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Official Information Legislation Review  
Law Commission  
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### ***The Public's Right to Know – Review of Official Information Legislation***

The New Zealand Law Society (Society) welcomes the opportunity to respond to the questions posed in *The Public's Right to Know: A Review of the Official Information Act 1982 and Parts 1-6 of the Local Government Official Information and Meetings Act 1987, Issues Paper 18, September 2010* (Issues Paper).

The Society agrees that it is timely to review New Zealand's official information legislation and is grateful for the opportunity to comment on the Law Commission's careful and thorough Issues Paper. The Society supports the Commission's emphasis on the benefits of proactive disclosure by government, including progressively increasing the availability of official information online. The Society also agrees with the Commission's general conclusion that the Acts are achieving their purpose, but that some changes are needed to improve their effectiveness.

The Society also notes that the Office of the Ombudsmen performs its functions under the legislation with competence and integrity. However, it is clearly apparent that the Office is under-resourced. The Commission's proposals, if implemented, would result in even greater demands being placed on the Ombudsmen and their staff. Accordingly, consideration should be given to increasing the resources available to the Office.

The Society's answers to the Commission's questions follow. The Society would be happy to expand on the reasons underlying its answers to particular questions, if that would assist the Commission.

#### **Chapter 2: Scope of the Acts**

- 1. Do you agree that the Schedules to each Act (OIA and the LGOIMA) should list every agency that they cover?***

Yes.

- 2. Do you agree that the schedules to the OIA and LGOIMA should be examined to eliminate anomalies and ensure that all relevant bodies are included?***

Yes.

3. *Do you agree that SOEs and other crown entity companies should remain within the scope of the OIA?*

Yes.

4. *Do you agree that council controlled organisations should remain within the scope of the LGOIMA?*

Yes.

5. *Do you agree that the Parliamentary Counsel Office should be brought within the scope of the OIA?*

Yes.

6. *Do you agree that the OIA should specify what information relating to the operation of the Courts is covered by the Act?*

No. The Official Information Act 1982 (OIA) already makes it clear that the Courts are not subject to the OIA (s 2(6)(a)). They are not considered part of the executive government. Other departments, for example the Ministry of Justice, hold information relating to the operation of the Courts and so the important issue appears to be whether such departments are correctly applying the OIA as it stands. If clarification were thought necessary, however, a “for the avoidance of doubt” style provision could be added, perhaps to the definition of “official information”, confirming that official information includes information held by a department or organisation relating to the operation or administration of a court.

7. *Should any further categories of information be expressly excluded from the OIA and the LGOIMA?*

No.

### **Chapter 3: Decision-making**

8. *Do you agree that the OIA and the LGOIMA should continue to be based on a case-by-case model?*

Yes.

9. *Do you agree that more clarity and more certainty about the official information withholding grounds can be gained through enhanced guidance rather than through prescriptive rules, redrafting the grounds or prescribing what information should be released in regulations?*

Yes.

10. *Do you agree there should be a compilation, analysis of, and commentary on, the case notes of the Ombudsmen?*

Yes.

11. *Do you agree there should be greater access to, and reliance on, the case notes as precedents?*

Yes, as long as the current case-by-case approach (where similar decisions are sometimes referred to in order to assist in making the decision) is maintained.

12. *Do you agree there should be a reformulation of the guidelines with greater use of case examples?*

Yes.

13. *Do you agree there should be a dedicated and accessible official information website?*

Yes.

#### **Chapter 4: Protecting good government**

14. *Do you agree that the “good government” withholding grounds should be redrafted?*

Yes.

15. *What are your views on the proposed reformulated provisions relating to the “good government” grounds?*

In general, the Society’s view is that the Commission’s proposed redraft at paragraph 4.46 of the Issues Paper is too complicated. Proposed sub-paragraph (iii) does not appear to be necessary: such negotiations are likely to be subject to an obligation of confidence and could be covered by s 9(2)(ba).

In any event, proposed sub-paragraph (iii) in its current form would not apply to information (such as that produced during coalition negotiations) relating to parties that *could* but in the end do not “form a government”. Nor would proposed sub-paragraph (iii) apply to information held in relation to parties that have a support arrangement with the government but that do not “form

the government”.

The Society agrees that it is desirable to delete the reference to “constitutional conventions” in s 9(2)(f) and to simplify that provision as well as s 9(2)(g), preferably along the lines of the United Kingdom Freedom of Information Act 2000 provision set out at paragraph 4.53.

## **Chapter 5: Protecting commercial interests**

16. *Do you think the commercial withholding ground should continue to be confined to situations where the purpose is to make a profit?*

No. Commercial can include non-profit.

17. *If you favour a broader interpretation, should there be a statutory amendment to clarify when the commercial withholding ground applies?*

Yes.

18. *Do you think the trade secrets and confidentiality withholding grounds should be amended for clarification?*

No, clearer guidance with examples would be adequate.

19. *Do you agree that the official information legislation should continue to apply to information in which intellectual property is held by a third party?*

Yes. The Society sees no need for a law change in this area.

20. *Do you have any comment on the application of the OIA to research work, particularly that commissioned by third parties?*

Other existing provisions (for example, ss 9(2)(b), 9(2)(ba), or 9(2)(k) OIA) may apply and these will suffice.

21. *Do you think the public interest factors relevant to disclosure of commercial information should be included in guidelines or in the legislation?*

Yes.

22. *Do you experience any other problems with the commercial withholding grounds?*

No.

## **Chapter 6: Protecting privacy**

23. *Which option do you support for improving the privacy withholding ground:*

*Option 1 – guidance only, or;*

*Option 2 – an “unreasonable disclosure of information” amendment while retaining the public interest balancing test, or;*

*Option 3 – an amendment to align with principle 11 of the Privacy Act 1993 while retaining the public interest test, or;*

*Option 4 – any other solutions?*

The Society supports Option 1.

The Society would not support Option 3, for the reasons set out in paragraph 6.36 of the Issues Paper. The Society also notes that, in practice, the Ombudsmen consult with the Office of the Privacy Commissioner when information is sought which relates to an identifiable natural person, allowing the distinct policy objectives of each Act to be recognised and applied. The Society considers that the present formulation remains appropriate and the difficulties that are faced by decision-makers in dealing with the privacy ground are best dealt with by appropriate practice guidelines with reference to key cases.

24. *Do you think there should be amendments to the Acts in relation to the privacy interests of:*

*(a) Deceased persons?*

No.

*(b) Children?*

No.

25. *Do you have any views on public sector agencies using the OIA to gather information about individuals?*

In principle, public agencies are not in a better or worse position than anyone else in their ability to seek recourse to the OIA. However, noting that the question is not intended to relate to personal information about individuals, the status quo should continue.

## **Chapter 7: Other withholding grounds**

26. *Do you agree that no withholding grounds should be moved between the conclusive and non-conclusive withholding provisions in either the OIA or LGOIMA?*

No. See the Society's response to Question 30, below.

**27. Do you think there should be new withholding grounds to cover:**

**(a) harassment;**

No.

**(b) the protection of cultural values;**

No.

**(c) anything else?**

No.

**28. Do you agree that the "will soon be publicly available" ground should be amended as proposed?**

Yes, but there would need to be more precision in the drafting to define what "a very short time" is, and what "unnecessary or administratively impracticable" would mean.

**29. Do you agree that there should be a new non-conclusive withholding ground for information supplied in the course of an investigation?**

Yes.

**30. Do you have any comments on, or suggestions about, the "maintenance of law" conclusive withholding ground?**

"Maintenance of law" should become a non-conclusive withholding ground.

### **Chapter 8: The public interest test**

**31. Do you agree that the Acts should not include a codified list of public interest factors? If you disagree, what public interest factors do you suggest should be included?**

The Society agrees.

**32. Can you suggest any statutory amendment which would clarify what "public interest" means and how it should be applied?**

The Society considers that statutory amendment regarding the meaning of "public interest" is not necessary.

**33. Do you think the public interest test should be contained in a distinct and separate provision?**

No. The existing provision works satisfactorily, and the amendment proposed in paragraph 8.17 is inconsistent with the current s 9 – which provides that a good reason to withhold does not

exist at all if the public interest balancing test is met.

34. *Do you think the Acts should include a requirement for agencies to confirm they have considered the public interest when withholding information and also indicate what public interest grounds they considered?*

Yes.

#### **Chapter 9: Requests – some problems**

35. *Do you agree that the phrase “due particularity” should be redrafted in more detail to make it clearer?*

Yes.

36. *Do you agree that agencies should be required to consult with requesters in the case of requests for large amounts of information?*

No, it is unnecessary to make this mandatory. However, the Society agrees that such consultation is best practice, and is consistent with the obligation on organisations to give reasonable assistance to requesters (e.g. OIA, s 13).

37. *Do you agree the Acts should clarify that the 20 working day limit for requests delayed by lack of particularity should start when the request has been accepted?*

No.

38. *Do you agree that substantial time spent in “review” and “assessment” of material should be taken into account in assessing whether material can be released, and that the Acts should be amended to make that clear?*

No.

39. *Do you agree that “substantial” should be defined with reference to the size and resources of the agency considering the request?*

No.

40. *Do you have any other ideas about reasonable ways to deal with requests that require a substantial amount of time to process?*

No.

41. *Do you agree it should be clarified that the past conduct of a requester can be taken into*

*account in assessing whether a request is vexatious?*

No, each request should be considered on its merits.

42. *Do you agree that the term “vexatious” needs to be defined in the Acts to include the element of bad faith?*

No, “vexatious” is a word that is easily understood, including by non-lawyers. Moreover, to require an element of bad faith would unduly limit its present scope.

43. *Do you agree that an agency should be able to decline a request for information if the same or substantially the same information has been provided, or refused, to that requester in the past?*

Yes, but this would be within the existing scope of “frivolous and vexatious”, so no change is needed.

44. *Do you think that provision should be made for an agency to declare a requester “vexatious”? If so, how should such a system operate?*

No.

45. *Do you agree that, as at present, requesters should not be required to state the purpose for which they are requesting official information nor to provide their real name?*

Yes.

46. *Do you agree the Acts should state that requests can be oral or in writing, and that the requests do not need to refer to the relevant official information legislation?*

Yes.

47. *Do you agree that more accessible guidance should be available for requesters?*

Yes.

#### **Chapter 10: Processing requests**

48. *Do you agree the 20 working day time limit should be retained for making a decision?*

Yes.

49. *Do you agree that there should be express provision that the information must be released as soon as reasonably practicable after a decision to release is made?*

Yes.

50. *Do you agree that, as at present, there should be no statutory requirement to acknowledge receipt of an official information request but this should be encouraged as best practice?*

No. The Society considers it should be a mandatory requirement to acknowledge receipt of a request.

51. *Do you agree that 'complexity of the material being sought' should be a ground for extending the response time limit?*

Yes.

52. *Do you agree there is no need for an express power to extend the response time limit by agreement?*

Yes.

53. *Do you agree the maximum extension time should continue to be flexible without a specific time limit set out in statute?*

No. There should be a maximum extension time limit of three months, beyond which a further extension cannot be obtained without making an application to an Ombudsman, supported by reasons. A failure to meet any extended deadline approved by an Ombudsman could have the implications set out in s 29A(6) of the OIA.

54. *Do you agree that handling urgent requests should continue to be dealt with by Ombudsmen guidelines and there is no need for further statutory provision?*

Yes.

55. *Do you agree there should be clearer guidelines about consultation with ministerial offices?*

Yes.

56. *Do you agree there should not be any mandatory requirement to consult with third parties?*

Yes.

57. *Do you agree there should be a requirement to give prior notice of release where there are significant third party interests at stake?*

Yes.

58. *How long do you think the notice to third parties should be?*

Five working days.

59. *Do you agree there should be provision in the legislation to allow for partial transfers?*

No.

60. *Do you agree there is no need for further statutory provision about transfer to Ministers?*

Yes.

61. *Do you have any other comment about the transfer of requests to ministers?*

No.

62. *Do you think that whether information is released in electronic form should continue to depend on the preference of the requester?*

There could be a presumption in favour of electronic provision unless that would cause significant difficulties for the requester.

63. *Do you think the Acts should make specific provision for metadata, information in backup systems and information inaccessible without specialist expertise?*

No.

64. *Should hard copy costs ever be recoverable if requesters select hard copy over electronic supply of the information?*

Yes.

65. *Do you think that the official information legislation needs to make any further provision for agencies to place conditions on the re-use of information, or are the current provisions sufficient?*

The existing provisions are adequate.

66. *Do you agree there should be regulations laying down a clear charging framework for both the OIA and the LGOIMA?*

Yes.

67. *Do you have any comment as to what the framework should be and who should be responsible for recommending it?*

The Society has no comment regarding what the framework should be, except that the charges should not be at a level that would discourage the making of requests. It would be appropriate to have the Ombudsmen's Office involved in recommending a charging framework.

68. *Do you agree that the charging regime should also apply to political party requests for official information?*

No.

### **Chapter 11: Complaints and remedies**

69. *Do you agree that both the OIA and LGOIMA should set out the full procedures followed by the Ombudsmen in reviewing complaints?*

Yes.

70. *Do you think the Acts provide sufficiently at present for failure by agencies to respond appropriately to urgent requests?*

No. Currently, the Acts provide no effective remedy for such failure.

71. *Do you agree with the existing situation where a person affected by the release of their information under the OIA or the LGOIMA cannot complain to the Ombudsman?*

No, such persons should be able to complain to the Ombudsmen under the OIA or the LGOIMA.

72. *Do you agree there should be grounds to complain to the Ombudsmen if sufficient notice of release is not given to third parties when their interests are at stake?*

Yes.

73. *Do you agree that a transfer complaint ground should be added to the OIA and the LGOIMA?*

Yes.

74. *Do you think there should be any changes to the processes the Ombudsmen follow in investigating complaints?*

No.

75. *Do you agree that the Ombudsmen should be given a final power of decision when determining an official information request?*

Yes, subject to the availability of judicial review by either the requestor or the requestee of the Ombudsman's decision.

76. *Do you agree that the veto power exercisable by Order in Council through the Cabinet in the OIA should be removed?*

Yes.

77. *Do you agree that the veto power exercisable by a local authority in the LGOIMA should be removed?*

Yes.

78. *If you believe the veto power should be retained for the OIA and LGOIMA, do you have any comment or suggestions about its operation?*

Not applicable.

79. *Do you agree that judicial review is an appropriate safeguard in relation to the Ombudsmen's recommendations and there is no need to introduce a statutory right of appeal to the Court?*

Yes.

80. *Do you agree that the public duty to comply with an Ombudsman's decision should be enforceable by the Solicitor-General?*

It should be a given that the requester is able to enforce the Ombudsman's decision in their favour. However, it is unclear why it would be necessary to provide the Solicitor-General with an enforcement role or whether such a role would be consistent with the usual role of the Solicitor-General. Perhaps the State Services Commissioner would be a better enforcement option as an authoritative official within government able to ensure compliance with the Ombudsman's decision.

81. *Do you agree that the complaints process for Part 3 and 4 official information should be aligned with the complaints process under Part 2?*

Yes.

82. *Do you agree that, rather than financial or penal sanctions, the Ombudsmen should have express statutory power to publicly draw attention to the conduct of an agency?*

An express statutory power is not necessary.

83. *Should there be any further enforcement powers, such as exist in the United Kingdom?*

No.

**Chapter 12: Proactive disclosure**

84. *Do you agree that the OIA should require each agency to publish on its website the information currently specified in section 20 of the OIA?*  
Yes.
85. *Do you think there should be any further mandatory categories of information subject to a proactive disclosure requirement in the OIA or LGOIMA?*  
No.
86. *Do you agree that the OIA and LGOIMA should require agencies to take all reasonably practicable steps to proactively release official information?*  
Yes.
87. *Should such a requirement apply to all central and local agencies covered by the OI legislation?*  
Yes.
88. *What contingent provision should the legislation make in case the “reasonably practicable steps” provision proves inadequate? For example, should there be a statutory review or regulation making powers relating to proactive release of information?*  
The Society supports statutory review, as suggested in paragraph 12.62.
89. *Do you think agencies should be required to have explicit publication schemes for the information they hold, as in other jurisdictions?*  
The Society considers this is unnecessary.
90. *Do you agree that disclosure logs should not be mandatory?*  
Yes.
91. *Do you agree that section 48 of the OIA and section 41 of the LGOIMA which protect agencies from court proceedings should not apply to proactive release?*  
Yes.

**Chapter 13: Oversight and other functions**

92. *Do you agree that the OIA and the LGOIMA should expressly include a function of providing*

*advice and guidance to agencies and requesters?*

Yes.

93. *Do you agree that the OIA and the LGOIMA should include a function of promoting awareness and understanding and encouraging education and training?*

Yes.

94. *Do you agree that an oversight agency should be required to monitor the operation of the OIA and LGOIMA, collect statistics on use, and report findings to Parliament annually?*

Yes.

95. *Do you agree that agencies should be required to submit statistics relating to official information requests to the oversight body so as to facilitate this monitoring function?*

Yes.

96. *Do you agree that an explicit audit function does not need to be included in the OIA or the LGOIMA?*

Yes.

97. *Do you agree that the OIA and the LGOIMA should expressly enact an oversight function which includes monitoring the operation of the Acts, a policy function, a review function, and a promotion function?*

Yes.

98. *Do you agree that the Ombudsmen should continue to receive and investigate complaints under the OIA and the LGOIMA?*

Yes.

99. *Do you agree that the Ombudsmen should be responsible for the provision of guidance and advice?*

Yes.

100. *What agency should be responsible for promoting awareness and understanding of the OIA and LGOIMA and arranging for programmes of education and training for agencies subject to the Acts?*

The Office of the Ombudsmen.

101. *What agency should be responsible for administrative oversight of the OIA and the LGOIMA? What should be included in the oversight functions?*

The Office of the Ombudsmen.

102. *Do you think an Information Commissioner Office should be established in New Zealand? If so, what should its functions be?*

No.

103. *If you think an Information Commissioner Office should be established, should it be standalone or be part of another agency?*

Not applicable.

#### **Chapter 14: Local Government Official Information and Meetings Act 1987**

104. *Do you agree that the LGOIMA should be aligned with OIA in terms of who can make requests and the purpose of the legislation?*

Yes.

105. *Is the difference between the OIA and LGOIMA about the status of information held by contractors justified? Which version is to be preferred?*

No comment.

#### **Chapter 15: Other issues**

106. *Do you agree that the official information legislation should be redrafted and re-enacted.*

No. The Society considers comprehensive redrafting and re-enactment of the legislation is not necessary given the limited scope of the changes recommended.

107. *Do you agree that the OIA and the LGOIMA should remain as separate Acts?*

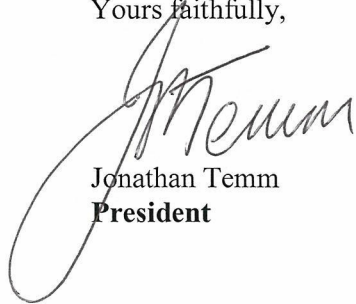
Yes.

108. *Do you have any comment on the interaction between the PRA and the OI legislation? Are any statutory amendments required in your view?*

The Society agrees that no statutory amendment is required.

This submission has been prepared by the Society's Public and Administrative Law Committee.  
If you have any queries regarding this submission please contact Vicky Stanbridge, the Public and Administrative Law Committee Secretary, by telephone (04) 463 2912 or email ([vicky.stanbridge@lawsociety.org.nz](mailto:vicky.stanbridge@lawsociety.org.nz)).

Yours faithfully,



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