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Dear Andrew

### **Consultation on the Official Information Act (OIA)**

The Ministry of Justice is currently undertaking public consultation with a view to advising the Government on whether the OIA should be reviewed, or whether the focus should remain on practice improvements. Officials have asked to meet with me to discuss my views on the matter. The purpose of this letter is to set out my views in writing.

In essence, my view is that the fundamentals of the OIA, as a reactive access to information regime, are sound. I recognise the progress that has been made through practice improvement initiatives in recent years. In the event that the Government did decide to proceed with a review of the OIA, I set out the legislative reforms that I think would have the most impact.

### **A note on the LGOIMA**

It is important to note that New Zealand's official information framework includes both the OIA and the Local Government Official Information and Meetings Act (LGOIMA). The Acts are largely aligned, and it is important that they stay this way.

The Ministry may wish to consider the LGOIMA in this discussion about whether the OIA should be reviewed. All references to the OIA in this letter should also be taken as references to the LGOIMA, unless stated otherwise.

### **The fundamentals are sound**

I consider that the OIA is still very fit for purpose, insofar as it relates to the establishment of a regime for the reactive release of official information in response to requests. The harm-based, case-by-case approach reflected in the OIA remains a significant strength and advantage over comparative freedom of information (FOI) regimes overseas. I note that, when the Law Commission reviewed the legislation in 2012, it too *'endorse[d] the fundamentals of the legislation, such as the case-by-case approach to decision-making ... [and] the role of the Ombudsmen as the arbiter of complaints about decisions made under the OIA and LGOIMA'*.<sup>1</sup>

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<sup>1</sup> [The Public's Right to Know: Review of the Official Information Legislation](#) (NZLC R125, 2012) at 25.

## Progress has been made

I also want to acknowledge the progress that has been made in recent years, just with policy and practice initiatives. For example, the government has developed policies of proactively releasing Cabinet papers and summaries of ministerial diaries.

The State Services Commission (SSC) has, alongside my Office's publication of OIA complaints data, been publishing OIA request data for the core state sector, including numbers of requests, compliance with statutory or extended timeframes, and proactive release of OIA responses. This has seen average rates of compliance with statutory or extended timeframes rise from 87.6 percent in 15/16 to 95 percent in 17/18; and proactive release rates rise from 553 OIA responses per year in 16/17, to 752 per year in 17/18, to 1138 in just the first half of the 18/19 year. SSC has also published guidance on proactive release, developed a capability development toolkit for agencies, and run a regular forum for official information leaders and practitioners.

My Office has heeded the Law Commission's call to publish better guidance on the OIA, including 'hot button' topics like ministerial involvement in OIA decision making, the good government withholding grounds, charging, administratively challenging requests, and frivolous or vexatious requests. A 2019 external stakeholder survey showed that three-quarters of respondents are using this guidance 'often' or 'regularly'. Feedback is that the new guidance is clear, authoritative, and useful when responding to OIA requests.

My Office has also been tasked by Parliament with undertaking a programme of proactive reviews of agencies' official information practices (referred to in this letter as 'OI practice investigations'). Four reviews have been completed and a further eight are currently underway.<sup>2</sup> These systemic own-motion reviews, conducted under the Ombudsmen Act 1975 (OA), are a very effective way of helping agencies to improve their official information practices.

## General observations

While my Office can work with the Act as it is, and continue to push for improvements within that framework, it is apposite to make the following general observations, in order to inform the debate as to whether there should be a review of the OIA.

New Zealand's end-of-term report under the Open Government Partnership concluded there had been only '*marginal change*' as a result of the practice improvements to date.<sup>3</sup> Issues around OIA compliance have affected New Zealand's ranking in the World Press Freedom Index.<sup>4</sup> Users of the OIA have been advocating on social media to [#fixtheoia](#). There is a problem with how the Act is perceived as working, and consequently, with its credibility.

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<sup>2</sup> See <http://www.ombudsman.parliament.nz/resources-and-publications/latest-reports/official-information-practice-investigations-oipi> for more information.

<sup>3</sup> Booth, K *Independent Reporting Mechanism (IRM): New Zealand End-of-Term Report 2016–2018*, at 16.

<sup>4</sup> In 2017 and 2018, it noted '*the media continue to demand changes to the [OIA], which obstructs the work of journalists by allowing government agencies a long time to respond to information requests and even makes journalists pay several hundred dollars for the information*', see <https://rsf.org/en/new-zealand>, accessed 22 March 2019.

The OIA is 37 years old. The LGOIMA—which is largely modelled on the OIA—is 32 years old. Some people find the language and structure hard to understand (the guides that this Office has produced in recent years have been directed at translating it, in a sense). The Act also lacks some components that are now generally recognised as an important part of an effective and functioning FOI regime, and that comparable jurisdictions have adopted in recent years.

As you know, there was a full review of the OIA and LGOIMA in 2012. The Law Commission concluded that *'significant legislative amendment'* was required, and recommended that the OIA and LGOIMA be re-drafted and re-enacted.<sup>5</sup> It also recommended a considerable number of other changes, most of which were not accepted. While some things have changed since 2012, the Law Commission made some valid suggestions that would be worth revisiting. The remaining discussion sets out the reforms that I think would make the most difference. Many of these were also recommended by the Law Commission.

### **Reforms that would have the most impact**

In my view, the following reforms would have the most impact:

- [Expanded obligations on agencies](#) (including proactive release)
- [A statutory oversight office or office-holder](#)
- [Extending OI practice investigations to cover all agencies subject to the OIA and LGOIMA](#)
- [Reforms related to burdensome requests \(Chapter 9 of the Law Commission report\)](#)
- [Measures to preserve the primacy of the OIA](#)
- [Making certain conduct unlawful under the OIA](#)
- [Removing the eligibility requirement](#)

I would also take this opportunity to advocate for [extending the exclusion covering Ombudsman-agency communications](#).

### **Expanded obligations on agencies**

Currently the only obligations on agencies relate to the processing of individual requests. A number of other FOI regimes impose additional obligations on agencies. Examples include obligations:

- to proactively release information;
- to actively promote compliance with the agency's FOI obligations (for example, through the appointment of dedicated 'information officers');
- to actively promote awareness of the agency's FOI obligations;
- to develop appropriate policies and procedures;

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<sup>5</sup> See note [1](#) at 368, and recommendation 136 at 372.

- to ensure appropriate staff training;
- to collect statistical data that enables performance to be measured over time; and
- to report annually on steps taken to implement the agency's FOI obligations, including statistical data.

Some of these obligations are discussed in more detail below.

### **A proactive release obligation**

Most modern FOI regimes include a mandate and requirement for agencies to disseminate information about their functions and activities on a routine and proactive basis, even in the absence of a specific request.

The Law Commission recommended a duty on agencies to take all reasonably practicable steps to proactively make official information publicly available, taking into account matters such as the type of information held by the agency and the public interest in it, the agency's resources, and any relevant government policy.<sup>6</sup> The Commission also recommended that agencies develop and report against proactive release strategies,<sup>7</sup> which is a point I routinely raise in my official information practice investigations. The Commission considered that leaving proactive release to government policy, rather than mandating it in legislation, would be a '*missed opportunity*'.<sup>8</sup>

### **Information officers**

The appointment of dedicated 'information officers', responsible for ensuring compliance with the OIA, would also help. In the Australian Capital Territory (ACT), for example, the Freedom of Information Act 2016 requires chief executives to appoint information officers, to deal with 'access applications', and give effect to the agency's proactive release obligations.<sup>9</sup> This is similar to the requirement for 'privacy officers' under the Privacy Act 1993.<sup>10</sup>

### **Statistical data**

In my view, uniform collection and reporting of data on OIA requests is likely to have the single biggest impact on improving agency performance. This is evidenced by the impact of the release that has occurred to date (discussed above under [Progress that has been made](#)).

However, there are some gaps in the existing regime. It covers only central government agencies. It does not include Ministers, or agencies subject to the LGOIMA. By recording collectively whether requests were met in the statutory or extended time limit, it obscures how many extensions were made, and for how long. It does not show how many requests were met in full,

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<sup>6</sup> See note [1](#) recommendation 85 at 267.

<sup>7</sup> See note [1](#) recommendation 86 at 267.

<sup>8</sup> See note [1](#) at 263.

<sup>9</sup> See s 19 Freedom of Information Act (ACT Aus.).

<sup>10</sup> See s 23 Privacy Act.

met in part, or refused, or the reasons why. This means we cannot do the kind of comparative analysis that tells us whether the government is becoming more or less transparent over time.<sup>11</sup>

The Law Commission recommended a new statutory provision stating that regulations may be made specifying which statistics must be kept by agencies.<sup>12</sup> In Australia, there is a statutory basis for the collection of FOI statistics at federal and state levels. Whether in primary or secondary legislation, it would be immensely beneficial to see something similar here.

### **A statutory oversight office or office-holder**

The Ombudsman is the enforcement mechanism under the OIA. My Office has the skill and expertise developed over 30+ years; it is trusted, effective, and authoritative. However, there is a definite need for greater oversight, coordination and leadership, across both central and local government sectors, in relation to matters other than the investigation of complaints.

In 1997, the Law Commission said one of the major problems with the OIA was *'the absence of a co-ordinated approach to supervision, compliance, policy advice and education regarding the Act and other information issues'*.<sup>13</sup> It recommended that the Ministry of Justice be given responsibility for ensuring a more co-ordinated and systematic approach to the functions of oversight, compliance, policy review, and education in relation to the Act. That recommendation was not accepted.

The same issue came through in the Law Commission's 2012 review. According to the Commission, *'the need to establish a high level leadership role for official information within Government's information management structure is now compelling in order to avoid problems and take advantage of opportunities'*.<sup>14</sup> It recommended the establishment of a statutory office or office holder responsible for policy advice, review, promotion of best practice, statistical oversight, oversight of training for officials, oversight of guidance for requesters, and preparation of an annual report.<sup>15</sup>

SSC has played more of an oversight role in recent years in relation to the core state sector. However, it cannot oversee Ministers of the Crown or local authorities. By way of example, the OIA request data published by SSC does not include data on requests to Ministers; nor does it incorporate local authorities. Later this year, I will begin publishing LGOIMA complaint data. However, there is unlikely to be any companion data on LGOIMA requests, because no agency has the mandate to collect and publish such data. The Department of Internal Affairs did not consider that it could assist in this role without legislative change. Accordingly, to be effective at both central and local government levels, it would be worth considering an oversight office or office-holder that is established and authorised to act by law.

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<sup>11</sup> For example, see *'How a flawed freedom-of-information regime keeps Australians in the dark'*, The Guardian (Australia), <https://www.theguardian.com/australia-news/2019/jan/02/how-a-flawed-freedom-of-information-regime-keeps-australians-in-the-dark>, accessed 25 March 2019.

<sup>12</sup> See note [1](#) recommendation 110 at 318.

<sup>13</sup> [Review of the Official Information Act 1982](#) (NZLC R40, 1997) at xi.

<sup>14</sup> See note [1](#) at 297.

<sup>15</sup> See note [1](#) recommendation 107 at 317, and recommendation 115 at 325.

## **Extending OI practice investigations to cover all agencies subject to the OIA and LGOIMA**

As noted above, I have been tasked by Parliament with conducting systemic own-motion investigations, under the OA, into agencies' official information practices. However, not all agencies subject to the OIA or LGOIMA are subject to the OA.

One notable exception is the New Zealand Police. Because the Police are not subject to the OA, I am presently unable to review the official information practices of that agency, outside of a specific complaint about an OIA decision that has been made. This is despite the fact that the Police regularly receive the most OIA requests and complaints of any agency. For example, Police completed more OIA requests in the six months to December 2018 than every other agency combined.<sup>16</sup>

It would assist to ensure overall scrutiny and accountability of agencies' official information practices if all agencies subject to the OIA or LGOIMA were made subject to the OA, but only for the purposes of review of their official information practices.

## **Reforms related to burdensome requests (Chapter 9 of the Law Commission report)**

The Law Commission, which devoted a chapter of its 2012 review to 'requests and resources', noted that *'agencies are sometimes put under considerable pressure by certain types of requests, and rightly wonder whether something can be done to keep within reasonable bounds the resources they need to expend in meeting those requests'*.<sup>17</sup> It made a number of recommendations, including amendments to the 'substantial collation or research' and 'frivolous or vexatious' refusal grounds. I have seen agencies struggle in a very real way with requests that, on their own or as part of a pattern, impose an unwarranted and excessive strain on the agency's resources, and I think there would be merit in giving further consideration to the Law Commission's suggestions.

## **Measures to preserve the primacy of the OIA**

One of the greatest threats to the OIA is the (sometimes unintended) impact of other legislation.

For example, an issue arose recently with respect to the interaction between the OIA and the Inquiries Act 2013. Section 15(1)(a) of the Inquiries Act permits the making of orders forbidding publication of evidence or submissions presented to an inquiry. Any matters subject to a section 15(1)(a) order are then excluded from the definition of *'official information'*.<sup>18</sup>

In a recent case, a section 15(1)(a) order was made in respect of advice from the State Services Commission to the Ministers of State Services and Police on the appointment of a Deputy Police Commissioner. The order remains in effect for 50 years. This information *was* *'official information'*, as departmental advice to Ministers ought to be, but then ceased to be so, for a period of 50 years. It could no longer be requested under the OIA, and release would have

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<sup>16</sup> See <http://www.ssc.govt.nz/official-information-statistics>, accessed 1 April 2019.

<sup>17</sup> See note 1 at 151.

<sup>18</sup> See s 32(2)(a) Inquiries Act and paragraph (ha) of the definition of *'official information'* in section 2 of the OIA.

constituted an offence under the Inquiries Act.<sup>19</sup> In this instance, the OIA was significantly undermined.

Paragraph 7.42 of the Cabinet Manual requires that *‘Officers of Parliament should be consulted in their areas of interest as appropriate: for example, the Office of the Ombudsmen over the application of the [OA] to a new agency’*. It may be that the example provided (of consulting the Ombudsman about the application of the OA to a new agency) has limited the understanding of when my Office should be consulted. I note that consultation with the Ombudsman is also suggested in the Legislation Guidelines but, again, this concerns the creation of a new public body.<sup>20</sup>

I am strongly of the view that the Ombudsman should be consulted on any legislation that could impact on the operation of OIA, but this does not always happen. For example, we were not consulted on the Local Government Regulatory Systems Amendment Act 2019, which came into force on 21 March 2019, and amended the definition of *‘working day’* in LGOIMA, so that it no longer aligns with the definition in the OIA (or the Privacy Act).<sup>21</sup> This has the potential to cause significant confusion, particularly where a request has to be processed under both the LGOIMA and the Privacy Act, and for bodies that are subject to the OIA and the meetings provisions in LGOIMA (like school boards of trustees), and will necessitate a lot of unnecessary work for my Office.

Review of the OIA would provide an opportunity to include stronger inducement to consult my Office when legislation could impact directly or indirectly on the OIA. I would also support a change to the OIA that underlines its primacy. For example:

- The Queensland Right to Information Act 2009 says *‘this Act overrides the provisions of other Acts prohibiting the disclosure of information (however described)’*.<sup>22</sup> It has an exemption for information the disclosure of which would be prohibited by specified enactments.<sup>23</sup>
- The New South Wales Government Information (Public Access) Act 2009 says *‘the Act overrides a provision of any other Act or statutory rule that prohibits the disclosure of information (whether or not the prohibition is subject to specified qualifications or exceptions), other than a provision of a law listed in Schedule 1 as an overriding secrecy law’*.<sup>24</sup>

A provision of this nature would require a clear and explicit intention for legislation to override

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<sup>19</sup> See s 29(1)(e) Inquiries Act.

<sup>20</sup> See paragraph 20.5, pages 98–99, of the Legislation Guidelines (2018).

<sup>21</sup> See s 29(3), which excluded the relevant regional anniversary day and days between 20 December and 10 January from the definition of *‘working day’*.

<sup>22</sup> See s 6 Right to Information Act (QLD Aus.).

<sup>23</sup> See s 12 Schedule 3 Right to Information Act (QLD Aus.).

<sup>24</sup> See s 11 Government Information (Public Access) Act 2009 (NSW Aus.).

the OIA, consistent with its status as a ‘*constitutional measure*’.<sup>25</sup>

### **Making certain conduct unlawful under the OIA**

If the Government was to review the OIA, it may also wish to consider whether to follow the international example of introducing offences under that Act. There were offence provisions originally, but these related to obstruction of the Information Authority, and they expired, in accordance with the sunset clause applying to the Authority (section 53), in 1988. The offence provisions in the OA apply to the OIA.<sup>26</sup> However, these relate to obstruction of the Ombudsman (for which there is a paltry fine of \$200), rather than non-compliance with an agency’s obligations under the OIA.

The Crimes Act 1961 includes offences of wrongful communication, retention, or copying of official information that would prejudice the security or defence of New Zealand,<sup>27</sup> and the corrupt use or disclosure of official information to obtain an advantage or a pecuniary gain.<sup>28</sup> The Summary Offences Act 1981 includes an offence of unauthorised disclosure of certain official information likely to cause specified harms.<sup>29</sup> However, these provisions focus on the unlawful release of information.

There is presently no offence relating to wilful interference with the lawful operation of the OIA. Potential offences include failing to include information that a person knew to exist; intentionally providing misleading records or information (or recklessly failing); unauthorised concealment or destruction of records; and directing unlawful action, or recklessly/knowingly making a decision contrary to the OIA.

It is helpful to consider the following offences provisions in recently updated Australian state FOI laws.

- The ACT legislation establishes offences of making a decision contrary to the Act, giving a direction to act contrary to the Act, failing to identify information, and improperly influencing the exercise of functions under the Act. The penalty is \$ AUD15,000 for an individual and \$AUD 75,000 for an organisation.<sup>30</sup>
- The New South Wales legislation establishes offences for acting unlawfully or directing an unlawful action, improperly influencing a decision, and destroying, concealing or altering records to prevent disclosure. The penalty is \$AUD 11,000.<sup>31</sup>
- The Tasmanian legislation establishes offences for deliberately obstructing or unduly influencing a decision maker in the exercise of their decision making power under the Act,

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<sup>25</sup> See *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 at 391.

<sup>26</sup> See ss 29 and 35 OIA and ss 28 and 38 LGOIMA.

<sup>27</sup> See s 78A Crimes Act.

<sup>28</sup> See s 105A Crimes Act.

<sup>29</sup> See s 20A Summary Offences Act.

<sup>30</sup> See Part 9 Freedom of Information Act 2016 (ACT, Aus.).

<sup>31</sup> See Part 6 Division 2 Government Information (Public Access) Act 2009 (NSW Aus.)

and deliberately failing to disclose information which is the subject of a request, in circumstances where the information is known to exist, other than where non-disclosure is permitted in accordance with the Act or any other Act. The penalty is \$AUD 7950.<sup>32</sup>

- The Queensland legislation establishes offences for directing someone to make the wrong decision or to act contrary to the Act, and providing false or misleading information to the Information Commissioner. The penalty is \$AUD 13,055.<sup>33</sup>

I note that the introduction of similar provisions in New Zealand would send a strong signal that people cannot willfully interfere with the lawful operation of the OIA, with impunity.

### **Removing the eligibility requirement**

The eligibility requirement in section 12 of the OIA would benefit from review. There is no similar eligibility requirement under the LGOIMA. The eligibility requirement in the Privacy Act has also been removed. Comparable jurisdictions like the United Kingdom, Ireland, the United States, and Australia (at federal and state levels) do not limit the eligibility of requesters. The Law Commission recommended removing the eligibility requirement in the OIA, noting it is hard to enforce in any event because of the ability to make requests by proxy.<sup>34</sup> My sense is that it is open to misuse by creating an unnecessary hoop that requesters have to jump through, and it should go.

### **Extending the exclusion covering Ombudsman-agency communications**

Lastly, I suggest extending the exclusion to the definition of *'official information'*, that currently covers *'correspondence or communication ... between the ... Ombudsmen and any [agency] which relates to an investigation'*,<sup>35</sup> to correspondence and communications exchanged during preliminary enquiries in relation to a complaint, or where formal resolution of a systemic issue was initiated.

Not all complaints are investigated. The OA specifically envisages that preliminary enquiries will be made to determine whether an investigation is necessary.<sup>36</sup> However, the OIA does not exclude these preliminary exchanges between the Ombudsmen and agencies.

In the past, we have faced situations where we have identified a complaint or serious or systemic issue that warrants investigation, and we wish to enter into discussions with the agency to see whether the matter can be resolved expeditiously without the need for an investigation, but the agency either:

- does not wish to enter into resolution discussions as they would be discoverable under the OIA; or

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<sup>32</sup> See s 50 Right to Information Act 2009 (TAS. Aus.).

<sup>33</sup> See Chapter 5 Part 2 Right to Information Act 2009 (QLD Aus.).

<sup>34</sup> See note [1](#) recommendation 134 at 366.

<sup>35</sup> See paragraph (i) of the definition of *'official information'* in s 2 of the OIA / paragraph (b)(iii) of the definition of *'official information'* in s 2 of the LGOIMA.

<sup>36</sup> See s 17(f)(i) OA.

- feels constrained in resolution discussions as they would be discoverable under the OIA, resulting in a sub-optimal resolution, or no resolution.

Engaging at an investigation level is much more involved and resource intensive for both the agency and the Ombudsman than addressing an issue by way of resolution, and should be reserved for those matters which the agency is unable or unwilling to resolve itself.

### **Conclusion**

I trust that the Ministry finds these comments helpful in preparing advice for the Government. I am happy to be consulted at any point on the shape of that advice.

I note (and endorse) the Ministry's decision '*to publish all written submissions on the Ministry of Justice's website*'. I confirm that I have no objection to the release of this letter proactively or in response to an OIA request.

Yours sincerely



Peter Boshier  
Chief Ombudsman