

Submission

Climate Change Response (Zero Carbon) Amendment Bill

NZ Council for Civil Liberties  
July 2019

## About the New Zealand Council for Civil Liberties

1. The New Zealand Council for Civil Liberties is a watchdog for rights and freedoms in New Zealand. The Council is a voluntary not-for-profit organization that works through education and advocacy to promote a rights-based society and prevent the erosion of civil liberties.
2. We wish to appear before the Committee to make an oral submission.

## Concerns

3. The New Zealand Council for Civil Liberties does not wish to comment on the substance of the Climate Change Response (Zero Carbon) Amendment Bill but is alarmed by the attack on people's rights to information created by a provision within the Bill.
4. The Council's concerns are with clause 10 of this Bill, which amends section 99 of the Climate Change Response Act 2002 (the principal Act). As it stands, clause 10 will mean that people's right to information under the Official Information Act 1982 (the OIA) will be ousted by creation of a statutory secrecy provision. This secrecy provision will mean that requests for vast swathes of information gathered by and relating to the operation of the Climate Change Commission will be refused under section 18(c)(i) of the OIA. The Ombudsman will not be able to overturn such refusals unless the Climate Change Commission tries to claim it applies to information outside the very broad umbrella of secrecy it creates.
5. The breadth of the effect clause 10 will have may be an unintended mistake on the part of officials and Ministers, but this is unclear from the response to OIA requests that have been made, so we invite Members to ask them specifically about what they intended with this provision and why.<sup>1</sup>

## Section 99 of the Climate Change Response Act 2002

6. Until such time as the Government says that there has been an error in the drafting of the Bill, we must assume the drafting of clause 10 is not a mistake. The remainder of this submission therefore sets out how it will operate in practice, and how we think the Bill should be amended to give effect to Parliament's intentions when it enacted the OIA. To assist the Committee, and because of the importance of its provisions to our concerns, the text of section 99 of the 2002 Act as it presently stands is reproduced below.

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<sup>1</sup> See OIA responses here:

<https://www.documentcloud.org/documents/6128833-Climate-Commission-Secrecy-Advice-4-June-2019.html> and here:

<https://www.documentcloud.org/documents/6180693-MfE-ZeroCarbonBillSecrecy-3July2019.html>

## 99 Obligation to maintain confidentiality

- (1) This section applies—
  - (a) to the chief executive, the EPA, an enforcement officer, and any other person who performs functions or exercises powers of the chief executive, the EPA, or an enforcement officer under this Part and Part 5; and
  - (b) at the time during which, and any time after which, those functions are performed or those powers are exercised.
- (2) A person to whom this section applies—
  - (a) must keep confidential all information that comes into the person's knowledge when performing any function or exercising any power under this Part and Part 5; and
  - (b) may not disclose any information specified in paragraph (a), except—
    - (i) with the consent of the person to whom the information relates or of the person to whom the information is confidential; or
    - (ii) to the extent that the information is already in the public domain; or
    - (iii) for the purposes of, or in connection with, the exercise of powers conferred by this Part or for the administration of this Act; or
    - (iiia) for the purposes of, or in connection with, reporting requirements of the Public Finance Act 1989; or
    - (iv) as provided under this Act or any other Act; or
    - (v) in connection with any investigation or inquiry (whether or not preliminary to any proceedings) in respect of, or any proceedings for, an offence against this Act or any other Act; or
    - (vi) for the purpose of complying with any obligation under the Convention or the Protocol.
- (3) A person to whom this section applies commits an offence under [section 130](#) if the person knowingly contravenes this section.
- (4) Nothing in subsection (2) may be treated as prohibiting the chief executive or the EPA from—
  - (a) providing or publishing general guidance in relation to the operation of this Part and Part 5; or
  - (b) with the prior approval of the Minister, preparing and supplying statistical information to any person in a form that does not identify any individual; or
  - (c) providing information to any person about whether any forest land is considered by the chief executive or the EPA to be pre-1990 forest land, pre-1990 offsetting forest land, or post-1989 forest land, or has been declared to be exempt land by the chief executive or the EPA.

7. Essentially, section 99 requires the people specified in s. 99(1)(a) - the chief executive, the EPA, enforcement officers, or anyone else exercising their powers - to keep confidential *“all information that comes into the person's knowledge when performing any function or exercising any power”* under Parts 4 and 5 of the Act. This is a broad range of information about the greenhouse gas emissions trading scheme (Part 4), and a variety of sectors involved in the scheme - forestry, fossil fuels, agriculture - (Part 5).

8. The information has to be kept confidential both while they're using it and afterwards (s. 99(1)(b)). Section 99(3) makes clear that anyone breaching this section commits an offence under section 130 of the 2002 Act, which provides for prison terms of 6 months, and/or a fine of up to \$15,000. So, although section 51 of the OIA repealed the Official Secrets Act 1951, section 99 of the Climate Change Response Act 2002 effectively recreates it for the Chief Executive and officials of the Ministry for the Environment, the Environmental Protection Agency (EPA) and others described in s. 99(1)(a), in respect of a significant range of information.
9. The section also contains provisions - in s. 99(2)(b) - which sets out limited exceptions to this obligation of confidentiality. Some of them are straightforward exceptions, such as if the information is already in the public domain, or if consent is given by the person to whom it is confidential.
10. Crucially, s. 99(2)(b) also contains a provision in sub-paragraph (iv) that the obligation of confidentiality is lifted if disclosure is "*as provided under this Act or any other Act*".
11. This might be thought to enable people to obtain information under the OIA, but this would be incorrect. The OIA gives people the right to request information held (on their behalf) by government agencies, but it does not 'provide for' the disclosure of information without it being requested - that is, set out circumstances when it may or must be disclosed proactively.<sup>2</sup> Further, section 52(3)(b)(i) of the OIA provides that nothing in the OIA "*derogates from*" - that is, overrides - any provision which is contained in any other Act which imposes a prohibition or restriction in relation to the availability of official information. Section 99 is one such section.
12. The effect of this drafting is that section 99 is a statutory bar to the disclosure of any of the information it covers, if it is not explicitly permitted under s. 99(2)(b). There is no public interest balancing test, as is inherent to the common law duty of confidentiality. The consequence of this is that if the Ministry for the Environment or the EPA receives an OIA request for information that falls under the section 99 secrecy clause, the Ministry and EPA must refuse the request under section 18(c)(i) of the OIA. That provision states that requests for official information must be refused if "*the making available of the information requested would be contrary to the provisions of a specified enactment*".
13. The Ombudsman's role in such a circumstance would be limited to confirming that the information requested by someone does indeed fall within the scope of section 99. This is not a matter of speculation: the Ombudsman has confirmed this is how the law has effect in a 2014 decision communicated to a requester seeking

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<sup>2</sup> There is one minor exception to this in section 20 of the OIA, which requires the Ministry of Justice to create and publish the *Directory of Official Information*, a guide to help requesters make their requests.

information about emissions units surrendered under the Emissions Trading Scheme.

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14. Conceivably the drafting of s. 99(2)(b)(iv) back in 2002 may have been an error, and it may not have been intended to oust the OIA, and thereby opportunities for public participation and accountability. But if it was an error, it was not recognised or fixed when the Climate Change Response Amendment Act 2011 was passed, which made other amendments to s. 99(2)(b).
15. **The present Bill should be fixing the secrecy problem created by section 99(2)(b)(iv) of the 2002 Act, not making it worse by also applying it to the Climate Change Commission.**

## Clause 10 and its secrecy effects

16. Clause 10 of the Climate Change Response (Zero Carbon) Amendment Bill states:

### **10 Section 99 amended (Obligation to maintain confidentiality)**

- (1) After section 99(1)(a), insert:

(ab) to the Climate Change Commission, in respect of the performance of its functions or exercise of its powers under **Parts 1A to 1C**; and

- (2) In section 99(2)(a), replace “this Part and Part 5” with “the relevant Part of this Act”.

- (3) After section 99(2)(b)(iiia), insert:

(iiib) to the Climate Change Commission for the purpose of assisting the Commission to perform its functions and duties and exercise its powers under this Act; or

17. Section 99 as amended by this Bill will then read as follows:

### **99 Obligation to maintain confidentiality**

- (1) This section applies—

(a) to the chief executive, the EPA, an enforcement officer, and any other person who performs functions or exercises powers of the chief executive, the EPA, or an enforcement officer under this Part and Part 5; and

(ab) to the Climate Change Commission, in respect of the performance of its functions or exercise of its powers under Parts 1A to 1C; and

(b) at the time during which, and any time after which, those functions are performed or those powers are exercised.

- (2) A person to whom this section applies—

(a) must keep confidential all information that comes into the person’s knowledge when performing any function or exercising any power under the relevant Part of this Act; and

(b) may not disclose any information specified in paragraph (a), except—

(i) with the consent of the person to whom the information relates or of the person to whom the information is confidential; or

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<sup>3</sup> See letter of 9 April 2014 from Deputy Ombudsman Leo Donnelly to Mr Simon Johnson here: <https://drive.google.com/file/d/0B8LhMBA3NXL4M1pqUjd0Y0pFbjg/edit>

- (ii) to the extent that the information is already in the public domain; or
  - (iii) for the purposes of, or in connection with, the exercise of powers conferred by this Part or for the administration of this Act; or
  - (iiia) for the purposes of, or in connection with, reporting requirements of the Public Finance Act 1989; or
  - (iiib) to the Climate Change Commission for the purpose of assisting the Commission to perform its functions and duties and exercise its powers under this Act; or
  - (iv) as provided under this Act or any other Act; or
  - (v) in connection with any investigation or inquiry (whether or not preliminary to any proceedings) in respect of, or any proceedings for, an offence against this Act or any other Act; or
  - (vi) for the purpose of complying with any obligation under the Convention or the Protocol.
- (3) A person to whom this section applies commits an offence under [section 130](#) if the person knowingly contravenes this section.
- (4) Nothing in subsection (2) may be treated as prohibiting the chief executive or the EPA from—
- (a) providing or publishing general guidance in relation to the operation of this Part and Part 5; or
  - (b) with the prior approval of the Minister, preparing and supplying statistical information to any person in a form that does not identify any individual; or
  - (c) providing information to any person about whether any forest land is considered by the chief executive or the EPA to be pre-1990 forest land, pre-1990 offsetting forest land, or post-1989 forest land, or has been declared to be exempt land by the chief executive or the EPA.

18. There are two distinct elements to the amendment. The first creates an exception to the existing obligation of confidentiality in the 2002 Act, applying to the Ministry for the Environment and EPA (and others described by s. 99(1)(a)), enabling them to share information with the Climate Change Commission. This is the new section 99(2)(b)(iiia).
19. The second is the amendment to s. 99(1). It radically expands the breadth and volume of information which will be kept secret from the public, and to which the OIA will not apply, by saying that the obligation of confidentiality also applies to the Climate Change Commission when carrying out its functions or using its powers under the new Parts 1A to 1C that the Bill inserts into the 2002 Act.
20. Parts 1A to 1C contain 49 new sections, setting up and describing the functions, powers and responsibilities of the Climate Change Commission and Ministers. The essence of the Commission's functions is summarised in new section 5J as follows:

#### **5J Commission's functions**

The functions of the Commission are—

- (a) to review the 2050 target and, if necessary, recommend changes to the target (*see sections 5P and 5Q*):

- (b) to provide advice to the Minister to enable the preparation of emissions budgets (*see section 5X*):
  - (c) to recommend any necessary amendments to emissions budgets (*see section 5ZB*):
  - (d) to provide advice to the Minister about the quantity of emissions that may be banked or borrowed between 2 adjacent emissions budget periods (*see section 5ZC*):
  - (e) to provide advice to the Minister to enable the preparation of an emissions reduction plan (*see section 5ZE*):
  - (f) to monitor and report on progress towards meeting emissions budgets and the 2050 target (*see sections 5ZG to 5ZI*):
  - (g) to prepare national climate change risk assessments (*see section 5ZN*):
  - (h) to prepare reports on the implementation of the national adaptation plan (*see section 5ZS*):
  - (i) to provide other reports requested by the Minister (*see section 5K*).
21. Officials working for the Climate Change Commission will be under a legal duty to *“keep confidential all information that comes into the person’s knowledge when performing any function or exercising any power”* in Parts 1A to 1C. If they fail to do so, they commit an offence under section 130 and can be sent to jail for 6 months and/or fined up to \$15,000. This provision does not just apply to the information that the Commission will have obtained from the EPA or the Ministry for the Environment: it applies to all the information they hold when doing their job.
22. The effect of clause 10 will be that neither MPs, the public, civil society groups nor the media will be able to obtain information under the OIA from the Commission about the discharging of its responsibilities under Parts 1A to 1C beyond what the Commission and Ministers choose to publish. Indeed, it is possible that the provision will also cut across the present Government’s initiative to proactively publish Cabinet papers 30 days after they have been considered, since any information in a Cabinet paper that would breach the obligation of confidentiality would not be protected under s. 48 of the OIA and does not appear to be sanctioned by section 99(2)(b) of the 2002 Act.

## Policy intent

23. When the Bill was published, it was unclear why the Government wished to expand the secrecy applying to this topic. After all, New Zealand’s Parliament enacted the Official Information Act in 1982, which made clear that the purpose of the legislation was both to enable accountability, but also to enable public participation in the making and administration of laws and policies (see s. 4 of the OIA).
24. The intent of the OIA is to facilitate accountability and public participation, and in creating rights to access information held by government agencies, New Zealand’s democracy took a great leap forward. The significance of the OIA has been recognised by the courts, with the late Lord Cooke stating that,

The permeating importance of the Act is such that it is entitled to be ranked as a constitutional measure.<sup>4</sup>

25. There is also significant irony that a Minister with responsibilities for the environment is the one introducing greater secrecy to the most significant field of public policy of our times, since one of the key external pressures for adoption of the OIA was public frustration about the secrecy of government information on projects with major environmental impacts, such as the Clyde Dam.<sup>5</sup>
26. The Bill also runs counter to the thrust of the worldwide move over the last three decades to empower the public to participate in environmental protection issues. New Zealand attended and agreed to the adoption in 1992 of the United Nations Rio Declaration on Environment and Development. Principle 10 of the Rio Declaration states:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. **At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.** States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.<sup>6</sup>

27. If the prior policy intent of successive New Zealand governments has been to operate the OIA according to its purposes, and to increase access to environmental information to enable public participation as signalled by Principle 10 of the Rio Declaration, then we should ask tough questions about what the policy intent of the present Bill is, and why it seeks to take the country back into the dark ages of the pre-OIA era.
28. The Minister was asked by an OIA requester for the reasoning behind the changes to section 99. The Minister's response stated:

Clause 10 of the Climate Change Response (Zero Carbon) Amendment Bill requires the Commission to keep information confidential and allows otherwise confidential information to be disclosed to the Commission. The intent of the Government was that, for the purpose of accessing relevant information under the CCRA, the Commission should be treated as though it

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<sup>4</sup> *Commissioner of Police v Ombudsman* [1988] 1NZLR 385 at page 391, Cooke P

<sup>5</sup> *Freedom of official information: from secrets to availability*, Te Ara The Encyclopedia of New Zealand. Accessed from <https://teara.govt.nz/en/freedom-of-official-information/page-1> on 15 July 2019.

<sup>6</sup> Rio Declaration on Environment and Development, Annex 1 of the Report of the United Nations Conference on Environment and Development, Brazil, June 1992. Emphasis added. Accessed from: <https://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>



were an administrating agency and be subject to equivalent obligations of confidentiality.<sup>7</sup>

29. If this is meant to explain why the information gathered by the Climate Change Commission (as well as the EPA) should be outside the scope of the OIA, it fails miserably. Government agencies of many sizes and shapes obtain information using their powers and hold it in confidence, but they do not often seek to place all such information outside the reach of the OIA. Instead, since they are within the scope of the OIA and the Ombudsman, decisions on whether the information they hold - and which they may hold as a result of exercising legal powers to compel the supply of it to them - should be disclosed to a requester are arbitrated under the OIA. The Minister's reply seems to suggest that an "administrating agency" has some special legal status, when in fact it simply means a government department or agency which administers a piece of legislation or a statutory scheme.
30. The only other information the Minister could point the requester to concerning the reasons behind the drafting of clause 10 were in paragraphs 179-182 of the Cabinet paper which outlined what the Bill would contain. This has been published on the Ministry for the Environment's website.<sup>8</sup> These state:

#### **Power to consult and to access information**

179. The Commission will require access to government-held information in order to fulfil its functions. The provisions of the Bill will need to balance access to this information with the need to safeguard legally privileged or personal information. Where appropriate, it will also have statutory provisions to allow it to access information that it might not otherwise be able to gain, for instance under the CCRA.
180. I propose that, for the purpose of accessing relevant information under the CCRA, the Commission should be treated as though it were an administrating agency. It will also be subject to equivalent obligations of confidentiality.
181. The CCRA contains substantial penalties for breaching obligations of confidentiality. These would apply to the Commission in respect of information it accesses under that Act.
182. The Commission will also have provision to consult broadly and gather information, and arrangements will be required to allow for the sharing of this information with government departments.

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<sup>7</sup> <https://www.documentcloud.org/documents/6128833-Climate-Commission-Secrecy-Advice-4-June-2019.html>

<sup>8</sup> Proposed Climate Change Bill, paper from the Minister for Climate Change to the 19 December 2018 meeting of the Cabinet Environment, Energy and Climate Committee.  
<https://www.mfe.govt.nz/sites/default/files/media/Climate%20Change/Proposed%20Climate%20Change%20Bill%20Cabinet%20Paper.pdf>

31. As will be clear from our explanation of how the amendments to the 2002 Act will work in practice, the advice presented to the Cabinet Committee is inaccurate. Paragraph 181 of the Cabinet paper says that the penalties in section 130 of the 2002 Act “*would apply to the Commission in respect of information it access under that Act*”, but in fact they go far beyond this and would apply also to disclosure of any information “*that comes into the person’s knowledge when performing any function or exercising any power under the relevant Part of this Act*” (see s. 99(2)(a)) unless it is permitted under one of the paragraphs of s. 99(2)(b). Disclosure in response to an OIA request is **not** one of permitted grounds for disclosure of information held by the Climate Change Commission in relation to its functions under Parts 1A to 1C of the amended Act.
32. The Cabinet paper states in paragraph 179 that the “*The provisions of the Bill [which provide the Climate Change Commission with access to information gathered by the EPA and Ministry] will need to balance access to this information with the need to safeguard legally privileged or personal information.*” While the Bill may need to create specific statutory authority for the EPA and Ministry to share confidential information with the Commission (although this is questionable since they’re both manifestations of the Crown), the Bill does not need to create a balancing mechanism, since this is precisely what the OIA was enacted by Parliament to do, 37 years ago.
33. Section 5 of the OIA states a presumption of disclosure of requested information (known as the principle of availability), but says this can be deviated from if “*there is good reason for withholding it.*” The reasons for which information may be withheld are set out in sections 6, 7 and 9 of the OIA, and require agencies - to echo the Cabinet paper - “*to balance access to...information with the need to safeguard legally privileged or personal information.*” Section 9(2)(a) of the OIA says that agencies may withhold information to protect the privacy of natural persons (unless there is an overriding public interest in its disclosure), while section 9(2)(h) permits the withholding of legally privileged information.
34. Section 9(2)(ba) of the OIA also allows agencies and Ministers to refuse requests for information they hold if the information 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 disclosure in response to a request
- “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 if disclosure
- “would be likely otherwise to damage the public interest.”*

35. In other words, for the last 37 years, government agencies have lived with a regime where they can obtain information in confidence using powers granted to them by statute, and in the knowledge that if they receive an OIA request for this information the law permits them to withhold it unless the public interest in disclosure is stronger than the reason for keeping it confidential. Parliament gave the Ombudsman the responsibility and powers to investigate complaints from requesters and arbitrate disputes about how the law should be applied.
36. As a result, the present Bill not only seeks to take huge swathes of information outside the scope of the OIA by making it subject to a secrecy clause, but also effectively expresses a lack of confidence in the Ombudsman making the correct judgment on disclosure of this information if and when it is requested under the OIA. It also effectively says that Parliament got it wrong when it created the balancing mechanism for disclosure of information set out in the OIA. This is strange considering both that the Government has said it is committed to openness and citizen participation, and that the Ombudsman has recently reviewed the Ministry for the Environment's OIA processes and confirmed that "*the Ministry's senior leadership has a strong commitment to the principle and purposes of the OIA, and to openness and transparency more generally*".<sup>9</sup>
37. The amendments in clause 10 of the Bill go beyond what the Minister has said is the purpose of this provision, namely to give the EPA legal authority to share information with the Commission, while at the same time continuing to provide an assurance of confidentiality to the people and businesses from whom it obtained the information.

## Comparison with Worksafe

38. One of the reasons that may lie behind this mismatch of what the Minister says is intended by clause 10 and what it will actually result in, goes back to the way that s. 99(2)(b)(iv) was drafted in the 2002 Act.
39. By stating that the confidential information may be disclosed "*as provided under this Act or any other Act*", it is possible that the Ministry and Parliamentary Counsel thought that they were enabling the OIA to have effect. However, as we have seen (paragraphs 10-13 above), this is not the case.
40. One reason for hoping that the blanket of secrecy and ousting of the OIA was not intended but is merely the result of poor drafting can be found in the Health and Safety at Work Act 2015 (the HSAW). Section 210 of the law also concerns confidentiality, in this case that gathered by WorkSafe. Similar to s. 99 of the 2002 Act, the HSAW requires WorkSafe to not to disclose or publish the information it has gained through performance of its functions or exercising its powers under that Act. Where it differs however is in the drafting of the provisions that give limited authority

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<sup>9</sup> *Official Information Act compliance and practice, Ministry for the Environment*. Office of the Ombudsman, Wellington 2018. Accessed from <http://www.ombudsman.parliament.nz/resources-and-publications/latest-reports/official-information-practice-investigations-oipi>

for disclosure of the information. These include s. 210(2)(c)(v), which states that information may be disclosed if it is “*required or authorised by law*”.

41. This small difference between the 2002 Act’s provision:

*“As provided under this Act or any other Act”*

And the Health and Safety at Work Act’s provision:

*“required or authorised by law”*

make a substantial difference in practice. The former ousts the OIA and the public, the latter lets them in - subject, of course, to that law’s mechanism for balancing competing public interests.

## Conclusion

42. The New Zealand Council of Civil Liberties believes that our society benefits from government openness and legally enforceable public rights to access information held by government agencies and Ministers. We hope the Government and Members of Parliament from all political parties also believe this. The Council therefore does not support unjustified official secrecy and does not consider that there is any valid justification for the increase in official secrecy that clause 10 of the present Bill and section 99 of the 2002 Act will create.
43. No part of the Cabinet paper adequately explains why the OIA should be ousted and people’s rights to information denied. Indeed, the responses to OIA requests for information about the policy intentions behind the drafting have suggested that this problem has not crossed officials’ minds. A further OIA request to the Ministry of Justice supports this interpretation, since the Ministry’s response reveals that it was not consulted by the Ministry for the Environment specifically about this provision.<sup>10</sup>
44. The way to rectify the problem caused by the drafting, while still achieving the Minister’s policy objective of enabling the Ministry and EPA to share information with the Climate Change Commission, is set out below.

## Recommendation

45. The Council recommends that clause 10 of the Bill be amended by adding a new sub-clause 4 which would amend section 99(2)(b)(iv) of the 2002 Act, to bring it into line with the Health and Safety at Work Act 2015 by enabling the OIA to apply to the information falling within the scope of the confidentiality provision. This would read:

(4) In section 99(2)(b)(iv), replace “as provided under this Act or any other Act” with “as required by the Official Information Act 1982 or any other law, or authorised by law”.

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<sup>10</sup> OIA Response 1 July 2019, Ministry of Justice reference 75875. Accessed from: <https://www.documentcloud.org/documents/6181109-MoJ-ZeroCarbonBill-1July2019.html>

46. If this was done, clause 10 would then read as follows:

**10 Section 99 amended (Obligation to maintain confidentiality)**

(1) After section 99(1)(a), insert:

(ab) to the Climate Change Commission, in respect of the performance of its functions or exercise of its powers under **Parts 1A to 1C**; and

(2) In section 99(2)(a), replace “this Part and Part 5” with “the relevant Part of this Act”.

(3) After section 99(2)(b)(iiia), insert:

(iiib) to the Climate Change Commission for the purpose of assisting the Commission to perform its functions and duties and exercise its powers under this Act; or

(4) In section 99(2)(b)(iv), replace “as provided under this Act or any other Act” with “as required by the Official Information Act 1982 or any other law, or authorised by law”.

47. The reason for specifically citing the OIA in the proposed sub-clause (4) is for the avoidance of any future doubt. The effect of the amendment would not only ensure appropriate disclosure of information being relied upon by the Climate Change Commission for its work, but also enlarge the sphere of openness by requiring the Environmental Protection Authority to apply the OIA to information it holds. In our view the 2002 provision should never have been permitted to stand, particularly after the Ombudsman had confirmed in 2014 that this was its effect.

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