



# Submission

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## Submission on the Building (Earthquake-prone Buildings) Amendment Bill (23 April 2014)

### Introduction

1. This submission relates to the information management requirements of clause 275B of this Bill.
2. The Ministry, (presumably MBIE) must keep a “seismic capacity” register of buildings, which, unlike other registers required to be kept under the Building Act, is intended to have restrictions on access. Clause 275B of the Bill provides:

*“275B Restriction on public access to certain information on seismic capacity register*

*“(1) Despite section 273(2), the chief executive must restrict public access to any prescribed information in the seismic capacity register—*

*“(a) if required to do so by regulations made under section 401C(e); or*

*“(b) if the chief executive considers that it is not necessary, or it is not desirable, for the information to be publicly available.*

*“(2) Despite subsection (1), the chief executive may supply any information contained in the register—*

*“(a) to an entity in the State services (within the meaning of the State Sector Act 1988) if the chief executive is satisfied that it is necessary or desirable for the entity to have the information to assist in the exercise of its*

*powers or the performance of its functions under any enactment; and*

*“(b) to any person, with the permission of the person to whom the information relates.”*

3. I have concerns about this clause of the Bill which is a provision that represents a major departure from Official Information Act 1982 (OIA) principles. I am also unaware of it having been the subject of consultation with my Office, which is becoming a matter of some concern as this is not the first time where legislation affecting an Ombudsman’s functions has been proposed without consultation.
4. The clause would:
  - authorise regulations to be made to override the OIA; and
  - vest absolute power to prohibit access to any information in the register not mentioned in the regulations in the Ministry itself.
5. Normal legal and constitutional principles that govern the relationship between Acts and subordinate legislation is that subordinate legislation should not override Acts of Parliament.
6. Clause 275B is inconsistent with this principle, which section 52(3)(b) of the OIA, serves to emphasise by saving only those regulations made and in force before 1 July 1983.
7. Another key principle underlying the OIA, is that it should apply universally to all information held by government agencies. The Act is intended to ensure that information is protected from inappropriate disclosure where such disclosure would be prejudicial to the public interest (as identified in sections 6, 7 and 9 of the Act).
8. Further, where a government agency subject to the OIA refuses to make official information available to a requester, that decision is intended to be open to investigation and review by an Ombudsman.
9. Clause 275B, in vesting the power to prohibit access to information in the register is not only inconsistent with these latter two principles, but also confers greater powers on the Ministry than are vested in an Ombudsman. An Ombudsman’s opinion on whether information may be withheld from a requester must be formed in accordance with the OIA requirements, whereas the Ministry’s authority to maintain secrecy is based on the subjective opinion of a chief executive who “considers that it is not necessary, or it is not desirable, for the information to be publicly available”.
10. Nevertheless, if Parliament is of the view that the OIA does not adequately protect some specific information, it would seem to be more appropriate and consistent with the purpose of the OIA, to make specific legislative criteria restricting the availability of that information rather than to confer a seemingly limitless discretion to maintain secrecy on an agency in respect of information that would otherwise be subject to the usual provisions of the OIA. Such a course would enable a request for that information to be

refused in accordance with the OIA; create greater transparency in decision making; and enhance, rather than undermine one of the purposes of section 5 of the Act.

11. I am available to address the Committee on my submission.

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Chief Ombudsman