
PUBLIC LAW

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LAW COMMISSION CALLS FOR SUBMISSIONS ON OIA REVIEW



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The Law Commission (the **Commission**) has released an Issues Paper reviewing the Official Information Act 1981 (the **Act**).

The review, entitled '*The Public's Right to Know*', is comprehensive and contains significant proposals for change in many areas. These changes may impact on both government agencies who are subject to the Act, and private sector corporations whose information may be held by an agency and therefore subject to request under the Act. While the review raises numerous issues, three key issues are highlighted below. Bell Gully would be happy to discuss all the proposals with you further and assist in making submissions. Submissions close on 10 December 2010.

Consultation with third parties and the ability for third parties to complain

The Paper discusses whether the OIA should contain a mandatory provision for consultation with third parties where the requested information relates to an individual (i.e. personal information) or a commercial entity (i.e. commercial information).

The Commission's view is that there should not be a mandatory consultation provision,

but it suggests alternatives such as a notice period when information relating to a third party is going to be released.

This suggestion must be considered in the context of the Commission's recommendation that the current complaints system should remain restricted to decisions to withhold, as opposed to decisions allowing release of information. This would mean that, as is current practice, those parties who have had their information released have no complaint mechanism should the disclosing agency have not released the information.

If the Commission's recommendations that the complaints system remain restricted and that consultation with third parties remain optional are adopted, this could work against private corporations who have disclosed sensitive information to government agencies. Although we think government agencies are likely to consult even if there is no mandatory requirement, the Commission's recommendations would effectively result in all information given to the government being available to the public, unless it falls within one of the statutory withholding criteria. The Commission is seeking feedback on these issues, particularly in relation to a possible mandatory consultation provision.

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OIA Watchdog

When the OIA was first enacted, the Committee responsible for drafting and implementing the Act (the Danks Committee) set up an Information Authority to oversee the operation of the OIA. However, the Information Authority only lasted 5 years and was dissolved in 1988. Since the dissolution of the original Information Authority there has been no formal structure in place to improve practice or understanding of the OIA regime, or oversee its operation more generally.

The Commission has considered whether an Information Authority should be revived.

The Paper states:

The Information Authority was a crucial element of the official information regime designed by the architects of the OIA. The Danks Committee was strongly in favour of setting up an “independent body of sufficient status” to be responsible for oversight of the new official information regime. The Danks Committee saw it as “integral” that an agency outside the normal administration and executive government should keep the OIA under review and report on its progress to Parliament.

The Commission notes there has been an overwhelming call from submitters for more specific and targeted guidance on the operation of the OIA. In response to these concerns, the Commission has proposed that the statute be amended to contain a specific set of functions. The focus of these functions will be on the complaints procedure, guidance, education and promotion, oversight and review. Currently there are no legislative provisions governing these areas, and complaints and guidelines have been left to the Ombudsmen to provide by default. Further, the Commission has

recommended that a watchdog body be established to:

- Monitor the operation of the Act;
- Collect information and statistics from agencies and Ministers about the operation of the Act;
- Report annually to Parliament on the operation of the Act; and
- Receive and invite representations from members of the public on any matter relating to the operation of the Act.

The Commission states that public agencies subject to the Act should be required to regularly provide statistics of requests to the oversight body. Such statistics could include the number of requests received and responded to, whether information was withheld and what withholding grounds were relied on in each case.

For agencies that are already subject to other disclosure regulations this could prove to be another time consuming and costly job. This will particularly be so if some of the proposed proactive disclosure measures are also implemented (see below).

A proactive approach to disclosure

The Commission has considered whether the OIA should contain statutory requirements for proactive disclosure of some documents or information without the need for any request. The Commission states that it has “no doubt” that proactive disclosure is desirable; rather, the question is to what extent it should be mandated in legislation.

The Commission recognises that there are already a number of legislative provisions requiring disclosure of information, such as the Public Finance Act 1989 and the

Crown Entities Act 2004. It also recognises that there is an existing move towards proactive disclosure of information and publications over the internet by many agencies. However, when comparing the proactive disclosure requirements that exist in some overseas jurisdictions, the Commission suggests New Zealand could do more – for example by:

- (a) Amending the OIA to include a statutory provision which places a duty on agencies to take “all reasonably practicable steps to proactively make information publicly available, taking into account the type of information held by the agency and the public interest in it, and the resources of the agency”; and
- (b) Requiring agencies to keep “disclosure logs” showing what items of information they have released under the OIA.

These requirements could add to the compliance costs of government agencies and could be considered unnecessary, given that there is evidence that many government agencies are already sufficiently motivated to proactively disclose documents.

Making a submission

Please contact the author or your usual Bell Gully adviser if you require further information on the Paper or assistance with a submission.