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Chief Ombudsman Peter Boshier

Ready or not?

A report on the public sector, the OIA, and the pandemic

Te Kaitiaki Mana Tangata Aotearoa
The Ombudsman New Zealand

September 2022

A report on the Chief Ombudsman's follow up investigation to *Not a game of hide and seek* - an investigation into the practices adopted by central government agencies for the purpose of compliance with the Official Information Act 1982.

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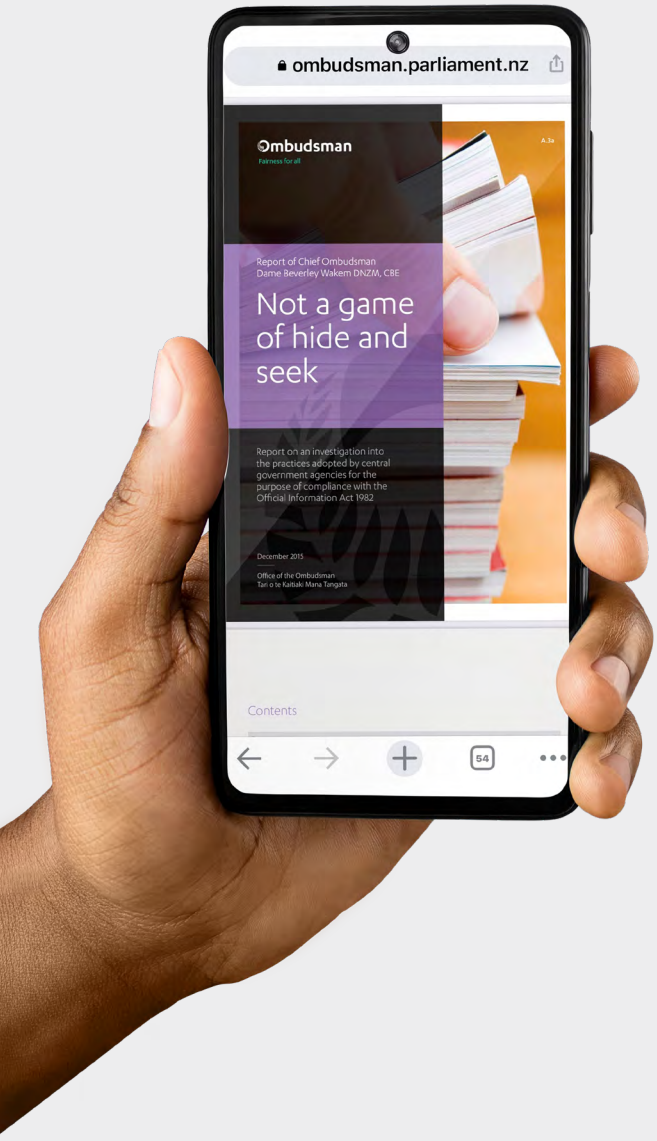


Ready or not?

A report on the public sector, the OIA and the pandemic.

Background

In 2015, my predecessor, Dame Beverley Wakem, carried out an investigation to:

- examine the attitudes, policies, practices, and procedures adopted by government agencies generally, in order to establish how well they were complying with the requirements of the Official Information Act 1982 (OIA);[1]
- identify good practices, areas of weakness or vulnerability, and practices that could give rise to non-compliance; and
- recommend improvements where needed.

As it was not practicable to examine in detail the practices of all government agencies subject to the Ombudsman's jurisdiction, 12 government agencies were selected to investigate as being representative of central government agencies.[2] A further 75 agencies and 27 Ministers' offices subject to the OIA were invited to provide information via a survey. The 12 agencies ultimately were provided

1 See Official Information Act 1982

2 The 12 government agencies selected were:

- Accident Compensation Corporation | Te Kaporeihana Āwhina Hunga Whara
- Department of Corrections | Ara Poutama Aotearoa
- Ministry of Education | Te Tāhuhu o te Mātauranga
- Ministry of Foreign Affairs and Trade | Manatū Aorere
- Ministry of Health | Manatū Hauora
- Ministry of Justice | Te Tāhū o te Ture
- New Zealand Customs Service | Te Mana Ārai o Aotearoa
- New Zealand Defence Force | Te Ope Kātua o Aotearoa
- NZ Transport Agency | Waka Kotahi
- Ministry of Social Development | Te Manatū Whakahiato Ora
- Ministry of Transport | Te Manatū Waka
- Public Service Commission | Te Kawa Mataaho

with individual reports, and although these reports were not published, the agencies were provided with action points which, if implemented, would lead to improvements in OIA practice.

The resulting report, titled *Not a game of hide and seek*, was tabled in Parliament and subsequently published in December 2015.[3]

In November 2019, I decided that it was timely to revisit the 12 representative agencies involved in *Not a game of hide and seek*, by initiating a follow-up investigation to determine the current state of OIA practice and culture in these central government agencies.

My investigation was well underway when an unprecedented event occurred: the World Health Organization announcement, in March 2020, of a global pandemic. In such extraordinary circumstances, it could be tempting to dismiss the OIA as a low-priority, compliance activity—one of the first things to be set aside to free resources to focus on 'more crucial' demands. On the contrary, I considered that effective administration of the OIA (and its local government counterpart, the Local Government Official Information and Meetings Act 1987),[4] as well as a strong focus on the proactive release of information, is never more important than in an extreme situation. It is crucial that the information on which impactful decisions are based is available to, or can be requested by, the public so the rationale for decision making is transparent and open to scrutiny by those whom the decisions affect.

Accordingly, I identified an opportunity to expand my inquiries to include consideration of how resilient the official information policies, practices, and systems of these core government agencies were during the COVID-19 pandemic and lockdowns. This report therefore considers the importance of this constitutional measure being able to operate as intended in extreme and challenging circumstances, in order to protect our democracy. It also emphasises the need for strong, clear leadership and messaging by those in agencies, as well as the need for an effective independent oversight agency.

3 Beverley Wakem, *Not a game of hide and seek: Report on an investigation into the practices adopted by central government agencies for the purpose of compliance with the Official Information Act 1982* (December 2015). See www.ombudsman.parliament.nz

4 See Local Government Official Information and Meetings Act 1987

Introduction

The ability for members of the public to access government information is fundamental to the democratic process. Without accurate and timely information about the work of the government, the public cannot participate in government processes in a meaningful way. The Official Information Act 1982 (OIA)[5] is a core part of New Zealand's constitutional and democratic framework, and a key mechanism by which members of the public can exercise their fundamental human right, reflected in section 14 of the New Zealand Bill of Rights Act 1990,[6] to seek and receive information of any kind in any form.

The public's ability to access information is also fundamental to accountability through transparency. In 2021, New Zealand ranked first equal in Transparency International's global Corruption Perceptions Index.[7] This is the third consecutive year in which New Zealand has ranked first or first equal. In the 27-year history of the Index, New Zealand has never been ranked lower than fifth in the world. New Zealand's continued high performance in this area is due, in part, to laws such as the OIA which promote open, transparent, and accountable government.

5 See Official Information Act 1982

6 See Bill of Rights Act 1990, s 14

7 Transparency International: The global coalition against corruption, 'Corruption Perceptions Index 2021'. See www.transparency.org

We can be proud of our reputation for transparency and openness, but we should not become complacent. In this spirit, in November 2019, I decided that it was timely to revisit the 12 representative agencies involved in *Not a game of hide and seek*, by initiating a follow-up investigation to determine the current state of OIA practice and culture in these central government agencies, and whether agencies had implemented my predecessor's suggestions and recommendations to improve OIA practices.

I am pleased that my investigation has shown evidence of a core public service that is increasingly transparent and open. Overall, the agencies I investigated are embedding the proactive release of information into their business-as-usual practices, and they have demonstrably improved reported OIA timeliness compliance.

However, it is evident that improvements can still be made. Continuous and rigorous attention to meeting the objectives of official information legislation is required in order for agencies to meet their stewardship obligations in relation to the official information system. This report identifies opportunities for improvement that will enable Chief Executives (CEs) to achieve this.

Although it was not anticipated at the time my investigation began, the COVID-19 pandemic quickly became a major backdrop, which changed the shape of the investigation.

In the early stages of the pandemic in March 2020, I was invited to a meeting with senior officials on the topic of business continuity in the event of a severe strain on resources due to the pandemic. CEs and other senior officials were encouraged to establish arrangements that would ensure their core business functions could continue if staff numbers were seriously depleted. CEs were considering what tasks, including responding to OIA requests, might need to be deprioritised, should a significant number of staff be unable to work.

In the period that followed, a number of agencies contacted my office seeking advice on how OIAs should be handled, and whether there were any changes to the timeliness requirement of the OIA. I published a statement and guidance for agencies in March and April 2020 respectively, which emphasised the importance of ensuring there was transparency in the Government's actions and decisions during this time.[8]

8 Office of the Ombudsman | Tari o te Kaitiaki Mana Tangata, 'Chief Ombudsman's statement on official information response times during the COVID-19 emergency' (press release, 24 March 2020). See www.ombudsman.parliament.nz Also *FAQs about official information requests during COVID-19* (21 February 2022). See www.ombudsman.parliament.nz

In the early stages of the pandemic, the Ministry of Justice | Te Tāhū o te Ture, in its role as administrator of the OIA, sought my input on any modifications I might suggest to the requirements of the OIA in the event a pandemic notice was issued. (I note that the Ministry indicated to me that it was undertaking the same review of all legislation it administered, not just the OIA.) Ultimately, and in concert with the Solicitor-General, I advised the Ministry that I did not consider any modifications to legislative requirements in the OIA were necessary, because existing provisions were sufficiently flexible—such as allowing for extensions in limited circumstances, while requiring agencies to make and communicate decisions as soon as reasonably practicable. The Ministry accepted this advice and, as a result, I am advised that no changes to the OIA were suggested to Ministers.

It is sobering that there was a possibility that the requirements of the OIA—the key legislative document that allows government information to be requested and supplied—could have been modified. In hindsight, I am convinced that this also highlights the importance of an independent oversight agency willing and able to ensure that this key constitutional instrument was protected and operating during this time. There was a huge increase in demand for information about the Government's actions and decision making during the pandemic, which is clearly shown in the OIA reporting statistics for the period covering the 2020 lockdown.[9]

As a corollary, there was an increase in the number of complaints I received over the same period. I wish to highlight that an increase in complaints does not necessarily indicate agencies are performing poorly. Simply, an increase in the number of requests to agencies will inevitably result in proportionate numbers of requesters who wish to challenge decisions. They have every right to do so, and it is crucial to continuing public trust and confidence that requesters can seek recourse from an independent oversight agency.

The increase in complaints made to me demonstrates that, in addition to the increased demand for information, there was a fundamental requirement for accountability and transparency during a period in which the Government was wielding extraordinary executive powers.

I consider that mechanisms which facilitate information disclosure, such as the OIA and the proactive release of information,[10] were crucial during the COVID-19 pandemic. Effective democratic accountability relies on the public having confidence in its government. To promote and maintain trust, government institutions must ensure that accurate information is released in a timely way. The free flow of information is also what allows the public to meaningfully participate in government decision making and promotes the accountability of Ministers and officials. The pandemic provided a perfect example of the importance and value of regular, open, and transparent information sharing on matters that affect the people of New Zealand, as well as the need for a potent, independent watchdog such as the Ombudsman.

9 Public Service Commission | Te Kawa Mataaho, *OIA Statistics 1 January 2020 to 30 June 2020, Official Information Statistics*. See www.publicservice.govt.nz

10 Including compliance with the Public Records Act 2005 and agencies' proactive release practices.

It is also my view that the COVID-19 pandemic presented the greatest challenge to the OIA that it has weathered in all its 40-year history, which we celebrate this year. The fact that my investigation into OIA compliance and practice covered the onset of the pandemic and subsequent lockdowns provided an opportunity to determine not only how agencies' OIA-handling processes coped with a once-in-a-generation challenge, but also the robustness and flexibility of the OIA itself. This report summarises the key issues I found in the 12 agencies I investigated.

I was able to ask, particularly in the face of a crisis, whether the OIA—one of the key constitutional measures for our democracy—is fit for purpose and able to meet the moment. Further, were agencies ready and able to comply with their obligations under the OIA to ensure that public trust and confidence in their actions could be maintained through this time? Were they ready for what was coming… or not?

Peter Boshier
Chief Ombudsman

28 September 2022

Terminology

A key aspect of my information gathering involved seeking information from the agency via a questionnaire, and seeking information from staff via an online survey before lockdown. I extended my investigation to include consideration of agencies' practices during the lockdown. After the lockdown, I asked agencies to complete another questionnaire, and staff to complete another survey. For clarity, I have outlined below how I will refer to these throughout my report:

- A questionnaire sent to agencies in late 2019 seeking information about policies, procedures and practices (I will refer to this throughout my report as 'my initial questionnaire').
- A questionnaire sent to agencies in mid-2020 seeking information about policies, procedures and practices *during lockdown* (I will refer to this throughout my report as 'my post-lockdown questionnaire').
- A survey of staff in late 2019 seeking their views about culture, policies, practices and procedures (I will refer to this throughout my report as 'my initial survey').
- A survey of staff in late 2020 seeking their views about culture, policies, practices and procedures *during lockdown* (I will refer to this throughout my report as 'my post-lockdown survey').

Individual agency reports are published on my website. These include the terms of reference and indicators used in my investigation.

Accident Compensation Corporation | Te Kaporeihana Āwhina Hunga Whara

Department of Corrections | Ara Poutama Aotearoa

Ministry of Education | Te Tāhuhu o te Mātauranga

Ministry of Foreign Affairs and Trade | Manatū Aorere

Ministry of Health | Manatū Hauora

Ministry of Justice | Te Tāhū o te Ture

New Zealand Customs Service | Te Mana Ārai o Aotearoa

New Zealand Defence Force | Te Ope Kātua o Aotearoa

NZ Transport Agency | Waka Kotahi

Ministry of Social Development | Te Manatū Whakahiato Ora

Ministry of Transport | Te Manatū Waka

Public Service Commission | Te Kawa Mataaho

Executive summary

Leadership and strategy

Messaging from senior leaders

I have stated in past official information practice investigations that senior leaders set the tone, culture, and conduct of their agency. To that end, it is my expectation that senior leaders clearly signal their agency's commitment to openness and the principle and purposes of the OIA to their staff and to the public. In addition to regular statements reinforcing their approach and expectations around information disclosure, leaders should model openness through their actions. These actions should include providing staff with systems, support, and training to facilitate the release of information.

I found that there has been an overall improvement in staff's perception of agency CEs' messaging around disclosure of information under the OIA, and openness more generally, since my predecessor's investigation. This is immensely encouraging. Leaders should ensure their words and actions promote openness on a continuing basis, in order to build an organisational culture that is open to the release of information.

Another improvement I noted since the 2015 investigation was the prominence of OIA content on agencies' websites. All agencies I investigated now have dedicated OIA webpages that contain helpful information for those seeking

official information, including links to proactively released information. This is an overt message to the public about agencies' commitment to providing access to official information. Some agencies, however, had limited data about the type of information they produce, and such data would help requesters to formulate targeted requests.

Agencies should:

- continue to build a strong culture around openness through regular messaging from senior leaders to staff, and through leaders modelling transparency; and
- ensure websites contain information that helps requesters formulate their requests and find published information.

OIA reporting to drive performance improvement and inform strategy

Stewardship of an agency's official information system requires that agency leaders have clear oversight of their agency's OIA compliance and practices. This can be achieved through regular OIA performance reporting to senior leaders. Analysis of this information should also be used to inform an agency's strategic framework around OIA compliance and transparency.

I found that many agencies' internal OIA reporting was focused mainly on the timeliness statistics reported to the Public Service Commission | Te Kawa Mataaho (Te Kawa Mataaho). Many agencies are missing the opportunity to collect a wider range of information about their OIA-handling process and outcomes. However, the point is not to simply collect information for its own sake, but to analyse and use it as a tool to drive performance improvement and improve OIA-handling capability.

Te Kawa Mataaho has announced that it will collect and publish an expanded range of OIA data, in addition to the current metrics of OIA timeliness and the number of OIA responses published by each agency. I consider this is a step forward in the transparency and accountability of public sector agencies' OIA performance, and I anticipate the expanded reporting required from Te Kawa Mataaho will help drive improvements in these aspects. These performance measures should also be used in CEs' performance objectives to reflect their ultimate accountability for their agency's OIA performance.

I also suggest agencies include media information requests in the data they report to Te Kawa Mataaho, to reinforce that these requests are subject to the OIA and to present a truer picture of the agency's OIA workload and performance.

Responding to OIA requests and proactively releasing information is part of an agency's core business, and OIA compliance does not happen by accident. Just like any other aspect of performance, agencies must have a strategy to help ensure they achieve their objectives relating to transparency and OIA

compliance. As an accountability measure, an agency's strategy around OIA compliance and the proactive release of information should feature in public-facing corporate documents.

Agencies should:

- collect and analyse a greater range of OIA data to drive performance improvement and inform strategy;
- ensure that their CEs meet stewardship performance objectives, by ensuring they actively seek reporting on wider OIA performance metrics to evaluate and monitor the performance of their agencies; and
- include media information requests in OIA reporting.

Proactive release of information

Staff survey respondents indicated a maturing culture within agencies around the proactive release of information. This is reflected in the improvement in the percentage of OIA responses proactively released by agencies since this measure was first reported by Te Kawa Mataaho in 2016/2017, and in an increase in the number of agencies with proactive release policies since my predecessor's investigation in 2015.

A number of factors may have contributed to this improvement. In addition to improved messaging from agency leaders around openness, strong leadership around proactively releasing information has also been demonstrated at the state sector leadership level by Te Kawa Mataaho. The Government's requirements that agencies publish Cabinet material and information about COVID-19 may also have contributed to agencies' increasing acceptance of proactively releasing information.

Proactively releasing information aligns with one of the purposes of the OIA; to increase progressively the availability of official information. It may also reduce agencies' OIA workload by pre-empting some requests, or helping requesters make more targeted requests. Agencies' proactive release practices should be underpinned by comprehensive policy. This helps to embed and safeguard agencies' practices, ensuring that they continue even in the absence of key staff or when the agencies' resources are challenged.

In contrast to 2015—when none of the 12 agencies had proactive release policies—almost all the agencies in my current investigation had a policy to guide their proactive release practice. Although this is excellent progress, there were notable gaps in some of these policies. Some did not include guidance around the timing of publication or how to ensure information was released in a way that optimised its accessibility. Some policies were very narrow in scope—for example, relating only to the agency's process around the proactive release of Cabinet material or OIA responses.

Agencies should:

- review and update proactive release policies to ensure they are comprehensive and focused on the principles and purposes of the OIA;
- publish their proactive release policies; and
- provide links to proactively released information from their OIA webpages.

Culture, systems and practices

Information management and record-keeping

Good information management (IM) systems and record-keeping practices are fundamental drivers of OIA compliance. The existence of such systems and practices helps to ensure that all information within the scope of an OIA request is identifiable and retrievable by staff tasked with preparing responses to OIA requests.

As stewards of their agencies' IM practices, CEs and senior leaders must promote a culture of robust record-keeping and compliance with the Public Records Act 2005 (PRA).[11] This should include ensuring that staff have access to, and attend, ongoing training in these areas. Record-keeping training should convey the importance of the free flow of information for New Zealand's democratic process, as well as highlighting the link between good record-keeping and the agency's ability to fulfil its OIA obligations.

I found evidence of vulnerability within the IM systems and/or record-keeping practices of all 12 agencies. Disappointingly, several agencies appeared to have acted contrary to law in relation to section 17 of the PRA, which requires that agencies create, maintain, and store records accessibly.[12]

Many agencies' staff noted that their IM systems were cumbersome, or that the array of systems made it unclear which should be used for what information. Some staff said that, as a result of these complexities, information would be stored outside the shared systems. I am concerned about the impact this may have on the retrieval of information when it is requested under the OIA. Where IM systems have vulnerabilities, the risk may be mitigated by ensuring staff have sound record-keeping practices and good knowledge of the use of IM systems to store and to retrieve information. It is troubling, then, that insufficient training on IM and record-keeping was another issue identified in most of the agencies investigated, with eight of the 12 agencies given action points relating to record-keeping training.

11 See Public Records Act 2005

12 See Public Records Act 2005, s 17

I noticed a commonality in the record-keeping culture in almost all Media Teams in the agencies I investigated. When I requested sample media files from the agencies, I frequently found that records were either missing or could not be easily retrieved by the agencies. It appears that sound record-keeping is not embedded in their work processes, nor promoted by leaders as a vital activity.

I saw a similar issue in some OIA Teams. Those teams were generally good at keeping records of OIA requests, responses, and internal emails, but most agencies I investigated did not appear to have a strong culture of keeping records of oral discussions, nor of the rationale behind OIA decision-making.

Agencies should:

- actively promote a strong culture around record-keeping, particularly in their Media Teams and in relation to decision-making processes in OIA Teams;
- ensure record-keeping training is available to staff on an ongoing basis. Training should highlight the link between record-keeping practices and compliance with relevant legislation, and the importance of the free flow of information to New Zealand's democratic process;
- identify whether new information-sharing platforms are in use following COVID-19 lockdowns, and ensure record-keeping requirements resulting from these are understood by staff and embedded in their policies and practices; and
- develop systems to ensure all information within the scope of an OIA request is identified, particularly where vulnerabilities in their IM systems have been identified.

OIA handling by Media Teams

Most of the agencies I investigated have a Media Team responsible for handling information requests from the news media. These Media Teams operate separately from centralised OIA Teams, which typically process information requests from the public. While separating requests in this way is not unreasonable in itself, I am concerned that some of the practices associated with this method of request handling has helped to create a false perception that media requests are not OIA requests and, as a result, that agencies do not need to adhere to OIA obligations when handling them.

I was disappointed to see multiple examples of agencies' Media Teams breaching section 19 of the OIA, which states that, when refusing a request, agencies must give to the requester the reason for the refusal and inform them of their right to complain to me.[13] This exemplifies, and is the inevitable result of, what appears to be a widespread misapprehension that media information requests do not fall under the OIA. This perception is simply incorrect.

13 See Official Information Act 1982, s 19

I consider that Media Teams require a fundamental cultural change, which should be driven and supported by agency leaders, and may be aided through targeted training for staff in those teams. The requirements under the OIA when refusing a request are not onerous and do not need to impede efficient handling of media information requests. Indeed, I have found that the additional steps agency OIA Teams often go through are entirely self-imposed—created by the agency and not a requirement of the OIA itself. The process for considering and responding to an OIA request is only as difficult or painful as the agency makes it for itself.

Throughout my investigation, I note there appears to be a growing mistrust within the news media of agencies' mechanisms for providing information and, most concerningly, a growing scepticism about the utility of the OIA itself. This has revealed itself in a number of high-profile news articles.

This scepticism appears to have been fuelled by the false dichotomy between 'media requests' and 'OIA requests' drawn by many public sector agencies. If a media information request is straightforward, the Media Team will typically respond within days or even hours. However, when the Media Team considers an information request is complex, voluminous and/or if it considers that withholding grounds may apply, it will generally send the request to the agency's OIA Team, which typically takes closer to the maximum allowable timeframe under the OIA—being 20 days—to provide a response. The longer timeframe may be due in part to the increased complexity of the request, but also to agencies' self-imposed peer-review and sign-out processes, which are not a requirement under the OIA.

From the perspective of the news media, it is easy to see how the difference in OIA request-handling practices can be perceived as agencies 'using the OIA' to delay the provision of information.

In addition to the harmful perception that has developed around the OIA being used as a tool to obfuscate and undermine transparency, I have another concern about the 'two-tier' system of information-request handling. Most agencies do not have a system for responding to requests that are both complex and urgent. My investigation has shown that agency Media Teams can handle straightforward information requests swiftly, but they are not equipped to handle complex information requests. OIA Teams, while having that expertise, are often hampered by lengthy review and sign-out processes. I encourage agencies to develop systems to ensure that all requests can be handled as soon as reasonably practicable, regardless of which business unit handles them. Agencies should consider how OIA Teams and Media Teams can work together more efficiently to leverage their respective capabilities.

Agencies should:

- ensure that media information requests are handled in accordance with the OIA. This should be driven through a cultural shift in Media Teams, led and supported by senior leaders;
- prioritise OIA training for Media Teams; and

- develop systems to ensure agencies comply with the legislative requirement to make and communicate their decisions on official information requests as soon as reasonably practicable.

Interactions with Ministers on OIA requests

When interacting with Ministers' offices on departmental OIA requests (that is, requests made to government departments), agencies must differentiate between situations where the Minister's input is required to allow the agency to make a good decision (consultation) and those which involve informing the Minister of a decision the agency has already made, under the 'no surprises' principle (FYI responses). In either case, agencies' interactions with Ministers must be configured in such a way that the agency is able to meet its timeliness obligations under the OIA.

I found that a number of agencies employed a blanket approach to their treatment of FYI responses, sending them to the Minister's office three to five days before the final date they were due to the requester under the OIA. While there may be occasional exceptions, an OIA response sent to a Minister's office on an FYI basis should be sent at the same time or just before it is sent to the requester. Otherwise, the agency risks breaching its statutory obligation to provide a response to the requester as soon as reasonably practicable. In addition, allowing several days to consider a response may lead to the perception that input from the Minister is being sought by the agency that might alter the decision planned for release.

Agencies' practices around ministerial interactions should be embedded in sound policy. I was encouraged to see that several of the agencies I investigated have developed written agreements with Ministers' offices since my predecessor's investigation in 2015. However, some agencies' policies have gaps in key areas, such as a lack of specificity about the process to follow in the event of a disagreement, and a lack of clarity around the timeframes for providing responses (or summaries, where applicable) to their Minister's office. I encourage all agencies to develop a written policy agreed with their Minister's office, which sets out their mutual understanding and intentions when engaging with each other on OIA requests. This may be based on or guided by the matters covered by the *Model protocol on dealing with OIA requests involving Ministers*, published by my Office.[14] Once settled, I would also encourage agencies to publish this so it is transparent to everyone; enables trust in the process for handling a request; and clarifies the differences between consultation and FYI situations.

Typically, agencies' primary contact in their Minister's office on departmental OIA responses is a Private Secretary seconded from the agency. One of the roles of a Private Secretary is to assist with ministerial interactions, and to use their experience and judgement to identify when, and what aspects of, a response should be drawn to the Minister's attention. It is not their role to provide feedback on responses

14 Office of the Ombudsman | Tari o te Kaitiaki Mana Tangata, *Model protocol on dealing with OIA requests involving Ministers* (1 July 2017). See www.ombudsman.parliament.nz

unless this is requested by the agency in the context of a consultation, nor to act as an additional layer of peer review. Agencies should ensure secondees to Ministers' offices have sufficient training and guidance to undertake their role.

Agencies should:

- develop clear and transparent processes for dealing with ministerial interactions on department OIA responses and ensure these are embedded in a written policy, ideally agreed with the Minister's office, and published;
- cease any blanket approaches to providing departmental OIA responses to Ministers under the 'no surprises' principle three to five days before the 'date due' to the requester. Instead, each response should be treated on its merits and, where an FYI is necessary, should be sent at the same time or just before the response is sent to the requester. Opportunities should also be identified where a summary, or the topic of the response, can be provided to a Minister to fulfil the 'no surprises' obligation; and
- ensure that Private Secretaries receive sufficient training to undertake their role in relation to ministerial interactions on departmental OIA requests.

Official information requests handled by OIA Teams

As stewards of their agencies' official information systems, CEs and senior leaders must ensure appropriate resources, staff capacity and resilience measures to handle their agency's OIA workload. All staff should receive OIA training appropriate to their role in the OIA process, including about the constitutional importance of the OIA, and about the importance of good record-keeping practices to facilitate OIA compliance. Agencies' OIA request-handling processes should not interfere with their timeliness obligations under the OIA. Where agencies' OIA processes include multiple layers of review, decision makers must be available to make decisions, or must have resilience arrangements in place.

The COVID-19 crisis did not diminish my expectations of agencies' OIA practices. I consider that the free flow of information was crucial during the pandemic, when maintaining public trust was key in supporting effective democratic processes.

Overall, it is my view that the agencies under investigation coped well with the very challenging situation presented by the initial 2020 lockdown, in particular. On short notice, public sector staff had to adapt to working differently—away from their office, remote from colleagues, and accessing work information from their homes. Although timeliness is not the only important measure of OIA performance, it nonetheless speaks to the commitment and adaptability of staff that reported OIA timeliness in the 12 agencies I investigated dropped by only 1.2 percentage points on average during the reporting period that included the 2020 lockdown.[15] Agencies and staff are to be applauded for this.

15 Compared to the same reporting period in the previous year.

Those agencies which experienced a more significant decrease in OIA timeliness were those with insufficient technological resources to equip OIA Teams while working from home, and/or those that diverted personnel resources from the OIA-processing function. Having identified those vulnerabilities, agencies should ensure that, in future, they have sufficient resources to fulfil their OIA obligations in the event of a pandemic or similar event.

In my view, agencies' continued strong performance in the face of the crisis COVID-19 presented also speaks to the adaptability of the OIA itself. As noted above, shortly before the first lockdown, I was asked to provide advice on whether OIA requirements should be amended or suspended due to the pandemic. I gave my view that no amendments were necessary, due to the existing mechanisms within the OIA that allow agencies to deal flexibly with official information requests, including extending the timeframe to make and communicate a decision. In hindsight, I remain convinced that this decision was the right one. In my view, suspending or amending legislative requirements regarding the provision of information would have only weakened public trust and confidence in executive government during a time when trust and the free flow of information were crucial.

Respondents to my post-lockdown staff survey reported the most significant practice change brought on as a result of the lockdown was the transition to electronic peer review and sign-out processes, where previously some agencies had relied on hard copies. In the spirit of good process stewardship, I consider that, where agencies identify a more efficient process, they have an obligation to embed this into their practices and policies. I am pleased that staff also reported this practice change had been maintained in respect of internal review and sign out.

Unfortunately, this has not been the case across all agencies in respect of ministerial interactions—with some agencies' practices reverting, post-lockdown, to inefficient and time-consuming paper-based methods. In addition to the impact on timeliness, there is a potential impact on record-keeping. If feedback is handwritten on a paper version of a document, this can be lost if staff are not assiduous about scanning and saving amended copies into electronic records systems. I encourage agencies to review their processes relating to ministerial interactions to ensure they are maximally efficient and do not risk records being lost (or stored in a manner that does not facilitate retrieval).

Some agencies' staff reported their OIA sign-out processes as cumbersome—requiring review and approval from five or more different officials. To help ensure compliance with the agencies' timeliness obligations under the OIA, agencies must achieve a balance between OIA decision makers being suitably senior and ensuring that the agencies' OIA sign-out procedures are not unduly lengthy. Like the transition to electronic review and sign-out, any efficiencies identified in this aspect of the sign-out process during lockdown should also be incorporated into business-as-usual practice.

I found that many agencies did not keep full records of their decision-making process around responding to OIA requests. In particular, OIA Teams did not often appear to keep records of oral discussions relating to the agency's decision, nor any public interest factors the agency considered in favour of releasing information. It is important for agencies to create and maintain full records of decision-making processes relating to OIA decisions. Not only is this a requirement under section 17 of the PRA,[16] it enables agencies to provide the grounds for their decisions if required by the requester and in the event of a complaint made to me.

Where relevant, agencies should also record the administrative steps taken to respond to requests, such as the search terms used by staff, and the time taken to search for information. As a result of a recommendation made by my predecessor in 2015, Te Kawa Mataaho and Archives New Zealand | Te Rua Mahara o te Kāwanatanga have produced a model search protocol which may assist agencies.[17]

I found that OIA training was an area of vulnerability for many agencies, with nine out of the 12 agencies given action points suggesting improvements. For example, many agencies did not deliver targeted training to OIA decision makers, nor to their Media Teams. I encourage agencies to ensure targeted, role-specific OIA training is available for all staff, which should include promoting awareness of sound record-keeping to facilitate OIA compliance. I can advise agencies that my staff are available to assist with developing and/or delivering training, on request.

Given the importance of information access to New Zealand's democratic process, I consider that OIA awareness and compliance should be specifically included in staff's performance objectives.

Agencies should:

- review any changes to OIA practice that occurred as a result of lockdowns and identify where these were more efficient than the previous status quo. Any improvements to process should be embedded in practice and policy;
- review the OIA training needs of staff and ensure sufficient, targeted training is available to staff at all levels;
- ensure sound record-keeping in relation to the OIA decision-making process is embedded into practice and policy; and
- include OIA awareness and compliance in staff's performance objectives, to a level appropriate to their role.

16 See Public Records Act 2005, s 17

17 Archives New Zealand | Te Rua Mahara o te Kāwanatanga, 'How to develop an OIA information search policy' (last updated 23 June 2022) at 5.1. See www.archives.govt.nz

Accessibility

Agencies must ensure that all released or published information is optimised in line with the New Zealand Government Web Standards,[18] to enable it to be accessible for all users, including those with disabilities. This includes providing material in a format that accommodates the use of assistive technology (such as screen readers), as well as ensuring that information is searchable and any visual elements are tagged with alternative text. Agencies can refer to my guide which provides advice on making information accessible.[19]

During this investigation I saw that gradual improvement has been made in this area, with some agencies moving away from the practice of watermarking documents, which can inhibit their accessibility. There is still work to be done to ensure that agencies routinely release and publish information in a searchable format and not as 'image only', as well as ensuring visual elements are tagged with alternative text. However, many agencies assured me that they were actively working towards ensuring the accessibility of official information they release or publish.

Agencies should:

- ensure all digital communications and publications are compliant with the New Zealand Government Web Accessibility Standard; and
- ensure the use of redaction software or the application of watermarks to documents released under the OIA, or proactively released, does not inhibit their accessibility.

18 New Zealand Government | Te Kāwanatanga o Aotearoa, 'NZ Government Web Standards'. See www.digital.govt.nz

19 Office of the Ombudsman | Tari o te Kaitiaki Mana Tangata, *Proactive release: Good practices for proactive release of official information* (8 June 2020), p. 11. See www.ombudsman.parliament.nz

Leadership and strategy

Section 52 of the Public Service Act 2020 (PSA)[20] places on Chief Executives (CEs) a stewardship responsibility for the public institutions they lead—stewardship being one of the five key principles of the public service.[21] The concept of stewardship conveys a proactive and ongoing, as well as immediate, responsibility to maintain institutional knowledge, information, systems, and processes. It recognises that, as part of the independent public service, CEs play an important role in managing and maintaining their agency's assets and policies to ensure long-term capability. Their responsibilities include the duty to work with Ministers to achieve this, in the public interest.

Stewardship of the official information system at the agency level requires that CEs and agency leaders take a long-term view to maintaining and developing Official Information Act 1982 (OIA)[22] capability. Senior leaders should have clear oversight of their agency's OIA compliance and practices through regular performance reporting, just as they would any other aspect of the agency's core business.

Analysis of information from OIA reporting can and should inform an agency's strategic framework around official information, which gives effect to a commitment to promote OIA compliance and good practices, as well as a culture that is positive and enables transparency, openness, and continuous improvement.

20 See Public Service Act 2020, s 52

21 See Public Service Act 2020, s 12

22 See Official Information Act 1982

Messaging from senior leaders

My expectations

An agency's culture around transparency, openness, and the strength of its OIA practices flows from the attitudes, messaging, and actions of its senior leaders and, in particular, those of the CE. It is my expectation that leaders make clear, regular statements to staff and to the public in support of the principle and purposes of official information legislation, and of the importance of openness more generally.

Words, however, are not enough. Public service staff receive signals from senior leaders not only through overt messaging, but through their actions. However vocal leaders may be about the importance of openness and compliance with the OIA, the message is diluted if they do not model openness and provide staff with the systems and support to facilitate the release of information.

The content on an agency's website relating to OIA requests gives a strong message about its approach to the OIA and how it assists people to identify and access information. Agencies' websites should contain up-to-date, easy-to-find information for the public about:

- what information it holds;
- how the information can be accessed or requested;
- how to seek assistance;
- what the agency's OIA policies and procedures are (including charging); and
- how to complain about a decision.

In addition, it is good practice for agencies to assist requesters by linking proactively released information, including published OIA responses, from their OIA webpage.

My findings

In relation to agencies' internal culture of openness and access to information, my predecessor's 2015 report noted that:

> *…there was a distinct lack of bold, visible messaging by agencies' senior leaders to their staff.*[23]

I consider that one of the most significant and laudable changes in agencies' approach to openness since the *Not a game of hide and seek* report was published is the messaging about the OIA and openness to public service staff from their senior leaders and, in particular, CEs. It is clear that staff perceive improved messaging on these topics in comparison to the responses received in my predecessor's investigation.

23 Above, n 3, p. 3.

Public service staff perception of signals sent by CEs about disclosure under the OIA

Year	Strongly or moderately pro-disclosure	Strongly or moderately anti-disclosure	'They are silent on the issue' or 'I don't know'
2015	32%	7%	62%
2019	56%	3%	41%

Public service staff perception of signals sent by CEs about openness and public engagement more broadly

Year	Strongly or moderately pro-openness	Strongly or moderately anti-openness	'They are silent on the issue' or 'I don't know'
2015	61%	9%	30%
2019	76%	3%	21%

I also asked staff their views on how, and if, their agency's culture around access to information had changed since 2015.[24] Across the 12 agencies, nearly 70 percent of respondents who provided their views said the culture in their agency was somewhat or significantly improved since 2015.[25] As positive as this figure is, I found the survey comments made by staff about the evolution of openness and the approach to the OIA within their agencies to be even more encouraging.

> *We have clearly moved from a culture of 'why should we provide information' to a culture of 'provide all information unless there is a valid reason not to'. I don't believe the former practice of not providing access to information was [widespread]. It was more a matter of inconsistent application of policy.*
>
> *Routine proactive releases of information are now commonplace. This is very different to the situation pre 2015.*
>
> *I have noticed more messaging from senior leaders on the need to improve the way we communicate to the public and share information more generally and then specifically under the OIA.*
>
> *OIA responses and compliance [have] increased significantly in those years, with better resourcing despite increasing quantity of OIAs.*
>
> *We are better informed about this subject than we used to be.*
>
> *There has been more resource, more messaging and more push for improving the timeliness of [OIA] responses.*

24 This question was only asked of staff who responded that they worked in the same agency when my predecessor's investigation took place in 2015.

25 Of the respondents, 69 percent said there was some or significant improvement in the access-to-information culture in their agency since 2015, 24 percent considered the access-to-information culture was the same as in 2015, and seven percent considered there had been some or significant decline.

> *Improvement down mostly to more clarity and consistency across agency rather than any change in official procedures so much.*

While there may be a variety of reasons that staff perceived agencies' overall culture around access to information has improved, my investigation suggests that the increased messaging from the CE and senior leaders played a key role in driving improvements in agencies' culture around openness and access to information. At the sector-wide level, I acknowledge the efforts of the Public Service Commission | Te Kawa Mataaho (Te Kawa Mataaho), whose leadership may have also contributed to an improved culture and perception of openness, particularly in relation to the proactive release of information. I will discuss this further under *Proactive release of information*.

Improved website content

In addition to overt messaging to staff from senior leaders, the information on agencies' websites is a tangible representation of agencies' commitment to the disclosure of information and the importance they place on the OIA. The visibility of agencies' online OIA material imparts a message not only to staff, but also to the public. In 2015, surprisingly, some agencies lacked an OIA page on their websites, with my predecessor noting:

> *…many agencies did not have basic information on their websites as to how the public could make a request and the types of information they can ask for.*[26]

In my current investigation I have seen significant improvement in the presence of OIA material on agencies' websites. All agencies had a dedicated OIA webpage and, across the board, these had high visibility and contained helpful information for requesters, such as:

- links to proactively released information;
- when they should expect a response from the agency; and
- their right to make a complaint to me.

It was encouraging to see that some agencies linked proactively released information, including completed OIA responses, from their OIA webpages. Availability of information on the work of the agency, and previous OIA responses, may pre-empt the need for requests or at least help requesters make their request with due particularity.

However, many agencies' websites had somewhat limited data about the type of information they produce. It would assist requesters for agencies to publish—in a discrete location on or linked from their OIA webpage—detailed information on the type of information they produce that is targeted toward those who may not necessarily be familiar with the machinery of government.

26 Above, n 3, p. 3.

This might include information on:

- their current workstreams,
- the types of statistical data they collect; and
- the rules, policies, and guidelines they use to make decisions which affect people personally.

Information of this type is intended to be published in a Directory of Official Information maintained by the Ministry of Justice|Te Tāhū o te Ture in its role under section 20 of the OIA.[27] I consider that the Directory is far from optimal. The information in the Directory has inconsistencies between agencies, and some agencies' entries were absent from the most recent version. I am disappointed that it has been allowed to languish over a number of years, rather than being improved and updated to incorporate a range of potentially useful resources, such as links from the Directory straight to the information listed on agencies' websites.

This is an issue I have specifically raised in my report on the Ministry of Justice | Te Tāhū o te Ture as one of the 12 agencies under investigation. I consider the Ministry acted unreasonably by failing to fulfil its role as administrator and steward of the OIA in respect of providing guidance to agencies to facilitate their compliance with their statutory responsibility,[28] and having regard *'to the need to assist members of the public to obtain official information'*.[29] The special role the Ministry holds under the OIA confers a responsibility to safeguard the utility of this resource and, in doing so, to improve the effectiveness of the OIA system.

I am pleased that the Ministry of Justice | Te Tāhū o te Ture has accepted my recommendation to develop and deliver guidance to agencies on the type of information they should include in their Directory entries. I encourage agencies to duplicate their Directory information on their own websites.

What agencies should do now

The improvements in staff perceptions of leadership messaging and overall culture of openness shows that the signals, both tacit and overt, that leaders give to staff have a profound impact on the culture of the agency. In the years since my predecessor's investigation, CEs have done a laudable job of improving agencies' cultures around openness.

Maintaining and building a culture that is open to the release of information is a task that is never complete. Senior leaders—CEs, in particular—must maintain consistent, positive messaging about their approach to openness and disclosure of information under the OIA. Leaders must ensure that their messaging is supported by the agency's strategy around openness and by their actions, which should include ensuring staff are sufficiently resourced and supported to fulfil the agency's OIA obligations.

27 See Official Information Act 1982, s 20

28 See Official Information Act 1982, s 20(3)

29 See Official Information Act 1982, s 20(4)

The CE (or their authorised delegate) is the accountable decision maker on OIA requests.[30] They are also responsible for the stewardship of their agency's systems, processes, and institutional information under section 12 of the PSA.[31] These accountabilities should be reflected in their performance objectives, which should include qualitative and quantitative measures relating to their agency's OIA performance. I consider it would be timely to reflect CEs' OIA accountabilities in their performance objectives, given that the type of performance measures I suggest for CEs overlap with the expanded range of statistics Te Kawa Mataaho has indicated it intends to include in its OIA reporting regime.

Although there has been great improvement in agencies' website OIA content since the previous investigation, agencies could benefit from adding more detail about the type of information they hold, which will assist OIA requesters to make targeted requests.

OIA reporting to drive performance improvement and inform strategy

My expectations

OIA performance reporting to an agency's CE and senior leaders should focus on more than just reported timeliness. While OIA timeliness is important, I would not wish for an undue emphasis on timeliness to incentivise fast but poor-quality decisions on information release. It is equally important that senior leaders promote quality and process improvement. Collection and analysis of a range of OIA performance data would allow agencies to recognise:

- emerging themes or trends in information requested;
- OIA response quality;
- opportunities for the proactive release of information;
- resourcing or capacity issues; and
- opportunities to train/upskill staff.

Agencies should have an overarching strategic framework describing how the agency intends to achieve:

- compliance with the OIA;
- good OIA practice;
- sufficient capacity and capability in OIA-handling and proactive release processes;

30 See Official Information Act 1982, s 15(4)

31 See Public Service Act 2020, s 12

- a culture of openness and continuous improvement; and
- participation and access to information by the public and stakeholder groups.

These should feature in public-facing corporate documents as a signal to external stakeholders of agencies' commitment to openness, and as an accountability measure.

I also encourage agencies to link their strategies around the proactive release of information with their OIA strategy. The proactive release of information is an important lever for managing agencies' OIA workloads and promoting a culture of openness.

My findings

In the 2015/16 reporting year, the average rate of reported timeliness compliance of state sector agencies was 87.6 percent. In the first half of the 2021/22 reporting year (the most recent completed reporting period at the time of writing this report) the average has increased to 97.3 percent — an improvement of nearly 10 percentage points.[32] This did not happen by accident. This improvement was spurred by Te Kawa Mataaho's implementation of a published OIA reporting regime. It shows that there is tremendous power in strong leadership at the state sector level, through drawing agencies' OIA performance into the light and demanding accountability.

CEs appeared to have a 'hands-off' approach to OIA handling in the agencies subject to my investigation. Based on my discussions with CEs as part of this investigation, few reported having direct involvement with individual OIA responses, indicating that they may be involved if it was *'of a sensitive nature'* or involved *'political issues'*. This, I think, is as it should be. I am not in favour of agencies making their OIA sign-out procedure any more intensive or time-consuming than it needs to be.

However, I do consider that CEs as stewards must have oversight of the performance of the official information system as a whole. It must be treated as an asset that needs to be well managed and monitored to deliver effectively over time. This can be achieved through the OIA reporting that CEs and senior leaders receive.

In my initial agency questionnaire, I asked agencies to provide an example of the OIA reporting provided to senior leaders. Most agencies I investigated provide fairly limited reporting, focused mainly and sometimes exclusively on the timeliness statistics reported to Te Kawa Mataaho. While timeliness is an important aspect of OIA compliance, it should not be the only outcome measured and reported to senior leaders, as this overlooks other key aspects of OIA performance and capability.

32 Public Service Commission | Te Kawa Mataaho 'Latest OIA statistics released' (press release, 10 March 2022). See www.publicservice.govt.nz

As my predecessor noted in her earlier investigation, there is a broad range of OIA information agencies should collect. However, simply collecting data without using it as a tool to improve performance and long-term OIA capability is of little use and, in my view, is an abrogation of the public service principle of stewardship.

There is a wealth of information, and potential improvement, to be gained from analysis of data that goes beyond simple timeliness compliance. For example, one of the data points I suggest that agencies collect is the number and type of extensions made on OIA requests. Once collected, this data should be analysed to determine what it suggests about the agency's practices. A high number of extensions on the basis that substantial collation is required may suggest that the agency could improve its practices around contacting requesters to refine their request, or that information on a particular topic is stored in a manner that does not facilitate easy retrieval. An over-reliance on extensions in a particular business unit could indicate a lack of resourcing, a lack of OIA awareness and training, or organisational inefficiencies (for example, an inefficient sign-out process). Alternatively, the agency may analyse data on their use of extensions and determine that they are used in a manner that is entirely consistent with the OIA, which is also valuable performance information for the agency.

Te Kawa Mataaho is expanding the range of statistics it will require from agencies, to include a greater range of qualitative aspects of OIA processing. I am confident that this will drive performance improvements in those areas, just as agencies' reported timeliness improved when the reporting regime was first introduced. However, this will require oversight from senior leaders in order to identify where efforts should best be targeted to hone their OIA processes. It will be timely for CEs to seek a similarly expanded range of OIA data in the reporting they receive from within their agency, as a way of meeting their stewardship responsibilities.

As I will discuss further, under *Official information requests handled by Media Teams*, agencies' Media Teams are heavily involved in responding to OIA requests, yet their efforts remain largely unaccounted for in the OIA statistics agencies report to Te Kawa Mataaho. Of the 12 agencies I investigated, only one included media information request statistics in the data they report to Te Kawa Mataaho. I consider that including these statistics would present a truer picture to the public about the amount of work that agencies are really doing to respond to media information requests. It may also help reinforce that media information requests are OIA requests, to which legislative obligations apply, and provide transparency around the handling of media information requests. This may improve public trust around that aspect of agencies' OIA handling.

As in the 2015 investigation, it did not appear that the agencies under investigation had a strategic framework for attaining OIA compliance or improving transparency. With the exception of a very few agencies who noted that they were beginning to build notions of proactive release of information into the policy-writing process (as I will discuss further under *Proactive release of information*), agencies' approaches to OIA compliance and to proactively releasing information were reactive and ad hoc.

What agencies should do now

Agencies should collect a greater range of data about OIA handling as a matter of practice, and for the performance improvements this can lead to, if analysed and used as a tool to inform the agency's OIA strategy, and drive performance improvement. The full list of data that I suggest agencies should collect includes:

- the type of request (Part 2, 3, or 4 of the OIA);
- the type of requester;
- the number and reason for transfers, and whether the transfer was made in time;
- the number, length, and reason for extensions;
- the outcome of the request (granted in full, granted in part, refused in full);
- the reason under the OIA for withholding or refusing information;
- the number of charges made and collected;
- whether the Minister was consulted on the decision;
- whether the decision was notified to the Minister;
- the time from receipt of the request to communication of the decision; and
- the time from receipt of the request to release of the information.

Responding to OIA requests and proactively releasing information should be considered part of an agency's core business. Accordingly, agencies should have an overarching strategic framework describing how they intend to achieve:

- compliance with the OIA;
- good OIA and proactive release practice;
- a culture of transparency, openness and continuous improvement; and
- participation and access to information by the public and stakeholder groups.

These should feature in corporate documents as a signal to external stakeholders of agencies' commitment to openness, and as an accountability measure.

Proactive release of information

My expectations

The OIA was not intended to be the only mechanism through which the public could access official information. Proactive release is the practice of publishing official information that is not subject to an information request under the OIA. Sound proactive release practices complement a well-functioning process for responding to OIA requests. These mechanisms, in concert, help agencies to progressively increase the availability of official information to the people of New Zealand, which is one of the purposes of the OIA.[33] In addition, a 2020 Organisation for Economic Co-operation and Development (OECD) report noted that *'disseminating accurate and timely information'* may *'counteract mis- and disinformation'*.[34]

New Zealand is a member of the Open Government Partnership (OGP) and has, in this context, developed a National Action Plan that includes a commitment to *'progressively increasing the proactive release of official information by publishing responses to requests for information made under the [OIA]'*.[35] Te Kawa Mataaho is the lead agency for the OGP in New Zealand. As such, it has been a champion for the proactive release of information by public sector agencies over the past several years. I expect agencies to play their part in fulfilling the National Action Plan by ensuring they have processes for publishing OIA responses.

A free flow of information about the work of the Government strengthens accountability, facilitates informed public participation in government decision making, and improves public trust and confidence in government. Proactively releasing information may have the added benefit, for agencies, of reducing the OIA workload. It may remove the need for some requests altogether, or help requesters to make their requests with greater particularity. In turn, a targeted, specific request for information will make the OIA response easier to prepare.

Agencies' proactive release practices should be underpinned by comprehensive policy in order to ensure a consistent approach across the organisation to releasing information. It is best practice for agencies to publish their proactive release policies, in order to facilitate accountability and transparency. Senior leaders must also ensure that staff are supported to enact the policy, through implementing adequate systems and fostering a positive culture within their organisation around the proactive release of information.

33 See Official Information Act 1982, s 4

34 Organisation for Economic Co-operation and Development, *Transparency, communication and trust: The role of public communication in responding to the wave of disinformation about the new coronavirus* (3 July 2020), p. 6. See www.oecd.org

35 Open Government Partnership New Zealand, *Third National Action Plan* (December 2018), Commitment 7, p. 30. Note that the Fourth National Action Plan has not yet been finalised. See www.ogp.org.nz

Just like the OIA process, building a strong culture around the proactive release of information requires ongoing, positive messaging from senior leaders. Staff receive signals from senior leaders not only from overt messaging, but from their actions.

My findings

My predecessor's 2015 investigation identified a great deal of room for improvement in agencies' approach to the proactive release of information. She noted that:

> *[f]or most agencies, any proactive disclosure was done on an [ad hoc] basis. Opportunities for the planned publication of information to assist the public's understanding of an agency's work (and reduce suspicion or media speculation) were often missed.*[36]

This suggested an immature culture around the proactive release of information at most agencies at the time of the earlier investigation.

In my current investigation, I reviewed the 12 agencies' proactive release practices, policies, and culture, to determine if there had been an evolution in agencies' approach to the proactive release of information. There are some indicators I may look to, in that regard. One of these is the percentage of OIA responses which agencies have proactively released. Te Kawa Mataaho introduced this measure alongside its OIA timeliness reporting in the 2016/2017 reporting period, requiring agencies to report how many OIA responses they published, alongside the number of requests they received. Of the 12 agencies I reviewed in the current investigation, there has been a modest increase in the number of agencies that routinely publish OIA responses: in 2016/2017, eight of the 12 agencies published some OIA responses; in the latest reporting period, 10 of the 12 agencies published some OIA responses.[37]

During my current investigation, the New Zealand Defence Force | Te Ope Kātua o Aotearoa did not publish any OIA responses on its website.[38] The Ministry of Justice | Te Tāhū o te Ture published only two OIA responses.[39] As the Ministry is the administrator of the OIA, with a leadership role, I find this disappointing.

However, the picture is more encouraging when one considers the number of OIA responses published as a percentage of requests received. In the 2016/2017 reporting period, the 12 agencies published an average of two percent of OIA responses; in July to December 2021 they published an average of 16 percent of OIA responses. This is a notable increase, though it is clear there is room for further improvement, particularly considering the increase is largely due to the efforts of five of the 12 agencies which published greater than five percent of their OIA responses.

36 Above, n 3, p. 84.

37 At the time of writing this report, the most current, published OIA statistics were for the 1 July – 31 December 2021 reporting period. See www.publicservice.govt.nz

38 The New Zealand Defence Force | Te Ope Kātua o Aotearoa advised me that its website platform was undergoing replacement during the period of my investigation, and that it is currently planning to publish OIA responses on its new website platform.

39 My investigation commenced in November 2019; I finalised my opinion on the New Zealand Defence Force | Te Ope Kātua o Aotearoa in December 2021 and on the Ministry of Justice | Te Tāhū o te Ture in June 2022.

The standouts in the July to December 2021 reporting period were Te Kawa Mataaho (which published 48 percent of its OIA responses), the Ministry of Transport | Te Manatū Waka (30 percent) and the Ministry of Education | Te Tāhuhu o te Mātauranga (28 percent). By drawing this measure into the light, Te Kawa Mataaho has driven improvement in the proactive release of OIA responses, just as its timeliness reporting regime improved agencies' reported OIA timeliness.

It is positive to see Te Kawa Mataaho, as an agency with a special leadership role under the OIA, setting an example in respect of the proactive release of OIA responses.

I was pleased to find that, at the time of writing individual reports on my investigations of each agency, all but three agencies included hyperlinks on their OIA webpages directing users to official information published by the agencies. This is a positive practice that assists requesters and helps ensure visibility and accessibility of information.

Another indicator I have looked to, in considering whether agencies' approach to the proactive release of information has matured, is the views of their staff. In this respect, the picture is encouraging indeed.

> *I've noticed a massive shift in the more than 10 years I have been at [Te Kawa Mataaho]. There is a much greater commitment to proactive disclosure even in relation to investigations and early advice to the Minister.*
>
> *The Ministry [of Transport] has made significant strides … over the past 3–4 years … (W)e are well supported to make information available, including numerous very significant proactive releases. This has been supported by [the senior leadership team] and Ministers.*
>
> *I think the last 12 to 18 months have seen a real shift towards releasing information and more transparency of the Transport Agency.*
>
> *A huge volume of information has been made proactively available [by the MOE] to the public…*

My discussions with agency CEs within my investigation also showed a maturing approach to the proactive release of information, with most agencies recognising the benefit of proactively releasing information to 'front-foot' issues. Others spoke of a developing culture of '*writing to proactively release from the beginning of the policy writing process*'. This is in line with my guidance on the topic, which identifies a good proactive release culture as one in which:

> *[c]onsideration is given to whether information should be released before it is created, or at the time it is created. Information that cannot be released should be easily identifiable to make the redaction process easier later.*[40]

40 Above, n 19, p. 5.

In addition to messaging from senior leaders, there are some external factors which may have contributed to agencies' increasing efforts to proactively release information. In 2018, the Department of the Prime Minister and Cabinet | Te Tari o te Pirimia me te Komiti Matua (DPMC) released a Cabinet Circular requiring the proactive release of Cabinet material. This directive required that:

> *Cabinet papers and minutes must be proactively released within 30 business days of final decisions being taken by Cabinet, unless there is good reason not to publish all or part of the material, or to delay the release.*[41]

The strong leadership from Te Kawa Mataaho and DPMC in the area of proactively releasing information may also be a contributor to an evolving culture of openness in agencies, as I discussed under *Messaging from senior leaders*. The proactive release of information is a regular agenda item in the Official Information Forums that Te Kawa Mataaho has led since August 2018. Te Kawa Mataaho has also published guides for agencies: *Proactive Release of Official Information* (released December 2017) and *Publishing responses to OIA requests on agency websites* (released May 2018).[42] It also developed and implemented the proactive release of Cabinet material policy approved by Cabinet in September 2018, and a further Cabinet paper in May 2022 containing proposals to progress the open government work programme[43] I note, however, that the proactive release of information should be promoted as a complement to the OIA process, rather than usurping it in terms of importance.

Agencies were also required by Cabinet to proactively release information about the COVID-19 response on the Government's Unite Against COVID-19 website.[44] Due to the nature of their work, some of the 12 agencies under investigation dedicated significant resources to proactively releasing official information, even during the 2020 lockdown that heavily impacted their operations. These requirements may have contributed to a normalisation of the practice of proactively releasing information, by embedding it into agencies' business-as-usual tasks. Some staff noted that, combined with messaging from senior leaders, the strengthened requirement to proactively release information has driven improvements in their agency's culture around openness.

> *I believe that there is stronger messaging about access to information. An example of this is the proactive releases of Reports and Cabinet Papers, etc.*
>
> *A lot of this has been driven by the minister and the commissioner through the proactive release policy.*
>
> *I don't think we ever proactively released papers or information in 2015 – now we think about it as a matter of course.*

41 Department of the Prime Minister and Cabinet | Te Tari o te Pirimia me te Komiti Matua, 'Proactive release of Cabinet material' (19 November 2018). See www.dpmc.govt.nz

42 Public Service Commission | Te Kawa Mataaho, 'Proactive release' (last updated 10 March 2022). See www.publicservice.govt.nz

43 Public Service Commission | Te Kawa Mataaho, 'The next steps in the public release of official information' (17 May 2022). See www.publicservice.govt.nz

44 Unite against COVID-19, 'Proactive release documents' (last updated 12 July 2022). See www.covid19.govt.nz

> *The practice of very prompt release of substantive papers after decisions were made was a great practice and should be encouraged for the future. Our advice should generally be … open to public scrutiny in real time.*

However robust an agency's proactive release practices may be, it is crucial that practice is underpinned by a comprehensive policy. Having a written policy for the proactive release of information helps agencies to:

- embed proactive release of information practices as part of business-as-usual work;
- consider proactive release right from the beginning of a process and throughout as information is being created;
- ensure that practices are applied consistently across different business units; and
- ensure that practices continue even in the absence of key staff.

Of the 63 agencies which provided information in response to a survey in the earlier 2015 investigation, 78 percent said they had no policies in place to guide the proactive release of information.[45] Accordingly, the *Not a game of hide and seek* report contained a recommendation to all agencies to:

> *…ensure comprehensive policy concerning the proactive release of information they hold, which includes how to maximise the benefits of proactive release while also managing risks that may arise from the release of certain types of information.*[46]

During my current investigation, I was pleased to find that, at the time of writing individual reports on my investigations of each agency, all but one of the 12 agencies had developed a proactive release policy. This is a tremendous advance since the *Not a game of hide and seek* report was published. There is clearly an evolving approach to proactively releasing information in the agencies I investigated.

However, agencies can do more to optimise their proactive release policies. I noticed that many policies did not include information on the frequency and timing of publications, while others lacked provisions on releasing official information in the most useable and accessible form. Many agencies' policies narrowly defined the types of official information that would be considered for proactive release—with some policies only applicable to Cabinet material, and others only regulating the publication of responses to OIA requests.

Te Kawa Mataaho's proactive release policy includes many of the aspects I consider a good proactive release policy should have—such as a high-level commitment to releasing information highlighting the principle of availability, preparing information for release, and risk management—and it is published on its website, which is a

45 Above, n 3, p. 84.

46 Above, n 3, Recommendation 22, pp. 17 and 88.

commendable demonstration of openness.[47] The policy is clear on its approach to some types of information—for example, stating that the publication of OIA responses '*should generally occur within a month of the response being given to the requestor but no sooner than one day after, to provide the requestor time to consider the response*'. However, there is a lack of clarity about the timing and nature of the release of other types of information. In the category of information ambiguously titled '*Other information released by the chief executive*', the only guideline is that it '*… will be released at a date determined by the chief executive*'.[48]

The proactive release policy of the Ministry of Health | Manatū Hauora, which it published subsequent to receiving my final opinion, contains another example of lack of clarity. In relation to the publication of OIA responses, the policy indicates the Ministry's intention to publish responses in the public interest, but it is not made clear which role within the Ministry is responsible for making this determination, nor on what criteria it is based. With that said, I also acknowledge that the Ministry proactively releases a large amount of material, as I will discuss under Proactive release during a pandemic: The Ministry of Health | Manatū Hauora.[49]

Where there is a narrow definition or a lack of specificity about the type of information agencies will consider for proactive release, and an absence of clear guidelines about the timing of publication, agencies are able to be 'transparent' only in a highly selective way. I consider that a mature proactive release culture should be based on the same principle of availability that underpins the OIA: that information should be released unless there is good reason (under the OIA) for withholding it. This approach should be embedded in agencies' proactive release policies and modelled in the messages and actions of senior leaders.

What agencies should do now

I strongly encourage agencies to publish their proactive release policy (and procedures). Not only is this, in itself, a visible demonstration of openness, it will help drive accountability for adherence with the policy. By publishing proactive release policies, agencies make themselves accountable to the public for ensuring that practice and policy align.

47 Public Service Commission | Te Kawa Mataaho, Proactive Release of Official Information—Internal Policy (January 2021). See www.publicservice.govt.nz

48 Above, n 47, p. 4.

49 See p. 37.

Those that have policies should review and update them to ensure they are comprehensive. In line with my published guidance, an agency's proactive release policy (and procedures) should include:[50]

- a high-level commitment to proactively releasing information;
- the types of information that will be proactively released. For example:
  - information that has been released in response to OIA requests;
  - information described in section 20 of the OIA about the agency and the information it holds;
  - information described in section 22 of the OIA about the agency's internal decision-making rules, including its OIA policies and procedures;
  - strategy, planning, and performance information;
  - financial information relating to income and expenses, tendering, procurement, and contracts;
  - information about work programmes and policy proposals;
  - information about public engagement processes, including public submissions;
  - information relating to policy development, including Cabinet papers;
  - minutes, agendas, and papers of advisory boards or committees;
  - information about regulatory or review activities carried out by agencies;
- a process and criteria for identifying opportunities for proactive release—for example, where a high number of OIA requests is received about a subject, or there is otherwise high interest in the topic;
- a process for preparing for proactive release, including managing risks around personal or confidential information, commercial information, and information subject to third-party copyright;
- a process for considering frequency and timing of publication;
- a commitment to releasing information in the most useable form in accordance with the New Zealand Government Open Access and Licensing framework,[51] and in line with New Zealand's obligations under the United Nations Convention on the Rights of Persons with Disabilities;[52]
- provision for the policy to be regularly reviewed and updated.

In order to assist requesters, it is good practice for agencies to provide links to proactively released information from their OIA webpages.

50 Above, n 39.

51 New Zealand Government | Te Kāwanatanga o Aotearoa, 'NZGOAL (New Zealand Government Open Access and Licensing) framework' (last updated 12 October 2016). See www.data.govt.nz

52 United Nations, *Convention on the Rights of Persons with Disabilities* (adopted 13 December 2006). See www.un.org

Proactive release during a pandemic: the Ministry of Health | Manatū Hauora

In the context of the ongoing COVID-19 pandemic, I cannot discuss the proactive release of information without lauding the efforts of the Ministry of Health | Manatū Hauora, particularly during the 2020 lockdown, and during subsequent outbreaks and lockdowns. As we have lived with COVID-19 for some time now, the anxiety and uncertainty of the early days of the pandemic may have faded but, at the time, the steady flow of information provided in the daily press briefings was crucial. I do not think I am overstating the importance of the daily briefings by describing them as a lifeline for many.

The Ministry advised me that, on its busiest day throughout the pandemic, its communications team received an average of one query per minute. In response to the high demand for information and in an effort to control their workload, the communications team began holding a stand-up press conference, fronted by the CE, in order to respond to as many questions as possible and to pre-empt information requests. The Ministry informed me that it held more than 200 'stand ups' between January 2020 and late 2021. These have continued on a weekly basis, as well as in response to additional demand—including when there were outbreaks of community cases of COVID-19 in February 2021 and in August 2021. The Ministry live-streams the 'stand ups' to make the information more accessible to the public. I commend the Ministry and its communications team for seeking out new ways of providing information to the media and to the public.

Some staff at the Ministry sought clearance to be considered 'essential workers' in order to come to the workplace to fulfil Cabinet requirements for proactively releasing information related to the Government's COVID-19 response. The Ministry, and particularly the staff involved in preparing this information for release, should be immensely proud of their efforts. I commend the Ministry for its work to impart information to the New Zealand public, as well as its extraordinary efforts to ensure compliance with the government's requirement to proactively release information. Their work contributed to New Zealand's COVID-19 response being hailed as one of the best in the world (based on research conducted by independent internal policy 'think tank', the Lowy Institute).

The flow of information from the Ministry greatly enhanced public trust and confidence in the actions and decisions of the government during this time, which is illustrated in New Zealand's strong ranking in the Transparency International Corruption Perceptions Index for 2020 and 2021, which I referenced in the introduction to this report. It also enhanced the ability of the public and media to hold the Government to account and challenge any decisions to withhold information.

Culture, systems and practices

An agency's culture is a shared set of core values that guides the behaviour of those within it. The culture fostered and modelled by leaders can be seen in the policies adopted by agencies and, in turn, the practices exercised by staff. In essence, culture is the shared view of what the agency considers important.

Leaders must establish and promote an official information culture which aligns with and facilitates compliance with the Official Information Act 1982 (OIA)[53] in all respects. This requires fostering a culture that not only aligns with the purposes of the OIA and its principle of availability, but also promotes sound systems and practices around the handling of official information—including record-keeping—and ongoing learning.

53 See Official Information Act 1982

Information management and record-keeping

My expectations

Government agencies are required to comply with the Public Records Act 2005 (PRA).[54] The PRA sets out obligations around how agencies create, maintain, transfer, and dispose of records. Meeting the obligations under the law through good information management (IM) systems and record-keeping practices is vital to enable transparency and accountability. Good IM systems and record-keeping practices also support compliance with the OIA. Information requested under the OIA can only be made available if it has been created and maintained in a form accessible for subsequent reference, and if it can be found when it is searched for.

IM systems and record-keeping practices are different: the former refers to the systems (nowadays usually electronic) to store, organise, and retrieve information; the latter refers to the actual practices employed by staff to keep records. Of course, the two are linked—user-friendly IM systems help to facilitate better record-keeping practices by staff.

However, the existence of good IM systems alone is not sufficient to ensure good record-keeping. The effective use of these systems is facilitated by staff being trained not only in how to store information, but also in how to retrieve it. It is essential to ensure information is stored in a manner that others in the organisation can retrieve it—for example, when it is the subject of an OIA request. Information should be accessible even when its creator has left the organisation.

Ideally, all agencies would have fit-for-purpose IM systems which are user friendly and which facilitate easy storage, organisation, and retrieval of information held by the agency. In reality, I understand that agencies are constrained by budgets, and that upgrading or transitioning to a new Electronic Document and Records Management System (EDRMS) is far from an overnight process. In this context, it is especially important for agencies to implement comprehensive IM and record-keeping training, and robust record-keeping practices. This becomes particularly important to mitigate risks in IM systems with known vulnerabilities.

Just as Chief Executives (CEs) are stewards of the OIA system in their agencies, so are they stewards of the information their agencies hold and their IM systems, processes, and practices.[55] Senior leaders have a responsibility for leading the culture in their agency around the importance of good record-keeping. This includes ensuring that ongoing training on IM systems and record-keeping is prioritised in their agency.

54 See Public Records Act 2005

55 The Public Service Act 2020 states that one of the principles of Public Service stewardship is to proactively promote stewardship (of) institutional knowledge and information. See Public Service Act 2020, s 12(1)(e)(ii)

The advent of COVID-19 and the subsequent lockdowns have exposed another challenge for agencies' IM systems. They should be fit for purpose, to effectively complete business-as-usual tasks even when being used remotely. This includes being able to find and retrieve information that is requested under the OIA, and to retrieve and prepare information for proactive release. As I have stated earlier, these functions are as important during a crisis as at any other time. This is supported by guidance from Archives New Zealand | Te Rua Mahara o te Kāwanatanga on the topic of keeping records during COVID-19:

> *To ensure Government is transparent and accountable, particularly in such an unprecedented time, it is crucial that public offices and local government continue to create and maintain full and accurate records of their business. These core obligations under the Public Records Act 2005 remain as important as ever.*[56]

In addition to remote working, the lockdowns also promoted greater use of platforms such as Zoom and Microsoft Teams, which agencies used to stay connected, and which often contain instant messaging platforms. Information exchanged in this format, along with text messages, social media, chat functions and any other '*instantaneous, non-sequential electronic communication mechanism*'[57] are considered records under the PRA and must be managed accordingly.

My findings

Information management systems and record-keeping practices

My predecessor's 2015 investigation found that:

> *…one of the most common difficulties agencies said they faced in meeting their obligations under the OIA was in finding and collating all relevant information falling within the scope of requests.*[58]

My current investigation has shown that issues of concern with IM systems and record-keeping appear to persist within most agencies under investigation. I identified areas of vulnerability in all 12 agencies, which resulted in either a recommendation or a suggested action point to improve IM systems and/or record-keeping practices.

56 Archives New Zealand | Te Rua Mahara o te Kāwanatanga, 'Managing information during COVID-19' (last updated 23 June 2022). See www.archives.govt.nz

57 Archives New Zealand | Te Rua Mahara o te Kāwanatanga, 'Text messages and other communications' (last updated 21 June 2022). See www.archives.govt.nz
Also Archives New Zealand | Te Rua Mahara o te Kāwanatanga, Chief Archivist's Annual Report on the State of Government Recordkeeping 2020/21. See www.archives.govt.nz

58 Above, n 3, p. 83.

I was disappointed to find that several agencies I investigated had not complied with sections 17(1) and/or 17(2) of the PRA[59] which, respectively, require an agency to:

> *…create and maintain full and accurate records of its affairs, in accordance with normal, prudent business practice, including the records of any matter that is contracted out to an independent contractor.*
>
> *maintain in an accessible form, so as to be able to be used for subsequent reference, all public records that are in its control, until their disposal is authorised by or under this Act or required by or under another Act.*

A risk of using multiple, disparate IM systems, or IM systems that are out of date or not user friendly, is that their complexity (whether actual or perceived) may compel staff to develop their own methods of storing information outside shared systems—removing or limiting access by other staff. When information is not stored on an easily searched shared system, there is a heavy reliance on staff's institutional knowledge when information needs to be retrieved, whether for the purpose of an OIA request or other operational reasons. When the staff who hold this knowledge leave, information can be effectively lost to the organisation.

Staff survey respondents in most agencies I investigated commented on difficulties with their agency's IM systems. Respondents said their IM systems were cumbersome and not user friendly, or that their agency had multiple IM systems,[60] and it was not clear which system should be used for what information. Staff reported using '*workarounds*', such as saving information on desktops or personal drives instead of shared systems.

> *While the information management system is non-existent, people tend to know who knows stuff. Responses to OIAs tend to find the information via knowledge about who knows this, and their internal team records.*
>
> *While there are IM systems, some parts of the department do not use them at all and store all information in our G Drive, which has basic search functions.*
>
> *Not always easy to find what I am looking for as not everything is added to the record management system.*
>
> *The search facility is known to be highly ineffective. We assume that things, once filed, are likely to be lost, so people save things on their personal areas. This is fine until people rotate into new roles.*

59 I consulted with the Chief Archivist prior to making a finding against any agency in relation to their compliance with the Public Records Act 2005. See Public Records Act 2005, ss 17(1) and 17(2)

60 A report by Archives New Zealand | Te Rua Mahara o te Kāwanatanga highlighted '*the number of systems in use' as one of the 'most common challenges affecting respondents' ability to build in IM requirements'. Building IM requirements into a business system was identified in the report as 'a key enabler for proper management of the information created and stored in that system'*. Archives New Zealand | Te Rua Mahara o te Kāwanatanga, *Findings report: Survey of public sector information management 2019/20*, pp. 21 and 19. See www.archives.govt.nz

There is no clarity about how we should save/retrieve information. With the lack of a comprehensive electronic record management system, each individual user can save information in a personal H drive that is not shared and therefore no one else can have access to it.

Everything is stored on a G Drive with access to individual folders restricted as required. We do not have a document management system. Version control of documents is problematic, as is retrieval. The search engine is horrible. Plus we have to go to our IT department to do a search on emails which can often throw up literally thousands of emails which makes it impossible to answer OIAs with certainty that all information has been provided.

Systems are siloed and do not talk to each other. This makes collation extremely difficult and time consuming.

There are multiple drives and systems; access is limited to the business group or unit, or team.

In theory there is one centralised system, but this is very difficult to navigate and thus people tend to avoid using it. This results in record storage which is all over the place.

There is only one centralised system for records storage. However, with the introduction of new technology (eg, 365 and Teams), there are now different ways of saving documents outside of your laptop which means that documents aren't necessarily making it into the one centralised storage system.

We hold so much information in different systems that it is almost impossible to accurately search and collate related information.

The potential impact on the OIA process is self-evident: there is a risk that information relevant to a request will not be found if it is not stored accessibly. But the impacts go beyond the OIA process. Information retrieval is important for agencies' other business-as-usual functions and for compliance with other any other legislation that regulates their activities, as well as the PRA. Agencies must also be able to provide information to explain their reasons for actions and decisions when subject to complaint or challenge, including investigation by an Ombudsman. In short; efficient and effective information systems and practices are crucial for agencies to operate fairly and effectively, as well as to ensure they are transparent and accountable and maintain the trust and confidence of the public in their actions and decisions.

Information management and record-keeping training

My predecessor's report identified a '*hands-off, self-reliant approach to information management*' which '*(did) not demonstrate a culture genuinely committed to enabling ready access to information*'.[61] This is still the case. Few agencies have IM/record-keeping refresher training available for staff. While some agencies have online modules and some guidance available for staff on their intranet, it appears that the onus is on staff to pursue their own IM and record-keeping training. A number of respondents to my initial staff survey noted that training was limited, and in many cases not strongly promoted by the agency, with staff often left to their own devices to seek assistance or further training beyond that received at induction.

> *More training would be useful instead of asking other staff for help all the time.*
>
> *There are separate systems, one introduced not long ago and we all received training in its use, the other learn[ed] from others or self-taught. Others mostly self-taught.*
>
> *[The nature of the training I received was] ad hoc help from work colleagues.*
>
> *Although this information is available on our intranet, you have to search for it and want to read it.*
>
> *I have done one online training module with the Ministry of Health but that was not promoted or encouraged; I did that because I wanted to know how the Ministry deals with these matters.*
>
> *For most staff there is training at induction and then a reliance on other staff for information.*
>
> *I think we need better training on information management.*
>
> *I would say that information management guidance is not something readily promoted.*
>
> *I read, figure out how these systems work and self-teach. No training has been offered in my role, since I started. I have staff that show me how to do ... what I need for my role.*
>
> *As part of my induction I received training on how to use one information management system, but the training did not include information around what should be kept and for how long.*
>
> *Was mostly on-the-job learning and asking how to do things or find them if unsure.*
>
> *We use a wide range of information systems and get varying levels of training on these systems. Some we get a lot of training on and some we are self-taught.*

61 Above, n 3, p. 83.

More training is needed when we deploy to each area.

Our organisation receives and generates classified documents. There seems to be no training that I am aware of around the management of such material.

Training when new data systems are introduced, but this doesn't cover any obligations for record-keeping.

I received some training on record-keeping requirements as part of my … role nine years ago and nothing since.

Roughly half—51 percent— of staff respondents to my initial survey indicated they had received a general overview of how to use their IM systems, and of their record-keeping obligations. This training typically occurs at induction. Across the 12 agencies, an average of only 10 percent of respondents reported that they received any 'refresher' training, post-induction. Insufficient IM and/or record-keeping training was an issue identified in most of the reviewed agencies, with eight of the 12 agencies given action points in their individual reports. Seven of those related to implementing IM/record-keeping refresher training.

Building an organisational culture that values good record-keeping

I consider that agencies' CEs and senior leaders can do more to demonstrate their commitment to enabling sound IM systems and-record-keeping practices, and to build a strong culture within their agencies around the importance of good record-keeping. Developing, delivering, and promoting effective systems and practices, and comprehensive training for staff, may go some way toward achieving this.

The impact that an agency's culture has on its practices cannot be overemphasised. Leaders make it clear whether or not sound IM systems and record-keeping practices are valued. For example, in many Media Teams, it does not appear that a culture of good record-keeping has been promoted. I made recommendations or suggested action points to eight out of the 12 agencies under investigation, related to improving Media Teams' record-keeping practices.

It was not uncommon for staff in Media Teams to store emails from media requesters in personal mailboxes rather than in a shared document management system. When I requested sample media information request files, I found that records were sometimes missing and could not be supplied by the agencies.

Where poor record-keeping practices exist, it is likely that the user friendliness of IM systems is a contributor. However, I consider a significant cause is that there was not a strong culture of accurate record-keeping in Media Teams. The action points and recommendations I have made will require a cultural shift in Media Teams. This will require changes to practices and systems within agencies, which must be driven and supported by agencies' CEs and senior leaders.

The fact that similar issues were identified in most of the agencies under investigation leaves me with a concern that record-keeping in Media Teams may be a significant issue across the wider public sector.

I also saw evidence of insufficient record-keeping in a number of OIA Teams. While the OIA does not impose specific requirements on agencies in relation to the record-keeping of OIA requests, I expect all government agencies to maintain records of relevant information that led to the agency's decision on an OIA request, including any verbal conversations held during consultations and administrative steps taken when conducting searches for information. Record-keeping needs to be built into the culture of OIA Teams, and ingrained in the OIA practice as a step just as fundamental as logging the request and peer reviewing the response.
I discuss record-keeping on OIA requests further under *Official information requests handled by OIA Teams*.

What agencies should do now

CEs and senior leaders must actively promote a culture in which sound IM and record-keeping practice is seen as fundamental. Modelling this culture should include developing and maintaining their agency's IM systems as assets to ensure they deliver effectively over time. Public sector organisations are stewards of information about New Zealanders, and this must be kept in mind.

Development, updating, and training on IM systems and record-keeping practices should be driven by senior leaders, rather than left to staff to pursue themselves. Training should highlight the link between good record-keeping and the agency's ability to fulfil its OIA obligations, as well as the importance of the free flow of information in New Zealand's democratic process.

I encourage agencies to consider the impact the lockdown may have had on the use of information-sharing and meeting platforms, and any concurrent impact on its compliance with the PRA. For example, if a significant discussion is held using a 'chat' function in an online meeting platform, agencies should consider either how this will be recorded, or ensure that staff understand that this mode of communication should not be used to undertake substantive discussion. Where there may be an impact on record-keeping, agencies should ensure their policies and user guidance are updated to reflect the appropriate practice.

In the OIA context, I encourage agencies to develop systems to ensure all information within the scope of a request is identified. For example, Te Kawa Mataaho has developed a two-step process for information retrieval when information is requested under the OIA. First, the OIA Team conducts an initial search for information, then consults with the subject-matter expert to request that they conduct an additional search for any information that is not accessible to the Ministerial Services Team. This may be especially useful where staff have identified that IM systems are difficult to use to store or to search for information.

Official information requests handled by Media Teams

My expectations

As I will discuss further, under *Official information requests handled by OIA Teams*, most of the 12 agencies I investigated operated a centralised OIA-handling process. Speaking broadly, agencies' centralised OIA Teams handle requests for information received from the public. Agencies typically have a separate team responsible for communicating with the news media, including responding to media requests for information. Each agency has its own title for these business units but, for the purpose of this report, I will refer to them respectively as OIA Teams and Media Teams.

Any request made by a person in New Zealand to an agency for information the agency holds is, by definition, an official information request.[62] This means the request for information must be handled in accordance with the OIA, irrespective of who is making the request or whether it is submitted to the Media Team, the OIA Team, or any other part of the agency. The separation of request handling between an OIA Team and a Media Team based on who the request is received from or on its complexity is, for the most part, a pragmatic approach.

However, I am concerned that it may create a false perception—not only within agencies but also in the news media—that 'media information requests' are not OIA requests, and that there are therefore different obligations that apply to information request handling in Media Teams. I am also concerned about a false perception that the OIA can be used to frustrate and delay responses to the media, such as by referral of a media information request through to another team to be handled as an 'OIA request'. This is simply not the case—there is no requirement in the OIA for requests to be entered into a lengthy 'formal' process with multiple layers of review and sign off, which might delay the timely supply of information. How an information request is handled is at the discretion of the agency.

For the sake of clarity, I want to state unequivocally that media information requests are OIA requests, with the core legislative obligations those confer. So that agencies and the media do not misunderstand my expectations, I want to be equally clear about what this does not mean: I do not expect that all requests for information must be transferred to OIA Teams to be processed. As I stated above, the OIA does not require a 'formal' process for the handling of requests.

62 Media Teams also field requests for an agency to generate fresh comment on an issue, and requests to interview officials. Requests of this type are *not* covered by the OIA, as they are not requests for information *already held* by the agency.

My expectation, simply, is that the same OIA obligations must be met for information requests handled by Media Teams as for information requests handled by OIA Teams, including:

- timeliness (including the requirement to respond as soon as reasonably practicable);
- providing assistance to requesters;
- providing reasons for refusal; and
- informing the requester of their right to complain to me about a refusal.

These requirements are not onerous and do not need to impede the efficient handling of media information requests.[63]

My findings

The relationship between agencies and the news media appeared, through the lens of my predecessor's 2015 investigation, to be characterised by a level of mistrust from agencies toward the media. CEs reported being concerned about their agency being portrayed negatively through what they perceived as manipulative and even irresponsible reporting by a news media seeking to sensationalise issues. As one CE stated, tellingly, '*It's not really information but bullets that are being released*'.[64]

In 2015, it appeared that agencies struggled to meet the demands of the 24-hour news cycle, which requires short turnaround times for the provision of information. In my current investigation, it appears that agencies have now adapted to the new media environment. Media Teams typically respond to straightforward information requests swiftly, with responses typically provided to requesters within their requested deadline—in just a few days and sometimes only hours. However, I fear that, due to their responsiveness to straightforward requests, Media Teams have not properly considered or provided for the times when they are unable to provide the information requested or respond to a more complex media request with characteristic swiftness, as I will discuss further in this chapter.

Compliance with the OIA

As noted above, there is more to OIA compliance than the timely supply of information. Under section 13 of the OIA, agencies have an obligation to provide reasonable assistance to requesters.[65] This aspect of Media Teams' OIA compliance is generally good. It is part of the culture of Media Teams to interact with requesters early in the process to discuss their requests and seek to understand what it is the requester really wants to know, so the agency can provide the most appropriate

63 Office of the Ombudsman | Tari o te Kaitiaki Mana Tangata, *Requesting official information—a brief guide for media* (28 September 2021). See www.ombudsman.parliament.nz

64 An unattributed quote from *Not a game of hide and seek* provided by a CE or senior manager of one of the agencies under investigation. Above, n 3, p. 102.

65 See Official Information Act 1982, s 13

information. Media Teams often provide additional contextual information to assist the requester in understanding the information that was requested and is being released to them.

I saw some excellent examples of staff in Media Teams 'going the extra mile' for requesters. For example, in Te Kawa Mataaho, I saw that the Media Team contacted a requester to advise them that information it had previously declined, on the basis it would soon be publicly available, was now published.

There are other aspects of OIA-handling practices in Media Teams however, that I find concerning. In most of the agencies I investigated, I saw evidence of breaches of the law. In particular, I saw multiple examples of agencies failing to comply with sections 19(a)(i) and/or 19(b) of the OIA.[66] Where an information request is refused, these sections oblige agencies to give to the requester:

- the reason for refusal under the OIA;[67] and
- information about the requester's right to complain to me.

I saw several distinct types of breach of the requirement to provide the reasons for refusal by Media Teams, including responses in which:

- the agency acknowledged that information was being refused, but the reason given for refusal was not a valid one under the OIA;
- no information was given and it was not acknowledged there had been a refusal; and
- general information on the topic of the question was provided, but the agency did not provide information that answered the question, and it was not acknowledged there had been a refusal.

Any breach of the OIA is a concern to me. In some of the examples where a refusal was not acknowledged by the agency in its response, the request was in the form of a list of questions from the requester, which were not all responded to. It is conceivable that a failure to respond to one or two out of a number of questions could be the result of an oversight. While not acceptable, this is understandable when considered in the context of extreme time constraints driven by the 24-hour news cycle. However, it is the other examples which suggest to me a deeper problem with Media Teams' understanding of their obligations under the OIA, and of what constitutes a 'refusal' of information.

For example, a number of agencies' Media Teams offered the following or similar reasons for refusing a request for information, which are not legitimate reasons under the OIA:

> *'That information is not centrally located.'*
>
> *'We're unable to provide that information within the given timeframe.'*

66 See Official Information Act 1982, s 19

67 See Official Information Act 1982, ss 6, 9 and 18

In some instances, the agency would provide information that related broadly to the request, but did not actually provide the information requested. Providing a broad response to a request without providing information to answer the specific question is an approach that undermines both the letter and the spirit of the OIA, and can be construed as 'spin', which can be damaging to public trust in executive government.

I was deeply concerned to find that the responses from some agencies to my investigation suggested they did not consider that media information requests fall under the OIA. As a result, it had become embedded in the culture and practice of staff in some Media Teams to refuse information without providing a valid reason under the OIA. Those staff considered that the OIA did not apply to their actions and decisions on information requests from the media—in stark contrast to their counterparts in OIA Teams operating in the same agency. This perception is exemplified by the response from one of the 12 agencies to my provisional opinion on the OIA practices of its Media Team. It said:

> *Placing the constraints of the OIA over the work of the Ministry's Media Team will add a layer of formality over those relationships and despite the best endeavours of staff, will add to the time required to respond.*

As noted above, I do not consider that meeting the core obligations of the OIA, to identify when information is refused and to advise of the right to complain to me, needs to add to formality or impede timeliness.

Within this investigation, I made recommendations or suggested action points to 8 of the 12 agencies which, in respect of the operations of their Media Teams, did not always comply with section 19 of the OIA.[68]

The perception that the OIA does not apply to media information requests is simply incorrect and appears to have been the cause of Media Teams operating contrary to the law, where I identified that in my investigations of the 12 individual agencies. As I made clear above, requests for information held by the agency are OIA requests, irrespective of who submits them or which business unit handles them. To those agencies that are operating under a misapprehension that the OIA does not apply to media information requests, I say: leaders must take responsibility, immediately, for a cultural shift within Media Teams and ensure policy, practice, and process changes are made to ensure compliance with the law. As I stated to one agency:

> *…Media Team(s) make a decision in every case about whether and what information to provide. It should take no additional time to make and communicate a correct decision based on the relevant legislation, being the OIA.*

68 See Official Information Act 1982, s 19

> *I don't accept the assertion that complying with the OIA in responses to journalists may damage 'cooperative relationship(s) with reporters' due to a 'layer of formality' over their interactions. There is no reason for a difference in the content or tone of their usual interactions, other than to communicate a correct decision.*

A number of agencies were concerned that OIA compliance may inhibit timeliness of responses from their Media Teams, but there is no need for this to be the case. As I have stated above, the requirements of the OIA are not onerous. They are either to provide the information requested, or to provide the reason for refusal and reference to the right to complain. There is no legislative obligation in the OIA for an information request to go through a lengthy, formal process—a 'formal OIA process' is an artefact created by agencies themselves, as I will discuss further under *The portrayal of the OIA in the media*.

If there is concern within an agency that the Media Team cannot comply with the OIA without harming their timeliness, this suggests to me that OIA training and/or capacity in Media Teams is insufficient to enable staff to quickly and confidently make correct decisions and accurately communicate these to requesters in the media. Media Teams make a decision, in every case, about whether to provide information, and what information to provide, to requesters. There is no reason it should take any additional time to make and communicate a decision that is compliant with the OIA. The alternative is that Media Teams are making and communicating decisions to requesters that breach the OIA. This is unacceptable.

In addition to the obligation to provide a valid reason for refusal under section 19(a)(i) of the OIA,[69] agencies must also inform requesters of their right to complain to me. Based on the media information request sample files I reviewed, Media Teams in most of the agencies under investigation did not comply with the obligation to advise requesters of the right to complain. This demonstrates that the agency either lacks awareness of what OIA compliance entails, or did not perceive its decision on the request constituted a refusal under the OIA which triggered the right of complaint.

I note that my predecessor raised the same concerns about OIA compliance in Media Teams in her earlier investigation in 2015. It is disappointing that agencies have not done more to ensure that the practices of Media Teams align with their legal obligations under the OIA, in a practical and user-friendly way. This can only lead to distrust and suspicion by requesters, which undermines public confidence in the transparency and accountability of government.

Responding as soon as reasonably practicable

Where an information request from the media is complex, voluminous, or may require technical expertise on the OIA (that is, considering whether withholding grounds apply), it is generally considered by agency staff to fall under the remit of their OIA Team. Media Teams use a triaging system to determine when it is more

69 See Official Information Act 1982, s 19(a)(i)

appropriate for the OIA Team to handle the request. The 12 agencies' Media Teams triaged requests in a broadly similar manner. Where the request could be answered by the Media Team within the requester's specified timeframe—typically a matter of hours or days, to accommodate media deadlines—it would be answered by the Media Team. If the request could not be answered within the timeframe specified by the requester because it was complex, voluminous, or if it was anticipated that withholding grounds may apply, the Media Team typically advised the requester that their request would need to be handled by the agency's OIA Team.

Agencies' practices around transferring an information request within their agency differed. Some Media Teams would tell the requester that their request '*would need to be an OIA*' without making it clear whether they had forwarded the request on, or whether the requester would need to resubmit their request via a different pathway.[70] This language and the practice of separating requests in this way is problematic, because it helps propagate the misapprehension that quick turnaround 'media requests' are distinct from other information requests. It also implies that the OIA does not apply to them, while 'formal' OIA requests 'must' go through a regimented, multi-stage process which invariably takes the maximum statutory time limit (20 working days).

Apart from the perception issue, there is another potential problem with the 'two-tier' approach to request handling. Where requested information cannot be provided in a matter of days, but the journalist finds it untenable to wait up to 20 working days, there is rarely a middle ground; the request is sometimes abandoned by the requester. It is here that Media Teams' commitment to responding in only hours or days may be a double-edged sword: when Media Teams cannot reply within the media's specified timeframe, the request may not get answered at all. Few agencies I investigated have effective mechanisms in place for providing information 'without undue delay', or under urgency if it falls outside the media's requested timeframe. This 'now or never' approach to media information requests reinforces the false perception that the OIA requires a separate process for handling 'formal' information requests, and it creates a potential gap in the provision of information which is of great concern to me and does not serve the public interest.

The portrayal of the OIA in the media

In interviews with agency staff, including agency CEs, there was little suggestion of the antipathy or suspicion toward members of the media that appeared prevalent in the 2015 investigation. Staff in Media Teams spoke of valuing their professional relationships with members of the media. The tone of correspondence that I reviewed between agencies and the media was most often friendly, familiar, and helpful; and members of agencies' Media Teams my investigators spoke to said that their agency's general approach was to be as forthcoming with the media as possible.

70 In addition to propagating a misapprehension that media information requests are different from OIA requests, I should also note that it is counter to the Official Information Act 1982 to require requesters to resubmit a request via a different pathway or require that the OIA be cited in their request. See Official Information Act 1982, s 12

However, I have noted through my investigation an increasing mistrust of government agencies by some in the media and, disturbingly, mistrust and scepticism about the OIA itself. Over the last several years, it has not been uncommon to see articles in the media which portray both the OIA and its local government equivalent not as mechanisms for obtaining information, but as bureaucratic tools employed cynically by agencies to delay or obfuscate information.

It seems to me that the false dichotomy around 'media requests' versus 'OIA requests' fuels perceptions by some in the media that the OIA is being used by agencies as a shield against scrutiny by delaying and/or frustrating the provision of information. An acknowledgement from an agency that an information request will be dealt with '*under the OIA*' is interpreted by the media as a warning that a response may be refused and will take weeks, not days or hours. This has led to a growing perception that the OIA legislation itself is a root cause of delay and a barrier to the release of information. This is simply not the case. The OIA does not prescribe any particular process which must be followed, and an agency's OIA process can be as agile, flexible and swift as the agency is prepared to make it. The OIA *requires* information to be released unless there is good reason not to, and also *requires* responses to be provided '*as soon as reasonably practicable*', and contemplates the making of urgent requests.[71]

As I stated earlier, Media Teams' process for triaging information requests will typically refer any request to which it is anticipated withholding grounds may apply to the agency's OIA Team. As a result, members of the media receive responses from OIA Teams that contain visibly redacted information, while responses from Media Teams rarely do. This may create a perception that the OIA is being used as a tool to obfuscate. I would note that a redaction of information does not imply a failure or a misuse of the OIA. On the contrary, one of the purposes of the OIA is to '*protect information to the extent consistent with the public interest and the preservation of personal privacy*'.[72] The OIA sets out the legitimate public interest reasons for declining access to certain official information if the circumstances apply.[73]

Where requesters have concerns about an agency's use of redactions in an OIA response, their recourse is to make a complaint to me, so that I can test the agency's decision to withhold the information, and the agency's application of the public interest test, where relevant.

The perception by some that the OIA is a barrier to the provision of information, rather than facilitating it, appears to have increased significantly throughout the course of my investigation. This can be seen in examples such as *Stuff's* 'Save the OIA' and 'Redacted' series[74] and its follow up,[75] the Media Freedom Committee's

71 See Official Information Act 1982, s 15

72 See Official Information Act 1982, s 4(c)

73 See Official Information Act 1982, ss 6, 7, 9, 10 and 18

74 *Stuff*, 'Save the OIA', various. See www.stuff.co.nz

75 Nikki Macdonald, 'Official information law is a horse and cart on a Formula One race track—former ombudsman', Stuff (28 July 2022). See www.stuff.co.nz

announced *'NOIA awards'*,[76] and Stuff's series of *'Things we didn't learn this week'*.[77] An increase in staff numbers in agencies' Media Teams has also been perceived in some media not as a response to increased demand for information and shorter timeframes to respond, but rather as the government employing 'spin doctors' to thwart the media's requests.[78]

All of this suggests there is a deep frustration in the media with the provision of official information. Some media outlets clearly hold real concerns about timely access to relevant information and the OIA regime itself, which appear to me to be fuelled, in part, by some of the issues outlined above. I am becoming increasingly concerned about the experiences the media are reporting, and about some Media Teams' apparent dismissal of the OIA as the legislation which underpins their work. I intend to consider this further as a result.

What agencies should do now

CEs and senior leaders must make it clear that their expectations are for media information requests to be handled in timely and effective way, in accordance with the provisions of the OIA.

Public sector agencies should, with assistance from my staff where needed, prioritise training for their Media Teams that will ensure that they are:

- able to distinguish between media requests that are covered by the OIA (requests for information) and those that are not (requests for comment, opinion or interviews); and
- fully aware of their legislative obligations under the OIA and how to fulfil them in practice.

I consider the lack of sufficient and specific OIA training for staff in Media Teams to be a contributor to the situation I have described above; therefore, more training will likely form part of the solution. I suggested that 10 of the 12 agencies give specific OIA training to their Media Teams.

However, I am also aware that increased knowledge does not inevitably result in behavioural or cultural change. I consider that a fundamental change in the culture of some Media Teams is required. Ultimately, each agency's CE has responsibility for the culture in their agency around access to information, and for ensuring that their staff operate in accordance with relevant legislation.

76 Uncredited, 'The NOIAs: New media awards highlight the battle for information', *New Zealand Herald*, (3 March 2022). See www.nzherald.co.nz

77 Various, 'Things we didn't learn this week', *Stuff* (12 February 2022 through 22 April 2022). See, for example, www.stuff.co.nz

78 Andrea Vance, 'This Government promised to be open and transparent, but it is an artfully crafted mirage', *Stuff* (6 June 2021). See www.stuff.co.nz

Agencies should have mechanisms for responding to information requests as soon as reasonably practicable (as required under the law), and for responding to requests for urgency. There may be benefit in Media Teams and OIA Teams exploring more efficient ways of working together and leveraging each team's expertise and capabilities to ensure the agency can respond as soon as reasonably practicable to all requests, irrespective of the type of requester or the business unit the request is assigned to.

Interactions with Ministers on OIA requests

My expectations

My investigation focused on OIA requests made to agencies—termed 'departmental OIA requests' (as opposed to ministerial OIA requests, which are those for information held by, or more closely connected to, a Minister). There is no requirement in the OIA for agencies to advise their Ministers about departmental OIA requests received and decisions made.

However, both the OIA and the Cabinet Manual make provision for agencies to consult their Minister prior to a decision being made, where reasonably necessary.[79] The decision maker on departmental OIA requests remains the CE (or an official of the department whom the CE has duly authorised).[80]

In addition, the Cabinet Manual recognises that the relationship between Ministers and CEs should be guided by the '*no surprises*' principle. This principle is defined in the Cabinet Manual, and states:

> *As a general rule, [officials] should inform Ministers promptly of matters of significance within their portfolio responsibilities, particularly where these matters may be controversial or may become the subject of public debate.*[81]

How agencies interpret the '*no surprises*' principle, when it comes to the processes they apply when preparing responses to departmental OIA requests, can impact their ability to comply with their legal obligations under the OIA. Therefore, when interacting with Ministers' offices on departmental OIA requests and responses, it is essential that agencies differentiate between:

- consultation with the Minister—where the Minister's input on a departmental OIA request is required to assist the agency to make a decision; and
- notification 'for your information' (FYI) to the Minister of the agency's decision on a departmental OIA request.

79 Consultation may be reasonably necessary when the requested information is of concern to the Minister—for example, because they supplied the information or it is about their functions or activities.

80 See Official Information Act 1982, s 15(4)

81 Cabinet Office, Department of the Prime Minister and Cabinet | Te Tari o te Pirimia me te Komiti Matua, *Cabinet Manual* (2017), s 3.22(a). See www.dpmc.govt.nz

An appropriate timeframe to consult or FYI on an OIA response is dependent on the individual circumstance of each case. When consultation is required, the Minister's office should be afforded a reasonable period of time within which to provide appropriate input in relation to the proposed decision, after which the agency may proceed to make a decision. It should be made clear to all involved that the agency may proceed to make a decision if no input is received within the agreed period.

In relation to FYI responses, where possible, decisions should be notified to the Minister at the same time as they are communicated to the requester. However, in some cases, a short period of advance notice may be required to enable the Minister to be properly briefed so that they are able to respond appropriately to public enquiries and legitimate scrutiny.

In either case, agencies' interactions with Ministers must be configured in such a way that the agency is generally able to meet the OIA requirement to make and communicate the decision on a request as soon as reasonably practicable and no later than 20 working days after the request is made.

In her 2015 investigation, my predecessor recommended the development of a model protocol to ensure agencies have clear and transparent processes for dealing with departmental OIA requests involving Ministers. The development of a protocol is important, to:

- acknowledge the roles and responsibilities of the Minister and the CE in relation to OIA requests with reference to the guidance in the Cabinet manual;
- acknowledge that a '*no surprises*' principle is expected to operate in the relationship between an agency and its Minister;
- make the distinction between consultations before a decision is made (under section 15(5) of the OIA),[82] and FYI or notification of responses ('*no surprises*');
- enable timely engagement; and
- require the outcomes of any consultations to be recorded.

I published a *Model protocol on dealing with OIA requests involving Ministers*[83] in 2017, and I consider it is best practice for agencies to have a written agreement with their Ministers' offices to guide the handling of departmental OIA requests and responses. I encourage agencies to use the model protocol as a starting point for themselves and their Ministers, to discuss and agree upon clear criteria for managing departmental OIA requests involving the Minister.

82 See Official Information Act 1982, s 15(5)

83 Above, n 14.

My findings

In her 2015 report, my predecessor found that agencies interpreted the '*no surprises*' principle in different ways when developing their departmental OIA processes. Agencies had written internal guidance on situations where Ministers should be advised of departmental OIA requests. Often included was a standard requirement that draft departmental OIA responses that raised sensitive or controversial issues should be provided to the Minister at least three to five working days before the 20 working-day maximum statutory timeframe for response. At that time, the practice across agencies varied considerably.

- Some agencies advised the Minister's office of every departmental OIA request.
- Many agencies were far more selective, and only engaged their Minister's office on the departmental OIA responses they considered could be sensitive or potentially controversial (as agreed by their CE or delegated senior manager).
- Some agencies referred draft departmental OIA responses to the Minister as an FYI, but with the invitation to provide feedback before the response was sent to the requester.
- Many agencies referred draft departmental OIA responses for consultation before making a decision.
- Some agencies referred draft departmental OIA responses for 'clearance' or 'approval'.

In my current investigation, key staff said that formal consultation with Ministers on departmental OIA requests occurs relatively infrequently. They advised that it was much more common for agencies to notify Ministers' offices about departmental OIA requests as an FYI. However, I found that a number of agencies took a blanket approach of sending responses to OIA requests to Ministers' offices (whether for FYI or formal consultation) three to five working days in advance of the 'date due' to requesters.[84]

It is my view that allowing, as standard, three to five working days for a Minister to review a response sent to the Minister as an FYI is generally unnecessary and excessive. Further, taking a blanket approach rather than considering each response on its merits could put an agency at risk of failing to meet its obligations under the OIA to make and communicate a decision on a request '*as soon as reasonably practicable*'[85] and to release information without undue delay once the decision is made.[86]

An FYI timeframe for Ministers of three to five working days also has an impact on agency staff, reducing the time available to prepare a quality OIA response. If this timeframe is combined with a similar timeframe for internal sign-out within

84 The 'date due' to the requester was typically determined by agencies based on the 20-working-day maximum allowable timeframe under the OIA, rather than '*as soon as reasonably practicable*'.

85 See Official Information Act 1982, s 15(1)

86 Link to Ombudsman case note issued 28 June 2022, summarising my opinion that NZ Police failed to advise a requester of its decision on an OIA request as early as it could have because of its practice of advising the Police Minister three working days in advance of decisions on certain requests.

an agency, the time for staff to identify the information, review it, and prepare a response is significantly reduced. I will discuss this further under *Official information requests handled by OIA Teams*.

My expectation is that, with few exceptions, the appropriate timeframe for a departmental OIA requests sent to the Minister's office as an FYI is at the same time, or just before, the response is sent to the requester—to ensure the Minister is across the information that is being released. Giving Ministers' offices several working days to consider a response as a blanket FYI approach implies that input may be invited. A perception can then arise that the department is seeking input from the Minister which might alter the decision planned for release, as opposed to simply informing them of the matter for their awareness.

Even the perception of unnecessary ministerial input is potentially harmful to public trust. For this reason, I am pleased that during the course of my investigation, several of the agencies that developed written agreements with their Minister's office also changed their practices to notify relevant departmental OIA requests to Ministers' offices at the same time, or shortly before, responses were sent to the requester. This aligns with the intention of the 'no surprises' principle.

I was concerned to see some FYI interactions with Ministers' offices operating as a proxy approval process. Some agencies providing departmental OIA responses to Ministers' offices as an FYI would, in practice, often wait until confirmation was received from the Minister's office before sending the response to the requester. This suggests that the agency was seeking clearance, approval, or sign-off from the Minister, which I would consider an abdication of the agency's responsibilities and accountabilities under the OIA. In such a case I may form an opinion that the delay was in breach of the agency's legal obligations under the OIA to provide the decision '*as soon as reasonably practicable*'.[87]

I found that some agencies' practices reflected my expectations. For example, the OIA Team in the Accident Compensation Corporation | Te Kaporeihana Āwhina Hunga Whara does not wait to hear back from Ministers' offices before sending departmental OIA responses to requesters, and Te Kawa Mataaho advised me that it notifies the Minister's office about selected departmental OIA requests at the same time, or shortly before, the responses are sent to the requester.

My investigation considered whether agencies had a written agreement (or protocol) guiding interactions with their Ministers on OIA requests. My investigation also considered whether agencies had improved their understanding of the difference (for OIA purposes) between departmental OIA requests sent to Ministers' offices for consultation, and those for FYI or notification under the 'no surprises' principle.

Generally, staff said they had well-established processes for interacting with Ministers' offices on departmental OIA requests; however, not all agencies had these processes clearly embedded in a written policy or protocol.

87 See Official Information Act 1982, s 15(1)

Of the agencies investigated, seven now have written agreements to guide their process of interacting with Ministers' offices on departmental OIA requests, and two are developing them. This is a significant improvement from 2015, when no agencies had such written agreements. Ideally, these written guidelines will be discussed and agreed with Ministers' offices.

I found some of the written agreements were based on my *Model protocol on dealing with OIA requests involving Ministers*.[88] However, key information was missing from some agencies' agreements—such as the process in the event of a disagreement and guidance around appropriate timeframes to send responses for notification under the 'no surprises' principle—which I encourage agencies to add. Of the seven agencies with written agreements, all included guidance on consulting with Ministers. Six of the seven included the factors an agency considered when consulting, the timeframe for consulting, and a commitment to record-keeping.

Some agencies explained that they considered a written agreement was unnecessary, because the unwritten practice was already working effectively. There are several reasons why this approach presents risks to agencies. First, it relies heavily on the institutional knowledge of staff. In the absence of those staff members, that knowledge can become lost. Further, when mistakes occur, they can become embedded in practice. One Private Secretary summarised the risk by saying, '*Some staff don't know where to go for advice, and they just start doing what has always been done*'.

An unwritten process allows for grey areas, which can allow practices in the margins of acceptability. I would also stress that when the relationship is working well and correctly, this is the perfect time to embed the practice in a written agreement or protocol, ensuring roles and responsibilities are clear and understood by all parties. If there is a disagreement, or the relationship between the CE and Minister is tested in the future, an agreed written protocol would provide agencies with a tool to rely on to resolve such issues.

My investigation, which covered the period from November 2019 to June 2022, did not find evidence confirming interference by Ministers' offices on departmental OIA responses. However, some staff survey responses conveyed that there is still a concern and/or perception of ministerial interference in departmental OIA responses. This is worrisome. Such perceptions damage public trust in the agency and the OIA. I am concerned that the ambiguity and/or lack of transparency of the consultation/FYI process by some agencies, which in practice enables feedback from Minister's offices and sometimes acts as a proxy ministerial approval process, may contribute to this perception.

88 Above, n 14.

Training for staff in Ministers' offices

My investigators met with the staff in Ministers' offices, with whom agency staff liaised in relation to departmental OIA requests. In all but one instance, this was the Private Secretary (a secondee from the agency).[89]

There was a notable lack of specific training on the role of Private Secretary and, in particular, their role in respect of ministerial and departmental OIA requests. Many of the private secretaries my investigators met with in the course of my investigation said they received limited guidance or specific training when they moved into the role; they were left to learn 'on the job'. For example, although the Department of Internal Affairs | Te Tari Taiwhenua (DIA) has produced a written guide for secondees to Ministers' offices, not all private secretaries my investigators spoke to were aware of this resource, and it provides only a high-level overview of the OIA process.

One meeting attendee noted that they intended to create guidance material because they did not want their '*…successor to be left in the lurch quite the same way I was*'. While I applaud this staff member's initiative, I consider the agency is responsible for ensuring private secretary secondees receive adequate training, guidance, and support. Theirs is a crucial role in the OIA-handling process—private secretaries must have absolute clarity about the OIA process, the difference between consultation and FYI, and the remit of their and others' roles within it, in order to usher departmental OIA requests appropriately through any ministerial interaction that may be required.

What agencies should do now

While I am pleased that many agencies who were part of this investigation have developed written agreements to guide them on dealing with departmental OIA requests involving Ministers, I continue to encourage agencies without such agreements to agree on a process, in writing, with their Ministers' offices. It is important for agencies to have clear and transparent processes for dealing with departmental OIA requests and responses. Agencies should publish these policies and procedures.

Although I saw some improvement in practices since 2015, I am still concerned that some agencies are providing a blanket three to five working days for Ministers' offices to consider OIA responses referred on an FYI basis. I expect agencies that employ such a blanket approach to cease this practice. Where possible, departmental OIA responses should be sent to the Minister's office as an FYI at the same time, or just before, they are sent to the requester. I acknowledge that, in some cases, a short period of advance notice may be required for FYIs to enable the Minister to be properly briefed so that they are able to respond appropriately to enquiries.

89 In the Ministry of Foreign Affairs and Trade | Manatū Aorere, the main liaison in the Minister's office on OIA responses was the Minister's Political Advisor.

When interacting with Ministers' offices on departmental OIA requests, agencies must ensure they are correctly distinguishing between FYI processes (under the 'no surprises' principle) and consultation. Crucially, agencies should also provide the Minister's office the appropriate amount of time depending on the circumstances, so that responses may still be sent to the requester as soon as reasonably practicable. Agencies should also note that in some instances it may only be necessary to provide the Minister's office an FYI with the topic or a summary of the response, rather than the response in full.

Where consultations are needed with a Minister before the agency makes the decision on an OIA request, this should also be undertaken in an appropriate timeframe.

Agencies must ensure that private secretary secondees to Ministers' offices receive appropriate training and guidance, including a clear understanding of the OIA, and of their role in the agency's process of interacting with Ministers on departmental OIA requests. Relying on a staff member's previous experience working within the agency is, in my view, insufficient to ensure that they are equipped to fulfil the role of a Private Secretary.

In particular, I consider that the Private Secretary's role in the FYI process should be, chiefly, to determine whether and what the Minister needs to be made aware of in relation to the OIA response, consistent with the 'no surprises' principle. Training and guidance should reinforce this, and should make it clear that it is not the role of a Private Secretary to act as an additional peer reviewer in the departmental OIA process. It is the role of the agency, not the Private Secretary, to ensure a consistent approach across similar requests, and to ensure all relevant information has been included by the department.

In addition to developing and delivering training and guidance for secondees, agencies should take advantage of external opportunities to upskill staff. On request, my staff are able to provide OIA training to staff in Ministers' offices, including private secretaries, press secretaries, and ministerial advisors. I have also produced a guide on dealing with OIA requests involving Ministers.[90]

90 Office of the Ombudsman | Tari o te Kaitiaki Mana Tangata, *Dealing with OIA requests involving Ministers: A guide to transfer, consultation, and the notification of decisions on OIA requests* (30 April 2019). Note that this guidance is being updated as at September 2022. See www.ombudsman.parliament.nz

Official information requests handled by OIA Teams

My expectations

The effectiveness of the OIA is largely dependent on those who implement it on a day-to-day basis, and how they apply the resources available to them to manage the realities of giving effect to the OIA. Official information practices should demonstrate understanding, compliance, and commitment to the principles and requirements of the OIA and related legislation, including the PRA.

It is my expectation that agencies have sufficient resources to fulfil their obligations under the OIA, as core business. This should include appropriate staff capacity to handle the OIA workload. Agencies should also have resilience measures in place which allow them to cope with surges in demand for OIA requests, or staff absences. As I discussed earlier under *Messaging from senior leaders,* agencies' OIA reporting should allow them to identify when an increase in OIA requests becomes an agency's new baseline, and to ensure it is sufficiently resourced.

I highlighted the importance of the OIA in New Zealand's democratic process in the introduction to this document, and it bears repeating here. Citizens must have access to accurate and timely information in order to participate meaningfully in government processes, such as voting and petitioning the government to make legislative change. Every public servant has a role in making information accessible—whether directly, as a member of a centralised OIA Team, or indirectly, by creating and storing information in a way that facilitates its later access.

Accordingly, all staff must be trained on the OIA to a level appropriate to their role and involvement with the OIA process. For example, staff in OIA Teams should be able to make appropriate use of the legislative mechanisms for dealing with large and complex information requests. They should also be able to give proper consideration to the public interest in the release of official information, and to explain this to requesters. Staff in Media Teams must be trained to recognise OIA requests (as distinct from requests for comment), and to make legislatively compliant decisions without hindering timeliness, as I discussed under *Official information requests handled by Media Teams*. Staff who are subject-matter experts, and may assist to identify relevant information and explore any harms in release, need to understand the OIA framework.

Even those staff who have no direct involvement in the handling process are very likely to be involved in an indirect sense when they create and store information. In this respect, it is important that they are aware of the agency's OIA obligations, and how these are facilitated by good record-keeping practices. I discussed this under *Information management and record-keeping*.

Agencies should ensure that OIA-handling processes, particularly relating to sign-out and peer review, do not interfere with timeliness obligations under the OIA, noting that this applies to the requirement to make and communicate a decision not only within 20 working days, but as soon as reasonably practicable. Once a decision is communicated, the information should be made available without undue delay.

The incidence of the COVID-19 pandemic did not diminish my expectations around OIA-handling practices. As I stated in my introduction, I did not suggest any amendments to the OIA, because it is my view that sufficient mechanisms exist in the OIA to render it applicable even during the challenges presented by an unprecedented global crisis. I consider that the free flow of information was crucial during the pandemic. The timely provision of information about the work of executive government is important to maintain public trust in its actions and decisions which affect the everyday lives of its people. This need for public trust was profound and acute during the pandemic in order for the government to effectively implement its strategy to safeguard New Zealand's security, economy, and public health. The OIA was therefore a critical tool if the government wanted to achieve that, and to be effective while also preserving our democracy.

My findings

The impact of COVID-19 on OIA-handling

During the lockdowns, those not deemed 'essential workers' were required to stay home.[91] Of the respondents to my post-lockdown staff survey, 85 percent indicated that they worked from home during the 2020 lockdown.

In my post-lockdown survey, I asked staff about their experiences of handling OIA requests while in lockdown. Predictably, some staff reported that they were unable to provide requested information when it was held in hard copy, as the government requirement to work from home meant that it was not possible to access the information. In the agencies I investigated, this did not appear to be a major problem. My Office released guidance on how to handle OIA requests during lockdown which suggested that, where a hard-copy document was requested, agencies could communicate a decision to grant the request and provide the information once the information was able to be accessed.[92] This is in line with existing mechanisms in the OIA, which also include the ability for agencies to extend the time limit to communicate a decision on an OIA response in certain circumstances. Most agencies within this investigation reported that they took this approach when they received a request for information held in hard copy, but this seemed to occur relatively infrequently, and chiefly where historical information was requested.

91 Unite against COVID-19, 'Timeline of key events' (last updated 29 June 2022). See www.covid19.govt.nz

92 Office of the Ombudsman | Tari o te Kaitiaki Mana Tangata, *FAQs about official information requests during COVID-19* (21 February 2022). See www.ombudsman.parliament.nz

To its credit, the Ministry of Foreign Affairs and Trade | Manatū Aorere identified that it received requests for a category of information that it was unable to access during lockdown, because it was held physically and was therefore inaccessible. Accordingly, the Ministry is considering whether it is necessary to digitise this information.

The most significant change to OIA processes, reported by respondents to my post-lockdown survey, was that their agency's OIA sign-out and peer-review processes became electronic, where previously many agencies had been reliant, at least to some degree, on hard copies. Overall, I consider this is a positive shift, as did many staff, based on comments made in my post-lockdown survey.

> *We implemented a digital process for signoff rather than physical folders being passed around. I believe that is a more efficient, less costly, more environmentally friendly approach and should be done Ministry-wide.*

> *By getting responses approved electronically, it was a quicker way to get the approval through management of the division.*

A fully electronic process appears to be more efficient than the alternative, and it is beneficial to embed the process, in the event all staff are required to work from home again, whether due to a pandemic lockdown or some other emergency situation. I consider there is also benefit in conducting review and sign-out procedures electronically when most IM systems are electronic. Comments made on Post-it notes or written in margins on a hard-copy document can be lost, unless staff are assiduous about scanning and saving reviewed documents.

In post-lockdown discussions with key staff, it appears that many agencies have maintained electronic sign-out and peer-review processes in most situations. However, in respect of interactions with Ministers for the purpose of notification or consultation on OIA responses, some agencies have reverted to pre-COVID-19 procedures, which rely on hard copies being collected from the agency and walked to the Minister's office at Parliament. As one Private Secretary noted, a response could be left to sit idle for a day if it became ready after the Private Secretary had completed their daily collection of hard copies from the agency. In addition, as I noted above, it is easier to keep and to retrieve records of feedback on OIA responses when this is given electronically (although I would highlight that seeking input from the Minister's office is not the purpose of the OIA-notification process).

Some staff also noted that sign-out processes—which often consume a large portion of the time allotted to staff to complete OIA responses, as I discussed earlier in this chapter—were relaxed somewhat during the lockdown. This was often through necessity rather than due to a conscious decision, as high-tier staff were often busier than usual. I am not in favour of OIA sign-out processes being any more time consuming than they need to be. However, it is also important that decisions on OIA requests are made by those who hold the appropriate delegation from the agency's CE, have sound knowledge of any harm that might occur, and are able to assess the weight of any countervailing public interests considerations favouring release, where relevant, in that decision-making process.

In terms of objectively assessing agencies' OIA performance, although Te Kawa Mataaho's timeliness statistics do not necessarily provide a complete picture of OIA performance—as I discussed earlier under *Messaging from senior leaders* —it is nonetheless a useful gauge of agencies' year-on-year performance. I consider the data shows that agencies, overall, performed admirably during the 2020 lockdown, based on an average decrease of reported OIA timeliness of just 1.2 percent across the 12 agencies I investigated.

Of those agencies, only two experienced a notable decrease—more than five percent—in reported timeliness performance when compared with the same six-month period the previous year. Those were the Ministry of Justice | Te Tāhū o te Ture (which reported a decrease in OIA timeliness of approximately 12 percent) and the Ministry of Foreign Affairs and Trade | Manatū Aorere (approximately six percent).

In both agencies, there were clear reasons for their decreased OIA timeliness performance, involving insufficient resources. The Ministry of Foreign Affairs and Trade | Manatū Aorere had reduced staff numbers in OIA-handling roles due to their redeployment into emergency response roles. The Ministry of Justice | Te Tāhū o te Ture had inadequate hardware available for staff in OIA-handling roles. Staff commented on this in my post-lockdown survey.

> *For a large part of the lockdown period most of the organisation did not have access to laptops or Te Tāhū networks—documents being worked on were stored on personal devices until they could be moved to Te Tāhū network.*
>
> *For the first month, I didn't have a Ministry laptop or access to Te Tāhū filing system. Once I received a laptop I could access all materials and perform all tasks.*

Those agencies, now being aware of their vulnerabilities, should review their business-continuity practices to ensure they have sufficient capacity, resources, and resilience arrangements to allow continuance of their OIA-handling processes the next time a lockdown or other emergency occurs.

There were a small number of comments from staff across the 12 agencies who noted that they did not have access to various technologies while working from home, such as printers or redaction software. These problems did not appear widespread; however, I encourage agencies to review their business-continuity processes to ensure necessary hardware and software is available to staff to fulfil their roles under the OIA.

The comments I received from staff in my post-lockdown survey, and the timeliness statistics reported by Te Kawa Mataaho relating to the lockdown period, indicate that when the OIA-handling function is sufficiently resourced in terms of staff and technology, the impact of working from home on agencies' ability to process OIA requests was minimal. The agencies that appeared to perform well were those that had adequate technology and adequate resourcing within teams, and those whose staff were already familiar with working remotely and equipped to do so, in terms of low reliance on paper documents.

Of all the comments received in my post-lockdown survey of staff across all 12 agencies, and in post-lockdown discussions with key staff, no concerns were raised that the OIA itself lacked sufficient flexibility to enable agencies to continue to respond to OIA requests during lockdown.

As I discussed in the introduction to this report, the Ministry of Justice | Te Tāhū o te Ture consulted with me and the Solicitor-General on whether any modifications to the requirements of the OIA might be necessary to accommodate the immediate challenges created by the COVID-19 pandemic. I was also approached by a number of other government agencies as to possible recommendations for modifications of the OIA under section 15 of the Epidemic Preparedness Act 2006. The Solicitor-General and I considered that no amendments were required, as the OIA contained sufficiently flexible provisions and mechanisms to allow agencies to manage requests during this difficult and rapidly evolving situation, and to cope with the particular challenges of the lockdown. Indeed, both the Solicitor-General and I issued specific guidance to agencies confirming that the OIA continues to apply during this Covid-19 emergency. The Minister for the Public Service has also since advised me that '*(n)o advice suggesting any changes to the OIA was ever prepared or considered by Ministers*.' He added: '*Even if such advice had been prepared, I am confident that Ministers would not have accepted it.*'[93]

Now that the initial alarm of the early days of the pandemic are behind us and we approach an, admittedly new, 'normal', I remain convinced that the decision to maintain the OIA as a priority for government agencies in every aspect was the right one. The decisions that were made around the OIA reinforce the importance of transparency and accountability for the actions and decisions the Government was making during this time, as well as the effectiveness of the existing system of review, and the importance of independent oversight.

Government departments coped admirably with a challenging situation without the need to amend or suspend a key constitutional mechanism for the provision of information to New Zealanders. I was therefore particularly heartened by the acknowledgement of the Secretary of Justice who, in a letter to me, recognised that '*when our policy team was looking at the OIA, it consulted you and the Solicitor-General on whether any modifications might be required and accepted your advice that the Act was sufficiently flexible to accommodate the immediate challenges created by the pandemic. In this case the system of review and independent oversight works, just as I would hope in a strong democracy.*'[94] Indeed, I consider that, quite apart from legislative compliance, most agencies and staff recognised that the continued provision of information was crucial to enable public trust and confidence during such an uncertain time.

93 Letter from the Minister for the Public Service dated 3 September 2022

94 Letter from the Secretary for Justice dated 5 September 2022

OIA training

As my predecessor identified in 2015, a lack of OIA training leaves agencies vulnerable to unintended bad habits embedding into practice, and decisions being made that may be out of date with current approaches of the Ombudsman.

Of the 12 agencies I investigated, 11 use a centralised model of OIA handling, in which the majority of OIA processing, including logging, tracking, and drafting the response, is handled by a centralised team. The OIA Team seeks information relevant to the response from subject-matter experts within the organisation. For a centralised model of OIA handling to be most effective, the OIA Team must hold a high level of technical expertise and knowledge of the OIA. Ongoing specialist training for OIA Teams must be prioritised, to ensure this team remains the 'centre of excellence' for the OIA process.

This does not mean, however, that other staff do not require any knowledge of the OIA. Subject-matter experts who provide information in response to OIA requests, for example, must have sufficient knowledge of withholding provisions in the OIA to enable them to meaningfully participate in discussions about withholding information from an OIA response. Senior leaders, who are often the final decision makers on OIA requests, should have a robust understanding of the provisions of the OIA, in order to ensure that decisions are legislatively correct and consistent across the organisation. Staff in Media Teams also require OIA training specific to their roles, as I discussed earlier under *Official information requests handling by Media Teams*.

In my current investigation, I identified that OIA training was not a great strength in many agencies. Of the 12 agencies under investigation, I gave action points to nine, suggesting improvements to OIA training. One of the most notable gaps in agencies' OIA training is targeted training for OIA decision makers. Relying on senior leaders' knowledge and past experience to make the appropriate decision undervalues the benefits of ongoing training, including keeping up to date with any changes in law, or any new opinions or guidance I have issued.

Developing and delivering targeted training to decision makers on OIA requests represents a huge opportunity for agencies. In addition to the obvious benefit of ensuring decision makers are equipped to make legislatively correct decisions on OIA requests, providing training to senior leaders demonstrates leaders' commitment to the principle and purposes of the OIA, and highlights the importance of OIA compliance.

Ensuring that training is prioritised for a range of staff, not only those in the OIA Team, can assist in developing resilience in the OIA-handling process. In the event that there is a surge in OIA requests, or attrition in the OIA Team, staff in other areas of the business who are adequately trained on the OIA may be able to assist.

Sign-out practices

Some agencies' OIA sign-out processes require review and approval from five or more different officials. Staff survey respondents had the following to say about their agencies' sign-out processes.

> *The sign-out process is very extensive and requires many layers of sign off. It feels like the most amount of time is spent here, rather than collating the information.*

> *As a provider of information for OIAs/collation of responses, I find the timelines for delivery frustrating. Most of the time available under the Act is taken up by the multitude [of] checking and sign-off processes which means that I get literally 3–4 days in which to collate information and write the response. As requests are always ad hoc, this creates difficulty in getting the rest of my (busy/urgent work) job done.*

OIA responses that agencies consider require multiple levels of sign-out are typically those considered to be 'sensitive' or 'high risk'. Agencies have different criteria for determining this, but, speaking generally, the criteria might include requests:

- from the media or bloggers;
- from political parties;
- from researchers or frequent requesters; or
- on controversial or high-profile issues that have political implications.

Accordingly, they are also likely to be sent to Ministers' offices on an FYI basis for up to five working days, as I discussed earlier under *Interactions with Ministers on OIA requests*. I am concerned that excessively time-consuming OIA sign-out and FYI practices significantly reduce the amount of time for staff to collate and consider information, and to formulate a response. Excessively stringent and multi-layered sign-out procedures may:

- increase pressure on staff required to complete OIA responses in a compressed timeframe;
- put agencies at risk of breaching their obligation to make and communicate a decision to the requester as soon as reasonably practicable, and to provide information to the requester without undue delay; and
- impact the quality of OIA responses, as staff have less time to consider the relevant issues and compose a response.

Agencies must ensure that their sign-out procedures achieve a balance between OIA decision makers being suitably senior, and agencies not being at risk of breaching timeliness obligations under the OIA, including the requirement to make and communicate a decision as soon as reasonably practicable.

Weighing the public interest

My predecessor's 2015 report stated:

> *When the decision was to decline a request for information under section 9 of the OIA, I found many agencies' communications were weak in explaining to the requester the public interest factors they had taken into account when coming to that decision.*[95]

'Public interest factors' are the reasons which exist in the public interest to release information. When agencies consider withholding information under section 9(2) of the OIA, they are required, under section 9(1) of the OIA, to weigh the countervailing public interest in releasing the information.[96] If the public interest in release is stronger than the harm to be protected by withholding, then the request cannot be refused.

There appears to have been little improvement in this area. Typically, where agencies withhold information from a request, it includes a rote sentence in OIA response letters stating the public interest has been considered, but it does not outweigh the need to withhold certain information. In the sample files I reviewed, it was exceedingly rare for agencies to specify in their response to requesters the public interest factors they took into consideration, or why these were determined not to outweigh the reasons(s) to withhold information. Based on the sample OIA files I viewed throughout this investigation, records of agency decision-making regarding public interest considerations, and communication to the requester about it, appear still to be lacking.

Frequently, information on how to consider the public interest was absent from agencies' OIA guidance. I suggested an action point for eight of the 12 agencies under investigation to include or enhance the OIA guidance available for staff on weighing the public interest. Some agencies' guidance referenced my guide for agencies on the subject of the public interest.[97] I encourage agencies to also develop guidance for their staff which is specific to their agency, using examples of the types of OIA requests they receive frequently, in order to make the guidance as relevant for staff as possible. I consider that many agencies are missing an opportunity to learn from prior experience of handling OIA requests through keeping good records and ensuring they are used for the benefit of staff. I discussed this earlier under *Information management and record-keeping*.

95 Above, n 3, p. 122.

96 See Official Information Act 1982, s 9

97 Office of the Ombudsman | Tari o te Kaitiaki Mana Tangata, *Public interest: A guide to the public interest test* (22 April 2019). See www.ombudsman.parliament.nz

Record-keeping on OIA requests

It is necessary to keep good records of OIA decision-making, particularly in the event of the requester exercising their right to complain to me under section 19(a)(2) of the OIA.[98] It is also a requirement of the PRA that agencies create and maintain full and accurate records of their affairs.[99]

Quite apart from the fact it is a legislative obligation to do so, keeping good records of OIA processing may also be used to benefit the agency through building a body of knowledge about their OIA processes, enabling effective quality assurance, and ensuring staff can use this information to learn and make continuous improvements to OIA practice. I consider this is an opportunity that is going unrealised by many agencies. Building a library of examples of the agency's decision-making processes in relation to withholding grounds, for example—particularly where these have been tested through an investigation by me—may help staff avoid having to 'reinvent the wheel' when the agency receives a similar request in the future.

As part of my investigation, I requested a sample of OIA files from each agency, which was to include all the records the agency kept on a request. I found that, with few exceptions, agencies' OIA Teams generally kept full and complete records of the OIA request and response (including emails of acknowledgement from the agency), along with internal and external emails relating to the response. However, where interactions on a request were not made via email, they appeared less likely to be kept or able to be retrieved. For example, I saw some emails in the sample files that referenced a meeting or conversation about a request, but no records of that discussion could be provided by the agency.

While I do not expect records to be kept of every exchange between staff members, where staff have a substantive discussion about the OIA decision-making process, as noted above, it is a requirement of the PRA that this is stored and maintained by the agency.[100] In addition, it is a requirement of the OIA that agencies provide the reasons for their decisions on an OIA request, if the requester seeks it. This goes beyond simply telling the requester under what provision of the OIA they withheld the information; the agency must be able to tell the requester the grounds in support of that reason and how they weighed any relevant public interest in release.[101] The agency must also be able to provide this information if I request it in the context of a complaint made to me about an agency's decision on an OIA request.

Agencies should also record administrative steps taken to respond to OIA requests, where necessary. For example, if an agency is considering refusing a request on the basis of substantial collation or research, or considering fixing a charge for the supply of information, it should make a record of data such as the search terms used, the volume of information the search produced, and the time taken to review a sample of the information.

98 See Official Information Act 1982, s 19

99 See Public Records Act 2005, s 17

100 See Public Records Act 2005, s 17

101 See Official Information Act 1982, s 19

This is important information to enable effective decision-making and quality assurance, and also to assist with review in the event of a complaint to me. Recording search terms used can also prove a useful resource for agency staff when a similar request is submitted in future.

What agencies should do now

I strongly encourage agencies to review the OIA-training needs of staff, and develop and deliver training accordingly. This should include targeted training for staff in specific roles, including:

- specialist OIA training for staff in OIA Teams;
- staff in Media Teams;
- OIA decision makers; and
- subject-matter experts.

In developing OIA training, the agency should consider business-continuity and resilience requirements. There should exist sufficient OIA expertise outside the centralised OIA Team to ensure the OIA-handling function and the proactive release of information can be maintained in the event of a surge in requests, staff attrition, or a crisis event such as a pandemic or natural disaster.

I can advise agencies that my staff are available to assist with developing and/or delivering training, on request.

As stewards of the official information system in their agency, CEs and senior leaders must ensure the efficiency of their OIA-handling processes. It is important that agencies have systems in place for learning from the experience of handling OIA requests. Where efficiencies in the process have been identified as a result of working through COVID-19, the agency has an obligation to ensure these are embedded into practice, and reflected in any associated guidance and policy documents, to ensure practice and policy are aligned.

Sign-out processes are a good example of an area in which a review of practices may be of benefit for agencies. This should also include reviewing which roles have delegated authority to make decisions on OIA requests on behalf of the CE. Where agencies' OIA processes include multiple layers of review, it is important that decision makers are available to make decisions and, if they are not, that resilience arrangements exist. Agencies may consider delegating decision-making authority to a lower leadership tier for some types of requests, while implementing something akin to a 'no surprises' principle, where necessary, to ensure senior leaders are kept aware of significant OIA requests—while not necessarily having to review and approve the entire response.

Agencies must ensure that sound record-keeping is embedded in their OIA processes. In the context of OIA handling in OIA Teams, this relates particularly to the decision-making process, including the agency's consideration of public

interest factors. This is not only to facilitate legislative compliance, but also due to the efficiencies that can be gained from learning from the process of OIA handling. I am pleased that Archives New Zealand | Te Rua Mahara o te Kāwanatanga, in conjunction with Te Kawa Mataaho, put one of my predecessor's recommendations into effect by developing a model search protocol.[102] I encourage agencies to use this to record administrative steps in the OIA process where this might be relevant.

Given the importance of information access to New Zealand's democratic process, I consider that OIA awareness and compliance should be specifically included in staff performance objectives, to a level appropriate to the nature of their involvement in the OIA process. I discussed this above in relation to CEs' performance objectives under *Messaging from senior leaders*.

OIA training: the Ministry of Education | Te Tāhuhu o te Mātauranga

The Ministry of Education | Te Tāhuhu o te Mātauranga sets a good example of agency-wide OIA training. The Ministry's Government, Executive and Ministerial Services (GEMS) Team delivers presentations to staff in regional offices and across different levels of the Ministry, from graduates to members of the Ministry's Senior Leadership team.

Presentation topics include the role and function of the GEMS Team, the support the GEMS Team is able to provide to regional offices, the role of subject-matter experts in responding to OIA requests, and the governance and structures of government and how they work.

As part of this outreach programme, monthly engagement meetings with coordinators, ministerial servicing satellite teams, tier three leaders and private secretaries have also been conducted.

102 Above, n 16.

Accessibility

My expectations

All agencies should have documented and practised awareness of disability rights. In the official information context, I expect agencies to have resources and practices around the release of information which enable it to be accessible to everyone. Agencies should be alert to particular accessibility needs of the requester. Section 16(2) of the OIA requires agencies to make the requested information available in the way preferred by a requester (subject to certain exceptions).[103]

All public sector agencies are required to meet the New Zealand Government Web Accessibility Standard.[104] The standard is intended to make websites more accessible for users with a range of disabilities, including visual, hearing, physical, speech, cognitive, language, learning, and neurological disabilities. Although the accessibility standards apply to website content, it is my expectation that agencies apply these standards to information released in response to OIA requests, and to information released proactively.

I expect agencies to publish and provide information in a format that accommodates the use of assistive technology, such as screen readers. For example, publishing or providing information in an 'image only' format (such as a scanned PDF or JPG) is not accessible for blind and low-vision individuals using screen readers, or those with learning disabilities using read-aloud applications. It also limits the ability to search documents using keywords. Where PDF documents are provided in response to an OIA request, they should be searchable. Published PDF documents should also be searchable, and ideally be accompanied by an accessible Microsoft Word version. Agencies should also be aware of the potential impact of adding elements, such as watermarks, and ensure this does not limit documents' accessibility.

My findings

In the 2015 report, my predecessor found that agencies frequently released information to requesters in a form that did not enable them to use it easily. Releases would be scanned into a PDF and sent to the requester, compromising the ability to make efficient use of the information.

I was disappointed to find in my current investigation that most of the 12 agencies were not routinely ensuring *all* information published or released is searchable and not 'image only' and that any visual elements are tagged with alternative text. Sometimes proactively released information is searchable, but information

103 See Official Information Act 1982, s 16(2)

104 New Zealand Government | Te Kāwanatanga o Aotearoa, 'Web Accessibility Standard 1.1'. See www.digital.govt.nz

released in response to a request is not, or vice versa, reflecting inconsistent practice within agencies. Some agencies are still using watermarks on proactively released documents, which can sometimes inhibit the use of assistive technologies.

I note that, during the course of my investigation, half of the agencies assured me that they were actively working towards ensuring that official information releases, and information released proactively, was accessible and not 'image only'. This is encouraging, but I would have expected more improvement to agency practices in ensuring accessibility over the intervening time since 2015.

What agencies should do now

Agencies must ensure that their digital information complies with the New Zealand Government Web Accessibility Standard. I encourage agencies to consult and use the Web Content Accessibility Guidelines 2.1 in order to ensure their compliance with the Standard.[105] The guidelines cover a wide range of methods for making web content more accessible—not only to people with disabilities but to users generally.

I have produced a guide which may also assist agencies, which includes a section on New Zealand's international and domestic obligations to ensure disabled people have equal access to information.[106] This section also provides advice on making information accessible. It should be noted that not all members of the public have access to the internet, and some may require information in other formats (including, but not limited to, audio, braille, printed materials, New Zealand Sign Language, and Easy Read) to cater for different access needs. The public should be advised that they can ask for accessible formats if required.

Where agencies use redaction software or apply watermarks to documents released under the OIA or proactively released, they should ensure this does not inhibit accessibility. Documents should still be able to be searched, and should be able to be used in conjunction with assistive technologies such as screen readers.

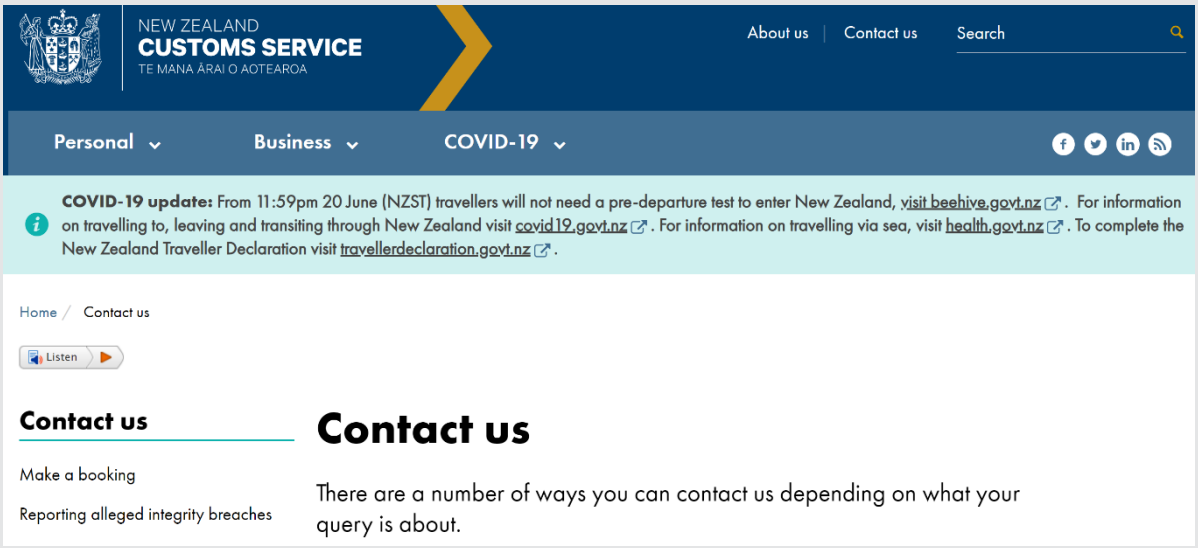
105 Web Accessibility Initiative, *Web Content Accessibility Guidelines (WCAG) 2.1—Recommendation* (5 June 2019). See www.w3.org

106 Above, n 19, 'Making sure the information is accessible', p. 11.

Good accessibility practice: New Zealand Customs Service | Te Mana Ārai o Aotearoa

I was pleased to observe that the New Zealand Customs Service | Te Mana Ārai o Aotearoa website uses the ReadSpeaker tool to provide an easy way for visually impaired people to access information on the website.

The ReadSpeaker icon appears on every page of Customs' website and allows users to listen to selected text.



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