

Consultation on the Official Information Act 1982

Summary of submissions

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RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

Executive summary

In August 2018 Cabinet agreed that the Ministry of Justice would carry out targeted engagement on the Official Information Act 1982 (OIA) to inform a decision on whether to progress a formal review of the OIA. Between 8 March and 3 May 2019, the Ministry invited submissions on the OIA from both individuals and organisations. We asked for views on the following questions:

1. In your view, what are the key issues with the OIA?
2. Do you think these issues relate to the legislation or practice?
3. What reforms to the legislation do you think would make the biggest difference?

The three questions were published on the Ministry of Justice website and stakeholders were advised of the process by email. We also met with a small number of experts including the Chief Ombudsman, Sir Geoffrey Palmer, the Law Commission and the Privacy Commissioner.

289 submissions were received from both organisations and individuals. Over half of the submitters identified themselves as organisations or individuals with experience making requests for information under the OIA. We also heard from organisations and individual employees that provide responses to requests under the OIA and from submitters whose primary interest related to constitutional matters.

Submissions showed a clear concern for how New Zealand's access to official information regime is currently operating. Submitters highlighted a variety of issues both with the legislation and how it operates in practice. Most commonly, submitters expressed concern about the culture in the public sector surrounding OIA requests. Submitters also expressed concern about the quality and timeliness of responses to OIA requests, particularly the extent to which information is withheld. Other commonly raised issues were about lack of resourcing for the Office of the Ombudsman to resolve OIA complaints and the inability of the OIA to ensure compliance.

Close to half of submitters believed that the issues with the OIA related to both legislation and practice. Most submitters favoured legislative change, with many suggesting changes they wished to see. Only two submitters thought that no legislative change was required.

Most commonly, submitters asked for the grounds for withholding information and refusing requests to be changed. Submitters also sought greater enforcement powers to ensure compliance and asked for changes to the statutory timeframes for responding to requests. Other common recommendations included publishing greater information and statistics on OIA compliance and proactive release of documents, strengthening agency processes and training, and greater oversight, coordination and leadership of the official information regime.

Introduction

The OIA is New Zealand's primary instrument providing access to official information and is administered by the Ministry of Justice. The State Services Commission provides advice and assistance to agencies in the management of official information and publishes statistics on agencies' compliance with the OIA.¹

In August 2018 Cabinet agreed that the Ministry of Justice would carry out targeted engagement on the OIA to inform a decision on whether to progress a formal review [Cabinet Committee Paper *Strengthening Proactive Release Requirements*, CAB-18-MIN-0418].

This report describes the Ministry's process for seeking views on the OIA and summarises the submissions we received. The report reflects the variety of views shared during the consultation period, both in written submissions and interviews. Where appropriate, submitter responses have been counted under the consultation question their response best related to.

The Official Information Act 1982

The OIA allows people to request official information held by Ministers and specified government agencies. It has been in force for over 36 years. Minor amendments were made in 2003, 2015 and 2016.

The purpose of the OIA is to increase the availability of official information to enable effective public participation in the making and administration of laws and policies, and promote public accountabilities. It aims to promote respect for the law and good governance of New Zealand.

The OIA provides that official information should be available, except where it needs to be protected for the public interest and the preservation of personal privacy. The Act also enables individuals to access official information about themselves.

Open Government Partnership commitment

New Zealand is a signatory to the Open Government Partnership (OGP). This is an international agreement for governments to create greater transparency, increase civic participation and use new technologies to make their governments more open, effective, and accountable. The OGP achieves these aims through two-year action plans.

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.

The Law Commission's report *The Public's Right to Know*

In 2012, the Law Commission completed a comprehensive review of the OIA and the Local Government Official Information and Meetings Act 1987. It concluded that the OIA's fundamentals were sound but suggested reform was necessary to respond to the context in which the OIA now operates. The Law Commission made a number of recommendations to improve the OIA's operation and efficiency, through a mix of legislative and non-legislative measures. The Government chose not to progress major reform at that time, but endorsed practice improvements.

Practice improvements

Since the Law Commission's review, the focus has been on improving how the OIA is implemented in practice and strengthening proactive release requirements. The State Services Commission and the Office of the Ombudsman have started publishing data on OIA requests and complaints, which has seen average rates of compliance and proactive release rise. They have also published guidance on preparing OIA requests and on proactive release. The Office of the Ombudsman is currently carrying out a programme of reviews of agencies' official information practices to help them improve.

Other legislation in the landscape

Other legislation which operates in or impacts New Zealand's official information regime includes:

- the Local Government Official Information and Meetings Act 1987, administered by the Department of Internal Affairs
- the Ombudsman Act 1975, administered by the Ministry of Justice
- the Privacy Act 1993, administered by Ministry of Justice
- Public Records Act 2005, administered by the Department of Internal Affairs
- the Intelligence and Security Act 2017, administered by the Department of the Prime Minister and Cabinet.

The consultation

The process

The Ministry invited submissions on the OIA between 8 March and 3 May 2019. We identified and emailed a wide range of interested individuals and organisations directly, inviting them to make written submissions by email or via the Ministry of Justice Consultation Hub. We also encouraged them to forward the invitation to others. In addition, we approached specific individuals and organisations with expertise and or responsibilities relating to the OIA and offered the option of meeting to discuss their views on the OIA.

The questions

We invited submitters to tell us about their experience with the OIA and their views on the need for legislative reform. In particular, we asked for their views on the following questions:

1. In your view, what are the key issues with the OIA?
2. Do you think these issues relate to the legislation or practice?
3. What reforms to the legislation do you think would make the biggest difference?

Types of submitters and primary interest

The Ministry received submissions from a total of 289 submitters. These included 284 written submissions and eight discussions with experts (five of these experts also provided a written submission). The appendix sets out the list of submitters who provided their names for release.

Submissions came from a range of individuals and organisations with various interests related to official information and various experiences with the processes established by the OIA. 64% of submitters identified their relationship to the OIA. Of these:

- 53% identified themselves as 'requestors' - individuals and organisations with experience making requests for information under the OIA. This included private individuals, non-government organisations with special interests, media companies, journalists and researchers.
- 34% identified themselves as 'responders' - organisations and individual employees that provide responses to requests under the OIA. These included departments, ministries, councils, universities and state-owned enterprises.
- 10% specified they had an interest in constitutional issues for New Zealand.
- Three submitters specified they had an interest in information management.
- Three submitters identified their primary interest as reviewing decisions on requests under the OIA. This included the Chief Ombudsman, the Privacy Commissioner and the Chief Archivist.

Expert discussions

The following eight experts took the opportunity to meet with the Ministry of Justice to provide their views on the OIA:

- Emeritus Professor John Burrows ONCM QC CNZM, former Pro-Vice Chancellor and Law Commissioner
- Hon Sir Douglas White QC, former President of the Law Commission
- John Edwards, Privacy Commissioner
- Peter Boshier, Chief Ombudsman
- Rt Hon Sir Geoffrey Palmer QC
- Rt Hon Sir Kenneth Keith, Emeritus Professor of Law, Victoria University
- Andrew Ecclestone, researcher and consultant on freedom of information
- Dr Gavin Ellis, former editor-in-chief of the New Zealand Herald

Key issues with the OIA

Of the 289 submitters, nearly all addressed Question 1: In your view, what are the key issues with the OIA?

While the letter of the law is observed, the spirit is not - Dr Gavin Ellis

The age of the OIA

Around 10% of submitters commented on the age of the OIA. They submitted that the OIA is now outdated and no longer reflects the modern information environment. It was also noted that although the OIA has been reviewed (most notably by the Law Commission in 2012), it has not been substantially amended.

Submitters commented that advances in technology have increased the types and quantities of information covered by the OIA, which increases the resources required to manage the information. Some submitters also suggested that the public appetite for official information has increased. As one submitter noted:

I don't think the OIA envisaged just how many OIA requests government agencies would receive. When I started at my job at a govt agency 10 years ago, we received perhaps three a year. Now, it is hundreds every year, and one request can consist of 10 to 20 questions.

Other submitters noted that the make-up of the public sector has changed since the OIA was introduced. They noted that it has become more politicised, which influences how the OIA operates in practice.

Current practice

Quality of OIA request responses

Over a third of submitters with experience making requests under the OIA raised concerns about the quality of the responses they received. Close to a quarter of these submitters commented that the quality of OIA responses is inconsistent across and within agencies. They believed requests are treated differently depending on who the requestor is and the nature of the request.

Many submitters believed their requests were unfairly refused under the Act, by agencies stating that the information did not exist, despite being previously advised it did. Others commented their requests had been unfairly refused as being 'frivolous or vexatious'.

Most submitters believed that the grounds for withholding information are overused, and/or misapplied. In particular, submitters expressed concern about information withheld on the grounds of being a draft or requiring substantial collation or research. Some submitters were concerned that agencies do not give weight to the public interest test in section 9 of the OIA,

which requires agencies to balance the public interest in disclosing information against the need to withhold it. If the public interest in disclosure outweighs the need to withhold the information, then it must be released.

Some submitters also considered that information provided to them has been inadequate. In some cases, the OIA responses received did not address the question, or contained overly technical answers. Submitters were also concerned that relevant information was withheld as out of scope, or that irrelevant information had been provided. Some responses were also said to be incomplete.

Several submitters found that information is provided in a manner or form different from that specified in the request, which makes transferring, reading or using the information more difficult, and reduces accessibility for those with disabilities.

Staff knowledge and training

Around 10% of submitters were concerned that officials handling OIA requests lack the necessary training and knowledge to appropriately process requests. Several officials with experience processing requests said they had no or little training. One submitter commented that their training had been biased towards withholding information.

Adequacy of processes for responding to OIA requests

Around 5% of submitters reported difficulties making requests under the OIA, including getting in contact with agencies. Some agencies wrongly require requests to be made in writing, or at a particular place, like a police station, impacting accessibility.

Around 5% of submitters were concerned that agencies' information management and recordkeeping processes inhibit agencies ability to meet their obligations under the OIA, as they are disconnected, out of date and inconsistent. Submitters expressed particular concern about information held by contractors or information on social media or text messages. Submitters also expressed concern that information is created or treated inconsistently by agencies.

A few submitters suggested that poor information management and recordkeeping caused delays in OIA responses. They felt there are inadequate and unclear rules around record-keeping and no incentive for agencies to improve their processes.

The Chief Archivist noted:

Based on the evidence that my staff gather in their work, I can say with confidence that there are issues arising during the process of locating, compiling, and releasing information for OIA requests that are the direct result of poor recordkeeping practices and inadequate information management systems.

Charging for OIA requests

Around 7% of submitters were concerned about agencies charging for OIA requests. Several submitters shared what they believed were exorbitant charges for their requests.

Timeliness

Over a third of submitters were concerned about the timeliness of OIA responses. This was the central focus of many submissions.

Most submitters commented that agencies are not responding to requests as soon as practicable, as is required by the OIA. Rather, agencies treat the 20-day timeframe as a target. Some of these submitters noted they often receive a response on the final day, typically just before 5pm. One submitter noted they once received a reply to their request stating "[w]e will get back to you in 20 days".

Many submitters also noted that the response timeframe is often ignored, and responses take longer than 20 days. Some submitters commented that certain agencies required multiple reminders before they responded, or never responded at all.

Many submitters also expressed concern that extensions are overused and/or used without sufficient justification or need. Submitters commented that extensions were often asked for on the 20th day, maximising the amount of time allowed for that request.

Agency resourcing and costs

Around 10% of submitters discussed agency's resourcing for OIA processes. Many were concerned that agencies are not sufficiently resourced to respond to OIA requests. Submitters also noted that OIA requests took time away from agencies' ability to deliver on their other functions and responsibilities. Many submitters with experience preparing responses emphasised the time and cost involved in responding to OIA requests. As one submitter summarised, the

research, compilation, writing, redacting, editing, consultation, reporting and authorisation required to get a response out the door is significant.

A few submitters were particularly concerned about the ability of smaller agencies (such as Boards of Trustees) to fulfil OIA requests. Submitters suggested that insufficient resources, high workloads and apathy contribute to delays in responding to OIA responses.

Submitters noted that the burden of the OIA has increased overtime, as more information is generated, stored, and requested. Around 5% of submitters also commented that agencies receive burdensome requests which require overwhelming resources, seeking "all documents" or "all emails" or pose questions to "all ministers".

Some submitters said they often received petty or frivolous requests, repeat requests, or multiple requests from the same requestor, which waste agencies' time and resources. NZ Police commented that "New Zealand citizens would be appalled by the cost to them of such requests."

Culture

"There is no doubt in my mind that the civil service's attitude to official information has become politicised, particularly over the past decade" - Dr Gavin Ellis

Close to 40% of submitters expressed concern about the culture in the public sector surrounding responses to OIA requests.

Submitters who identified as requestors felt that agencies were not well disposed towards OIA requests at the outset. They described their experiences with agencies as being largely adversarial and a "*battle*". Submitters noted that agencies often failed to communicate, and when they did, were opaque and confusing. In contrast, several submitters who identified as responders commented that at times requestors are rude and threatening.

Both requestors and responders expressed concern that officials devalue and deprioritise OIA requests. They believe that officials view OIA requests as an inconvenience and waste of time and resources. As one submitter expressed:

the government departments don't respect the fact that they are there to serve the public, therefore any OIA requests they see as a nuisance, get defensive and drag their heels at every opportunity.

Many submitters appeared to believe there is a culture of secrecy within agencies. They described officials as risk adverse, and focused on avoiding embarrassing or detrimental information about the agency or its Minister being revealed. Submitters pointed to a range of potential causes for this culture: the politicisation of the public sector, the Government's 'no surprises' approach and what they saw as an adversarial relationship between the government and media.

Submitters described a variety of ways they believed agencies avoided providing information. They suggested that agencies purposely hide information. For example, through permanently listing documents as draft or having "off-diary" communications. Submitters also believed that agencies deliberately and wrongly withhold or refuse to provide information, and deliberately delay responses until they are no longer newsworthy or damaging. Submitters also noted that OIA responses often appeared to have a public relations "*spin*", rather than being purely factual. Submitters also suggested that requestors and request were often treated differently for political purposes, and that some agencies used non-disclosure and confidentiality agreements inappropriately.

Ministerial and political influence

As a government employee with previous experience with OIA processes, I was horrified by the level of both overt and unconscious influence that politics have on the process.

Around 15% of submitters expressed the belief that responses to requests under the OIA are directly or indirectly influenced by ministers and ministerial staff.

Most submitters stated that Ministers and their public relations staff were directly influencing OIA responses. Some submitters described a "*culture of fear*" in agencies. They stated that

staff experienced political and career pressure to withhold information. Several submitters identified themselves as officials who had experienced or witnessed pressure to withhold information:

I have had minister's staff screaming down the telephone at me, threatening me with dismissal or being barred from parliament in an effort to get me to change my mind on how requests will be processed.

Submitters commented that real and perceived ministerial and political interference implies a level of corruption and undermines trust in the public sector. A few submitters also expressed concern that such interference inhibits their ability to gain neutral information, which is critical to research.

Misuse of the Act

Around 10% of submitters expressed concern that the OIA is deliberately misused by requestors. Submitters suggested that some requestors, in particular the media, often make broad or "fishing requests" for information in the hope of discovering something that reflects poorly on the agency or its Minister. Other submitters suggested that opposition members make large and complex requests to tie up agency resources or that requestors use the OIA to "harass" or "punish" agencies. One submitter described receiving nearly 150 requests from one individual over several weeks.

Public information about the Act

Several submitters suggested there is insufficient public awareness and understanding of the OIA, which contributes to a negative perception of the OIA. They felt that the public does not understand how the OIA works, how requests and responses should look, and which agencies they should approach for certain information. They suggested this contributes to the public submitting broad, vague and otherwise improper requests.

Around 5% of submitters felt that there is inadequate reporting on agencies compliance with the OIA. They expressed dissatisfaction about the statistics released by the State Services Commission, noting that it does not give enough of an overview of agencies compliance, both in terms of timeframes and the quality of responses. Submitters also questioned the reliability of the statistics. As one submitter summarised:

"...this initiative itself lacks transparency as every agency develops their own system for essentially 'marking their own homework'."

Review of decisions

Around 20% of submitters expressed concern about the Office of the Ombudsman's processes for dealing with complaints about the OIA. Around half of these submitters expressed concern that the Ombudsman's investigations take too long. Some commented that investigations have taken as long as two years. Submitters felt that the length of time taken in investigations often makes any response eventually received worthless. Submitters often linked the delays to a lack of resources in the Office of the Ombudsman.

Other submitters commented negatively on the Ombudsman's process. Some submitters believed the Ombudsman's investigations favoured the agency and that the complainant is left out of the process or not taken seriously. Submitters also expressed concern that agencies do not appear to follow the Ombudsman's advice or guidance.

Issues related to the current Act

Overall quality and usability of the OIA

Many submitters commented negatively on the overall quality of the OIA. Submitters believe the OIA is unclear and complicated, and has significant gaps and loopholes.

Definitions, purpose and principles of the OIA

Submitters noted the importance of the principles and purpose of the OIA, and that access to official information is important for ensuring transparency, scrutiny and accountability in the public sector.

Submitters noted that the presumption in the OIA is that information should be released unless there are reasons to withhold it. Some submitters felt that this presumption was unclear or inadequately emphasised. Others believed the OIA does not go far enough and that all government information should be public and accessible.

A few submitters noted that the Privacy Act and the OIA treat privacy considerations differently and that this could cause confusion. A few submitters noted that the OIA does not give sufficient weight to privacy.

Several submitters felt that more clarity is needed about what information is included in the definition of "official information" and what constitutes an official information request.

Relationship of the OIA to other legislation

Around 10% of submitters referred to other legislation in their submissions. Submitters felt that there is a need to align and clarify the interactions of the OIA and other legislation dealing with official information, including the Ombudsman Act 1975, the Local Government Official Information and Meetings Act 1987, the Public Records Act 2005 and the Privacy Act 1993. Some submitters identified specific misalignments between the OIA and these pieces of legislation. Others believed the official information system is fragmented and recommended consolidation. Annette Sykes submitted that the OIA and the Ombudsman Act does not sufficiently consider the Treaty of Waitangi as part of the public interest test.

Agencies covered by the OIA

Around 7% of submitters commented that the current scope of agencies covered by the OIA is unclear and should be clarified. Submitters felt the scope of the OIA no longer reflects the spread of public accountabilities and expressed concern that relevant schedules had not been updated. For example, Air New Zealand is not covered by the OIA although the

government is a majority shareholder. Submitters also commented that there are discrepancies between the scope of the OIA and other relevant legislation, like the Ombudsman Act and the Public Records Act.

In contrast, a few submitters felt the OIA's scope was too broad and does not sufficiently distinguish between the different types of agencies and information under the Act.

Eligibility to make OIA requests

A few submitters expressed concern for the OIA's eligibility requirements. Submitters commented that the OIA's eligibility requirements are out of step with international jurisdictions and runs counter to the spirit of the OIA. To be eligible to request official information under the OIA, a requester must be: a New Zealand citizen or permanent resident; a person in New Zealand; or a corporate entity which is either incorporated in New Zealand or has a place of business here.

Some submitters expressed concern that some agencies used the eligibility requirements to deliberately delay and deter requests. Other submitters commented that the eligibility requirement is impossible to enforce in the digital age and is easy to circumvent.

Grounds for refusing requests and withholding information

Around 15% of submitters expressed concern about the number and nature of grounds available for refusing requests or withholding information.

Some submitters believed the grounds for refusing requests are insufficient to prevent vexatious and burdensome requests.

Many submitters commented that the grounds for refusing or withholding information are used too often, are vague and difficult to apply. One submitter noted that the "*withholding grounds are unclear in their application and the ombudsman description of how they should be applied is often starkly different from what can be inferred in the Act*". Other submitters found the recent guidance by the Ombudsman and the State Services Commission helpful.

Some submitters felt there are too many withholding grounds or that the grounds are too broad or too easily met. Others expressed concern that the public interest is not given sufficient weight as required by the OIA.

In contrast, several submitters who identified as responders think there are not enough withholding grounds. In particular, several submitters felt commercial information was not sufficiently protected. For example, Victoria University submitted:

As a University, we find ourselves caught between being a business and a crown entity. It can be difficult to relate the OIA, which is more tailored to the public side of things, when we do have extra commercial interests. There are current commercial withholding grounds, however it can be difficult to apply that to a University as we don't exist "for profit" yet are undertaking commercial activities and have a commercial position in a competitive domestic and international market.

Other submitters believed there are insufficient grounds to withhold information during investigations, inquiries and reviews, or to protect peoples' privacy and safety. Several noted that the OIA does not withhold information due to Budget sensitivity, despite this being a long-recognised convention.

Timeframes for requests and extensions

Around 7% of submitters expressed concern for the current timeframes and grounds for extension under the OIA. Some submitters believed the 20 day timeframe is too long or that the OIA should not allow time to restart after transferring or consulting on a request.

In contrast, submitters who identified themselves as responders felt that the 20 day timeframe is not sufficient for all requests, particularly those that are burdensome or require consultation. Submitters also expressed that the current extension grounds do not cover all potential reasons for delays, including emergencies.

Charging for OIA requests

Several submitters commented negatively on charging for OIA requests. Submitters took issue with the availability to charge on principle, stating that it obstructs the public from their right to access official information. Several submitters who identified as responders found the charging provisions were difficult and ineffective to use, and no longer adequately reflected the potential costs of responding to OIA requests.

Proactive release of official information

Around 5% of submitters discussed proactive release of official information. Submitters suggested more official information should be proactively released, as it is in line with the presumption of availability and reduces the burden of the OIA on agencies. Submitters noted there is no incentive for agencies to proactively release information. Some submitters described certain classes of information they believed should be routinely released.

A few submitters commented positively about proactive release initiatives they had seen. The Chief Ombudsman noted that *"uniform collection and reporting of data on OIA requests is likely to have the single biggest impact on improving agency performance. This is evidenced by the impact of the release that has occurred to date."*

Rules around review of decisions

Some submitters were concerned that the Ombudsman does not have enough powers and, that the Ombudsman's recommendations are not binding on agencies. Several submitters also commented that there is no ability to appeal or judicially review the Ombudsman's recommendations.

Protection against certain actions

Around 5% of submitters expressed concern that the protections afforded to released information under section 48 of the OIA do not apply to proactively released information. Submitters saw this as a barrier to agencies releasing more information proactively.

Incentive to comply and holding parties to account

Around 20% of submitters believed the OIA does not ensure or incentivise compliance. They noted that the OIA does not contain any serious penalties or accountability for non-compliance and errors. As one submitter summarised:

Basically, the Act is perceived as toothless and it is routinely ignored, abused, and regarded as an inconvenience at best.

Leadership and coordination

A strong theme in submissions was the lack of oversight and coordination in the OIA. They considered that neither the Ombudsman and the State Services Commission had enough of a leadership role of the OIA, and neither was it appropriate for them to. Rather, submitters saw the agencies as having the most power and discretion under the OIA. As submitter Jem Traylen summarised:

The central problem is that we have essentially an adversarial governmental system in which you are asking a group of people to be put in charge of handing over the evidence that they possess (ie official information) by which their own performance will be judged. That creates a fundamental incentive incompatibility issue which lies at the heart of the many criticisms and controversies over how the Act is being administered.

Views on reform

Do the issues relate to legislation or practice?

The second consultation question asked whether people think that the issues with the OIA relate to the legislation or to practice. Over 90% of submitters expressed a view on this question.

Just under half of all submitters considered that issues with the OIA relate to both legislation and practice. Many of these submitters discussed the interplay between legislation and practice, stating that “*law drives change*”. They suggested that improving the legislation would be the most effective way to improve practice. As one submitter summarised:

The legislation provides the framework for the policy in organisations. If the legislation was more clear there would be less ambiguity and organisations policy's might be more closely aligned.

Around 35% of submitters considered that issues with the OIA relate primarily or entirely to practice. Some submitters believed practice issues were deliberate, other submitters saw issues with the OIA to be largely accidental and a consequence of a lack of resourcing or poor information management. Some still saw legislative reform as an important part of improving the OIA. One submitter wrote after stating that issues with the OIA relate primarily to practice:

But there seems to be a view that this means that reform isn't required. Serious changes are needed, and it may be that legislative reform is the best way to drive change in practice.

Around 15% of submitters believed the issues with the OIA relate primarily or entirely to the legislation itself. Many felt the lack of accountability and enforcement mechanisms incentivise breaches of the OIA. Other submitters considered that the OIA lacked clarity or provides a framework for excessively restricting access to official information.

Approaches to review and reform

Submitters varied on the extent of legislative change they believe is required. A few thought there is a need for large-scale reform of New Zealand's approach to official information. As one submitter stated:

While tinkering at the edges of the OIA may relieve some of the issues that have developed, stepping outside the OIA box and promulgating legislation is the most effective way to meet the aims of transparency and enabling effective participation in the digital age.

Other submitters believed that it would be sufficient to make slight amendments and adjustments to the OIA. Two submitters stated that they did not believe the OIA needed

amending. Some submitters thought the Local Government Official Information and Meetings Act 1987 should be included in the review.

What reforms to the legislation would make the biggest difference?

Most submitters made suggestions under Question 3: What reforms to the legislation do you think would make the biggest difference? The below section identifies the reforms not already discussed in previous sections of this report.

Redevelop the principles, purposes and definitions

Some submitters felt the presumption of availability needed to be re-emphasised in the review. Other submitters believe that all government information should be made available to the public. Several submitters sought a review to reconsider how privacy is considered under the OIA.

Other submitters wanted greater clarity and changes to determining what amounts to an official information request and official information. A few submitters gave specific recommendations for what they believed should or should not be included in the definition of official information. A few submitters believed there needs to be greater obligations and restrictions on requestors, for example emphasising that all requests should be in good faith.

Change the agencies subject to the OIA

Around 10% of submitters recommended extending the agencies subject to the OIA, for example extending it to:

- the Parliamentary agencies
- agencies in receipt of public funding, such as Radio New Zealand
- all state-owned entities
- private entities with a large public function or role, such as electricity trusts
- public agencies' subsidiaries, joint ventures and contracting services
- other agencies, including the courts, Auditor-General, the Independent Police Conduct Authority

Change the withholding and refusal grounds

Nearly a third of submitters suggested changes to the refusal and withholding grounds.

Many submitters believed that the refusal grounds should be strengthened to prevent vexatious and burdensome requests. Agencies submitted that a requester's past conduct should be taken into account in determining whether a request is vexatious. Other submitters sought greater clarity around the terms 'due particularity' and 'substantial collation or research'.

In contrast, several submitters expressed dissatisfaction that their requests had been treated as being “vexatious”. They sought a greater responsibility on agencies to give reasons as to why their requests were treated as such.

Both responders and requestors asked for greater clarity about how the withholding grounds are applied. They also asked for the withholding grounds to be modernised and simplified.

Most submitters believed that the number of withholding grounds should be reduced. The two grounds most cited by submitters as being vague and overused were “free and frank advice” and “commercial sensitivity”. A few submitters thought that the public interest test should be added to the section 6 of the OIA (conclusive withholdings grounds). Other submitters believed that agencies should be required to give reasons when withholding information.

In contrast, other submitters proposed strengthening certain withholding grounds or creating new ones. Several supported making legal privilege a conclusive section 6 withholding ground, others suggested expanding the commercial sensitivity withholding grounds. Some suggested the creation of a new non-conclusive withholding grounds for information provided in the course of an investigation or inquiry and for Budget information.

The Chief Ombudsman noted the risks of substantially changing withholding grounds that have been subject to more than 30 years of interpretation and on which clear and accessible guidance has now been produced.

Change the statutory timeframes

Around 20% of submitters thought the statutory timeframes should be amended. Most commonly, submitters wanted time frames to be significantly shortened. Some submitters believed that different time frames should be imposed based on the nature and complexity of the request. To prevent agencies approaching the 20 day limit as a target, submitters recommended emphasising the requirement to respond as soon as reasonably practicable.

In contrast, other submitters (largely responders to OIA requests) recommended increasing the timeframes for responses or separating the timeframes for providing a decision on the request from providing the actual information.

Several submitters suggested provisions that would require decisions to extend time frames or refuse requests to be made much sooner in the process. Some submitters believed that there should be no extensions of time. In contrast, some submitters believed that there should be additional grounds for extending time frames – for example where the agency does not have the capacity or resources to respond to a request.

Change the charging grounds and guidelines

Just over 5% of submitters sought changes to the charging regime. Some submitters wanted no charges imposed regardless of the nature of the request. Others suggested that certain requests, such as requests from media, organisations or opposition members should incur a cost. Some submitters believed that charging should also consider an agencies’ resourcing

and the amount of time spent on the OIA. A few submitters referred to the United Kingdom's Freedom of Official Information Act as a model.

Require agencies to release more information

Around 20% of submitters thought that agencies should proactively release more information, including on their compliance with OIA requests. Some submitters believed the OIA should require agencies to proactively release information. Other submitters wanted a statutory requirement for agencies to publish their responses to OIA requests. A few submitters suggested creating a central Government OIA database where all responses and information are published.

There were mixed views on whether protections from liability should be applied to proactive releases. The Privacy Commissioner considered that personal information should be carved out from the OIA before any immunity from liability for proactive release could apply.

Change the rules around review of decisions

Submitters also recommended changes around how the Ombudsman deals with OIA complaints. Some submitters recommended a hard time limit on the Ombudsman's investigation and complaints process. Other submitters wanted the Ombudsman (or another body) to have the power to compel information release following a review of an agency's decision. A few submitters suggested that the Ombudsman's decisions should be appealed to the Human Rights Review Tribunal or the Courts.

Create statutory mechanisms for enforcement

A quarter of all submissions emphasised the need for sanctions to apply in cases of non-compliance, or that the Ombudsman should have more direct enforcement powers, such as the ability to impose penalties on agencies. Some submitters recommended individual liability, while others believed that agencies should be penalised. The Chief Archivist asked for greater investigatory powers to deal with poor information management.

Create rules around ministerial involvement

About 10 percent of submitters asked for protocols to be created around ministerial involvement in OIA requests. They believed the OIA should emphasise the independence of public officials and formalise any involvement by Minister's offices in the OIA process. Other submitters suggested that ministers' offices should be prohibited from being involved in departmental requests. A few submitters thought that Cabinet's veto power should be removed.

Better public awareness

Several submitters believed there should be greater public awareness of the OIA including on how to make a request, who to make a request to and what to expect as a response.

Strengthen agency OIA processes and information management

Around 20% of submitters believed that the way in which agencies process OIA requests and manage their official information needs to be improved and strengthened. They believed that agencies' processes for responding to OIA requests should be standardised across agencies or mandated in legislation. For example, submitters thought there should be centralised training and information officers similar to privacy officers in each agency.

Other submitters believed that agencies should have better information management and recordkeeping processes. Some submitters wanted greater and formalised communication between responders and requesters, other agencies and third parties. Several submitters also commented that agencies should respond to requests in more accessible forms or in the form specified by the responder. Several submitters suggested there should be a standardised submission form.

Strengthen resourcing for agencies and the Office of the Ombudsman

Close to 10 %of submitters asked for greater resourcing for agencies and the Office of the Ombudsman. Some suggested the OIA include a statutory requirement for adequate resourcing.

Ensure greater leadership and oversight of the Act

Over 15% of submitters supported more independent oversight of the OIA, although there was a range of suggestions as to the form this could take. Many submitters sought greater powers and duties for the Ombudsman. They suggested that the Ombudsman should be required to oversee the operation of the OIA. This would include increasing public awareness and guiding agencies on their obligations under the Act. However, several experts noted that these activities do not sit well with the classic function of an Ombudsman's office.

A few submitters recommended that OIA requests should be processed and responded to by an independent third party.

Many submitters supported the creation of an independent information authority or a Commission-type body as is seen in comparable organisations. Others agreed with the recommendation from the Law Commission's 2012 report for the creation of an independent information commissioner. Submitters suggested this body or person should provide independent oversight to agencies, including having power to making binding decisions and review and audit agencies' performances, provide guidance and training, record statistics on compliance with OIA, and promote the release of official information.

Appendix: List of submitters

Of the 289 submissions we received, 166 provided their name for release:

Adam Nicholson	Department of Internal Affairs	Gill Minogue
Adrian Cowie		Glenda Morrissey
Alex	Department of Prime Minister and Cabinet	Glenn Marshall
Allan Sargison	Des Marshall	Gordon George
Andrew Ecclestone	Dirk De Lu	Graeme Edgeler
Andrew Ollivier	Donna	Graeme Thompson
Andy Bartlett	Dr Gavin Ellis	Grant Carroll
Anna Gruczynska	Dr Jenny Condie	Grant Cotty
Anna Key	Duncan Greive	Grant Hewison
Anne French	Elaine Smith	Green Party
Annette Sykes	Emeritus Professor John Burrows ONCM QC CNZM	Greg Rzesniowiecki
Antony Pullon		Gregor White
Brittany Keogh	Emma MacDonald	Greyhound Protection League of New Zealand
Bruce Kerr	Environment and Conservation	Hamish Buckley
Charlotte Graham-McLay	Organisations of New Zealand Incorporated	Hamish Peters
Christchurch City Council		Hamish Solomon Brodie
Christopher Gourlay	Eru Loach	Harry
Commerce Commission	Ethan Tucker	Hayden Eastmond-Mein
Commercial Fisheries Forum	Federated Mountain Clubs	Ian Brown
Craig Major	Felix Drissner-Devine	Jack Craw
Curtis Nixon	Fire and Emergency	James Kane
Damian Light	Forest and Bird	James Scott
Daye Clemens	FYI.org.nz	Jamie Small
David Fisher	Genevieve Davidson	Jan Morison
Davina Powell		Jane Carrigan

Jane Kelsey	Lucy King	New Zealand Police Legal Team
Jason Senior	Malcolm Harbrow	
Jay Daley	Malcolm O'Neil	New Zealand Taxpayers' Union and Auckland Ratepayers' Alliance
Jem Traylen	Marcus Wilkins	
Jill Latham	Mark Hanna	Nicholas Lee
Joanna Adkins	Max Rashbrooke	Nick Smale
Joe Harbridge	MediaWorks	NORML New Zealand Inc
John Combs	Michael	Office of the Ombudsman, including Chief Ombudsman Peter Boshier
John Conneely	Michael	
John Edwards	Michael Beckett	
John Farquhar	Michael Reddell	Patrick Corish
Jonathan Marshall	Michael Rodgers	Paul Bryant
Jonathan Woodford-Robinson	Michael Stockdale	Paula Harris
	Mike Barton	Pete Hill
Jonathon Harper	Miles Startford	PHARMAC
Joseph McClure	Movement	Phillip Hutchings
Judit Farquhar-Nadasi	National Council of Women New Zealand	Ray Hellyer
Julian Adamson		Richard Bacon
Julie Hopcroft	Neal Barber	Richard Fletcher
Katrina Taylor	New Zealand Air Line Pilots' Association	Richard Foy
Keith		Richard Overy
Keitha Booth	New Zealand Beekeeping Incorporated	Richard Startford
Kelvin		Robert Whitaker
Kerry Tankard	New Zealand Council for Civil Liberties	Roger Bray
Kurutia Seymour	New Zealand Council of Trade Unions	Roger Fowler
Laura Mills	New Zealand Law Society	Ron Burberry
Law Commission, including Hon Sir Douglas White QC	New Zealand Nurses Organisation	Ron Eddy
Lew		Ross Francis

Rt Hon Sir Geoffrey
Palmer QC

Rt Hon Sir Kenneth Keith

Sam Murray

Shahil

Simon Tapp

Statistics New Zealand

Stephen Black

Steve Glassey

Steve York

Stuart Browning

Stuff

T S O'Donnell

Tamaki Legal

Tony Randle

Transparency
International NZ

Treacy Mander

Trevor Richards Richards

Victoria University of
Wellington

Vivienne Cuff

Warren Forster

Wellington Howard
League

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Tāhū o te Ture

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New Zealand Government

- *Improving accessibility:* This would involve redrafting and re-enacting the OIA in a clearer and more accessible style. A restructure and rewrite would help to give greater prominence to key elements in the Act such as the presumption in favour of making information available.
- *Clarifying and updating the OIA's coverage:* There appear to be some anomalies in the OIA's coverage. For example, Parliament and its agencies are not subject to the OIA. The Law Commission recommended extending the OIA's application to certain parliamentary information (e.g. Parliamentary Services and the Office of the Clerk).
- *Reviewing 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. A review could consider ways to reduce complexity and increase certainty in this area.
- *Reforms related to vexatious requests:* Agencies work with limited resources which can sometimes be put under strain by certain types of requests. A review could look at how to draw a better balance between freedom of information and the resources agencies have to meet requests.
- *Compatibility with other legislation:* A review could help clarify the relationship between the OIA and related pieces of legislation (e.g. the Ombudsmen Act 1975, the Inquiries Act 2013, the Public Records Act 2005 and the Privacy Act 1993). Feedback from submissions suggested that this was an area which can cause unnecessary confusion for both agencies and requesters.
- *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. But 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. A review could consider the costs and benefits of establishing an oversight mechanism.
- *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. A review could consider the appropriateness of additional enforcement tools.
- *Proactive release:* A requirement for agencies to publish information proactively is a feature of most modern freedom of information regimes internationally. A review could consider whether it is desirable to include a requirement in legislation for agencies to proactively publish information.

Policy projects

Hon Kris Faafoi, Minister of Justice
4 December 2020

Purpose

1. s9(2)(f)(iv)

s9(2)(f)(iv)

5. The Justice Policy Group's constrained capacity is at the core of our need to heavily prioritise our work. s9(2)(f)(iv)

We will provide a further briefing on the full policy work programme, and a proposed legislative programme for 2021

6. Your decisions on these projects will assist with the development of the 2021 Legislation programme for the Justice and Courts portfolios. This programme is to be submitted to the Cabinet Office in late January 2021 and we will work with you and your office to finalise it beforehand.
7. Your decisions will also feed into a comprehensive briefing on the overall policy work programme for the next three years. We are aiming to provide this to you on 14 December (along with an initial view of the legislative programme). This briefing will cover our mandatory policy work, the projects you have identified as your priority projects, and options for the priority, and sequencing and timeframes of other policy projects over the next three years.
8. Our work programme is dynamic. As projects are completed, new ones emerge, or Budget decisions are made, we reassess the priorities. We typically deliver two to three unplanned, urgent projects each year. We will look to discuss with you the relative priorities and key deliverables for the policy work programme on a regular, usually quarterly, basis.

Approved by Rajesh Chhana, Deputy Secretary, Policy

Project	Source/Driver	Recommendation, rationale and implications	Mitigations and next steps	Minister's comments
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out of scope

s9(2)(f)(iv)	Review of the Official Information Act (OIA) The Open Government Partnership National Action Plan 2018-2020 (Commitment 7) committed the Government to undertake targeted engagement with experts and key stakeholders on the merits of formally reviewing the OIA. The Ministry completed this in September 2019 and proposed a targeted review of the OIA. The scope would address concerns that information is not being released when it should, the Act is out of date, its relationship to other Acts is unclear, the reasons to withhold information are hard to understand, and it is difficult to hold agencies to account.	The previous Minister indicated his intention to seek Cabinet approval on the scope of an OIA review in a media interview in July 2020.	s9(2)(f)(iv)
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out of scope

Enclosed:

Excerpt from *Legislative and Policy Work Programme 2021-2023*

Briefing from the Ministry of Justice to the Minister of Justice

14 December 2020

[Out of scope – pages 1-8]

Notes to Appendix 1

[Out of scope – paras 1-9]

10. Projects that have simply been paused or deferred until resources become available have not been included on the work programme for the time being. They have been moved to our 'holding pen' list of potential projects which we will discuss with you further as and when resources allow. These projects include:

- **[Out of scope]**
- **[Out of scope]**
- **[Out of scope]**
- **[Out of scope]**
- reviewing the Official Information Act;
- **[Out of scope]**
- **[Out of scope]**
- **[Out of scope]**

[Out of scope – Appendices 2 and 3]