Whether there should be a review of the Official Information Act 1982

Ministry of Justice consultation, 8 March – 18 April 2019

Submission in response

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About the submitter

1. I have worked on freedom of information legislation, policy and practice since 1993. I am a former Senior Investigator Official Information Practice Investigations in the Office of the Ombudsman, where I worked for 12 years, including on the 2014-15 investigation leading to the Chief Ombudsman's report, *Not a game of hide and seek*. I have also worked for the State Services Commission on implementation of the first Open Government Partnership action plan. From 2001-3, I was a Policy Manager for the UK Department for Constitutional Affairs, working on implementation of the Freedom of Information Act 2000. I worked for the UK Campaign for Freedom of Information from 1993-2001, and have consulted for the World Bank, UNDP, USAID, the Council of Europe and the Open Society Justice Initiative in various countries. I was a speaker at the 3rd, 7th and 11th International Conferences of Information Commissioners, in addition to organising the 5th Conference held in Wellington. I have a Masters in Public Policy from Victoria University of Wellington.

Introduction

2. I welcome the Government's decision to hold a public consultation on whether it should undertake a review of the Official Information Act 1982 (the OIA). Information previously disclosed in response an OIA request indicated that it was minded only to seek views from a limited range of people.[1] This would have been a mistake, as the OIA confers rights on, and therefore belongs to, everyone living in New Zealand. As the late Robin Cooke said of the OIA in *Commissioner of Police v Ombudsman*,

> *The permeating importance of the Act is such that it is entitled to be ranked as a constitutional measure.*[2]

[1] *Possible legislative reform to the Official Information Act 1982*, Report SSC 2018/519, 17 May 2018, and *Meeting with Ministers Hipkins and Curran – possible reform of the Official Information Act 1982*, briefing for Minister of Justice Andrew Little, 8pm 22 May 2018. Accessed from: https://www.documentcloud.org/documents/5130522-AndrewLittle-OIAReform-16Nov2018.html

[2] *Commissioner of Police v Ombudsman* [1988] 1NZLR 385 at page 391, Cooke P

3. The idea that suggestions for reform of one of the laws that makes up New Zealand's constitution would only be invited from a group of people handpicked by officials and Ministers was quite bizarre. Doing so would have been contrary to one of the purposes of the OIA, which is to enable the people of New Zealand to participate effectively in the making and administration of laws and policies.[3] It would also have been contrary to the commitments given by the Government when New Zealand joined the Open Government Partnership (OGP) in 2014. A condition of joining the OGP was that the Government endorsed the *Open Government Declaration*. The *Declaration* expands on the values encapsulated in section 4 of the OIA and includes the following:[4]

> *We value public participation of all people, equally and without discrimination, in decision making and policy formulation. Public engagement, including the full participation of women, increases the effectiveness of governments, which benefit from people's knowledge, ideas and ability to provide oversight. We commit to making policy formulation and decision making more transparent, creating and using channels to solicit public feedback, and deepening public participation in developing, monitoring and evaluating government activities. We commit to protecting the ability of not-for-profit and civil society organizations to operate in ways consistent with our commitment to freedom of expression, association, and opinion. We commit to creating mechanisms to enable greater collaboration between governments and civil society organizations and businesses.*

4. Since the consultation launched by the Ministry of Justice on 8 March 2019 is being held in the context of a commitment made by the Government in its 2018-20 Open Government Partnership National Action Plan (NAP), it was

[3] Official Information Act 1982, section 4(a)(i).

[4] *Open Government Declaration*, Open Government Partnership, September 2011. https://www.opengovpartnership.org/open-government-declaration

clearly appropriate for the Government to run a public consultation prior to Ministers being provided with advice on how they might proceed.[5]

5. Closer to home, the Policy Methods Toolbox developed by the Policy Project (hosted in the Department of Prime Minister and Cabinet) also makes clear why it was appropriate for the present consultation to be open to the public, as well as why the Government and the public would benefit from a public review of the OIA:

    - *Public participation can improve policy quality. Policy and services are increasingly being designed and delivered through greater collaboration with users or the broader public. This helps to better understand problems and risks, and to craft solutions that are more likely to meet user needs.*
    - *Participation can improve legitimacy and impact. Decisions that arise from open and collaborative processes with strong user input can be more credible.*
    - *Participation is important when hard choices have to be made, when disruption may result, or when we want to govern what people and organisations can do.*[6]

6. This submission argues that the case for a review of the OIA is unanswerable, as the law clearly needs improvement that goes beyond what may be included in a Statutes Amendment Bill. Further, if the Government were to draft and introduce an OIA Amendment Bill without first consulting the public on what changes should be made to their rights to information, it would clearly be acting contrary to the spirit of the OIA and the country's membership of the OGP, as well as flouting guidance from DPMC. The ability to make submissions to a select committee on a Bill is a flawed process, that would in no way make up for the loss of an opportunity to provide input earlier in the policy development process. This submission also argues that there are

[5] Disappointingly, the homepage of the Ministry's website has no direct link to its 'consultation hub', and therefore misses the opportunity of advertising all its consultations (including this one) to visitors to its website.

[6] *Public participation,* Policy Methods Toolbox, The Policy Project. Department for Prime Minister and Cabinet. 16 August 2017. Accessed from https://dpmc.govt.nz/our-programmes/policy-project/policy-methods-toolbox/public-participation#why

practice improvements that can and should be made, but is clear that without statutory improvement of the OIA, experience shows us that the political and administrative willpower to improve the operation of the Act is likely to wither over time as changes in government occur and officials move to different positions or retire.

The merits of a review of the OIA

7. The commitment in the NAP merely states that the Ministry will:

> *Test the merits of undertaking a review of the Official Information Act 1982 and provide and publish advice to Government.*[7]

8. The NAP then outlines the approach to the commitment that the government – in the form of the two lead agencies, the Ministry of Justice and State Services Commission – will take:

> ***Approach:***
> *There have been continued calls to take another look at the legislation. The conversation and workshops with civil society to develop this Plan also generated ideas and suggestions to improve official information legislation and practice. This input will be built on to inform advice to Government on whether a formal review of official information legislation would be worthwhile, or whether the focus should instead remain on achieving practice improvements.*

9. Similarly, the introductory 'Overview' to the present consultation on the Ministry's website states that:

> *Your feedback will help inform a decision by Government on whether to review it, or whether to keep the focus on practice improvements.*
> *…*

[7] *National Action Plan 2018-2020,* New Zealand Government, December 2018. Commitment 7, page 30. Plan: https://www.ogp.org.nz/assets/Publications/91b28db98b/OGP-National-Action-Plan-2018-2020.pdf Accessed from: https://www.ogp.org.nz/new-zealands-plan/third-national-action-plan-2018-2020/

> *In recent years, the focus has been on improving agency performance on implementing the spirit and intent of the OIA*.[8]

10. Therefore, while the criteria against which the merits of a review will be tested have not been published, the implication is that submitters need to persuade officials and Ministers that there are things that need fixing, or opportunities for improvement, that cannot be achieved through policy and practice improvements alone. While the recent work by agencies on practice improvements is welcome, this is somewhat surprising, for a number of reasons. The most facile and easily pointed out reason for why there should be a review and statutory improvement is that more than three years after *Not a game of hide and seek* was published, the Ministry of Justice itself has not implemented recommendation 6 from the Chief Ombudsman. This stated:

> *All agencies should ensure their websites have a page,* ***no more than one click away from the home page****, which provides the public with key information on how to make a request for official information, what the agency's internal policies and guides on processing OIA requests are, who to contact for assistance, and the information the agency supplies to the Ministry of Justice for inclusion in the Directory of Official Information. (emphasis added)*[9]

11. The Ministry, charged with the administration of the OIA overall, does not have a link directly from its homepage to the page which explains how to make OIA requests. Instead, the reader has to find a link entitled 'About the Ministry' in small type at the bottom of the homepage, and then from that page click on the link for the OIA information. If the public cannot rely upon the lead agency for OIA policy and practice to implement basic practice recommendations from

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[8] *Have your say about access to official information*, Ministry of Justice, 8 March 2019. Accessed from: https://consultations.justice.govt.nz/policy/access-to-official-information/

[9] *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*. Office of the Ombudsmen, December 2015. Accessed from: http://www.ombudsman.parliament.nz/newsroom/item/chief-ombudsman-releases-report-into-government-oia-practices

the Chief Ombudsman, it seems self-evident that they should not trust government and Ministers to adopt and implement more challenging practices to improve the operation of the OIA.[10]

12. Notably, the Ministry is not alone in failing to implement this recommendation from the Chief Ombudsman. The OGP's Independent Reporting Mechanism (IRM) reviewer for the 2016-18 NAP states in her *End of Term Report* that most government websites do not do this. Her audit of agency websites found that only Oranga Tamariki, the Ministry of Defence and the State Services Commission did so.[11] Milestone 1 of Commitment 2 in the 2016-18 NAP, which was to

> *Ensure information about the OIA (how to make requests, etc) and responses to requests are easy to access on agency websites. This could include development of single OIA web pages for agencies.*[12]

13. This shift from the Chief Ombudsman's recommendation, to a subtly weakened commitment in the NAP, provides further reason to be sceptical of the idea that the public can trust the government to implement necessary practice recommendations without statutory underpinning of them.

14. This weakening of the improvement recommended by the Chief Ombudsman is in spite of the fact that the State Services Commissioner's introduction to the NAP included the following:

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[10] The Ministry of Justice does not even list the Official Information Act amongst its policy responsibilities on the pages for Human Rights Law (https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/human-rights/domestic-human-rights-laws/) or Constitutional Law (https://www.justice.govt.nz/about/learn-about-the-justice-system/how-the-justice-system-works/the-basis-for-all-law/) and has not done so for years.

[11] *Independent Reporting Mechanism: New Zealand End of Term Report 2016-18*, Open Government Partnership, 2019. Page 16. Accessed from https://www.opengovpartnership.org/sites/default/files/New-Zealand_End-Term_Report_2016-2018.pdf

[12] *Open Government Partnership New Zealand National Action Plan 2016-18*, New Zealand Government, October 2016, page 11. Accessed from: https://www.ogp.org.nz/assets/Publications/953677eaeb/New-Zealand-Action-Plan-2016-2018-updated.pdf

> *The State Services Commission is committed to leading the work programme to improve agency practice around the OIA. A cross-agency team is being established to take this work forward without delay, working in partnership with the Office of the Ombudsman.*[13]

15. While this is a trivially easy recommendation for agencies to have implemented – and to fix if they are reminded by the present Ombudsman to do so – it belies a more serious point about why there should now be a review of the OIA. After *Not a game of hide and seek* was published in December 2015, neither Ministers nor agencies ever saw fit to produce a full response to the Chief Ombudsman's recommendations. Any reliance the public might have placed on Parliament to scrutinise the Executive, and follow up its single hearing on the report by asking the State Services Commissioner or Secretary for Justice to give evidence on how they would respond to the recommendations, would also have been sadly misplaced. Besides the Commissioner's introduction to the 2016-18 NAP cited above, the only statement issued by a government agency or Minister in response to the Chief Ombudsman's report was a media statement issued on 20 October 2016 at the time the NAP was published.[14]

16. This alone creates serious doubt as to why the public should trust government agencies and Ministers to commit sufficient willpower and resources to address deficiencies in the operation of the OIA that have been apparent to many for a number of years, were crystallised in the Chief Ombudsman's report of December 2015, and which have since been supplemented by further agency-specific reports published by the Ombudsman following investigations conducted by his Official Information Practice Investigations (OIPI) team.[15]

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[13] *Ibid*, page 4.

[14] *Joint work to improve OIA responsiveness*, Media Statement, State Services Commission, 20 October 2016. Accessed from http://www.ssc.govt.nz/media-statement-joint-work-improve-oia-responsiveness

[15] *Official Information Practice Investigations*, Office of the Ombudsman, 2018. Accessed from: http://www.ombudsman.parliament.nz/resources-and-publications/latest-reports/official-information-practice-investigations-oipi

17. It is notable that in its 1980 report, the Committee on Official Information (hereafter known by its more commonly known name, the Danks Committee) rejected non-statutory commitments to improved practices in this field:

> *From our study of the "code of practice" approach, we have concluded that in New Zealand circumstances injunctions to officials would not work without a firm commitment by government to back them. And we doubt whether any commitment which did not have the force of law would either be acceptable to the community as an earnest of government intentions, or give officials a sufficient base to take substantial steps towards further opening up official information in their day-to-day operations.*[16]

18. However, following this introductory illustration of why there is merit in conducting a review, as opposed to continuing with the current hodge-podge of partially implemented practice improvements, let us return to how officials may advise Ministers on whether to conduct a review of the OIA.

19. The approach set out in the NAP commitment and introduction to the present consultation suggests that a review of the OIA will take place if the following conditions are met:

    i. Opportunities for improving openness via the OIA, or fixing deficiencies in the law, are identified that cannot be addressed through policy or practice improvements alone; **and**

    ii. The Government actually wants to seek input on these issues prior to introducing legislation to amend the OIA.

20. There is no guarantee in the text of the Government's commitment in the NAP that such a review would actually seek to hear from the general public on these issues, rather than simply rely on advice from officials and possibly a few hand-

[16] *Towards Open Government*, *General Report,* Committee on Official Information, December 1980, paragraph 61. Accessed from http://www.ombudsman.parliament.nz/resources-and-publications/general-information/danks-committee-reports

picked 'stakeholders'. If the Government did not invite the public to make submissions on improvement of the OIA though, it would – as pointed out in paragraphs 2-5 above – be proceeding in a manner which is clearly contrary to the spirit and purpose of the OIA itself, to the OGP's values of openness and public participation, and to the government's own guidance on development of high quality policy. It seems to me that many people would clearly see OIA reform as an instance where the function of reform must be closely aligned with form in which it is carried out.

21. There are two alternatives to a public review of the OIA.

22. First, the Government may decide that only reforms to operational practices are necessary. But, as noted above, there has been no coherent government response to *Not a game of hide and seek* after three years, and the actions taken have therefore been haphazard and lacking in consistency of implementation. This means that – aside from inferences that might be drawn from the lack of action on some issues - the public has no clear idea of what practice reforms the present Government agrees with the Ombudsman on, where it disagrees and will do something different (and what the desired outcome is), or disagrees and will do nothing. The public also has no idea whether the Government has in mind other practice reforms not identified by the Law Commission in 2012, the Ombudsman in the 2015 report, or in the subsequent OIPI reports. The absence of a coherent and clearly articulated statement of the current Government's position means that if it were to decide only to proceed with practice improvements, the Government, agencies, the Ombudsman and the public would all benefit from a clear statement of:

    - the outcomes the Government is seeking;
    - what actions it will take to try and achieve those outcomes and why it believes the selected actions are the correct ones;
    - what inputs are needed (both from the Government and from other actors); and

- the measures against which the public will be able to transparently evaluate the success or otherwise of the proposed course of action.

23. Second, the Government may agree that some things in the OIA need legislative amendments to fix, or that there are areas where a 37-year-old law could be improved, and proceed to introduce an OIA Amendment Bill without first seeking the public's views. It seems from the information disclosed in response to an OIA request (see note 1 above), that a very limited range of issues are being considered, such as (qualified) protection against legal action for Ministers and agencies that choose to release information proactively. This may be driven by Ministers only making modest requests for advice from their officials – perhaps because they are unaware of the progress made in other jurisdictions – or it may be driven by institutional reluctance by officials to embark on more substantive reform.[17] If the latter, then the public are likely to question whether it is appropriate for officials to try and shape the agenda on this topic given their inherent conflict of interest.

24. There has been no indication yet that the present Government Ministers for Justice and State Services have revisited decisions made by the previous National Government in response to the Law Commission's 2012 recommendations, in spite of the current Government's stated commitment to greater openness. This means we also do not know if they intend to implement any of these recommendations either.[18] It is quite possible that after nine years in opposition, Ministers have been too busy with other matters to spend time on this issue. If Ministers do decide to introduce a Bill to amend the OIA without a prior public review, not only would it be contrary to the spirit of the

[17] For example, in the advice disclosed to an OIA requester (see note 1 above), officials provided an Aide Memoire to the Minister of Justice on 13 February 2018. Paragraph 13 of this Aide Memoire advised Ministers that neither the US, Canada nor Australia applied their freedom of information law to Congress or Parliament, but failed to point to more recent examples such as the UK, where the FOI Act does apply to Parliament.

[18] The Law Commission's report, *The Public's Right to Know*, R125 published on 25 July 2012, and the then Government's response, published on 4 February 2013, can be accessed from the Law Commission's website: https://www.lawcom.govt.nz/our-projects/official-information-act-1982-and-local-government-official-information-act-1987

OIA and OGP, but there is a serious likelihood of missing the opportunity to get reform of the law in this area right. Ministers and officials would not hear about innovations in freedom of information (FOI) practice and law in other jurisdictions, and they would be much less likely to put forward proposals which aligned desired outcomes for OIA reform with improvements in the Public Records Act (PRA), the Local Government Official Information and Meetings Act (LGOIMA), and the Ombudsmen Act (OA). The Government would be legislating to amend people's constitutional rights, without first explaining the values that drive the proposed reform or what they are intended to achieve. This seems deeply counterintuitive, and unlikely to succeed in high quality law reform.

25. To conclude then, the merits of the Government conducting a public review of the OIA are clear:

- Actions to deliver OIA practice improvements have been haphazard in choice and in quality of implementation so far, so we should not rely on more of the same to achieve the changes needed;
- Practice improvements cannot overcome the obstacles to achieving desired outcomes that are present in the current law;
- Ministers and officials who have been occupied with other matters of law reform since the 2017 general election are likely to be unaware of the progress made in other jurisdictions, and inviting public submissions as part of a review will enable this to occur;
- High quality law reform to deliver substantive improvements to the openness of New Zealand's governance and institutions is likely to benefit from a clear statement of the Government's values and objectives in this field. Inviting comments and suggestions on how to achieve them will enrich the information officials can draw upon when providing analysis and advice to Ministers on how to proceed;
- A public review will enable a more holistic consideration of how related legislation such as the Public Records Act, LGOIMA and Ombudsmen Act also need amendment to ensure they complement each other in contributing to openness and high-quality management of information held by government;

- Proceeding directly to the introduction of an OIA Amendment Bill will not only result in missed opportunities but also increase political and media friction, and diminish public trust in Ministers and officials; and

- A public review of the OIA is necessary if the Government is committed to the spirit and purposes not only of the OIA but also New Zealand's membership of the Open Government Partnership, and the government's own guidance on policy making.

What are the key issues with the OIA?

Introduction

26. This section of my submission considers both legislation and practice. This is to address both the first and second questions asked in the Ministry's online consultation form.

27. Inevitably issues of legislation and practice are intertwined, as legislation creates the framework of requirements, incentives, and disincentives that drive both good and poor practices in the operation of the law. However, this submission will not delve too deeply into the detail of these points, since it is not a response to a review of the OIA, but to the question of whether there should be a review. To that end, a subset of the key issues has been selected to demonstrate how practice improvements can either not be delivered without legislative reform, or would be supported by it.

The legislative framework

28. At the time that the OIA was drafted and enacted, there were very few other FOI laws elsewhere in the world to draw upon for drafting inspiration. Only four FOI laws had been implemented at the time the Danks Committee was undertaking its work, and of those, the USA was the only English-speaking nation amongst them.

29. It was therefore not surprising that little research into the operation of these laws existed at the time that the Danks Committee undertook its work and drafted the Bill that became the OIA. It is to the credit of the Committee that in spite of this lacuna, they put forward proposals that showed considerable foresight as to what was needed to sustain an FOI law in the long run, if it was to go beyond a basic mechanical framework for requests and dispute resolution, and help deliver an outcome of greater openness and public participation in policy debates. One clear example of this was the Committee's proposal for an Information Authority, an independent body with functions that would include:

- A regulatory function to receive submissions, conduct hearings, establish guidelines for administrative action, and to define and review categories of information for routine availability;
- A monitoring function to keep the OIA under review, along with other legislation and practice in the information field, and to recommend changes to the Government and report to Parliament – with such recommendations being made public, along with the Government's response to them;
- Report publicly on progress in opening up government, as *'Public confidence demands that the bureaucracy should not be seen to be the final judge of its own virtue in this matter.'*[19]

30. The Committee clearly saw the Information Authority's role as separate from that which would be performed by the State Services Commission.[20] The Commission was to have an 'information unit' of three to four officials, and *'would essentially:*

- *work with departments and agencies to develop systems and standards which can help them carry out their responsibilities under the new legislation;*
- *advise on mechanisms, develop training programmes, and co-ordinate the preparation of first-line information aids such as directories of Government organisations and their functions and powers;*
- *advise the Information Authority of progress made and problems encountered in these areas."*[21]

31. Sadly, during the passage of the Official Information Bill, a 'sunset clause' was added to the provisions creating the Information Authority, meaning that a key part of the freedom of information ecosystem ceased to exist on 30 June 1988.[22]

[19] *Towards Open Government, General Report,* op cit, paragraph 114.

[20] *Ibid*, paragraphs 94 and 115.

[21] *Ibid*, paragraph 94

[22] See section 53 of the Official Information Act 1982.

32. The demise of the Information Authority, and absence of a unit within government that has statutory responsibility to do what the Danks Committee envisaged the SSC would do, has – in combination with the reforms introduced by the State Sector Act 1988 – in my opinion led to an atrophy of the freedom of information system in New Zealand. The problems caused by the demise of the Information Authority were also recognised by the Law Commission in Chapter 13 of its 2012 report, *The Public's Right to Know*.[23] This cannot be remedied by policy directive alone, as both the Danks Committee and Law Commission recognised, and is not an appropriate role for the regulator of the FOI system. The creation of a new institution within the FOI system is not something that should be left to an OIA Amendment Bill that is introduced without a prior public review.

33. A second area where the need for a public review of the OIA is clear is on the topic of redrafting the law for two major structural reasons:

    - combining the OIA with the relevant aspects of its local government counterpart, the LGOIMA; and
    - to make the OIA free-standing, removing the linkages and dependency on the Ombudsmen Act.

34. While the Law Commission concluded that the arguments were finely balanced on combining the OIA with the LGOIMA, (see paragraph 16.36 of *The Public's Right to Know*), the Ombudsmen were not so hesitant. In their submission to the Law Commission, the Ombudsmen said:

> *We advocate for there to be one Act covering both central and local government. In our view, New Zealand's freedom of information regime would be more effective if it was unitary and of universal application. Having two pieces of legislation containing essentially the same provisions but with different statutory references complicates the*

[23] See note 18 above, especially paragraphs 13.1-13.2

> *task of educating agencies and the general public about the operation of the legislation.*[24]

35. The Ombudsmen also anticipated the Law Commission's hesitation about combining the two pieces of legislation, stating:

> *We think any differences between the central and local government regimes are not insurmountable, and that they could be overcome with careful drafting*.[25]

36. There are now 127 countries with freedom of information laws, the vast majority of which have a single piece of legislation covering both central and local government. The Law Commission's hesitation about LGOIMA also governing the public's rights to attend local authority meetings could be dealt with by either having a free-standing law on open meetings, which should apply to a broader range of organisations than LGOIMA does at present, or by dealing with this issue in a separate part of the combined law.

37. In relation to the second main structural reason for redrafting the OIA, the Law Commission proposed replicating the relevant provisions of the Ombudsmen Act in the OIA, to facilitate ease of understanding of the regulator's powers and complaints processes.[26] The Ombudsmen agreed with this, stating in their submission:

> *We agree with the Law Commission that the legislation should be self-contained, incorporating relevant provisions from the Ombudsmen Act*

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[24] *Submissions of the Ombudsmen – the Public's Right to Know*, Office of the Ombudsmen, 17 December 2010. Accessed from http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/346/original/review_of_the_oia.pdf?1346369926

[25] *Ibid*

[26] *The Public's Right to Know, Issues Paper 18,* Law Commission, 29 September 2010. Paragraphs 11.18-11.19. Accessed from https://www.lawcom.govt.nz/our-projects/official-information-act-1982-and-local-government-official-information-act-1987

(OA) explicitly rather than by reference, and that it should be redrafted and re-enacted.[27]

38. Making the OIA free-standing, and removing the current inter-dependencies with the Ombudsmen Act also provides the opportunity to revisit whether the Ombudsmen should remain the regulator of New Zealand's FOI regime. Although the Law Commission concluded that they should, there are matters of principle to suggest that they should not. Primarily this revolves around the Ombudsmen's reluctance to be given the power to make the final decision on whether official information should be released, and to be able to order departments and other public authorities to do so. As the Law Commission explains in paragraphs 11.54-11.56 of the *Issues Paper* the Ombudsmen resisted this both in 1981 and again in 1987, on the basis that exercise of such a power would be fundamentally contrary to the nature of an Ombudsman's office, which is to persuade a department to make amends when an Ombudsman forms an opinion that it has acted unreasonably in relation to a matter of administration.[28] On both occasions the Government and Parliament decided to retain the right of the Executive to veto an Ombudsman's recommendation that information be disclosed. In 1987, the then Labour Minister of Justice, Geoffrey Palmer, wanted to remove the veto altogether. It was only because the Chief Ombudsman indicated that if this was done he no longer wanted the official information complaints function (meaning the Government would have to create a new regulator, in the form of an Information Commissioner) that the Government resiled, and the Minister instead drafted a provision that created a serious disincentive to the use of the Executive's veto power. Sir Geoffrey has since indicated that he thinks the responsibility for supervising compliance with the OIA should be removed from the Ombudsmen, and given to a new body, partly because he still believes the

[27] See note 24 above.

[28] "*The abolition of the ministerial power of directive would result in the Ombudsman's decision becoming a binding directive and thus a decision. Such a change would herald a major departure from the traditional characteristics of the Ombudsmen"* Report of the Ombudsmen for the year ended 31 March 1985, [1984 -85] 1 AJHR A3 8

veto should be removed from the OIA altogether, but also because he believes a number of other advantages would flow from this.[29] Sir Geoffrey concluded this part of his 2012 paper in the following manner:

> *Fourth, the importance of transparency in the government decision-making process is an important and growing trend internationally. More robust measures towards this end are warranted in New Zealand in my view. The New Zealand legislation has been a success, but as the Law Commission review demonstrates there are problems that need to be addressed. I would like to see the information issue elevated and enjoy the focus of a new agency that can develop new approaches. My conclusion is that the time has come in New Zealand to push the boat out a little further on official information.*

39. Sir Geoffrey also baldly stated of the OIA that:

> *Redrafting the whole Act is essential if real progress is to be made in improving access to official information.*[30]

40. Removal of the veto is key issue in New Zealand's FOI regime meeting what are increasingly recognised as international standards for access to official information. One of the fundamental principles of FOI laws is that the final decision as to whether a department or Minister must disclose the information at issue must lie with an arbitrator that is independent of the Executive. The 1987 amendments to the OIA recognise this in a very convoluted manner, by providing that the use of the veto can be challenged in the Courts by the requester, at the government's expense. But the existence of the veto is, as

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[29] *Constitutional Reflections On Fifty Years Of The Ombudsmen In New Zealand*, Sir Geoffrey Palmer QC. Paper as originally delivered to the World Conference of the International Ombudsman Institute in Wellington, November 2012 accessed from http://www.theioi.org/downloads/9v7uf/Wellington%20Conference_63.%20Plenary%20VI_Geoffrey%20Palmer%20Paper.pdf . An updated version of the paper, commenting on the then National Government's response to the Law Commission's 2012 Report on the OIA can be found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404104

[30] See the updated version of the paper cited in note 29 above, also found in VUWLRPPC 5/2014 or as 4 VUWLRP 30/2014, page 797

Sir Geoffrey has indicated, wrong in principle. In practical terms, since no regulator wants to see their judgment on interpretation of the law rejected by the Government of the day – it implies a lack of confidence in the regulator's capabilities and decision making – the existence of the veto is also likely to have a chilling effect on either the Ombudsman or any other regulator given the OIA complaints function. This was acknowledged in the Law Commission's *Issues Paper*, which stated:

> *Its very presence may sometimes lead to more moderate positions being taken.*[31]

41. Even if a decision is made to ignore one of New Zealand's more eminent legal experts and retain the Ombudsman as the FOI regulator, making the OIA jurisdiction free-standing of the Ombudsmen Act would still have advantages. One of the more significant of these would be the replication of the Ombudsmen's power to initiate an investigation without first receiving a complaint, found in section 13(3) of the Ombudsmen Act. The Ombudsmen have used this power on several occasions in recent years to review the OIA practices of central and local government bodies, and in 2017 created a new team to carry out a rolling programme of investigations of public authorities' FOI capabilities and practices.[32] However, there are problems for the Ombudsmen's functions in the official information field in relying upon his Ombudsmen Act jurisdiction. First, because Ministers are outside the scope of the OA since the function of an Ombudsman under that Act is to investigate 'matters of administration'. Second, because the effect of section 13(7)(d) of the Ombudsmen Act is to remove the Ombudsmen's ability to investigate matters of administration by the Police. This means that the Ombudsman has no authority for his new team to look at the FOI practices of key institutions, including that which receives more OIA requests than any other in the country,

[31] *The Public's Right to Know, Issues Paper 18,* paragraph 11.58. See note 26 above.

[32] The Official Information Practice Investigations team, details of which can be found here: http://www.ombudsman.parliament.nz/resources-and-publications/latest-reports/official-information-practice-investigations-oipi

and those who are at the apex of our system of government. Replicating in an updated OIA the power to conduct self-initiated (or 'own motion') investigations is key to the regulator's ability to provide Parliament and the public with assurance that all agencies subject to the law are following good practices and have the necessary capacity and capability to comply and give effect to people's rights to information.

42. The final issue to be mentioned at this stage of considering whether the framework of the FOI legislation merits a public review of the law is the almost non-existent connection between the OIA and the Public Records Act 2005.

43. The Law Commission's 2012 report made one minor recommendation in this area, that the Ombudsman be empowered to notify the Chief Archivist if he or she receives a complaint that a department, Minister or other organisation has refused a request under sections 18(e), 18(f) or 18(g) of the OIA.[33] These are the provisions concerning the non-existence or inability to find the information requested, the inability to provide the information without 'substantial collation or research', or that the information is not held. The Official Information Amendment Act 2015 inserted section 28(6) of the OIA to give effect to the Commission's recommendation. How often this provision has been used since it was enacted four years ago is unknown, a by-product of there being no statutory regime for collection and publication of statistics about the operation of the OIA.

44. The Law Commission's report was however, remarkable for the lack of its curiosity about how other jurisdictions overseas had considered the relationship between public records legislation and FOI. It also appears to have accepted at face value the requirements of section 21(1) of the PRA as meaning that records be maintained for 25 years.[34] In reality, the General

[33] Recommendation R133. See page 361 of *The Public's Right to Know*, *op cit,* note 17 above.

[34] See paragraphs 15.23 of the *Issues Paper*, and 15.7 of *The Public's Right to Know*.

Disposal Authorities issued by the Chief Archivist permit departments to dispose of a significant portion of the records they hold after only 7 years.[35]

45. Compliance with the PRA is audited by the Chief Archivist, although there have been concerns expressed by the information management profession as to the utility and validity of the reports resulting from these audits. These concerns have led to a commitment in the 2018-20 Open Government Partnership National Action Plan on developing and implementing a framework on public reporting on *'how well government is managing information'*.[36]

46. The 2015 report from the Chief Ombudsman contains five recommendations specifically under the heading of information management policies and systems, one which says the Ministry should work with SSC and Archives New Zealand to develop a model information search policy for agencies to apply when responding to requests, and there are several other recommendations which have clear information management dimensions.[37] In the absence of any government response to these recommendations by the Chief Ombudsman, it is fair for the public to assume that no work has been taken forward on these in the three years since they were made. This reinforces the earlier points about the need for statutory underpinning of key practice requirements.

47. In other jurisdictions, such as the United Kingdom, there is a tighter relationship between FOI and public records legislation. Section 46 of the UK Freedom of Information Act 2000 requires the creation of a Code of Practice on good records management practice, while section 47 places a duty on the Information Commissioner to promote observance of that Code of Practice. It also empowers the Commissioner to assess whether a public authority is following good practice, and requires the Commissioner to consult with the

[35] See General Disposal Authority 6 https://records.archives.govt.nz/resources-and-guides/general-disposal-authority-6/ and General Disposal Authority 7 https://records.archives.govt.nz/resources-and-guides/general-disposal-authority-7/

[36] Commitment 10, page 36. See note 6 above, and http://archives.govt.nz/advice/our-projects-and-work/open-government-partnership-third-national-action-plan

[37] See recommendations 17-21, and 31. Also, 12, 13, 22 and 37-43.

Keeper of Public Records about authorities' observance of the Code of Practice.[38]

48. Section 10 of Norway's 2006 revision of its FOI law requires agencies to create a journal pursuant to the requirements of the Archives Act and associated regulations, and empowers the government to make regulations about making the journal available on the internet.[39] This has led to the creation of an online system for querying the government's electronic document management systems, known as *e-Innsyn*.[40] The system provides metadata about more than 39 million government records, with some agencies now also using the system to make the full document available as well. As a corollary to this point about improving tools for requesters and agencies to identify the information sought, the 2006 revision to the law also reduced the permitted timeframe for agencies to respond to requests to 5 working days.[41]

49. In conclusion then, there is ample reason from the perspective of the legislative framework on access to official information alone, for the present Government to conduct a public review of the OIA, with a view to acting on the Law Commission's 2012 recommendation that the OIA and LGOIMA be re-drafted and re-enacted.[42] The Law Commission itself started from the position that the Ministry of Justice and State Services Commission now appear to hold, that only minor modification of the law is required, and that most things can be left to improvements in practices. However, the Commission changed its mind as it gathered more information, stating:

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[38] Freedom of Information Act 2000, United Kingdom. Section 46 http://www.legislation.gov.uk/ukpga/2000/36/section/46 and Section 47 http://www.legislation.gov.uk/ukpga/2000/36/section/47

[39] An English translation of the law is accessible here: https://lovdata.no/dokument/NLE/lov/2006-05-19-16

[40] Accessible here: https://www.einnsyn.no/sok

[41] See note 39 above, section 32.

[42] Recommendation R136. See page 372 of *The Public's Right to Know*, *op cit,* note 18 above.

> *When we embarked on this review we were of the preliminary view that the legislation required only minor modification and that much could be achieved simply by additional guidance in relation to the withholding grounds. As we investigated further, however, it became clear that while additional guidance is needed, and has a very valuable part to play, legislative change is also required to obviate problems in the working of the legislation and to obtain the necessary balance between openness and the interests which need to be protected in a modern age. More and more it became clear that the official information legislation is one important part of the wider environment of information management and citizen involvement. Integration with the various laws, practices and government policies already operating in that environment is increasingly important.*[43]

Scope

50. While minor amendments to the scope of the OIA (and LGOIMA) may be made via a Statutes Amendment Bill – deleting defunct agencies and dealing with mergers and name changes – substantive changes require a substantive Bill. In addition to adding Officers of Parliament and those parts of Parliament recommended for inclusion by the Law Commission, there is also scope to improve OIA practices by clarifying the application of the law to organisations supplying services to the public under contract. Agencies, suppliers, the regulator and the public would benefit from drafting that replaces the present section 2(5), and places clear obligations on agencies to notify suppliers of the application of the OIA to them, and maintain a register of the suppliers currently affected (in such a manner as it can easily be incorporated into an updated and online database to replace the *Directory of Official Information*). Agencies would also benefit from an *Information Authority* that takes on the task of drawing up model clauses about the application of the OIA for inclusion in the contracts for the supply of these services to the public, and which is the forum for receiving comments on their effectiveness and reviewing them in light

[43] Paragraph 1.35. See page 25 of *The Public's Right to Know*, *op cit,* note 18 above.

of this. One complementary, or alternative, way of proceeding on this topic would be to amend the law to include a presumptive application of the OIA to organisations exercising public functions or receiving public funds. A public review of the OIA is obvious vehicle for canvassing views on this.

51. Besides the Ombudsmen and the Auditor-General, two other key oversight institutions designed to provide the public with assurance that state powers are being exercised lawfully are not included in the scope of the OIA. These are the Inspector General of Intelligence and Security (IGIS), and the Independent Police Conduct Authority (IPCA). As the law already applies to many other oversight and regulatory institutions, such as the Privacy Commissioner, Commerce Commission, Financial Markets Authority – as well as to the institutions that the IGIS and IPCA oversee – it is past time that these institutions were added to the scope of the country's FOI law.

52. The partially privatised State-Owned Enterprises (Meridian Energy etc) were removed from the scope of the OIA by the previous National Government, in spite of the fact that the state retained a 51% stake in them. This removal needs to be reversed, and Air New Zealand added to the schedule of organisations subject to the OIA.

53. The discussions and policy development on this point would clearly benefit from a public review of the OIA, to ensure that all relevant actors are heard from, and their claims scrutinised and contested by others.

Appeals

54. As noted earlier in this submission, Sir Geoffrey Palmer believes the time has come for New Zealand to create a new regulator for its FOI regime. I agree with him, based on my 12 years' experience as an investigator of OIA complaints within the Ombudsman's office.

55. Crudely speaking, and in relation to Ombudsmen in the abstract rather than the New Zealand Ombudsman in particular, an Ombudsman's office has been created by many countries to resolve disputes arising from a complaint that a

matter of public administration has gone awry. It may be about an action that has been taken, or not taken, or a decision that the complainant believes was taken based on flawed information or understanding. Ombudsmen aim to resolve these disputes by examining the issues in the context of the relevant legislation or guidance and then seeking to persuade one or both of the parties of the opinion that they themselves have formed on the merits of the matter. It is considered relatively unusual for an Ombudsman to have to go beyond expressing an opinion on the matter, and having to make a recommendation to the institution responding to the complaint (or own-motion investigation). Because Ombudsman investigate matters of administration, not policy, Ministers are often outside their jurisdiction.

56. An institution created to perform such a function – which is incredibly valuable – axiomatically has a culture oriented to mediation rather than binding decision-making. In the context of investigating maladministration, this is a good approach. However, freedom of information is a completely different animal from maladministration. This is because control over the possession and flow of information is intrinsically and inevitably political, in a way that is different from the issues that might arise from a department accepting an Ombudsman's view that something needs to be done or said to make good a previous failing. The regulator of a freedom of information law is at the crux of deciding complaints that affect raw political power, since the law itself is fundamentally about transferring the power of control over information from organs of the state to the public (whether they be individual people, civil society organisations, private companies or the media). When raw political power is at stake, those holding the information are less likely to be persuadable of another view, because they often have a strong self-interest in not being persuaded. This means that an institution which has to both persuade government agencies to see another person's point of view in maladministration cases, and has to decide on the disclosure of information which could cost a Minister their job, has an extremely difficult job of managing the difference of approaches and institutional cultures that the legislation inherently creates. There is a risk in managing this difference: the

Ombudsmen's need to maintain good working relationships with agencies in order to be able to persuade them to follow their opinions and recommendations may make them hesitate to be strict in how they interpret the law in relation to politically or administratively difficult and contentious FOI complaints. In addition to this, an Ombudsman may decide to resolve the tension created by these two regimes by approaching the FOI jurisdiction in an 'Ombudsman-like' manner – seeking to persuade agencies and complainants, rather than gathering evidence and making a decision based on application of the provisions of the law. On balance, this sort of approach is likely over time to favour agencies' arguments about the difficulties disclosure would cause, or the workload issues involved, rather than uphold complainants' legal rights.

57. Returning from the abstract to the specific, we can see from the New Zealand Ombudsmen's previous resistance to the removal of the veto and providing them with the function of making decisions and orders that they have been fully cognisant of this tension between the two statutory roles. In the past, Governments and Law Commissions have decided that, on balance, the greater benefit lies with keeping FOI regulation with an institution that has good knowledge of government administrative processes, rather than creating a new institution. However, faced with evidence of innovations in other jurisdictions, and concerns from submitters about the Ombudsmen's lack of publication of OIA 'jurisprudence', the Law Commission resorted to the argument that moving to a new regulator would mean the loss of the knowledge accumulated by the Ombudsman's staff.[44] This is clearly a weak defence of the status quo, as the Investigators and their knowledge could easily move to work for a new Information Commissioner's office. Sir Geoffrey Palmer has also dismissed this line of reasoning by the Commission.[45]

58. One of the apparent attractions of having the Ombudsman as the FOI regulator is that, barring judicial review on limited grounds, her or his opinions on

[44] *The Public's Right to Know*, *op cit*, note 18 above, paragraph 13.37

[45] See the updated version of the paper cited in note 29 above, also found in VUWLRPPC 5/2014 or as 4 VUWLRP 30/2014, pages 798-9.

complaints cannot be appealed to the Courts. This reduces the cost of the appeals mechanism, and is also likely to mean that the duration of an appeal being considered and finalised is shorter than if it were possible to appeal the Ombudsman's opinions on the merits of the decision (assuming the Ombudsman's office is resourced sufficiently to employ enough investigators for the workload experienced). On balance however, this structure might be perceived to be unbalanced, and favour agencies who would not lack the resources to mount a judicial review, versus a complainant who would be taking on relatively serious financial risk. To my knowledge, no OIA complainant has ever brought such a judicial review, only agencies. But the probability over 36 years of a complainant never having a solid case to challenge – on the merits, rather than on the more limited grounds of judicial review – an Ombudsman's interpretation of how OIA provisions should be applied is vanishingly small. Indeed, Professor Jane Kelsey's legal challenge to the Ministry of Foreign Affairs and Trade's decision on her request for information about the Trans-Pacific Partnership Agreement (which, by virtue of section 34 of the OIA could only proceed following the Chief Ombudsman's investigation of her OIA complaint had concluded) did result in a judgment that included some criticism of how the then Chief Ombudsman had proceeded.[46]

59. I suggest that it would benefit government agencies, others subject to the OIA, requesters, and the regulator of New Zealand's FOI system, for the regulator's decisions to be susceptible to appeal on the merits. While this may result in a more drawn out appeals process to begin with, as superior courts provide determinative interpretations of the law, the areas of ambiguity that might present reasons for seeking clarification will be reduced, and the number of appeals to the courts will diminish over time. Prior to reaching the Courts, I believe it would benefit the regulator and others for appeals against the regulator to be heard by a specialist tribunal. The tribunal should be able to consider the issues and determine the case *de novo*, as well as being able to

[46] Kelsey v Minister of Trade [2015] NZHC 2497, at 139. Accessed from http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZHC/2015/2497.html

make binding orders. Only appeals to the courts on a point of law should be permitted beyond this stage.

60. A new specialist Information Tribunal to hear appeals against the FOI regulator could also succeed the Human Rights Review Tribunal as the locus for determining matters under the Privacy Act, and also hear appeals against the Chief Archivist's decisions on compliance with the Public Records Act.

61. Clearly considering the arguments for and against such a substantive change to the FOI regime requires a public review.

Section 6 – Adding a public interest test

62. The core principles of any freedom of information regime can be boiled down to the following: all information held by public authorities should be accessible to the public without them having to show a legal interest in receiving it, unless it is not in the public interest for this to occur, and the final determination of where the balance of competing public interests lies should be in the hands of an institution wholly independent from the executive branch of government.

63. The OIA largely respects the gist of these principles, with three key exceptions.

64. The first, (considered above) is that the regulator does not make decisions or issues orders that must be complied with (or appealed to the Courts). Added to the matters considered above however, is the fact that under section 31 of the OIA the Prime Minister and the Attorney General can serve certificates on the Ombudsman blocking her or him from even recommending that the information requested should be made available. In this manner, the Government can forestall the use of the veto power under section 32, thereby denying a requester the right to challenge the Government's decision not to disclose the information following an Ombudsman's recommendation. This is clearly contrary to the core principles of an FOI regime, and has contributed to New Zealand's OIA ranking only 51st in the Global Right to Information Rating.[47]

[47] *The RTI Rating*, Centre for Law and Democracy and Access Info. Scoring criteria listed here: https://www.rti-rating.org/country-data/scoring/ . New Zealand's assessment against these

65. The second, (considered later, below) is that it places limits on who is eligible to make requests for information.

66. The third divergence from internationally recognised principles for FOI laws is that section 6 of the OIA does not require agencies, or the regulator on appeal, to balance the harm that may result from the disclosure of the information against the public interest factors in favour of release. Effectively, Parliament pre-determined where the balance of public interest would lie in relation to information affecting the matters defined in section 6, and prevented Ministers, departments, and the Ombudsman from making a different decision based on the circumstances prevailing at the time of the request.

67. Since the OIA was enacted in 1982, the world has moved on. The United Kingdom's Freedom of Information Act, for example, requires departments to consider whether the public interest in disclosure outweighs the harm that may result to the country's international relations.[48] The Information Commissioner, tribunal and courts can reach a different decision. In contrast, the OIA under section 6(a) does not require agencies to consider the public interest, nor permit the Ombudsman to form an opinion or recommend that the public interest favours release. The most that the Ombudsman can do is decide that this section does not apply to the information at issue because its release would not 'be likely' to prejudice the international relations of the New Zealand Government.

68. Amending section 6 of the OIA to require agencies to consider the public interest in disclosure and empower the regulator to reach an alternative view would be a major step towards greater openness. Again, however, the redrafting of this section is something that should be considered as part of a public review of the OIA.

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criteria is accessible here: https://www.rti-rating.org/country-data/ . Note that New Zealand's law is ranked eight places lower than the United Kingdom, in spite of that country having retained its Official Secrets Act, and not including its intelligence agencies within the scope of its FOI Act.

[48] Section 27 and section 2.

Proactive disclosure

69. Proactive disclosure is clearly a matter already under consideration by the Government, and I welcome the practice and policy improvements made over the years, not least the recent decision to routinely proactively publish Cabinet papers. Compliance with these ad hoc steps however, are not susceptible to review by the regulator. It is clearly time that New Zealand caught up with other modern FOI regimes and amended its law to include provisions on proactive disclosure and the ability to challenge non-compliance with the requirements of the law to the regulator. I consider that the UK model of 'publication schemes' setting out classes of information that will be made available is a useful one to adopt, as it was at the Federal level of Australia when that country re-wrote its FOI laws nearly a decade ago.

Other matters

70. At present, sections 18(c)(i) and 52(3)(b)(ii) provide that provisions in other statutes that bar disclosure of information take precedence over the right to information contained in the OIA. This should be reversed, with a 'notwithstanding' provision in the OIA, since the country's FOI regime (and Privacy Act) should be the framework that determines access to official information. If this were not agreed, at the very least, the law should codify the Cabinet Manual guidance that no new statutory bars on disclosure of information should be introduced into a Bill prior to consultation with the Ombudsman, and I believe should also require public consultation. Further, the OIA could be amended to contain an enabling power so that secrecy provisions elsewhere on the statute book can be repealed or amended by secondary legislation. A model for such a provision can be found in section 75 of the UK Freedom of Information Act.

71. Section 12(1) of the OIA sets out who is eligible to make requests under Part 2 of the law. Similar limitations on who can make requests under Part 3 of the OIA can be found in sections 21, 22, 23. It is not clear why such limitations on eligibility exist in the OIA, since they were not included in the original draft of

the Official Information Bill contained in the Danks Committee's *Supplementary Report*.[49]

72. It is clear from reviewing some departments' responses to OIA requests made via the FYI.org.nz online platform that needless challenges to the eligibility of requesters are made, presumably with the intent of either delaying the processing of a request or seeking to discourage the person from exercising their rights. This practice undermines other improvements made of OIA practices, and damages public trust in the agencies that act in this way.

73. Many FOI laws around the world – notably the federal US FOI law and the UK FOI law – do not place any restriction on who can make requests under these statutes. The Law Commission in 2012 recommended that the limits on eligibility be removed from the OIA, not least to bring it into line with the absence of any limits to exercising rights to information under LGOIMA. It is long past time that the Government gave effect to recommendation R134, with or without a pubic review of the OIA.

74. Finally, at present, research and analysis of the operation of the OIA and LGOIMA are hampered by the absence of rigorous statistics on the application of most of the two laws' provisions. While the regime introduced by the State Services Commission enables people to learn how many requests were made, and how many were responded to within the time limit, they do not tell us how many requests were refused, or on what grounds. Statistics that do not help Parliament, government or the public understand how agencies are using the provisions of the Act provide almost no usable intelligence whatsoever. As I noted in a blogpost last year, the present emphasis in the statistics and reporting regime on responding to requests within the permitted time limits merely incentivises agencies to use the extension provisions, or to quickly make a poor quality decision on a request. This has resulted in a 150%

[49] *Towards Open Government: Supplementary Report*, Committee on Official Information, Wellington, July 1981. See clauses 10, 19 and 20 of the draft Bill from page 59 onwards. Accessed from http://www.ombudsman.parliament.nz/resources-and-publications/general-information/danks-committee-reports

increase in complaints to the Ombudsman about the use of the extension provisions, a 125% increase in the number of complaints about agencies not making a decision on a request as soon as reasonably practicable, and a 120% increase in complaints about delays in supplying the information at issue after a decision on the request has been communicated.[50]

75. While the SSC's guidance on data agencies would benefit from collecting and publishing (not least for their own performance monitoring purposes) is better than the meagre data it actually collects and publishes,[51] it is time an enabling provision for collection and publication of statistics on the operation of the OIA was inserted in the Act, requiring the relevant Minister to consult the Chief Statistician, the regulator and the public before finalising the relevant regulations and guidance.

What reforms to the legislation do you think would make the biggest difference?

76. Adding a public interest test to the section 6 withholding grounds.

77. Removal of the Cabinet veto and section 31.

78. Making the OIA free-standing, and not dependent on the Ombudsmen Act powers and jurisdiction.

79. Transfer responsibility for investigation of complaints to a new Information Commissioner, with appeals on the merits to a new specialist Information Tribunal.

80. Introducing an enforceable regime for proactive publication.

[50] *Openness and Official Information Act Timeliness*, Proactively Open, Andrew Ecclestone, 4 September 2018. Accessible from: https://proactivelyopen.org/2018/09/04/openness-and-official-information-act-timeliness/

[51] *Selection and Reporting of Official Information Act Statistics,* State Services Commission. Accessed from http://www.ssc.govt.nz/sites/all/files/Selection-Reporting-of-OIA-Statistics-v2.pdf

81. Creating linkages to the Public Records Act to drive improvements in agencies' information management.
