Collation of written submissions received on Ministry of Justice's Fourth National Action Plan Commitment 7 consultation

Contents

Submission to MOJ on secrecy clause guidance

1. I am a political blogger who has been using the OIA to scrutinise government for the past 20 years. For the past five years I have been monitoring the use of secrecy clauses in legislation, and made a number of submissions to select committees considering bills containing such clauses. I have also filed numerous OIA requests to agencies promoting such clauses in an effort to understand their justification and origins.

Comments on the consultation process

2. While I am pleased to see the Ministry considering how it might improve scrutiny of such clauses in the future, I am appalled that it has chosen to run the process as a "targeted consultation" of handpicked groups, rather than a full public consultation process. The OIA is legislation of constitutional significance, and deserves better than that, and deliberately excluding the voices of experts such as Nicky Hager, Steven Price, Nicola White, or various media or public law experts is likely to result in insufficient information.

3. I am also appalled that the Ministry has chosen so limited a goal, rather than running a full first-principles review of existing secrecy clauses, with an aim to producing a bill to clarify, standardise, or repeal them, as was done by the Information Commission in 1987. In case the Ministry has forgotten, our constitutional structure has changed significantly since the enactment of the OIA in 1982. Public expectations of transparency and open government have become entrenched, while the BORA's affirmation of freedom of expression (which includes the right to *receive* information, a right which is interpreted by the UN Human Rights Committee, this "embrac[ing] a right of access to information held by public bodies" under rules consistent with the ICCPR[1]) has changed the legal foundations. Old ideas about what should be secret and what should be open may no longer meet public expectations or the strict requirements to be considered a justified limitation under the BORA. A first-principles review is therefore needed.

Existing scrutiny mechanisms are ineffective

4. Regarding the limited questions you have chosen to ask, I note that the Ministry's "research" appears solely focused on justifying existing secrecy clauses (despite declaring this exercise to be out of scope of the consultation). While highlighting so-called "scrutiny mechanisms", it has apparently made no investigation as to whether they work as claimed, or if not, how and why they fail. It has not even backed up its claim in the OGP Action Plan that "It is also the Ministry of Justice's (MoJ) role, for example, to provide advice on Bills that interface with the OIA" with an examination of whether it did, in fact, provide advice on any of the recent bills containing secrecy clauses (or on any other proposed clauses which were subsequently not included).[2]

5. From my experience with using the OIA to examine the policy basis, formulation, and process for such clauses, existing consultation requirements (for example, to consult the Ombudsman when considering legislation which impacts the OIA) are hardly ever adhered to. While the LDAC guidelines are largely effective at ensuring that new public bodies are subject to the OIA, where agencies have proposed that bodies *not* be,[3] they have typically provided a very poor rationale for doing so, and have not conducted the sort of analysis

1 Human Rights Committee (102nd session, Geneva, 11-29 July 2011) *General comment No. 34: Article 19: Freedoms of opinion and expression.* CCPR/C/GC/34 https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf

2 Unfortunately the short amount of time allowed for this consultation meant I did not have time to file an OIA request seeking such information. You should probably expect one in the future.

3 e.g. in the original versions of the Racing Industry Bill and Resale Right for Visual Artists Bill.

suggested by the Law Commission in *The public's right to know: review of the official information legislation* (NZLC R125).[4]

6. The scrutiny provided by Departmental Disclosure Statements is weak. From a quick analysis of the last 20 enactments passed which contain secrecy clauses, only two contained detailed discussion of those clauses.[5] Four more[6] discussed the clauses, but not their impact on the OIA regime (instead, the discussion was typically about privacy or criminal penalties for disclosure). None of these latter bills mentioned secrecy under question 4.9 as suggested. The majority of bills contain secrecy clauses – 14 – did not discuss them at all.

7. For completeness, scrutiny in BORA vets is even thinner, with only one bill[7] receiving any real discussion of its secrecy clause, though two more covered the issue [8]in terms of criminal penalties while ignoring the impacts on freedom of information. Scrutiny in Regulatory Impact Statements is similarly thin.

8. In short, it appears that these "scrutiny mechanisms" are largely theoretical, in that such clauses are largely unexamined. Insofar as the purpose of such scrutiny is to ensure that any secrecy clause has a sound policy justification, and can meet the BORA "justified limitation" test of

    - advancing an important public objective,
    - being rationally connected to that objective,
    - impairing the right no more than is reasonably necessary, and
    - being in due proportion to the importance of the objective

    it is almost entirely ineffective.

Drivers of secrecy and lack of scrutiny

9. A key driver of this lack of scrutiny is that agencies often do not understand that their secrecy clause – typically framed as a "confidentiality clause" or "information-sharing provision" – impacts the official information regime. A common problem here is where a clause forbids disclosure, but then allows it where "provided" or "authorised" or "required" or where it is "available" under another Act. At first glance, this protects the right to official information. Unfortunately, an unpublished 2014 ruling from the Ombudsman's office disagrees: s52(3) OIA means that it does not "provide" for the disclosure of information, and by parallel it is unlikely to "authorise" or "require" or make it available – so the clause overrides the OIA.[9] Some agencies outright deny such an impact, or state that it is not the intention.[10]

10. Another problem is where agencies are updating old legislation, and mindlessly re-enact secrecy provisions without any examination of whether they are suitable in the modern era.

4 P 337.
5 The Inspector-General of Defence Act 2023 and Local Government Official Information and Meetings Amendment Act 2023.
6 Worker Protection (Migrant and Other Employees) Act 2023, Therapeutic Products Act 2023, Income Insurance Scheme (Enabling Development) Act 2022, Commerce Amendment Act 2022.
7 Civil Aviation Act 2023
8 Inspector-General of Defence Act 2023 and Deposit Takers Act 2023.
9 While unpublished, the relevant parts of this opinion can be found in the comments here: https://fyi.org.nz/request/emission_units_surrendered_by_no
10 This occurred with the Mental Health and Wellbeing Commission Bill, resulting in it's information-sharing / ORCON clause being amended at select committee to include an explicit reference to disclosure under the OIA being permitted.

Or where they simply copy existing (and potentially outdated) secrecy clauses wholesale, because the power exists, so it must be OK. All of these approaches can lead to scrutiny mechanisms being bypassed, and secrecy being imposed with weak or non-existent justification.

11. There are also problems with public-sector dysfunction: agencies not trusting each other with "their" (really the public's) information, without statutory assurances of protection. And of agencies being too willing to undermine fundamental constitutional norms in order to "give assurance to stakeholders".

Scrutiny is meaningless without guidelines

12. The focus on enhancing scrutiny mechanisms is misplaced, because it ignores the question of what proposed clauses are being scrutinised *against*. What guidelines will be used to judge whether a secrecy clause is justified or not?

13. The scrutiny of the BORA process works well, because the relevant guidelines are laid out in statute and caselaw for over 30 years now. People can argue over the relative weighting of various matters, but the basic equation of important public purpose, rational connection, minimal impairment, and proportionality is well-understood. By contrast, none of the existing scrutiny mechanisms lays down such guidelines for even recognising when a law infringes the right to freedom of information, let alone assessing whether such infringement is justified. While some of the proposed scrutiny mechanisms may cover this issue, most simply ignore it.

14. Such guidelines need to be at the heart of any scrutiny of future secrecy clauses. Some suggestions on what they should contain:

    - They should recognise the constitutional nature of the OIA,[11] and start from a position that it is sufficient, that its withholding grounds cover all legitimate interests of the government in withholding information. Any divergence from those withholding grounds needs the strongest policy justification.

    - That agencies, the Ombudsman and the courts can be trusted to perform their statutory roles of interpreting and applying those withholding grounds correctly, and to give due weight to both the public interest in withholding and (where applicable) the public interest in release.

    - That the right of access to official information is included in s14 BORA, and therefore impairing this right must be assessed as to whether it is a justified limitation. Given the sufficiency of the OIA, this poses immediate barriers around minimal impairment and due proportionality which require strong reasons to overcome.

    - That where interests are already protected by existing OIA withholding grounds, there is no justification for further secrecy, and that "giving assurance to stakeholders" is not a good reason to undermine our fundamental constitutional norms.

    - That any exemptions must be narrowly tailored, to ensure minimal impairment of the right, rather than broadly-tailored and all-encompassing.[12]

---

11 as recognised by the High Court in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385

12 Yes, this is a problem. For example, the original "information-sharing" clause in the Climate Change Response (Zero Carbon) Amendment Bill would have forbidden the Climate Commission from releasing its policy advice on

- That secrecy clauses should only include criminal provisions for unauthorised disclosure in extreme cases, and that these should be consistent with the penalties and safeguards of the existing offence of Unauthorised disclosure of certain official information in the Summary Offences Act 1981.[13] This covers information far more sensitive than that typically covered by secrecy clauses, requires the consent of the Attorney-General to prosecute, and has a maximum penalty of three months imprisonment and/or a $2,000 fine.

- That if passed, secrecy clauses should be subjected to regular and ongoing review to assess whether they are necessary.

15. The publication of such guidelines will also inform the obvious next phase of this work: the assessment of existing secrecy clauses to determine whether they are justified. Once guidelines are published, such scrutiny becomes unavoidable, so the Ministry might as well embrace it.

Specific questions

16. In response to the specific questions posed in the consultation document:

a) I am not sure that adding further, largely passive "scrutiny mechanisms" will improve matters, given the problems identified above.

b) As noted above, I think the focus needs to be on guidelines.

c) It is not easy to access information on exemptions. I'm an OIA geek, with a particular interest in this area, so I'm aware of some of the better-known old ones , and I track new exemptions that I notice – but I don't notice everything. For normal OIA users, I expect that the first time they learn of a particular exemption is when it is used to refuse a request. A full review of such clauses would at least give us a list.

budgets, targets, ETS price settings and so forth under the OIA, effectively removing our most important policy challenge from public scrutiny. Fortunately, it was fixed at select committee. And this was not an isolated incident.

13 Section 20A.

NEW ZEALAND COUNCIL FOR
CIVIL LIBERTIES

Open Government Partnership National Action Plan 2022-24 Commitment 7 – Secrecy clauses that override the Official Information Act

17 March 2024

Introduction

1. The New Zealand Council for Civil Liberties ('the Council') is a voluntary, not-for-profit organisation which advocates to promote human rights and maintain civil liberties.

2. Commitment 7's existence in New Zealand's 4th National Action Plan as a member of the Open Government Partnership is a direct result of our briefing on the issue of secrecy clauses to the then Minister for the Public Service in December 2021.[1]

3. In this submission we deal first with the shortcomings of the Ministry's consultation process on this issue, and then with the substantive matter of secrecy clauses.

Deeply flawed consultation process

4. While the Council is pleased that the Ministry is doing work on this commitment, we are appalled by the deeply flawed approach it has taken to consulting anyone outside government about this issue.

5. The following are reasons why the Ministry should have been consulting the public, rather than five organisations whose names it obtained from the Public Service Commission:

    - How government departments develop policy and legislative proposals to achieve policy goals, and how our rights interact with those proposals, are matters of profound public interest in a democratic system. Aotearoa is not

[1] *Open Government Partnership: Summer Reading from Civil Society*, Appendix part G, 6 December 2021. https://nzccl.org.nz/wp-content/uploads/Civil-Society-OGP-Briefing-Minister-Hipkins-Dec-2021.pdf

an oligarchy or dictatorship where those in power determine who should be able to comment on matters of public interest;

- As the High Court recognised in 1988, and successive Ombudsmen have been at pains to repeat since then, the Official Information Act (OIA) is legislation of a constitutional nature;[2]

- Section 14 of the New Zealand Bill of Rights Act 1990 sets out everyone's fundamental right to seek, receive and impart information, and is the translation into New Zealand's domestic law of Article 19 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[3] The OIA is part of how those rights are given practical effect and consequently secrecy clauses are limitations on those rights;

- The Ministry's work on this topic is because it notionally administers the OIA and this is policy work that affects how that law operates. The OIA itself sets out that one of its purposes is *"to increase progressively the availability of official information to the people of New Zealand in order to enable their more effective participation in the making and administration of laws and policies"*. The OIA also sets out the principle of availability, and limiting the availability of the consultation paper to only five civil society organisations is not consistent with that principle nor any of the Act's reasons for departure from that principle;

- Section 11 of the Public Service Act 2020 states that the purpose of the public service is to *"facilitate active citizenship"* and section 12 says that in order to achieve that purpose the heads of government departments have a statutory duty to *"foster a culture of open government"*. Section 16 of the Act sets out the 'public service values', one of which is to be *"trustworthy"* and that departments and officials should *"act with integrity and be open and transparent"*. Participation by the public is a core aspect of 'open government';

- The Ministry's work is undertaken to deliver an Open Government Partnership (OGP) commitment and the fundamental ethos of the OGP is that public participation leads to better public policy; and

- The Ministry is intrinsically unlikely to be able to in theory, and has demonstrated that it cannot in practice, identify all those who would be interested in providing comments on the issue of secrecy clauses and therefore was creating unnecessary risks to the quality of its own work on

---

2 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385

3 *Universal Declaration of Human Rights*, United Nations, 1948. https://www.un.org/en/about-us/universal-declaration-of-human-rights
International Covenant on Civil and Political Rights, United Nations, 1966. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

this topic by limiting who it consulted to those organisations whose names it obtained from the Public Service Commission.

6. The Ministry's apparent inability to recognise and act on these factors raises significant questions about its competence, not least to administer the OIA, but also to its commitment to the values set out in that legislation, the NZ Bill of Rights Act, the Public Service Act, and to government policy on public participation. It is simply not good enough to say to the Council *"We wrote and shared the paper with the intention of gathering input from the five civil society organisations involved with Commitment 7."* The Ministry's confirmation to the Council that it has not sent the paper to *"government or parliamentary agencies"* seems to suggest that it has also not asked the Ombudsman for comments.[4] This is frankly incredible given the Ombudsman has highlighted in submissions to select committees on Bills the failure of government departments to consult him on legislation that contains secrecy clauses.

7. At the PSC-organised hui on 5 December 2023, for agencies to report back to civil society organisations on progress with the commitments, the MOJ representative set out its plan to only undertake 'targeted engagement' as part of its work on Commitment 7. The NZCCL representative in the meeting strongly urged the Ministry to reconsider this approach, and to consult the public. The Ministry representative said the Ministry would consider the Council's advice. Did it in fact consider public consultation following this hui? If so, what factors led the Ministry to believe that 'targeted engagement' with five organisations was appropriate for this topic?

8. In comments to *Newsroom* for an article published on 8 March 2024, the Ministry's General Manager for Civil and Constitutional Policy stated that *'the ministry "expect[ed] that civil society organisations will involve their wider networks as part of their input to the engagement process."'*[5] This is disingenuous buck-passing that is unworthy of the Ministry and the relevant General Manager. If the Ministry had intended the Council and other consultees to 'involve their wider networks' it should have explicitly stated this expectation in its emails to us of 23, 26 and 28 February 2024. No such statement was included in these emails. Abdication by the Ministry of its responsibilities, and then trying to shift this work on to the consultees is unacceptable and certainly not compliant with the spirit either 'of service' or the duty to foster a culture of open government set out in the Public Service Act, or the participatory purpose of the OIA nor the OGP. It is inimical to building trust in government.

9. Providing a three week period for responses to its consultation document further indicates the Ministry's unfamiliarity with good consultation practices, as well as undermining the honesty of its statement to *Newsroom* on consultees

---

4 Ministry of Justice email to the Council's Deputy Chair, 28 February 2024.

5 *Govt's shadowy work on secrecy clauses criticised*, Sam Sachdeva, *Newsroom*, 8 March 2024. https://newsroom.co.nz/2024/03/08/govts-shadowy-work-on-secrecy-clauses-criticised/

"involving their wider networks". The executive committees of civil society organisations, like many committees of officials within government departments, usually meet on a monthly basis. A three week response period indicates the Ministry is either unthinking about the needs of its consultees to have time both to draft a response and then have it approved by its executive committee, or that some reason for urgency exists which suggests consultees should be asked to short-circuit their normal processes. If the latter is the case, no reason for a short consultation period and a request to short-circuit normal good governance processes was contained in the Ministry's email to us of 23 February 2024.

10. The foregoing, along with its inherent conflict of interest as the administering department of the Official Information Act, also mean that the Ministry of Justice is a wholly inappropriate body to carry out the review of the OIA that the government is committed to undertaking. The review should be conducted independently, as were the Independent Electoral Review and the Review into the Future for Local Government.

Flawed consultation paper

Scope of commitment not agreed with civil society

11. In the section describing Commitment 7, paragraph 10 of the consultation paper states that *"during the formation of Commitment 7 it was agreed that the following matters were out of scope:"* (emphasis added). The use of the passive *'it was agreed'*, following paragraph 5's description of how commitments are developed, implies that civil society organisations including NZCCL were party to the agreement that the matters listed by the Ministry were *'out of scope'*. Nothing could be further from the truth. The Ministry of Justice did not engage in discussions with the civil society or Council about the scope of Commitment 7, so it is disingenuous of it to suggest that the scope of the commitment was agreed with it or broader civil society. In reality, the Ministry decided the scope of the commitment in agreement with the Public Service Commission.

No evaluation of existing scrutiny mechanisms

12. Milestone 1 of Commitment 7 states that the Ministry would:

> *Review current legislative processes and guidance in relation to the scrutiny of legislative clauses that propose to override the presumption of disclosure under the Official Information Act 1982*

13. The Council would expect that any consultation paper following such a review would present the text of the existing guidance and processes, along with an evaluation of how they have been functioning in practice.

14. The consultation paper not only fails to provide any such evaluation, but also fails to provide any existing guidance held by the Ministry of Justice on how its

officials should evaluate proposals by government departments for secrecy clauses in legislation they are preparing.

15. No such guidance for MOJ officials is presented in the table set out on pages 7-8 of the consultation paper, and the Council notes the use of the qualification *"Some of the different mechanisms available are outlined below:"* in paragraph 18 preceding the table. If this is meant to explain the absence of MOJ guidance in the consultation paper, its lack of transparency is disturbing.

16. Perhaps the Ministry has no such guidance for its officials. This would be worrying, since the entry in the table for the Cabinet Guide is explicit that it is 'mandatory' for departments to consult the Ministry on proposals to ensure consistency with the New Zealand Bill of Rights Act, the Human Rights Act and the Privacy Act; and on proposals that would create new offices, infringements or penalties, or alter the jurisdiction and workload of courts, or access to court information. Presumably guidance for Ministry officials exists to guide evaluation of proposals when they are consulted on these?

17. The absence of the Official Information Act in that Cabinet Guide list of legislation indicates that DPMC and the Ministry have no specific provision requiring departments to consult the Ministry on provisions that would impact either the OIA or the Local Government Official Information and Meetings Act (LGOIMA).

18. We are left to assume that when other departments consult the Ombudsmen in line with paragraph 8.41 of the Cabinet Manual, the Ministry are at least copied in, as the administrators of the Ombudsmen Act 1975 and the OIA. Perhaps this is what supports the statement in Commitment 7 itself that *"It is also the Ministry of Justice's (MoJ) role, for example, to provide advice on Bills that interface with the OIA."* If this is the case, is the Ministry suggesting that the absence of any guidance on how to evaluate proposals for secrecy clauses is because they 'outsource' all such evaluation to the Ombudsmen? This would appear to be a substantially flawed approach, leaving the Ministry dependent on the Ombudsmen and often vice-versa. In the absence of the consultation paper providing any evaluation of how the existing 'system' of scrutiny is working, we are left to rely upon other evidence.

Absence of evidence and evidence of absence

19. The consultation paper states that the Ministry carried out some research on withholding clauses, and provides a summary of that in the appendix. However, paragraph 2 of the appendix states in relation to the purpose of the research that:

> *"The Ministry wanted to know why lawmakers have considered additional protections are needed to limit when official information can be disclosed. The Ministry also wanted to know how publicly available information is on the rationale for any such exemptions."*

20. In other words, the research (the summary of which doesn't even list which 11 pieces of legislation were selected for review) does not examine how well the existing scrutiny mechanisms are functioning, a significant departure from milestone 1 of Commitment 7.

21. One source of evidence for how well the 'system' is working are the Ombudsmen's submissions to select committees on Bills. It is unclear whether the Ministry has reviewed these.

22. An example of an Ombudsman submission to a select committee that indicates the existing 'system' is not working is that on the Data and Statistics Bill. The Council's own submission to the select committee noted that the Cabinet papers on development of the proposals indicated that the Ombudsman had not been consulted.[6] Probably as a result of not being consulted, the Ombudsman's submission notes not only that his office was improperly categorised as an agency that Statistics NZ could compel data from – such that it would *'significantly undermine'* his independence – but also that Part 5 of the Bill ousted the OIA by disapplying it to data that Statistics NZ held. The Ombudsman concludes:

> *Consequently, I suggest the removal of Part 5 of the Bill. It will further complicate and confuse would-be researchers about which regime to use, in circumstances where the OIA already strikes an appropriate balance between access and protection.*[7]

23. Part 5 of the Bill was not removed by the select committee or government, so there is now an entirely separate regime for access to official statistical data than the OIA, one which has no independent mechanism to investigate complaints about refusal to grant access to that data.

24. The Council suggests that as part of evaluating whether the existing 'system' is working well, the Ministry should review the Cabinet papers for legislation containing secrecy clauses, to establish whether the Cabinet Manual was complied with and the Ombudsman consulted during development of policy and legislation. It could also seek the Ombudsman's views on this issue, as the Ombudsman is likely to have noted when he was not consulted on legislative proposals that impinge on the OIA and LGOIMA.

---

[6] NZCCL submission to the Governance and Administration Select Committee on the Data and Statistics Bill, 9 February 2022, paragraph 35. https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/53SCGA_EVI_116197_GA20890/new-zealand-council-for-civil-liberties

[7] Ombudsman submission to the Governance and Administration Select Committee on the Data and Statistics Bill, 22 December 2021. https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/53SCGA_EVI_116197_GA20878/chief-ombudsman

25. Other documents to review for how well the existing system is working are Departmental Disclosure Statements, and the vetting of bills for compliance with the New Zealand Bill of Rights Act.

Departmental Disclosure Statements

26. Departmental Disclosure Statements seem to be a weak form of scrutiny. Only two out of the last 20 enactments containing secrecy clauses contained a detailed discussion of them.[8] Four others discussed the clauses but did not examine their impact on the OIA.[9] None of these four bills mentioned secrecy in response to question 4.9 as the Ministry's consultation paper suggests they should. The majority of bills with secrecy clauses in them – 14 out of 20 – did not have Departmental Disclosure Statements that considered them at all. We therefore cannot rely on these Statements as a means to alert MPs or the public to proposals that limit their right to information.

New Zealand Bill of Rights Act vetting

27. The vetting of bills for compliance with the New Zealand Bill of Rights Act is even more problematic.

28. As noted previously, section 14 of the New Zealand Bill of Rights Act 1990 sets out everyone's fundamental right to seek, receive and impart information. This is the translation into New Zealand's domestic law of Article 19 of the both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[10]

29. The OIA is therefore a cornerstone element in how those Article 19 and section 14 rights are given practical effect for people in Aotearoa.

30. This is not just the Council's view. There is now widespread agreement in international human rights fora that laws such as the OIA are key tools in giving practical, usable, effect to the rights described in Article 19. For example:

    - The December 2004 joint declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom

---

8 The Local Government Official Information and Meetings Amendment Act 2023 and the Inspector-General of Defence Act 2023.

9 Commerce Amendment Act 2022, Income Insurance Scheme (Enabling Development) Act 2022, Worker Protection (Migrant and Other Employees) Act 2023, Therapeutic Products Act 2023.

10 *Universal Declaration of Human Rights*, United Nations, 1948. https://www.un.org/en/about-us/universal-declaration-of-human-rights
International Covenant on Civil and Political Rights, United Nations, 1966. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

of the Media and the OAS Special Rapporteur on Freedom of Expression includes the following statements:[11]

- The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.
- The access to information law should, to the extent of any inconsistency, prevail over other legislation.
- Urgent steps should be taken to review and, as necessary, repeal or amend, legislation restricting access to information to bring it into line with international standards in this area, including as reflected in this Joint Declaration.

- The United Nations Human Rights Committee stated in its 102nd session in July 2011 that:[12]
  - Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.
- The January 2022 report of the Office of the United Nations High Commissioner for Human Rights to the 49th session of the Human Rights Council states:[13]
  - The right of access to information is recognized in international human rights law. Article 19 of the International Covenant on Civil and Political Rights, echoing article 19 of the Universal Declaration of Human Rights, protects everyone's right to seek, receive and impart information of all kinds. States have the obligation to respect and ensure the right of access to information to everyone within their jurisdiction without distinction of any kind. States must take all necessary measures, legislative and otherwise, to give effect to human

[11] International Mechanisms for Promoting Freedom of Expression JOINT DECLARATION By the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression. 6 December 2004. https://www.osce.org/files/f/documents/6/f/38632.pdf

[12] Human Rights Committee (102nd session, Geneva, 11-29 July 2011) *General comment No. 34: Article 19: Freedoms of opinion and expression.* CCPR/C/GC/34 https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf

[13] Human Rights Council (49th session 28 February–1 April 2022) *Annual report of the United Nations High Commissioner for Human Rights*, *Freedom of opinion and expression.* A/HRC/49/38. https://undocs.org/en/A/HRC/49/38

rights within their domestic systems. The right of access to information covers information held by public authorities. As highlighted by the Human Rights Committee, the obligation applies to all branches of government and may include other entities carrying out public functions. The right applies irrespective of the content of the information and the manner in which it is stored.

- The right in article 19 (2) of the International Covenant on Civil and Political Rights may be restricted in accordance with the requirements provided in article 19 (3). That is, any restrictions must be provided by law, on grounds specified in article 19 (3), and be necessary and proportionate. In addition, restrictions shall not be discriminatory. The State restricting the right of access to information must demonstrate that the restriction is compatible with the aforementioned conditions.

- The right of access to information is also enshrined in other international and regional human rights treaties. The Convention on the Rights of the Child, in article 13, reaffirms that the right of access to information applies to children. The Convention on the Rights of Persons with Disabilities sets forth a general principle on accessibility in articles 3 (f) and 9, and includes specific obligations concerning the right of access to information in its article 21.

31. From the citations above, it is particularly worth noting the second of the bullet points in the quote from the January 2022 report of the UN High Commissioner for Human Rights: *"any restrictions* [on the right to information] *must be provided by law, on grounds specified in article 19(3), and be necessary and proportionate."* The state must also *"demonstrate that the restriction is compatible with the aforementioned conditions."*

32. This is what we see in the tests developed in Aotearoa for legislative provisions that limit the other rights set out in the New Zealand Bill of Rights Act; any such restriction must meet the 'justified limitation' test of:

    - Advancing an important public objective;
    - Being rationally connected to that objective;
    - Impairing the right no more than is reasonably necessary; and
    - Being in due proportion to the importance of the objective.

33. On this basis, we should be able to expect that every bill which contains proposals to limit access to information would be assessed against the 'justified limitation' test in relation section 14 of Bill of Rights Act.

34. However, only one bill we have located has received a Bill of Rights Act vet that considers the secrecy clause against section 14 of that Act – that leading to the Civil Aviation Act 2023. The fact that it is the only assessment we have found indicates to us that it is an aberration from the normal policy of the Ministry. The

consultation paper is silent on this issue, and we are at a loss to understand why.

35. Section 198 of the 2023 Act clearly limits our section 14 Bill of Rights Act right to seek and receive information. Paragraphs 26-30 of the *Attorney General's NZBORA Section 7 Compliance report* (section 7 report) purport to justify this limitation but fail to consider whether the existing withholding grounds in the OIA provide sufficient protection for the interests at stake.[14]

36. What is really going on here is that the Government did not want to allow for any possibility that, while the application for authorisation of air carriage was being considered by the Minister (and up to 20 working days afterwards), the Ombudsman might find the public interest in disclosure outweighed that in withholding the information.

37. This, unfortunately, seems to be a common feature of many of the secrecy clauses the Council has encountered.

38. The failure to assess secrecy clauses against the NZ Bill of Rights Act tests cannot be accidental. It must be a matter of policy or interpretation by government officials, and we have found no explanation as to why they do not consistently assess secrecy clauses using the normal 'justified limitation' tests that would surely acknowledge the existing protections set out in the OIA and LGOIMA. The Ministry's work on Commitment 7 must openly interrogate the policy stance of its own officials on this respect, and test the reasons relied upon by officials not to conduct assessments of secrecy clauses.

39. This failure is particularly significant given the importance of these vetting exercises and the prominence of the documents that attracts scrutiny by Members of Parliament, journalists and lawyers.

40. The Council is confident that if all secrecy clauses were properly assessed for whether their limitation on section 14 of the Bill of Rights Act were justified and necessary, we would see far fewer such clauses making their way into legislative proposals, let alone on to the statute book.

Failure to set out standards against which to consider secrecy proposals

41. The most significant methodological failure of the consultation document is that it does not contain any reference to standards or principles which could guide officials when considering arguments for secrecy clauses.

42. The Ombudsman's submission to the select committee on the Civil Aviation Bill sets out why the government should be applying tests. After pointing out

[14] Removed from the Ministry of Justice website, but accessible from: https://web.archive.org/web/20211022065838/https://www.justice.govt.nz/assets/Documents/Publications/20210729-NZ-BORA-Advice-Civil-Aviation-Bill.pdf

another common feature of secrecy clauses – they lazily reproduce secrecy clauses from legislation that predates the OIA – the Ombudsman states:[15]

> *Successive Ombudsmen have considered draft legislation containing clauses which seek to oust, suspend or otherwise limit the application of the OIA, and have consistently observed:*
>
> - *The courts have long recognised the OIA as being 'constitutional' in nature. In addition, the OIA is one of the vehicles by which New Zealanders may exercise their fundamental freedom to seek and receive information, as enshrined in section 14 of the New Zealand Bill of Rights Act 1990. It follows that the application of the OIA, as a constitutional measure which reflects fundamental freedoms, should not be curtailed lightly.*
> - *The Legislation Design and Advisory Committee's Legislation Guidelines state:*
>
> *All public bodies should be subject to the Ombudsmen Act 1975, the Public Audit Act 2001, the Public Records Act 2005, and the Official Information Act 1982 (or the Local Government Official Information and Meetings Act 1987).*
>
> *The Acts discussed in this section are key mechanisms by which government bodies are held accountable for their activities.* ***They should apply to all new bodies and existing bodies unless there are compelling reasons for them not to****… [emphasis added].*
> - *Where it is proposed that Parliament legislate for a specific class of information to be exempt from the application of the OIA, there ought to be a substantive and principled justification, with express consideration of the impact on the constitutional right to information. This is particularly relevant where, as is the case here, there already appears to be grounds within the OIA capable of protecting the relevant interests.*
>
> *In circumstances where the OIA already appears to protect the interests identified within the Bill as warranting protection, there does not seem to be a sufficient justification from creating an exemption, even a limited and time-bound one, from the OIA*

[15] Ombudsman submission to the Transport and Infrastructure Committee on the Civil Aviation Bill, 26 November 2021. Footnotes omitted. https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/53SCTI_EVI_115765_TI2218/chief-ombudsman

regime. The Chief Ombudsman therefore would suggest removing clause 199 from the Bill.

43. Without clearly defined standards or principles any guidelines and scrutiny mechanisms will be next to useless. What are proposed secrecy clauses being scrutinised against?

44. The Bill of Rights Act tests work well, mostly, because they have developed through statute and case law over the last three decades. In contrast, none of the documents listed in pages 7-8 of the consultation paper, nor those in the proposals set out on pages 9-10, set out any tools for recognising when a proposed secrecy clause infringes the right to freedom of information, let alone whether it might be justified.

45. The Council believes key principles should be set out to guide officials considering whether a secrecy clauses are needed:

    A. The right to seek, receive and impart information is set out in international human rights law (UDHR and ICCPR) that New Zealand has signed and ratified. Section 14 of the New Zealand Bill of Rights Act 1990 gives domestic effect to the relevant aspect of these instruments, and the Official Information Act 1982 and Local Government Official Information and Meetings Act 1987 make these aspects of the section 14 rights practically usable by people. Consequently, any legal provision which would limit the scope of, or the rights in the OIA, LGOIMA and section 14 of the Bill of Rights Act must be considered in relation to the well-established tests for departing from such rights.

    B. The OIA and LGOIMA are important pieces of constitutional legislation and the courts have recognised them as such. There are good reasons for openness and it has been the policy for all governments since these laws were enacted for this to be the norm.

    C. There are already reasons set out in the OIA and LGOIMA where it is permissible to depart from the principle of availability of official information. These are far-reaching and have proved workable in almost all situations.

    D. Government agencies, the Ombudsmen and courts each have their role to play under these laws. The Ombudsmen and courts can and should be trusted to correctly perform their statutory roles in applying and interpreting the official information legislation, including the withholding grounds. This includes giving appropriate weight to the public interest in release of information. It is not the job of government agencies to doubt

the capability of the Ombudsmen or courts to perform their interpretation functions adequately.[16]

E. Where there are already reasons for withholding information set out in the OIA and LGOIMA, there is no justification for additional secrecy. 'Giving assurance to those who are required to supply information to government' is not a good reason to go beyond the existing withholding grounds set out in the OIA and LGOIMA.

F. Any further secrecy (whether removing information or an agency from the scope of the OIA or LGOIMA) that can meet the previous tests must be as narrowly drafted as possible to ensure the least possible infringement of the right to information. The policy objective must be clearly identified and described.

G. Secrecy clauses that include provision for criminal offences for unauthorised disclosure should be the rare exception and only included in extreme cases. These must be consistent with the safeguards and penalties found in section 20A of the Summary Offences Act 1981, including the requirement that prosecution needs the consent of the Attorney-General.

H. That accompanying any secrecy clause included in a legislative proposal is a requirement in the law for the Ministry of Justice to conduct regular reviews of whether the provision is necessary.

46. In addition to these principles, the Council believes a key process step is necessary. While it may be the expectation that government agencies consult the Ministry on proposed secrecy provisions, and the Ministry then consults the Ombudsmen, at present this all takes place behind closed doors. The public is unaware of such consultation until a Cabinet paper is voluntarily published by a Minister or a Regulatory Impact Statement is published when a Bill is introduced to the House. This is wholly inadequate, and must be strengthened by the publication of the Ministry's correspondence to the Ombudsmen seeking their views on the secrecy proposal, and the Ombudsmen's reply. This correspondence must be published within a week of the Ombudsmen's reply. The process should be drafted broadly enough so that it captures circumstances where another government agency besides the Ministry seeks the Ombudsman's views on a secrecy provision. Doing this will not only contribute to achievement of the participation and accountability purposes of the OIA, but also to the 'active citizenship' purpose and 'foster a culture of open government' duty in the Public Service Act, and the legitimate expectations the public has due to the country being a member of the Open Government Partnership.

[16] The courts are referenced here because section 34 of the OIA makes clear that a requester may appeal the original refusal decision to the courts after an Ombudsman has completed their investigation. An example of this is Kelsey v Minister of Trade [2015] NZHC 2497.

Failure to consider previous work on this subject

47. In its agreement with the Public Service Commission on the scope of Commitment 7 the Ministry ruled out a key aspect of what the Council sought to be achieved as a result of the current National Action Plan. This was a review of the existing secrecy clauses, to determine which should be repealed or amended.

48. As we noted in our December 2021 briefing to the Minister for the Public Service, such a review was previously conducted by the Information Authority, established in Part 6 of the OIA when it was enacted.

49. The Ministry's consultation document makes no reference to the work of the Information Authority, nor to the Committee on Official Information (also known as the Danks Committee after the name of its chairman).

50. In its first report, of December 1980, the Committee on Official Information addressed the creation of new secrecy clauses to override the OIA:[17]

> *90. As we have already mentioned there are, aside from the Official Secrets Act, many other statutes which provide protection for specific areas of information as well as sanctions for unauthorised disclosure. It is not uncommon for protection clauses to be included in new enactments. One result the Committee would not wish to see arising from the changes recommended in this report, would be a rash of new protective measures. This would, we consider, seriously undermine the Government's intention and we hope it can be resisted.* ***The compatibility of protection accorded by existing statutes with the proposals we are developing should be reviewed in due course.*** *This review will be part of the work programme of the new machinery we are proposing.*
>
> [emphasis in the original]

51. The Committee followed up on this in its Supplementary Report of July 1981. We have reproduced several paragraphs for ease of subsequent reference:[18]

> ***Criminal Sanctions Protecting Particular Types of Information***
>
> *5.60 There is a large number of specific statutory provisions requiring that certain official information be kept confidential. Appendix 4 sets out a list of most of these. We have not examined the provisions in detail and have received little information about*

[17] Committee on Official Information, *Towards Open Government*, *General Report,* December 1980. Accessed from: https://www.ombudsman.parliament.nz/resources/towards-open-government-danks-report

[18] Committee on Official Information, *Towards Open Government*, *Supplementary Report,* July 1981. Accessed from: https://www.ombudsman.parliament.nz/resources/towards-open-government-danks-report

their operation. We do, however, record one general conclusion based on submissions and on interviews, and we make one comment. We also explain why we have not proposed any immediate or sweeping action to repeal or modify these provisions. We then go on to note the questions which such provisions raise. We have already said that the compatibility of the protection they accord with the proposed legislation should be reviewed in due course (General Report paragraph 90) that would be a task for the Information Authority (see clause 37(2)(c) of the draft Bill).

5.61 The conclusion is that no departments would require additional specific criminal sanctions in the event of the general provisions in the Official Secrets Act 1951 being drastically narrowed. (Our findings about that Act set out in paragraphs 80-83 of the General Report might be recalled here.) The comment is that we would be concerned if the narrowing of those general prohibitions led to arguments for the creation of new specific offences. That would fly in the face of the general tenor of the proposals and would not be justified by any evidence or argument presented to us. We would also be concerned if overbroad and unjustifiable prohibitions which are found not to be compatible with our overall proposals stayed on the statute book.

5.62 We do not propose the wholesale repeal or amendment of this long list of prohibitory provisions for two broad reasons: one of substance, the other of process. The substantive point is that these provisions, at least in many cases, protect interests which sometimes justify the withholding of information, e.g., the protection of law and order, individual privacy, the protection of sources, and proper commercial confidences. This will appear from a reading of the legislation and from the following paragraph. The process point is that we do not consider that a simple overall view can be adopted and implemented. As generally in the wider field of official information, so too in the narrower one of criminal sanction, judgments have to be made taking account of the basic principles of openness and of the balance of competing factors applying in the particular area of public administration. We are certainly not in a position to make all the specific determinations called for. We are not alone in this. We note that overseas proposals and legislation in general protect existing legislation, although sometimes with some limits and sometimes with provision for review by Parliament.

5.63 The provisions set out in the list of statutory- prohibitions (appendix 4) suggest a range of questions that might be considered in the review of the existing provisions which, it is proposed, the Information Authority should carry out.

(1) *Is a specific statutory prohibition or restriction needed? We note that in some quite sensitive areas-such as constitutional and citizenship matters administered by the Department of Internal Affairs or the extensive operations of the Ministry of Works and Development - there are no specific provisions making wrongful disclosure an offence. It may be that some provisions in other departmental statutes have been carried forward without specific review. By contrast, some recent statutes provide examples of carefully thought through and debated confidentiality provisions.*

(2) *If a specific provision is needed, must its breach be an offence? It maybe that many of the provisions in the list are not backed by criminal sanction. (Our uncertainty results principally from the uncertain application of section 107 of the Crimes Act 1961 which provides for a general criminal penalty for the breach of statutory obligations.) Such a provision has an effect of its own force on those subject to it. It may also be capable of enforcement in civil proceedings. And it has behind it the other formal and informal sanctions mentioned earlier (paragraphs 5.22-5.24). It may be useful in answering this question and that under (1) above to have regard to the parallel situation - if there is one - in the private sector. So in that sector important commercial interests are protected by contract, civil action and discipline within the firm rather than by legislation and criminal prosecution. But is discipline in that case a more real sanction than in the public sector?*

(3) *What is the interest to be protected? Is it a sufficiently good reason to justify the additional protection of, first, a specific statutory provision and, second, a criminal sanction? Among those interests reflected in the list are (a) the concern for a continued flow of information from regulated and licensed industries, from informers, and from those, such as taxpayers, who may be the sole source of the relevant information; (b) the protection of privacy; (c) the protection of some trade secrets; and (d) the protection of defence interests and police and prison security. In some circumstances a wide executive power to require the citizen to provide information might be justified by strict limits, enforced by the criminal law, being placed on the use to which that information can be put.*

(4) *Should the prohibition be subject to waiver by the executive, usually the Minister? In some circumstances (e.g., census information) the interest protected is such that the protection has to be absolute. But, as the list shows, in many cases it has been thought appropriate to allow such relaxation. If so, how should that discretion be worded? (See also (7) below).*

(5) *What other limits are there on the prohibition? In some cases it will be appropriate to allow the individual involved to waive the prohibition. In some cases there can be disclosure "for the purposes of the Act". Will the effect of that always be clear? Is it always clear whether information can be disclosed elsewhere within the public service? Does the prohibition prevent court access to the information for the purposes of matters before it? Should information which is already in the public domain be caught? Sometimes such questions will be answered clearly by the statute, in others they have been the subject of litigation. Ideally the legislation should resolve these questions.*

(6) *Which individuals should be subject to the prohibition and any criminal sanction? If only public servants are to be or can be so subject, the need for the legislation might be more seriously questioned: they are already subject to the controls discussed earlier. But in some cases others might be involved in unlawful disclosure and might appropriately be subject to prosecution.*

(7) *How precisely is the protected information defined? How is any discretion to release it worded? As overseas reports and legislation suggest, a broad prohibition accompanied by a broad discretion is undesirable. It amounts, within the particular area of administration, to a system which involves secrecy with disclosure at the absolute discretion of the organisation. Our general approach leads us to oppose this system.*

(8) *How should any requirements of intention and knowledge be worded?*

(9) *What is the appropriate penalty?*

52. While the Committee's report predates the New Zealand Bill of Rights Act by almost a decade, it is useful to see the overlap between the tests proposed by it and the requirements for justifying a limit on Bill of Rights Act rights now.

53. The Ministry's consultation document also makes no reference to the Law Commission's 2012 review of the official information legislation, *The Public's Right to Know*.[19]

54. Chapter 13 of that report considers oversight of the official information legislation, including secrecy clauses. The Commission made the following recommendations:

[19] *The Public's Right to Know: Review of the Official Information Legislation*. Law Commission. (NZLC R125, 2012) https://www.lawcom.govt.nz/our-work/official-information-act-1982-and-local-government-official-information-act-1987/tab/report

R107 The OIA and LGOIMA should include the following functions so as to provide leadership and whole-of-government oversight, and to promote the purposes of the legislation: ***policy advice; review; statistical oversight; promotion of best practice; oversight of training; oversight of requester guidance*** *and* ***annual reporting****.*

R108 The ***policy advice*** *function should cover all official information related policies and legislation and should include:*

(a) co-ordinating official information policy and practice with other government information management and pro-active information release policies;

(b) advising on the regulation of official information as appropriate and as referred by government;

(c) advising on official information aspects of new legislation and the establishment of new public agencies; and

(d) advising on any matter affecting the operation of the official information legislation.

R109 The ***operational review*** *function should include:*

(a) receiving and investigating complaints about the operation of the legislation;

(b) reviewing agency practice in relation to certain aspects of the legislation;

(c) undertaking a five year review of the operation of the official information legislation, aligned with reviews of the Privacy Act 1993 and the Public Records Act 2005.

55. The Commission concluded its chapter by stating that the current fragmentary systems were not working in relation to the long term health of the official information legislation, and that a single, permanent, oversight body should be established for the policy advice and operational review functions (paragraph 13.120).

56. The then government rejected the Commission's recommendations. In its cursory response, it stated in relation to Chapter 13:[20]

[20] Government Response to Law Commission Report on The Public's Right to Know: Review of the Official Information Legislation. Presented to the House of Representatives 4 February 2013. Accessed from: https://www.lawcom.govt.nz/assets/Publications/GovtResponse/NZLC-Government-response-R125.pdf

The Law Commission recommends the statutory creation of a new oversight office. The Office of the Ombudsman currently provides specific training and education to agencies subject to the Act, as well as publicly available information and guidance. The government considers that the oversight provided by the Ombudsmen is effective, including responsibility for complaints and guidance, and that government departments and agencies should continue to look to the Office of the Ombudsman for guidance.

57. As well as failing to address the arguments of the Commission in detail, the subsequent decade has seen numerous further secrecy clauses enacted. This demonstrates that the then Government's confidence in the effectiveness of the oversight provided by the Ombudsmen – and by inference the Ministry of Justice in relation to proposed secrecy clauses – was sorely misplaced.

Need for an independent review of the Official Information Act

58. The 12 years since the Law Commission's report have been largely one of drift and carelessness, notwithstanding the Ombudsman and Public Service Commission's misplaced confidence in timeliness statistics. While the Council does not endorse all the recommendations of the Law Commission, the failure of successive governments to act on most of them have resulted in an official information regime that is now even further behind the times than the Commission noted in its report.

59. All the main political parties contesting the last general election committed themselves to maintaining New Zealand's membership of the Open Government Partnership, and the National and Labour Parties are committed to a review of the Official Information Act.

60. The Ministry of Justice's 2019 advice to the Minister of Justice on whether such a review should be undertaken did not even consider who should undertake the review – it assumed that the Ministry should do it.[21]

61. This would be unacceptable, as not only has the Ministry demonstrated that it cares little for the legislation through the quality of its administration of the Act, failure to protect it from proposals to create unnecessary secrecy clauses, and because it seemingly lacks the policy capability to do the job well, but more fundamentally because it has an institutional conflict of interest and its administration role also needs examining by any review. The review of the OIA that the government is committed to undertaking should be conducted independently, as were the Independent Electoral Review and the Review into the Future for Local Government.

[21] *Official Information Act 1982 - report back on targeted engagement and next steps*, Ministry of Justice advice to Minister Andrew Little, 27 September 2019.

Next steps – the Ministry's specific questions

62. It will be clear from the rest of this consultation response that we do not think the Ministry is asking the necessary questions in paragraph 21 of the consultation paper.

63. That said, the Council's response to the questions posed are as follows:

    (a) The proposed options to improve scrutiny mechanisms are unlikely to work as the Ministry has not yet developed a set of principles against which claims for additional secrecy clauses should be tested. They also are too dispersed, with a lack of institutional ownership of the overall function. The paper not only fails to provide the Ministry's existing guidance for officials to use when assessing agencies' bids for secrecy clauses, but it fails to explain what items 3 and 4 in its table on page 9 would contain. In light of this, it is impossible to say whether they would improve the situation.

    (b) Scrutiny mechanisms without clear standards for those mechanisms to apply have been proven to fail to protect people's rights to information. The additional option the Council would like to see is a new independent oversight agency, one of whose functions would be to review and advise on secrecy proposals. However, this goes beyond the current consultation and into the territory of the needed, and promised, review of the OIA overall.

    (c) It is not easy to find information on secrecy clauses, or 'exemptions to the OIA' as the Ministry describes them. A Ministry that was adequately discharging its function of administering the OIA would be maintaining a public database of these clauses, along with the supporting documents supplied by the proposing government agency as well as the Ministry and the Ombudsmen's assessments of the proposals. A full review of existing secrecy clauses is the obvious place to start, along with re-reading Appendix 4 and the relevant paragraphs of the Committee on Official Information's report. The Council currently has to manually search Bills and Acts for references to confidentiality and non-disclosure.

Conclusion

64. As a consultation exercise in fulfilment of an Open Government Partnership commitment, the Ministry's work is wholly unfit. It will not lead to stronger testing of claims for secrecy, as it sets out no tests.

65. The Ministry's next steps should be:

    (a) to publish its existing guidance for officials on how to scrutinise agencies' claims that a secrecy clause is needed in new legislation;

    (b) to publish a document that seeks views on why NZ Bill of Rights Act vets of new legislation should test secrecy clauses using the established methodology for scrutinising provisions that limit our rights; and

(c) to publish a further consultation paper that sets out the draft text of the proposed new guidance and procedures for scrutinising proposed secrecy clauses.

New Zealand Law Society
Te Kāhui Ture o Aotearoa

Level 4, 17–21 Whitmore Street, Wellington
PO Box 5041, Wellington 6140 · DX SP20202, Wellington
04 472 7837 · inquiries@lawsociety.org.nz

lawsociety.org.nz

18 March 2024

[redacted]

Feedback on Open Government Partnership Fourth National Action Plan Commitment 7 – improving scrutiny of OIA exemptions

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the Ministry of Justice's *Open Government Partnership Fourth National Action Plan Commitment 7 – improving scrutiny of OIA exemptions* discussion paper (**Discussion Paper**).

1.2 This submission has been prepared with input from the Law Society's Public Law Committee, and Human Rights and Privacy Committee.[1]

2 General comments

2.1 We understand the Discussion Paper was prepared for the purpose of undertaking targeted engagement with select stakeholders who were involved in the development of New Zealand's Fourth National Action Plan (**Action Plan**), and Commitment 7 in that Action Plan (which is to strengthen the scrutiny of legislative clauses that propose to override the disclosure requirements of the Official Information Act 1982 (**OIA**)).

2.2 We encourage the Ministry to always undertake wider public consultation on work relating to the OIA and the Action Plan, in order to improve transparency, and to ensure the public, and other interested stakeholders, have the opportunity to provide feedback. Wider public engagement, and transparency around this work is particularly important, given that:

(a) a sub-objective of Commitment 7 is to increase transparency,[2]

(b) transparency is one of the three Open Government Partnership values, alongside citizen participation and public accountability,[3] and

(c) it relates to the potential ouster of the OIA, a part of New Zealand's constitutional framework.[4]

---

1 More information about these committees can be found on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.
2 Discussion Paper at [9].
3 See: https://www.opengovpartnership.org/glossary/transparency/.
4 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 at 391.

2.3 It is appropriate for any work relating to Commitment 7 to be undertaken in a manner consistent with these values and objectives. Furthermore, whilst other stakeholders and the wider public may not have had any feedback on the development of the Action Plan, they may nevertheless wish to provide feedback on more discrete aspects of the Action Plan.

3 Options to improve scrutiny mechanisms

3.1 The Ministry has sought feedback on nine proposed options for improving scrutiny mechanisms (question a), as well as any other mechanisms which could be updated to include reference to the OIA and potential exemptions (question b).

3.2 We agree all nine options outlined in the Discussion Paper will help improve scrutiny mechanisms. Once these options are implemented, we encourage the Ministry to work with relevant stakeholders to draw the updated resources to the attention of those involved in drafting and scrutinising legislation.

3.3 We have also discussed some additional or alternative options which could help improve scrutiny of OIA exemption clauses below.

Scrutiny of OIA exemption clauses during Bill of Rights vet

3.4 The Ministry of Justice scrutinises proposed bills and advises the Attorney-General of any inconsistencies with the New Zealand Bill of Rights Act 1990 (**Bill of Rights**).[5]

3.5 When preparing this advice, the Ministry could consider whether a proposed bill will limit the right to seek and receive information of any kind in any form (a right protected by section 14 of the Bill of Rights). That right may be subject only to reasonable limits which are prescribed by law, and can be demonstrably justified in a free and democratic society.[6]

3.6 Where a proposed bill seeks to override the disclosure requirements in the OIA, it may limit the public's ability, and their right to seek and receive certain information. The Ombudsman has taken a similar view, noting that:[7]

> "[T]he OIA is one of the vehicles by which New Zealanders may exercise their fundamental freedom to seek and receive information, as enshrined in section 14 of the New Zealand Bill of Rights Act 1990. It follows that the application of the OIA, as a constitutional measure which reflects fundamental freedoms, should only be curtailed where there is clear justification."

3.7 On this basis, in appropriate cases, the Ministry's advice to the Attorney-General could consider whether a proposed OIA exemption clause places *any* limits on the section 14 right to seek and receive information, and whether or not those limits are justified.

---

5 If a bill contains an inconsistent provision, the Attorney-General must then notify the House of Representatives what that provision is, and how it appears to be inconsistent with the Bill of Rights (see Bill of Rights, s 7, and Standing Orders of the House of Representatives 2023, SO 269(1)).

6 Bill of Rights, s 5.

7 See Office of the Ombudsman *Guidance on when to engage the Ombudsman in law reform proposals* (2022) at [9], also cited in the Discussion Paper, at page 8.

3.8 It is unclear whether the inclusion of an OIA exemption clause in a bill is presently seen to trigger such an analysis.[8] If it is not, we encourage the Ministry to assess whether the current guidance and processes for preparing advice to the Attorney-General require revision, in order to provide for such a trigger.

3.9 It may in any case be worthwhile considering a short, additional step that would apply in all cases of a proposed exemption clause. Where a bill includes an OIA exemption clause, and even where the Ministry considers it unlikely the clause places an unjustified limit on the right to seek and receive information, it could prepare a supplementary report, which:

(a) Identifies the exemption clause;

(b) Outlines the Ministry's views around whether the clause places any limits on the right to seek and receive information, and whether those limits are reasonable and justified; and

(c) Details any consultations about that clause with relevant stakeholders, including the Ombudsman.

3.10 This information would therefore be prepared in respect of every bill which contains an OIA exemption clause (or in fact, any form of limitation on the application of the OIA).

3.11 We acknowledge that this adds an additional process, however we do not envisage it would be a lengthy or resource intensive undertaking. In return, it would:

(a) Recognise the constitutional status of the OIA and the significance of proposals to limit its application;

(b) Provide an additional layer of scrutiny of exemption clauses, and provide the Ministry further, procedural reassurance that all Bill of Rights issues have been considered;

(c) Enhance public visibility and awareness of proposed exemption clauses, and public understanding of how those clauses override the requirements under the OIA; and

(d) Improve the public's understanding of how proposed new legislation limits their right to seek and receive information.

4 Information about existing provisions which override the OIA

4.1 The Ministry has sought feedback on how easy it is for submitters to access information about exemptions to the OIA (question c). We understand the Ministry does not hold a list of all exemption clauses, and we are not aware of an easily accessible and up-to-date list being available to the public. In addition, it is difficult to carry out internet searches for guidance about exemptions to the OIA, as such search results typically relate to the withholding grounds contained in the OIA, rather than exemptions to the OIA itself.

---

8 We have observed that the Bill of Rights advice prepared by the Ministry does not always consider *all* relevant clauses which limit the application of the OIA – see, for example, the Ministry's advice to the Attorney-General about the Commerce Amendment Bill (which did not consider whether cl 32 of the Bill limits s 14 of the Bill of Rights), and the Ministry's advice on the Reserve Bank of New Zealand Bill (which did not consider the potential impacts of clauses 266, 268 and 269).

Therefore, we do not believe it is easy to access information about exemptions to the OIA.

4.2 It would therefore be helpful for the Ministry to identify and maintain a list of enactments which override the disclosure requirements in the OIA.[9] This list could include information about:

(a) The specific legislative provisions which override the disclosure requirements in the OIA,[10] and how they fit within the exemption categories identified by the Ministry;

(b) Whether, and to what extent, those provisions have impacted the public's ability to freely access official information (which is one of the objectives of the OIA);[11] and

(c) Whether there was consideration of the impacts of those provisions on section 14 of the Bill of Rights when the provisions were being drafted and where information on that consideration may be found.

4.3 We believe it is appropriate for the Ministry to develop and maintain this list, as the Ministry is the lead agency for this work,[12] and is likely better-placed to make the list available to the public. Once this list is developed, we recommend reviewing the various exemption provisions on the list to determine if they ought to be amended in order to ensure better consistency with the OIA and the Bill of Rights.

5 Understanding the driver for exemption clauses

5.1 The OIA is intended to operate as a comprehensive harm-based scheme, capable of protecting specified interests unless the countervailing public interest in disclosure outweighs that prospective harm. It does not take a class-based approach to the protection of official information.[13]

5.2 The continued use of statutory exemptions detracts from the legislative scheme of the OIA and its harm-based approach. In effect, it had introduced a series of class-based exemptions. It is not clear what harms those exemptions seek to protect against, and whether in fact those harms are not already protected by the OIA. We suggest it would be beneficial for the Ministry of Justice to identify the motivations for existing exemptions, consider whether those motivations indicate a wider concern about the OIA. The Ministry could then also consider what further guidance could be provided under the mechanisms identified in the paper.

---

9 We acknowledge the Appendix of the Discussion Paper contains some of this information, but that information only relates to *"eleven pieces of legislation … selected from a list provided by the NZ Council for Civil Liberties in [a] submission during development of the NAP4"*.

10 The Action Plan notes, at page 28, that there are now *"more than 85 clauses in legislation that override the presumption of availability of official information found in section 5 of the Official Information Act 1982. More than 20 have been added as a result of legislation introduced since 2019."*

11 Explanatory Note of the Official Information Bill.

12 Discussion Paper at [7].

13 See Te Aka Matua o te Ture | Law Commission *The Public's Right to Know: Review of the Official Information Legislation* (NZLC R125, 2012) at 2.4-2.7.

6 Next steps

6.1 We would be happy to answer any questions, or discuss this feedback with the Ministry. Please feel free to get in touch via the Law Society's Senior Law Reform & Advocacy Advisor, Nilu Ariyaratne [redacted].

Nāku noa, nā

David Campbell
Vice-President

Submission - Open Government Partnership Fourth National Action Plan
15 March 2024

This consultation should have been opened to a wider audience for a much longer period. Official Information should be released proactively where at all possible and in such as manner that citizens can have their say before they get stuck with the downside of expensive, ill considered policies put into action with minimal consultation. Exemptions should be kept to an absolute minimum and require individual justification.

However:

To ensure that OIA exemptions are created and correctly processed, however that may be, then each and every exemption should also be passed as an amendment recording the exemption in the Official Information Act 1982. This gives one legislative place of reference for all exemptions.

The Official Information Act 1982 should also be amended to include a sunset clause for each and every exemption granted so that after a period of say 3-5 years the exemptions have to reviewed and relegislated for otherwise they lapse.

The use of all legislated exemptions (and denial of OIA requests) should be included in one annual report to parliament. Select committees should have the power to inquire and compel attendance to this inquiry. Currently the Ombudsman only reports on complaints made.

Stories of avoidance and slow walking of Official Information requests abound. Whilst there are review provisions they appear to be anything but timely. Parliament (or the designated select committee) should be entitled to hold an inquiry and compel testimony providing certain trigger points are met and that the trigger points are set at a level that avoids the government of the day being able to stymie such an inquiry. (e.g by 60% of the non governing parties requiring one, or a petition from members of the public with a minimum number of signatures)

Amend the Official Information Act 1982 so that commercial confidentiality cannot be imposed upon the non government party unless they request it. e.g The police have paid out significant sums to journalists when they have breached their rights and imposed a confidentiality clause on the other party (*even though the other party would be quite happy to make the amount public.)* OIA exemptions should not be created or imposed on external parties by way of confidentiality clauses in settlements but should be covered by the main act and amendments that permit external parties to determine their own fate providing they do not breach the privacy of other third parties.

Pre-emptive release of Information.
There are any number of government processes and decisions that operate within a very wide legislative boundary or even none at all other than that set by cabinet. Public consultation is at a minimum if it exists at all.
Again a select committee or parliament should be able to impose a requirement for pre-emptive release of information by a process that cannot be thwarted by the government of the day. Where the information discloses a clash with individual privacy then the information released should also include how and where the express consent of the individuals has been gained by“opt in” provisions and disclose the exact nature of this to prevent forced consent.

Examples of such processes are:
Addition of individual databases to the Individual Data Index. Most citizens are completely unaware of it's existence, the nature and scope of the data held, the extent of the "skews" in the data and the gay abandon with which it is dispensed without check or balance to all comers private businesses included and without any heed to data reintegration or acquisition by other countries or corporations domiciled elsewhere which is likely to be against the direct interest of those whom the information relates too. However, an individual requesting their own information is not permitted to access it despite thee avowed aim of every citizen receiving a unique identity number.

Immigration targets and population policy. There has been no public discussion on these and without pre-emptive disclosure no reasonable discussion can be had before the public is responsiblefor the cost of a massive clean up.

From: Kirsten Windelov
To: [redacted]
Subject: RE: OIA exemptions clause (Commitment 7) discussion paper feedback
Date: Thursday, 14 March 2024 2:46:43 pm
Attachments: image001.jpg

Kia ora [redacted]
Many thanks. Have had further thoughts about this. Had said in my email below that OIA exemption clauses should only be included in bills where (among other conditions) the Ombudsman has determined it's in the public interest to include this exemption. On further reflection, am thinking that this would in effect be giving the Ombudsman a veto and this could conflict with their "watchdog" role. So, instead I'd amend my feedback to the following (changed text highlighted):

We agree the OIA is constitutional in nature etc and therefore it is our view that:

- There should be a presumption against using exemption clauses and this should be articulated in all guidance relating to legislative drafting; and
- Such clauses should only be included in draft legislation where there has been public consultation about this as part of the policy process leading to the drafting of that legislation; *and* the Ombudsman has been consulted about the inclusion of the clause and their response has been made available to the public.
- Any bill such a clause is included in must be subject to full parliamentary scrutiny – so this would include a full select committee process, which would mean legislation including such clauses could not be passed under urgency.

Apologies for coming back on this after the closing date – less haste, more speed!

Ngā mihi
Kirsten

From: [redacted]
Sent: Wednesday, March 13, 2024 3:38 PM
To: Kirsten Windelov [redacted]
Subject: RE: OIA exemptions clause (Commitment 7) discussion paper feedback

Kia ora Kirsten,

Thank you for your submission.

We appreciate your thoughts on this topic and the discussion paper.

We will be in touch, where relevant, about anything further on this Open Government Partnership Commitment.

Ngā mihi nui,
[redacted]

[redacted]
Democracy and Open Government Team | Policy Group

Wahi mahi: Justice Centre – Level 6, 19 Aitken St, Wellington
Īmera:
Pae tukutuku: justice.govt.nz | electoralreview.govt.nz

From: Kirsten Windelov
Sent: Tuesday, 12 March 2024 4:33 pm
To:
Subject: OIA exemptions clause (Commitment 7) discussion paper feedback

Kia ora
I am with the policy team at the PSA Te Pūkenga Here Tikanga Mahi.

We have read through the discussion paper on Commitment 7. In summary, our feedback on this is:

We agree the OIA is constitutional in nature etc and therefore it is our view that:

- There should be a presumption against using exemption clauses and this should be articulated in all guidance relating to legislative drafting; and
- Such clauses should only be included in draft legislation where there has been public consultation about this as part of the policy process leading to the drafting of that legislation; *and* the Ombudsman has determined it's in the public interest to include this exemption
- Any bill such a clause is included in must be subject to full parliamentary scrutiny – so this would include a full select committee process, which would mean legislation including such clauses could not be passed under urgency.

Ngā mihi nui

Kirsten Windeløv
Senior Advisor Policy and Strategy

New Zealand Public Service Association (PSA)
Tē Pūkenga Here Tikanga Mahi
11 Aurora Terrace
Wellington 6140

[redacted]

From: Steven Price
To: [redacted]
Cc:
Subject: OGP - Commitment 7 - discussion paper
Date: Thursday, 14 March 2024 10:15:06 am

Hi [redacted]
I'm in a slightly awkward position here, in that I have not been asked to provide views on this paper, which I found out about through the NZ Council for Civil Liberties. But I'm going to anyway.

I can't help but think that there must be many others with knowledge and experience of the operation of the OIA who are not on the consultation list but whose views might be useful. The media are an obvious example. Academics such as Dean Knight and Andrew Geddis. Users of the OIA such as Nicky Hager. Various current or former officials such as Grant Liddell and Nicola White have a wealth of knowledge. For my part, I was the original country reporter for NZ's OGP plan, and have conducted research on the operation of the OIA.

I would also have thought there is a strong case to invite public submissions, and no good reason not to. For a project that is supposed to be about open government, it really is extraordinary that the consultation is so limited. I'm not sure whether you're familiar with the history of the OGP, but this seems to be a thing.

Another common feature of the NZ's OGP plans is governments leaving their action until the last minute, and beyond. That seems to be happening here again.

I am going to keep being grumpy. The commitment is to strengthen the scrutiny of legislative secrecy clauses. The method seems to be about improving the guidance about them. I would have thought that the first step was to identify what guidance is currently being provided, and then consider whether it's working well. What does it say? Where does it say it? Is it being applied? How? Is it proving useful?

Isn't that step 1? Instead, this paper examines (a) at what points might this guidance be provided? and (b) is the justification for secrecy usually accessible? Those do not seem to be the most important questions.

I suppose it's possible that the summary of scrutiny mechanisms does contain the guidance that exists. If so, that seems rather appalling because it suggests that there is effectively none at all, except for some consultation requirements. And there's no indication of whether these mechanisms are ever used, or with what impact. I realise that the government has defined the scope of this commitment very narrowly, and with many exceptions, but in my view, you can't work out how to strengthen guidance without considering the content and efficacy of existing guidance.

I am baffled by the lack of any actual consideration of the content of any guidance. Is there a policy somewhere that says something like:

1. The OIA is important legislation and the courts have considered it constitutional. There are good reasons for transparency. It is government policy for this to be the norm.
2. This is supported by the right to seek, receive and impart information of any kind and in

any form, under the NZBORA. This reinforces the right to access government information. Exceptions to the BORA must be demonstrably justified under section 5 of the BORA.
3. There are exceptions in the OIA and LGOIMA which are quite far-reaching and have proved workable in almost all situations.
4. When considering the need for exceptions, you must look at those existing exceptions first. If you need further secrecy, you must explain why. (This is because, as your research seems to have found, extra secrecy will usually not be required. But it's also because any blanket protections or alternative approaches are a slap in the face of the Ombudsman and the constitutional system set up to strike the balance, which for 40 years it has done well.
5. The public interest override is almost never applied in practice. (My own research found only once instance among 1000 requests). It should not be used as a reason for further secrecy.
6. Blanket exceptions are generally undesirable. Even legal advice is not absolutely protected, and has been released in rare situations. When designing policy settings it must be borne in mind that secrecy can, and occasionally is, used to hide wrongdoing.
7. When exceptions are created, they must be tailored so that they are as narrow as possible, consistent with fulfilling the overriding policy objective identified. (It would then be useful to provide a list of models of such tailored sections, here and overseas).
8. There should follow tailored advice about the sorts of justifications that may be acceptable, and the sorts of questions that should be asked to ensure they are, in different fields.

As a matter of process, I would hope that any secrecy clause would be mandatorily referred to the Ombudsman and LDAC for comment, along with the proposed justification. The proposal for secrecy and the justification for it should be made public early, to facilitate public debate. The justification and any arguments against should be included in a Cabinet paper.

It should also be tested in a BORA vet. The sorts of questions that are asked in a proper BORA vet – what is the purpose of the limitation? What's the evidence that it's a problem? Will this exception really fix it? Is there another way to address it that would lead to less or no infringement of the right to receive information? Is the restriction proportionate? … seem like the right questions to be asking. I note that the Ministry's consultation paper (good!), the Ombudsman, Article 19 and the UNHC for Human Rights, have all found that freedom of information is an aspect of freedom of expression.

It seems telling that your own research seems to show that these secrecy provisions are being passed unnecessarily. I would encourage the government to review the existing ones to ensure they are properly justified.

In relation to the questions you've asked in para 21, I think it's obvious that I don't think they are very helpful questions. But:

1. It's hard to comment on the options to improve scrutiny mechanisms without knowing what the guidance is. And it's not clear that anyone has thought about that.
2. Again, I don't understand why this is about scrutiny mechanisms. The first issue is about where the line is to be drawn. What are the standards to be applied? After that, we can think about who's in the best position to provide scrutiny.
3. It's not easy to access information about restrictions. I'd have to search the legislation

database. No-one who's not researching the question does that. It would be helpful to have someone compile them so that lessons can be learned. A review would be ideal. If not, then at least models of best practice can be identified, and patterns of use. (For instance, if some investigatory bodies have added protections and others do not, and the ones that do not are operating just fine, then that calls into question then need for the additional secrecy).

Steven Price

13 March 2024

[redacted]
Democracy and Open Government Team
Ministry of Justice
Justice Centre
19 Aitken St
Wellington

By email: [redacted]

SUBMISSION ON THE OPEN GOVERNMENT PARTNERSHIP FOURTH NATIONAL ACTION PLAN: COMMITMENT 7 – IMPROVING SCRUTINY OF OIA EXEMPTIONS

About the Submitter

1. Founded by David Farrar and Jordan Williams in 2013, the *Taxpayers' Union*'s mission is Lower Taxes, Less Waste, More Accountability.

2. We enjoy the support of some 200,000 registered members and supporters, making us the most popular campaign group championing fiscal conservatism and transparency. We are funded by our thousands of donors and approximately two percent of our income is from membership dues and donations from private industry.

3. We are a lobby group not a think tank. Our grassroots advocacy model is based on international taxpayer-group counterparts, particularly in the United Kingdom and Canada, and similar to campaign organisations on the left, such as Australia's *Get Up*, New Zealand's *ActionStation,* and *Greenpeace*.

4. The Union is a member of the *World Taxpayers Associations* – a coalition of taxpayer advocacy groups representing millions of taxpayers across more than 60 countries.

5. Nothing in this submission is confidential and we would welcome the opportunity to discuss this submission with you further.

General

6. Thank you for the opportunity to provide feedback on the Ministry's discussion paper on options to improve scrutiny mechanisms for exemptions to the OIA. The *Taxpayers' Union* maintains that it would have been better to have made this a proper public consultation to enable the widest engagement, as is fitting, on such an important issue to government transparency and accountability.

7. Our general view is best summed in our submission on the draft Fourth National Action Plan relating to Commitment 7:

> *The Taxpayers' Union considers that that this commitment to scrutinise legislative clauses that propose to override the disclosure requirements of the Official Information Act 1982 (OIA) is too weak and does not go far enough.*
>
> *In our view there should be no such clauses in any legislation. The OIA already has sufficient protections for privacy, commercial sensitivity, free and frank advice, amongst other reasons for non-disclosure of official information. The Taxpayers' Union is not aware that the existing non-disclosure provisions in the OIA are preventing the Government from obtaining any of the information it needs for decision-making. Inserting clauses in legislation to override the disclosure requirements of the OIA is unnecessary and therefore redundant.*
>
> *The Taxpayers' Union is concerned that there are now more than 85 such clauses in legislation and that 20 of these have been added in the last three years. We regularly use the provisions of the OIA to obtain relevant information from government and fully understand how difficult it can be to obtain this information under the OIA. Inserting clauses to override the provisions of the OIA just makes it harder to obtain relevant information where there is a public interest in its disclosure and insufficient justification for withholding that information.*
>
> *This commitment needs to be restated to remove all legislative clauses that override, or propose to override, the disclosure requirements of the Official Information Act 1982.*

8. The OIA is an extremely important piece of legislation to hold central government accountable and expose wasteful expenditure. These are two of the three key elements of the *Taxpayers' Union* mission. Allowing state sector organisations to legislatively contract-out of their obligations under the OIA is simply bad policy and poor law-making.

9. Whilst the Ministry is to be commended on attempting to improve the situation, the proposals do not go far enough. Nevertheless, providing feedback on the proposed options to improve scrutiny mechanisms is a worthwhile exercise.

Ministry of Justice Potential Options to Improve Mechanisms for Scrutiny

10. *Option 1: Additional question in Disclosure Statements template.* These statements are of such variable quality that this is unlikely to be effective. Legislation that is hastily developed, or extensively modified through the parliamentary process, frequently has inadequate disclosures. As Parliament is sovereign, governments can override such deficiencies.

11. *Option 2: LDAC guidance and/or webinar.* The Legislative Design and Advisory Committee of the Cabinet provides an extremely useful check on the quality of legislation. However, it only has an advisory role and can be bypassed.

12. That said, its Legislation Guidelines are an extremely useful resource. Under the Part: Constitutional Issues and Recognising Rights, a new chapter could be added that covers the OIA and setting out the extremely narrow circumstances where primary legislation might contain sections that should exempt certain matters from the provisions of the OIA.

13. *Option 3: Ministry of Justice letter + guidance note to Tier 2 policy managers and the government legal network.* The *Taxpayers' Union* is unclear how this would be effective. The requirements of more formal processes are routinely not complied with.

14. *Option 4: Ministry of Justice website update.* This could provide a useful centralised repository of the policy behind the extremely narrow use of exemptions, with links to supporting material such as LDAC's legislative guidelines.

15. *Option 5: Update the Cabinet Guidelines.* This is useful, but these are only guidelines. Who is going to enforce compliance?

16. *Option 6: Update the LEG template.* Completing the LEG template is an existing requirement of the Cabinet Guidelines and it already requires an explanation of why any provisions of new legislation will amend the existing coverage of the OIA. It is not clear how any changes to the template would provide additional scrutiny and the *Taxpayers' Union* agrees with the Ministry's view that this may not be the best tool.

17. *Option 7: Require consultation when policy approvals are sought to override the OIA.* Consultation is already required when finalising Cabinet Papers that propose to amend or introduce new legislation. It is the *Taxpayers' Union* view that this consultation can be usefully strengthened as we propose below.

18. *Option 8: Instruct drafters that any instruction to override the OIA must have been discussed with/agreed with the Ministry of Justice.* This step is too late in the process, but is worth considering to be a requirement much earlier, as we discuss.

19. *Option 9: Improvements to legislative scrutiny guidance and advice to Select Committee.* Always helpful, but can be better dealt with by stronger directives earlier in the process.

Taxpayers' Union Proposal

20. Whilst much of what the Ministry has proposed is helpful, it is simply not directive enough. The instant a state agency proposes legislation with clauses overriding the OIA; **formal opinions on the proposals must be obtained from the Secretary of Justice and the Chief Ombudsman.**

21. **These opinions must be published**, without redactions, on the websites of the Chief Ombudsman and the Ministry of Justice.

22. **Cabinet and Select Committees must be provided with short summaries** of both opinions to assist their decision-making.

23. This should require the most rigorous scrutiny by both parties and thus create the necessarily high hurdle that exemption clauses must meet.

24. Further, requiring the Secretary of Justice and the Chief Ombudsman to publicly provide formal opinions improves accountability.

25. Anything less is insufficient.

Next Steps

26. The Ministry of Justice must identify all sections in all current legislation that have the effect of creating an exemption from some or all provisions of the OIA. The *Taxpayers' Union* understands that the Ministry does not yet have a list containing this information. The Ministry must make it a priority to complete this task.

27. In parallel with this research, the Ministry must perform a gap analysis that compares the extant exemption sections with the provisions of the OIA. The Ministry must provide some commentary on these sections that should include:

    - Whether or not the section largely repeats the provisions of the OIA (i.e. section is superfluous);
    - Whether or not the OIA already covers the matters being exempt (i.e. section is redundant); and
    - Whether or not the OIA could be appropriately amended to cover the exempted matters.

28. The Appendix to the Ministry's discussion paper is a start, but a much more detailed analysis is required. The Council for Civil Liberties has also prepared some useful material in its *Open Government – Briefing to Minister Hipkins, part one: Secrecy Clauses* of February 2022.

29. Completing these tasks is important prior to any further consultation.

Concluding Comments

30. The *Taxpayers' Union* does not believe legislation should have sections exempting matters from any provisions of the OIA. Allowing state sector organisations to legislatively contract out of their obligations under the OIA is poor policy and bad law-making. It reduces transparency and accountability.

31. Whilst some of the Ministry's options for improving scrutiny of exemption proposals do have merit, they do not go far enough and are highly likely to be bypassed when inconvenient.

32. Only a requirement for the Secretary of Justice and Chief Ombudsman to provide formal opinions on exemption proposals will improve the analytical rigour and scrutiny of such proposals. This should provide the necessary high hurdle that any proposed exemptions must meet and publicly disclosing these opinions provides an important accountability mechanism.

33. The *Taxpayers' Union* looks forward to further engagement on this important issue and with a wide range of interested parties.

Yours sincerely

Ray Deacon
Economist
[redacted]

From: [redacted]
To: [redacted]
Subject: FW: Open Government Partnership Fourth National Action Plan – Commitment 7
Date: Monday, 18 March 2024 1:19:49 pm
Attachments: image001.jpg
image002.png

[redacted]

Thanks to Ministry of Justice for the opportunity to comment on the discussion paper. TINZ appreciates the considerable work done by MoJ within the scope. Our comments don't neatly fit into the scope of your request, which may not be a surprise.

1. TINZ is not clear on how broad the consultation was for this working paper. There are other organisations and individuals with strong interest and wisdom on this take, who were not involved in the OGP process. Is broader consultation to be planned during the policy/guidance development process?

2. The piece of work is missing measurable outcomes (outputs are proposed), yet this context offers a singular opportunity in that outcomes could exactly and fairly simply be measured were the scope to encompass that. The appendix and 'out of scope' narrative sets up the absence of a measurable outcome. The appendix appears to justify the use of exemption clauses but not identify cases or discuss issues where the exemption clause does not have sufficient rationale. That appendix seems to suggest that the authors are unconvinced as to whether there is a problem to be solved here. Similarly the 'out of scope' generates avoidance of the challenge that civil society put on the OGP table, i.e. that there is overuse of exemption clauses which severally and collectively have already undermined human rights, likely to further decline if left unchecked.

3. The commitment suggests that the Ombudsman *may be* consulted on any proposed improvements. TINZ seeks assurance that the Ombudsman's advice is sought on the working paper. It may be that the Ombudsman would not limit himself just to the working paper, but also to other relevant matters of importance (such as the Bill of Rights) that would better inform policy recommendations or cabinet papers. That is not a risk.

4. The scope of the commitment itself was limiting. TINZ was not part of the crafting of the action part of Commitment 7. In relation to 'out of scope' TINZ itself was not part of any discussion where there was agreement as stated on page 5. Our point is restated : that when the problems sitting behind civil society concern are left unstated or where expert independent opinion is not sought, then this will weaken the effectiveness of any guidance.

5. We assume, based on the statement on Page 7 "If guidance is created, then it could set the foundation for future work....." that no specific guidance has been developed

in the past, nor is any specific overarching guidance being proposed. MoJ rather talks about potential changes to a selection of mechanisms identified on Pages 7-8, with those potential changes discussed on pages 9-10. Again we expect the Ombudsman's response on this would be sought. In relation to guidance, TINZ's comments are that:

a. Overarching guidance is needed as well as changes to mechanisms to reflect that guidance.
b. Guidance should advise all mechanisms (including those on 9-10) where consideration for exemption clause is being considered.
c. That guidance should emphasise and be consistent with the OIA and Bill of Rights Act in relation to publicly held information.
d. The guidance should be consistent with international standards.

6. TINZ is not clear on the reasoning behind Cabinet Office advice that additional LEG or policy template requirements may not be the best tool for the intended purpose. They seem like useful tools.

7. Rather than limited focus on making proposed OIA exemptions more transparent, TINZ supports stronger 'top of the cliff' mechanisms which as we note above could be directly measurable, through number and proportion. It was this vision that drove civil society to seek an OGP commitment on the OIA.

8. There is plenty of good practice including discussion on principles and standards for exemption provisions, in documents such as https://www.article19.org/data/files/RTI_Principles_Updated_EN.pdf and the 2022 Report of the United Nations High Commissioner for Human rights on Freedom of opinion and expression https://digitallibrary.un.org/record/3956409?ln=en&v=pdf

In exceptional circumstances in which it may be necessary to restrict the right of access to information on legitimate grounds, the burden is on the State to demonstrate that it has no other means to protect the interest at stake. Where restrictions are necessary for a legitimate purpose, they must be proportionate to the interest protected, they must be appropriate to achieve their protective function and they must be the least intrusive instrument among those which might achieve their protective function. The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities applying the law. The principle of proportionality must also take account of the form of expression at issue, as well as the means of its dissemination.

Warm Regards

Julie Haggie
Chief Executive Officer
[redacted]

Trust Democracy Incorporated
contact@trustdemocracy.nz
https://trustdemocracy.nz

17 March 2024

Democracy + Open Government policy team
Ministry of Justice : Tāhū o te Ture

Response to request for feedback on paper about improving scrutiny of OIA exemptions under Commitment 7 of New Zealand's fourth Open Government Partnership (OGP) National Action Plan (NAP)

This submission has been developed by Trust Democracy, an incorporated society that was established in 2019 to strengthen public discourse, education and research about democracy in Aotearoa New Zealand.

Need for a more open, thorough review that upholds the principles of open government and stewardship

'Open government' is one of the principles enshrined in the Public Service Act 2020 (PSA) that public sector agencies are required to uphold, and give effect to, along with other principles, including 'stewardship'. Upholding these principles, ensures the 'constitutional and democratic government' purpose of the Act is supported.[1] From the communication we have received from the Ministry of Justice on Commitment 7, it appears that the Ministry is conducting a very limited review of the large number of exemptions that currently exist to the disclosure requirements set out in the Official Information Act 1982. This seem incongruous given the 'constitutional' nature[2] of the OIA and its function as one of the "key mechanisms by which government bodies are held accountable for their activities."[3] Given the proliferation of exemptions in recent years, and the current Government's extraordinary use of urgency, which limits legislative scrutiny, the need for an open and thorough review is a necessity. Trust Democracy therefore strongly encourages the Ministry to give more weight to upholding the principles of open government and stewardship in the delivery of Commitment 7.

Another reason for the Ministry to use the concept of 'open government' to structure its work on Commitment 7 is that it is an Open Government Partnership (OGP) commitment! 'Open government' is usually understood as public participation, public accountability and public access to information/transparency in relation to government policy and decision making,[4] and the OGP's principles and guidance reflect this.

---

[1] See s.11 and s.12 of the Public Service Act 2020.
[2] See the Ombudsman guidance cited in the table on page 8 of the discussion document.
[3] See Paragraph 15 of the Legislation Design Advisory Committee template cited in the table on page 7 of the discussion document.
[4] Ecclestone A, Booth K, Wright S (2023), 'Open government: A 40-year gestation and still in labour', *Public Sector*, IPANZ: Spring.

Targeted consultation inappropriate for this issue, especially as it is an OGP commitment

Trust Democracy takes issue with being the subject of a 'targeted engagement'. Through the active participation of a number of our members, Trust Democracy, along with a number of other civil society actors, devoted considerable time and effort to having the issue of 'OIA exemptions' put on the Government's public policy agenda through the OGP NAP mechanism. While we appreciate being notified about the Ministry's consultation, this is an important public issue that needs to be openly and publicly considered and worked through.

Furthermore, Trust Democracy is concerned that the use of 'targeted engagement' seems to be a common and growing practice across public agencies. We consider it a pernicious engagement strategy that is not only contrary to the principle of 'open government' but also contrary to the sort of good policy making practice set out by the Policy Community Engagement Tool (PCET),. The adoption by the Public Service of the PCET is the subject of the first commitment of the fourth NAP. The linkages between NAP commitments is important. Even a stakeholder analysis, which the PCET recommends as part of policy and engagement processes, would have identified multiple interested parties (e.g. constitutional academics, the Law Commission, journalists/media organisations, the National Council of Women, etc) in addition to the civil society organisations that took part in the development of the commitment and the general public.

Consequence of 'targeted engagement' and the General Manager's comments

As a consequence of the Ministry's decisions to use 'targeted engagement' and to invite Trust Democracy to comment on the Ministry's work, Trust Democracy has been publicly named in the *Newsroom* article of 8 March 2024 and associated with a consultation practice we do not support.[5]

We also take issue with the disingenuous comments attributed to the Ministry's General Manager for Civil and Constitutional Policy in the *Newsroom* article. She claims that the Ministry "expect[ed] that civil society organisations will involve their wider networks as part of their input to the engagement process". However, the Ministry's email of 23 February 2024 that invited Trust Democracy to comment on the discussion paper does not ask Trust Democracy to forward the invitation to anyone else. Furthermore, by allowing only three weeks for comment, the Ministry has not allowed sufficient time for a volunteer-run organisation such as Trust Democracy to develop a response with members let alone wider networks.

These decisions and actions do not, in our opinion, uphold important public service values set out in s.16 of the PSA, namely to be accountable, trustworthy and respectful. In light of this, we considered not providing any feedback on the content of the discussion document. Our decision to provide the following comments stems from our long-term commitment to the OGP process.

Comments on the discussion document

While our confidence in the Ministry has been dented, Trust Democracy would like to acknowledge the research and analysis that has been undertaken to produce the discussion paper. We support the three additional sub-objectives set out in paragraph 9, and consider the analysis presented as well as the research summarised in the Appendix to be useful and necessary, but insufficient on its own.

[5] S Sachdeva (2024), 'Govt's shadowy work on secrecy clauses criticised', Newsroom, 8 March 2024.

We would like more clarity about who decided the out-of-scope matters set out in paragraph 10 and the basis for this. OGP commitments are supposed to be co-created by government and civil society. Three of our members were heavily involved in the development of the NAP. As far as we know, these out-of-scope matters were not discussed by civil society representatives, or the Public Service Commission's OGP Expert Advisory Panel during the co-creation process. Perhaps the Ministry means merely that they were agreed between it and the Public Service Commission. If so, it is disingenuous to imply that such limitations were agreed with the civil society organisations who suggested a far stronger commitment on this topic. Given the findings of the research set out in the Appendix – it is concerning that a partial review of OIA exemption clauses has identified cases for which the purpose/rationale for the exemptions is lacking – the Ministry should review the out-of-scope matters and consider re-scoping its work on this commitment.

Reviewing the 'scrutiny mechanism' table on pages 7 and 8, Trust Democracy is surprised that proposed OIA exemption clauses are not mandatorily reviewed by Crown Law for compliance with section 14 of the New Zealand Bill of Rights Act 1990, which, as the Ombudsman guidance notes, is how "New Zealanders may exercise their fundamental freedom to seek and receive information" as required by Article 19 of the International Covenant on Civil and Political Rights.[6] As the OIA is a key instrument by which these fundamental freedoms and rights are given effect in New Zealand, the Ministry should consider why this scrutiny mechanism is not currently in force and how it can be made mandatory.

From our perspective, the plethora of scrutiny mechanisms set out in the section entitled 'Scrutiny Mechanisms' serves to highlight the fragmented nature of New Zealand's policy and legislative ecosystem. While it is useful to set out the formal instruments in the table on pages 7 and 8, this review also needs to consider the actual policy practices of agencies and whether they comply with the formal requirements. If further research finds that significant non- or poor-quality compliance is an issue, additional measures will need to be considered. For example, in addition to training and guidance, quality systems, as used in many professional settings, may need to be implemented or strengthened to ensure reliability and to drive quality improvement.

In terms of the options for improving scrutiny mechanisms, Trust Democracy is pleased that the Ministry will be able to progress some measures within the NAP timeline, and understands that some other measures are likely to be implemented in the foreseeable future, albeit after the NAP4 deadline. Trust Democracy does not have a problem with this as long as the rationale is publicly explained and that any lessons learned from commitment 7 implementation are shared publicly.

Trust Democracy is not convinced by the Cabinet Office's intransigence regarding the Policy and LEG templates and guidance. Given the constitutional nature of this issue, the potential need for Prime Ministerial approval is not a sufficient reason to not update guidance, etc. As this work is being conducted as an OGP commitment, Trust Democracy suggests that the Ministry seeks support from Minister Willis, the responsible minister, and the Public Service Commissioner to encourage agencies to progress this work.

An independent review for any future review of the OIA

Since the Government has indicated that it may conduct a full review of the OIA during its term of office, Trust Democracy would like to provide advice about how this should be done. We consider that the OIA is similar to electoral law as both are about fundamental democratic rights and

[6] See the Ombudsman guidance cited in the table on page 8 of the discussion document.

freedoms that are sometimes in conflict with the preferences of politicians, their parties and the public service. Trust Democracy therefore strongly recommends that any review be conducted by an independent panel (e.g. similar to the recent Independent Electoral Review) [7] and/or through the deliberations of a representative mini-public (e.g. such as the citizens' assemblies used in Ireland).[8] Central agencies, and the Ministry of Justice in particular, have conflicts of interest that are too substantial for them conduct such as review.

[7] https://electoralreview.govt.nz

[8] See, for example, https://trustdemocracy.nz/2023/07/democratic-innovation-hunger/