government easily in a digital environment.

13.10 In 2011 Cabinet approved the *Principles for Managing Data and Information held by the New Zealand Government*.⁶⁹⁰ The principle headed “Well-managed” is particularly relevant for oversight of official information:

Data and information held and owned by government:

- effectively belong to the New Zealand public;
- are a core strategic asset held by government as a steward on behalf of the public; and
- should only be collected or generated for specified public policy, operational business, or legislative purposes.

Agencies are stewards of government-held data and information and must provide and require good practices which manage the data and information over their life-cycle, including catering for technological obsolescence and long-term preservation and access. Good practices also include collaborating with other agencies and the public, facilitating access, strengthening awareness, and supporting international cooperation.

Agency custodians must implement these practices on a day-to-day basis.

13.11 It seems that there is a strong synchronous relationship between our review and Government’s strategic objectives in bringing the public service into the digital age. In our view, leadership of the various components of the Government information framework must include oversight of the operation of the OIA and LGOIMA so that there are consistent and connected future developments. This overarching objective is supported by the Data and Information Re-use Chief Executives Steering Group which submitted that:⁶⁹¹

We feel there is a need for an integrated, future-focused strategic information management function that positions elements within the system to:

- Anticipate and avoid information related problems; and
- Take advantage of emerging opportunities.

MANAGEMENT OF OFFICIAL INFORMATION LEGISLATION

The original scheme

13.12 The Danks Committee, aware of the part oversight and education had to play in ensuring the official information system operated effectively, proposed responsibilities for three key institutions:⁶⁹²

- (a) The State Services Commission would have an advisory and coordinating role for state sector agencies through a dedicated information unit;
- (b) The Ombudsmen would receive and investigate complaints about official information access decisions; and

- (c) The Information Authority would oversee the overall system and be responsible to Parliament for keeping the operation of the Act under review, in particular by developing guidelines or rules as to when and how particular categories of information should be made available.

13.13 The Committee saw effective operation of the legislation as requiring these distinct functions on an ongoing basis, although the workload might alter over time. As passed, however, the OIA included a sunset clause for the Information Authority after five years. In reporting the Official Information Bill back to the House, the Chair of the Select Committee, Paul East said:⁶⁹³

It was felt that by the end of a 5 year period there would be sufficient experience of the scheme and operation of the Act to do without the monitoring role of the authority, however essential that may be in the first few years.

13.14 The responsibilities of the Information Authority were not transferred to any other agency so its oversight and monitoring functions expired on 30 June 1988.

State Services Commission

13.15 As the original administrator of the OIA, the State Services Commission set up a dedicated information unit to provide assistance and advice to other agencies and also produced the *Directory of Official Information*. Since 1988 it has had no specific statutory functions under the OIA and has played only a limited role relating to its mandate as overseer of the public service. Most of its guidance has been limited to events such as general elections and been sporadic in nature. A more enduring guideline was issued in 2002 on the topic of consultation and transfer of requests between Ministers and Departments.⁶⁹⁴

The Ministry of Justice

13.16 The Ministry of Justice currently administers the OIA, along with many other statutes. In practice this means the Ministry must be consulted about proposed legislative amendments and may take the lead role in issuing drafting instructions.⁶⁹⁵ The Ministry also has two statutory functions under the OIA – it must “cause to be published” the *Directory of Official Information* and update it at two-yearly intervals,⁶⁹⁶ and it can provide advice and assistance to other agencies:⁶⁹⁷

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.

- 13.17 No submitters mentioned this advice provision and its discretionary nature is significant. Nicola 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.”⁶⁹⁸ The Ministry has published administrative guidelines, approved by Cabinet, in relation to charges for the provision of official information, the most recent dated 2002.⁶⁹⁹ A power in section 47(d) to make regulations prescribing reasonable charges for the purposes of the OIA has never been used.

Department of Internal Affairs

- 13.18 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. It exercises a limited role in relation to the LGOIMA and the day-to-day running of local government, reflecting the approach of the Local Government Act 2002 which saw devolution of authority to local government bodies.
- 13.19 2011 saw significant structural changes in DIA which potentially impact on the official information function in both the OIA and LGOIMA. The Chief Executive of DIA became the Government Chief Information Officer (GCIO), with the role of providing leadership on information and communications technology (ICT) matters within government. In addition the National Library of New Zealand and Archives New Zealand were amalgamated into the Department. Public records provide the foundation for access to official information and Archives has responsibility for the maintenance of official records under the Public Records Act 2005.⁷⁰⁰

The Ombudsmen

- 13.20 The OIA and LGOIMA grafted a complaints jurisdiction onto the Office of the Ombudsmen’s original jurisdiction as established under the Ombudsmen Act 1975. This is their sole statutory responsibility in relation to official information. Ombudsmen do not have any specific requirements to carry out promotion, oversight, support or training in relation to official information.
- 13.21 In practice, however, the Office of the Ombudsmen carries out a range of activities to support official information in recognition that this work needs to be done. As noted on their website, the Ombudsmen carry out training because:⁷⁰¹

[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.

- 13.22 In their 2011–14 Statement of Intent, the Ombudsmen state that:

To deal effectively with official information complaints the Ombudsmen will:

- investigate and review Ministerial and agency decisions on requests for official information;

- form opinions on whether Ministers and agencies have complied with their obligations under the official information legislation and make necessary recommendations;
- report on and monitor the implementation of the Ombudsmen's recommendations;
- promote the proactive disclosure of official information where appropriate to reduce the administrative burden and transaction costs of reacting to individual requests for similar information;
- contribute to the Law Commission review of the official information legislation.

13.23 The 2010/11 Annual Report lists six outcomes and impacts sought by the Ombudsmen, one being:

Improved capability of state sector agencies in administrative, decision making and complaints handling processes and operation of official information legislation.

13.24 The Report notes that the Office conducted 29 workshops and training seminars around New Zealand, including training on the requirements of the official information legislation, and they advised on 35 legislative, policy and administrative proposals relevant to the Ombudsmen's jurisdiction, also including the official information legislation. On 43 occasions, the Office provided advice to agencies on the types of considerations they ought to be taking into account in responding to official information requests.⁷⁰²

13.25 The Law Commission applauds the work of the Ombudsmen in upholding the official information legislation and assisting the public and agencies further than the legislation requires of them. Our review must, however, consider whether the Office of the Ombudsmen is the most appropriate body to carry out all the oversight functions related to the official information legislation or whether some of the load should be carried elsewhere.

Cabinet Office

13.26 The Cabinet Office has an influence on the way official information is handled because the Cabinet Manual contains substantive guidance on aspects of the OIA relating to Cabinet and Ministers.⁷⁰³ The Manual provides a broad overview of sources of further guidance (including the Practice Guidelines and Ombudsmen Quarterly Review) as well as its own substantive advice about the release of official information.

The Information Authority

13.27 The Information Authority was seen by the Danks Committee as a crucial part of the official information framework. In light of our consideration of the oversight functions, it is helpful to look at the original discussion recommending establishment of the Information Authority and the legislative provisions setting out its functions.

13.28 In its General Report, the Danks Committee strongly recommended setting up an “independent body of sufficient status” to be responsible for oversight of the new official information regime, seeing it as “integral” for an agency outside the normal administration and executive government to keep the OIA under review and report on its progress to Parliament.⁷⁰⁴ In its Supplementary Report, the Committee described two functions for the Authority which they considered of primary importance.⁷⁰⁵

(1) A regulatory function: to receive submissions, and conduct hearings; to establish guidelines and criteria for administrative action; to define and review categories of information for the purposes of access and protection;

(2) A monitoring function: to keep under review the Official Information Act and other legislation and practice in the general information field and to recommend changes to the Government or other appropriate body, and to report to Parliament;

13.29 These regulatory and monitoring functions constituted the Authority’s main task of implementing the legislation fully by making recommendations about the scope of the Act and clarifying various questions about how the OIA should interact with other legislation. The Authority was expected to take up hard issues as they emerged and develop categories and rules on how and when information of that type should be made available. The ability to develop categories was described by the Danks Committee as “central to the gradualist approach we have recommended”⁷⁰⁶ but, as Nicola White notes, the original concept of an ongoing regulatory function to provide a framework for application of the OIA’s broad criteria has effectively vanished from discourse on the Act.⁷⁰⁷

13.30 To some extent, our recommendations in Chapter 2 for the Ombudsmen to identify themes and provide guidance drawn from previous cases, particularly in regard to commonly recurring situations, are in line with the original vision of the Danks Committee approach to streamline case-by case consideration of requests. But this will not assist with the application of the OIA to new situations where regulatory guidance may be useful. This kind of work has not been carried out consistently since the Authority was abolished in 1988, and in our view is now overdue.

13.31 Under the original provisions in the OIA the Authority was given very broad oversight and review functions.⁷⁰⁸

38. Functions and powers of Authority – (1) The principal functions of the Authority shall be-

(a) To review, as a first priority, the protection accorded to official information by any Act with a view to seeing whether that protection is both reasonable and compatible with the purposes of the Act:

(b) To define and review categories of official information with a view to enlarging the categories of official information to which access is given as a matter of right:

(c) To recommend the making of regulations prescribing –

- (i) Categories of official information to which access is given as a matter of right; and
 - (ii) Such conditions (if any) as it considers appropriate in relation to the giving of access to any category of official information.
- (2) The Authority shall also have the following functions:
- (a) To keep under review the working of this Act and the manner in which-
 - (i) Access is being given to official information; and
 - (ii) Official information is being supplied:
 - (b) To recommend to any Department or Minister of the Crown or organisation that the Department or Minister of the Crown or organisation make changes in the manner in which it or he gives access to, or supplies, official information or any category of official information:
 - (c) 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:
 - (d) To inquire into and report on the question whether this Act should be extended to cover information held by bodies other than Departments, Ministers of the Crown, and organisations:
 - (e) To inquire generally into and report on any matter, including any enactment or law, or any practice or procedure, affecting access to or the supply or presentation of official information.

13.32 During its short term the Authority produced a very considerable body of work for an office of its size, reflected in amendments to the OIA and repeals and amendments to various legislation that contained secrecy provisions. It also carried out research on protecting the personal information of individuals and published an issues paper and later a report discussing how the OIA should deal with access to personal information.⁷⁰⁹ It made recommendations relating to the scope of the OIA which resulted in hospitals, schools and universities coming under the Act, and worked on remission of charges, criminal sanctions and third party access rights.

13.33 It is worth noting that an equivalent body did not exist to oversee the implementation of the LGOIMA. That Act has never benefited from dedicated monitoring or systematic review, other than indirectly through the work of the Information Authority on the OIA.

A SET OF STATUTORY FUNCTIONS

- 13.34 Our 2010 Issues Paper proposed that statutory responsibility for some new functions should be included in the OIA and the LGOIMA. The submissions confirmed that co-ordination of various operational aspects of the official information framework can be problematic for both agencies and requesters. But although there is agreement on some problems, submitters offer a variety of views on how the Act should operate and who should be responsible for oversight. In this section we discuss possible statutory functions and the submissions received on them. We discuss the options for assigning the leadership function to a particular agency later in this chapter.

Functions of the Office of the Ombudsmen

- 13.35 We begin with two vital functions that we consider should remain with the Office of the Ombudsmen:
- (a) Complaints; and
 - (b) Guidance.

Complaints

- 13.36 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. This was also the very clear feedback received from submissions, with unanimous support from 39 submitters that the Ombudsmen should continue to receive and investigate complaints. The Media Freedom Committee commented that;

For the most part, the mainstream media has a good and mutually respectful relationship with the Ombudsmen's Office.

- 13.37 Such negative comments as there were concerned resourcing issues and timing concerns, resulting in delays in processing complaints. Removing the Ombudsmen as the complaints body would mean losing the institutional knowledge and awareness built up over more than 25 years of dealing with official information complaints.

Guidance

- 13.38 In the issues paper we said that the provision of guidance is an appropriate role for the Ombudsmen,⁷¹⁰ and this approach is strongly supported by the submissions. There was also overwhelming support for more specific and targeted guidance about the withholding grounds, particularly in regard to commonly recurring situations. In Chapter 2 we make recommendations about the function of guidance, which we anticipate will primarily be available online and on which training for both officials and requesters can be based.
- 13.39 Several submitters noted that if the Ombudsmen did not already carry out a guidance function without being required to do so, there would be a serious gap. Other submitters pointed out that if the online advice were more streamlined and user-friendly, if there was better training for officials, the media and interest groups, and if the official information legislative provisions were clearer, there would be less need for guidance of any kind.
- 13.40 Guidance from the Ombudsmen is about the correct interpretation of the legislation and therefore how the provisions should generally be applied. Some submitters noted the fine line between legal advice and guidance and how important it is that guidance is not seen as determinative. The Office of the Ombudsmen receives requests for advice from agencies in relation to specific requests but only provides general advice about the types of considerations that should be taken into account. It would be inappropriate to give what would amount to legal advice when the Office may be called on to investigate and review the decision taken. We agree with this approach.
- 13.41 We contrast the authoritative but interpretative approach of the Ombudsmen with the situation under the Privacy Act where the Privacy Commissioner can provide specific advice if requested.⁷¹¹ A significant difference is that Privacy Commissioner resolutions on a complaint can be taken to the independent Human Rights Review Tribunal, whereas Ombudsmen recommendations are to all intents and purposes the end of the line for complainants.
- 13.42 We also discussed in the issues paper the contentious issue of whether it is appropriate for a complaints body that makes rulings over legal rights to also issue guidance on how the rules governing those rights are to be applied.⁷¹² We considered the possibility of the State Services Commission or the Department of Internal Affairs taking this responsibility but rejected those options and noted the potential risk for confusion if the Ombudsmen and an alternative guidance agency hold different views on interpretation of the legislation. In the Law Commission's 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 concluded that it does not offend against constitutional practice.⁷¹³

- 13.43 Given the exposure of the Ombudsmen to complex official information problems and the experience gained from dealing with both complainants (requesters or third parties) and officials, we consider they are best placed to develop formal guidelines and practice notes that take account of considerations that weigh for and against release. We recommend in Chapter 2 that the Office of the Ombudsmen should carry out the statutory function of provision of guidance as set out but, as we explain in that chapter, when preparing that guidance they should consult with the office that has oversight of the official information legislation.

R105 The Ombudsmen should continue to have the statutory function of investigating complaints under section 28 of the OIA and section 27 of the LGOIMA.

R106 The Ombudsmen should have the statutory function of providing guidance on the official information legislation, as recommended in R1.

Oversight functions

- 13.44 In the issues paper we suggested that the OIA and the LGOIMA might include an oversight function that encompassed monitoring the operation of the Acts, policy, review and promotion.⁷¹⁴ The great majority of submitters were in favour, with one commenting this would assist adaptation to changing circumstances, rather than complaints being the only driver. The Ombudsmen also strongly support these statutory functions, pointing out that they are all functions the Danks Committee originally envisaged would be required for an effective access to information regime. A few submitters, who agreed with the functions being carried out, were not sure that legislation was necessary.
- 13.45 After consideration of the submissions and further consultation we have concluded that a number of oversight functions should be given statutory authority under the leadership of one oversight office or officeholder, although not necessarily only carried out by that body. In creating a list of functions we have also drawn in part on the provision conferring functions on the previous Information Authority, reset for our present day context. We have also taken into consideration the range of recommendations in this final report which will require facilitative leadership over several years to progress. A large proportion of our recommendations propose development of guidance and best practice models that will require cross agency leadership.
- 13.46 In our view the functions we propose are integral to the official information legislation and essential for its efficient operation. We also believe there is a particular need for these functions to be undertaken during the next few years so as to promote and incorporate changes for the pro-active digital environment.

- 13.47 We emphasise again that we recognise official information is a part of the wider government information management network. While it is not our role to frame recommendations that encompass the whole picture, we strongly support development of an integrated management framework to provide strategic oversight, leadership and co-ordination of government held information, and for this to include oversight of the official information legislation.

Leadership

- 13.48 Our focus here is on leadership for the operation of official information framework. The functions we propose are necessary to allow the office charged with oversight to carry out the responsibilities of leadership.

- 13.49 There are several models of overall leadership or responsibility in related legislation. The Public Records Act 2005, for example, also covers both central and local government agencies. The wide application of the official information framework, with compliance being a requirement for all officials and impacting on all the information they hold, no less requires leadership and oversight. The first function of the Chief Archivist is:⁷¹⁵

to exercise a leadership role in record keeping and in the management of public archives in New Zealand;

- 13.50 We also see leadership as encompassing the promotion of official information principles, arising from the first purpose of the Official Information Act:⁷¹⁶

to increase progressively the availability of official information to the people of New Zealand--.

- 13.51 The Privacy Act 1993, Health and Disability Commissioner Act 1994, and Human Rights Act 1993 all include functions for promotion of the principles of their legislation. The Privacy Commissioner is given a wide range of activities in order to:⁷¹⁷

promote, by education and publicity, an understanding and acceptance of the information privacy principles and of the objectives of those principles.

- 13.52 The Health and Disability Commissioner is required to:⁷¹⁸

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 ... of the rights of the health consumers and disability services consumers and of the means by which those rights may be enforced.

13.53 We envisage that the legislation would provide for an oversight office to have overall leadership and be required to report annually to the relevant Minister on the operation of the official information legislation in government and local government. We propose that statutory oversight for the provision of official information would incorporate the following functions:

- (a) Policy advice;
- (b) Operational review;
- (c) Promotion of best practice;
- (d) Statistical oversight;
- (e) Oversight of training for officials;
- (f) Oversight of guidance for requesters; and
- (g) Annual reporting.

Policy advice

13.54 We suggested in the issues paper that the oversight office should be responsible for making reports on prospective legislation or policy relating to access to official information. Such a policy function would impose a positive obligation to provide advice to Government on proposed legislation or policies affecting access to government information and on the implications for the official information framework. This would ensure that the links between access entitlement under the OIA and the LGOIMA and information management more generally are not overlooked.

13.55 For example, we see new policy responsibilities arising with collaboration on new information initiatives such as data reuse, particularly at the outset of planning, to ensure streamlined co-ordination with the existing official information framework.⁷¹⁹ Policy advice can and will be given by other relevant agencies but there is no consultation requirement specifically relating to the official information framework and significant implications are sometimes overlooked. The Privacy Commissioner takes a similar statutory role in relation to the Privacy Act.⁷²⁰

- 13.56 It is 24 years since the Information Authority ceased to exist and we consider that official information policy is again at a stage where work on specific regulatory issues is needed to ensure the legislative framework remains effective and pertinent. Earlier in this report we identified some gaps where we have given a lead but propose that further work is needed, which is likely to lead to further legislative change. In some cases we have provided a detailed analysis of the issues and suggested the direction but recognised that whole-of-government collaboration is required. These include:
- (a) reviewing the schedules of the Acts to eliminate anomalies, bring within coverage organisations that should be included and provide one accessible list of the agencies covered by the official information legislation (chapter 2);
 - (b) revising guidance about ministerial/agency consultation and transfers (chapter 4);
 - (c) developing policy advice on the need for culturally sensitive withholding grounds (chapter 7);
 - (d) establishing a consistent and principled charging framework for the provision of information which covers official information legislation and also other relevant government information initiatives such as NZGOAL (chapter 10).
- 13.57 In our view, this work is needed in the near future. Integration of the official information framework with the digital and other initiatives underway may also require new policy and regulatory work. We see the oversight office or officer as facilitating and contributing to, or as appropriate, leading this policy work.
- 13.58 One-off policy issues also arise, such as when a secrecy provision is proposed in a draft Bill or a new public agency is proposed. The oversight body would report to Parliament on the appropriateness of the secrecy provision and whether the new agency should be subject to the OIA or LGOIMA.
- 13.59 The importance of Government receiving wide policy advice on public information matters is increasingly recognised in other jurisdictions. For example, since 2003 the United Kingdom has had an independent Advisory Panel on Public Sector Information (APPSI). This panel:⁷²¹
- (a) advises Ministers on how to encourage and create opportunities in the information industry for greater re-use of public sector information;
 - (b) advises the Director of the Office of Public Sector Information and the Controller of HM's Stationery Office about changes and opportunities in the information industry, so that the licensing of Crown copyright and public sector information is aligned with current and emerging developments; and
 - (c) reviews and considers complaints under the Re-use of Public Sector Information Regulations 2005 and advises on the impact of the complaints procedures under those regulations.

Operational review

- 13.60 The effective operation of the OIA and LGOIMA is a practical matter in the hands of numerous officials, and there is value in assigning a statutory function for assessment of whether the legislation is working well, whether amendments are needed, and whether other measures are required to enhance their efficacy. Our recommendations elsewhere in this report include several operational aspects where review will be the first step in undertaking policy or regulatory work, for example reviewing the take-up of the proposed pro-active release provision,⁷²² or whether the proposed legislative amendment results in more effective application of the public interest test.⁷²³ In order to provide useful and relevant policy and regulatory advice, the oversight body needs to have authority to investigate what is actually happening.
- 13.61 We consider the oversight body should also be able to receive representations from members of the public or officials and investigate problems they experience with the operation of the Acts. This does not duplicate the Ombudsmen's complaints function about specific requests. It is about ensuring there is a way for the public to notify, and for government to investigate, operational problems that may arise such as systemic problems within an agency, the need for a specific legislative amendment or even the working of the complaints process. The Ombudsmen can and do call attention to management problems that come to notice in relation to complaints they receive, but we consider this operational oversight function should be formally recognised in the legislation.
- 13.62 Similar responsibility exists in other New Zealand legislation, including the Human Rights Act 1993 and Children's Commissioner Act 2003. The Health and Disability Commissioner, for example, is required to:⁷²⁴
- 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
- 13.63 It is a common function amongst Information Commissioners abroad to monitor individual agency compliance with freedom of information legislation. We do not advocate 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, these can be investigated and reported to the responsible Minister who may undertake further enquiry.
- 13.64 The Law Commission considers that periodic reviews of all legislation is desirable. In our review of the Privacy Act, we expressed the view that:⁷²⁵
- 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.

- 13.65 The Privacy Commissioner is required to undertake reviews of the operation of the Privacy Act at intervals of not more than five years.⁷²⁶ To date, a total of five such reports have been made to the responsible Minister, each proposing a significant number of legislative changes.⁷²⁷ We suggested in our review of the Privacy Act that that Act be reviewed at the same time as the OIA and the LGOIMA and the Public Records Act 2005, given the close interrelationship of these three statutes.⁷²⁸ We remain of this view.

Promotion of best practice

- 13.66 We noted at the start of this chapter that lack of central co-ordination or oversight of internal management processes has resulted in little sharing of common problems and solutions, and with agencies largely developing their own internal systems for applying the official information legislation. The submissions suggest that agencies operating under the LGOIMA may be particularly isolated in this regard. There has been little attention given to developing cross-agency protocols or best practice models.
- 13.67 We see a role for the oversight office to promote best practices across agencies, in consultation with the Ombudsmen. In this report we have mentioned areas where the development of best practice would be desirable such as:
- (a) consultation with third parties when releasing information relating to them (chapter 10);
 - (b) developing timely and appropriate processes for managing both individual requests and proactive release (chapter 12); and
 - (c) providing user friendly information for requesters (chapter 9).
- 13.68 We also make recommendations for some specific guidelines to be developed where new issues have arisen in recent years. We envisage that an oversight office or office holder could respond to these recommendations, and to other significant practice issues called to their attention by central and local government agencies, by initiating and coordinating the development of best practice models and cross agency guidelines.
- 13.69 For example, in this report, we recommend guidelines should be developed for:
- (a) The crossover between the Public Records Act 2005 and the official information legislation (chapter 15);
 - (b) The interaction of the OIA, LGOIMA and the Public Records Act 2005 in relation to requests for metadata and information in backup systems (chapter 10);
 - (c) The interaction of the OIA, LGOIMA and NZGOAL, including advice about legal restrictions on the use of released information such as defamation, copyright, privacy and contempt of court (chapter 10);

- (d) Encouragement of proactive release opportunities by developing lists of possible categories of information and of examples (chapter 12); and
- (e) Liability issues and due diligence best practice to manage any potential liabilities involved with pro-active release (chapter 12).

Statistical oversight

- 13.70 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, in that this can 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.”⁷²⁹ The requirement to maintain statistics about official information requests already exists, consistent with agencies’ obligations to create and maintain full and accurate records of its affairs under the Public Records Act 2005.⁷³⁰ In order to review the operation of the Act and ensure policies and practice keep pace with changes in the information environment, we consider there should be some statutory clarification about the collection and maintenance of data for both agencies and the oversight body.
- 13.71 In the issues paper we proposed that the oversight agency could be charged with collecting statistics about the operation of the Act and should also report annually to Parliament on the overall operation of the Act.⁷³¹ This proposal was not supported by agency submitters, and we have modified our proposal in light of this.
- 13.72 Comments included reservations about the practicality and cost of collecting statistics and whether the benefit would offset the cost. Central government agencies made less comment on this aspect, possibly because their reporting requirements already include some of this information and they would not find the provision of statistics to the oversight agency much more onerous than current practice. One comments that it would duplicate reporting within the agency. Many agencies only log formal requests and several submitters thought it would be impractical to report accurately on all requests as most are informal or oral and responded to immediately.
- 13.73 It appears to be practical for most agencies to provide statistics on requests for information that were refused and on the overall resources applied to responding to official information requests, but we agree that it is difficult to provide statistics on the total number of requests received, whether orally or in writing.⁷³² We suggest more work should be undertaken with agencies to clarify, probably in regulations, what statistics must be kept. We envisage that at a minimum the statistics would include:
- (a) the number of requests received in writing and responded to;
 - (b) whether information was withheld;

- (c) what withholding ground or grounds were relied upon in each case; and
 - (d) the resources applied generally to official information work.
- 13.74 A very clear majority of submitters agree with us that there should be no statutory requirement for an annual audit relating to the official information legislation, as required in some other jurisdictions, since agencies already have robust legislative compliance requirements. Taking a contrary view, two requester submitters point out that that some agencies cannot yet be relied on to fulfil their commitment to official information principles.
- 13.75 We remain of the view that there should be statutory requirements about the collection of statistical data. For review to be effective we believe there must be a clear obligation on agencies to keep certain statistics and for the oversight office to have authority to request this information and be required to maintain and consolidate data about the operation of official information across government and local government. We favour the use of regulations to set out what statistics should be kept by agencies.

Oversight of training for officials

- 13.76 The application of the official information legislation is core work for officials in all central and local government agencies. The two overriding principles - that information should be made available unless there are valid withholding grounds under the Act and that all requests for information, however formulated, are covered by the Act - apply to all the information held by officials and determine how they manage that information. Training and supervising staff so that they apply these principles properly in the course of routine daily work is therefore also a routine management function.
- 13.77 Our impression from the submissions is that a few agencies do not regard official information as integral to their work but as an add-on regime for responding to requests, sometimes a rather irritating add-on. The submissions also suggest that training is sometimes insufficient or done in an ad hoc way. A consistent theme of submitters in regard to many issues, particularly coming from requesters, is that some officials do not understand their responsibilities and do not apply the legislative provisions correctly.
- 13.78 The submissions indicated that some agencies do incorporate official information training within their general or induction programmes, and several supplement basic training with in-house seminars or sending staff on external training. A few commented that training is a function that agencies and local authorities are already required to carry out. On a positive note the great majority of submitters, whether requesters or officials, see training of officials to maintain skill levels as very important and agree with the issues paper's suggestion that the provision of training for officials should be a statutory function.⁷³³ Submissions from the Ombudsmen and Privacy Commissioner are supportive of such a statutory function.

- 13.79 The Ombudsmen's Office is sometimes asked to participate in training or to provide training materials and the important contribution the Office has made to training is greatly appreciated by agencies. In our view the Office of the Ombudsmen should continue to act as expert advisers for training programmes. But the responsibility for training of officials does not rest with the Ombudsmen, who are officers of Parliament not public sector bodies. The responsibility lies with the management of central or local government agencies.
- 13.80 Submitter comment reflected the need to be realistic about what can be achieved and about the costs. Several thought that if training were a statutory function more funding would be required. We suggest only that the oversight body should have a function to develop and co-ordinate best practice training and to promote consistent standards within agencies. The generic nature of the training required should lead to efficiencies of scale by one office having responsibility for oversight and monitoring the effectiveness of training programmes. This should save costs for agencies as well as encourage consistency and best practice across agencies. We envisage that the choices about application of resources to training would continue to be with agencies and local authorities.

Oversight of guidance for requesters

- 13.81 Most central and local body agencies field large numbers of inquiries from the general public and have telephone services to respond as effectively as possible to general requests for assistance. Most agencies also provide user-friendly and helpful online advice about their work and the legislation they administer.
- 13.82 Despite this, the submissions suggest that requesters do not find it easy to find out their rights under the official information legislation and to understand how best to advance their particular queries. The website maintained by the Office of the Ombudsmen, almost the only source of detailed information at present, is not particularly user friendly for lay readers. Nor is that its primary purpose.
- 13.83 Comments from submitters in response to questions in two other chapters in the issues paper are relevant here. In Chapter 2 of the issues paper, entitled Decision-making, we asked whether there should be a dedicated and accessible official information website.⁷³⁴ This option was strongly endorsed by submitters, who made some detailed comments mentioning the need for very effective search capacity and organisation of material. Some supported the idea of a site that provides a portal to other information, others that the site should be a central repository of information including statistics on complaints, alerts and the ability to lodge requests or complaints. In this report, we recommend that an accessible website should be established containing the guidance from the Office of the Ombudsmen and the agencies that administer the OIA and LGOIMA.⁷³⁵

- 13.84 In Chapter 9 of the issues paper, entitled Requests, we asked whether there should be more accessible guidance for requesters.⁷³⁶ There was also overwhelming endorsement of this, with comments again mentioning options such as linked websites or a central website, provision of plain English guidelines, a standard form for making requests and the ability to talk to people in agencies.
- 13.85 In response to these submissions, we see provision of accessible guidance for requesters on a dedicated website as an important function that belongs with the oversight office, in collaboration with agencies. We think design and presentation of the website should focus on assistance for the general public, and for requesters in particular.⁷³⁷ This would complement the Ombudsmen's website which focusses on the interpretation of the legislation and is probably primarily used by officials and professionals. We envisage that entry level guidance for requesters would draw on material from the Ombudsmen website but, as with the training of officials, we see assistance for requesters as a core responsibility of government and local government not the Ombudsmen. There are many examples of interactive, user friendly websites provided by central and local government agencies in New Zealand, and of excellent freedom of information websites provided in overseas jurisdictions.
- 13.86 The oversight office could also maintain a user friendly telephone service. Experience shows that a really accessible website removes the need for many inquiries and can also guide staff answering calls, but it does not negate the need for a one-stop telephone number.

Annual report

- 13.87 We envisage that the oversight office or office holder would report annually on the operation of the official information framework across government and local government. This provides an avenue for publicity about progress as well as about problems, and enables successive governments to participate in improving the operation of the official information legislation.
- 13.88 Most submitters did not see benefit in an annual report to Parliament. Some queried whether Parliament would engage with an annual report or asked how this would improve productivity and access to information. Others point out that the Ombudsmen can already report to Parliament on egregious problems they encounter. Whether the report is to a responsible Minister or to Parliament will depend on the status given to the oversight office or office holder.

Summary of oversight functions

- 13.89 We share the very natural caution of agencies about changes that may introduce more compliance costs with little benefit to productivity, and have carefully examined our proposals in that light. We see the proposed functions as largely facilitative. This is appropriate given the autonomous nature of local authorities and the established accountabilities of central agencies. The provision of informed policy advice, co-ordinated guidance for development, participation in whole-of-government planning, promotion of best practice, assistance with training and guidance for requesters are all functions that will support agencies and also relieve them of some costs.
- 13.90 While the proposed functions are largely standard for the provision of any government services, as we have seen historically there have been some gaps in relation to the delivery of official information. We consider this is the minimum oversight necessary to both implement amendments that will make the legislation more robust and efficient and to guide the provision of official information into the digital age. Leadership and tools that can promote a collaborative whole-of-government approach will be required in this rapidly changing environment. Retaining the current fragmented approach will be less efficient and more costly in our view.
- 13.91 The following recommendations summarise the oversight functions we propose should be introduced.

R107 The OIA and LGOIMA should include the following functions so as to provide leadership and whole-of-government oversight, and to promote the purposes of the legislation: **policy advice; review; statistical oversight; promotion of best practice; oversight of training; oversight of requester guidance and annual reporting.**

R108 The **policy advice** function should cover all official information related policies and legislation and should include:

- (a) co-ordinating official information policy and practice with other government information management and pro-active information release policies;
- (b) advising on the regulation of official information as appropriate and as referred by government;
- (c) advising on official information aspects of new legislation and the establishment of new public agencies; and
- (d) advising on any matter affecting the operation of the official information legislation.

R109 The **operational review** function should include:

- (a) receiving and investigating complaints about the operation of the legislation;
- (b) reviewing agency practice in relation to certain aspects of the legislation;
- (c) undertaking a five year review of the operation of the official information legislation, aligned with reviews of the Privacy Act 1993 and the Public Records Act 2005.

R110 The **statistical oversight** function should include ensuring essential statistics about the operation of the official information legislation are collected and maintained. A new statutory provision should state that regulations may be made specifying which statistics must be kept by agencies.

R111 The **promotion of best practice** function should include developing best practice models and cross-agency guidelines.

R112 The **oversight of training** function should include providing and co-ordinating assistance to agencies to deliver training.

R113 The **oversight of requester guidance** function should include ensuring that appropriate assistance is available to requesters, such as by way of a dedicated website.

R114 The **annual reporting** function should include making an annual report to the relevant Minister on the operation of official information legislation.

ASSIGNING THE OVERSIGHT FUNCTION

13.92 Our strong recommendation is for one agency to have leadership and oversight responsibility for the functions listed above. This excludes the complaints and guidance functions which we recommend should remain with the Ombudsmen.

13.93 In the issues paper we asked open questions about which agency should be responsible for the oversight role, including the option of establishing a new Information Commissioner's Office. We expressed a preference for the functions to be shared between the State Services Commission and the Department of Internal Affairs in response to their responsibilities at that time. The leadership role of E-government programmes across the state sector was then with SSC.

- 13.94 This division of responsibilities is no longer our preference. We now favour combining the OIA and LGOIMA into one statute.⁷³⁸ Also, since publication of the issues paper, the functions of DIA and SSC have changed. Government information management structure is now centralised in DIA, where the position of Chief Government Information Officer has been established.

Submitter views

- 13.95 There was not a large response to questions in the issues paper about responsibility for the oversight function. Preferences for the choice of agency were spread fairly evenly between the Ombudsmen, SSC, DIA and an independent Information Commissioner. One submitter made a case for the Chief Archivist to have an oversight function for both the functions of the Public Records Act 2005 and the official information legislation, possibly as an independent Crown Entity or Officer of Parliament.
- 13.96 The option of an Information Commissioner did not attract a lot of interest from submitters and views were fairly evenly divided, with twelve against and nine in favour. One submitter set out strong reasons for establishment of an Information Commissioner with functions aimed at achieving coherent information policy on a whole-of-government approach and focussing on future needs, transparency around funding and support, and more efficient delivery of training. Most support came from the requester side, including the media organisations, but with some doubt expressed about whether there would be adequate funding.
- 13.97 The Ombudsmen see consistency of approach as a key benefit in vesting all functions in one agency. They recognise independence and long term commitment as good arguments for creating a new agency such as an Information Commissioner with joint oversight of OIA and LGOIMA, and think this would also increase the prominence of freedom of information in New Zealand. They also suggested another alternative – re-establishment of the Information Authority which was originally charged with the oversight functions under consideration.
- 13.98 We asked in the issues paper whether, if an Information Commissioner were appointed, the person should operate in a stand-alone organisation or as part of another agency.⁷³⁹ Again there was little response but ten submitters expressed clear support for the stand-alone option, one commenting that the position would not have enough clout from within an agency. A few thought it could be a separate function of the Ombudsmen's Office and one thought the position could incorporate the Privacy Commissioner.

Office of the Ombudsmen

- 13.99 The issues paper discussed whether it would be appropriate for the Ombudsmen to take on the oversight role.⁷⁴⁰ As we have seen, the Ombudsmen increasingly deal with systemic issues and foster state sector capability, and their submission pointed out that they offer some of the same advantages as an independent Commissioner. An important question is how compatible the oversight role is with their complaints jurisdiction.
- 13.100 Overseas there are models where a complaints investigation function sits in the same organisation as the policy and regulatory functions, but these are not necessarily parallel with the situation in New Zealand. The UK Information Commissioner's Office, for example, encompasses jurisdiction for data protection complaints (equivalent to our privacy statute) as well as freedom of information but the decisions are not final as they can be appealed to a tribunal. In Tasmania, at the other end of the scale, the Ombudsmen holds both the complaint and oversight roles but the operation of the freedom of information legislation covers only the state government and is a much smaller operation than in New Zealand.
- 13.101 We see the roles of government and the Ombudsmen in relation to the legislation as separate but complementary. The primary role of the Ombudsmen is to investigate complaints in relation to the specific application of the legislation by agencies and make recommendations. This is an independent and semi-judicial function. Although the Ombudsmen's focus is on individual noncompliance, their investigations and recommendations can inform the managers who have the responsibility for maintaining performance standards for this core responsibility. As well as potentially conflicting with their independent complaints function, it also seems unreasonable to expect the Ombudsmen to have a responsibility for oversight and policy development in relation to the far reaching changes in information technology and management of those changes by Government.
- 13.102 On balance, we do not favour the Office of the Ombudsmen taking on the oversight role. We consider that the role of the Ombudsmen in investigating complaints and providing interpretative guidance on the legislation is complementary to, but should remain separate from, responsibility for oversight of the operation of the legislation.

Independent Information Commissioner

13.103 Many jurisdictions overseas have appointed independent Information Commissioners to oversee freedom of information legislation. There is considerable variety in both the structure and responsibilities of Information Commissioners internationally. In some places the Information Commissioner has a determinative role in handling complaints and some FOI Commissioners are part of an umbrella information commission with oversight of other information legislation, such as privacy and public records. Independence from government is a common feature.

13.104 In 2010 Australia established the Office of Information Commissioner in relation to the federal government and in five Australian states the freedom of information statutes are now overseen by an independent commissioner. A summary of different models overseas is provided at the end of this chapter. Our existing Privacy Commissioner is a model similar to the Australian Freedom of Information Commissioners. 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 developing the Australian Freedom of Information Act:⁷⁴¹

It is vital that someone or some agency...should be more closely monitoring the experience under the FOI Act. Otherwise, the preventive 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.

13.105 The reasons given for creating a position of Information Commissioner in New South Wales in 2010 are helpful for our consideration of the issues. They relate to independence, accountability, and guardianship, in that the Commissioner is the public proponent of the objects and intentions of the official information system.⁷⁴² 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. Creation of an independent office holder who can speak out on matters of access to official information, and promote its cause, is seen as more effective than an oversight body housed within a government agency that may be less willing, and indeed constitutionally less able, to hold the government to account for shortcomings in the operation of the legislation.

13.106 A factor against creating an independent Information Commissioner at this time of economic restraint is the financial cost of setting up and maintaining a new office. The proliferation of agencies in the New Zealand state sector is also a long standing concern, indeed as far back as when the five year Information Authority was created in 1982.⁷⁴³ These concerns are still relevant today when a whole-of-government approach is seen as more likely to enhance efficiency.

In-house Statutory Information Officer

- 13.107 Some of the advantages of an independent information commissioner model can be realised by the establishment of a statutory position in-house. Statute can ensure that the officer has policy and operational independence but the officer could be positioned in an agency where economies of scale can be achieved with support from existing resources and the functions combined with related work. The position would have obvious synergy, for example, with the role of the Chief Archivist.
- 13.108 A factor favouring the creation of a new statutory office is that statute can clarify the differences between local authorities and central agencies, and the independence of local government from central government. Another reason is the greater likelihood of long term stability. We have seen that since the Information Authority expired, oversight responsibilities have been abolished, diminished and fragmented between agencies as priorities altered. Restructuring of functions within agencies is an ever present reality. A statutory office, although situated inside an existing agency, would have greater assurance of permanence.

Short-term Information Authority

- 13.109 Another option that could be considered in light of the particular need for these functions to be undertaken at this stage in conjunction with other information developments, would be to establish an independent authority or taskforce for a specific term, rather than on an ongoing basis. This might be a stand-alone independent body such as the original Information Authority, or encompassed within an existing government agency, perhaps with cross-agency secondment. Such a unit might have a wider brief and include implementation and co-ordination of other new information initiatives as well as oversight and implementation of changes to official information legislation.

Our view

- 13.110 We do not express a strong view as to where the oversight function should sit, but we do have a strong view, based on past experience, that it should not be divided between several agencies. We see the relative lack of effort to develop best practice cross-agency standards for official information in both central and local government sectors as stemming from fragmented responsibilities. We have also found that separation of official information oversight from information management and new technology developments has led to a lack of awareness of the close connection between the existing legislation and these developments. Our view is that assigning oversight functions for official information to one office, thus providing leadership and co-ordination, will assist agencies to be more effective than at present.

Ministry of Justice

13.111 The Ministry of Justice must be considered as a possible location for the oversight role. The Ministry currently administers the OIA and it also has an important role in providing policy advice on constitutional and public law matters, a watchdog role that can be seen as encompassing official information. We see the Ministry as continuing to bring a public law perspective to policy relating to official information but also see arguments against the oversight role being located there. It does not have a significant role in local government as it only administers the OIA not LGOIMA. Nor is it centrally involved in government information policy and, in our view the oversight role will to a significant extent set the OIA and LGOIMA in this much wider context. What is problematic and requires attention is alignment of the official information legislation with government wide information technology initiatives and policies.

Department of Internal Affairs

13.112 The Department of Internal Affairs (DIA) is also a possible home for the oversight role as it is now positioned to play a greatly enhanced leadership role in relation to the official information initiatives described in the Chapter 12 and in wider government information policy and practice. Placement here would more easily align the official information legislation with pro-active release initiatives underway. It would also accord with DIA's existing relationship with local authorities under the LGOIMA and with its responsibility for the Public Records Act 2005. Our view is that the benefit of having oversight functions with an agency responsible for overall information management is a significant factor.

State Services Commission

13.113 As one of the three central government agencies that oversee the entire state sector, the State Services Commission (SSC) is a possible home. SSC is responsible for ensuring that the state sector is efficient, provides value for money, and effectively delivers services to the New Zealand public. A very wide range of central agencies comprise the state sector and are subject to the OIA but SSC has no formal responsibilities for local government. Our suggestion in the issues paper that the SSC could share the oversight functions with DIA was largely based on its then leadership of E-government across the state sector, which has now moved to DIA.⁷⁴⁴ Oversight of official information nevertheless has some similarity with the overarching responsibilities of SSC as recognised with the original placement of certain OIA responsibilities there.

Information Commissioner

- 13.114 We see the option of a stand-alone independent Information Commissioner as being the most robust and effective option. An Information Commissioner could be appointed for a specific term or for terms aligning with other similar appointments. This view is tempered, however, by the fact that we must also consider what is realistic given the size of New Zealand and the current fiscal stringency.

Conclusion

- 13.115 Our starting point is that the official information function in New Zealand's central and local government is large enough to warrant ongoing independent oversight and that this is in fact overdue. We consider that independent oversight of the official information legislation is constitutionally significant for our democratic framework and complementary to the individual complaint function of the Ombudsmen. The oversight functions we propose – policy development, operational support and performance review – would align New Zealand with the situation in Australian states and the Commonwealth Government following their recent overhaul of freedom of information responsibilities.
- 13.116 We also consider that the oversight functions we have described are required on a permanent basis, as part of the wider framework for management of public information. We do not therefore favour appointment of another temporary Authority or Taskforce to undertake these functions.
- 13.117 New Zealand is not so large, in our view, that a new structure entirely distinct from existing management frameworks is absolutely necessary. What we see as critical is that the oversight function is established by statute and carried out by a statutory office holder. With these protections in place the office might well be located within a government department. Nor do we see location within a central government agency as incompatible with the autonomy of local authorities, provided that the office has a facilitative role and provides independent advice relating to the purposes of the legislation. Co-location could enhance collaboration between other information management responsibilities, and we earlier noted close links with the functions of the Chief Archivist who also has oversight responsibilities for both local and central government agencies.
- 13.118 We suggest that the ongoing cost of an independent statutory office should be weighed against the ongoing protection it gives our democratic system of government and the rule of law; and in light of potential savings to agencies by avoiding duplication of policy advice and standardising operational activities such as training and in-house systems.⁷⁴⁵

13.119 Deciding the best option for establishing the oversight function will require advice and input from a wide range of people and agencies. The Law Commission does not make a definitive recommendation on which existing agency should include the new statutory office, or whether a standalone Information Commissioner should be established. We see those choices as relating to broader structural objectives in the information management sector.

13.120 We recommend that the following five principles should guide Government decisions in relation to establishing effective oversight of the operation of official information legislation:

- (a) The first principle is that responsibility for the oversight policy and operational functions should be with one office or office holder;
- (b) The second principle is that the oversight responsibility should be vested in a statutory officer to ensure the responsibility is resourced and carried out appropriately;
- (c) The third principle is that the statutory office or officer holder should be accountable to the purposes of the official information legislation in providing policy or practice advice to Government, as are other statutory officers with responsibilities for specialist legislation;
- (d) The fourth principle is that the statutory office or office holder should be integrated with the wider strategic management of government held information; and
- (e) The fifth principle is that the the statutory office or office holder should be established on an ongoing, not short term, basis to ensure that the official information legislation continues to operate efficiently and effectively within the wider information sector.

R115 The oversight function should be established in accordance with the following five principles:

- (a) Responsibility for oversight of the OIA and LGOIMA should be vested in a single office or office holder.
- (b) The office or office holder should be established by statute.
- (c) The statutory office or office holder should be accountable to the purposes of the official information legislation when providing advice to government.
- (d) The statutory office or office holder should be integrated into the wider strategic management of government-held information.
- (e) The statutory office or office holder should be established on an ongoing, not short-term, basis.

INTERNATIONAL FREEDOM OF INFORMATION MODELS

Australia

- 13.121 In five jurisdictions in Australia, freedom of information (FOI) matters are overseen by an independent Information Commissioner (Commonwealth, New South Wales, Northern Territory, Queensland and Western Australia). In these jurisdictions the Information Commissioner's functions include complaints and review, oversight and monitoring, and the provision of advice and assistance. In the remaining three jurisdictions (South Australia, Tasmania and Victoria) freedom of information matters are overseen by an Ombudsman but only in Tasmania does the Ombudsman also have functions relating to guidance and policy advice. In South Australia and Victoria the Ombudsmen have limited roles similar to the situation in New Zealand.

Australian Commonwealth

- 13.122 The Office of Information Commissioner is a recent development in the Australian Commonwealth. It was established by the Australian Information Commissioner Act 2010 which creates a dedicated Freedom of Information Commissioner responsible for carrying out functions that can be categorised as adjudicative, oversight and monitoring, and advisory. The Department of Prime Minister and Cabinet is responsible for FOI policy and the management of the Freedom of Information Act across the Australian Government through its Privacy and FOI branch.
- 13.123 The Commissioner is responsible for promoting awareness and understanding of the legislation, 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 recommendations to Ministers, monitoring and reporting on compliance and reviewing the decisions of agencies, amongst others.⁷⁴⁶ The Federal Reforms also incorporated the Office of the Privacy Commissioner into the Information Commissioner's Office.
- 13.124 These reforms were driven by election commitments made by the Labour Government which wanted to "restore trust and integrity" in the handling of government information.⁷⁴⁷ 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:⁷⁴⁸

The establishment of an Information Commissioner and an FOI Commissioner, as independent officers, will address a long standing lacuna in effective FOI administration.

13.125 It was thought that the role carried out by the Ombudsman reviewing individual decisions was reactive in its approach and was not enough to support an effective freedom of information regime. The Australian Ombudsman echoed these calls, saying that a major shortcoming of Australia's FOI regime:⁷⁴⁹

...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.

Queensland

13.126 In July 2009 the Queensland Parliament replaced its Freedom of Information Act with the Right to Information Act 2009. This retained the existing Office of Information Commissioner, which oversees privacy matters, and creates in addition a Freedom of Information Commissioner who is deputy to the Information Commissioner. As well as being responsible for complaints, this Commissioner has 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.

13.127 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. The Right to Information Act 2009 is administered by the Department of Premier and Cabinet and the Minister responsible for the Act is required to produce annual reports to Parliament.

New South Wales

13.128 Following the Queensland review of its freedom of information law, the NSW Ombudsman carried out an extensive review of that state's FOI laws and made over 80 recommendations for change. The Government Information (Public Access) Act 2009, creating a new Office of Information Commissioner, came into effect on 1 July 2010. The Commissioner is a statutory officer of Parliament, independent from the executive who is required to promote public awareness and understanding of the law 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. The NSW Information Commissioner Office and Privacy Commissioner Office are co-located, but each still exists under its own statute.

- 13.129 The NSW Department of Premier and Cabinet administers the freedom of information legislation and 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. The Information Commissioner will issue guidance about the Act.⁷⁵⁰

Tasmania

- 13.130 Breaking away from the mould set by the Queensland and New South Wales reforms, the Tasmanian Government chose to retain the Ombudsman as its complaint body but gave the office an enhanced role with a number of oversight and reporting functions that it had not previously had to carry out.
- 13.131 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. The responsible Minister is the Minister for Justice, and he or she is required to report annually to both Houses of Parliament on the operation of the legislation. The Department of Justice is responsible for the administration of the Tasmanian legislation.

United Kingdom

- 13.132 An Information Commissioner's Office has had oversight of freedom of information matters in the United Kingdom since 2001 as well as of matters under the Data Protection Act 1998 (similar to our privacy legislation).⁷⁵¹ The Commissioner is responsible for complaints, oversight and monitoring, and training and assistance on matters affecting access to information.
- 13.133 The Commissioner 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 also made regularly to Parliament about compliance across the sectors or in response to specific issues such as the Ministerial veto of the decision to release cabinet documents relating to military action against Iraq.

13.134 The Ministry of Justice (UK) is responsible for the implementation of the Freedom of Information Act 2000 within Government, and administers the Act through a Data Access and Compliance Unit.⁷⁵² This produces guidance for requesters and public bodies subject to the Act and an Annual Report on the operation of the 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.

Ireland

13.135 Amongst the jurisdictions we looked at, Ireland is the only jurisdiction where the Information Commissioner can be a presiding Ombudsman. Each Office is governed by its own legislation with different powers and functions but they are carried out by the same person.

13.136 The Information Commissioner's functions include reviewing complaints, oversight and monitoring and education and guidance. A Freedom of Information Central Policy Unit within the Ministry of Finance oversees freedom of information within Government. The Unit maintains a website which contains information, guidelines, and other resources relevant to both requesters and officials on freedom of information in Ireland.⁷⁵³

13.137 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 legislation, including training in Government agencies, organisational arrangements and any other matters the Minister believes affects the Act's implementation.⁷⁵⁴ 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.

Chapter 13 Footnotes

- 685 The Ombudsmen's OIA complaints jurisdiction is discussed in chapter 11.
- 686 OIA, s 4(a).
- 687 Budget Policy Statement 2010, p 10.
- 688 OIA, s 4; LGOIMA, s 4. To refer to these sections, see Appendix C to this report.
- 689 State Services Commission, papers released on Better Public Services Programme (4 May 2012).
- 690 Cabinet, Minute of Decision (8 August 2011) CAB Min (11) 29/12, available at < www.ict.govt.nz > .
- 691 Submission from Colin MacDonald, Chair, Data and Information Re-use Chief Executives Steering Group (16 March 2007).
- 692 Committee on Official Information *Towards Open Government: General Report* (Government Printer, Wellington, 1980).
- 693 Committee on the Official Information Bill (1981) "Official Information Bill: Report of the Committee on the Bill" 449 NZPD 5042 (30 November). The Committee sat for over a year and received more than 100 submissions.
- 694 State Services Commission *Release of Official Information: Guidelines for Coordination* (Wellington, October 2002) < www.ssc.govt.nz > .
- 695 In the past 30 years there have been few reviews or policy changes to official information legislation and none undertaken by the Ministry of Justice.
- 696 OIA, s 20. The Directory is discussed in more detail above at [12.87]-[12.90] in the context of proactive disclosure requirements.
- 697 OIA, s 46.
- 698 Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007) at 46.
- 699 Ministry of Justice *Charging Guidelines for Official Information Act 1982 Requests* (March 2002). Charging is discussed in more detail in chapter 10.
- 700 The Public Records Act 2005 is discussed in more detail in chapter 15.
- 701 See < www.ombudsmen.parliament.nz > .
- 702 Office of the Ombudsmen *Annual Report 2010/2011* (Wellington, July 2011) at 42.
- 703 Cabinet Office *Cabinet Manual* (Department of the Prime Minister and Cabinet, Wellington, 2008) Part 8.
- 704 Committee on Official Information, above n 692, at 31.
- 705 Committee on Official Information *Towards Open Government: Supplementary Report* (Government Printer, Wellington, 1981) at 15.
- 706 At 19.
- 707 Nicola White, above n 698, at 28.
- 708 OIA, s 38, expired 30 June 1988 under OIA, s 53.

- 709 The Information Authority *Personal Information and the Official Information Act: An Examination of the Issues* (Wellington, 1985). Principles for the protection of personal information were subsequently enacted in the Privacy Act 1993.
- 710 Issues Paper at [13.86].
- 711 Privacy Act 1993, s 13(1)(l).
- 712 Issues Paper at [13.88].
- 713 Law Commission *Alcohol in our Lives: Curbing the Harm* (NZLC R114, 2010) at [10.49].
- 714 Issues Paper at Q97.
- 715 Public Records Act 2005, s 11(1)(a).
- 716 OIA, s 4(a).
- 717 Privacy Act 1993, s 13(1)(a).
- 718 Health and Disability Commissioner Act 1994, s 14(1)(c).
- 719 See Cabinet *Declaration on Open and Transparent Government* Minute of Decision, above n 690; State Services Commission *New Zealand Government Open Access and Licensing framework* (NZGOAL) (August 2010).
- 720 Privacy Act 1993, s 13 (1) (f), (o).
- 721 See < www.nationalarchives.gov.uk/appsi > .
- 722 Chapter 12.
- 723 Chapter 8.
- 724 Health and Disability Commissioner Act 1994, s 14(1)(l).
- 725 Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC IP17, 2010) at 159.
- 726 Privacy Act 1993, s 26.
- 727 See Office of the Privacy Commissioner *Necessary and Desirable: Privacy Act 1993 Review* (Wellington 1998), and subsequent supplements.
- 728 Law Commission, above n 725, at 160.
- 729 Nicola White, above n 698, at 51.
- 730 Public Records Act 2005, s 17(1).
- 731 Issues Paper at Q94 and Q95.
- 732 In the UK certain agencies are required to keep statistics on non-routine requests for information. The 2008 Annual Report on FOI produced by the Ministry of Justice states that ‘non-routine’ requests are those 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.
- 733 Issues Paper at [13.36].
- 734 Issues Paper at Q13.
- 735 Chapter 2, R6.

- 736 Issues Paper at Q47.
- 737 The existing website www.ict.govt.nz, maintained by the Government Chief Information Officer, may be a starting point for such a facility.
- 738 Chapter 16.
- 739 Issues Paper at Q103.
- 740 Issues Paper at [13.100].
- 741 Justice M Kirby “Information and Freedom” (The Housden Lecture, Melbourne, 6 September 1983) at 11.
- 742 New South Wales Ombudsmen *Opening Up Government: Review of the Freedom of Information Act 1989* (Sydney, February 2009) at ch 9.
- 743 See *State Services Commission Reviewing the Machinery of Government* (Wellington, February 2007) at 18.
- 744 Issues Paper at [13.99].
- 745 The NSW government elected to create an independent office of Commissioner, contrary to the recommendations of the Ombudsman, stressing that the benefits would outweigh the costs.
- 746 Australian Information Commissioner Act 2010 (Cth), s 8.
- 747 Australian Labor Party *Government Information: Restoring Trust and Integrity* (October 2007).
- 748 (26 November 2009) Australian Senate Hansard 12972.
- 749 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.
- 750 See < www.oic.nsw.gov.au > .
- 751 See < www.ico.gov.uk > .
- 752 See < www.justice.gov.uk > .
- 753 See < www.foi.gov.ie > .
- 754 Freedom of Information Act 1997 (Ire), s 15.

Chapter 14

Scope of the Acts

AGENCIES SUBJECT TO THE ACTS

- 14.1 The agencies subject to the Official Information Act (OIA) are:⁷⁵⁵
- (a) a department;
 - (b) a Minister of the Crown in his or her official capacity; and
 - (c) an organisation.
- 14.2 A “department” is a government department named in Part 1 of Schedule 1 of the Ombudsmen Act 1975 (other than the Parliamentary Counsel Office).⁷⁵⁶ An “organisation” is an organisation named in Part 2 (but not Part 3) of Schedule 1 of the Ombudsmen Act (other than the Parliamentary Service or Mortality Review Committees) and also an organisation named in Schedule 1 of the OIA itself.⁷⁵⁷ As far as the LGOIMA is concerned, the first schedule of that Act lists the local authorities subject to it. They are divided into two categories, *classes* of local authority and *particular* named local authorities.
- 14.3 Determining whether an agency is subject to the Acts is therefore not a simple question. In respect of the OIA, three schedules of two Acts need to be considered. Even then, a reader might be forced to go to yet another Act for a definitive answer. 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 titled “Institutions established under Part 14 of the Education Act 1989” in Part 2 of Schedule 1 of the Ombudsmen Act.
- 14.4 There is even more complexity when determining whether a Crown entity is subject to the Act. Some, like the Law Commission, are explicitly listed in Schedule 1 of the OIA. The remainder are covered by virtue of the reference in Part 2 of Schedule 1 of the Ombudsmen Act to “Crown entities within the meaning of section 7 of the Crown Entities Act 2004 (other than the Independent Police Conduct Authority)”. Section 7 of the Crown Entities Act then refers readers to that Act’s schedules, the Companies Act 1993 and the Education Act 1989.

- 14.5 The 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 to 6 of 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.
- 14.6 In our view, this situation is not very satisfactory. The Acts are intended to be used by members of the public. They should be able to be understood by the people who wish to use them, and it should be easier than it currently is to find out which agencies are subject to them.
- 14.7 We recommend that the schedules to the OIA and LGOIMA should be as comprehensive as possible, and identify all agencies that they cover. At the very least, the OIA should reproduce the list of agencies that appear in the schedule to the Ombudsmen Act, and should also list the Crown entities which presently do not appear by name. The optimal approach would be for the schedules to list all individual agencies, although that is probably an unattainable ideal: some categorisation of agencies is probably still going to be necessary. For example, more than one submitter noted that CCOs frequently change, with one submitter describing them as a “moving feast”. This might make it impracticable to list individual CCOs. Similarly, it would likely be more trouble than it is worth for school boards of trustees to be individually listed. A pragmatic approach is appropriate but always with the need in mind to make the lists as accessible as possible to those who use them.
- 14.8 Another submitter suggested that it should be a requirement for agencies that are subject to the OIA or LGOIMA to include a statement to that effect on their website and in other information they distribute about their agency. We agree that an agency should identify on its website that it is subject to the OIA or LGOIMA. In chapter 12, we recommend that the *Directory of Official Information* published by the Ministry of Justice be replaced with a requirement that each agency publish on its website the information that would otherwise have been included in that publication. By implication, the inclusion of this information on a website will indicate that an agency is subject to the OIA, but we think it would be desirable for agencies to be explicit in this respect.
- 14.9 Submitters rightly noted that it would be important for the schedules to remain up to date in light of the establishment, abolition or name changes of agencies. In order to ensure that occurs, we recommend that the oversight office we discuss in chapter 13 have a statutory responsibility to maintain the schedules. This would include taking an active role to ensure that application of the OIA or LGOIMA is considered when new bodies are established. The oversight office should also be required to maintain and make publicly available a list of the agencies that are subject to the OIA.

14.10 Both the OIA and LGOIMA include provisions that enable their schedules to be updated via an Order in Council when an organisation is abolished or its name is changed.⁷⁵⁸ Section 32 of the Ombudsmen Act 1975 also enables an Order in Council to be used when a new department of state is created. On most occasions changes to the machinery of government will require legislative change and the appropriate changes to the schedules can and should be made at the same time. However, for situations where legislation is not required, or where the application of the OIA is not considered at the time, we consider that the Order in Council process should also be available.

R116 The schedules to the OIA and LGOIMA should be comprehensive and identify all agencies covered by the OIA and LGOIMA respectively.

R117 Wherever practicable, the schedules should list individual agencies rather than categories of agencies.

R118 There should be a statutory responsibility on all agencies subject to the OIA and LGOIMA to state that fact on their website.

R119 There should be a statutory responsibility on the oversight office to:

- (a) maintain the schedules to the OIA and LGOIMA; and
- (b) maintain and make publicly available a list of the agencies that are subject to the OIA and LGOIMA.

R120 A new provision in the OIA and LGOIMA should state that the Acts' schedules may be updated by Order in Council when an agency is established or abolished, or its name is changed.

WHICH AGENCIES SHOULD BE SUBJECT TO THE ACTS?

- 14.11 Which agencies should be subject to the OIA (and LGOIMA) and which should not does not admit of as clear-cut an answer as one might wish. At one end of the spectrum it is clear enough: Ministers, government departments, crown entities and local authorities should certainly be covered. But there is a spectrum, and it is not an easy matter to determine where the line is to be drawn.
- 14.12 It is a problem worldwide. A survey from Canada says:⁷⁵⁹
- The dilemma of determining which entities should be covered by freedom of information laws is the most complex, amorphous and perplexing topic for FOI theory and practice.
- 14.13 The difficulty of drawing the line is apparent when perusing the present schedules. They contain what at first sight appear to be discrepancies and anomalies. They are not entirely easy to understand. There may in some cases be good reason for these differences, but they invite scrutiny to see whether that is indeed the case. For example:
- (a) The Plumbers, Gasfitters and Drainlayers Board and the Building Practitioners Board are included, but not the Electrical Workers Registration Board.
 - (b) The NZ Security Intelligence Service and the Government Communications Security Bureau are subject, but not the Inspector General of Intelligence and Security or the Independent Police Conduct Authority.
 - (c) Council controlled organisations and licensing trusts are subject to the Act, but not port companies, even those which are more than 50 per cent publicly owned.⁷⁶⁰
 - (d) State Owned Enterprises are included, but not Air New Zealand, which is our national carrier, and in which the state has a majority shareholding.
 - (e) The Accounting Standards Review Board is included, but not the Council of Legal Education.
 - (f) The Abortion Supervisory Committee is included, but not Mortality Review Committees.
- 14.14 There is no single criterion for inclusion in the OIA and LGOIMA.
- 14.15 Some submitters to our issues paper took the view that receipt of any amount of state funding – “even one dollar’s worth of state funding” according to one submitter – should be enough. But that would mean that even private organisations which receive a government subsidy (private schools and the Royal Society, for instance) would be included. They are not, and we heard no suggestion that they should be.

- 14.16 Nor is establishment of an agency by or under statute a sufficient criterion. Companies and incorporated societies exist by virtue of statute, but are private enterprises and properly outside the reach of the OIA. Moreover some bodies subject to the OIA are not statutory: most importantly, Ministers and government departments, while recognised and regulated by statutes, are not *established* by them.
- 14.17 The performance by an agency of a public function is by itself not enough either. If it were, all energy and telecommunications companies would be subject to the OIA. A logical case for their inclusion could be made based on the significance of their impact on the lives and wellbeing of citizens, but many are private enterprises and it would be unrealistic to press for their inclusion.
- 14.18 So how is it to be decided whether or not to include an agency in the OIA or LGOIMA? Part of the answer is to be found in the purpose provisions of the two Acts, which emphasise the accountability of Ministers and officials, and the promotion of good government.
- 14.19 We think the most promising approach is that contained in the Legislation Advisory Committee (LAC) guidelines.⁷⁶¹ The guidelines provide a list of factors, all or some of which should be present for an agency to be subject to the Ombudsmen Act, the OIA or LGOIMA. The factors are:
- (a) the extent of the agency's dependence on central government funding;
 - (b) the obligation of the agency to consult with the Minister on particular matters, respond to ministerial directions, or obtain ministerial approval;
 - (c) the existence of ministerial control over appointments in contrast to, for example, elected membership representing relevant interest groups;
 - (d) the existence of any government controls on finance, for example by the Auditor-General;
 - (e) the public purpose of the agency.
- 14.20 To take account of institutional developments in recent times we suggest that two further factors might be added to the LAC guidelines list:
- (a) the degree of public ownership of the agency;
 - (b) the potential for decisions of the agency to impact on members of the public.
- 14.21 No one of these factors is decisive. Nor is it necessary that all the criteria be present. In any one case a combination of some or all of them will determine the decision. Strength in one may outweigh weakness in another. Decisions must be made individually as to whether a particular agency should be subject or not. An overall assessment of the factors is required. This is bound to leave some difficult decisions at the margins.

- 14.22 We recommend that the schedules to both the OIA and LGOIMA be gone through carefully to eliminate anomalies and bring within coverage organisations with such a relationship to central or local government that they should properly be included. Such an exercise is beyond the scope of this Law Commission project. We suggest that a working party be established for this purpose, led by the Ministry of Justice as the current administrator of the OIA with input from central and local government agencies. This exercise should preferably be undertaken before any new Act is introduced.
- 14.23 However, some bodies raise particularly difficult and important issues, and merit further discussion in this report.

R121 The Ministry of Justice should convene a working group, including representatives from central and local government, to examine the schedules to the OIA and LGOIMA to eliminate anomalies and bring within coverage organisations with such a relationship to central or local government that they should properly be included.

Offices of Parliament

- 14.24 There are three Offices of Parliament in New Zealand: the Office of the Ombudsmen, the Office of the Controller and Auditor-General (OCAG), and the Parliamentary Commissioner for the Environment. Only the last is subject to the OIA. The reason for this is not readily apparent.

Office of the Controller and Auditor-General

- 14.25 The approach taken by overseas jurisdictions to the inclusion of their equivalent of the OCAG in freedom of information legislation differs. The United Kingdom includes the National Audit Office within the scope of its freedom of information legislation but exempts information from being disclosed if disclosure would, or would be likely to, prejudice the exercise of the Office's audit function.⁷⁶² The Auditor-General is excluded from the scope of the Australian Commonwealth legislation.⁷⁶³ Tasmania and New South Wales extend their legislation to the administrative functions of the Auditor-General.⁷⁶⁴
- 14.26 We cannot identify any issue of principle which leads to the conclusion that the OCAG (including Audit New Zealand) should be entirely excluded from the OIA. We think extending the scope of the OIA to include the OCAG, which itself plays an important role in New Zealand's accountability arrangements, would provide an important signal about the role the OIA plays in holding public bodies to account. At least in respect of its administrative functions, including its use of public resources, the OCAG should be as accountable as any other public body. We shall return shortly to the question of which of the OCAG's functions should be subject to the OIA.

Office of the Ombudsmen

- 14.27 For similar reasons, the Ombudsmen have suggested to us that consideration should be given to making them, at least in respect of their administrative functions, subject to the OIA. Information held by the Ombudsmen or other agencies in respect of the Ombudsmen's investigative functions is explicitly excluded from the scope of the OIA.⁷⁶⁵
- 14.28 We agree that, in principle, extending the OIA to include the Ombudsmen's administrative functions is appropriate. It does not send a satisfactory message if the Ombudsmen, the authority charged with holding other agencies to account under the OIA, are themselves completely exempt from it. We thus recommend that subject to the exceptions we discuss below, the Ombudsmen should be subject to the OIA.
- 14.29 The key difficulty is developing an appropriate mechanism for review of decisions by the Ombudsmen to withhold their own information under the OIA. In the United Kingdom, the Information Commissioner, who investigates complaints under the Freedom of Information Act but who is also subject to it, must investigate any complaints about himself or herself. This seems an uncomfortable position. The situation is slightly less problematic in New Zealand, because there is more than one Ombudsman. Nevertheless, we have some doubts about the desirability of an arrangement whereby one Ombudsman investigates the actions of another. Cases of complaints against the Ombudsmen for wrongly withholding information are likely to be very few. We think that when they arise the Speaker should be charged with appointing an independent person to investigate them.

Parliamentary Commissioner for the Environment

- 14.30 The Parliamentary Commissioner for the Environment is, and always has been, fully subject to the OIA. The Commissioner made a submission to our review noting the difficulties posed by, on the one hand, the obligation of openness in the OIA, and on the other hand, the obligation of secrecy imposed on her by the Environment Act 1986. She said that "the two sets of obligations appear to point in opposite directions". We agree.
- 14.31 The Commissioner advises that confidentiality is essential for the effective conduct of many of her functions under the Environment Act. We accept that, and acknowledge that this is a feature of the position of all the Offices of Parliament. The question is how that should best be reflected in the OIA.

Excluded information

- 14.32 We believe that all three Offices of Parliament should be subject to the OIA. The question is how best to provide for that while at the same time protecting the confidentiality necessary for the proper performance of their functions, especially their investigatory functions. There are several options.
- 14.33 *One* would be to make them fully subject to the Act, and to rely on existing withholding grounds, and also the new ground we propose for material acquired in the course of an investigation or inquiry, to withhold information where these grounds are satisfied.
- 14.34 The *second* would be to make the Offices subject to the Act in relation to their “administrative” functions only.
- 14.35 The *third* would be to make the Offices subject to the Act, but to exclude from the definition of “official information” certain categories of information, in particular those which relate to any audit, assurance work, inquiry or investigation. We prefer this third avenue.
- 14.36 The *first* may not give sufficient protection. The *second* is imprecise: exactly what is encompassed by the term “administrative” is open to interpretation. The *third* is more in line with existing provisions of the OIA which exempt evidence provided to commissions of inquiry and the Judicial Conduct Commissioner, and also correspondence and communications (held by others) relating to investigations conducted by the Privacy Commissioner or the Ombudsmen.⁷⁶⁶ We recommend accordingly.

R122 The Offices of Parliament (the Ombudsmen, the Office of the Controller and Auditor-General and the Parliamentary Commissioner for the Environment) should be subject to the OIA by inclusion in Schedule 1. Information relating to any audit, assurance work, inquiry or investigation undertaken by an Office of Parliament should be excluded from the definition of “official information” in section 2 of the OIA.

Parliamentary Counsel Office

- 14.37 In our issues paper, we proposed that the Parliamentary Counsel Office should be subject to the OIA. The Office is already subject to the Ombudsmen Act and already provides information on request. It is not clear why it is not presently subject to the OIA. The Chief Parliamentary Counsel agreed with the proposal in the issues paper, noting that several of the factors listed above in paragraph 14.19 apply to the Office. However, this agreement was subject to having adequate protection of the Office's confidential communications with clients including, for example, drafting instructions and Bills. We believe these communications can be adequately protected by the existing grounds for withholding, in particular legal professional privilege,⁷⁶⁷ but the Legislation Bill 2010, which is currently before Parliament, provides desirable additional clarity on this issue.⁷⁶⁸ In the light of these protections, we recommend that the Parliamentary Counsel Office be made subject to the OIA.

R123 The Parliamentary Counsel Office should be subject to the OIA by inclusion in Schedule 1.

Parliamentary agencies

- 14.38 The OIA was enacted to provide for accountability and transparency of executive government. However, the rationale of the Act applies equally to Parliament. Indeed the Danks Committee, while concentrating its focus on the Executive, expected that its proposals would in due course affect practice in relation to information generated and held by Parliament.
- 14.39 There are legitimate and significant public interests that weigh in favour of a principle of availability of information held by Parliament and its administration just as much as in the case of the Executive. These include the need to maintain openness and transparency in the expenditure of public money in order to maintain public confidence; to enable the public to hold elected representatives to account; and to allow for informed public debate.
- 14.40 In its 2010 review of the Civil List Act 1979, the Law Commission stated its reasons for recommending that the parliamentary administration come under the OIA. The Commission considered that such openness would encourage MPs to make better value-for-money choices. The Commission's recommendations were consistent with the approach taken in the United Kingdom, India, Ireland and South Africa. The Law Commission recommended that:⁷⁶⁹

R5 The OIA should be extended to cover information held by the Speaker in his role with ministerial responsibilities for the Parliamentary Service and the Office of the Clerk; the Parliamentary Service Commission; and the Office of the Clerk in its departmental holdings.

R6 The OIA should not apply to:

- proceedings in the House of Representatives, or Select Committee proceedings; and internal papers prepared directly relating to the proceedings of the House or committees;
- information held by the Clerk of the House as agent for the House of Representatives;
- information held by members in their capacity as members of Parliament;
- information relating to the development of parliamentary party policies, including information held by or on behalf of caucus committees;
- party organisational material, including media advice and polling.

14.41 The effect of these recommendations would be, broadly, that information which related to Parliament's use of public resources and its administrative functions would be subject to the OIA, while information that related to parliamentary proceedings, matters of political strategy or an MP's activities, for example in dealing with constituents, would not.

14.42 In 2011 the Standing Orders Committee considered the Law Commission's 2010 report.⁷⁷⁰ It noted, correctly, that a great deal of parliamentary information is already available to the public through avenues such as Hansard, broadcasting, and the common practice of select committees releasing all evidence received on an item of business. It pointed out that the estimates and financial review processes play an important role in ensuring transparency.

14.43 However, the Committee acknowledged the importance of openness and transparency, and considered how a freedom of information regime could be developed for Parliament. It was uncomfortable about any definition of "parliamentary proceedings" being included in the OIA; the concept is at the core of parliamentary privilege, and applies well beyond the narrow freedom of information context. The definition of "departmental holdings" is also uncertain. The Committee concluded that these definitional issues would require close consideration if there were to be a detailed statutory scheme for the disclosure of parliamentary information. The Committee put forward as an option for consideration that a freedom of information regime for Parliament might be developed:⁷⁷¹

... with high-level principles established in legislation, but implemented under the Standing Orders or other rules adopted by the House or published by the Speaker. This model would be similar to how the New Zealand Bill of Rights Act 1990 (NZBORA) already applies to the legislative branch of government.

- 14.44 The Commission understands the definitional problems, and acknowledges the reasons which have persuaded the Standing Orders Committee to prefer that the legislation contain only high level principles. However the Commission still prefers a more specific legislative solution so that the rules applying to all agencies are contained in one place. Not only does it enhance accessibility to the general public, but it helps to counter any suggestion that the parliamentary agencies are subject to a different regime from everyone else. The Commission respectfully suggests that Parliament consider the Commission's alternative proposals which follow.
- 14.45 The Commission agrees that it is important that proceedings of Parliament should not be subject to the OIA. The House should itself maintain control of those. Yet the expression "proceedings of Parliament" is not easily defined – the law of defamation amply illustrates that – and it would not be easy to frame an exclusion based on that terminology. It is better, we think, to specify the parliamentary agencies which are subject to the OIA, and to list the categories of information held by them which are "official information". By listing what is in, and not just what is excluded, more certainty can be attained. If it be objected that this is to introduce a category-based, as opposed to a case-by-case system, it may be answered that there is precedent in the Act already for doing this in special cases.⁷⁷²

Information to be included in the OIA

Office of the Clerk and Parliamentary Service

- 14.46 We recommend that the following information held by the Office of the Clerk and the Parliamentary Service should be subject to the OIA. The definition of "official information" in relation to parliamentary agencies should specify that only the following types of information are included:
- Statistical information about the parliamentary agency's activities;
 - Information about the parliamentary agency's expenditure of public money;
 - Information about the parliamentary agency's assets, resources, support systems and other administrative matters.

The Speaker of the House

- 14.47 Under the Public Finance Act 1989 the Speaker is the responsible Minister in relation to the Office of the Clerk and Parliamentary Service. This means that the Speaker is accountable for the expenditure and financial performance of those organisations. We recommend that the OIA should be extended to cover the Speaker in that ministerial role under the Public Finance Act 1989, and that only information held by him or her in that capacity is within the definition of "official information".

Parliamentary Service Commission

- 14.48 The Parliamentary Service Commission is an advisory body. It advises the Speaker on services to the House of Representatives and Members of Parliament; recommends criteria for funding entitlements and other matters; and considers and comments on draft reports prepared by review committees. We have considered whether the Commission should also be subject to the OIA. However after discussion with the Parliamentary Service we believe this to be unnecessary. The Commission is analogous to a committee which assists or advises a department or Minister in terms of section 2(2) of the OIA. The Commission “holds” no information in its own right. The information presented to it is held by the Parliamentary Service, which also prepares and holds the minutes of its meetings. If our recommendations are accepted the Parliamentary Service will be subject to the OIA. So we make no recommendation about the Parliamentary Service Commission.

Information to be excluded from the OIA

- 14.49 We believe that, to remove doubt, four types of information should be expressly excluded from the coverage of the OIA.

Agency role

- 14.50 It is already a principle of the OIA that “official information” does not include information held solely as an agent for a person who is not subject to the OIA. We do not propose that the House of Representatives or individual Members of Parliament shall be subject to the OIA, so it follows that information held by a parliamentary agency as an agent for them should not be subject to the Act either. It is not strictly necessary to provide separately for this, but to avoid confusion we think it desirable to make specific provision. We thus recommend that the OIA include a provision that information held by the Office of the Clerk or the Parliamentary Service solely as agent for the House of Representatives or a Member of Parliament is not official information.

Proceedings of the House

- 14.51 Again it is probably not strictly necessary to do so because of the specific list of inclusions, but it will remove any room for doubt if the OIA also provides that nothing in the Act is to apply to proceedings of the House of Representatives, or to limit or affect any privileges, immunities or powers of the House of Representatives or its committees or members. None of those concepts is susceptible of precise definition, so to deal with cases where there might be some doubt as to whether proceedings of the House or parliamentary privilege is involved, we suggest a provision analogous to section 31 of the OIA. It would provide that where the Speaker certifies that the release of any requested information would limit or affect any privileges, immunities or powers of the House, an Ombudsman will not recommend that the information be made available. The Freedom of Information Act 2000 (UK) contains an analogous provision in section 34.

Development of political policies

- 14.52 The disclosure of information about the expenditure of money is particularly problematic and sensitive if it would be likely to prejudice the development of political policies. It is in the public interest that parties be free to formulate policy without obstruction. One way of achieving this might be to create a new conclusive withholding ground of a kind similar to the grounds in section 6. But a more direct, and simpler, route to the same end is to exclude such information from the definition of official information. We recommend the definition of official information exclude “information held by a parliamentary agency that relates to the development of political policies by a recognised party or an independent Member”.

Individual Members of Parliament

- 14.53 Individual Members of Parliament should not be subject to the OIA. It is important that they be able to pursue their activities as Members, whether in relation to their constituencies or to Parliament, free from harassment or pressure. Just as information held by Members themselves should be exempt from the OIA, so should information held about them by parliamentary agencies which might be prejudicial in the way we have described.
- 14.54 We recommend that the OIA exclude from the definition of official information in relation to a parliamentary agency any information about a Member in relation to the Member’s performance of his or her role and functions as a Member.
- 14.55 We note that the UK Freedom of Information Act 2000, which applies to the House of Commons and House of Lords, contains the following exemptions in relation to individual Members of Parliament:⁷⁷³
- (a) information relating to any residential address of a Member of either House of Parliament,
 - (b) information relating to travel arrangements of a Member of either House of Parliament, where the arrangements relate to travel that has not yet been undertaken or is regular in nature,
 - (c) information relating to the identity of any person who delivers or has delivered goods, or provides or has provided services, to a Member of either House of Parliament at any residence of the member,
 - (d) information relating to expenditure by a Member of either House of Parliament on security arrangements.
- 14.56 We agree with those instances, and would add another:
- (e) information relating to any meeting that a Member attends in connection with his or her role and functions as a Member.

- 14.57 Such a list of specific instances might be added to the legislation as examples of the general exemption for Members which we have recommended. Alternatively the list might be contained in guidance.

Conclusion

- 14.58 We acknowledge that the handling of OIA requests will place a further administrative burden on the agencies made subject to it. This is true of all agencies already subject to the legislation. But this burden will be significantly alleviated by the regular proactive release of information about matters of expenditure and administration. The Members of Parliament (Remuneration and Services) Bill 2011, currently before Parliament, requires the quarterly release of information about Members' travel and accommodation expenses. We acknowledge and commend the present practices of releasing material of this kind without statutory compulsion. As we explain in chapter 12, we support the increasing voluntary proactive release of information by agencies. It will significantly reduce the number of individual OIA requests which would otherwise have to be dealt with. We note also the recommendations in chapter 9 of this report which should help to alleviate the burden of unreasonably large or vexatious requests.

R124 The Office of the Clerk of the House of Representatives and the Parliamentary Service should be subject to the OIA by inclusion in Schedule 1. The definition of "official information" in section 2 of the OIA should state that, in relation to these agencies, "official information" includes only:

- (a) statistical information about the agency's activities;
- (b) information about the agency's expenditure of public money;
- (c) information about the agency's assets, resources, support systems, and other administrative matters.

R125 The Speaker in his or her role as responsible Minister in relation to the Office of the Clerk and Parliamentary Service should be subject to the OIA by inclusion in Schedule 1. The definition of "official information" in section 2 of the OIA should state that only information held by the Speaker in that capacity is included.

R126 Section 2 of the OIA should state that “official information”, in relation to information held by a parliamentary agency, does not include:

- (a) any information held by a parliamentary agency solely as an agent for, or on behalf of, the House of Representatives or a Member of Parliament; or
- (b) any information held by a parliamentary agency about a Member of Parliament in relation to the Member’s performance of his or her role and functions as a Member; or
- (c) any information held by a parliamentary agency that relates to the development of political policies by a recognised party or an independent Member of Parliament.

Consideration should be given to whether the exemptions in the Freedom of Information Act 2000 (UK) that apply to individual Members of Parliament should be included in the OIA or in guidance.

R127 To avoid doubt, a new provision in the OIA should state that nothing in the OIA limits or affects any privileges, immunities or powers of the House of Representatives.

R128 Section 31 of the OIA should be amended to provide that the Ombudsmen must not recommend making available any official information held by a parliamentary agency or the Speaker, if the Speaker certifies that making the information available would be likely to limit or affect any privileges, immunities, or powers of the House of Representatives.

R129 Section 9(2)(g)(i) of the OIA should be amended so that the withholding ground covers the free and frank expression of opinions between:

- (a) an officer or employee of a parliamentary agency;
- (b) the Clerk;
- (c) the Speaker; and
- (d) a Member of Parliament.

Courts

14.59 As the OIA currently stands, the terms “department” and “organisation” do not include a court.⁷⁷⁴ The OIA was originally conceived to ensure the accountability and transparency of executive government. But the rationale of the Act applies equally to the courts, just as we have said it does to Parliament. They spend public money, and (obviously) perform an essential public function. The paramount necessity of an independent judiciary is beyond debate. It is a cornerstone of the constitution of any democracy. But transparency and openness do not diminish independence: they enhance it.

- 14.60 The central function of the courts is to try cases.⁷⁷⁵ Cases are tried in public. Indeed, along with Parliament, courts are the most public of all our institutions. The material generated in the course of this central function – that is to say the records of cases – can already be accessed in accordance with rules of court.⁷⁷⁶ That access is under the control of the judges. There is no need, and it would create confusion, to have access to these records further regulated by the OIA. In this respect the exclusion of the courts from the OIA is consistent with the exclusion of other bodies whose function and essential role is judicial inquiry and determination: Royal Commissions, commissions of inquiry, statutory bodies of inquiry and the Judicial Conduct Commissioner. Evidence and submissions to those bodies are excluded from the definition of “official information”.⁷⁷⁷
- 14.61 Yet there is information of an administrative kind in relation to which there is a clear case for subsection to the OIA. This includes information about expenditure; details of resources such as buildings, equipment and support staff; and statistics about such things as numbers and kinds of cases tried or pending. Some of this information is held by court officials, but more is held by the Ministry of Justice: that Ministry’s information system holds much material about, and for, the courts. There is presently a degree of uncertainty as to what the Ministry should release in response to an OIA request. By virtue of section 2(1)(f) of the OIA, if the material is held by the Ministry as an agent for the courts, it is deemed to be held by the courts, and thus to be exempt from the OIA. Yet the line between what is held as agent and what is not is not as clear as it might be. It has been the cause of some confusion.
- 14.62 One solution might be to provide simply that information relating to the courts is subject to the OIA if it is “administrative” in nature, but not if it is “judicial” in nature. This is the approach taken in much of the Australian freedom of information legislation, both state and federal.⁷⁷⁸ A similar distinction between a court’s “judicial” and “administrative” functions is drawn in New Zealand’s Privacy Act 1993.⁷⁷⁹ The OIA currently provides that tribunals are excluded “in their judicial functions”. Nevertheless, as we said in the issues paper, we have reservations about that approach. Trying to isolate “administrative” functions could cause some confusion. The judiciary described the judicial/administrative dichotomy as “a generalised formula” which does not actually fit the situation, and which would be likely to lead to much argument. The judiciary also said:
- ... the suggested approach by way of applying to courts the same qualification as is expressed in the Act with reference to tribunals is likely to create more problems than it solves. To begin with, tribunals can have both administrative and judicial functions, whereas courts have only judicial functions.
- 14.63 The New Zealand Law Society suggested a clarifying provision that for the purposes of the OIA “official information” includes information held by a department or organisation relating to the operation or administration of a court. That is certainly an advance on the judicial/administrative dichotomy, but it is probably still a little open-ended, and we think that a greater degree of specificity would be desirable.

- 14.64 We recommend that a provision be added to the OIA which would be analogous to paragraph (c) of the definition of “official information” in section 2(1). It would provide that, in relation to information about the courts, “official information” includes only:
- (a) statistical information about cases;
 - (b) information about expenditure; and
 - (c) information about buildings, resources, support systems, and other operational matters.
- 14.65 The position should, we think, be clarified by specifically providing for some exclusions. The information subject to the OIA should not include information about specific cases, nor information about judicial communications including judges’ papers and notes. In addition (although it may not be strictly necessary in light of the specific list of inclusions) we think it desirable that the special position of judges in our democracy should be recognised by an exemption similar to that which we have recommended for Members of Parliament. We recommend, for the removal of doubt, an express provision that information about a judge in relation to the judge’s performance of his or her role and function as a judge should not be official information.
- 14.66 Currently the OIA provides that official information “in relation to information held by the Ministry of Justice includes information held by the Rules Committee appointed under section 51B of the Judicature Act 1908”.⁷⁸⁰ That result could perhaps be achieved more simply and directly by providing that the Rules Committee, a statutory body, is an “organisation” for the purposes of the OIA. But that may involve an inference that even the personal papers and notes of the *members* of the Committee would be subject to disclosure, and we would not wish to go so far. So, in the end, we have decided to make no recommendation for change in the present provision.
- 14.67 There is a question about the complaints process in cases where a requester believes court information has been wrongly withheld. The Ombudsmen are officers of Parliament, and it may be argued that oversight by them of court matters offends against the separation of powers. We do not think this is a persuasive argument. If the Ombudsmen’s jurisdiction extended to *judicial* matters it might be different, but we are proposing that the OIA extend only to administrative and operational matters, most of the relevant information being held by the Ministry of Justice. Such is the undoubted independence and experience of the Ombudsmen that they seem the obvious complaints authority.
- 14.68 We note the increasing trend towards proactive release of information. We discuss that trend, and its relationship with the OIA, in chapter 12. We believe that the courts, or the Ministry of Justice on their behalf, could proactively publish much information online. Some is available already, but there might helpfully be more. We commend the idea of an annual report containing information about statistics and operational details.⁷⁸¹

14.69 Finally we return to the point we made earlier about the allocation of administrative responsibility between the courts and the Ministry of Justice. Greater clarity is desirable in this area, and we hope that efforts can be made to achieve it. We note that in some jurisdictions much greater operational autonomy is given to the judges: for example in England and Wales the courts are supported by a court service answerable to the judges. There is an argument that judicial independence, and (perhaps more importantly) the perception of it, are enhanced by institutional separation of the courts from the executive. This is beyond the terms of reference of the present review, but we think this matter is deserving of careful study in New Zealand.⁷⁸²

R130 Section 2 of the OIA should be amended so that the definition of “official information” includes, in relation to information about the courts, only:

- (a) statistical information about court cases;
- (b) information about expenditure; and
- (c) information about court buildings, resources, support systems and other operational matters;

and excludes:

- (d) information about specific court cases;
- (e) judicial communications including judges’ papers or notes; and
- (f) information about a judge in relation to the judge’s performance of his or her role and function as a judge.

State Owned Enterprises (SOEs)

14.70 In our issues paper, we asked whether SOEs should continue to be subject to the OIA, and expressed our view that they should. We quoted the views of a special select committee established in 1989 to determine whether SOEs should remain subject to the OIA. That committee concluded:⁷⁸³

- 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.
- 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.

- 14.71 Most submitters agreed with our view. Those SOEs that provided a submission either disagreed or considered that, if SOEs were to remain subject to the OIA, some specific provisions dealing with the particular issues faced by SOEs were required. They said that the landscape had changed significantly since the 1989 select committee report. They noted that SOEs now operate in a highly competitive market whereas, in 1989, the major SOEs were monopoly providers. Some SOEs (for example, Kiwibank and the energy generators and suppliers) did not exist in 1989. And accountability arrangements, including the introduction of the Continuous Disclosure Rules, have been strengthened.
- 14.72 These submitters expressed some common concerns about being subject to the OIA. These included that the release of information held by SOEs did not really achieve the OIA's purposes as expressed in section 4 of the Act. For example, access to SOE information does not promote effective participation in the making of law and policy.
- 14.73 They also considered that being subject to the OIA placed them at a competitive disadvantage compared to private sector businesses operating in the same environment. This is because SOEs would be required to make information available that their competitors were not, because competitors could request and use information to their benefit and to the SOE's detriment, and because of the compliance costs in responding to OIA requests.
- 14.74 SOE submitters also considered that there were already sufficient mechanisms in place to hold SOEs accountable. These included those imposed by the State Owned Enterprises Act 1986, which subjects SOEs to a detailed public disclosure and reporting regime and ensures that their financial affairs and activities are made public. Several SOEs are also subject to a set of Continuous Disclosure Rules drawn up by the Crown Ownership Monitoring Unit (COMU).⁷⁸⁴ These Rules require the identified SOEs to disclose matters having a material effect on the SOE's commercial value.
- 14.75 We continue to hold the view that SOEs should be subject to the OIA. We accept that there have been changes in the environment within which SOEs operate since the select committee's report in 1989. However, we do not consider these to be so significant that SOEs should be excluded from the OIA. We believe that their exclusion would leave a significant gap in the OIA's application and have a detrimental impact on overall accountability mechanisms for public agencies. The functions SOEs 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. While their principal objective is to operate as a "successful business", they also have "public good" responsibilities consistent with their role as a state sector agency. These include the need to exhibit a sense of social responsibility and have regard to the interests of the community within which they operate.⁷⁸⁵

- 14.76 The fact that the Government has elected to retain these enterprises in Crown ownership means that their connection with government is seen as being of continuing importance. Being subject to the OIA is a consequence of that. Nor do the other reporting and disclosure requirements go as far as the obligations which arise under the OIA. There may be information held by SOEs which falls outside these other requirements. For example, not all SOEs are subject to the Continuous Disclosure Rules. Nor will accountability documents like annual reports and statements of intent necessarily provide information about the reason why the SOE acted in a particular way or agreed to a particular policy.
- 14.77 We consider that recommendations made in other areas of this report will address some of the concerns raised by SOE submitters. In particular, we recommend in chapter 5 a new withholding ground that aims to protect the competitive position or financial interests of the agency which holds or supplies the information, and another in chapter 7 to protect information supplied in the course of an investigation or inquiry. We also recommend a review of the charging regime, and greater guidance about how each withholding ground is to be applied.
- 14.78 In May 2011, the Government announced its policy of moving to a mixed public-private sector ownership model for Genesis Energy, Solid Energy, Mighty River Power and Meridian Energy. Under this policy, the Government would retain majority ownership of these SOEs with a lesser proportion being owned by the private sector. This is a broadly similar arrangement to that in place for Air New Zealand, where the Government currently holds approximately 74 per cent of the company's shares.⁷⁸⁶
- 14.79 The greater use of a mixed ownership model raises questions about whether the OIA should continue to apply to these particular SOEs. Air New Zealand is not subject to the OIA. (It used to be, but was withdrawn from the OIA when it was privatised, and not brought back under it when the Government again became a shareholder.)
- 14.80 There are two views on whether mixed ownership entities should or should not be subject to the OIA. On one view they should. This view holds that the Government's majority shareholding provides an important signal about the role these organisations play in the state sector, and their importance to New Zealand's interests. A parallel can be drawn with majority-held council controlled organisations, which are subject to the LGOIMA. The contrary view, i.e. that mixed ownership entities should not be subject to the OIA, is based on the fact that there may be a potential conflict between a listed company making disclosures to requesters under the OIA and its obligation to fairly inform the market as a whole under companies and securities laws and under the stock exchange listing rules.⁷⁸⁷ Moreover the shareholding *Ministers* would remain subject to the OIA, even though the entity itself may not. The Mixed Ownership Assets Bill 2012, currently before Parliament, adopts the second option, and takes the entities in question out of the Act. The matter is controversial. The Law Commission makes no recommendation on it.

Council controlled organisations (CCOs)

- 14.81 In relation to the LGOIMA, the same reasoning applies to CCOs as applies to SOEs. As noted by one local authority, ratepayer funds are often used to establish CCOs and a local authority may also provide administrative assistance and support to the organisation. It is therefore appropriate that a CCO's operations are open and transparent.
- 14.82 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 the LGOIMA.⁷⁸⁸ We believe that the commercial sensitivity reasons for withholding information, along with our proposed new withholding ground, are adequate to protect the commercial interests of such bodies *if those grounds are properly applied*.

R131 State Owned Enterprises should continue to be subject to the OIA and council controlled organisations should continue to be subject to the LGOIMA.

EXCLUDED INFORMATION

- 14.83 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”.⁷⁸⁹ Categories of information are not excluded, in contrast to Australia where, for example, any document which has gone before Cabinet is automatically outside the scope of the Act.⁷⁹⁰ 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.
- 14.84 Although this is generally true, however, 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.⁷⁹¹ 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;⁷⁹² information held by the Public Trust or the Māori Trustee in their capacity as a trustee;⁷⁹³ evidence given or submissions made to a commission of inquiry;⁷⁹⁴ information in any correspondence between the agency and the Office of the Privacy Commissioner or the Ombudsmen relating to an investigation;⁷⁹⁵ information in a victim impact statement;⁷⁹⁶ and information which could be sought under the Criminal Disclosure Act 2008.⁷⁹⁷

- 14.85 We queried in the issues paper whether there were other *categories* of information that should be excluded from the coverage of the Act. The advantage of this is that it creates certainty and eliminates the need for the exercise of individual judgement. The disadvantage is that rigid exclusions 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.
- 14.86 Two possible categories for exclusion that were identified in the issues paper were “informal information” (for example, email trails or draft papers) and “third party information” (that is, information held by an agency which relates solely to, and may have been provided by, a private entity not subject to the Act). We deal with the second of these categories in chapter 5 which discusses the commercial withholding grounds. The other proposed category, “informal information”, merits brief discussion here.
- 14.87 As we noted in the issues paper, modern information technology means that many agencies hold a vast supply of information of an informal kind, some of which is 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. However, there was little support amongst submitters for excluding informal information from the scope of the OIA.
- 14.88 Most submitters agreed with our view that it would be difficult to draw the line between formal and informal information.⁷⁹⁸ In addition, even draft documents may shed light on the genesis of a decision that has been made. As noted by the Ombudsmen, this material “may provide a useful backdrop to the decision, improving public understanding of it, and facilitating public participation in the decision-making process”. Finally, there is a risk that, if drafts were to be excluded, documents might too often be alleged not to have proceeded beyond the draft stage. Information may sometimes be justifiably disposed of under the Public Records Act 2005 if it complies with an authority to dispose. But beyond that, we do not think the OIA should place any further restrictions on what may be withheld.

Chapter 14 Footnotes

- 755 OIA, s 2(1) definition of “official information”.
- 756 Section 2(1) definition of “department”.
- 757 Section 2(1) definition of “organisation”.
- 758 OIA, s 49; LGOIMA, s 56.
- 759 Stanley L Tromp “Fallen Behind: Canada’s Access to Information Act in the Modern World Context” (September 2008) at 78, accessible at < www3.telus.net/index100/report > .
- 760 A member’s bill proposes to reverse the exclusion of port companies and their subsidiaries from the LGOIMA: see Local Government (Council-Controlled Organisations) Amendment Bill 2012 (Consultation Draft) proposed by Darien Fenton (Labour).
- 761 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, May 2001) at [9.6.2].
- 762 Freedom of Information Act 2000 (UK), sch 1, pt 6; s 33.
- 763 Freedom of Information Act 1982 (Cth), sch 2.
- 764 Right to Information Act 2009 (Tas), s 6; Government Information (Public Access) Act 2009 (NSW), sch 2, cl 1.
- 765 See OIA, s 2(1)(i), which excludes from the definition of “official information” any correspondence or communication between the Ombudsmen and a Minister or organisation in relation to an investigation under the OIA or Ombudsmen Act 1975. Ombudsmen and their staff are under a statutory obligation to maintain the secrecy in respect of all matters that come to their knowledge in the exercise of their functions (Ombudsmen Act 1975, s 21(2)) including in respect of investigations under the OIA or LGOIMA (OIA, s 29(1); LGOIMA, s 28(1)).
- 766 OIA s 2(1), definition of “official information” paras (h), (i), (j), (l).
- 767 See *State of New South Wales v Betfair* [2009] FCAFC 160.
- 768 See Legislation Bill 162-2 (2010), cl 58B. The Bill identifies “confidential communications” between a PCO client and the Chief Parliamentary Counsel as being subject to legal professional privilege. These communications include drafting instructions and draft legislation.
- 769 Law Commission *Review of the Civil List Act 1979: Members of Parliament and Ministers* (NZLC R119, 2010) at 42.
- 770 Standing Orders Committee *Review of Standing Orders* (September 2011) 1.18B at 63–65.
- 771 At 65.
- 772 See for example OIA, s 2(1), definition of “official information”, paras (d) and (e).
- 773 Schedule 1, Part 1, clause 2.
- 774 OIA, s 2(1).
- 775 Yet this is not the only function. A commentator has recently said that “... a judge’s job, especially at the level of the Supreme Court and Chief Justice, is more than just deciding cases. The Chief Justice, especially, needs to travel internationally as part of the representative aspect of her role.” Richard Cornes “Judicial Transparency Needs Rethink” *The Dominion Post* (online ed, Wellington, 17 January 2012), accessible online at < www.stuff.co.nz > .
- 776 For example, High Court (Access to Court Documents) Amendment Rules 2009.

- 777 OIA, s 2(1).
- 778 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, cl 1.
- 779 Privacy Act 1993, s 2 definition of “agency”, para (b)(vii).
- 780 OIA, s 2 definition of “official information”, para (c).
- 781 Compare *The Supreme Court: Annual Report and Accounts 2010 – 2011* (London, 2011).
- 782 See for example Rt Hon Dame Sian Elias, Chief Justice of New Zealand “Fundamentals: A Constitutional Conversation” (Harkness Henry Lecture 2011, University of Waikato, Hamilton, 12 September 2011).
- 783 Report of the State-Owned Enterprises (Ombudsmen and Official Information Acts) Committee (Wellington, 1989) at [4].
- 784 COMU is a business unit located within the Treasury. The SOEs which are subject to the Rules are New Zealand Railways Corporation, Transpower, Meridian, Mighty River Power, Landcorp, Genesis, NZ Post, Solid Energy and Kordia.
- 785 State Owned Enterprises Act 1986, s 4.
- 786 Minister of Finance and Minister for State Owned Enterprises *Extending the Mixed Ownership Model* (Cabinet paper, 6 May 2011) at 6, accessible at < www.comu.govt.nz > .
- 787 OIA, s 52, would be one option for dealing with any legislative conflict.
- 788 Local Government Act 2002, s 74.
- 789 *Commissioner of Police v Ombudsmen* [1985] 1 NZLR 578 (HC) at 586 (Jeffries J).
- 790 Freedom of Information Act 1982 (Cth), s 34.
- 791 See the other examples in John Burrows and Ursula Cheer *Media Law in New Zealand* (5 ed, Oxford University Press, Melbourne, 2005) at 541–547.
- 792 OIA, s 2 definition of “official information”, para (f).
- 793 Para (g).
- 794 Para (h).
- 795 Paras (i) – (j).
- 796 Para (k).
- 797 Section 18(da).
- 798 In addition, agencies will not necessarily need to retain informal information to meet the requirements of section 17(1) of the Public Records Act 2005, which requires agencies to maintain “full and accurate records” of their affairs.

Chapter 15

Issues of compatibility

15.1 In this chapter we examine two matters:

- (a) The relationship between the OIA and the Public Records Act 2005;
- (b) The relationship between the OIA and LGOIMA.

PUBLIC RECORDS ACT 2005

The legislative scheme

15.2 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. A record is defined as being:⁷⁹⁹

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

15.3 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.

15.4 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.”⁸⁰⁰ These offices and authorities are required to maintain their records in an accessible form until destruction is authorised under the PRA or another enactment.

- 15.5 An important part 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 standards to ensure that electronic records are maintained in a format that allows access to them in the long term.
- 15.6 Emails can be problematic in that they are usually addressed to an individual rather than to an agency. Their management can involve particular difficulty due in part to their volume, and in part to the fact that many contain personal as well as "official" matters.⁸⁰¹
- 15.7 Agencies are required to retain records for 25 years, unless disposal is authorised in writing in advance by the Chief Archivist.⁸⁰² Archives that are 25 years old must be transferred to the possession of Archives New Zealand or an authorised repository.
- 15.8 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 2008/2009 Annual report:

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.

- 15.9 The PRA interacts with the OIA and LGOIMA 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.

- 15.10 Secondly, given that the PRA recognises what agencies must keep and what can be disposed of, the PRA defines the boundaries of information held by an agency. This contributes to setting the boundaries of what information can be requested. If it has been validly disposed of under the PRA, it will obviously not be available under the OIA or LGOIMA, unless, presumably, officials have retained the information in their memories.

Compliance

- 15.11 In our issues paper we noted considerable variation in agency awareness of requirements of the PRA. Agencies that told us that they had sound information management systems in place tended to say that this assisted their ability to respond to OIA requests. Many agencies seemed to be in a period of transition towards full compliance.
- 15.12 Compliance with the PRA is continually improving. To meet its obligations under the PRA, Archives New Zealand has initiated an audit programme to audit the recordkeeping of central government bodies subject to the Act. The cycle of audits is now well advanced.

Reform issues

- 15.13 In our issues paper we asked whether any statutory amendments were required to ensure better alignment between the PRA and the OIA. In chapter 10 of this report we deal with the issues of metadata and backup systems. In this chapter we raise two further matters.

Aligning the definition of record and information

- 15.14 "Information" in the OIA and "record" in the PRA are not identical.
- 15.15 "Information" is not defined in the OIA and LGOIMA but it has been held that the concept is a wide one, befitting the purpose of both Acts. Information is not limited to paper documents, but includes information held in electronic and other formats. Most significantly it includes "knowledge" – information that has not been reduced to writing.
- 15.16 As we have seen above, the definition of "record" in the PRA is also wide, in that it covers information held in all formats. 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. However, "record" in the PRA does not cover information which has not been reduced to writing or other visual form. Obviously, unrecorded information is not a "record".
- 15.17 We do not think that the difference between "record" in the PRA and "information" in the OIA and LGOIMA is problematic. "Information" under the OIA is wider in that it includes unrecorded information. The Ombudsmen told us that this is a good thing:

It is important that unrecorded information continues to be covered [by the OIA] because otherwise agencies could circumvent the intent of the legislation by opting not to record information.

- 15.18 We agree, and recommend no change be made to the definition of “information” or “record”.

R132 The terms “information” in the OIA and LGOIMA and “record” in the Public Records Act 2005 should remain unchanged.

Requesting information that has not been kept in accordance with the PRA

- 15.19 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.

- 15.20 Destruction of records contrary to the PRA’s requirements is already an offence.⁸⁰³ But the problem extends wider than this: it is not just a question of the destruction of information. If record-keeping is poor, information may be unable to be located, or the task of collation may be so large as to lead to a refusal under section 18 of the OIA. Moreover, if advice or information is supplied orally between officials, rather than being written down as normal prudent business practice requires, it may be said in response to a later OIA request that the information “does not exist” (section 18(e)) or that it “is not held” (section 18(g)).
- 15.21 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”.⁸⁰⁴ The proper functioning of the OIA thus depends on proper compliance with the PRA. Now that 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 some form of redress or sanction if an agency has not kept information in accordance with the PRA with the result that an OIA request is unable to be met.
- 15.22 We received a number of submissions on this issue. Some thought that non-compliance with the PRA should be able to be the subject of a complaint to the Ombudsmen.
- 15.23 Archives New Zealand, in their submission to our issues paper, said:
- Whenever Archives New Zealand receives a complaint that unauthorised disposal of records has occurred, an investigation is undertaken. Archives New Zealand is developing an enforcement policy that starts with providing education and tools to assist agencies to achieve compliance with the Public Records Act. Action will be escalated and could result in court action in cases where non-compliance is systematic and no effort is made to improve information management.

- 15.24 The Ombudsmen indicated that they deal with some such cases under the Ombudsmen Act 1975, and consult the Chief Archivist as appropriate. But they do not think that enforcing the PRA should be a function of the Ombudsmen under the OIA.
- 15.25 However we wonder whether there may be options for linking the OIA and the PRA, and put forward two possibilities. One is a mechanism whereby the Ombudsmen might notify the Chief Archivist in cases where a request is refused under OIA sections 18(e), (f) or (g). The other would be to include a provision like section 29B of the OIA (addressing the relationship between the Ombudsmen and the Privacy Commissioner) requiring consultation between the Ombudsmen and the Chief Archivist. We prefer the first of the two possibilities because it is less resource intensive and probably more effective. Notifying the Chief Archivist would enable remedial action to be taken concerning the agency in question.
- 15.26 We thus recommend that section 18 of the OIA should be amended by adding a subsection to the effect that, if information is refused by an agency under the OIA on the ground that it does not exist or cannot be found (section 18(e)), or cannot be made available without substantial collation or research (section 18(f)), or is not held by the agency (section 18(g)), the Ombudsmen may notify the Chief Archivist. We do not anticipate that such notification would invariably follow: the Ombudsmen would have a discretion to do so, and be likely to exercise it only in cases of serious or persistent infringement. If there is to be the kind of oversight agency that we recommend in chapter 13, that agency might also keep under review the relationship between the OIA and the PRA.

R133 Section 18 of the OIA and section 17 of the LGOIMA should be amended to provide that the Ombudsmen may notify the Chief Archivist if a request is refused on any of the following grounds:

- (a) the information does not exist or cannot be found (under section 18(e) of the OIA or section 17(e) of the LGOIMA);
- (b) the information cannot be made available without substantial collation or research (under section 18(f) of the OIA or section 17(f) of the LGOIMA);
- (c) the information is not held by the agency in question (under section 18(g) of the OIA or section 17(g) of the LGOIMA).

Material on open access

- 15.27 The Chief Archivist has brought another matter to our attention. When material has been archived, members of the public are often unclear whether to access it under the PRA or the OIA. Section 58 of the PRA provides, somewhat unhelpfully, that public records transferred to the Archives “are not subject to the OIA just because they have been so transferred”. No doubt the status of material as “open access” would be a ground for refusing an OIA request under section 18(d) – the information is “publicly available”. But Archives NZ believes that more is needed, namely a provision which expressly provides that once a record has been placed on open access in the Archives the public right to access it renders the OIA inapplicable.
- 15.28 Yet we doubt whether that is necessary. If a requester requests the information under the OIA the relevant agency will simply direct the requester to the Archives. The “publicly available” reason for refusing a request allows that now; the existence of a provision that such information is not subject to the OIA would lead to exactly the same result. We have therefore decided to make no recommendation for amendment on this issue.

LOCAL GOVERNMENT OFFICIAL INFORMATION AND MEETINGS ACT 1987**Introduction**

- 15.29 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.⁸⁰⁵ The submissions we received on the issues papers revealed the same concerns about both Acts. The important issues are the same in both and most of the reforms we propose for the OIA would be equally appropriate to the LGOIMA. So we have extended our review to both Acts. We do not, however, cover part 7 of the LGOIMA (the meetings provisions) or section 44A relating to land information memoranda (LIMs).
- 15.30 In this report, where there are identical or almost identical provisions in both the OIA and LGOIMA, we have preferred to refer in the body of the text to the OIA only, with the corresponding section of the LGOIMA in a footnote. This is solely for reasons of economy of expression. It would render the text congested and less user-friendly if we had to give both references throughout the text. However, when the LGOIMA raises issues particular to itself – for example in the case of the veto of an Ombudsman’s recommendation – we have dealt with it separately.

Differences between the OIA and LGOIMA

- 15.31 The great majority of the provisions of both Acts are identical, although with references to Ministers and departments in the OIA being substituted with the relevant local government personnel and agencies in the LGOIMA. However, there are some more significant differences.

Constitutional

- 15.32 The most obvious differences between the OIA and 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 indeed local, and involves a large number of authorities each exercising jurisdiction in a defined area. These differences are reflected in the Acts in a number of ways.
- 15.33 First, the grounds for 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.⁸⁰⁶ The "free and frank" provisions are found in both Acts, although the personnel whose disclosures are protected obviously differ in each instance. Our proposed redraft of these provisions necessarily retains these distinctions. 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 1991 to avoid causing serious offence to tikanga Māori, and to avoid the disclosure of the location of wāhi tapu.⁸⁰⁷ We discuss in chapter 7 whether there should be any similar ground in the OIA.
- 15.34 Secondly, the differing constitutional arrangements are also reflected in the definition of "official information" in the two Acts.⁸⁰⁸ The OIA definition is much longer because it needs to take account of information held by courts and tribunals, royal commissions, universities and a wide range of national bodies.
- 15.35 Thirdly, the most significant difference relates to the so-called power of veto.⁸⁰⁹ In 1987 the power of veto over Ombudsmen's recommendations under the OIA was transferred from the individual Minister holding the relevant portfolio, to Cabinet.⁸¹⁰ In the absence of any central coordinating body for local government, the veto power in the LGOIMA remains now, as it did from the beginning, 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 (as in the LGOIMA) is essentially different from a duty which is defeasible by a separate agency (as in the OIA). We discuss in chapter 11 our recommendations for the veto in these two different situations.

- 15.36 Fourthly, sanctions for breaches of duty differ between the two statutes. If a central government agency fails to comply with an Ombudsman's direction to provide information, the Ombudsman can report the failure to the Prime Minister and make a report to the House of Representatives.⁸¹¹ There is no equivalent sanction in the LGOIMA.
- 15.37 Ombudsmen may also report to the Prime Minister or the House of Representatives on the way in which a Minister or other agency has dealt with a request under Part 3 or Part 4 of the OIA.⁸¹² 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.⁸¹³ In both instances, therefore, publicity is the deterrent, but in the case of the local authority that publicity is undertaken by the local authority itself.
- 15.38 Fifthly, the Ministry of Justice has powers and duties under the OIA. It is required to issue a publication setting out the functions of departments and organisations, which it does in the form of its *Directory of Official Information*.⁸¹⁴ 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.⁸¹⁵ Once again the distributive nature of local government stands in contrast to unitary central government. Our proposal for OIA agencies to publish information about themselves, and no longer have a *Directory of Official Information*,⁸¹⁶ would make the OIA and LGOIMA similar in this respect.
- 15.39 The other role of the Ministry of Justice under 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.⁸¹⁷ No equivalent function rests with any agency in relation to the LGOIMA.
- 15.40 We discuss in chapter 13 the need for effective oversight of the official information regime. The need for oversight may 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. Accordingly, in chapter 13 we make proposals for an oversight office which monitors both central and local government.
- 15.41 In conclusion, there are inevitable and unchangeable differences between central and local government, and therefore between the provisions of the OIA and LGOIMA. Any redrafting of the Acts will need to take account of these differences. Some of them create difficulties for any amalgamation of the two pieces of legislation.

Other differences

- 15.42 The differences between the OIA and 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.
- 15.43 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.⁸¹⁸ Under the LGOIMA there is no such restriction. Any person can make requests.⁸¹⁹ Whether this distinction makes much difference in practice is doubtful. 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.
- 15.44 Submitters who addressed this question agreed. Having considered the arguments in the submissions, we now think that the LGOIMA provision is more sensible, and that the OIA provision should come into line with it. It is hard to enforce any residency requirement: people can appoint proxies. 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.⁸²⁰ No doubt the context is different, but there are advantages in having the principles consistent between the privacy and the official information legislation.
- 15.45 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.”⁸²¹ By contrast in the LGOIMA, the equivalent provision is “to provide for the availability to the public of official information.”⁸²² Thus an underlying assumption of the OIA is that there will be continual advances in the openness of government. This same assumption does not appear, at least expressly, in the LGOIMA. Consistently with this, in the LGOIMA there is no equivalent to the OIA provision which provides a right of access to categories of information declared by regulation to be available as of right.⁸²³ In the LGOIMA there never was such a power to regulate for open categories of information.
- 15.46 The reason for the distinction between the two Acts eludes us. It may simply be a reflection of the fact that the LGOIMA was passed in 1987, just before 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. In chapter 12 we discuss proactive disclosure in more detail. We can see no distinction between the two types of government in this respect. We therefore think that the purpose sections of both Acts should be the same, and that both should emphasise progressive availability.⁸²⁴

- 15.47 Thirdly, there is a difference between the two Acts in relation to information held by an independent contractor engaged by a government agency which is subject to the Act. For the purposes of the OIA, information held by the independent contractor is “deemed to be held by the department or Minister of the Crown or organisation”.⁸²⁵ The flaw in this formulation is that it does not clearly state how information in the possession of the contractor is to be *obtained*. The contractor itself is not subject to the OIA, so it is difficult to see how it could be obliged to comply with a request to disclose. But if the government agency is subject to a request under the OIA, how is it to obtain the information from the contractor, in the absence of a provision in the contract between them requiring disclosure?
- 15.48 It was no doubt to plug this perceived gap that the LGOIMA, passed five years later than the OIA, provides that information held by a contractor is only deemed to be held by the local authority in question if the local authority “is, under and by virtue of that contract, entitled to have access” to it.⁸²⁶ That fills the lacuna which is present in the OIA, but carries with it the difficulty that it effectively leaves in the hands of the contracting parties the right to determine by contract whether or not the information may be disclosed. It could be an incentive to draft contracts which kept information solely in the contractor’s possession. That problem may well be more apparent than real, however, for it is difficult to imagine cases where an agency which has outsourced work to a contractor would not require access to information held or generated by the contractor relevant to the operation of that contract.
- 15.49 There is, however, no apparent reason why the two Acts should be different in this respect, and we think they should be brought into line. While the matter is reasonably finely balanced, we prefer the OIA solution. It means that the government agency is deemed to hold the information, and places the onus squarely on that agency to justify a failure to disclose it.

R134 Sections 12, 21, 22 and 23 of the OIA should be amended to provide that any person (whether a citizen of New Zealand, resident in New Zealand or otherwise) can make a request for information, consistent with sections 10, 21, 22 and 23 of the LGOIMA.

R135 The following sections of the LGOIMA should be amended for consistency with the OIA:

- (a) Section 4(a) of the LGOIMA should provide that a purpose of the Act is to increase progressively the availability of official information to the public;
- (b) Section 2(6) of the LGOIMA should be deleted and replaced with a provision like section 2(5) of the OIA, deeming that any information held by an independent contractor engaged by a local authority is, for the purposes of LGOIMA, held by the local authority.

Chapter 15 Footnotes

799 Public Records Act 2005, s 4.

800 Section 17(1).

801 See Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007) at 122–126.

802 As White notes at 257 – 258, section 27 of the Public Records Act 2005 is ambiguous as to whether departments can make their own choices about what is necessary to keep to meet the standard of “normal prudent business practice”, or whether records can only be destroyed with the authority of the Chief Archivist. At 122, some of her interviewees comment that “the reality is that practical people make practical judgments every day about what is sensible to keep and file.”

803 Public Records Act 2005, s 61.

804 White, above n 801, at 119.

805 For discussion of the LGOIMA, see Mai Chen *Public Law Toolbox* (LexisNexis, Wellington, 2012) at [10.5].

806 Compare OIA, ss 6 and 9 with LGOIMA, ss 6 and 7.

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

808 Compare section 2 of both Acts.

809 OIA, s 32; LGOIMA, s 32.

810 Official Information Amendment Act 1987, s 18.

811 OIA, s 29A(6).

812 Section 35.

813 LGOIMA, s 39.

814 OIA, s 20.

815 Local Government Act 2002, s 40.

816 See chapter 12 at [12.87]–[12.90].

817 OIA, s 46.

818 Sections 12, 21–23.

819 LGOIMA, ss 10, 21–23.

820 Privacy Act 1993, s 34.

821 OIA, s 4.

822 LGOIMA, s 4.

823 OIA, s 21(2).

824 If the power to specify by regulation information to which there is a right of access is retained in the OIA, we think it should appear in LGOIMA also.

825 OIA, s 2(5).

826 LGOIMA, s 2(6).

Chapter 16

The legislative vehicle

IS LEGISLATION NECESSARY?

- 16.1 This report has demonstrated a large number of areas where the OIA and LGOIMA are not working as they should. We have asked whether these deficiencies could be remedied in a way which does not involve legislation. In a number of instances improved guidance will undoubtedly assist. But we have concluded that significant legislative amendment is also required. It would be surprising if it were not. The Acts are nearly 30 years old. They date from a time when information was mainly stored in paper form; their framers could not have been expected to foresee the new technologies which enable the creation, storage and transfer of information in digital form.
- 16.2 In a good number of instances these developments in technology, and long experience applying the Acts over the years, have shown up deficiencies in the legislation which can only be corrected by legislative amendment. The submissions we received demonstrated considerable dissatisfaction with some of them. Increasing resources for education and guidance can do nothing to correct what are essentially structural deficiencies.
- 16.3 There follow some examples of the kinds of problems which can only be fixed by legislation.
- 16.4 First, in some instances we have concluded that the Acts' grounds for withholding information are insufficient, and further grounds are needed. Perhaps most significantly, the scope of the "commercial" withholding grounds has been a matter of growing concern as government agencies increasingly become involved in the market place. The concern emanates not just from the agencies themselves, but also from private sector bodies with whom they deal. The legal meaning of "commercial" is too narrow: it assumes a profit-making motive. What is needed is an additional withholding ground which protects "competitive position" and which is not dependent on a profit motive.⁸²⁷

- 16.5 There is also, we think, a need to protect information provided in the course of a statutory investigation or inquiry. Currently attempts are made to do this via the “maintenance of the law” ground, with the result that this ground is distorted beyond its proper scope. A new ground is needed.⁸²⁸
- 16.6 Secondly, some of the requests made to hard-pressed agencies require a very great deal of work over and above the core business of these agencies. Requests are made asking for very large amounts of information. Sometimes that is inevitable, and is one of the prices the system must pay for a desirable degree of openness. But resources are limited. We are persuaded that amendment is currently required to the grounds for refusing a request where the work involved on the part of the agency in providing the information is clearly unreasonable. The existing grounds are narrow. Legislative change is needed.⁸²⁹
- 16.7 Thirdly, in a number of areas the legislation is insufficiently clear. Lack of clarity can lead to inconsistent responses, and also to mistrust, and suggestions that an agency is misusing a provision. Guidance cannot always help, as what is needed is creation of a clear new provision rather than mere interpretation of the provision that is already there. Only legislation can achieve this. This is true of the so called “good government” grounds which have been the cause of much dissatisfaction on the part of both agencies and requesters. The use of the concept of “constitutional conventions” in the present provision hinders comprehension. We believe redefinition is necessary.⁸³⁰ There is general agreement among agencies with that view.
- 16.8 Also needed is some certainty about whether partial transfers are possible; how urgency is to be dealt with; and when information can be said to be “publicly available”.⁸³¹ Any attempts to provide explanations in guidance material would be effectively to purport to create new law rather than explain the existing law.
- 16.9 Fourthly, the scope of the Acts needs urgent review. There are presently anomalies as to which agencies are in and which are out. Nor in a modern democracy is there any sensible reason why officers of Parliament, parliamentary agencies and the court system should not be subject to a regime of openness, particularly in relation to expenditure and operational matters. The schedules listing the agencies subject to the legislation need review and amendment.⁸³² Fifthly, there are discrepancies, inconsistencies, and uncertainties in the relationship between the official information legislation and other Acts (such as the Privacy Act 1993 and the Public Records Act 2005); between the OIA and LGOIMA;⁸³³ and even between different parts of the OIA (in particular, the different complaint-handling processes in Parts 2, 3 and 4).⁸³⁴ Only legislation can remedy this. Moreover the new developments in proactive release of information to the public, while have they been achieved by policy directives, raise questions about their relationship with the OIA and LGOIMA.⁸³⁵ Legislation would help to clarify that.

- 16.10 Sixthly, the Acts are showing signs of age. The purpose provisions of both have not caught up with the fact that the Privacy Act 1993 now deals with most access requests for personal information. There is outdated and obscure language which needs modern translation: for example “vexatious” and “due particularity”.
- 16.11 Finally, unlike most modern legislation the OIA and LGOIMA do not confer functions on officials (with the exception of the Ombudsmen’s complaints function). Important oversight, guidance and leadership functions are not provided for. In this sense the Acts lack an “owner” charged with advancing their purpose. This is in obvious contradistinction to other Acts, including some in the information area: the Human Rights Act 1993, the Public Records Act 2005 and the Privacy Act 1993, for instance, all contain lists of functions and vest them in a statutory official.
- 16.12 No doubt functions can be created and conferred on individuals or organisations by the government without the intervention of statute: the recent establishment of a Government Chief Information Officer in the Department of Internal Affairs is an example. But that, in our view, is a less than optimal solution. The functions thus established are not as publicly accessible and are potentially less permanent. Nor are they likely to be as effective in relation to local government. Given that legislation is necessary to accomplish most of the necessary reforms we propose, we believe that the new functions suggested should be included as part of that legislative reform.⁸³⁶
- 16.13 In conclusion, this report recommends a balanced package of reform which combines more guidance for those using the Acts, and legislative amendment where that is necessary. After 30 years, change is needed to ensure proper flows of information, to create more comfort for those dealing with government, particularly in the commercial arena, and also to provide reasonable limits on the workloads of government departments.
- 16.14 The next question is the type of legislation which should be employed.

AMENDMENT OR NEW ACT?

- 16.15 There is a question whether the legislation should be redrafted and re-enacted in its entirety. Generally speaking there are two situations where, on review of an Act, complete redrafting is desirable. The first is where amendments are proposed which are of such substance, or of such number, that amending the original Act would render it less than desirably coherent or understandable. The second 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.
- 16.16 We shall take both these matters in turn in relation to the OIA and LGOIMA.

Proposed amendments

- 16.17 We have outlined above some significant amendments we believe to be necessary. That is by no means a full list. Throughout the report we recommend many other changes, some more far-reaching than others. The sheer number of amendments may of itself merit a new Act. Large numbers of ad hoc amendments are likely to increase problems with navigating and understanding the Act. Moreover some of the amendments we propose are of policy significance, especially those relating to proactive release and oversight functions. These constitute a shift in focus which can best be marked by a new Act.

Accessibility

Language

- 16.18 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. There are a few archaisms (“shall”, “deemed” and “subject to”) and as noted above, there are some examples of outdated and obscure language that effectively need a modern translation.
- 16.19 Some provisions are unduly complicated, and could do with some reorganisation. One is section 2, the interpretation 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 subsections of section 2 which deem that various kinds of arrangement do, or do not, constitute situations where official information is held. We think much could be done by moving these important provisions to a separate section and getting rid of the constant reference to deeming.
- 16.20 We have also heard an opinion that section 52 of the OIA, the so-called “savings” section, could do with an overhaul to clarify the relationship between the OIA and the secrecy provisions which appear in several Acts.

Structure

- 16.21 There was, however, greater criticism from submitters on the order and structure of the Acts. Many felt that the sections are not currently arranged in logical order. As one submitter put it colloquially:

There is a fair bit of jumping around and cross-referencing between sections which makes it difficult to follow.

Related provisions are sometimes separated in the Acts, and there is no attempt to follow a natural chronological order.

- 16.22 Others commented that section 18 (reasons for refusal) tends to get forgotten and should be more prominently placed adjacent to the grounds for withholding in sections 6 to 9. Section 52 contains important provisions about withholding material where releasing it would constitute contempt of court, and other enactments which override the OIA: currently this is at the end of the legislation in a section obscurely titled “Savings”; it should be made more upfront.
- 16.23 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 by a submitter 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 standalone provisions in Part 1 or Part 2 of the OIA.

- 16.24 We agree that the current order in which the provisions appear in the OIA 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); the process to be followed in both disclosing and withholding information; and complaints. Key provisions, such as the power to charge, should be placed where they are clear and prominent.

Conclusion

- 16.25 Overall, we take the view that the OIA and LGOIMA should be re-drafted and re-enacted. The opportunity to better order and structure the Act is the main reason for that conclusion, but we think that the extent of recommended amendment supports it. The opportunity can then also be taken to modernise and simplify the language as appropriate. That has been the course taken by the Australian state legislatures when revising their freedom of information legislation.
- 16.26 The majority of submissions agreed with this view. The main concern was that of structure and order. Some commented that the current structure was a barrier to understanding. One submission noted the need for informative headings. The Ombudsmen said that there are a number of potential amendments under consideration which might be difficult to incorporate seamlessly into the existing legislation.

R136 The OIA and LGOIMA should be re-drafted and re-enacted. The sections should be rearranged in a more logical order; important provisions which are presently insufficiently emphasised should be given more prominence; and the language should be modernised and simplified as appropriate.

COMBINING THE OIA AND LGOIMA

16.27 A more difficult question is whether the OIA and the official information provisions of LGOIMA should be combined in one Act. The arguments for and against this course of action are fairly finely balanced.

Arguments in favour

16.28 In favour of combining the Acts are the following considerations.

- (a) First, 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.
- (b) Secondly, many of their provisions are identical, or nearly so.
- (c) Thirdly, members of the public who are aware of the disclosure regime of local government often do not know the difference between the two Acts. They often refer to both as “the OIA”.
- (d) Fourthly, the fact that local government is subject to disclosure requirements 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.
- (e) Fifthly, we recommend that the same oversight office be responsible for monitoring and reporting on the operation of the two Acts.
- (f) Sixthly, the Ombudsmen hear complaints under both. The jurisprudence developed through their case notes is equally applicable to both.

Arguments against

16.29 The arguments against combining the Acts are as follows.

- 16.30 First, as we have seen earlier in this chapter there are significant differences between LGOIMA and the OIA. This is inevitable given the differences between central and local government. Some of the withholding grounds are different; the definition of “official information” differs between the Acts; and different personnel are subject to each Act. If the Acts were to be combined, local government officials would need to sift through the new composite Act picking out the parts that apply to them, and vice versa with central government officials.
- 16.31 Secondly, 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 whichever way it is done there is likely to be awkwardness.

- 16.32 Thirdly, 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.

Submissions

- 16.33 We posed the question of whether the Acts should be combined in both our 2009 survey and our 2010 issues paper. In the survey, there was a fairly even split among respondents. In the submissions to the issues paper, however, a substantial majority agreed with our tentative view expressed in that paper that the Acts should remain separate. The main reason given was that a single Act would be more complex and cumbersome. Respondents to our survey put it thus:

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.

- 16.34 It was also noted that there have been two Acts for 25 years, and the situation is thus familiar. Other submissions pointed out that the present position is not a problem because administering officials only use one Act, and need only be familiar with that one. There is also no adverse impact for requesters, even if they do not know which Act applies to their request. Another felt that combining the two “would blur the constitutional separation between local and central government”.
- 16.35 However a minority of submitters strongly supported one Act. They believe that our freedom of information laws would be more effective if they were unitary and of universal application. They noted that having two Acts complicates the task of educating agencies and the public, and referred to the fact that in our issues paper there was awkwardness in that for every reference to the OIA we had to footnote or otherwise cross-reference the corresponding provision in the LGOIMA.

Conclusion

- 16.36 As we said earlier, the arguments are quite finely balanced. We are attracted to the idea of a single Act, because we agree that it would communicate a single, all-encompassing message about the importance of openness in government. But we would not want that to happen if combining the two led to complexity and thus impeded accessibility. That in the end is an issue for expert drafters. We recommend that consideration be given to combining the two Acts, but that that not be at the expense of accessibility.

R137 As part of re-drafting and re-enacting the OIA and LGOIMA, consideration should be given to combining the two Acts into one piece of legislation. However, the need for accessibility and clarity should remain paramount.

Chapter 16 Footnotes

827 See chapter 5.

828 See chapter 7.

829 See chapter 9.

830 See chapter 3.

831 See chapters 7 and 10.

832 See chapter 14.

833 See chapter 14.

834 See chapter 11.

835 See chapter 12.

836 See chapter 13.



Appendix A

Recommendations

CHAPTER 2 – DECISION-MAKING

Case notes and opinions published by the Ombudsmen

R1 A new provision in the OIA and LGOIMA should expressly confer on the Ombudsmen the function of publishing opinions and guidelines on the official information legislation.

R2 Significant case notes and opinions on the OIA and LGOIMA should be compiled and published in a readily accessible database. They should be indexed and searchable. The Ombudsmen should have power to make them anonymous where confidentiality is an issue.

R3 The database of case notes should be accompanied by a regularly updated analytical commentary.

R4 The Ombudsmen's Guidelines should give specific examples drawn from previously decided cases, and, where appropriate, state presumptions and principles deriving from them.

R5 In preparing the Guidelines the Ombudsmen should consult with the oversight office.

Accessibility of guidance

R6 An accessible and easily navigable website should incorporate all guidance on the OIA and LGOIMA prepared by the Ombudsmen and by other agencies involved in administering these Acts.

R7 The Ombudsmen's Guidelines should be available in hard copy as well as electronically.

CHAPTER 3 – PROTECTING GOOD GOVERNMENT

R8 Sections 9(2)(f) and 9(2)(g) of the OIA (the “good government” grounds) should be replaced by a provision stating that:

The withholding of the information is necessary to avoid prejudice to the effective conduct of public affairs by protecting:

- (i) collective and individual ministerial responsibility;
- (ii) the political neutrality of officials;
- (iii) negotiations between political parties or Members of Parliament for the purpose of forming or supporting the government;
- (iv) the free and frank expression of opinions and provision of advice or information by, 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;
- (v) the ability of Ministers properly to consider advice tendered, whether that advice was requested or not;
- (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.

R9 Section 7(2)(f) of the LGOIMA should be replaced by a provision stating that:

The withholding of the information is necessary to avoid prejudice to the effective conduct of public affairs by protecting:

- (i) the free and frank expression of opinions and provision of advice or information by, between or to members or officers or employees of any local authority, in the course of their duty;
- (ii) such members, officers and employees from improper pressure or harassment;
- (iii) the ability of a local authority properly to consider advice tendered, whether that advice was requested or not.

CHAPTER 4 – POLITICALLY SENSITIVE REQUESTS

R10 Any protocol between an agency and a Minister in relation to engagement on official information matters should be published on the agency's website.

R11 As a drafting matter, section 14 of the OIA should follow section 12 of the LGOIMA to remove any technical ambiguity about transfers between Ministers and departments and vice versa.

R12 No further statutory provisions about transfers to Ministers should be introduced, but existing guidelines about transfers of requests to Ministers should be reviewed, clarified and further developed by a working party of central agencies including the State Services Commission, the Ombudsmen, the Department of the Prime Minister and Cabinet including the Cabinet Office, and the oversight office.

R13 Existing guidelines about consultation between departments and ministerial offices should be clarified and developed by the working party, in particular clarifying the distinction between consultation and notification and the circumstances in which each is appropriate.

R14 Guidance for agencies on how an information management strategy can be used to plan the way in which release and withholding will be managed at various stages of the policy development process would be desirable.

CHAPTER 5 – PROTECTING COMMERCIAL INTERESTS

R15 Information about third parties held by agencies subject to the OIA and LGOIMA should not form a category of information excluded from the Acts.

R16 Section 9(2)(i) and 9(2)(j) of the OIA should be amended to cover the commercial activities of "any person, including a Minister of the Crown or any department or organisation holding the information". Section 7(2)(h) and 7(2)(i) of the LGOIMA should be amended to cover the commercial activities of "any person, including a local authority holding the information".

R17 The term “commercial” should not be defined in the legislation. Instead, a new withholding ground should be added to section 9(2) of the OIA and section 7(2) of the LGOIMA, stating that good reason for withholding official information exists (subject to the public interest override) where the making available of the information would be likely to cause material prejudice to the competitive position or financial interests of any person, including the agency that holds the information.

R18 The public interest factors relevant to the commercial withholding grounds should not be included in the legislation, but should be the subject of more guidance, with examples.

CHAPTER 6 – PROTECTING PRIVACY

R19 The privacy withholding ground should not be amended, but new and comprehensive guidance on this withholding ground should be developed as a matter of priority by the Office of the Ombudsmen and the Office of the Privacy Commissioner.

R20 The privacy withholding ground should continue to protect the privacy interest of the deceased, as it does at present.

R21 Guidance on the privacy withholding ground should deal with public interest considerations where the privacy interests of children are involved.

R22 Guidance on the privacy withholding ground should deal with the extent to which the anonymity of officials may be maintained where information is released.

R23 A new provision in the OIA and LGOIMA should make it explicit that OIA and LGOIMA requests may be made by public agencies, subject to the limitation that personal information about individuals in their personal capacity is outside the scope of these requests.

CHAPTER 7 – OTHER WITHHOLDING GROUNDS AND REASONS FOR REFUSAL

Protecting information obtained in the course of an investigation or inquiry

- R24 A new withholding ground should be added to section 9 of the OIA and section 7 of the LGOIMA, stating that good reason for withholding information exists where it is necessary to protect information which has been provided to an agency in the course of an investigation or inquiry, and disclosure is likely to prejudice the conduct or outcome of that investigation or inquiry. The new withholding ground should expressly provide that:
- (a) it covers only investigations or inquiries authorised by or under statute;
 - (b) it applies only during the course of an investigation or inquiry, and not once it has been determined;
 - (c) it covers information supplied to, generated or obtained by the agency in the course of an investigation or inquiry;
 - (d) it does not restrict or otherwise affect the existing “maintenance of the law” withholding ground.

“Maintenance of the law”

- R25 The Ombudsmen’s Guidelines should address in detail, and with examples, the proper use of the “maintenance of the law” withholding ground.

“Publicly available” information

- R26 Section 18(d) of the OIA and section 17(d) of the LGOIMA should be amended to state that a request may be refused where the information requested is either:
- (a) publicly available and reasonably accessible to a member of the public; or
 - (b) will soon be publicly available, and to require its release before that time is unnecessary, or would be unreasonable in the circumstances.

- R27 The OIA and LGOIMA should define the term “publicly available” and should confirm that it may include information that is available on payment of a fee.

Legal professional privilege

R28 The OIA and LGOIMA should state that legal professional privilege for the purpose of those Acts means legal professional privilege as defined in the Evidence Act 2006.

R29 As a drafting matter, the legal professional privilege withholding ground in section 9(2)(h) of the OIA and section 7(2)(g) of the LGOIMA should be amended for consistency with section 27(1)(g) of the OIA and section 26(1)(g) of the LGOIMA, so that an agency may withhold requested official information if “withholding the information is necessary to avoid a breach of legal professional privilege”.

Other withholding grounds

R30 The OIA and LGOIMA should not include, as a further reason for withholding information, that the withholding of the information is necessary to protect an individual or individuals from harassment.

R31 The Government should establish a working party to examine whether there should be a new ground in the OIA relating to the protection of cultural matters, and if so, what its terms should be; and whether such a ground should also be included in the LGOIMA to supplement or extend the existing ground in that Act relating to the protection of tikanga Māori or wāhi tapu (in relation to certain matters under the Resource Management Act 1991).

CHAPTER 8 – THE PUBLIC INTEREST TEST

R32 The requirement to consider the public interest in making information available should continue to be a feature of the OIA and LGOIMA. This should be made more prominent by redrafting section 9 of the OIA and section 7 of the LGOIMA along the following lines:

Non-conclusive reasons for withholding official information

- (1) Good reason for withholding official information exists where both (a) and (b) are met:
 - (a) Subsection (2) applies; and
 - (b) The withholding of the information is not outweighed by other considerations which render it desirable, in the public interest, to make that information available.

R33 The term “public interest” should not be statutorily defined or limited by a list of factors to be taken into account. Instead, the Ombudsmen’s Guidelines should provide clear examples of previous cases in which the public interest in disclosure has, and has not, been sufficient to justify overriding a withholding ground.

R34 The oversight office should monitor how agencies are considering the public interest as part of the decision to withhold or release requested information under section 9 of the OIA or section 7 of the LGOIMA.

CHAPTER 9 – REQUESTS AND RESOURCES

“Due particularity”

R35 The requirement for due particularity in section 12(2) of the OIA and section 10(2) of the LGOIMA should be replaced with the following statement: “The requester must provide sufficient detail to enable the agency to identify the information requested.”

R36 The OIA and LGOIMA should state that, where a request is insufficiently clear, the agency may not treat the request as invalid unless it has reasonably attempted to fulfil its duty of assistance under section 13 of the OIA and section 11 of the LGOIMA. The Ombudsmen’s Guidelines should give examples, if possible drawn from prior cases, as to what generally constitutes reasonable assistance.

R37 Section 28 of the OIA and section 27 of the LGOIMA should provide for the Ombudsmen to hear complaints that an agency has failed to offer reasonable assistance to a requester under section 13 of the OIA and section 11 of the LGOIMA.

R38 Section 13 of the OIA and section 11 of the LGOIMA should state that if, despite reasonable attempts by the agency to provide assistance, the requester maintains the request in a form which does not comply with section 12(2) of the OIA or section 10(2) of LGOIMA, the agency may treat the request as invalid.

“Substantial collation or research”

R39 Section 18(f) of the OIA and section 17(f) of the LGOIMA should be amended to state that an agency may refuse a request where substantial time would be required to:

- (a) identify, locate, and collate the information;
- (b) read and examine the information;
- (c) undertake appropriate consultation; and
- (d) edit and copy the information.

“Substantial” should be defined in the OIA and LGOIMA to mean that the work involved would substantially and unreasonably divert resources from the agency’s other operations.

Consulting requesters

R40 Section 18B of the OIA and section 17B of the LGOIMA should be amended to state that an agency may not refuse a request under section 18(f) of the OIA or section 17(f) of the LGOIMA unless it has first made a reasonable attempt to consult the requester.

R41 Section 28 of the OIA and section 27 of the LGOIMA should provide for the Ombudsmen to hear complaints that an agency has not made a reasonable attempt to consult with the requester before refusing a request under section 18(f) of the OIA or section 17(f) of LGOIMA.

R42 The OIA and LGOIMA should provide that, if a request for information is revised after consultation, the revised request is to be treated as a new request for the purpose of the 20-working day time limit in section 15 of the OIA and section 13 of the LGOIMA. An agency should not receive the benefit of this provision unless it has made a demonstrable effort to clarify the request within seven working days of receiving it.

Vexatious requests

R43 Section 18(h) of the OIA and section 17(h) of the LGOIMA should be amended to make it clear that, in determining whether a request is frivolous or vexatious, the past conduct of a requester may be taken into account.

R44 The OIA and LGOIMA should state that a request may be considered vexatious where it would impose a significant burden on the agency and it:

- (a) does not have a serious purpose or value; and/or
- (b) is designed to cause disruption or annoyance to the agency; and/or
- (c) has the effect of harassing the agency; and/or
- (d) would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

R45 The OIA and LGOIMA should include new provisions stating that:

- (a) an agency may decline to provide information if the same, or substantially the same, information has been supplied to the requester before, provided there is no good reason for requesting it again;
- (b) an agency may decline to provide information if a request for the same or substantially the same information has been declined previously, provided there is no good reason for requesting it again.

R46 The OIA and LGOIMA should not give agencies the power to declare a requester vexatious with a view to declining future requests from that person.

Requester's purpose

R47 The Acts should not require requesters of official information to state their purpose. However, guidance for requesters should make it clear that it can be useful for agencies to know the purpose of a request and that they may be asked for it.

Form of requests

R48 A new provision in the OIA and LGOIMA should state that:

- (a) requests may be made in any form (in hard copy, electronically, or orally);
- (b) requests do not need to make express reference to official information legislation;
- (c) where it is reasonably necessary to clarify an oral request, agencies may ask for it to be put in writing;
- (d) if the requester declines or is unable to put an oral request in writing, the agency should record its understanding of the request and provide a copy of it to the requester.

Guidance for requesters

- R49 There should be a set of publicly available, readily accessible, user-friendly guidelines for persons wishing to request official information. Consideration should be given to creating a dedicated 0800 number, administered by the oversight office, to provide assistance to requesters.

CHAPTER 10 – PROCESSING REQUESTS

Time limits

- R50 Section 15(1) of the OIA and section 13(1) of the LGOIMA should retain the standard 20-working day time limit for responding to requests. However, the sections should be amended so that it is explicit that this time limit covers both (i) the agency's decision about release or withholding; and (ii) the release of any information in response to a request.

- R51 Acknowledging receipt of official information requests should be encouraged as best practice, rather than introducing a statutory requirement to do so.

- R52 The maximum extension time in section 15A of the OIA and section 14 of the LGOIMA should continue to be flexible, without introducing a specific time limit.

- R53 Section 15A of the OIA and section 14 of the LGOIMA should be amended to allow a further extension of the time limit during the initial extension period, for a reasonable period having regard to the circumstances.

- R54 No provision should be introduced allowing for the extension of statutory timeframes by agreement with the requester; however, extensions by agreement should be encouraged on an informal basis as part of the dialogue between agency and requester.

- R55 Complexity should not be added as a further ground for extending the 20-working day time limit in section 15A of the OIA and section 14 of the LGOIMA.

- R56 A new provision in the OIA and LGOIMA should provide the following:
- (a) a requester may make an urgent request provided that reasons for urgency are given;
 - (b) an agency must treat such a request as urgent if it would be reasonably practicable in the circumstances to do so; and
 - (c) a response to a request treated as urgent should be notified promptly and, where the decision is in favour of release, the information should be provided to the requester as soon as reasonably practicable in the circumstances.

Consultation and notification

- R57 Guidance about inter-agency consultation processes should be reviewed and revised as necessary. This guidance should be an information resource for both agencies and requesters to promote understanding of the processing framework.

- R58 A new provision in the OIA and the LGOIMA should provide that where reasonably practicable, agencies must notify a third party prior to the release of requested third party information, where the withholding of the information would be justified on the grounds of:
- (a) privacy;
 - (b) confidentiality, disclosure of a trade secret or unreasonable prejudice to commercial or competitive position (in relation to information obtained from a third party); or
 - (c) in the case of LGOIMA, tikanga Māori;
- but the agency considers the need to withhold to be outweighed by the public interest in disclosure.

- R59 The period for pre-release notification to third parties should be a minimum of five working days.

- R60 Following pre-release notification to a third party, the agency should have a duty to take into account any submission in favour of withholding made within the five working day time period, before finalising a decision to release the requested third party information.

R61 Subject to the new statutory pre-release notification requirement, consultation with affected third parties should continue to be encouraged as a matter of best practice. Guidance about third party consultation should be developed, covering both the recommended notification requirement, as well as the nature and objectives of third party consultation more generally.

Transfer of requests

R62 Section 14 of the OIA and section 12 of the LGOIMA should be amended to explicitly allow for partial transfers of requests.

R63 The time limit for notification provided in section 15A(3) of the OIA and section 14(3) of the LGOIMA should be reduced to 10 working days, where a time limit has been extended to allow a request to be transferred.

Release of information

R64 Section 16(2) of the OIA and section 15(2) of the LGOIMA should continue to require the release of information in the form preferred by the requester, subject however to a new condition that the requester's preference is reasonable in the circumstances, in place of the condition in section 16(2)(a) of the OIA and section 15(2)(a) of the LGOIMA that the requester's preference not "impair efficient administration".

R65 Section 16 of the OIA and section 15 of the LGOIMA should be updated to include electronic release of information.

R66 Requests for metadata and information in backup systems should continue to be dealt with on a case by case basis, and therefore no legislative change is required.

R67 Section 18(e) of the OIA and section 17(e) of the LGOIMA should be amended to state that an agency may refuse a request where the information requested does not exist or cannot be found "after taking reasonable steps to locate the information".

R68 Guidance should be developed that addresses the interaction of the information management requirements of the Public Records Act 2005 and the official information legislation, including how agencies should deal with requests for metadata and information that is difficult or costly to access.

R69 Further work should be undertaken to address the interaction between the official information legislation and the New Zealand Government Open Access Licensing framework, with a view to producing guidance for agencies.

R70 Guidance for requesters should be developed to explain common legal restrictions that may apply to the use and re-use of released information, including defamation, copyright, privacy and contempt of court.

Charging

R71 A review of charging policy based on the objectives listed at [10.202] should be undertaken in order to establish a charging framework that is cohesive, consistent and principled. The review should include charging policy under the official information legislation, the *Declaration on Open and Transparent Government*, the *New Zealand Data and Information Management Principles* and the *New Zealand Government Open Access and Licensing* framework, and any other relevant government information policy.

CHAPTER 11 – COMPLAINTS AND REMEDIES

Alignment of process

R72 The complaint-handling process contained in Parts 3 and 4 of the OIA and LGOIMA should be amended to achieve consistency with the complaint-handling process contained in Part 2 of each Act. However, this should not be at the expense of recognising the distinct nature of requests for information under the existing sections 22, 23 and 24 of the OIA and sections 21, 22 and 23 of the LGOIMA.

R73 Section 27(1) of the OIA and section 26(1) of the LGOIMA should include as a reason for refusal in relation to a request for information under Part 4, that making the information available would be contrary to an enactment or would constitute contempt of court or of the House of Representatives.

R74 The reasons for refusing a request for personal information under section 27 of the OIA and section 26 of the LGOIMA and under the Privacy Act 1993 should be kept in alignment as far as possible.

New grounds for complaint

R75 To improve the clarity of the complaint grounds, section 28(4) of the OIA and section 27(4) of the LGOIMA should be removed and replaced with a new ground providing for the Ombudsmen to hear complaints that an agency has failed to make a decision in response to a request for official information within 20 working days (or a properly extended time limit) or “as soon as reasonably practicable”.

R76 To improve the clarity of the complaint grounds, section 28(5) of the OIA and section 27(5) of the LGOIMA should be removed and replaced with a new ground providing for the Ombudsmen to hear complaints that an agency has failed to make official information available in response to a request within 20 working days (or a properly extended time limit) or “as soon as reasonably practicable”.

R77 Section 28 of the OIA and section 27 of the LGOIMA should provide for the Ombudsmen to hear complaints that an agency has not properly transferred a request for information, whether fully or partially; and that an agency has not complied with designated time limits for transfers.

R78 Section 28 of the OIA and section 27 of the LGOIMA should provide for the Ombudsmen to hear complaints that an agency has not complied with its obligations to notify affected third parties prior to releasing their information.

R79 Section 28 of the OIA and section 27 of the LGOIMA should provide for the Ombudsmen to hear complaints that an agency has not followed proper process before deciding to release information. The complaint ground should only become available after the information has been released.

The veto

R80 The “veto” of an Ombudsman’s recommendation by Order in Council under section 32(1)(a) of the OIA should be retained.

R81 Section 32(1) of the LGOIMA should be amended so that the “veto” of an Ombudsman’s recommendation under the LGOIMA is only exercisable by Order in Council.

Enforcing an Ombudsman’s recommendations

R82 A new provision in the OIA and LGOIMA should state that the Ombudsmen can report publicly on an agency’s failure to comply with its statutory obligations under those Acts.

R83 A new provision in the OIA and LGOIMA should state that, where an agency is under a public duty to release specified official or other information, the requester may bring court proceedings for such relief as is available on his or her own behalf.

R84 A new provision in the OIA and LGOIMA should state that the requester’s costs of bringing such proceedings should be met by the Crown on a solicitor-client basis, unless the court is satisfied that the proceedings have not been reasonably or properly brought.

CHAPTER 12 – PROACTIVE RELEASE AND PUBLICATION

Duty to proactively release

R85 A new provision in the OIA and LGOIMA should place a duty on agencies to take all reasonably practicable steps to proactively make official information publicly available, taking into account matters such as the type of information held by the agency and the public interest in it, the agency’s resources and any relevant government policy.

R86 Agencies should include proactive release strategies and progress reports in their annual accountability documents.

R87 The new statutory duty to proactively release information should apply to all agencies that are subject to the OIA and LGOIMA.

R88 The new statutory duty to proactively release information should be reviewed three years after it comes into force.

R89 Section 20 of the OIA should be amended to require every agency to publish on its own website the information specified in that section, in place of the obligation on the Ministry of Justice to publish the *Directory of Official Information*.

R90 The new statutory duty to proactively release information should not mandate particular categories of information that must be proactively released. Rather, guidance should be developed for agencies including examples of information that should be released unless there are good reasons not to. This list should be reviewed periodically with a view to expanding it where possible.

R91 Agencies that produce information systems strategic plans (ISSPs) should provide them to the oversight office.

Regulation and guidance

R92 The new statutory duty to proactively release information should be placed in a new Part to each Act that also sets out provisions governing proactive release.

R93 An official information request should continue to be a request for the provision of information to an individual requester (for the purposes of section 12 of the OIA and section 10 of the LGOIMA) and no legislative change is required.

R94 The new Part to each Act that regulates proactive release should recognise public requests that official information be published and require agencies to take such requests into account in developing their proactive release strategies.

R95 The new Part to each Act that regulates proactive release should require agencies to take account of the interests protected by the respective withholding grounds in each Act in reaching decisions about the proactive release of official information.

R96 The Ombudsmen's Guidelines should address how the public interest test is applied before information is proactively released.

R97 The protection of privacy in the context of proactive publication programmes should continue to be covered by the Privacy Act 1993.

R98 The new Part to each Act that regulates proactive release should make the proactive release of third party information that would otherwise be protected by the commercial and confidentiality withholding grounds and, in the case of the LGOIMA, the tikanga Māori ground, conditional on the prior consent of the relevant third party.

R99 The proactive release of such third party information without consent should be a new ground of complaint to the Ombudsmen in section 28 of the OIA and section 27 of the LGOIMA.

R100 Section 48 of the OIA and section 41 of the LGOIMA should continue to apply to the release of official information in response to specific requests, but should not be extended to the broader proactive publication of official information.

R101 Liability issues in relation to proactive release and best practice due diligence processes for managing them should be addressed in guidance.

Oversight of proactive release

R102 Oversight functions in relation to the official information legislation should include oversight of proactive release activities in the public sector including monitoring, policy, review and promotion of best practice.

R103 The oversight office should contribute to the work of the Data and Information Re-use Chief Executives Steering Group, in an advisory capacity.

R104 The Privacy Commissioner should have an oversight role in relation to the privacy aspects of proactive release, including:

- (a) consulting with the oversight office;
- (b) contributing to the work of the Data and Information Re-use Chief Executives Steering Group as an expert adviser; and
- (c) having the power to recommend a Privacy Impact Assessment prior to proactive release.

CHAPTER 13 – OVERSIGHT OF OFFICIAL INFORMATION LEGISLATION

Functions of the Ombudsmen

R105 The Ombudsmen should continue to have the statutory function of investigating complaints under section 28 of the OIA and section 27 of the LGOIMA.

R106 The Ombudsmen should have the statutory function of providing guidance on the official information legislation, as recommended in R1.

Oversight functions

R107 The OIA and LGOIMA should include the following functions so as to provide leadership and whole-of-government oversight, and to promote the purposes of the legislation: **policy advice; review; statistical oversight; promotion of best practice; oversight of training; oversight of requester guidance and annual reporting.**

R108 The **policy advice** function should cover all official information related policies and legislation and should include:

- (a) co-ordinating official information policy and practice with other government information management and pro-active information release policies;
- (b) advising on the regulation of official information as appropriate and as referred by government;
- (c) advising on official information aspects of new legislation and the establishment of new public agencies; and
- (d) advising on any matter affecting the operation of the official information legislation.

R109 The **operational review** function should include:

- (a) receiving and investigating complaints about the operation of the legislation;
- (b) reviewing agency practice in relation to certain aspects of the legislation;
- (c) undertaking a five year review of the operation of the official information legislation, aligned with reviews of the Privacy Act 1993 and the Public Records Act 2005.

R110 The **statistical oversight** function should include ensuring essential statistics about the operation of the official information legislation are collected and maintained. A new statutory provision should state that regulations may be made specifying which statistics must be kept by agencies.

R111 The **promotion of best practice** function should include developing best practice models and cross-agency guidelines.

R112 The **oversight of training** function should include providing and co-ordinating assistance to agencies to deliver training.

R113 The **oversight of requester guidance** function should include ensuring that appropriate assistance is available to requesters, such as by way of a dedicated website.

R114 The **annual reporting** function should include making an annual report to the relevant Minister on the operation of official information legislation.

R115 The oversight function should be established in accordance with the following five principles:

- (a) Responsibility for oversight of the OIA and LGOIMA should be vested in a single office or office holder.
- (b) The office or office holder should be established by statute.
- (c) The statutory office or office holder should be accountable to the purposes of the official information legislation when providing advice to government.
- (d) The statutory office or office holder should be integrated into the wider strategic management of government-held information.
- (e) The statutory office or office holder should be established on an ongoing, not short-term, basis.

CHAPTER 14 – SCOPE OF THE ACTS

Maintaining the schedules to the OIA and LGOIMA

R116 The schedules to the OIA and LGOIMA should be comprehensive and identify all agencies covered by the OIA and LGOIMA respectively.

R117 Wherever practicable, the schedules should list individual agencies rather than categories of agencies.

R118 There should be a statutory responsibility on all agencies subject to the OIA and LGOIMA to state that fact on their website.

R119 There should be a statutory responsibility on the oversight office to:

- (a) maintain the schedules to the OIA and LGOIMA; and
- (b) maintain and make publicly available a list of the agencies that are subject to the OIA and LGOIMA.

R120 A new provision in the OIA and LGOIMA should state that the Acts' schedules may be updated by Order in Council when an agency is established or abolished, or its name is changed.

R121 The Ministry of Justice should convene a working group, including representatives from central and local government, to examine the schedules to the OIA and LGOIMA to eliminate anomalies and bring within coverage organisations with such a relationship to central or local government that they should properly be included.

Parliament and the OIA

R122 The Offices of Parliament (the Ombudsmen, the Office of the Controller and Auditor-General and the Parliamentary Commissioner for the Environment) should be subject to the OIA by inclusion in Schedule 1. Information relating to any audit, assurance work, inquiry or investigation undertaken by an Office of Parliament should be excluded from the definition of “official information” in section 2 of the OIA.

R123 The Parliamentary Counsel Office should be subject to the OIA by inclusion in Schedule 1.

R124 The Office of the Clerk of the House of Representatives and the Parliamentary Service should be subject to the OIA by inclusion in Schedule 1. The definition of “official information” in section 2 of the OIA should state that, in relation to these agencies, “official information” includes only:

- (a) statistical information about the agency’s activities;
- (b) information about the agency’s expenditure of public money;
- (c) information about the agency’s assets, resources, support systems, and other administrative matters.

R125 The Speaker in his or her role as responsible Minister in relation to the Office of the Clerk and Parliamentary Service should be subject to the OIA by inclusion in Schedule 1. The definition of “official information” in section 2 of the OIA should state that only information held by the Speaker in that capacity is included.

R126 Section 2 of the OIA should state that “official information”, in relation to information held by a parliamentary agency, does not include:

- (a) any information held by a parliamentary agency solely as an agent for, or on behalf of, the House of Representatives or a Member of Parliament; or
- (b) any information held by a parliamentary agency about a Member of Parliament in relation to the Member’s performance of his or her role and functions as a Member; or
- (c) any information held by a parliamentary agency that relates to the development of political policies by a recognised party or an independent Member of Parliament.

Consideration should be given to whether the exemptions in the Freedom of Information Act 2000 (UK) that apply to individual Members of Parliament should be included in the OIA or in guidance.

R127 To avoid doubt, a new provision in the OIA should state that nothing in the OIA limits or affects any privileges, immunities or powers of the House of Representatives.

R128 Section 31 of the OIA should be amended to provide that the Ombudsmen must not recommend making available any official information held by a parliamentary agency or the Speaker, if the Speaker certifies that making the information available would be likely to limit or affect any privileges, immunities, or powers of the House of Representatives.

R129 Section 9(2)(g)(i) of the OIA should be amended so that the withholding ground covers the free and frank expression of opinions between:

- (a) an officer or employee of a parliamentary agency;
- (b) the Clerk;
- (c) the Speaker; and
- (d) a Member of Parliament.

Courts and the OIA

- R130 Section 2 of the OIA should be amended so that the definition of “official information” includes, in relation to information about the courts, only:
- (a) statistical information about court cases;
 - (b) information about expenditure; and
 - (c) information about court buildings, resources, support systems and other operational matters;
- and excludes:
- (d) information about specific court cases;
 - (e) judicial communications including judges’ papers or notes; and
 - (f) information about a judge in relation to the judge’s performance of his or her role and function as a judge.

SOEs and the OIA; CCOs and the LGOIMA

- R131 State Owned Enterprises should continue to be subject to the OIA and council controlled organisations should continue to be subject to the LGOIMA.

CHAPTER 15 – ISSUES OF COMPATIBILITY

Consistency with the Public Records Act 2005

- R132 The terms “information” in the OIA and LGOIMA and “record” in the Public Records Act 2005 should remain unchanged.

- R133 Section 18 of the OIA and section 17 of the LGOIMA should be amended to provide that the Ombudsmen may notify the Chief Archivist if a request is refused on any of the following grounds:
- (a) the information does not exist or cannot be found (under section 18(e) of the OIA or section 17(e) of the LGOIMA);
 - (b) the information cannot be made available without substantial collation or research (under section 18(f) of the OIA or section 17(f) of the LGOIMA);
 - (c) the information is not held by the agency in question (under section 18(g) of the OIA or section 17(g) of the LGOIMA).

Consistency between the OIA and LGOIMA

R134 Sections 12, 21, 22 and 23 of the OIA should be amended to provide that any person (whether a citizen of New Zealand, resident in New Zealand or otherwise) can make a request for information, consistent with sections 10, 21, 22 and 23 of the LGOIMA.

R135 The following sections of the LGOIMA should be amended for consistency with the OIA:

- (a) Section 4(a) of the LGOIMA should provide that a purpose of the Act is to increase progressively the availability of official information to the public;
- (b) Section 2(6) of the LGOIMA should be deleted and replaced with a provision like section 2(5) of the OIA, deeming that any information held by an independent contractor engaged by a local authority is, for the purposes of LGOIMA, held by the local authority.

CHAPTER 16 – THE LEGISLATIVE VEHICLE

R136 The OIA and LGOIMA should be re-drafted and re-enacted. The sections should be rearranged in a more logical order; important provisions which are presently insufficiently emphasised should be given more prominence; and the language should be modernised and simplified as appropriate.

R137 As part of re-drafting and re-enacting the OIA and LGOIMA, consideration should be given to combining the two Acts into one piece of legislation. However, the need for accessibility and clarity should remain paramount.



Appendix B

List of submitters

The following list includes people the Law Commission had meetings with in the course of this project, as well as people and organisations who made submissions to the Commission. It has not been possible to also include all those with whom the Commission has had email contact.

Accident Compensation Corporation

AgResearch Ltd

Air New Zealand

Airways New Zealand

Akaroa Mail

Archives and Records Association of New Zealand

Archives New Zealand

Bay of Plenty Regional Council

Canterbury Museum

Children's Commissioner

Christchurch City Council

Chye-Ching Huang

Commerce Commission

Courtenay Lambert

Crown Law

Dave Clemens

Denis Sheard

Department of Building and Housing

Department of Conservation

Department of Corrections

Department of Internal Affairs

District Health Boards New Zealand

DRACO Foundation

Dunedin Community Law Centre

Elspeth McLean

Environment Waikato Regional Council

Fairfax Media (incorporating national, regional, community, magazine and digital media)

Financial Markets Authority

Frank Marvin

Guardians of the New Zealand Superannuation Fund

Hastings District Council

Health and Disability Commissioner

Human Rights Commission

Ian Matheson

Inland Revenue Department

Johnny Blades

Kapiti Coast District Council

Landcare Research

MacKenzie District Council

Maritime New Zealand

Marketing Law

Marlborough District Council

Media Freedom Committee of Commonwealth Press Union (incorporating 38 media outlets and organisations)

Mental Health Commission

Meridian Energy

Ministry of Agriculture and Forestry

Ministry of Economic Development

Ministry of Education

Ministry of Justice
Ministry of Social Development
Nelson Bays Community Law
New Zealand Blood Service
New Zealand Council for Civil Liberties
New Zealand Council of Trade Unions
New Zealand Customs Service
New Zealand Fire Service
New Zealand Law Society
New Zealand On Air
New Zealand Police
New Zealand Post
New Zealand Racing Board
New Zealand School of Trustees Association
New Zealand Security Intelligence Service
Olivia McRae
Office of the Ombudsmen
Parliamentary Commissioner for the Environment
Parliamentary Counsel Office
Peter Ellis
Pharmac
Plant and Food Research
Powell Webber & Associates
Office of the Privacy Commissioner
Public Service Association
Public Trust
QEII National Trust
Seafood Industry Council
Serious Fraud Office
Solid Energy New Zealand Limited

Southern District Health Board
State Services Commission
Statistics New Zealand
Tasman District Council
Tauranga City Council
The Treasury
Thomas Beagle
Tony Randle
Television New Zealand
University of Auckland
Veterans Affairs New Zealand
Waikato District Council
Western Bay of Plenty District Council
Westpac New Zealand Limited

Appendix C

Legislative provisions

OIA 1982	LGOIMA 1987
<p>4 Purposes</p> <p>The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—</p> <p>(a) to increase progressively the availability of official information to the people of New Zealand in order —</p> <p>(i) to enable their more effective participation in the making and administration of laws and policies; and</p> <p>(ii) to promote the accountability of Ministers of the Crown and officials,—</p> <p>and thereby to enhance respect for the law and to promote the good government of New Zealand:</p> <p>(b) to provide for proper access by each person to official information relating to that person:</p> <p>(c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.</p>	<p>4 Purposes</p> <p>The purposes of this Act are—</p> <p>(a) to provide for the availability to the public of official information held by local authorities, and to promote the open and public transaction of business at meetings of local authorities, in order —</p> <p>(i) to enable more effective participation by the public in the actions and decisions of local authorities; and</p> <p>(ii) to promote the accountability of local authority members and officials,—</p> <p>and thereby to enhance respect for the law and to promote good local government in New Zealand:</p> <p>(b) to provide for proper access by each person to official information relating to that person:</p> <p>(c) to protect official information and the deliberations of local authorities to the extent consistent with the public interest and the preservation of personal privacy.</p>

OIA 1982	LGOIMA 1987
<p>6 Conclusive reasons for withholding official information</p> <p>Good reason for withholding official information exists, for the purpose of section 5, if the making available of that information would be likely—</p> <ul style="list-style-type: none"> (a) to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or (b) to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by— <ul style="list-style-type: none"> (i) the Government of any other country or any agency of such a Government; or (ii) any international organisation; or (c) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or (d) to endanger the safety of any person; or (e) to damage seriously the economy of New Zealand by disclosing prematurely decisions to change or continue government economic or financial policies relating to— <ul style="list-style-type: none"> (i) exchange rates or the control of overseas exchange transactions; (ii) the regulation of banking or credit; (iii) taxation; (iv) the stability, control, and adjustment of prices of goods and services, rents, and other costs, and rates of wages, salaries, and other incomes; (v) the borrowing of money by the Government of New Zealand; (vi) the entering into of overseas trade agreements. 	<p>6 Conclusive reasons for withholding official information</p> <p>Good reason for withholding official information exists, for the purpose of section 5, if the making available of that information would be likely—</p> <ul style="list-style-type: none"> (a) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or (b) to endanger the safety of any person.

OIA 1982	LGOIMA 1987
<p>9 Other reasons for withholding official information</p> <p>(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.</p> <p>(2) Subject to sections 6, 7, 10, and 18, this section applies if, and only if, the withholding of the information is necessary to—</p> <ul style="list-style-type: none"> (a) protect the privacy of natural persons, including that of deceased natural persons; or (b) protect information where the making available of the information— <ul style="list-style-type: none"> (i) would disclose a trade secret; or (ii) would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; 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— <ul style="list-style-type: none"> (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; or (ii) would be likely otherwise to damage the public interest; or (c) avoid prejudice to measures protecting the health or safety of members of the public; or (d) avoid prejudice to the substantial economic interests of New Zealand; or (e) avoid prejudice to measures that prevent or mitigate material loss to members of the public; or (f) maintain the constitutional conventions for the time being which protect— <ul style="list-style-type: none"> (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; or 	<p>7 Other reasons for withholding official information</p> <p>(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.</p> <p>(2) Subject to sections 6, 8, and 17, this section applies if, and only if, the withholding of the information is necessary to—</p> <ul style="list-style-type: none"> (a) protect the privacy of natural persons, including that of deceased natural persons; or (b) protect information where the making available of the information— <ul style="list-style-type: none"> (i) would disclose a trade secret; or (ii) would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; or (ba) 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 wāhi tapu; or (c) 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— <ul style="list-style-type: none"> (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; or (ii) would be likely otherwise to damage the public interest; or (d) avoid prejudice to measures protecting the health or safety of members of the public; or (e) avoid prejudice to measures that prevent or mitigate material loss to members of the public; or

OIA 1982	LGOIMA 1987
<p>(g) maintain the effective conduct of public affairs through—</p> <p>(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</p> <p>(ii) the protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment; or</p> <p>(h) maintain legal professional privilege; or</p> <p>(i) enable a Minister of the Crown or any department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities; or</p> <p>(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); or</p> <p>(k) prevent the disclosure or use of official information for improper gain or improper advantage.</p>	<p>(f) maintain the effective conduct of public affairs through—</p> <p>(i) the free and frank expression of opinions by or between or to members or officers or employees of any local authority, or any persons to whom section 2(5) applies, in the course of their duty; or</p> <p>(ii) the protection of such members, officers, employees, and persons from improper pressure or harassment; or</p> <p>(g) maintain legal professional privilege; or</p> <p>(h) enable any local authority holding the information to carry out, without prejudice or disadvantage, commercial activities; or</p> <p>(i) enable any local authority holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations); or</p> <p>(j) prevent the disclosure or use of official information for improper gain or improper advantage.</p>

OIA 1982	LGOIMA 1987
<p>12 Requests</p> <p>(1) Any person, being—</p> <ul style="list-style-type: none"> (a) a New Zealand citizen; or (b) a permanent resident of New Zealand; or (c) a person who is in New Zealand; or (d) a body corporate which is incorporated in New Zealand; or (e) a body corporate which is incorporated outside New Zealand but which has a place of business in New Zealand,— <p>may request a department or Minister of the Crown or organisation to make available to him or it any specified official information.</p> <p>(1A) Notwithstanding subsection (1), a request made, on or after the date of commencement of this subsection, by or on behalf of a natural person for access to any personal information which is about that person shall be deemed to be a request made pursuant to subclause (1)(b) of principle 6 of the Privacy Act 1993, and shall be dealt with accordingly, and nothing in this Part or in Part 5 shall apply in relation to any such request.</p> <p>(2) The official information requested shall be specified with due particularity in the request.</p> <p>(3) If the person making the request asks that his request be treated as urgent, he shall give his reasons for seeking the information urgently.</p>	<p>10 Requests</p> <p>(1) Any person may request any local authority to make available to that person any specified official information.</p> <p>(1A) Notwithstanding subsection (1), a request made, on or after the date of commencement of this subsection, by or on behalf of a natural person for access to any personal information which is about that person shall be deemed to be a request made pursuant to subclause (1)(b) of principle 6 of the Privacy Act 1993, and shall be dealt with accordingly, and nothing in this Part or in Part 5 shall apply in relation to any such request.</p> <p>(2) The official information requested shall be specified with due particularity in the request.</p> <p>(3) If the person making the request asks that that request be treated as urgent, that person shall give that person's reasons for seeking the information urgently.</p>

OIA 1982	LGOIMA 1987
<p>14 Transfer of requests</p> <p>Where—</p> <p>(a) a request in accordance with section 12 is made to a department or Minister of the Crown or organisation; and</p> <p>(b) the information to which the request relates—</p> <p>(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</p> <p>(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,—</p> <p>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.</p>	<p>12 Transfer of requests</p> <p>Where—</p> <p>(a) a request in accordance with section 10 is made to any local authority; and</p> <p>(b) the information to which the request relates—</p> <p>(i) is not held by that local authority but is believed by the person dealing with the request to be held by another local authority or a department or Minister of the Crown or organisation; or</p> <p>(ii) is believed by the person dealing with the request to be more closely connected with the functions of another local authority or a department or Minister of the Crown or organisation,—</p> <p>the chief executive of the local authority to which the request is made, or an officer or employee authorised by that chief executive, shall promptly, and in no case later than 10 working days after the day on which the request is received, transfer the request to the other local authority, or the appropriate department, Minister of the Crown, or organisation, and inform the person making the request accordingly.</p>

OIA 1982	LGOIMA 1987
<p>15 Decisions on requests</p> <p>(1) Subject to this Act, the department or Minister of the Crown or organisation to whom a request is made in accordance with section 12 or is transferred in accordance with section 14 of this Act or section 12 of the Local Government Official Information and Meetings Act 1987 shall, as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received by that department or Minister of the Crown or organisation,—</p> <p>(a) decide whether the request is to be granted and, if it is to be granted, in what manner and for what charge (if any); and</p> <p>(b) give or post to the person who made the request notice of the decision on the request.</p> <p>(1A) Subject to section 24, every department or Minister of the Crown or organisation (including an organisation whose activities are funded in whole or in part by another person) may charge for the supply of official information under this Act.</p> <p>(2) Any charge fixed shall be reasonable and regard may be had to the cost of the labour and materials involved in making the information available and to any costs incurred pursuant to a request of the applicant to make the information available urgently.</p> <p>(3) The department or Minister of the Crown or organisation may require that the whole or part of any charge be paid in advance.</p> <p>(4) Where a request in accordance with section 12 is made or transferred to a department, the decision on that request shall be made by the chief executive of that department or an officer or employee of that department authorised by that chief executive unless that request is transferred in accordance with section 14 to another department or to a Minister of the Crown or to an organisation or to a local authority.</p> <p>(5) Nothing in subsection (4) prevents the chief executive of a department or any officer or employee of a department from consulting a Minister of the Crown or any other person in relation to the decision that the chief executive or officer or employee proposes to make on any request made to the department in accordance with section 12 of this Act or transferred to the department in accordance with section 14 of this Act or section 12 of the Local Government Official Information and Meetings Act 1987.</p>	<p>13 Decisions on requests</p> <p>(1) Subject to this Act, the local authority to which a request is made in accordance with section 10, or is transferred in accordance with section 12 of this Act or section 14 of the Official Information Act 1982, shall, as soon as reasonably practicable, and in no case later than 20 working days after the day on which the request is received by that local authority,—</p> <p>(a) decide whether the request is to be granted and, if it is to be granted, in what manner and for what charge (if any); and</p> <p>(b) give or post to the person who made the request notice of the decision on the request.</p> <p>(1A) Subject to section 23, every local authority (including a local authority whose activities are funded in whole or in part by another person) may charge for the supply of official information under this Act.</p> <p>(2) Any charge for the supply of official information under this Act shall not exceed the prescribed amount.</p> <p>(3) Where no such amount is prescribed, any charge fixed shall be reasonable, and regard may be had to the cost of the labour and materials involved in making the information available and to any costs incurred pursuant to a request of the applicant to make the information available urgently.</p> <p>(4) The local authority may require that the whole or part of any charge be paid in advance.</p> <p>(5) Where a request in accordance with section 10 is made or transferred to a local authority, the decision on that request shall be made by the chief executive of that local authority or an officer or employee of that local authority authorised by that chief executive unless that request is transferred in accordance with section 12 to another local authority or to a department, Minister of the Crown, or organisation.</p> <p>(6) Nothing in subsection (5) prevents the chief executive of a local authority or any officer or employee of a local authority from consulting a local authority or any other person in relation to the decision that the chief executive or officer or employee proposes to make on any request made to the local authority in accordance with section 10 or transferred to the local authority in accordance with section 12 of this Act or section 14 of the Official Information Act 1982.</p>

OIA 1982	LGOIMA 1987
<p>18 Refusal of requests</p> <p>A request made in accordance with section 12 may be refused only for 1 or more of the following reasons, namely:</p> <ul style="list-style-type: none"> (a) that, by virtue of section 6 or section 7 or section 9, there is good reason for withholding the information: (b) that, by virtue of section 10, the department or Minister of the Crown or organisation does not confirm or deny the existence or non-existence of the information requested: (c) that the making available of the information requested would— <ul style="list-style-type: none"> (i) be contrary to the provisions of a specified enactment; or (ii) constitute contempt of court or of the House of Representatives: (d) that the information requested is or will soon be publicly available: (da) that the request is made by a defendant or a person acting on behalf of a defendant and is— <ul style="list-style-type: none"> (i) for information that could be sought by the defendant under the Criminal Disclosure Act 2008; or (ii) for information that could be sought by the defendant under that Act and that has been disclosed to, or withheld from, the defendant under that Act: (e) that the document alleged to contain the information requested does not exist or cannot be found: (f) that the information requested cannot be made available without substantial collation or research: (g) that the information requested is not held by the department or Minister of the Crown or organisation and the person dealing with the request has no grounds for believing that the information is either— <ul style="list-style-type: none"> (i) held by another department or Minister of the Crown or organisation, or by a local authority; or (ii) connected more closely with the functions of another department or Minister of the Crown or organisation or of a local authority: (h) that the request is frivolous or vexatious or that the information requested is trivial. 	<p>17 Refusal of requests</p> <p>A request made in accordance with section 10 may be refused only for 1 or more of the following reasons, namely:</p> <ul style="list-style-type: none"> (a) that, by virtue of section 6 or section 7, there is good reason for withholding the information: (b) that, by virtue of section 8, the local authority does not confirm or deny the existence or non-existence of the information requested: (c) that the making available of the information requested would— <ul style="list-style-type: none"> (i) be contrary to the provisions of a specified enactment; or (ii) constitute contempt of court or of the House of Representatives: (d) that the information requested is or will soon be publicly available: (da) that the request is made by a defendant or a person acting on behalf of a defendant and is— <ul style="list-style-type: none"> (i) for information that could be sought by the defendant under the Criminal Disclosure Act 2008; or (ii) for information that could be sought by the defendant under that Act and that has been disclosed to, or withheld from, the defendant under that Act: (e) that the document alleged to contain the information requested does not exist or cannot be found: (f) that the information requested cannot be made available without substantial collation or research: (g) that the information requested is not held by the local authority and the person dealing with the request has no grounds for believing that the information is either— <ul style="list-style-type: none"> (i) held by another local authority or a department or Minister of the Crown or organisation; or (ii) connected more closely with the functions of another local authority, or a department or Minister of the Crown or organisation: (h) that the request is frivolous or vexatious or that the information requested is trivial.

OIA 1982	LGOIMA 1987
<p>28 Functions of Ombudsmen</p> <p>(1) It shall be a function of the Ombudsmen to investigate and review any decision by which a department or Minister of the Crown or organisation—</p> <p>(a) refuses to make official information available to any person in response to a request made by that person in accordance with section 12; or</p> <p>(b) decides, in accordance with section 16 or section 17, in what manner or, in accordance with section 15, for what charge a request made in accordance with section 12 is to be granted; or</p> <p>(c) imposes conditions on the use, communication, or publication of information made available pursuant to a request made in accordance with section 12; or</p> <p>(d) gives a notice under section 10.</p> <p>(2) It shall be a function of the Ombudsmen to investigate and review any decision by which the chief executive of a department or an officer or an employee of a department authorised by its chief executive or a Minister of the Crown or an organisation extends any time limit under section 15A.</p> <p>(3) An investigation and review under subsection (1) or subsection (2) may be made by an Ombudsman only on complaint being made to an Ombudsman in writing or orally.</p> <p>(3A) A complaint made orally must be put in writing as soon as practicable.</p> <p>(4) If, in relation to any request made in accordance with section 12, any department or Minister of the Crown or organisation fails within the time limit fixed by section 15(1) (or, where that time limit has been extended under this Act, within that time limit as so extended) to comply with paragraph (a) or paragraph (b) of section 15(1), that failure shall be deemed, for the purposes of subsection (1), to be a refusal to make available the official information to which the request relates.</p> <p>(5) Undue delay in making official information available in response to a request for that information, shall be deemed, for the purposes of subsection (1), to be a refusal to make that information available.</p>	<p>27 Functions of Ombudsmen</p> <p>(1) It shall be a function of the Ombudsmen to investigate and review any decision by which a local authority—</p> <p>(a) refuses to make official information available to any person in response to a request made by that person in accordance with section 10; or</p> <p>(b) decides, in accordance with section 15 or section 16, in what manner or, in accordance with section 13, for what charge a request made in accordance with section 10 is to be granted; or</p> <p>(c) imposes conditions on the use, communication, or publication of information made available pursuant to a request made in accordance with section 10; or</p> <p>(d) gives a notice under section 8.</p> <p>(2) It shall be a function of the Ombudsmen to investigate and review any decision by which the chief executive of a local authority, or an officer or employee of a local authority authorised by its chief executive, extends any time limit under section 14.</p> <p>(3) An investigation and review under subsection (1) or subsection (2) may be made by an Ombudsman only on complaint being made to an Ombudsman in writing or orally.</p> <p>(3A) A complaint made orally must be put in writing as soon as practicable.</p> <p>(4) If, in relation to any request made in accordance with section 10, any local authority fails within the time limit fixed by section 13(1) (or, where that time limit has been extended under this Act, within the time limit as so extended) to comply with paragraph (a) or paragraph (b) of section 13(1), that failure shall be deemed, for the purposes of subsection (1) of this section, to be a refusal to make available the official information to which the request relates.</p> <p>(5) Undue delay in making official information available in response to a request for that information shall be deemed, for the purposes of subsection (1), to be a refusal to make that information available.</p>

OIA 1982	LGOIMA 1987
<p>48 Protection against certain actions</p> <p>(1) Where any official information is made available in good faith pursuant to this Act,—</p> <p>(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</p> <p>(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.</p> <p>(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.</p>	<p>41 Protection against certain actions</p> <p>(1) Where any official information is made available in good faith pursuant to Part 2 or Part 3 or Part 4 by any local authority,—</p> <p>(a) no proceedings, civil or criminal, shall lie against the local authority or any other person in respect of the making available of that information, or for any consequences that flow from the making available of that information; and</p> <p>(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 local authority.</p> <p>(2) The making available of, or the giving of access to, any official information in consequence of a request made under Part 2 or Part 3 or Part 4 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.</p>



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