

Hon Andrew Little, Minister of Justice

Official Information Act 1982 – report back on targeted engagement and next steps

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| Date | 27 September 2019 | File reference | |
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| Action sought | Timeframe |
|---|---------------------|
| Discuss this briefing with officials and provide feedback on the scope and timing of a potential review of the Official Information Act 1982. | At your convenience |

Contacts for telephone discussion (if required)

| Name | Position | Telephone | | First contact |
|------------------|---|---------------|----------|---------------|
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Minister's office to complete

| | | |
|---|------------------------------------|---|
| <input type="checkbox"/> Noted | <input type="checkbox"/> Approved | <input type="checkbox"/> Overtaken by events |
| <input type="checkbox"/> Referred to: _____ | | |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Withdrawn | <input type="checkbox"/> Not seen by Minister |
| Minister's office comments | | |
| | | |

In confidence

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982²

Purpose

1. This briefing provides advice on the outcome of our targeted engagement on the Official Information Act 1982 (OIA) and next steps.

Executive summary

2. In September 2018 Cabinet agreed that the Ministry of Justice would undertake targeted engagement on the OIA to inform a decision on whether to progress a review of the legislation [CAB-18-MIN 0418 refers].
3. Earlier this year, the Ministry invited submissions on the OIA from individuals and organisations. We received 284 written submissions and spoke to eight experts. Submissions highlighted a variety of issues both with the legislation itself and how it operates. The most common concern was that the OIA is outdated and not reflective of the modern information environment. Submitters also noted the need for a more positive culture in the public sector towards processing OIA requests. Almost all submitters considered that legislative change is required to some degree.
4. Our view is that while the fundamentals of the OIA remain sound, some aspects would benefit from review, due to the changed context in which it now operates. This changed context includes increased public expectations of open and transparent government and changes in technology and the public service.
5. We think there is an opportunity to consider improving the openness, transparency and accessibility of government information. We recommend a review of the OIA. There are choices around where a potential review could focus to deliver improvements to the OIA regime. Our initial thinking has identified a broad scope for a potential review.
6. We seek your direction on a potential review of the OIA. We recommend you discuss with officials the priority and timing of this work.

Background

7. The OIA allows people to request official information held by Ministers and specified government agencies. It contains rules for how such requests should be handled and provides a right to complain to the Ombudsman in certain situations.
8. In 2012, the Law Commission published *The Public's Right to Know* on the functioning of both the OIA and the Local Government Official Information and Meetings Act 1982 (LGOIMA). The report's recommendations included significant legislative change, but the then-Government favoured largely operational improvements. The focus since then has been on improving OIA practice, and most recently, increasing the level of proactive release.
9. There has been a wider collaborative approach to improving and measuring practice and compliance. The Office of the Ombudsman has published better guidance on the OIA, including on topics like ministerial involvement in OIA decision-making. The Office has also increased resources for, and streamlined, its complaint resolution activities, and initiated own motion reviews of OIA practices within agencies.
10. At the same time, the Ministry of Justice and more recently the State Services Commission (SSC) have been providing advice and assistance to improve how agencies

implement the OIA.¹ This programme has included reporting on compliance with the OIA (via the publication of statistics on timeliness and volumes) and increased emphasis on the proactive release of OIA responses and official information more generally.

11. In recent years, the Department of the Prime Minister and Cabinet and the State Services Commissioner have also taken steps to strengthen public service and ministerial expectations regarding the supply of free and frank advice.² This work responded to concerns that public servants can be reluctant to provide free and frank advice because they are concerned they will not be able to withhold it under the Act. Amongst other things, the work programme has focused on improving officials understanding of when advice can be given and received in confidence. The Ombudsman's guidance has sought to emphasise that withholding free and frank advice is permissible, including where discussion and advice is at an early stage.
12. Internationally, there is a changing context, with increased public expectations of open and transparent government as well as changes in technology and the public service. A further aspect of the changed context are the developments in official information regimes in other jurisdictions. Common features internationally include pro-active release obligations and statutory oversight bodies such as Information Commissioners.
13. Against this context, Cabinet agreed that the Ministry of Justice would undertake targeted engagement on the OIA to inform a decision on whether to progress a review of the legislation [CAB-18-MIN 0418 refers]. The engagement became one of the milestones under the Open Government Partnership's National Action Plan 2018-2020 commitment on official information.

Engagement process

14. Between 8 March and 3 May 2019, the Ministry invited submissions on the OIA from both individuals and organisations. We asked for feedback on three questions:
 - In your view, what are the key issues with the OIA?
 - Do you think these issues relate to the legislation or practice?
 - What reforms to the legislation do you think would make the biggest difference?
15. We received 284 written submissions and spoke to eight experts. Submissions came from a wide range of individuals and organisations.

Summary of feedback

16. The attached submissions summary provides an overview of the submissions' key themes. Overall, most submitters thought the fundamentals of the OIA remain sound. But submitters did highlight a number of issues with both the current practice and its legislative and policy underpinnings. The main issues raised with us are set out below.

¹ In 2016 the Secretary for Justice delegated to the SSC the Ministry of Justice's function, under section 46 of the OIA, of providing advice and assistance to organisations to act in accordance with the OIA.

² These steps include Cabinet manual changes in 2017 and an expectations document issued by the State Services Commissioner, *Acting in the Spirit of Service: Free and Frank Advice and Policy Stewardship* (December, 2017)

Practice issues raised by submitters

- Delays in processing requests and misapplication of the withholding grounds.
- Staff responding to OIA requests often lack specialised training.
- Ministerial offices can delay, limit or restrict responses to OIA requests.
- Information management systems do not support efficient and comprehensive responses.
- Agencies are not resourced for timely responses.
- Agencies have inconsistent and disproportionate charging practices.
- The presumption that information should be made available in the public interest is not sufficiently clear or given enough weight.
- Ombudsman investigations suffer from lengthy and consistent delays.

Policy and legislation issues raised by submitters

- The OIA is over 30 years old and its language and structure can be hard to understand.
- The OIA's interaction with other legislation is not clear e.g. the Public Records Act 2005, the Inquiries Act 2013 and the Privacy Act 1993.
- The OIA's coverage no longer reflects public accountabilities e.g. the OIA does not extend to all state-owned enterprises.
- Agencies reported difficulty in dealing with large volumes of requests and frivolous and vexatious requests.
- The withholding grounds can be difficult to understand and apply, particularly the "good government" withholding grounds.³
- The OIA does not contain any serious penalties or accountability for non-compliance.
- There is insufficient oversight, coordination and leadership of the OIA.

17. Submitters offered a range of suggestions for reform of the OIA. Submitters told us they would like to see:

- official information legislation that reflects New Zealand's principles and values
- legislation that reflects the modern information environment
- a positive culture about access to information (government, agencies, officials, the public and the media)

³ The "good government" withholding grounds are 9(2)(f) of the OIA, concerned with the maintenance of constitutional conventions; and 9(2)(g)(i) of the OIA concerned with maintaining the effective conduct of public affairs through the free and frank expression of opinion.

- legislation that is easy to understand and apply
- good information for those requesting and providing information
- good processes and resourcing to ensure timely responses
- proactive release of official information, including about official information, and
- effective mechanisms to ensure compliance and accountability.

Is a review necessary?

18. The arguments for and against a review are set out in the table below.

| Arguments for a review | Arguments against a review |
|---|--|
| <ul style="list-style-type: none"> • A fit for purpose and effective official information legislation is vital to the functioning of a healthy democracy. • The OIA is 37 years old - it no longer reflects its operating environment or developments internationally and some people find its language and structure hard to understand. • The Law Commission's 2012 review concluded that significant legislative amendment was required. It made several recommendations which were not accepted. Instead a small number of piecemeal amendments were made. • New Zealand's End of Term report under the Open Government Partnership National Action Plan 2016-2018 concluded there had been only "marginal change" as a result of practice improvements to date.⁴ • Submitters largely favour a review (there is a problem with how the OIA is perceived as working and consequently there are risks to credibility). | <ul style="list-style-type: none"> • Some of the issues identified through submissions would not necessarily be resolved by a review e.g. embedding a more positive culture in the public sector, agencies' resourcing issues and the need for better compliance by government with the OIA's requirements. • Legislative change resulting from a review could have potentially less benefit than people might think (e.g. the Ombudsman has developed guidance and case notes on the more unclear withholding grounds, which are a very useful resource. A more prescriptive legislative approach may not improve on the guidance already available). • Resourcing a review will need to be balanced against other priorities. |

19. On balance, given the range of issues raised by submitters, the age of the OIA and the very different context in which it now operates we recommend reviewing it. We think there is an opportunity to consider improving the openness, transparency and accessibility of government information.

⁴ Booth, K Independent Reporting Mechanism (IRM): New Zealand End of Term Report 2016-2018. The IRM carries out a review of the activities of each OGP participating country.

Initial thinking on the scope of a review

20. There are choices around where a potential review could focus to deliver improvements to the OIA regime. We do not think that a 'first principles' review is needed. The Law Commission's review concluded that the fundamentals of the OIA remain sound (e.g. the presumption in favour of openness and the case by case approach to decision-making). The majority of submitters, including the Chief Ombudsman, did not think that a major overhaul is warranted. The purpose and principles of the OIA also align with the public's now much stronger expectations of open and transparent government.
21. We have identified some areas that could form the basis of a potential review based on the feedback from submissions and our own analysis. Our initial thinking is that reform in these areas could be a significant step toward making the OIA more efficient and fit for purpose, and complement the work already being done by the SSC to lift agency performance. The Law Commission undertook comprehensive analysis of the issues in these areas. We would build on their analysis in our work where the issues and recommendations remain relevant. However, further effort will be required to embed practices where compliance with the OIA is not simply perceived as a legal obligation, but becomes an essential part of open and transparent government.
- 21.1. **Improving accessibility:** This would involve implementing the Law Commission's recommendation to redraft and re-enact the OIA in a clearer and more accessible style. Due to its age, the OIA uses a number of archaic drafting devices and obsolete expressions and is complicated in places. The Ombudsman's guidance has helped to translate the OIA to some extent. However, we think a restructure and rewrite would help to give greater prominence to key elements such as the presumption in favour of making information available.
- 21.2. **Clarifying and updating the OIA's coverage:** The make-up of the public sector has changed since the OIA was enacted, for example where parts have become privatised and no longer subject to the OIA. This has given rise to anomalies in the OIA's coverage. For example, some state-owned enterprises are included in the OIA but not others. The OIA also does not cover the Parliamentary agencies for reasons which are not obvious.
- 21.3. **The withholding grounds:** Many submissions focused on the number of withholding grounds in the OIA and how they are not always correctly applied by agencies. We note that the number and nature of the withholding grounds in the OIA are not out of step with comparable jurisdictions. Recently completed Ombudsman guidance will also make a difference. However, the issues raised by submitters on three withholding grounds may benefit from further examination – free and frank advice, privacy, and commercial sensitivity. In terms of free and frank advice, the appropriate balance between the interests the ground is intended to protect (i.e. government making good decisions) and the public interest in disclosure remains contested. A review could consider ways to increase certainty in this area. The increasing moves towards proactive release of official information may also assist to remove some of the tension in this area.
- 21.4. **Reforms related to vexatious requests:** Agencies work with limited resources which can sometimes be put under strain by certain types of requests. The Law Commission recommended changes in this area to help draw a better balance between freedom of information and the resources available to meet requests. We

think it would be worthwhile revisiting the Law Commission's recommendations in this area e.g. clarify the definition of "vexatious request".

- 21.5. **Te Tiriti o Waitangi implications:** Although not a strong theme in submissions, we think a review could consider the treaty implications of the OIA. There may be barriers particular to Māori being able to access information (for example for the purposes of treaty settlements and commitments). The OIA provides all New Zealanders with a mechanism to access government information. It is not clear if the OIA disproportionately affects Māori in their ability to access information and thereby their ability to participate in political life. We would undertake further engagement with Māori to determine this.
- 21.6. **Compatibility with other legislation:** There is an opportunity to clarify the relationship between the OIA and related pieces of legislation (e.g. the Ombudsmen Act, the Inquiries Act, the Public Records Act and the Privacy Act). Feedback from our engagement suggested that this was an area which can cause unnecessary complexity for both agencies and requesters.
- 21.7. **Oversight and guidance:** Many submitters, including the Ombudsman, noted the need for greater oversight, coordination and leadership of the OIA. The Ombudsman has the complaints function, produces guidance and undertakes practice investigations. The SSC, in recent years, has had an oversight role in relation to the core State sector. However, there is no whole of government oversight of agencies' management systems for dealing with official information requests, including oversight of training, improving awareness of the OIA and promoting best practice. The Law Commission recommended that the function of providing oversight for official information legislation should be established by statute and carried out by a statutory office holder. We propose a review consider the costs and benefits of establishing an oversight office or officeholder.
- 21.8. **Enforcement:** The Ombudsman's recommendations are central to the effective operation of the OIA. But their ability to respond to non-compliant conduct by agencies is limited to making recommendations. The OIA contains no additional tools the Ombudsman may use to sanction any egregious or repeated failure to comply with the legislation. We think the majority of OIA breaches are likely to arise as a result of misunderstanding the legislation or genuine mistake. However, there may also be occasions of deliberate non-compliance. We propose that a review consider the appropriateness of new enforcement tools.
- 21.9. **Proactive release:** The Law Commission recommended a duty on all agencies to take reasonably practicable steps to proactively make official information available (although accounting for things like their resources). A requirement for agencies to publish information proactively is a feature of most modern freedom of information regimes. We think a review could consider the desirability of a legislative requirement on all agencies to proactively publish information. Including proactive release as part of a review will provide an opportunity to further test whether protections from liability should be applied to proactive releases. We received divided responses from the experts we spoke to on this point, which indicates this issue is not straightforward.

Factors we have considered in determining the scope of a review

22. In identifying the areas that could be in scope of a potential review, we have considered the following factors.
- The degree to which changes in these areas will give effect to the objectives of the OIA.
 - The degree to which they will reduce complexity and increase capacity to manage OIA workload both by agencies and the Ombudsman.
 - The degree to which the review can build on the progress already made.
23. If a review of the OIA is pursued, we would further test and refine its scope in consultation with the SSC, the Office of the Ombudsman and other agencies.

Local Government Official Information and Meetings Act 1987 (LGOIMA)

24. Although LGOIMA was not included in our engagement, some submitters told us about poor practice and a lack of accountability by local authorities. The LGOIMA is administered by the Department of Internal Affairs (DIA), which also leads the government's relationship with local government.
25. We understand the Minister of Local Government, Hon Nanaia Mahuta, has indicated she is interested in scoping the work for a broad review of the local government legislative framework including LGOIMA. The alignment between the two Acts (often word for word) means that a potential review of the OIA could consider improving the language and structure of both Acts. If a review of the OIA is pursued, we would discuss with DIA the feasibility of a parallel review of the LGOIMA.

Practice improvements

26. SSC were consulted on this briefing. SSC is considering the submissions relating to practice improvement to review and refresh its official information work programme. Likely actions include: expanding the suite of OIA statistics collected and published; utilising SSC's advisory role to promote best practice in the areas highlighted in submissions; and continuing to expand and encourage proactive release.

Next steps and timing

27. We have provided you with a briefing updating you on Policy Group's work programme and seeking approval for the priorities between now and the 2020 General Election. We recommend you meet with officials to discuss the priority of a potential review of the OIA in the context of the other priorities identified in that briefing.
28. We recommend sending a copy of this briefing to the Minister of State Services, Hon Chris Hipkins.

Recommendations

29. We recommend that you:

1. **Discuss** this briefing with officials and provide feedback on the scope and timing of a potential review of the OIA. YES / NO
2. **Send** a copy of this briefing to the Minister of State Services, Hon Chris Hipkins. YES / NO

s9(2)(a)

Chris Hubscher
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APPROVED SEEN NOT AGREED

[Hon Andrew Little]
[Minister of Justice]

Date / /

Attachments: Summary of submissions

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