Submissions of the Ombudsmen – the Public's Right to Know

17 December 2010

Introductory comments

We have the following comments to make before addressing the discussion questions.

Flexible v prescriptive approach

We agree that a flexible case-by-case approach is preferable to a prescriptive rules-based approach. At the same time we acknowledge that greater clarity and certainty are required in order not to put unreasonable strain on limited government resources. Our clear preference would be to achieve greater clarity and certainty through enhanced guidance rather than prescriptive rules. Prescriptive rules applied through legislative amendment or regulations would be too inflexible, and would discourage the application of intelligent judgment in particular cases that is one of the strengths of the New Zealand approach. As the Danks Committee originally noted, *"judgments cannot … be properly and satisfactorily made all at one time by legislation".*[1]

Harm v class-based approach

We support the continuance of a harm-based approach rather than class-based approach. We therefore agree with the Law Commission's current view that it is not desirable to expressly exclude certain classes or categories of information. In our view, information should only be withheld because of the potential harm from release, and not simply because it falls within a particular class or category. Valid concerns about release of official information may be addressed through the proper application of the withholding grounds. If the existing withholding grounds are demonstrably insufficient to prevent harm, consideration should be given to whether extension or amendment of those grounds is required, rather than removing classes or categories of information from the ambit of the legislation.

One Act for central and local government

We advocate for there to be one Act covering both central and local government. In our view, New Zealand's freedom of information regime would be more effective if it was unitary and of universal application. Having two pieces of legislation containing essentially the same provisions but with different statutory references complicates the task of educating agencies and the general public about the operation of the legislation. This complexity is well-illustrated by the issues paper, which refers primarily to the OIA, but cross-references the equivalent LGOIMA provisions. As the issues paper notes, *"this is solely to make the text easier to read and for economy of expression".* We think any differences between the central and local government regimes are not insurmountable, and that they could be overcome with careful drafting.

Self-contained, re-drafted and re-enacted

We agree with the Law Commission that the legislation should be self-contained, incorporating relevant provisions from the Ombudsmen Act (OA) explicitly rather than by reference, and that it should be redrafted and re-enacted. While the Law Commission recognises that the underlying principles of the legislation are sound, and it does not propose significant changes in that regard, there are nevertheless a number of potential amendments under consideration, which may be difficult to incorporate seamlessly in the existing legislation. We also agree that the structure and order of the legislation could be improved, and that this would aid readability and comprehension of the Act.

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[1] Danks Committee General Report, p 22, available at www.ombudsmen.parliament.nz.

Discussion questions

CHAPTER 2: Scope of the Acts

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

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

We support both propositions. Having a complete and self-contained list of agencies subject to the legislation would make it easier to use and understand (although in some cases it will continue to be appropriate to list agencies in categories rather than in their own right, e.g. school boards of trustees, council-controlled organisations).

A stocktake exercise to ensure that all agencies that should be subject to the legislation are in fact scheduled would also be beneficial. However, this task may be complicated by the changing landscape and ways of doing government business e.g. public-private partnerships and private sector delivery of public services.

In this context, we think it is important to review the deeming provisions[2] to ensure they are still capable of capturing information about devolved functions and services. Our concern is that information connected with the performance of public functions or provision of public services may come to be held by corporate entities that are not established for this purpose by an agency or enactment, or engaged as contractors to an agency.

For instance, the Animal Health Board, which exercises functions as a pest management agency under the Biosecurity Act, is not currently subject to the OA or OIA in its own right[3]. It is an incorporated society and it is not clear whether it has a contractual relationship with an agency of the Crown. The information it holds in performing its functions under the Biosecurity Act may not be official information for the purpose of the OIA.

Another possible example is vehicle inspectors and inspecting organisations, which are appointed pursuant to rule 2.2 of the Land Transport Rule: Vehicle Standards Compliance 2002 (the Rule) to carry out a range of activities relating to the inspection and certification of vehicles. The Rule is made by the Minister of Transport under Part 11 of the Land Transport Act. We understand that inspectors and inspecting organisations are corporate entities who are not engaged as contractors to the New Zealand Transport Agency (NZTA). The information they hold in performing their functions under the Rule will not be official information for the purpose of the OIA (although the NZTA may hold some of it, and it may be accessible by this route).

There may be an argument for an extended deeming provision, similar to s 2(2) and (3) of the OIA, but along the following lines:

[2] Sections 2(2), (3) and (5) OIA / 2(6) LGOIMA.
[3] This will be remedied by the Biosecurity Reform Bill 2010.

> Where information is held by a body authorised to perform statutory functions, that information shall be deemed to be held by the authorising agency, and for this purpose the body shall be deemed to be part of the authorising agency.

The Commission may also like to consider recommending a mechanism within the legislation to add new or existing agencies to the schedule – the existing mechanism being limited to amending the schedule if an agency is abolished or its name is changed[4]. New departments of state can be added to the OA schedule by Order in Council[5]. Such Orders in Council could be empowered to amend the OIA schedule too (in the same way that alterations to the state-owned enterprises schedules have the effect of amending the OA and OIA schedules, see s 10A(2) of the State Owned Enterprises Act). However, there should be a separate mechanism within the OIA to deal with agencies that will not also be made subject to the OA.

Should the Office of the Ombudsmen be subject to the OIA?

In its review of the Civil List Act, the Law Commission proposes that the parliamentary agencies – the Office of the Clerk and the Parliamentary Service – be brought within the scope of the OIA. In the issues paper, the Commission suggests that the existing exemption for the Parliamentary Counsel Office be removed. Those proposed extensions of the scope of the OIA to the legislative branch of government raise the question of the application of the Act to the Officers of Parliament.

One Officer of Parliament, the Parliamentary Commissioner for the Environment, is already subject to the Act. This leaves only the positions of the Office of the Ombudsmen and the Office of the Auditor-General to consider. Our comments are concerned only with the Office of the Ombudsmen.

The Office has never been subject to the OIA. In addition, correspondence and communications between the Office and agencies under investigation are not official information even when held by the agency concerned[6]. In carrying out its OA functions, the Ombudsmen and staff are under a duty to maintain secrecy in respect of all matters that come to their knowledge in the exercise of their functions[7]. This provision applies too in respect of the Ombudsmen carrying out their functions under the OIA and LGOIMA[8].

Confidentiality has been seen as essential for the effective conduct of the Ombudsmen's functions under the OA, the official information legislation, the Protected Disclosures Act and the Crimes of Torture Act. However, we are cognisant of the move to greater openness which the proposed extension of the OIA to the legislature signifies and we consider that this should encompass the Office too, provided that this can be done in a way that does not compromise the Ombudsmen's ability to perform their statutory functions effectively.

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[4] Section 49 OIA / s 56 LGOIMA.
[5] Section 32 OA.
[6] Section 2(1) paragraph (i) (paragraph (b)(iii) LGOIMA) of the definition of *"official information".*
[7] Section 21(2) OA.
[8] Section 29(1) OIA / s 28(1) LGOIMA.

Essentially, we accept that in the course of its administrative operations, such as accounting and reporting on its use of public resources, the Office should be as accountable as any other agency of state. We see no reason why the coverage of the OIA could not be extended to those operations to bring the Office into line with public expectations, without undermining the ability of the Ombudsmen to carry out their statutory functions effectively. We would therefore support the limited application of the OIA to the administrative operations of the Office.

If the OIA is to apply to the Office to any extent, this will raise the question of review of any decision by the Office to withhold information. In the United Kingdom the Information Commissioner reviews requests for information the Commissioner holds under the Freedom of Information Act. We see no reason why a similar provision could not operate satisfactorily for the Office of the Ombudsmen, especially given the fact that there is more than one Ombudsman available to carry out any review.

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

As noted in our introductory comments, we strongly support the Law Commission's current view that it is not desirable to expressly exclude certain classes or categories of information. In our view, information should only be withheld because of the potential harm from release, and not because it falls within a particular class or category.

Informal information

We agree with the Commission that *'informal information'* should not be exempt from the legislation on a class basis. Submissions suggested *"that it might be possible to draw a line between 'formal' information which has influenced decision making and informal information which is not of lasting influence on anything".*

We think this would be a difficult line to draw, and that it would potentially impose significant limits on access to information rights. It overstates the significance of decision-making processes which many, but by no means all, requesters are interested in. It also overlooks the fact that pre-decisional material often influences the decision-making process, including the options and advice put to the decision maker. Pre-decisional material may provide a useful backdrop to the decision, improving public understanding of it, and facilitating public participation in the decision-making process.

There may be a reason for refusal where release of informal information would prejudice one of the withholding grounds (s 9(2)(g)(i) in particular may be relevant). And truly ephemeral information could potentially be refused under s 18(h) of the OIA on the basis that it is trivial. However, such information should be available on request unless there is a harm in disclosure that is not outweighed by the public interest in release, or there are sound administrative reasons to decline the request.

Third party information

We are similarly opposed to the general exemption of *'third party information'* provided by and relating solely to private entities. Information of this nature that comes to be held by agencies subject to the legislation is unlikely ever to relate *solely* to a private entity. It will be held because it is in some way germane to the performance of the agency's functions. The example given is information provided by a private organisation to a local authority for resource consent. This does not relate *solely* to the private organisation, but also to the local authority's resource consent decision-making. The issues paper considers two particular types of third party information. The first is research done by Crown Research Institutes and universities under contract, which we address in answer to question 20. The second is information supplied to a statutory body in the course of proceedings before that body to determine an application or resolve a dispute, which we address in answer to question 29.

CHAPTER 3: Decision-making

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

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

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

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

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

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

As noted in our introductory comments, we strongly favour continuation of the case-by-case model. At the same time, however, we acknowledge that greater clarity and certainty are required in order not to put unreasonable strain on limited government resources. We agree that greater clarity and certainty should be achieved through enhanced guidance rather than prescriptive rules. We therefore support the Commission's conclusions at discussion questions 10, 11 and 12, that there should be:

- a compilation, analysis of, and commentary on the case notes;
- greater access to, and reliance on the case notes as precedents; and
- a reformulation of the practice guidelines with greater use of case examples.

We have begun moving in this direction ourselves with what we refer to in our Annual Report 2009/10 as a *"principles-based"* approach: investigating individual complaints with a view to establishing and disseminating principles of broader application.

However, it should be recognised that a *backward-looking* approach – looking at existing case notes – will be of limited utility. Not all significant cases have been noted. Often cases were noted because of their novelty value. Cases that are the exception rather than the rule will not help to illustrate principles of broader application.

We therefore consider that a *forward-looking* approach is also required in order to meet demand for better guidance on the proper application of the legislation. In this regard, we have considered the resources made available by other Ombudsmen and Information Commissioners. We think significant benefits could be gained by the Ombudsmen following a similar approach in New Zealand. This could include:

- ***General guides:*** A set of guides providing commentary on the mechanics of processing requests (e.g. providing reasonable assistance) and grounds for refusal. The guides would incorporate case studies based on existing case notes. They would draw on but eventually replace the existing practice guidelines, with a focus on providing practical and succinct advice illustrated by real-life examples.

- ***Thematic guides:*** A set of thematic or topic-specific guides, articulating principles of general application in relation to frequently recurring requests and types of information; for instance, officials' names, public sector salaries, severance payments, draft documents, informant identities etc.

- ***Public decisions:*** A publicly available and searchable database of Ombudsmen decisions on official information cases in future. The benefits of this approach would be that it would:

  - remove the need to create a separate resource for publication;
  - significantly expand the pool of available 'case notes' in a short amount of time; and
  - model the transparency we expect of agencies subject to our jurisdiction.

Any move toward publishing our decisions would require a significant departure from our standard practice. Although we have published our findings on OIA complaints from time to time in the past it has not been a routine occurrence.

Complaints under Parts 3 and 4 of the OIA are investigated under the OA[9], and that Act also applies in respect of investigations under Part 2 as if they were investigations under the OA[10]. Accordingly, our investigations must be conducted in private[11], and we must maintain secrecy in respect of all matters that come to our knowledge in the exercise of our functions[12].

Consideration would need to be given to the implications for our secrecy requirements of public decisions. The need for privacy is arguably less in the official information context than it is in the context of investigations concerning other types of administrative acts or omissions affecting individuals in their personal capacity.

It may be that our ability to publish reports in the public interest under rule 2 of the Ombudsmen Rules 1989 is sufficient to justify a practice of public reporting. However, in our view it would be preferable to have explicit statutory endorsement for that practice.

We consider that our office is in the best position to provide advice and guidance on the operation of the legislation, although it would require appropriate resourcing, and we agree that it should be mandated by an explicit statutory function.

[9] Section 35 OIA / s 38 LGOIMA.
[10] Section 29 OIA / s 28 LGOIMA.
[11] Section 18(2) OA.
[12] Section 21(2) OA.

We are not convinced that a separate official information website is necessary at this point. However, we do acknowledge that our current website requires updating and reorganisation to make it more accessible and easy to use. We will be considering the website as part of an overall review of our communications platform, scheduled to begin in early 2011.

CHAPTER 4: Protecting good government

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

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

We agree that the good government grounds – particularly s 9(2)(f) – can be difficult to understand and apply, and that the situation could be improved through legislative amendment. At the same time, we have some reservations about the proposed reformulation. While we have not suggested an alternative formulation at this point, we would be happy to work with the Law Commission to develop one.

Overall structure

We understand the desire to have a single *"good government"* ground incorporating all subparagraphs in s 9(2)(f) and (g) of the OIA, but it is difficult to combine these subparagraphs and have an appropriate introductory statement.

The proposed introductory statement incorporates reference to *"maintaining the effective conduct of public affairs".* In earlier discussions with the Law Commission we advocated for that reference to be retained in the free and frank provision for the reasons set out in paragraph 4.36 of the issues paper. However, it will introduce a new element to the existing s 9(2)(f) tests, which could create unnecessary uncertainty.

At the same time, because the element of *"maintaining the effective conduct of public affairs"* is so far removed from the free and frank subparagraph, there is a risk that it will continue to be overlooked as a necessary part of the test. We often have to clarify the required link between the free and frank expression of opinions and the effective conduct of public affairs. There is still a belief that gratuitous opinions can be protected, with no regard to whether the future expression of such opinions is in the interests of the effective conduct of public affairs. There is an opportunity to make that link clearer in the review of the legislation.

Our other concern is that the proposed subparagraphs are all framed as *interests requiring protection*, when some of them may be better framed as *prejudices to be avoided* e.g. (iii), (iv) and (v).

Coalition negotiations *(new subparagraph (iii))*

Subparagraph (iii) would apply if withholding is necessary to maintain the effective conduct of public affairs by protecting negotiations and the free and frank expression of opinion between the parties that form the government. It reflects an interest already recognised by the Ombudsmen as one of the purposes of the constitutional convention in existing s 9(2)(f)(iv)[13]. However, we

[13] See Part B, Chapter 4.5, p 13 of the practice guidelines, and case notes W36406, W44732 and W44790.

think it would be better framed as a prejudice to be avoided, rather than an interest requiring protection. We also think the reference to *"negotiations"* and *"parties"* could be open to more than one interpretation. One view is that *"negotiations"* in this context is restricted to negotiations regarding the formation of the government. An alternative view is that *"negotiations"* covers, in addition, any ongoing negotiations throughout the term of the government. We assume the word *"parties"* is intended to refer to political parties, but it could possibly also refer to Ministers. It may be that further clarity is required in these two areas.

Free and frank opinions *(existing s 9(2)(g)(i), proposed subparagraph (iv))*

Subparagraph (iv) would apply if withholding is necessary to maintain the effective conduct of public affairs by protecting the free and frank expression of opinions and provision of advice by or between Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty, where the making available of the information would be likely to prejudice the free and frank expression of similar opinion or the provision of advice in the future.

With respect, this reformulation seems somewhat repetitive; it is about *protecting* the free and frank expression of opinions where disclosure would *prejudice* the free and frank expression of opinions. It therefore incorporates both an interest requiring protection and a prejudice to be avoided. We think it would be simpler and more accurate if it were framed as a prejudice to be avoided. For instance:

> There is good reason to withhold official information if it is necessary to avoid prejudice to the free and frank expression of opinions by, between or to Ministers, members, officers and employees that are necessary for the effective conduct of public affairs.

As noted above, we also favour making the link between the free and frank expression of opinions and the effective conduct of public affairs clearer, by incorporating those words within the subparagraph itself.

We think this provision should continue to protect opinions by, between *or to* Ministers and officials. The word *"to"* is missing from the suggested reformulation. Without it the application of existing s 9(2)(g)(i) would be restricted to opinions expressed within government. This seems unintentional given the Commission's comments at paragraphs 4.37 – 4.39 about the scope of existing s 9(2)(g)(i)[14]. For the record, we think it is clear that s 9(2)(g)(i) can apply to bodies outside the core of government. It protects opinions by and between members, officers and employees of scheduled organisations (including SOEs, CRIs and tertiary education institutions), as well as opinions provided *to* them by third parties.

We do not object to the inclusion of the words *"provision of advice"*, but at the same time we are not convinced it is necessary. *"Advice"* is a kind of *"opinion".* To our knowledge, we have never suggested that *"advice"* is not covered by existing s 9(2)(g)(i), although often the concern about disclosure of advisory material is more appropriately captured by s 9(2)(f)(iv).

[14] Paragraphs 4.37-4.39 of the issues paper discuss responses to the Law Commission's survey that question whether s 9(2)(g)(i) can apply to bodies outside the core of government.

Government decision-making *(new subparagraph (v))*

Subparagraph (v) would apply if withholding is necessary to maintain the effective conduct of public affairs by protecting the ability of Ministers properly to consider advice tendered before a decision is made. This new subparagraph reflects an interest already recognised by the Ombudsmen as one of the purposes of the constitutional convention protecting the confidentiality of advice tendered[15].

This is much clearer and easier to understand and apply. However, the Commission should be aware that it will significantly narrow the Ombudsmen's approach to the existing s 9(2)(f)(iv).

The proposed reformulation will apply to advice related to ministerial decision-making before a decision is made. However, in certain circumstances it has been accepted that the need to maintain the convention of confidentiality applies *after* decisions have been made, or in respect of advice that *does not relate to conventional ministerial decision-making processes*. Examples include:

- Draft answers to parliamentary questions[16].
- CAB100 forms[17].
- Advice provided to the Prime Minister by the Policy Advisory Group of the Department of the Prime Minister and Cabinet[18].

It may be that the free and frank provision can apply in situations where s 9(2)(f)(iv) would have applied in the past. However, careful consideration should be given to the interests that section is intended to protect, and whether the proposed reformulation is adequate for that purpose.

A factor that may complicate the application of the reformulated test in practice is the complexity of government decision-making processes. While these processes are in train there is often no finite or conclusive endpoint in sight. They can be long iterative processes, comprising multiple stages. This is perhaps an issue that can be addressed by ensuring there is adequate guidance on the application of any new provision.

We also consider that any replacement s 9(2)(f)(iv) should be framed as a prejudice to be avoided rather than an interest requiring protection. One of the issues considered in applying s 9(2)(f)(iv) is whether disclosure would prejudice executive government decision-making processes. This is how the general position was reached that once decision-making processes have concluded there may no longer be a need to withhold the information. We think the replacement s 9(2)(f)(iv) would provide stronger information access rights if it included a prejudice test, as opposed to protecting the ability of Ministers to consider advice tendered.

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[15] See Part B, Chapter 4.5, p 13 of the practice guidelines.

[16] See case note W45495 and *Ombudsmen's Quarterly Review* 8(3).

[17] See Annual Report 2007, pp 28-29.

[18] The reasons for this are outlined at p 27 of the Annual Report 2002. While that Annual Report article focused on ss 9(2)(ba)(i) and 9(2)(g)(i) of the OIA, in subsequent years these cases have mostly turned on s 9(2)(f)(iv). We have since rejected the argument that a Minister owes an obligation of confidence to his or her staff or advisors.

Improper pressure or harassment *(existing s 9(2)(g)(ii), proposed subparagraph (vi))*

Subparagraph (vi) would apply if withholding is necessary to maintain the effective conduct of public affairs by protecting Ministers, members of organisations, and officers and employees of any department or organisation from improper pressure or harassment.

As with the replacement s 9(2)(g)(i), we consider that a reference to the effective conduct of public affairs should be incorporated within the subparagraph itself. The Ombudsmen have always used this reference to establish a threshold for the proper application of s 9(2)(g)(ii). It is not enough that officials may be subjected to pressure or harassment; that pressure or harassment must affect them to a degree that the effective conduct of public affairs would be prejudiced.

CHAPTER 5: Protecting Commercial Interests

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

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

The term *"commercial"* appears in two withholding grounds – one directed to protecting the commercial position of third parties (s 9(2)(b)(ii) OIA / s 7(2)(b)(ii) LGOIMA), and the other directed to protecting the commercial activities of state sector agencies subject to the legislation (s 9(2)(i) OIA / s 7(2)(h) LGOIMA).

Based on case law Ombudsmen have interpreted the term *"commercial"* as requiring a profit motive[19]. A broader interpretation of that term would have implications for both withholding grounds, when the concerns articulated in the issues paper come predominantly from state sector agencies.

We have some sympathy for agencies that do not have a profit motive but nevertheless feel disclosure of certain information would prejudice their competitive position or financial interests. However, we are not convinced that the way to address these concerns is by widening the definition of *"commercial"* beyond that determined by the courts.

In many cases, agency concerns can be addressed by the proper application of the negotiations provision (s 9(2)(j) OIA / s 7(2)(i) LGOIMA). However, where negotiations are not anticipated, there may be a gap in the protection available for what the Danks Committee referred to as the *"quasi-commercial activities"* of state sector agencies[20].

While in general we would not advocate adding to the number of withholding grounds without a demonstrated need to do so, it may be that an additional ground is required to address this gap, i.e. where disclosure would be likely to prejudice the competitive position or financial interests of an agency, including the ability to limit cost impacts for goods and services being acquired by the Government for citizens.

For instance, the Canadian Access to Information Act provides that information may be withheld if it could reasonably be expected to *"prejudice the competitive position of a government institution"* or *"be materially injurious to the financial interests of a government institution"* (ss 18(b) and (d).

It is noted that the original s 9(2)(i) provided good reason for withholding to enable the Government to carry out *"trading activities"* without prejudice or

[19] *Calgary (City) v Alberta (Assessment Appeal Board)* (1987) 77 AR 23 (QB); *Mayor of Timaru v South Canterbury Electric Power Board* [1928] NZLR 174; *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405; *Commissioner of Inland Revenue v Carey's (Petone and Miramar) Limited* [1963] NZLR 450; *Commissioner of Inland Revenue v United Dominions Trust Ltd* [1973] 2 NZLR 555 (CA); *Bevan Investments Ltd v Blackhall and Struthers* (No 2) [1978] 2 NZLR 97 (CA); *Lowe v Commissioner of Inland Revenue* [1981] 1 NZLR 326 (CA); *New Zealand Rail Ltd v Port Marlborough New Zealand Ltd* [1993] 2 NZLR 641 (CA); *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278 (CA).

[20] Danks Committee General Report, p 19.

disadvantage[21]. This aligns more closely with the UK and Ontario definitions cited in the issues paper *("the purchase and sale of goods or services"*; information that *"relates solely to the buying, selling or exchange of merchandise or services"*).

We are not opposed to the enactment of an additional withholding ground in s 9 to protect against prejudice to an agency's competitive or financial interests if that is considered necessary. However, we do not favour widening the definition of *"commercial"* in the existing withholding grounds.

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

We do not think the trade secrets withholding ground requires further legislative definition. This ground rarely arises, and its application has not in our view been problematic.

We also think that if further clarification of s 9(2)(ba) (s 7(2)(c) LGOIMA) is required it would be preferable to do this through supporting guidance rather than legislative amendment.

The Commission has suggested two possible reasons for amending s 9(2)(ba)(i). The first reason is that it *"deals only with information provided by someone else, not information generated by the agency which holds it".* However, we do not see 9(2)(ba)(i) as being restricted in this way. Internally-generated information may be covered by s 9(2)(ba)(i) so long as it is subject to an obligation of confidence, and its disclosure would prejudice the future supply of similar information. This is usually the case where the information (internally-generated or externally-supplied) is about a third party, and disclosure would prejudice the ongoing supply of information by that party, or other parties in a similar position (e.g. audit situations).

The second reason is that *"the concept of 'public interest' appears twice in this withholding ground, as part of a threshold test, and again once the ground to withhold is established when the public interest in disclosure must be balanced as the final stage".* It is true that the concept of public interest appears twice, but that is the case with every s 9 withholding ground; the public interest in withholding is balanced against the public interest in disclosure. The difference with s 9(2)(ba)(ii) is that the public interest in withholding is not defined. Section 9(2)(ba)(ii) recognises that other types of damage (not just damage to the ongoing supply of information) can flow from releasing confidential information. We think it would be difficult to exhaustively define the types of damage to the public interest that may arise.

[21] Danks Committee Supplementary Report, p 67.

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

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

As noted in our introductory comments, we oppose the idea of exempting categories of information from the legislation. We therefore consider that the legislation should continue to apply to information in which intellectual property is held by a third party, and that the withholding of such information should only be justified where release would harm one of the protected interests, and the need to withhold is not outweighed by the public interest in release. Like the Law Commission we consider that the existing withholding grounds are adequate to protect third party research work where necessary. In case note W35177 we stated:

> *"**Comment***
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> *This investigation highlighted a general concern on the part of CRIs about the application of the Official Information Act in circumstances where confidentiality clauses have been included in contracts between CRIs and third party commercial clients. CRIs believed that, in the absence of effective confidentiality clauses, they were likely to encounter difficulties obtaining commercial revenue because potential clients would be concerned about the ability of CRIs to hold in confidence research which a CRI has undertaken for a particular client. The primary concern of the potential clients was that commercial competitors might be able to use the Official Information Act to obtain access to that research to the commercial disadvantage of the client in that:*
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> - *a competitor might obtain free of charge research which the client had paid the CRI to undertake for it alone; and*
> - *a competitor could negate any commercial advantage the client may have obtained over competitors as a result of the research.*
>
> *The Official Information Act does not allow for a blanket assurance to be given that all such research information can be withheld. The existence of a confidentiality clause does not, on its own, provide good reason for refusal under the Act. However the existence of such a clause is an important element in establishing whether s 9(2)(b)(ii) or s 9(2)(ba) or s 9(2)(i) are relevant in a particular case. The existence of a confidentiality clause provides strong evidence of an understanding between the parties concerned that the information covered by it is 'subject to an obligation of confidence' for the purposes of s 9(2)(ba). It also provides supporting evidence that the party to which the information relates considers it 'commercially sensitive' and, to that extent, disclosure may be likely to:*
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> *(a) prejudice unreasonably the commercial position of that party (s 9(2)(b)(ii) refers); and*
> *(b) cause the party not to enter into future contracts with the CRI concerned to the detriment of that CRI's commercial activities (s 9(2)(i) refers).*

In the context of concerns that disclosure would be likely to cause prejudice or disadvantage to the ability of CRIs to obtain commercial revenue, s 9(2)(i) is the more relevant provision. ***Section 9(2)(i) is always likely to apply where a CRI has entered into a commercial contractual arrangement to undertake research for a client. Disclosure of that research to another party without the specific consent of the client would prejudice the CRI's ability to obtain further contracts.***

However, before good reason for refusal will exist under the Official Information Act consideration must always be given pursuant to s 9(1) to whether, in the circumstances of a particular case, there are any countervailing considerations which outweigh the need to withhold under s 9(2)(a)-(k). As a matter of law, a blanket assurance cannot be given that the countervailing public interest will never be strong enough to outweigh the need to avoid prejudice of disadvantage to a CRI's commercial activities. However, CRIs can reasonably advise potential clients that in cases where a Crown agency is acting in a purely commercial activity, completely separate from any regulatory or social policy function, there is likely to be little countervailing public interest in disclosure" (our emphasis).

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

We have addressed this issue in our comments on the public interest chapter. We do not think that the public interest balancing test is any more difficult for the commercial grounds than it is for the others.

CHAPTER 6: Protecting privacy

Q23 Which option do you support for improving the privacy withholding ground:
Option 1 – guidance only, or;
Option 2 – an "unreasonable disclosure of information" amendment while retaining the public interest balancing test, or;
Option 3 – an amendment to align with principle 11 of the Privacy Act 1993 while retaining the public interest test, or;
Option 4 – any other solutions?

We acknowledge that agencies are having difficulty applying the privacy withholding grounds. However, we consider that the complexity of the privacy withholding ground is overstated in the issues paper, and the best way of addressing any confusion about its application is through guidance and training rather than legislative amendment.

Option 2 would involve restating the privacy withholding ground so agencies would determine whether "*the disclosure would involve an **unreasonable** disclosure of information **affecting** the privacy of any natural person, including a deceased person"* (our emphasis). The key benefit of this approach would be to introduce a clear threshold for the application of the privacy withholding ground (disclosure would have to be unreasonable to justify withholding). However, it would also provide less protection for personal privacy by restricting the withholding ground to informational privacy. This could mean that an additional *"harassment"* withholding ground would be necessary. We also agree with the Commission's observation at paragraph 6.24, that the proposed reformulation *"retains[s] a relatively conceptual process"*. It does not seem that much simpler to replace a *"necessity"* test with a *"reasonableness"* one. Whether information *"affects"* personal privacy is also likely to be a complex determination. We also observe that the proposed reformulation would not fit comfortably into the existing s 9 (s 7 LGOIMA) list of interests requiring protection and prejudices to be avoided.

We do not favour option 3 for reasons already canvassed in our submission on the Privacy Act review (**enclosed** appendix, page 59-60).

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

As noted in our submission on the Privacy Act review we favour the continued ability to protect information relating to deceased persons (**enclosed** appendix, pages 58-59). We have not come across any cases to suggest that the existing privacy withholding ground is insufficient to protect the special privacy interests of children.

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

In our submission on the Privacy Act review we canvassed some of the reasons

why it might be problematic to limit the ability of state sector agencies to use the OIA where the information sought includes personal information about individuals (**enclosed** appendix, page 62). Our primary concern was that many agencies are subject to the OIA, and some will have legitimate reasons for seeking information that includes personal information about individuals from other agencies. However, we agree that if any limitation is considered it should be restricted to requests between central public service departments with the principle purpose of obtaining personal information about identifiable individuals. This could be done by providing that any such request between the agencies currently listed in Part 1 of the First Schedule to the OA is not an OIA request.

CHAPTER 7: Other withholding grounds

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

We agree that the current division between conclusive and non-conclusive grounds is appropriate, and do not advocate moving any particular grounds between those categories. While some grounds in ss 6 and 9 (ss 6 and 7 LGOIMA) appear to be similar, the difference between them is one of degree. It is appropriate that where the predicted prejudice is greater conclusive grounds for withholding will apply; and conversely, that non-conclusive grounds will apply where the predicted prejudice is less great but still to be taken seriously. Although the grounds referred to by the Commission are used very infrequently, we do not think they should be removed.

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

We do not advocate adding to the number of withholding grounds without a demonstrated need to do so.

Harassment

We have seen no evidence that legitimate concerns regarding the harassment of individuals have not been able to be addressed through the application of ss 6(d) (safety), 9(2)(g)(ii) (improper pressure or harassment), or 9(2)(a) (privacy) of the OIA, and the equivalent provisions of the LGOIMA.

However, having said that, the threshold for s 6(d) is quite high – there must be a serious, real or substantial risk to a person's safety. And while the Commission says that s 9(2)(g)(ii) (s 7(2)(f)(ii) LGOIMA) already goes much of the way to protect individuals from harassment, that section only protects certain categories of individuals (Ministers, members, officers and employees of agencies). This is not widely understood.

Section 9(2)(a) (s 7(2)(a) LGOIMA), which is not currently restricted to informational privacy, can in our view properly apply where there are genuine concerns that harassment will prejudice the privacy of a natural person. This can, as the Law Commission suggests, be clarified by guidance rather than legislative amendment. However, if s 9(2)(a) is amended in a way that restricts it to informational privacy, further consideration would need to be given to a separate harassment withholding ground.

The protection of cultural values

We have seen no demonstrated need for a separate withholding provision for this purpose.

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

We agree that s 18(d) (s 17(d) LGOIMA) is quite widely misunderstood and, consequently, misused. We therefore support the general thrust of the proposed reformulation, although we note that the reference to information that is *already* publicly available has been removed (this was probably an oversight).

An alternative means of tightening the statutory definition and clarifying its ambit would be to set a specific timeframe within which information will be made available. For instance, the Canadian Access to Information Act provides for a request to be refused if the head of the institution believes on reasonable grounds that the information will be published within 90 days (s 26). We would not advocate such a long period as this, but think that having such a bright line could aid understanding, minimise the potential for misuse of the provision, and oblige agencies to consider release unless one of the substantive withholding grounds is made out. However, the danger of setting a specific timeframe is that it becomes the default period irrespective of necessity or practicality.

Other section 18 grounds

Section 18(d) is one of a number of s 18 grounds that could be improved by providing further statutory elaboration of their proper application. Section 18(f) and (h) (s 17(f) / 17(h) LGOIMA) are discussed in later questions (see pages 30-33 and 33-34). We also consider that s 18(e) and (g) (s 17(e) / 17(g) LGOIMA) could be improved.

Section 18(e) provides a reason for refusal if *"the document alleged to contain the information requested does not exist or cannot be found".* This section is usually applied only where the information requested is comprised in a document. However, we see no real reason why the section needs to be restricted in this way. In our view, it would be clearer if it simply referred to the information requested. We also think it would be beneficial to clarify that reliance on s 18(e) is only permitted where reasonable steps have been taken to try and locate the information or to establish that it does not exist.

Similarly, it could be clarified that reliance on s 18(g) – which provides a reason for refusal where the information requested is not held – is only permitted where reasonable steps have been taken to try and locate the information.

A possible reformulation could read:

> A request may be refused if:
>
> (a) the information requested does not exist or cannot be found; or
>
> (b) the information requested is not held by the agency, and there are no reasonable grounds for believing it is held by or more closely connected with the functions of another agency;
>
> provided that reasonable steps have been taken to try and locate the information or to establish that it does not exist, as the case may be.

We note that even where reliance is properly placed on s 18(e) or (g) to refuse a request, this may give rise to a question about whether the information *should* exist or be held and be capable of being found. That question relates to a matter of administration and may be investigated under the OA. The issue of the relationship between the OIA and agencies' obligations to create and maintain public records in an accessible form under the Public Records Act is discussed at page 57.

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

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

We agree that the main problem with the *"maintenance of the law"* ground is the attempt to use it outside the law enforcement sphere, and that if this issue is addressed the present wording can stay as it is.

With regard to the new withholding ground we are sceptical. We are concerned that numerous government activities could be characterised as *"investigations"* or *"inquiries".* If the proposed ground proceeds, the terms *"investigation"* and *"inquiry"* should be carefully defined, and the ground should perhaps be restricted to investigations and inquiries for which there is a statutory basis.

In considering whether an additional withholding ground is required, or what form it should take, we think it is important to consider precisely what it is that agencies are concerned to protect over and above the interests already protected by existing withholding grounds. For instance:

- s 9(2)(ba) (s 7(c) LGOIMA) will protect information received in circumstances imposing an obligation of confidence on an agency, where release would prejudice the ongoing supply of information, or otherwise damage the public interest (which would include the effective conduct of investigations and inquiries); and

- s 9(2)(g)(i) (s 7(2)(f)(i) LGOIMA) will protect information the disclosure of which would prejudice the free and frank expression of opinions necessary for the effective conduct of public affairs, including the effective conduct of investigations and inquiries.

It seems to us that the additional interest agencies are concerned to protect is the ability of decision-makers to close the door at a particular point in time and deliberate in private on advice and other pertinent material received. In this regard it is similar to the most common manifestation of s 9(2)(f)(iv), which Ombudsmen have accepted provides grounds for withholding advice tendered by Ministers and officials where release would be likely to prejudice the effective and orderly conduct of executive government decision-making processes.

This issue arose in a previous case (not case noted) concerning the Commerce Commission's decision to withhold a consultant's report relevant to its statutory decision-making function under s 57G of the Commerce Act 2003. The concern was, in effect, that premature disclosure of the report would prejudice the

effective and orderly conduct of the Commission's deliberative processes. Section 9(2)(ba)(ii) was found to apply, the Ombudsman stating:

> *"The process at issue in this case and the concerns expressed by the Commission regarding release at the time of its refusal are akin to those often relied on by the Government when it is concerned about the effect release of official information may have on certain decisions required during the course of a particular policy-making process. In this regard, my colleagues and I accept that for good government to be achieved there may often be times where advice tendered may need to remain confidential in order to allow it to be considered in an effective and orderly manner".*

If the concern of agencies carrying out investigations and inquiries is to protect the effective and orderly conduct of their deliberative processes, we wonder whether a better approach might be to extend s 9(2)(f)(iv) beyond executive government decision-making.

We note that Australian freedom of information legislation protects deliberative material. For instance, s 47C(1) of the Freedom of Information Act (FOIA) 1982 (Cth) conditionally exempts from disclosure documents that:

> *"…disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth".*

This is not ideal, being a class-based rather than a harm-based exemption, but it would not be too difficult to reframe it as a harm-based withholding provision; for instance, where withholding is necessary to avoid prejudice to the deliberative processes involved in the functions of an agency or Minister. It could be made explicit that this withholding ground does not apply after the deliberative process has concluded.

Whatever the Commission recommends, we agree that it is important that the relevant withholding ground be subject to the public interest test. The need for this is illustrated by a recent case (not case noted) involving a decision by the Health and Disability Commissioner (HDC) to withhold information supplied in the course of an investigation.

The HDC's reasons for withholding were similar to those advanced in its submission to the Law Commission, including that early release of the information might tempt providers to tailor their evidence to refute allegations made by other witnesses. The Ombudsman considered the application of s 9(2)(ba)(ii) of the OIA, and was prepared to accept a temporary obligation of confidence in respect of the information. However, the Ombudsman concluded that any predicted prejudice was:

> *"…counterbalanced by the enhanced fairness and compliance with natural justice that would accrue to all persons subject to complaints if the specific allegations against them are available, if requested, throughout the course of the inquiry".*

Section 9(2)(h) – legal professional privilege

There are two matters relating to legal professional privilege (LPP) that we would like to raise for consideration.

Definition

Section 9(2)(h) (s 7(2)(g) LGOIMA) identifies maintaining LPP as a good reason to withhold information. Since the OIA was enacted, the Evidence Act has codified LPP (and other evidential privileges). However, the statutory definitions of LPP are not intended to affect the general law relating to LPP outside claims to it made in the course of proceedings before a Court[22].

This means that claims to LPP under the OIA must be determined under the common law relating to LPP, not under the definitions of the Evidence Act. The Evidence Act is quite clear in its intentions in this regard and there may be compelling reasons why this dichotomy (or potential dichotomy) is maintained. Apart from the OIA, presumably the common law will continue to apply where LPP is in issue before tribunals or other bodies with investigatory functions. If these proceedings lead to litigation, say judicial review, a question will arise as to whether the Evidence Act definition becomes the relevant standard for the Court to apply. (It is noted that the High Court in *Wilson v Attorney-General*, 28 September 2010, appears to have assumed that the claim for LPP before the Judicial Conduct Commissioner was governed by the Evidence Act – see para [123] of the judgment.)

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

In a review of the OIA the question for consideration is whether to maintain this distinction or whether to apply the statutory definition.

Other jurisdictions have adopted legislative provisions that ensure consistency of approach between Court proceedings and freedom of information principles. Thus Victoria's Freedom of Information Act 1982 words its exemption for LPP in the following way:

> *"A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege"* (s 32(1)).

It would not be difficult to word s 9(2)(h) similarly or to define LPP as meaning LPP as provided in the Evidence Act. On the other hand, it might be argued that this issue is best addressed in the Evidence Act itself after a reconsideration of s 53(5), since it has implications for all claims to LPP in any non-court proceedings context.

[22] Section 53(5) Evidence Act.

Subject to consideration of this latter point, we consider that it would be simpler and more convenient to align LPP for OIA purposes with the law on LPP as it develops under the Evidence Act.

Difference between Part 2 and Part 4

It is a ground for withholding information under Part 2 if it is necessary *"to maintain"* LPP[23]. By way of contrast, where access to personal information by a body corporate is concerned under Part 4 the equivalent withholding ground refers to *"a breach"* of LPP[24]. (In respect of access to personal information by a natural person this has been carried over to the Privacy Act in the same terms – see s 29(1)(f) of that Act.)

Eagles et al remark this distinction in their work[25]. Their discussion of it does not suggest that it is of any particular significance. If the test under Part 4 is made more difficult for a requester to have access to the information (as is a possible reading of the provisions) this seems anomalous in itself. It is suggested that Part 4 be aligned with Part 2 in this respect.

[23] Section 9(2)(h) OIA / s 7(2)(g) LGOIMA.
[24] Section 27(1)(g) OIA / s 26(1)(g) LGOIMA.
[25] Eagles I, Taggart M and Liddell G, *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992) at 538.

CHAPTER 8: The public interest test

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

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

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

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

We acknowledge that there needs to be better guidance on the application of the public interest test, and possible public interest factors that agencies may take into account. However, we do not favour having a codified list of public interest factors. Any such list could not be determinative or exhaustive, but giving it the force of law would invariably create that impression, notwithstanding any caveats to the opposite effect.

We note that this chapter seems to be based on a misunderstanding of the s 9 (s 7 LGOIMA) withholding grounds. At various places it refers to there being *"good reason"* to withhold official information where one of the paragraphs in s 9(2) applies (e.g. paragraph 8.4 and the proposed distinct and separate public interest test at paragraph 8.17). However, there is only *"good reason"* to withhold official information where one of paragraphs in s 9(2) applies ***and*** the need to withhold is not outweighed by the public interest in disclosure. This is a common misunderstanding, which has clearly led to the confusion voiced in submissions to the Law Commission that the *"public interest"* plays a part twice. As far as we are concerned there *is "a single test that simply require[s] the two interests (the one favouring disclosure and the other favouring withholding) to be balanced".* The question is how this could be more clearly expressed in the legislation.

We agree that it could help if the public interest test was separate and distinct. However, we have some reservations about the revised public interest test at paragraph 8.17. As noted above, we do not think it is correct to say that there is good reason for withholding where one of the grounds in s 9(2) applies prior to considering whether the public interest outweighs the need to withhold. The revised test also loses the concept of *"outweigh"*, which we think gives a clearer indication that the weight of the public interest in disclosure must be greater than the weight of the public interest in withholding. It could also be helpful if the s 9 grounds were called *"non-conclusive reasons for withholding information"*, as opposed to *"other reasons"*, to make the distinction between s 6 and s 9 withholding grounds clearer.

A possible formulation that reflects the way Ombudsmen have traditionally approached s 9(1) and (2) is:

> **Non-conclusive reasons for withholding official information**
>
> [X] There is good reason for withholding official information where both [Y] and [Z] are met:
>
> [Y] Withholding is necessary to – …; and
>
> [Z] The need to withhold the information is not outweighed by other considerations which render it desirable, in the public interest, to make that information available.

CHAPTER 9: Requests – some problems

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

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

Due particularity

We agree that the phrase *"due particularity"* in s 12(2) of the OIA (s 10(2) LGOIMA) causes confusion and should be redrafted. In our experience it is often used as a reason for refusing a request, with insufficient effort made at providing reasonable assistance to requesters in accordance with s 13 (s 11 LGOIMA).

Ombudsmen have consistently taken the position that a request is duly particular if the requested information can be identified by the recipient. We do not believe the requirement for due particularity was intended to be a reason for refusal, or to bar broadly-framed requests. Rather, it was intended that as a first step, in order for a request to be valid under the OIA, the recipient must reasonably be able to identify the information requested. That is how successive Ombudsmen have interpreted the due particularity requirement. Section 12(2) does not invalidate requests for a large amount of information. There are other mechanisms in the legislation to deal with such requests.

While agreeing that a redraft is necessary, we do not support the form of words mooted in the issues paper. We foresee wide scope for disputes between agencies and requesters about whether a request is clear, and refers as precisely as possible to the information that is requested. These are very subjective tests, and agencies are likely in very many cases to consider that they are not met.

We consider that s 12(2) should be redrafted as Ombudsmen have interpreted it over the years. A form of words might be:

> The request must enable the agency reasonably to identify the information requested; or
>
> The requester must provide sufficient detail to enable the agency to identify the information requested.

Comparable provisions in other freedom of information legislation also focus on whether the requested information is reasonably identifiable. For instance:

- s 15(2)(b) of the Australian FOIA provides that:

  > *"The request … must provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to **identify** it".*

- s 6 of the Canadian Access to Information Act provides that:

  > *"A request for access to a record under this Act shall be made in writing to the government institution that has control of the record and shall provide*

*sufficient detail to enable an experienced employee of the institution with a reasonable effort to **identify** the record".*

- s 1(3) of the UK Freedom of Information Act (FOIA) provides that:

  "Where a public authority

  *(a) reasonably requires further information in order to **identify and locate** the information requested, and*
  (b) has informed the applicant of that requirement,

  the authority is not obliged to comply with subsection (1) unless it is supplied with that further information".

- the Code of Practice issued under s 45 of the UK FOIA further provides that:

  *"A request for information must adequately specify and describe the information sought by the applicant. Public authorities are entitled to ask for more detail, if needed, to enable them to **identify and locate** the information sought".*

Reasonable assistance

We also argue strongly that the *"due particularity"* requirement must be considered alongside the duty on an agency under s 13 to give the requester reasonable assistance to make their request in accordance with s 12. In our opinion, agencies are not always complying with the letter and spirit of s 13.

There are several options that could be considered as a means of improving the situation.

First, the ability to declare a request invalid under s 12 could be made contingent on meeting the requirement in s 13. That is, a request could not be deemed invalid for lack of particularity unless the agency had first complied with the duty to provide reasonable assistance.

Secondly, the duty to provide reasonable assistance to a person to specify the information requested with due particularity could be made explicit. Currently, the duty is to provide reasonable assistance to a person who wishes to make a request in accordance with s 12 but has not done so. In 1997, the Law Commission recommended amending s 13 to make explicit the duty to assist a person to specify the requested official information with due particularity:

"Accordingly, the Law Commission recommends that section 13 be redrafted as follows:
13 Assistance
Every Department, Minister of the Crown and organisation shall owe the following duties to the person who has made or wishes to make a request under this Act:
(a) To assist that person to specify the requested official information with due particularity…" [26].

[26] Law Commission Review of the Official Information Act 1982 (NZLC R40, 1997) at 37.

Thirdly, the legislation could specify what agencies must do to comply with the duty to provide reasonable assistance. For instance, s 16(2) of the UK FOIA provides that a public authority has complied with the duty to provide advice and assistance if it conforms with the code of practice issued under s 45, which in turn states:

> *"Appropriate assistance in this instance might include:*
>
> - *providing an outline of the different kinds of information which might meet the terms of the request;*
> - *providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority;*
> - *providing a general response to the request setting out options for further information which could be provided on request".*

The Australian FOIA provides that an agency must take *"reasonable steps"* to assist an applicant to revise a request, and that *"reasonable steps"* include the following:

> *(a) "giving the applicant a reasonable opportunity to consult with the contact person;*
> *(b) providing the applicant with any information that would assist the applicant to revise the request"* (s 24AB(4))*.*

An additional or alternative way to ensure that agencies are complying with the duty to provide reasonable assistance would be to add the failure to comply with that duty as a further ground of complaint capable of investigation by the Ombudsmen under the OIA. While the failure to provide reasonable assistance to requesters under the OIA is a matter capable of investigation under the OA, not every agency subject to the OIA is subject to the OA. We also think it would be preferable if OIA disputes were capable of being resolved under the OIA (hence in our introductory comments we argued that the legislation should be self-contained).

Mandatory consultation

The Commission moots the idea of mandatory consultation of requesters seeking large amounts of information. As noted above, s 12(2) is not (in our view) necessarily about the *amount* of information at issue, but about whether that information is *identifiable*. Accordingly, the question raised seems more directly connected with s 18(f) of the OIA (s 17(f) LGOIMA) than the discussion around due particularity.

Section 18B of the OIA (s 17B LGOIMA) provides that an agency must *consider* consulting a requester if a request is likely to be refused under s 18(e) or (f) (s 17(e) or (f) LGOIMA). There is presently no requirement to consider consulting a requester if the information sought is not specified with due particularity. We would support an expansion of the consultation requirement to cover situations where requests are deemed invalid for lack of particularity. We would also strongly support a *requirement* to consult rather than to *consider* consulting.

In our experience of complaints concerning refusals under s 18(f), agencies are not always giving proper effect to the duty to consider consulting, and the only way to address this is to make it mandatory. In fact, we would go further and say that agencies *must* consult, rather than that they *should consult where reasonably practicable.* It is difficult to imagine circumstances where it is not reasonably practicable to consult a requester. Consultation may not work if requesters refuse to revise or refine their request in a way that enables the information to be identified or the reason for refusal to be removed, but that should not excuse agencies of the requirement to attempt it.

We note that the Australian FOIA provides that agencies *"must undertake a request consultation process"* where:

- the equivalent to our s 18(f) applies; or
- the requested information is not identifiable[27].

The consultation requirement is therefore mandatory, and applies in respect of both requests for large amounts of information, and where the requested information is not identifiable. We would support a similar approach in New Zealand.

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

This is already the case under the current legislation. The statutory timeframes apply in respect of a request *"made in accordance with s 12"*[28]. Section 12(2) states that *"the official information requested shall be specified with due particularity"*. Where the official information requested is not specified with due particularity it is not made in accordance with s 12 and therefore the statutory timeframes do not apply.

However, if the Commission considered it desirable to give this further emphasis, New Zealand could follow the example in the UK FOIA, which provides that where a public authority reasonably requires further information in order to identify and locate the information requested, and has informed the applicant of that requirement, it is not obliged to supply the information requested unless that further information is received[29].

Q38 Do you agree that substantial time spent in "review" and "assessment" of material should be taken into account in assessing whether material can be released, and that the Acts should be amended to make that clear?

The meaning of *"substantial collation or research"* is frequently contested, and we would welcome greater clarity. But at the same time, we have serious reservations about extending s 18(f) (s 17(f) LGOIMA) to take account of time spent *"reviewing"* and *"assessing"* requested material.

[27] Sections 24(1) and 24AA(1).
[28] Section 15(1) OIA / s 13(1) LGOIMA.
[29] Section 1(3) FOIA.

Much of the difficulty currently is that *"collation"* and *"research"* are concepts open to interpretation. *"Review"* and *"assessment"* are similarly indistinct concepts. We do not think their inclusion would add significant clarity to the meaning and interpretation of s 18(f). In this regard the provision of the Australian FOIA discussed in the issues paper is preferable because it is quite clear what processes can be taken into account in determining whether the work involved in processing a request would substantially and unreasonably divert the resources of the agency or interfere with its operations.

"Review" could mean examining the information. We agree that time spent examining the information can go toward establishing substantial collation or research. However, *"review"* could also potentially encompass time spent deciding whether or not a request can be granted. *"Assessment"* clearly encompasses decision-making time, including internal and external consultation with a view to deciding whether or not a request can be granted.

The Ombudsmen's approach has always been that *"substantial collation or research"* refers to the *administrative* difficulty in identifying what information comes within the scope of the request, or in bringing together the requested material. We have concluded on a number of occasions in the past that it does not include time spent consulting with a view to making a decision, or deciding whether or not a request can be granted[30].

The Law Commission's approach in 1997 supported this interpretation:

> *"We consider that the actual process of identifying what information comes within the scope of the request is necessarily covered by the word "research"; "collation" must bear its standard dictionary definition of bringing together material, especially for comparison"* [31].

The Commission considered whether s 18(f) should be widened to include *"consultations necessary to make a decision on the request"*, a factor explicitly mentioned in s 15A(1)(b) of the OIA (s 14(1)(b) LGOIMA) as a reason for extending the maximum statutory time limits for processing a request:

> *93. "… Should s 18(f) mention (substantial)* 'consultations necessary to make a decision on the request' *as a further ground for refusing a request? We do not think so.*
>
> *94. Any widening of the Act's grounds for refusing requests must be approached cautiously in light of the purpose in s 4(a) to increase progressively the availability of official information. Section 15A(1)(b) is wide enough to include consultation concerning the withholding grounds which might apply to a request, for example, discussions with persons whose privacy might be affected under s 9(2)(a), or with a legal adviser about whether any of the withholding provisions might apply.* ***Section 18(f), by contrast, is an administrative reason for refusing a request in that it relates to the accessibility of information itself, rather than its contents. We do not consider it appropriate to allow an agency to refuse a request because of the time or difficulty in making a substantive decision about***

[30] See for instance *Ombudsmen's Quarterly Review* 11(2).
[31] Supra n 26 at 31.

> ***whether it can withhold information.*** *As we note in the following chapter, an agency is not allowed to charge for the time spent in deciding whether or not to release information, although it may charge for the process of identifying or locating that information. The same distinction should be made in the context of refusing requests"* [32] (our emphasis).

We have similar reservations. The Law Commission in the issues paper emphasises that it does not want to undermine or impair the ability to make legitimate requests, but the proposed extension may well do that. Official information decision-making and consultation processes can be onerous and complicated. They commonly involve inter-departmental consultation, legal vetting, multiple levels of internal sign-off and Ministerial consultation, and they may necessitate consultation with affected third parties. Ministers and agencies have judged that this level of caution is necessary to manage the risks associated with inadvertent disclosure of sensitive or embarrassing information. However, this does not mean that legitimate requests should be refused. There is a risk that if substantial time spent reviewing and assessing information provides a reason for refusing requests, then high risk requests stand a greater chance of being refused. It is often the high risk requests that raise the strongest public interest considerations favouring disclosure, and for this reason we think the proposed amendment could significantly undermine access rights. We also note that the administrative difficulty in identifying and pulling together relevant information is capable of objective assessment by considering factors such as:

- the amount of information at issue;
- the form in which the information is held;
- the location of the information;
- the practical steps required to make the information available;
- the staff time likely to be involved in making the information available; and
- the impact on the other operations of the agency.

In contrast, the appropriate degree of consultation required and the complexity of the decision-making process are much more subjective. It is not clear what scope there would be to consider whether the projected level of review and assessment is in fact reasonable and necessary in the circumstances.

Our preferred approach would be an expanded s 18(f), which clearly specifies the types of processes that can be considered in deciding whether a request requires so much work that it can be refused outright. This could be similar to s 24AA of the Australian FOIA, but ideally would not encompass time spent making a decision, or consulting in order to make a decision, on a request. It could encompass time spent:

- identifying, locating and collating the information;
- reading and examining the information;
- editing and copying the information.

If the Law Commission remains of the opinion that it is necessary to include time spent making a decision, or consulting in order to make a decision, then we would argue that s 18(f) should be subject to the public interest test. There are

[32] Supra n 26 at 42.

situations where, notwithstanding the amount of time required to consult and reach a decision on a request, the information is of such public import that the Minister or agency should be required to comply with it. Often Ministers and agencies will recognise these situations and decline to exercise their discretion to refuse under s 18(f) (an example of this is the release of Ministerial credit card expenditure), but they should not be relied upon to do so in every case.

Q39 Do you agree that "substantial" should be defined with reference to the size and resources of the agency considering the request?

Our practice guidelines say that one of the relevant factors when assessing whether meeting a particular request would involve *"substantial collation or research"* is:

> *"…the nature of the resources and the personnel available to process requests for information and the effect on other operations of the diversion of resources to meet the request"* [33].

Accordingly, we already take an agency's resources into account. However, we do not support making this explicit in the legislation. Our concern is that this could create a perverse incentive to inadequately resource what should be regarded and resourced as a core function.

Q40 Do you have any other ideas about reasonable ways to deal with requests that require a substantial amount of time to process?

We consider that the legislative mechanisms available to deal with requests that require a substantial amount of time to process are sufficient. The available mechanisms include extensions, charging, releasing in an alternative form, imposing conditions, consulting the requester, and ultimately and as a last resort refusing the request. Some of these mechanisms may require expansion or clarification e.g. charging (Q 66 & 67), imposing conditions (Q 65), consulting the requester (Q 36), and refusing a request under s 18(f) of the OIA (Q 38). However, in our view the basic framework is fundamentally sound. Rather than creating additional mechanisms to deal with broad requests, we think this is another area that could benefit from expanding the available guidance.

Q41 Do you agree it should be clarified that the past conduct of a requester can be taken into account in assessing whether a request is vexatious

Q42 Do you agree that the term "vexatious" should be defined in the Acts to include the element of bad faith?

The bar is set very high on vexatious requests – so high in fact that to many agencies it will seem unattainable, and not worth risking further deterioration in what are probably already difficult relationships with particular requesters. We agree that further elaboration of the term *"vexatious"* is required, either in legislation or in supporting guidance, to make resort to s 18(h) (s 17(h) LGOIMA) a realistic option.

[33] Part B, Chapter 2, p 9.

Clarifying that the past conduct of a requester can be taken into account in assessing whether a request is vexatious would help. However, it is arguable whether defining vexatious with reference to *"bad faith"* would significantly improve clarity, unless the concept of bad faith is also defined.

We note that the UK and Scottish Information Commissioners provide detailed and helpful guidance on the factors that can be taken into account in determining whether a request is vexatious[34]. Their approach is that a request may be considered vexatious where it would impose a significant burden on the agency and:

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

They also take into account the past conduct of the requester, including whether the request is part of a series or one of a large number of requests, and the use of abusive or inappropriate language.

Section 89L of the Australian FOIA (which provides for the declaration of vexatious applicants) provides a useful example of detailed legislative guidance on the meaning of vexatious. It refers to *"repeated"* access actions (i.e. requests, requests for internal review, requests for correction, requests for Information Commissioner review); *"abuse of process"*; and *"manifest unreasonableness". "Abuse of process"* is defined as including but not limited to harassing or intimidating an individual or an employee of an agency, or unreasonably interfering with the operations of an agency.

In our view, vexatious needs to be defined, and that definition should go further than a reference to bad faith and the past conduct of the requester.

Q43 Do you agree that an agency should be able to decline a request for information if the same or substantially the same information has been provided, or refused, to that requester in the past?

In our experience there is no need for a specific ground for refusing repeat requests. There are often legitimate reasons for making repeat requests – for instance, where additional relevant information has been generated in the intervening period; where circumstances have changed since the original request was submitted; or where the requester has lost or destroyed the information previously supplied. We are concerned that agencies would rely on such a provision without giving proper consideration to whether there are legitimate reasons for the repeat request. Where there are no legitimate reasons for the repeat request agencies need only confirm the previous decision. The ability to declare a request vexatious under s 18(h) would address the situation of repeat requests that are designed to harass and have no legitimate purpose.

[34] See *When can a request be considered vexatious or repeated?* Information Commissioner's Office, December 2008, available at www.ico.govt.nz, and *Vexatious or repeated requests*, Scottish Information Commissioner, available at www.itspublicknowledge.info.

Q44 Do you think that provision should be made for an agency to declare a requester "vexatious"? If so, how should such a system operate?

The Law Commission:

> *"…would support an amendment to the Act which allows an agency to give notice to a requester that it will not answer any more questions if that requester has persistently made requests in such numbers, and of such a nature, that it has unnecessarily interfered with the operations of the agency".*

This could potentially apply to many high traffic yet legitimate requesters. We do not think an ability to declare particular requesters vexatious would be necessary if *"vexatious requests"* are defined in legislation or clarified in appropriate supporting guidance. Declaration would in effect amount to the refusal of all future requests from a particular requester, which does not fit comfortably alongside the case-by-case approach of the legislation. Requesters would potentially be denied the ability to moderate or change their behaviour in such a way so as to make it reasonable for them to exercise their rights under the legislation. We do not think this amendment is necessary or desirable.

Q45 Do you agree that, as at present, requesters should not be required to state the purpose for which they are requesting official information nor to provide their real name?

We agree that requesters should not be required to state their purpose, and that no legislative amendment is required to confirm that they may voluntarily supply information about their purpose. We also agree that there should be no requirement for requesters to supply their real name.

Q46 Do you agree the Acts should state that requests can be oral or in writing, and that the requests do not need to refer to the relevant official information legislation?

This legislative clarification would be very helpful. It would also be helpful to confirm that official information includes unrecorded information (we expressed support for this idea in the context of the Privacy Act review also, see **enclosed** appendix, page 58). We note the proposed provision states *"However if an oral request is not clear the agency may ask that it be put in writing".* There may be situations where a requester is unable, because of illiteracy or disability, to put their request in writing. We wonder whether the Act should further provide that where a requester is unable to put their request in writing, the agency should reduce it to writing, and give a copy of the written request to the person who made it.

CHAPTER 10: Processing requests

Q48 Do you agree the 20 working day time limit should be retained for making a decision?

The legal obligation on agencies is to make and communicate a decision on a request as soon as reasonably practicable and no later than 20 working days after receipt.

We agree that the 20 working day maximum should be retained. Developments in information technology have complicated the task of responding to OIA requests as much, if not more, than they have simplified it. The limit in New Zealand is less than in Australia and Canada, and the same as the United Kingdom.

However, consideration should be given to an additional basis for complaint where an agency has failed to respond to a request as soon as reasonably practicable. There is otherwise no way of ensuring an agency complies with its legal obligation in this regard, other than a complaint under the OA, if the agency is subject to that Act (notable exclusions being Ministers and the New Zealand Police).

Q49 Do you agree that there should be express provision that the information must be released as soon as reasonably practicable after a decision to release is made?

Our interpretation of the legislation is that notifying the decision on a request and releasing the information requested do not necessarily need to happen at the same time. The legal obligation for advising the decision on a request is *explicit* in s 15 (s 13 LGOIMA) – it must be done within 20 working days of receipt. The legal obligation for releasing the information is *implicit* in s 28(5) (s 27(5) LGOIMA) – it must be done without *"undue delay".*

We agree that it would be helpful to make the timeframe obligations for releasing information explicit. The Commission proposes an explicit obligation in s 15 to release *as soon as reasonably practicable* after a decision is made. However, we wonder whether the obligation should be consistent with the function under s 28(5) of the OIA to investigate and review *undue delay* in the release of official information. The s 15 obligation could be to release without undue delay after a decision is made. Alternatively, the Ombudsman's function in s 28(5) could be to investigate and review the failure to release information as soon as reasonably practicable after a decision is made.

Q50 Do you agree that, as at present, there should be no statutory requirement to acknowledge receipt of an official information request but this should be encouraged as best practice?

We support the acknowledgement of official information requests as a matter of good practice, but wonder whether it would be workable as a statutory requirement. A statutory requirement would apply to all requests, including ones that do not need to go through formal agency processes. It is not necessary or practicable to acknowledge requests that can be dealt with informally by releasing the information at the time or shortly after (for example, oral requests answered orally).

Q51 Do you agree that 'complexity of the material being sought' should be a ground for extending the response time limit?

We are not opposed to *"the complexity of the issues raised by a request"*[35] being an additional ground for extending the maximum response time. However, we query whether there is any real need for an additional ground for extension. In most cases complex issues will be a reflection of the volume of information at issue, or the need to undertake consultation in order to make a decision on the request, which already provide grounds for extension. We also note that *"the complexity of the issues raised"* is a subjective concept, and there is a risk that it will be used indiscriminately or without proper justification if a request seems *"too hard".* This will not help the existing perception of unreasonable delays in processing OIA requests. Having said that, we note that requesters' interests are arguably safeguarded by their ability to seek an Ombudsman's investigation and review of the extension.

Q52 Do you agree there is no need for an express power to extend the response time limit by agreement?

We see no need for an express power to extend the maximum response time by agreement with the requester.

Q53 Do you agree the maximum extension time should continue to be flexible without a specific time limit set out in statute?

We agree that the maximum extension time should continue to be flexible. We have seen no evidence that this right has been abused by agencies. Because there is no limitation on the extended time period other than that it is reasonable in the circumstances, we see agencies complying with requests that they would otherwise refuse if there was a maximum extension time.

Q54 Do you agree that handling urgent requests should continue to be dealt with by Ombudsmen guidelines and there is no need for further statutory provision?

Requirements for processing urgent requests

We think there may be merit in having a self-contained provision relating to urgent requests. This provision could set out in one place:

- The ability to request urgency.
- The requirement to state reasons.
- The legal obligations on agencies that receive urgent requests.
- The ability to impose a charge for the costs involved in meeting urgent requests.

One requirement could be for agencies to notify requesters of their decision on a request for urgency promptly and within 10 working days.

[35] Note, if the intention is to create a similar ground for extension as s 29A(2)(c) of the OIA (s 29(2)(c) LGOIMA), that ground would relate to the complexity of the issues raised by the request, rather than the complexity of the material being sought.

Investigating complaints about urgent requests

The Law Commission considers that the Ombudsmen's function under s 28(5) (s 27(5) LGOIMA) is adequate to cover complaints about delay in the treatment of urgent requests. Section 28(5) provides that undue delay in making official information available in response to a request is deemed to be a refusal.

We are not as confident as the Law Commission that s 28(5) allows us to investigate the failure to respond to requests urgently. That is why our Practice Guidelines say *"the OIA does not provide authority for an Ombudsman to investigate complaints about the failure of an agency to accord urgency to a particular request"*, and why we investigate such complaints under the OA.

The reason is that s 28(5) is about undue delay in *releasing* official information not undue delay in *deciding* on a request. Official information cannot be released until after a decision has been made. If a decision has not been made – which is the situation with most complaints stemming from urgent requests – there can be no basis to investigate undue delay in release.

We consider that the OIA needs to be explicit if the Ombudsmen are to have the function of investigating complaints about the failure of an agency to accord urgency to a particular request.

One way to do this would be to amend s 28(5) to provide that undue delay in deciding on a request or releasing official information in response to a request is deemed to be a refusal. This would also empower us to investigate complaints that an agency has failed to respond to a request as soon as reasonably practicable (raised for consideration in answer to question 48).

However, our preferred option would be to provide for a general power of investigation in relation to whether an agency has, in respect of a request, complied with the requirements of the legislation. This is in preference to attempting to list the Ombudsmen's functions under the OIA exhaustively. This option is discussed in greater detail in our answer to question 74.

Q55 Do you agree there should be clearer guidelines about consultation with ministerial offices?

We have found that agencies and individual officials often struggle with the issue of consulting and transferring requests to Ministers. This is also an area that generates suspicion and distrust among requesters. We would therefore support clearer guidelines.

Q56 Do you agree there should not be any mandatory requirement to consult with third parties?

Q57 Do you agree there should be a requirement to give prior notice of release where there are significant third party interests at stake?

Q58 How long do you think the notice to third parties should be?

We support the position reached by the Law Commission on the question of mandatory consultation with third parties. A requirement to give reasonable notice to affected third parties of an agency's decision to release official information seems a workable way of addressing legitimate third party interests and concerns, while minimising the administrative burden on agencies, and ensuring timely compliance with the legislation.

The Law Commission refers to *"significant"* third party interests, and queries what type of interest should give rise to the notice requirement. Privacy, trade secrets and commercial prejudice, and breach of confidence would be obvious types of interests that could trigger the requirement. However, we think there should be a reasonable basis for believing that release could *adversely affect* the third party before the notice requirement is triggered, regardless of the type of interest under consideration. As Ombudsmen we are familiar with making this kind of judgment when complying with s 18(3) of the OA (which requires us to give adversely affected parties a reasonable opportunity to be heard).

At paragraph 10.49 the Commission says:

> *"Our general proposal is that notice would be required to third parties where there is good reason for withholding information, but the agency considers this to be outweighed by public interest factors".*

We do not think the notice requirement should be limited to circumstances where release is contemplated on the basis that the withholding ground is outweighed by the public interest in disclosure. It may also be appropriate where the agency is not convinced that the withholding ground is made out. After all, the agency may not be fully equipped to make that assessment where third party interests are at stake – that is the reason for the notice requirement in the first place.

We also wonder whether there should be a focus on taking *reasonably practicable* steps to give notice, because there will be some cases where the number of third parties at issue makes notice to all of them impractical.

A possible option could be:

> Where an agency has reasonable grounds to believe a third party might be adversely affected by disclosure of the information requested, it must take reasonably practicable steps to give that third party advance notice of the proposed disclosure.

Q59 Do you agree there should be provision in the legislation to allow for partial transfers?

Yes, it would be helpful if the legislation explicitly mandated the partial transfer of requests.

Another issue in relation to transfers is the ability under s 15A of the OIA (s 14 LGOIMA) to extend *within 20 working days* the 10 working day time limit to transfer a request. This seems to be an anomaly, and it would be worth considering whether it is necessary to be able to extend the 10 working day time limit to transfer, and if it is necessary, whether the appropriate time limit for extending should be 10 rather than 20 working days.

Q60 Do you agree there is no need for further statutory provisions about transfer to ministers?

Q61 Do you have any other comment about the transfer of requests to ministers?

We agree that the existing grounds for transfer are appropriate, and that they should not be amended to account for situations where agencies and Ministers disagree on the decision to be taken.

We wonder whether s 14 (s 12 LGOIMA) should require agencies to transfer the relevant information in their possession along with the request. In our experience, this is a key concern for requesters when it comes to transfers: that the effect of the transfer is to change or limit the scope of information captured by their request. We suggest as a matter of best practice that the relevant information held by the recipient of the request be identified and transferred to the appropriate agency along with the request, but there could be statutory provision to this effect. If this were done it should remove most of the concerns that arise with regard to transfers.

Q62 Do you think that whether information is released in electronic form should continue to depend on the preference of the requester?

Q64 Should hard copy costs ever be recoverable if requesters select hard copy over electronic supply of the information?

We agree that information should continue to be released in the form preferred by the requester unless there is a legitimate reason not to do so – those legitimate reasons being set out in s 16(2) (s 15(2) LGOIMA).

As the issues paper notes, s 16 permits information to be made available in electronic form. However, the reader has to refer to the definition of *"document"* in s 2 to realise this. It would be clearer if electronic release was mentioned explicitly as a mandated form of release in s 16(1).

Agencies are permitted to charge for the cost of materials involved in making the information available[36]. In our view hard copy costs would be recoverable if

[36] Section 15(1A) & (2) OIA, s 13(1A) & (3) LGOIMA, and the existing charging guidelines.

requesters select hard copy over electronic supply, unless there were circumstances in the particular case that made it unreasonable to do so.

Q63 Do you think the Acts should make specific provision for metadata, information in backup systems and information inaccessible without specialist expertise?

It does not seem necessary to clarify that access to metadata need not be provided unless it is explicitly requested. Access need only ever be provided to information that, on a reasonable interpretation of the request, falls within its scope. If information is inaccessible without specialist expertise then s 18(f) (s 17(f) LGOIMA) may apply, or there may be a basis for passing on the cost associated with that specialist expertise.

Q65 Do you think that the official information legislation needs to make any further provision for agencies to place conditions on the re-use of information, or are the current provisions sufficient?

We do not think it is satisfactory that the ability to release official information subject to conditions is implied by the fact that Ombudsmen have the power to investigate such decisions. The Act should make express provision to the following effect:

> Where an agency would otherwise have good reason to withhold official information it may release the information subject to reasonable conditions, including but not limited to conditions on the use, communication or publication of the information.

We agree that it would probably not be possible to solve the issue of enforceability of conditions in the legislation. However, guidance could be developed canvassing options for giving effect to conditional release as well as any risks associated with it.

Q66 Do you agree there should be regulations laying down a clear charging framework for both the OIA and the LGOIMA?

Q67 Do you have any comment as to what the framework should be and who should be responsible for recommending it?

We strongly endorse the idea of charging regulations that apply uniformly across the state sector.

We do not favour a standard application fee model. Charges imposed should in some way reflect the amount of work involved in making the requested information available. If there is very little work involved the information should be made available free of any charge. By having a standard application fee modest or infrequent requesters would in effect be subsidising immoderate or frequent users.

We agree that the existing model, the categories model and the flat fee model warrant further consideration. The relative advantages and disadvantages of each model need to be explored in-depth, and with regard to experience in other comparable jurisdictions. Regardless of what model might ultimately be adapted,

our concerns are as follows:

- *Activities that may be charged for:* The Law Commission notes that time spent deciding whether or not a request can be granted cannot be charged for. That has been the consistent view of the Ombudsmen, based on our interpretation of s 15(1A) (s 13(1A) LGOIMA) which gives agencies the discretion to charge for the *supply* of official information. Accordingly, a charge can only be levied if a request is to be granted. Consultation and decision-making processes may result in a decision to withhold some or all of the information requested. Our view is that requesters should only be charged where information is released. In addition, as noted above official information decision-making and consultation processes can be onerous and complicated. Much of the work involved is as much for the benefit of the agency concerned – in terms of risk management – as it is for the individual requester. The ability to charge for consultation and decision-making processes will lead to much higher charges. Charging for information will reduce its accessibility. We note that the new Australian federal charging regime permits charges for decision-making but the first five hours are free, and the hourly rate thereafter is $20 AUD, which is much lower than the $76 NZD rate under the current charging guidelines.

- *Waiver or remission:* It is essential that the discretion to waive or remit charges based on financial hardship and public interest be retained, and possibly included in the legislation itself, as it is in the Australian FOIA Act (s 29(4) and (5).

- *Ability to charge for information that ought to have been made available proactively or to which there is a right of access:* We do not think it is appropriate to charge an individual requester for supplying information that ought to have been made available to the general public proactively. We also think that there is by definition a strong public interest in providing information to which there is a right of access (e.g. under s 22 of the OIA, s 21 LGOIMA – internal rules affecting decisions), and that should be taken into account in deciding whether to waive or remit charges.

Q68 Do you agree that the charging regime should also apply to political party requests for official information?

The charging guidelines provide that MPs (and their research units) *may* be exempted from charges, not that they must. The usual approach has been that MPs are not charged. However, on occasion charges have been levied, and have been upheld as reasonable[37]. We agree that agencies should retain the discretion to charge MPs, but that the applicable guidelines or regulations should recognise that release to MPs and other categories of requester (e.g. media, special interest groups) may serve a public interest that warrants waiver in appropriate circumstances.

[37] See Annual Report 2005, p 25.

Q69 Do you agree that both the OIA and LGOIMA should set out the full procedures followed by the Ombudsmen in reviewing complaints?

See introductory comments.

Q70 Do you think the Acts provide sufficiently at present for failure by agencies to respond appropriately to urgent requests?

See our comments on question 54.

Q71 Do you agree with the existing situation where a person affected by the release of their information under the OIA or the LGOIMA cannot complain to the Ombudsman?

Q72 Do you agree there should be grounds to complain to the Ombudsmen if sufficient notice of release is not given to third parties when their interests are at stake?

Where there is a right there should be a means of enforcing that right. Accordingly, we agree that if there is a requirement to give prior notice of proposed disclosures to third parties, there should also be a right for them to complain about the failure to give prior notice.

Also, having reflected on this issue further since our submissions on the Privacy Act review (see **enclosed** appendix, page 61), we consider that there should be some remedy for people adversely affected by wrong or unreasonable OIA disclosures.

We can already consider complaints about wrong or unreasonable OIA disclosures under the OA where the decision-making agency is subject to that Act. It seems unfair that third party rights to challenge wrong or unreasonable decisions will depend on who made the decision, and whether or not they are subject to the OA.

Section 48 of the OIA (s 41 LGOIMA) will still protect agencies from civil or criminal proceedings arising out of OIA disclosures. We acknowledge the important public policy reasons behind the s 48 immunity – namely, ensuring that officials are not unduly inhibited from releasing official information[38]. However, the likely impact and consequences of complaining to an Ombudsman about an unreasonable OIA disclosure are much less than the impact and consequences of pursuing a claim through the courts. The inhibiting effect could therefore be expected to be less.

This is part of a general issue we raised in our introductory comments. We support all OIA and LGOIMA agencies being subject to review under the OIA in relation to issues arising under that legislation.

[38] See *Director of Human Rights Proceedings v Commissioner of Police* Chch CIV-2007-409-002984 [2008] NZHC 1286 (14 August 2008), paragraph 44.

Q73 Do you agree that a transfer complaint ground should be added to the OIA and the LGOIMA?

We agree that requesters should be able to complain about transfers. We can already consider complaints about transfers under the OA where the decision-making agency is subject to that Act. Once again, it seems unfair that an individual's right of complaint depends on who made the decision and whether or not they are subject to the OA.

We also note that our ability to investigate transfer decisions under the OA is not widely known. An explicit ability to investigate transfer decisions under the OIA would probably incentivise stricter agency compliance with s 14 (s 12 LGOIMA).

However, we note that transfers are for the most part uncontroversial (except where the transfer is from a central government agency to a Minister); and used properly they are simply a mechanism to ensure that the agency that holds the information and/or knows it best is the one to reach a decision on it. Who takes the decision should not matter to the requester unless they have been prejudiced in some way. Prejudice can arise where:

- an agency transfers out of time (meaning it takes longer to receive the decision on a request); or
- the effect of the transfer is to change or limit the scope of information captured by their request.

Our current approach to investigating transfers under the OA is to consider whether the person that transferred the complaint had a reasonable basis for believing one of the circumstances in s 14(b)(i) or (ii) was met, and whether the requester has been prejudiced by the decision to transfer. We would want to retain the discretion not to investigate transfer complaints under the OIA where the requester has not been prejudiced in any way by the decision to transfer.

In our answer to questions 60 and 61 (page 40) we suggested that one way of minimising possible prejudice to requesters from transferring OIA requests would be to require the recipient of the request to transfer all relevant information held along with the request.

Q74 Do you think there should be any changes to the processes the Ombudsmen follow in investigating complaints?

We consider that instead of trying to prescribe an exhaustive list of Ombudsmen's functions under the OIA, it would be preferable to provide a general power of investigation and review in relation to whether an agency has, in respect of a request, complied with the requirements of the legislation.

The UK FOIA allows a person to apply to the Information Commissioner for a decision whether *"in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I"* (s 50(1)).

In addition to the traditional grounds of complaint (refusals, extensions, charging etc), this would enable the investigation of transfers, the failure to accord urgency

or respond to a request as soon as reasonably practicable, and the failure to provide notice to potentially adversely affected third parties (if a requirement to give notice is included in the OIA).

If there was a general power of investigation and review, it would be important to retain the discretion not to investigate (or not to investigate further), where, for instance, such investigation is unnecessary, or the subject-matter of the complaint is trivial. Consideration would need to be given to what elements of the discretion not to investigate would need to be brought over from the OA. The discretion not to investigate under the OIA should arguably be more limited than the discretion not to investigate under the OA.

Q75 Do you agree that the Ombudsmen should be given a final power of decision when determining an official information request?

Q76 Do you agree that the veto power exercisable by Order in Council through the Cabinet in the OIA should be removed?

Q77 Do you agree that the veto power exercisable by a local authority in the LGOIMA should be removed?

Q78 If you believe the veto power should be retained for the OIA and LGOIMA, do you have any comment or suggestions about its operation?

Our position is to support the status quo. We agree with the view expressed at paragraph 11.58 of the issues paper:

> *"Even as a latent power it may continue to serve an essential function in balancing the powers of the Executive and the Ombudsmen and promoting a sense of comity between those parts of government. Its very presence may sometimes lead to more moderate positions being taken. Its existence, even if it is not used, may be a useful counterbalance and check on the otherwise unconstrained power of the Ombudsmen".*

The veto reflects an important constitutional principle, which is that the final power of decision and ultimate responsibility for release of official information rests with the executive (or the local authority). Removing the veto could raise the stakes, make the investigation process more confrontational, and encourage a more adversarial and litigious environment. The fact that the power of veto has rarely (in the case of local government), or never (in the case of central government[39]) been used, does not mean it should be removed. We would also suggest that because the veto is virtually never used it does not create any notable degree of uncertainty.

However, we do suggest one change to the local authority veto, which is that only LGOIMA agencies that are elected bodies should have the right to veto an Ombudsman's recommendation. Other LGOIMA agencies e.g. Airport Authorities, should not have that right. The right of veto in respect of such bodies should be held by Cabinet.

[39] Since the power of veto became exercisable collectively by the Cabinet in 1987.

Q79 Do you agree that judicial review is an appropriate safeguard in relation to the Ombudsmen's recommendations and there is no need to introduce a statutory right of appeal to the Court?

We agree that judicial review is an appropriate safeguard. It seems to us that if statutory rights of appeal were to be introduced we would lose many of the advantages of the Ombudsman model – which are, essentially, the relatively quick, low-cost, low-level resolution of disputes.

Q80 Do you agree that the public duty to comply with an Ombudsman's decision should be enforceable by the Solicitor-General?

We consider that the question of enforcement is a significant one. As noted by Heron J in *Television New Zealand v Ombudsman*:

> *"Whilst there is a right of review of an Order in Council made which has the effect of thwarting the recommendation there is* ***no enforcement procedure within the Act itself****. A successful applicant for information will take proceedings in the High Court for enforcement of that duty. As Mrs Scholtens put it, an organisation which is unhappy with a recommendation of the Ombudsman will either take no action at all, anticipating that a requester may not consider the requested information worth the expense of pursuit in the High Court. Alternatively it may await the requester's High Court action and then challenge the validity of the recommendation by way of review proceedings. All of this is* ***a considerable impediment to the proper implementation of a most important piece of legislation****. As other Judges have said this Act has constitutional significance, and information not made available despite the recommendation of an Ombudsman may lose its value with the passage of time. It is important that holders of information are made aware of their responsibility in this regard"* [40] (our emphasis).

In our view there should be an effective enforcement procedure, and there should be a time limit for agencies to commence judicial review proceedings of an Ombudsman's opinion and recommendations.

Effective enforcement procedure

We note the Law Commission's view that the public duty to comply with an Ombudsman's decision should be enforceable by the Solicitor-General. While that is how it has worked in the few cases where agencies did not comply with the public duty, this can be problematic.

The Solicitor-General is the Crown's legal adviser and advocate in the courts. In enforcing the public duty he or she would often be acting against an agency of the Crown. The agency's decision may have been based on Crown Law advice, or the agency may have obtained Crown Law advice in the course of the investigation. The Solicitor-General may disagree with the Ombudsman's opinion and recommendation, and may be reluctant to enforce the public duty. It does not seem appropriate for the Solicitor-General with a duty of enforcement to be in a position of second-guessing the Ombudsman.

[40] [1992] 1 NZLR 106, 123.

An alternative would be to enable the requester to enforce the public duty directly against the holder of the information at the holder's expense. This would be analogous to s 32B of the OIA (s 34 LGOIMA), which enables a requester, at the Crown's (or local authority's) expense, to compel compliance with a recommendation where the veto has been exercised. The Law Commission considered this option in 1997:

> *"Why should the cost of securing the information fall on the requester, who would usually have recovered the costs of bringing judicial review proceedings if the agency had managed to secure a Cabinet veto of the Ombudsman's recommendations? The Law Commission sees no justification for this discrepancy. Consistency with s 32B suggests that a requester who seeks to enforce the public duty should be reimbursed in the same way as if the proceedings were to review the Order in Council".*

However, it may occasionally be unreasonable to expect a requester to assume responsibility for enforcing the public duty, even if their costs are met. In such circumstances it may be considered appropriate for the Ombudsmen to have a discretion to enforce the public duty.

Time limit for seeking judicial review

In 1997, the Law Commission also considered whether there should be a time limit for agencies to commence judicial review proceedings, and recommended that:

> *"…a further subsection be added to s 32 to provide that any application by a Minister, department or organisation under s 4(1) of the Judicature Amendment Act 1972 for review of an Ombudsman's recommendation, or to otherwise challenge, quash or call into question that recommendation in any court, must be made within 20 working days of the recommendation being made"* [41].

We support that recommendation and would like it to be given consideration in the current review.

Q81 Do you agree that the complaints process for Part 3 and 4 official information should be aligned with the complaints process under Part 2?

We understand this proposal would see complaints under Parts 3 and 4 of the OIA investigated under that Act, rather than under the OA. This would mean that instead of being recommendatory only, an Ombudsman's recommendations would give rise to a public duty. In addition, the courts would no longer have concurrent jurisdiction, though complainants could have recourse to the courts after their complaints were determined. We support that proposal.

The Law Commission may also want to consider whether the grounds for refusing Part 3 and 4 requests should be more closely aligned with the grounds for refusing Part 2 requests (already suggested in regard to legal professional privilege, see page 24). The grounds for refusing Part 3 and 4 requests are

[41] Supra n 26 at 124.

narrower than the grounds for refusing Part 2 requests. The difference was to reflect the greater rights of individuals to access personal information about themselves. However, there is possibly less justification for the distinction since the rights of natural persons were removed to the Privacy Act.

We wonder whether some of the reasons for refusal in s 18 (s 17 LGOIMA) and the withholding grounds in s 9(2) (s 7(2) LGOIMA) should apply to requests by bodies corporate for information about themselves. For instance, s 18(c)(i) (s 17(c)(i) LGOIMA) is not referred to as a reason for refusing a request under Parts 3 or 4. Yet it is axiomatic that if release of information of any nature is prohibited by or would be contrary to a specified enactment, it must be withheld. Whether in any particular case release is prohibited or would be contrary to an enactment is, of course, a matter of interpreting the statutory provision involved against the OIA. But it seems strange that the OIA does not itself recognise the need to consider the effect of other enactments when considering requests under Parts 3 or 4.

Q82 Do you agree that, rather than financial or penal sanctions, the Ombudsmen should have express statutory power to publicly draw attention to the conduct of an agency?

Q83 Should there be any further enforcement powers, such as exist in the United Kingdom?

The Ombudsmen arguably already have sufficient powers to report publicly by virtue of the Ombudsmen Rules 1989:

> *"**2. Power to publish reports***
> *(1) An Ombudsman may from time to time in the public interest, or in the interests of any person or Department or organisation, publish—*
> *(a) Reports relating generally to the exercise of an Ombudsman's functions under—*
> *(i) The Ombudsmen Act 1975; or*
> *(ii) The Official Information Act 1982; or*
> *(iii) The Local Government Official Information and Meetings Act 1987; or*
> *(b) Reports relating to any particular case or cases investigated by an Ombudsman".*

However, as noted at page 7, we consider that it would be preferable to have an explicit statutory endorsement in the OIA for public reporting on matters relating to the Ombudsmen's performance of their functions under that Act.

We have found public reporting to be an extremely effective sanction, and do not consider that any other financial or penal sanctions are required.

CHAPTER 12: Proactive release

Q84 Do you agree that the OIA should require each agency to publish on its website the information currently specified in section 20 of the OIA?

We support the idea of requiring agencies to publish the information specified in s 20 on their websites. The existence and location of the Directory are not widely known. Accuracy and accessibility of the information is likely to be improved if individual agencies are responsible for maintaining and publicising it. However, we also think the Directory has the potential to be a useful centralised repository for this information. Given the trend toward greater centralisation and coordination of government services, there may be some benefit in retaining the Directory, but boosting its profile and making it more accessible – for instance, by locating it on the www.newzealand.govt.nz website.

Q85 Do you think there should be any further mandatory categories of information subject to a proactive disclosure requirement in the OIA or LGOIMA?

We appreciate the Commission's point that once you get past 'lowest common denominator' material, it can be difficult to identify particular categories of information that should always and without exception be made available.

However, one change that could be considered, and which would bring New Zealand more into line with the international trend toward proactive release, would be to require s 22 information (s 21 LGOIMA) to be made publicly available, rather than providing a right of access to that material on request. Section 22 refers to policies, principles, rules or guidelines in accordance with which decisions or recommendations are made in respect of any individual of body of persons in his, her or its personal capacity. A number of agencies already make this information available proactively. For instance, the Department of Corrections publishes a range of prisons manuals and policies; Immigration New Zealand publishes its operational manual; and Work and Income New Zealand publishes its manuals and procedures.

Another initiative worth exploring is the proactive disclosure of departmental file lists. This occurs in Australia pursuant to the Senate Order for the Production of Indexed Lists of Departmental and Agency Files (it is not a requirement of the freedom of information legislation). We are not aware whether the benefits of this initiative are considered to outweigh the costs of implementing and maintaining it, but it may be worth making enquiries in this regard.

Q86 Do you agree that the OIA and LGOIMA should require agencies to take all reasonably practicable steps to proactively release official information?

Q87 Should such a requirement apply to all central and local agencies covered by the OI legislation?

Q88 What contingent provision should the legislation make in case the "reasonably practicable steps" provision proves inadequate? For example, should there be a statutory review or regulation making powers relating to proactive release of information?

Q89 Do you think agencies should be required to have explicit publication schemes for the information they hold, as in other jurisdictions?

Q90 Do you agree that disclosure logs should not be mandatory?

It is clear that the benefits of any wider legislative requirement for proactive release must outweigh the costs, particularly in the current economic environment. From our perspective, the benefits and the costs associated with publication schemes and disclosure logs are uncertain, and at this stage therefore we do not advocate that those measures should be mandatory.

The Law Commission mentions that the publication scheme solution has not been without difficulty in the UK. Hazell et al[42] had intended to research publication schemes as part of a project examining the impact of the UK FOIA on central government in the UK. However, an analysis of publication schemes proved *"less useful than … hoped for"*[43], and as a result the researchers decided not to devote further time and resources to analysing them. This was in part because *"the publication schemes were very similar across government departments, based upon a standard model"*, and in part because *"publication schemes were not kept up to date by officials and, more importantly, were not used by requesters"*[44]. The results of interviews were as follows:

> *"The representative view from interviewees confirmed the findings that, although preparation for the scheme was a 'massive amount of effort' and a 'massive amount of work', as one official put it, 'I'm not sure that it has had a massive effect' (Interview 53; 35). The scheme appeared to be caught in a vicious cycle of internal neglect and lack of use: 'there was a big thrust of activity to begin with [but] not much seems to be happening' (Interview 60). Another felt that it was a case of simply 'going through the motions', as it 'was given no real sort of profile across the department. It seems to have been developed just because we had to do one' (Interview 55)"*[45].

After considering the good intentions behind publication schemes, the researchers concluded that *"the publication scheme initiative proved to be less*

[42] Robert Hazell, Ben Worthy and Mark Glover *The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI work?* (Palgrave Macmillan, Hampshire, 2010).
[43] Ibid, p 59.
[44] Ibid.
[45] Ibid, p 95.

effective in practice" and that:

> *"Proactive disclosure has increased as a result of FOI but not as a result of publication schemes which, in their first incarnation, suffered from confusion and a lack of clarity"*[46].

It seems to us that further research into the effectiveness of publication schemes and disclosure logs is required before any recommendation that such initiatives be adopted as mandatory in New Zealand. We note that we are in an excellent position to learn from the experience of the Australian jurisdictions that have adopted mandatory publication schemes and disclosure logs in deciding whether similar legislative measures are warranted here.

We therefore support the idea of a general requirement for agencies to take reasonably practicable steps to proactively release information, and agree that any such requirement should apply to departments, crown entities and local authorities in the first instance. But beyond that, and beyond the proactive release of s 22 information, we do not presently support further legislative requirements for proactive release, such as publication schemes and disclosure logs.

Promoting proactive disclosure, including disclosure logs, as a matter of best practice is another matter. To the extent that we are able to do so, we intend to promote proactive release as a matter of strategic priority (see Ombudsmen's *Statement of Intent 2010-2013*). This includes the idea of disclosure logs, which we referred to in our Annual Report 2010 (p 12). The promotion of proactive disclosure would be advanced by the establishment of an effective oversight agency (see discussion at page 52-53). We would also support a requirement for agencies to report annually on their compliance with the *"reasonably practicable"* requirement.

At the same time, we do not want New Zealand to fall too far behind comparable overseas jurisdictions that have opted for mandatory proactive disclosure requirements. We therefore support the idea of a review in 3 years time to determine whether mandatory requirements are necessary.

We note the idea of a regulation-making power to prescribe categories of information to be made publicly available. This is not too dissimilar to s 21(2) of the OIA which gives a right of access to any category of information declared by regulations made under the Act to be a category of official information in respect of which such a right exists. We are not aware of any such regulations having been made, and wonder whether a regulation-making power such as that proposed would be used.

Q91 Do you agree that section 48 of the OIA and section 41 of the LGOIMA which protect agencies from court proceedings should not apply to proactive release?

We agree with the distinctions drawn by the Law Commission between the *requirement* to release official information *in response to a request*, and the *voluntary* release of official information to *the world at large*. We also agree that these distinctions warrant a different approach in terms of the protection from civil and criminal liability afforded to the decision-maker. We therefore support retention of s 48 (s 41 LGOIMA) in its present form.

[46] Ibid, pp 95-96.

Chapter 13: Oversight and other functions

Q92 *Do you agree that the OIA and the LGOIMA should expressly include a function of providing advice and guidance to agencies and requesters?*

Q93 *Do you agree that the OIA and LGOIMA should include a function of promoting awareness and understanding and encouraging education and training?*

Q94 *Do you agree that an oversight agency should be required to monitor the operation of the OIA and LGOIMA, collect statistics on use, and report findings to Parliament annually?*

Q95 *Do you agree that agencies should be required to submit statistics relating to official information requests to the oversight body so as to facilitate this monitoring function?*

Q96 *Do you agree that an explicit audit function does not need to be included in the OIA or the LGOIMA?*

Q97 *Do you agree that the OIA and LGOIMA should enact an oversight function which includes monitoring the operation of the Acts, a policy function, a review function, and a promotion function?*

Q98 *Do you agree that the Ombudsmen should continue to receive and investigate complaints under the OIA and the LGOIMA?*

Q99 *Do you agree that the Ombudsmen should be responsible for the provision of general guidance and advice?*

Q100 *What agency should be responsible for promoting awareness and understanding of the OIA and the LGOIMA and arranging for programmes of education and training for agencies subject to the Acts?*

Q101 *What agency should be responsible for administrative oversight of the OIA and the LGOIMA? What should be included in the oversight functions?*

Q102 *Do you think an Information Commissioner Office should be established in New Zealand? If so, what should its functions be?*

Q103 *If you think an Information Commissioner Office should be established, should it be standalone or part of another agency?*

We strongly support the additional legislative functions mooted in the issues paper. They are all functions that the Danks Committee originally envisaged would be required for an effective access to information regime, but that were lost with the disestablishment of the Information Authority and the Information Unit in the State Services Commission. The more difficult question is who should perform the functions, and whether the functions should be vested in one agency, or shared among many.

The key benefit of vesting all the functions in one agency would be consistency of approach. The only *existing agency* in which all the functions could be vested is the Ombudsmen. We are already performing some of the functions, notwithstanding the lack of legislative mandate and as our limited resources allow. For instance, we are performing complaints, advice and guidance, education and training, and policy functions, and have arguably on occasion in the past performed tasks related to monitoring, reviewing and promoting the legislation.

As observed by the Danks Committee, expanding our legislative functions in this way would move us away from a focus on *"individual cases"* and our traditional role *"as the individual's 'grievance men'"*[47]. However, we have been moving in that direction for some time now, particularly as we have picked up more diverse jurisdictions under the Protected Disclosures Act 2000 (providing advice and guidance), the Crimes of Torture Act (monitoring and inspecting), and the United Nations Convention on the Rights of Persons with Disabilities (protecting and monitoring in close collaboration with disabled people's organisations). As flagged in our *Statement of Intent 2010-2013* we are also increasingly focusing on wider systemic issues and fostering state sector capability in administrative and decision-making processes, and knowledge of the official information legislation.

The Law Commission does not favour vesting oversight functions in the Ombudsmen because those functions could more profitably be carried out at arm's length from the day-to-day workings of the legislation. However, close proximity to the day-to-day workings of the legislation would also be an advantage. Absent that, the Ombudsmen will undoubtedly be called on to advise and explain their practice and decisions on a regular basis.

There are some good arguments for creating a *new agency* in which all the functions could be vested i.e. an Information Commissioner. The advantages as canvassed in the issues paper are joint oversight of the OIA and LGOIMA, independence and long-term commitment (note, these advantages would also accrue if the oversight function was vested in the Ombudsmen). Another advantage would be increasing the profile and prominence of freedom of information in New Zealand. However, an *"Information Commissioner"*, as that term has come to be understood internationally, should hold the complaints or adjudication function, as well as the functions relating to information privacy that are currently performed by the Privacy Commissioner. Accordingly, this proposal would require an appetite for significant reform, and the associated financial cost that would come with it.

The Law Commission's preferred option is to share the functions between the Ombudsmen and the State Services Commission / Department of Internal Affairs. We would willingly retain the complaints function. We would also welcome the legislative mandate and appropriate resourcing to carry out the advice and guidance function; and would continue, and expand, our education and training function if required. We do not object to oversight functions being vested in the State Services Commission / Department of Internal Affairs, provided those

[47] Danks Committee Supplementary Report, p 17.

departments were adequately resourced to carry out those functions.

An alternative option would be to re-establish the Information Authority, which was originally charged with the oversight functions under discussion. While this would involve establishing a new agency (or re-establishing a pre-existing one), the reform required would be more limited than establishing an Information Commissioner with complaints and oversight roles in relation to both official information and privacy. It would also avoid any confusion that might arise from establishing an Information Commissioner that had only limited oversight functions and no complaints or adjudication function.

CHAPTER 14: Local Government Official Information and Meetings Act 1987

Q104 Do you agree that the LGOIMA should be aligned with the OIA in terms of who can make requests and the purpose of the legislation?

Q105 Is the difference between the OIA and LGOIMA about the status of information held by contractors justified? Which version is to be preferred?

In our introductory comments we advocated for one Act covering both central and local government. This would align any inconsistent provisions. However, if the Acts are to remain separate, we would support amendments necessary to address those inconsistent provisions.

Who can make requests?

We agree that the Acts should be consistent on this point. The Law Commission favours the stricter jurisdictional approach of the OIA, which limits the ability to make requests to citizens, residents, and people in New Zealand. However, we consider the more liberal approach of the LGOIMA may be preferable. It would be better to *extend* access rights – which would be the case if the OIA was aligned to the LGOIMA – rather than *restrict* them. It is in any event difficult to enforce the OIA restrictions, as in our experience non-citizens and residents outside New Zealand will make their requests by proxy. As the Law Commission notes, the Privacy Act was recently amended to allow individuals outside New Zealand to request personal information. Arguably the right of access by bodies corporate to personal information about themselves should be consistent with this. The impact of extending access rights in this way could be monitored and addressed if it became unmanageable, but we are not convinced that it would.

Purpose statement

We agree that the purpose statement in LGOIMA should be consistent with the purpose statement in the OIA in emphasising the *progressive* availability of official information.

Information held by contractors

We are not aware of the reason for the difference between the two Acts on the issue of information held by contractors. The draft version of LGOIMA prepared by the working group on official information in local government included a provision identical to s 2(5) of the OIA. We agree that the provisions should be aligned, and we strongly favour the OIA approach. The LGOIMA approach, which is restricted to information a local authority is entitled to access under the contract, is too narrow and could incentivise agencies to make insufficient contractual provision relating to access to information.

"Official information" – correspondence and communications between agencies and the Ombudsmen (or the Privacy Commissioner)

Another possible gap between the two official information regimes is in the definition of *"official information"*, which in the OIA excludes correspondence between an Ombudsman and a department, Minister or organisation relating to

an investigation conducted under the OIA or OA, and in the LGOIMA excludes correspondence between an Ombudsman and a local authority relating to an investigation conducted under the LGOIMA or OA. The OIA does not protect correspondence between an Ombudsman and a local authority relating to an investigation conducted under the LGOIMA, and the LGOIMA does not protect correspondence between an Ombudsman and a department, Minister or organisation relating to an investigation conducted under the OIA. This would ordinarily not be a problem, but the case has arisen where a local authority held correspondence between it and the Ombudsman relating to an investigation conducted under the OIA (the local authority was the complainant). That information was not excluded from the definition of official information. This issue could be addressed if the OIA and Parts 1 – 6 of LGOIMA were amalgamated.

Chapter 15: Other issues

Q106 Do you agree that the official information legislation should be redrafted and re-enacted?

Q107 Do you agree that the OIA and the LGOIMA should remain as separate Acts?

See introductory comments.

Q108 Do you have any comment on the interaction between the PRA and the OI legislation? Are any statutory amendments required in your view?

Aligning the definition of record and information

We do not agree that definition of *"record"* in the Public Records Act (PRA) and *"information"* in the OIA and LGOIMA need to be aligned. The concept of *"record"* in the official information context would be far too narrow, because it would imply that only recorded information is covered. As noted in our submissions on the Privacy Act review (**enclosed** appendix, page 58), it is important that unrecorded information continues to be covered because otherwise agencies could circumvent the intent of the legislation by opting not to record information.

Requesting information that has been destroyed

The issue discussed in this section of the paper is not just a problem where information has been destroyed. The problem also arises where the information exists but it cannot be provided without substantial collation or research because it has not been maintained in an accessible form; and where the information does not exist but arguably it should. It can also arise where a charge is imposed for the work involved in collating or locating the requested information, again because it has not been maintained in an accessible form.

Increasingly refusals under s 18(e), (f) and (g) of the OIA (s 17(e), (f) and (g) LGOIMA), and decisions to charge, are giving rise to the question of whether the agency concerned is complying with its obligations under the PRA to create and maintain full and accurate business records in an accessible form. At the moment these cases are dealt under the OA, and the Chief Archivist is consulted as appropriate. We do not think that enforcing the PRA should become a function of the Ombudsmen under the OIA. However, there may be options to better link the two pieces of legislation.

For instance, there could be a mechanism for the Ombudsman to notify the Chief Archivist when forming an opinion that a request was justifiably refused under s 18(e), (f) or (g). Such notifications could inform the PRA audit programme. Another option would be to include a consultation provision in the legislation like s 29B of the OIA (s 29A LGOIMA)[48]. For instance, the Ombudsman might consult the Chief Archivist where an agency refuses a request under s 18(e), (f) or (g), or imposes a charge for the work involved in collating the requested information.

[48] Section 29B requires an Ombudsman to consult the Privacy Commissioner before forming a final opinion on the merits of refusing a request under s 9(2)(a).

Appendix: Excerpts from the submissions of the Ombudsmen on the review of the Privacy Act

…

Q9 Do the following elements of the definition of "personal information" in the Privacy Act need to be clarified? If so, do you have any suggestions about how this should be done?

- *"information"*
- *"about"*
- *"identifiable"*

…

We agree there may be some benefit in statutory confirmation that information includes unrecorded information. The issue of whether unrecorded information is *"held"* arises with sufficient frequency in the official information context that it would be simpler and more persuasive to be able to cite statutory authority.

The issues paper questions *"whether the inclusion of information held in a person's mind … causes practical difficulties for agencies, and whether such information should continue to be covered by the definition".* Its continued coverage is important in our view because otherwise agencies could circumvent the intent of the legislation by opting not to record information. The record-keeping requirements in the Public Records Act provide only limited protection against this, and then only in respect of *"public offices".* While there may be evidential difficulties in particular cases concerning unrecorded information, this should not prevent an independent person (either the Ombudsmen or the Privacy Commissioner) being able to examine all the facts and determine whether the relevant information is held and should be provided.

…

Q13 Should there be any changes to the existing provisions relating to deceased persons in the Privacy Act? (See in particular the proposals in paragraphs 3.52 and 3.55.)

Paragraph 3.55 relates to section 29(1)(a) of the Privacy Act, which provides a reason for refusing an individual's access request if it would involve *"the unwarranted disclosure of the affairs of another individual or of a deceased individual".* It proposes amending section 29(1)(a) by removing the words *"or of a deceased person"*. Accordingly, the privacy of the deceased would no longer be a reason for refusing an access request by the living for personal information about themselves.

Section 9(2)(a) of the OIA provides good reason for withholding official information where it is necessary to protect the privacy of natural persons, including deceased natural persons. Paragraph 3.53 of the issues paper says that *"even if the OIA withholding ground continues to refer to the privacy of deceased persons, there could be a case for removing or narrowing the reference*

to deceased persons in section 29(1)(a) of the Privacy Act".

However, we are concerned about the implications of the proposed amendment for the interrelationship between the Privacy Act and the OIA. The difficulty is that often requests for official information must be considered under both the Privacy Act and the OIA (because the requested information is a mix of personal information about the requester and information about other matters). In many cases, it is not possible to distinguish clearly between information that is and is not about an individual. In this context it is important for the equivalent provisions of the Privacy Act and the OIA to remain consistent. We can see that if one Act protected the privacy of the deceased and the other did not, it would cause significant confusion and complication in cases involving mixed information.

In the OIA context, we would advocate for the continued ability to protect information relating to deceased persons. This information is often highly sensitive, and disclosure can impact significantly on surviving family members. The *"necessity"* test in section 9(2)(a) allows due consideration to be given to factors like the passage of time and prior publication, which may diminish the relevant privacy interests. We note that section 29(1)(a) of the Privacy Act has a similar degree of flexibility in that disclosure of information about a deceased person may be considered to be *"warranted"* in the circumstances of a particular case.

…

Q130 What are your views on whether there should be closer alignment of the tests for disclosure of personal information under the OIA and the Privacy Act?

The issues paper queries whether there should be closer alignment of the tests for disclosure of personal information under the OIA and the Privacy Act by either or both:

- defining the privacy withholding ground in the OIA by reference to principle 11 in the Privacy Act; and
- being more specific about the respects in which the *"public interest"* override in the OIA aligns with, or is wider than, the exceptions in privacy principle 11.

We note that the Privacy Act and the OIA serve different and to some degree inherently conflicting purposes.

The Privacy Act is concerned with data protection and has universal application. Its purpose is to ensure that personal information is not made available to anyone except within strictly defined parameters.

The OIA, on the other hand, is concerned with ensuring that information held by government agencies is made available, except where a prejudice to an interest identified in the Act would result. It identifies some interests (such as the maintenance of the law) as having such a strong public interest that they should always be protected. Prejudice to other interests, including privacy, while recognised as providing grounds for refusal, are not seen to carry the same weight in public interest terms. The Act recognises that in some circumstances, there may be other public interest considerations in favour of disclosure that

outweigh the need to protect against the identified prejudice. Our practical experience over 26 years has identified a number of such cases.

As a general comment, we see no need to use terminology that may be appropriate in the data protection context but unnecessarily limiting for official information purposes.

More specifically, the first option discussed above would amend section 9(2)(a) – which currently provides good reason for withholding information if it is necessary to protect the privacy of natural persons, including deceased natural persons – to provide good reason for withholding if disclosure would breach principle 11 of the Privacy Act.

In our view, this would be importing a more complex and prescriptive test. The current drafting is simple and allows a more nuanced application of the law to the facts of a case. Whether withholding is *"necessary"* to protect privacy will depend on a number of factors, including the nature of the information and whether it is inherently private or not; the circumstances of supply; the extent to which privacy is diminished by the passage of time or prior publication; and the reasonable expectations of the data subjects. We consider that moving away from a *"necessity"* test to a plain *"breach"* test could weaken freedom of information rights.

The second option discussed above involves specifying the respects in which the *"public interest"* override in the OIA either aligns with, or is wider than, the exceptions in privacy principle 11. The *"public interest"* exceptions appear to be (e), (f), and perhaps (g). The remaining exceptions appear to be factors we would consider in determining whether it is necessary to withhold information to protect personal privacy (e.g. authorisation by the data subject and anonymised disclosure).

The public interest override is potentially much wider than the principle 11 exceptions. We have found more often than not that the public interest turns on the purpose for which a requester says they need or wish to use the information. To illustrate this point we attach two case notes where Ombudsmen have disagreed with the Privacy Commissioner's view of the public interest and found it to outweigh the need to protect privacy. We would oppose any move to limit the public interest override in relation to section 9(2)(a) to the principle 11 exceptions. Nor do we think it would significantly assist understanding of the legislation to specify that the public interest override includes, but is not limited to, those exceptions. It would also be confusing to be prescriptive about the public interest test in relation to section 9(2)(a), when that test applies in respect of every other section 9 withholding ground as well. Those withholding grounds relate to a number of interests that may be at least equally deserving of protection as privacy.

We are aware that there is confusion generally surrounding the public interest override, and not solely in relation to how it operates in respect of the privacy withholding ground (the Law Commission's OIA survey summary confirmed as much). However, we do not favour any attempt to prescribe exhaustively the public interest considerations in favour of disclosing official information. Section 4 of the OIA already foreshadows the key public interest considerations in favour of

disclosing information; myriad other public interest considerations can arise on the facts of a specific case, depending on the nature and content of the information at issue. A 'catch-all' public interest test, while some may find it challenging to apply in first-instance decision-making, is ultimately one of the strengths of the legislation.

…

Q132 Should consideration be given to a specific right of review or complaints process for those affected by the release of personal information under the OIA?

We agree that this issue needs to be addressed in the context of the review of the OIA because it does not relate solely to privacy and personal information. As the issues paper notes: *"there is a broader question of whether a remedy should be available to anyone who suffers detriment because insufficient attention has been paid to any of the withholding grounds under the OIA (prejudice to commercial position, or an obligation of confidence are two further examples)".* It would not seem reasonable to limit any right of review or complaints process to alleged breaches of privacy, and it would not seem appropriate to have different review or complaints mechanisms depending on the kind of harm caused by disclosure (e.g. breach of privacy, breach of confidentiality, commercial prejudice). Personal information released under the OIA is often an inextricable mix of personal information and official information simpliciter. The personal information will not be neatly severable.

In particular, we do not think it would be appropriate to extend the Privacy Commissioner's complaints process to OIA releases of personal information. The Privacy Act is subject to the OIA and the making available of official information in good faith under that Act is protected from suit by section 48 of the OIA. It would be inconsistent with the interrelationship between the two Acts to permit action to be taken under the Privacy Act for an OIA decision.

We consider that we already have the power under the OA to investigate complaints about allegedly unreasonable decisions made under the OIA by agencies subject to the OA. However, some agencies subject to the OIA are not subject to the OA. One notable limitation is that the Ombudsmen cannot investigate the decisions of the New Zealand Police[49]. Rather, these are undertaken by the Independent Police Conduct Authority. In addition, the Ombudsmen's ability to investigate complaints about OIA decisions by affected persons is unlikely to be widely known. Therefore, consideration could be given to extending the Ombudsmen's jurisdiction under the OIA to be able to investigate under the OA complaints by affected third parties concerning decisions by agencies not otherwise subject to that Act. This would address the concerns raised by this question and would, in our view, be more appropriate than removing section 48 protection for the limited purpose of privacy and creating rights of action under the Privacy Act.

We agree that consideration will need to be given to whether the existence of a complaints process will unduly inhibit release of official information. The need for

[49] Although the Police are subject to the OA, section 13(7)(a) precludes the Ombudsmen from investigating their decisions *"other than any matter relating to the terms and conditions of service of any person as a member of the Police".*

a remedy for people affected by disclosure of official information must be weighed against the important policy considerations behind the section 48 immunity. As noted by the High Court in *Director of Human Rights Proceedings v Commissioner of Police*[50]:

> *"[44] In our view, that accords with the language used in s48 and gives effect to the legislative intention to confer a wide immunity as evidenced by the 1987 amendment. In our view, it also accords with the policy of the Official Information Act. The purpose of the immunity is to ensure officials are not inhibited from releasing information."*

…

Q134 Should the OIA be able to be used by government agencies to obtain from each other information about individuals? If not, how should such a limitation be given effect?

We do not think it is appropriate to limit the ability of state sector agencies to use the OIA where the information sought includes personal information about individuals.

Our primary concern, as noted in the issues paper, is that many agencies and organisations are subject to the OIA. We have some difficulty in discerning any rationale for excluding official information that is personal information from the scope of an official information request solely because the request is made by such an agency. Why should the OIA not apply to a University's request to a school board of trustees; or to a local authority's request to a government department; or a state owned enterprise's request to a District Health Board, where the requests concern information about individuals? If the concern is information matching, this is prohibited by section 109 of the Privacy Act.

Furthermore, if public sector agency requests involving personal information are not considered under the OIA, then presumably they would be governed by the Privacy Act. This would only seem to exacerbate confusion around the interplay between the two pieces of legislation, particularly if a public sector agency request covers a mix of personal information about individuals and information about other matters (the latter would presumably continue to be covered by the OIA).

The OIA was enacted as a code to govern the availability of official information in response to a request for such information by any *"person"* (defined in a manner that would include public sector agencies). In principle, therefore, no distinction should be drawn between requesters based on the nature of the requester. Similarly no distinction should be drawn between requests for official information on the basis of it being or not being personal information, with the exception that has always been recognised that if the information is about the requester, the requester has statutory rights also enforceable in a Court.

In our view, so long as information is official information its availability should be determined under the OIA irrespective of who the requester may be.

[50] Chch CIV-2007-409-002984 [2008] NZHC 1286 (14 August 2008).