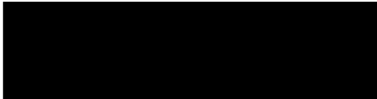


17 May 2021



Our ref: OIA 86727

Dear 

Official Information Act request: Documents relating to a potential review of the Official Information Act 1982

Thank you for your email of 17 March 2021 requesting, under the Official Information Act 1982 (the Act), information regarding a review of the Act. I have outlined your specific questions and my responses to each, below:

** What "further work" the Ministry did for the Minister on this issue after September 2019 in preparation for taking a paper to Cabinet;*

We prepared a draft Cabinet paper for the Minister and supported the Minister to put forward a Budget Bid for Budget 2020 for a review of the Act. The draft Cabinet paper and Budget Bid are within scope of this part of your request. The draft Cabinet paper was never provided to the Minister or sent outside the Ministry of Justice.

** Any advice or documents on the OIA review which was not given to the Minister;*

We have identified three documents that fall within scope of this part of your request. These are listed in the attached Appendix as documents 3-5. Please note these are draft documents and were never provided to the Minister or sent outside the Ministry of Justice.

Document 4 was created as part of work carved out by a policy group intern as a research and training exercise. The document is a draft that has not been through any quality assurance or sign out processes. Document 5 is a draft briefing that was not finalised in light of discussions with the Minister of Justice about work programme priorities.

** All notes made by MOJ officials during any discussion with the Minister about the OIA review.*

No notes were made by officials during discussions with the Minister about a potential review of the OIA. The recall of senior Justice officials is that on 24 November 2020, as part of a series of initial briefing material to the incoming Minister of Justice, we provided Hon Faafoi with a note on the projects that had been publicly signalled as key priorities in the Justice portfolio over the next 12 months.

In the note dated 24 November, titled "Justice Work Programme Priorities 2021", we requested to meet with the Minister in early December to discuss his legislative priorities. Specifically, the note stated:

We would welcome a further discussion with you regarding your legislative priorities

We would like to meet with you in early December to discuss the development of your legislative programme bids for 2021.

[out of scope-----],
we have a range of existing policy projects already underway, or that had been signalled as potential priority projects during the previous term of government. Many of these will also require legislative change.

We do not have capacity to continue all this work – there are some trade-offs to make so that we can deliver your key priorities. Some projects will need to be slowed down or stopped to ensure we have enough resources available for your priority projects.

We would like to discuss all these projects in the context of the overall policy work programme, and their relative priority, sequencing and timeframes over the next parliamentary term. We will provide you with a series of short background briefings about these projects, and a more detailed briefing about the full policy work programme, to assist with that discussion.

On 25 November, we met with Hon Faafoi to discuss these priorities. At the end of the meeting we indicated to the Minister that there were other additional pieces of work that had also previously been signalled as areas we would work on. We noted that it would not be possible to carry out work on the full range of projects at the same time and that choices would need to be made regarding the sequencing and prioritisation of work. Hon Faafoi asked for a note with the other projects that had been signalled for his consideration. This then led to the note titled "Policy projects", which is dated 4 December, which was followed by the briefing titled "Legislative and Policy Work Programme 2021-2023" which is dated 14 December. We have included relevant excerpts from these documents in the Appendix as documents 6 and 7.

Some information has been withheld from the documents under the following provisions of the Act:

- section 9(2)(a) to protect privacy of natural persons
- section 9(2)(f)(iv) to maintain the constitutional conventions that protect confidentiality of advice tendered by Ministers and officials, and
- section 9(2)(g)(i) to maintain the effective conduct of public affairs through the free and frank expression of opinions.

I am satisfied there are no other public interest considerations that render it desirable to make available the information withheld under section 9 of the Act. If you require further

information, please contact Alison Horwood, Media Manager on 021 636 416, or email: media@justice.govt.nz.

If you are not satisfied with my response, you have the right to complain to the Ombudsman under section 28(3) of the Act. The Ombudsman may be contacted by email at: info@ombudsman.parliament.nz.

Yours sincerely

A handwritten signature in blue ink that reads "Caroline Greaney". The signature is written in a cursive, flowing style.

Caroline Greaney
**General Manager – Civil and Constitutional
Policy Group**

Appendix: Documents relating to a review of the OIA

#	Date	Document type	Title	Decisions on release
1	February 2020	Draft Cabinet paper	Scoping official information review	Withheld in full under s9(2)(g)(i)
2	November 2019	Budget 2020 Bid	Increase public participation, openness and transparency around official information	Some information withheld under s9(2)(f)(iv)
3	November 2019	Draft Treaty of Waitangi analysis	Treaty of Waitangi (Te Tiriti o Waitangi) analysis – for Official Information Act review.	Released in full
4	September 2019	Appendix	Appendix B: Official information regimes in other jurisdictions	Released in full
5	September 2020	Draft briefing	Official Information Act 1982 Review: your direction on priority and timing	Some information withheld under s9(2)(a)
6	04/12/20	Note	Policy projects	Some information withheld under s9(2)(f)(iv) and out of scope.
7	14/12/20	Briefing excerpt	Legislative and Policy Work Programme 2021-2023	Some information has been withheld as out of scope.

New Spending Initiative Summary

Increase public participation, openness and transparency around official information

Overview

Agency to complete			
Initiative type	Priority	Commitment	Detail
	Priority A	Coalition agreement	
	Priority B	X Confidence and Supply	
	Priority C	Speech from the Throne	
	Priority D	Other	
	Priority E	Other	
Description	This initiative will provide funding for a review of the Official Information Act 1982 (OIA). A review would aim to make the OIA more fit for purpose and compatible with the modern information environment, with the objective of improving the openness and accessibility of government information. Improved access to government held information improves participation in democratic processes, promotes good government and transparency and fosters public trust and confidence in agencies.		
New or existing initiative	Expansion or extension	X	New initiative
Cabinet consideration	N	This initiative has not been considered by Cabinet or received funding previously. However, in September 2018 Cabinet agreed to targeted consultation on the OIA to inform a decision on whether to progress a review of the legislation [CAB-18-MIN-0418].	
Lead Minister	Minister Andrew Little		
Lead agency	Ministry of Justice		
Involved agencies or Ministers	N/A		
Package initiatives	This initiative is not part of a package.		
Agency contact	Anne Naganathan, Senior Policy Advisor, 04 466 0303, anne.naganathan@justice.govt.nz		
Treasury contact	Shereen Capper		

Total Funding Sought

Agency to complete	
Operating funding sought (\$m)	s9(2)(f)(iv)
Agency to complete	
Capital funding sought (\$m)	

Initiative Details

Proposal

Agency to complete

Each answer must not exceed 300 words. To the extent practical, answers should link to information in the bid's Wellbeing Analysis and Investment Logic Map sections.

Problem or opportunity

The OIA is central to New Zealand's constitutional arrangements. It enables participation in the democratic process, promotes trust in government and enables government to be held to account.

The context in which the OIA operates has changed dramatically since it was passed 37 years ago. Government information is now more readily available, and the public has stronger expectations of open and transparent government. The legislative landscape has shifted with the Privacy Act 1993, the Public Records Act 2005 and the Inquiries Act 2013 impacting directly on the official information framework. The make-up of the public sector has also changed - some parts of the public sector have become privatised and no longer subject to the OIA.

The Law Commission's 2012 review of the OIA concluded that significant legislative amendment was required. It made several recommendations which were not accepted by the government at that time. The government response instead focused on largely operational improvements. However New Zealand's End of Term report under the Open Government Partnership National Action Plan (OGP NAP) 2016-2018 concluded there had been only "marginal change" as a result of practice improvements to date. Issues around OIA compliance have also affected New Zealand's ranking in the World Press Freedom Index.

Earlier this year the Ministry of Justice invited submissions on the OIA in the context of a commitment in the 2018-20 OGP NAP to engage with stakeholders on whether a review of the OIA is warranted. Most submitters thought the OIA would benefit from review. A review provides an opportunity to strengthen New Zealand's representative democracy through increasing participation in government processes and government accountability. However due to resourcing constraints and an over-subscribed work programme the Ministry cannot commit to a review of the OIA in the next 2-3 years.

s9(2)(f)(iv)

Expected outcomes

The expected outcomes in the short term are:

- Measurable improvement in both the quality and timeliness of agency responses to OIA requests
- More agencies proactively publish information and increase the range of information they publish
- Reduced regulatory and administrative burden on agencies, including costs.

The long-term expected outcomes are:

- Trust in government promoted through increased transparency and accountability under an improved OIA regime
- Improved participation in democratic processes shown through increased voter turn-out and enrolment and participation in the census
- Improved public participation in developing policy and services.

s9(2)(f)(iv)

If capital or ICT initiative	Type	ICT/data/digital	Physical Infrastructure	Other <i>please specify</i>
	Start and end dates	N/A		

Funding Sought by Component

Agency to complete

Provide a component-by-component breakdown of what the requested funding will purchase. Briefly explain the formula used, or key assumptions made, to calculate the cost of each output. Add additional rows to the table as needed to capture each output separately.

s9(2)(f)(iv)

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Fit with Existing Activity

Agency to Complete	
<i>The answer must not exceed 300 words.</i>	
Existing services	<p>There are existing initiatives aimed at improving agencies' compliance with the OIA and increasing government transparency.</p> <ol style="list-style-type: none"> Under delegation from the Secretary for Justice, the State Services Commission (SSC) provides advice and assistance to improve how agencies implement the OIA. This programme includes reporting on compliance with the OIA and increased emphasis on the proactive release of OIA responses and official information more generally. SSC has published guidance on proactive release, developed a capability development toolkit for agencies, and run a regular forum for official information leaders and practitioners. The Office of the Ombudsman publishes guidance on the OIA and undertakes proactive reviews of agencies' official information practices under the Ombudsmen Act 1975. Four reviews have been completed and a further eight are underway. Since 1 January 2019 all Cabinet and Cabinet committee papers and minutes must be proactively released and published online within 30 business days of final decisions being taken by Cabinet. <p>This work programme has seen an improvement in agency's timeliness in responding to OIA requests. But the data collected does not allow for the type of comparative analysis that would indicate if government is becoming more transparent over time. The reach and scope of these initiatives is also limited, as they are delivered within the current OIA framework which many stakeholders consider to be outdated and not working well.</p> <p>Submissions to the Ministry of Justice's consultation earlier this year suggest that legislative change is needed to increase government transparency and public trust and confidence in agencies.</p>

Agency to complete	
<i>Provide an overview of existing funding levels for this initiative, and/or initiatives with similar objectives, in the two tables below.</i>	

	Operating Funding profile (\$m)					Total
	2019/20	2020/21	2021/22	2022/23	2023/24 & outyears	
Existing funding for this/similar initiatives						
Total funding sought for this initiative						
% change between existing funding and funding sought						

Comments (optional) *Provide explanatory comments to help interpretation of the above baseline figures.*

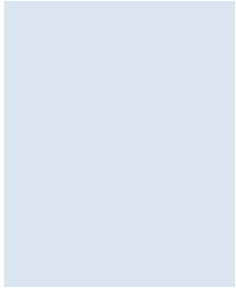
	Capital Funding profile (\$m)										Total
	19/20	20/21	21/22	22/23	23/24	24/25	25/26	26/27	27/28	28/29	
Existing funding for this/similar initiatives											
Total funding sought for this initiative											
% change between existing funding and funding sought											

Comments (optional) *Provide explanatory comments to help interpretation of the above baseline figures.*

Options analysis

Agency to Complete	
<i>The answer must not exceed 300 words.</i>	
Options analysis	<p>Status quo: Current funding for the Policy Group is insufficient to take on substantial new projects without trading off against other priorities. A review of the OIA is highly unlikely to proceed under these constraints because of its impact on other high priority Government and Ministerial projects. Without a review, ongoing concerns about compliance with the OIA and with the legislation itself are likely to remain unaddressed. New Zealand's ranking in global measures for transparency and integrity may also be affected and its commitment to open government questioned.</p> <p>s9(2)(f)(iv)</p>

s9(2)(f)(iv)



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Intervention Logic Map

Agency to attach








Intervention logic maps are compulsory and must not exceed one A4 page. Maps must capture the specific problem of opportunity the initiative aims to address; the initiative's outputs; its outcomes (over the short, medium and long term where applicable) and the future state the initiative contributes to. Corresponding Wellbeing Domain icon(s) (below) should be provided alongside each outcome to indicate impacted domains. Quantification and monetisation of each impact should also be included where possible.

Wellbeing domains

	Civic engagement and governance		Cultural identity		Environment		Subjective wellbeing
	Health		Housing		Income and consumption		Safety
	Jobs and earnings		Knowledge and skills		Social connections		Time-use

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BUDGET SENSITIVE

Wellbeing Analysis & Risks Agency to complete					
Provide a brief overview of the initiative's key impacts – both positive and negative. Use a new row for each impact.					
Impact Description	Affected Group	Timeframe Realised	Domain Impacted	Supporting Evidence	Magnitude of impact
Promoting representative democracy and increasing public participation in the democratic process	General public of New Zealand Government	med (5-10 years), 10+years	 	There is a clear acceptance on a worldwide basis that access to information held by government enables better participation in the democratic process and in the design, development and delivery of policy and services. The importance of citizens having access to government information is also recognised in international law (Universal Declaration of Human Rights (1948) Art 19; International Covenant on Civil and Political Rights (1966) Art 19). Participation in decision making that affects individuals and their communities can also help promote subjective well-being through overcoming the cynicism or indifference that many people can feel about government.	It is not possible to quantify this impact.
Promoting trust in government	General public of New Zealand Government	med (5-10 years), 10+years	 	Research shows that open government policies that concentrate on citizen engagement and access to information can increase public trust (OECD, Trust and Public Policy, 2017). Increasing trust in government rather than engendering suspicion through secrecy can help to promote subjective wellbeing.	It is not possible to quantify this impact.
Reduced regulatory and administrative burden on agencies including costs	Agencies covered by the OIA Government	med (5-10 years), 10+years		Submitters to the Law Commission's 2012 review of the OIA and to the Ministry's 2019 engagement on the OIA outlined the significant resource constraints and issues they have experienced in administering the OIA in their agency.	It is not possible to quantify this impact given available evidence. There are no figures for the cost of OIA administration across all government agencies.
Benefits for wider society.	Businesses, researchers, and others outside government.	med (5-10 years), 10+ years	 	Government holds a vast amount of information that is of general public utility. Increasing access to government held information through proactive publication, for example, can encourage informed decision making, research and discussion within the community.	It is not possible to quantify this impact.

BUDGET SENSITIVE

Agency to complete	
Dependencies, assumptions and risks	The scope and timing of a review of the OIA is yet to be agreed by Cabinet. This bid assumes Cabinet will agree to a review of the OIA with a broad scope. Through its engagement on the OIA, the Ministry has identified some areas that could form the basis of a potential review based on the feedback from submissions and our analysis. Our initial thinking is that reform in these areas could be a significant step toward making the OIA more efficient and fit for purpose.
	Evidence of the efficacy of legislative intervention in shifting attitudes towards the release of information is provided by the OIA itself, the enactment of which resulted in a sea-change from the policy of the Official Secrets Act 1951 which preceded it. However, a degree of official and political acceptance of any legislative changes will also be required to ensure that government becomes more open and transparent.
	Implementation risks will be managed through identifying and addressing practical design, resourcing and timing issues required for effective implementation and operation of any changes in conjunction with other agencies. Any risks to timeframes will be managed through regular review and adjustment as required.

Child Poverty Implications

Agency to complete	
<i>The following reporting requirements are now required:</i>	
Child Poverty	<i>This initiative has a positive/negative impact on child poverty:</i>
	N

Monitoring and Reporting

Agency to complete
<i>The answer must not exceed 300 words.</i>

s9(2)(f)(iv)

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Alternative Option

Agency to complete

The answer must not exceed 500 words.

s9(2)(f)(iv)

Minimum Viable Option

Agency to complete

The answer must not exceed 500 words.

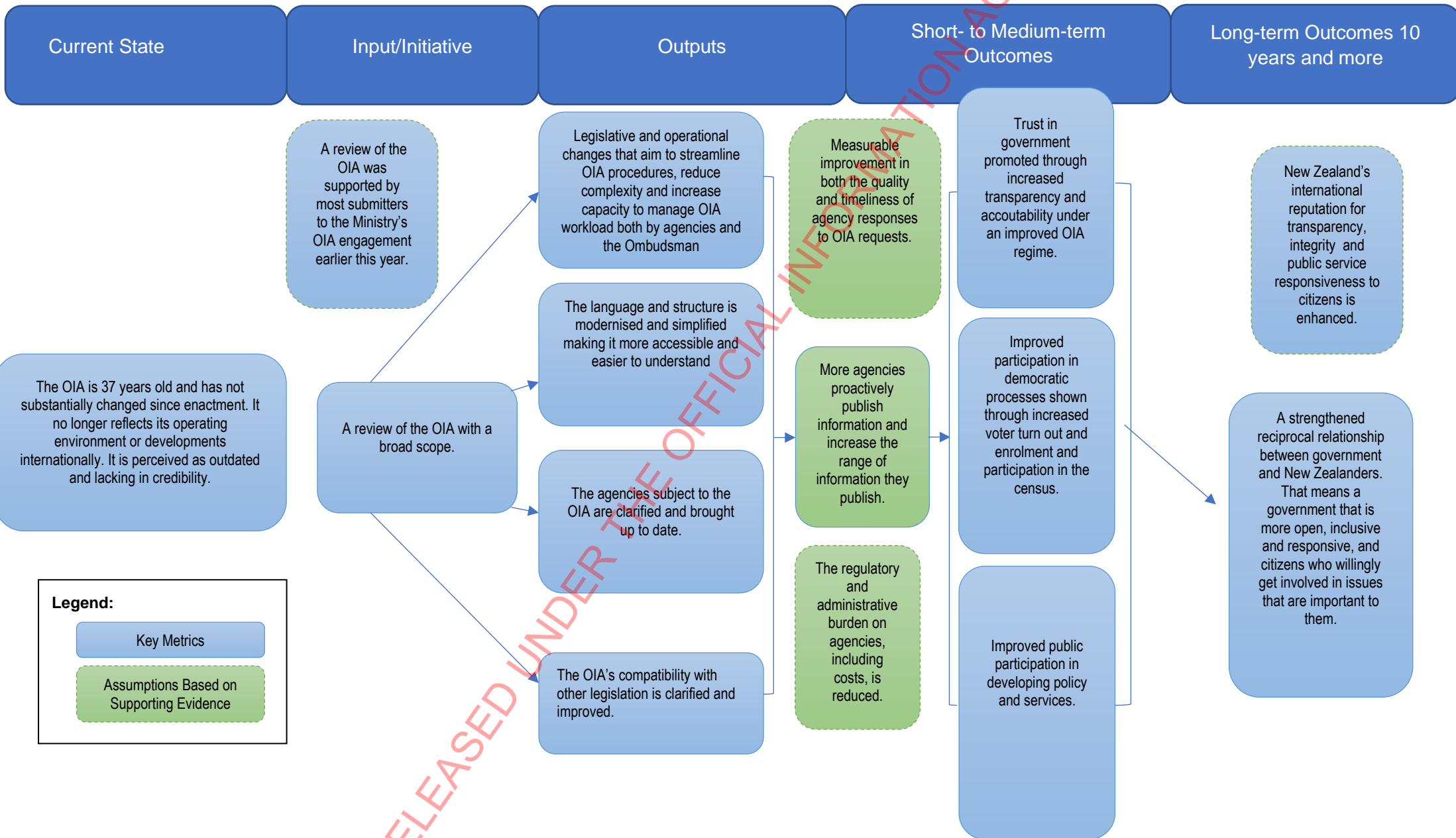
s9(2)(f)(iv)

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s9(2)(f)(iv)

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Supporting Intervention Logic for Review of the Official Information Act 1982



Treaty of Waitangi (Te Tiriti o Waitangi) analysis – for Official Information Act review.

The key purposes of the OIA are to:

- progressively increase the availability of official information to the people of New Zealand to:
 - enable more effective public participation in the making and administration of laws and policies; and
 - promote the accountability of Ministers and officials;and so enhance respect for the law and promote good government, and
- protect official information to the extent consistent with the public interest and the preservation of personal privacy.

The key purposes reflect competing interests between making information available and protecting it where necessary. Agencies need to balance:

- considerations which favour releasing information; and
- considerations which favour refusing requests for information.

Have Māori perspectives previously been raised in relation to this matter, has it been the subject of historical or contemporary Treaty claim?

Yes.

In relation to considerations which favour refusing requests for information, the Law Commission's 2012 Review of the OIA recommended that the Government should establish a working party to examine whether there should be a new ground in the OIA relating to the protection of cultural matters and what its terms should be.

They also recommended that the working group examine whether such a ground should also be included in the LGOIMA to supplement or extend the existing ground in that Act relating to the protection of tikanga Māori or wāhi tapu (in relation to certain matters under the Resource Management Act 1991).

There was no specific Government response to this recommendation.

In relation to considerations which favour releasing information, one submitter provided the following treaty perspective during our consultation. Annette Sykes noted:

It would be increasingly beneficial to ensure that the OIA and Ombudsman worked under and with Te Tiriti o Waitangi. There has yet to be evidence that the Ombudsman's office has considered their constitutional obligations to Te Tiriti in reaching decisions, including when they weigh up the public interest in release of documents.

She also noted:

“A point to understand is that the withholding of information makes it harder to invest in effective engagement, especially regarding those who are marginalised. Evidence of this is that during the Trans-Pacific Partnership Agreement Waitangi Tribunal Inquiry officials would not even disclose to the Tribunal and an expert independent whether there was a Treaty of Waitangi exception clause in the negotiating text. These refusals resulted in Official Information Act requests. The issue here is that requests may be refused under section 6(b) for information provided confidentially by another country or 6(e) where disclosure would be premature and damage the economy. If they are supplied, they are almost always delayed after the government body unilaterally extends its time and the documents are heavily redacted in the name of confidentiality or free and frank advice.”

Does the policy issue affect or concern legislation that references the Treaty or contains a relevant legislative provision?

No. The OIA does not contain a specific provision that references the Treaty.

Does the policy issue involve international agreements or conventions that refer to the rights or interests of indigenous peoples?

No. The OIA does not specifically relate to existing international obligations referring to the rights or interests of indigenous people.

However, more generally, processes and legislative provisions that support the right to participate fully in political life aligns with New Zealand’s obligations under the United Nations Declaration on the Rights of Indigenous Peoples.

More engagement and analysis is required to determine whether the OIA disproportionately impacts Māori in their ability to participate in political life.

Does the policy issue apply to or affect Māori rights and interests, such as those referred to in Article 2 of the Treaty?

Yes. The OIA is most relevant to the principles of active protection and participation.

Active protection

The LGOIMA is not within the scope of this review. But in LGOIMA there is a ground justifying withholding:

... in the case only of an application for a resource consent, or water conservation order, or a requirement for a designation or heritage order, under the Resource Management Act 1991, to avoid serious offence to tikanga Māori, or to avoid the disclosure of the location of wāhi tapu ...

That ground is narrow, being confined to certain named applications or requirements within the purview of local government. There is a question about whether it may be too narrow. It also raises the question of whether there should be recognition of such grounds at national level in the OIA. The Law Commission supported the addition to both the OIA and LGOIMA

of a new non-conclusive withholding ground relating to cultural matters, but signalled that more work is needed before formulating the ground to determine its coverage and extent.

Participation

Unclear the extent to which the OIA impacts Māori and whether this impact is disproportionate.

Could the policy issue affect or undermine existing Crown/Māori commitments and/or Treaty settlements?

Probably indirectly, as the ability to access information for legal research purposes etc might impact solicitors and legal advisors working in this space. It's difficult to determine at this stage what consequence that will have for commitments or settlements.

Are Māori likely to be affected by the policy? Are Māori disproportionately represented in the affected population?

The OIA provides all New Zealanders with a mechanism to access government information. It is not clear if the OIA disproportionately affects Māori in their ability to access information and thereby their ability to participate in political life.

Appendix B: Official information regimes in other jurisdictions

1. This section describes the national-level official information access regimes in Australia, Canada, United Kingdom and Ireland.

Australia

1. Access to official information is governed by the Freedom of Information Act 1982. The Act gives people a right of access to official information and aims to do so promote and at the lowest reasonably cost. The object of the Act is to increase public participation in Government processes and scrutiny, discussion, comment and review of the Government's activities.
2. There are no eligibility requirements; any person, regardless of nationality and residency can make a request. The request must in writing and state it is an application under the Act.
3. The Act covers all Departments, Norfolk Island Authorities and public bodies either established for a public purpose under law or listed in the schedules. It also applies to agencies providing services to the Commonwealth under contract and administrative information held by courts, tribunal and the Official Secretary to the Governor General.
4. Requests can be refused where work substantially and unreasonably diverts agency operations, where document cannot be found/do not exist or where the Information Commissioner declares an applicant to be vexatious.
5. The Act provides ten conclusive reasons for withholding information, including information which if disclosed would be reasonably expected to damage the national security, defence or international relations and information from Federal Cabinet. The Act also provides conditional exemptions which apply when disclosing is considered against the public interest. These include information which if disclosed would be reasonably expected to damage federal and state government relations or about the Government's financial or property interests. Reasons and for conditional exemptions, the public interest factors taken into account, must be given for all refusals.
6. Agencies must inform requestor that the request was received within 14 days, and notify the requestor of the decision within 30 days. Time can be extended with the consent of the requestor or for consultations. Time can also be extended, with the consent of the Information Commission, where the request is complex or voluminous. In certain situations, access to the documents can also be deferred.
7. Agencies can charge for processing requests and regulations specify how much each activity (such as search and retrieval time and photocopying) costs. The first 5 hours of decision making are free. A person can request that
8. The FOI also obliges agencies to publish information online about what the agency does and the way it does it, and operational information, being information that assists the agencies' performance or exercise of functions or powers in making decision, for example, rules, guidelines, practices and precedents. Immunities from liabilities extend

to proactively published material. Agencies must also publish previous information that was requested and disclosed.

9. Decisions are firstly internally reviewed by the agency. On further appeal, the Information Commissioner can review and make a decision. Where their decision is not followed, the Commission can apply to the Federal Court who can make any order it thinks fit to secure compliance. The Information Commissioner can also refer any question of law to Federal Courts. On further appeal, a tribunal can review the Information Commissioner's decision and the Administrative Appeal Tribunal decisions can be appealed to federal courts.
10. Australia has an office of the Australian Information Commissioner. This consists of the Information Commissioner, the Freedom of Information Commissioner and the Privacy Commissioner. The Information Commissioner and Freedom of Information Commissioner can investigate compliance with the FOI. They have a number of powers to aid their investigations, including powers to enter premises and oblige people to give them information or appear. It is a criminal offence for a person not to follow these powers. The Information Commissioner and Freedom of Information Commissioner also promote awareness and understanding of FOI, help agencies with compliance and proactive release, make reports and recommendations to Ministers and collection information and statistics on FOI matters.

United Kingdom

11. Access to official information is governed by the Freedom of Information Act 2000.
12. There are no eligibility requirements for making a request. Requests must be made in writing and state the person's name, address and desired information.
13. The Act applies to public authorities, including companies wholly owned by the Crown or public sector. The Secretary of State and Cabinet Ministers also have the power to designate further bodies public authorities. Some bodies are only covered for some of the information they hold, such as GPs, broadcasters and judicial bodies.
14. Requests can be refused where the cost of compliance exceeds an appropriate limit (being £450 or £600 depending on the type of body) or the request is vexatious or repeat. The Act provides absolute reasons for withholding information, such as if the information is supplied by or relating to bodies dealing with security matters. The Act also provides reasons for withholding information where the public interest in withholding outweighs the public interest in releasing. This include information that is likely to prejudice the economy or the effective conduct of public affairs.
15. Requests must be responded to within 20 working days of receiving the request or fees being paid.
16. The United Kingdom has a two-tier system for costs. Where the likely cost of completing the request is lower than the prescribed amount (either £450 or £600 depending on the responding agency) the agency can only charge for expenses actually incurred, like photocopying or postage. Where the likely cost of completing the request is higher than the prescribed amount, the agency can either refuse the request or charge the requestor for expenses incurred and staff time spent on the request.

17. The Act also requires agencies to publish information proactively. They must have a publication scheme, approved by the Information Commissioner's Office. The scheme must set out the commitment to making certain classes of information routinely available, such as policies and procedures, minutes of meetings, annual reports and financial information. A model publication scheme can be viewed at www.ico.org.uk
18. The Information Commission reviews decision where a requestor has exhausted all complaints procedures provided by an authority. The Commission can issue an information notice or apply to a court for warrants. The Commissioner can issue an enforcement notice which is enforced by the Courts. Parties can appeal the Commissioner's findings to a tribunal in the General Regulatory Chamber.
19. Cabinet also has a code of conduct for agencies responding to requests. The Information Commissioner also promote observance of the FOI and codes of conduct and give public information about the FOI. The Secretary of State also issues codes of practice for the management and destruction of Government records.

Canada

1. Access to Canadian official information is governed by the Access to Information Act 1985. The Act has also been recently amended by a new Bill C-58, which received royal assent on 21 June 2019. This section includes these new requirements.
2. The Act applies only to Canadian citizens, permanent residents and any individual or corporation who is present in Canada at the time.
3. A written request must be made, either through a prescribed form or mentioning the Act. Canada has a centralised request place - ATIP Online Request Service – which also has summaries of previous requests and guidance on making a request. This can be viewed at: <https://atip-aiarp.apps.gc.ca/atip/welcome.do>
4. The Act applies to government institutions, being departments, ministries, bodies and offices listed in the schedule and Crown Corporations.
5. Agencies can seek Information Commissioner's approval to decline a request that is vexatious, made in bad faith or is otherwise an abuse of the right of access. The Act also lists types of information that must be withheld. There include
6. Agencies have 30 days to respond to a request, unless there are large quantities of information, consultation is required or there is third party interference. Agencies can charge a prescribed application fee (no more than \$25). This can be waived or refunded.
7. The new Bill has substantially increased proactive publication requirements. There is an obligation to proactively provide a broad range of information on a predictable schedule without requests, including information about travel expenses, briefing packages for new ministers and the title and reference number of all memorandums sent to the Minister. Like other jurisdictions, agencies must also provide online information about themselves, including a description of the organisations and its responsibilities and the title and address of appropriate officers to send requests to.

8. The Information Commissioner can investigate and review decision following complaints or on its own initiative. To aid this, the IC has several powers including summoning people and compelling them to give evidence. The Commission can make orders and recommendations that are binding. These decisions can be appealed to a federal court.
9. Canada has an Information Commissioner and a designated minister to oversee and provide services on the administration of the Act.

Ireland

1. Access to official information in Ireland is governed by the Freedom of Information Act 2014.
2. There are no eligibility requirements for making a request. Requests must be in writing and must specify it is being made under the FOI.
3. The Act applies to Departments of State, majority owned companies and their subsidiaries, higher education and public bodies and entities established under enactments (except Companies Act) or appointed by Ministers.
4. The head of an agency can withhold information in certain situations, like when the information is protected by legal professional privilege or when disclosure is reasonably expected to adversely affect the security of the state. Where information is withheld, agencies must provide requestors with an explanation of the reasons for withholding.
5. Decision must be made within 4 weeks and must be published in line with the model publication scheme. Agencies should publish as much information as possible outside of FOI. A person can be charged for search, retrieval and copying for request overs €101 and up to €700.
6. Responses can be reviewed by the head of the body. Following this, a requestor can then appeal to the Information Commissioner. They have the power to affirm, vary or annul the public body's decision and make a new decision. Decisions are binding. Decisions from the Information Commissioner can be appeal to the High Court but only on points of law.
7. The Publication Scheme is designed to facilitate the provisions of information to the greatest extent possible, except for information exempted under the FOI. The information must be published online and specify, at least, information about the FOI Body, services provided or to be provided to the public, decision-making process for major policy proposals, financial information, procurement, FOI disclosure log and other information to be published routinely. These are reviewed and updated every three years.
8. The Information Commissioner also reviews the operation of the FOI, publishes reports, guidance and other materials, and carry out investigations into how public bodies comply with FOI.

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Draft



Hon xxx xxx , Minister of Justice

Official Information Act 1982 Review: your direction on priority and timing

Date	Xx November 2020	File reference	
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Action Sought

Timeframe/Deadline

Provide us with your direction on the priority and timing of a review of the Official Information Act 1982.	At your convenience
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Contacts for telephone discussion (if required)

Name	Position	Telephone		1st contact
		(work)	(a/h)	
Rajesh Chhana	Deputy Secretary Policy	04 494 9909		
Caroline Greaney	General Manager, Civil and Constitutional	04 918 8584	s9(2)(a)	✓
Chris Hubscher	Policy Manager, Electoral and Constitutional	04 918 8930	s9(2)(a)	

Minister's office to complete

<input type="checkbox"/> Noted	<input type="checkbox"/> Approved	<input type="checkbox"/> Overtaken by events
<input type="checkbox"/> Referred to: _____		
<input type="checkbox"/> Seen	<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Not seen by Minister
Minister's office comments		

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

Purpose

1. This paper provides an overview of issues related to the Official Information Act 1982 (OIA) and outlines an approach to a potential review of the legislation.

Key messages

2. The OIA is central to New Zealand's constitutional arrangements. By enabling access to information held by central government, the OIA is intended to support public participation in the democratic process, promote trust in government, and enable government to be held to account.
3. The OIA is almost 40 years old and no longer reflects its operating environment or developments internationally. The Law Commission's review of the OIA in 2012 recommended significant legislative change, however the then-Government favoured largely operational improvements. The focus since then has been on improving OIA practice, and most recently, increasing the level of proactively released information.
4. In September 2018, Cabinet agreed that the Ministry of Justice would carry out targeted engagement on the OIA to inform a decision on whether to progress a review of the legislation [CAB-18-MIN 0418 refers]. We received 284 submissions and spoke to eight experts. Submissions highlighted a variety of issues both with the legislation itself and how it operates. The most common concern was that the OIA is outdated and not reflective of the modern information environment. Submitters also noted the need for a more positive culture in the public sector towards processing OIA requests. Almost all submitters considered that legislative change is required to some degree.
5. Our view is that the OIA would benefit from a review, due to the changed context in which it now operates. This changed context includes increased public expectations of open and transparent government and changes in technology and the structure of the public service. We have identified a broad scope for a potential review. We recommend you discuss with officials the priority and timing of this work.

The case for a review of the OIA

The OIA establishes a framework of openness in central government

6. The OIA allows people to request official information held by Ministers and specified government agencies. It contains rules for how such requests should be handled and provides a right to complain to the Ombudsman in certain situations. It is based on the principle that if information is requested from a government agency, the information shall be made available unless there is good reason for withholding it.

The OIA is almost 40 years old and no longer reflects its operating environment or developments internationally

7. The context in which the OIA operates has changed dramatically over the last four decades, particularly with the use of the internet as a primary communication tool.

Information is now readily available. This has increased public expectations of openness and has supported the proactive release of information.

8. A further aspect of the changed context is the developments in official information approaches in other jurisdictions. A notable trend overseas is the emphasis on mandatory proactive release and the establishment of statutory oversight bodies like Information Commissioners.

The Law Commission recommended reform of the OIA in its 2012 review, which was not pursued

9. The Law Commission's 2012 review concluded that significant legislative amendment was required. In its report *The Public's Right to Know*, the Law Commission found that much could be done to improve the operation and efficiency of the OIA through a mix of legislative and non-legislative means. It made several recommendations which were not accepted. Instead a small number of piecemeal amendments were made.¹

Recent work has focussed on improving OIA practice

10. The Ministry of Justice is responsible for policy in relation to the OIA and would be responsible for carrying out any review. The Ministry also had responsibility, under section 46 of the OIA, for providing advice or assistance to departments and organisations about the OIA. In 2016 the Secretary for Justice delegated this function to the Public Service Commissioner.
11. Te Kawa Mataaho is also the lead agency for New Zealand's membership of the Open Government Partnership (the OGP). The OGP is an international multi-stakeholder initiative of governments and civil society committed to making governments more open, accountable and responsive to citizens.
12. Te Kawa Mataaho established a work programme to improve public sector OIA practice in 2016. This programme has included reporting on compliance with the OIA (via the publication of statistics on timeliness and volumes) and increased emphasis on the proactive release of OIA responses and official information more generally. Since 2015 when Te Kawa Mataaho started collecting data, there has been overall improvement in OIA requests being completed on time.
13. The Office of the Ombudsman has been reviewing and updating its official information legislation guides, which include case studies and succinct and accessible explanations of key principles and concepts. It also regularly publishes notes on the OIA and Ombudsman Act cases on its website. It has also increased resources for, and streamlined, its complaint resolution activities, and initiated own motion reviews of OIA practices within agencies.

¹ The Official Information Amendment Act 2015 made a number of minor and technical changes to the OIA.

Steps have been taken to avoid a ‘chilling effect’ on free and frank advice

14. The Department of the Prime Minister and Cabinet and the Public Service Commissioner have also taken steps to strengthen public service and ministerial expectations regarding the supply of free and frank advice.² This work responded to concerns that public servants can be reluctant to provide free and frank advice because they are concerned they will not be able to withhold it under the OIA.
15. Amongst other things, the work programme has focused on improving officials’ understanding of when advice can be given and received in confidence. The Ombudsman’s guidance has sought to emphasise that withholding free and frank advice may be permissible where discussion and advice is at an early stage and all options are on the table.

There are continued calls for reform of the OIA

16. Despite the focus on practice improvements, New Zealand’s End of Term report under the OGP National Action Plan 2016-2018 concluded there had been only “marginal change” as a result of practice improvements to date.³
17. There have been continued calls by the media, academics and civil society representatives for reform of the OIA. The dominant themes have been concerns about OIA processes and the need for better compliance by government. The annual public engagement on the initiatives New Zealand might progress in its OGP Action Plan has consistently included discussion on the statutory framework and the operation of the OIA.

In 2019 the Ministry undertook targeted consultation on a potential review of the OIA

18. Against this context, Cabinet agreed that the Ministry of Justice would carry out targeted engagement on the OIA to inform a decision on whether to progress a review of the legislation [CAB-18-MIN 0418 refers]. The engagement became one of the milestones under the Open Government Partnership’s National Action Plan 2018-2020 commitment on official information.
19. We carried out targeted consultation between 8 March and 3 May 2019. The Ministry received 284 written submissions and spoke to eight experts.
20. Submissions raised a highlighted a variety of issues both with the legislation itself and how it operates. The main issues raised with us are set out below.

Practice issues raised by submitters

- Delays in processing requests and misapplication of the withholding grounds.

² These steps include Cabinet manual changes in 2017 and an expectations document issued by the Public Service Commissioner, *Acting in the Spirit of Service: Free and Frank Advice and Policy Stewardship* (December, 2017).

³ Booth, K Independent Reporting Mechanism (IRM): New Zealand End of Term Report 2016-2018. The IRM carries out a review of the activities of each OGP participating country.

- Ministerial offices can delay, limit or restrict responses to OIA requests.
- Information management systems do not support efficient and comprehensive responses.
- Staff responding to OIA requests often lack specialised training.
- Agencies are not resourced for timely responses.
- The presumption that information should be made available in the public interest is not sufficiently clear or given enough weight in decision making.
- Ombudsman investigations suffer from lengthy and consistent delays.

Policy and legislation issues raised by submitters

- The OIA is over 30 years old and its language and structure can be hard to understand.
- The OIA's interaction with other legislation is not clear e.g. the Public Records Act 2005, the Inquiries Act 2013 and the Privacy Act 1993.
- The OIA's coverage does not reflect public accountabilities
- Agencies reported difficulty in dealing with large volumes of requests and frivolous and vexatious requests.
- The withholding grounds can be difficult to understand and apply, particularly the "good government" withholding grounds.⁴
- The OIA does not contain any serious penalties or accountability for non-compliance.
- There is insufficient oversight, coordination and leadership of the OIA.

Submitters offered a range of suggestions for reform of the OIA

21. Submitters told us they would like to see:

- legislation that reflects the modern information environment
- a more positive culture about access to information (officials, staff in Minister's offices, the public and the media)
- legislation that is easy to understand and apply
- good processes and resourcing to ensure timely responses

⁴ The "good government" withholding grounds are 9(2)(f) of the OIA, concerned with the maintenance of constitutional conventions; and 9(2)(g)(i) of the OIA concerned with maintaining the effective conduct of public affairs through the free and frank expression of opinion.

- more proactive release of official information, including about official information, and
- more effective mechanisms to ensure compliance and accountability.

We recommend a review of the OIA

22. We recommend a review, given the range of issues raised by submitters, the age of the OIA and the very different context in which it now operates. An effective official information legislation is vital to the functioning of a healthy democracy. A review provides an opportunity to consider improving the openness, transparency and accessibility of government information.
23. We acknowledge, however, that some of the issues identified through submissions would not necessarily be resolved by a review e.g. embedding a more positive attitude towards requests for information, agencies' resourcing issues, and the need for better compliance by government with the OIA's requirements.

Proposed approach to a review

24. We have identified some areas that could form the basis of a potential review based on the feedback from submissions and our own analysis. The Law Commission undertook comprehensive analysis of the issues in these areas. We would build on its analysis in our work where the issues and recommendations remain relevant.
- Improving accessibility: This would involve redrafting and re-enacting the OIA in a clearer and more accessible style. A restructure and rewrite would help to give greater prominence to key elements in the Act such as the presumption in favour of making information available.
 - Clarifying and updating coverage: This would involve examining discrepancies and anomalies in the OIA's coverage. For example, Parliament and its agencies are not subject to the OIA. The Law Commission recommended extending the OIA's application to certain parliamentary information (e.g. Parliamentary Services and the Office of the Clerk).
 - Reviewing the withholding grounds: While the Office of the Ombudsman, and Te Kawa Mataaho have published guides on the existing withholding grounds, they do not address the need identified by the Law Commission to express existing concepts in plainer language, or to introduce new protections for certain types of information.⁵ A review could consider ways to reduce complexity and increase certainty in this area.
 - Reforms related to vexatious requests: Agencies work with limited resources which can sometimes be put under strain by certain types of requests. A review could look at how to draw a better balance between availability of information and the resources needed to meet requests.

⁵ Sensitive commercial information relating to financial position, information provided for the purpose of an investigation or inquiry and sensitive cultural information.

- Compatibility with other legislation: A review could help clarify the relationship between the OIA and related pieces of legislation (e.g. the Ombudsmen Act 1975, the Inquiries Act 2013, the Public Records Act 2005 and the Privacy Act 1993).
 - Oversight: Many submitters, including the Ombudsman, noted the need for greater oversight, coordination and leadership of the OIA. The Ombudsman has the complaints function, produces guidance and carries out practice investigations. Te Kawa Mataaho, in recent years, has had an oversight role in relation to the core State sector. But there is no whole of government oversight of agencies' management systems for dealing with official information requests, including oversight of training, improving awareness of the OIA and promoting best practice. A review could consider the costs and benefits of establishing an oversight body.
 - Enforcement: The Ombudsman's recommendations are central to the effective operation of the OIA. But their ability to respond to non-compliant conduct by agencies is limited to making recommendations. A review could consider whether additional enforcement tools are desirable.
 - Proactive release: A requirement for agencies to publish information proactively is a feature of most modern freedom of information approaches internationally. A review could consider whether it is desirable to include a requirement in legislation for agencies to proactively publish information. A review could also consider the ongoing appropriateness of the 'request and release' approach to information on which the OIA is grounded.
25. If you wish to pursue a review of the OIA, we would further test and refine this initial scope in consultation with Te Kawa Mataaho, the Office of the Ombudsman and other agencies. We would then prepare a Cabinet Paper seeking agreement to the scope, timing and approach of a review.

Local Government and Official Information and Meetings Act (LGOIMA)

26. Any changes to the OIA will need to take into account flow on implications for accessing official information at local government level under the Local Government Official Information and Meetings Act 1987 (LGOIMA). LGOIMA is administered by the Department of Internal Affairs (DIA). There is currently a strong alignment between the Acts and thus corresponding changes to LGOIMA may need to be subsequently considered by DIA.

Intended outcomes of a review

27. Any changes in legislation or practice arising from the review would seek to achieve:
- modern and accessible official information legislation that is easy to apply, practicable and enduring, and
 - more information being proactively published.

Timing

28. A review of the legislation governing access to information held by Ministers and central government information will be of interest to all public sector agencies as well as to civil society groups with an interest in open government, transparency and accountability. For this reason, the review will need to take enough time to engage well with the public and agencies. Resourcing a review will need to be prioritised and sequenced in relation to other government and ministerial priorities.

Recommendations

29. We recommend that you:

1. **Indicate** whether you would like to pursue a review of the Official Information Act 1982; **YES / NO**
2. **Note** that if you are interested in a review, we will discuss the priority and sequencing of that review alongside other priorities as part of the policy work programme discussion.

Rajesh Chhana
Deputy Secretary Policy

APPROVED / SEEN / NOT AGREED

Hon xxxx
Minister of Justice and Minister for Courts

Date: / /

Policy projects

Hon Kris Faafoi, Minister of Justice
4 December 2020

Purpose

1. s9(2)(f)(iv)

s9(2)(f)(iv)

5. The Justice Policy Group's constrained capacity is at the core of our need to heavily prioritise our work. s9(2)(f)(iv)

We will provide a further briefing on the full policy work programme, and a proposed legislative programme for 2021

6. Your decisions on these projects will assist with the development of the 2021 Legislation programme for the Justice and Courts portfolios. This programme is to be submitted to the Cabinet Office in late January 2021 and we will work with you and your office to finalise it beforehand.
7. Your decisions will also feed into a comprehensive briefing on the overall policy work programme for the next three years. We are aiming to provide this to you on 14 December (along with an initial view of the legislative programme). This briefing will cover our mandatory policy work, the projects you have identified as your priority projects, and options for the priority, and sequencing and timeframes of other policy projects over the next three years.
8. Our work programme is dynamic. As projects are completed, new ones emerge, or Budget decisions are made, we reassess the priorities. We typically deliver two to three unplanned, urgent projects each year. We will look to discuss with you the relative priorities and key deliverables for the policy work programme on a regular, usually quarterly, basis.

Approved by Rajesh Chhana, Deputy Secretary, Policy

out of scope

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s9(2)(f)(iv)

Review of the Official Information Act (OIA)

The Open Government Partnership National Action Plan 2018-2020 (Commitment 7) committed the Government to undertake targeted engagement with experts and key stakeholders on the merits of formally reviewing the OIA. The Ministry completed this in September 2019 and proposed a targeted review of the OIA. The scope would address concerns that information is not being released when it should, the Act is out of date, its relationship to other Acts is unclear, the reasons to withhold information are hard to understand, and it is difficult to hold agencies to account.

The previous Minister indicated his intention to seek Cabinet approval on the scope of an OIA review in a media interview in July 2020.

s9(2)(f)(iv)

out of scope

Enclosed:

Excerpt from *Legislative and Policy Work Programme 2021-2023*

Briefing from the Ministry of Justice to the Minister of Justice

14 December 2020

[Out of scope – pages 1-8]

Notes to Appendix 1

[Out of scope – paras 1-9]

10. Projects that have simply been paused or deferred until resources become available have not been included on the work programme for the time being. They have been moved to our 'holding pen' list of potential projects which we will discuss with you further as and when resources allow. These projects include:

- **[4 bullet points out of scope]**
- reviewing the Official Information Act;
- **[3 bullet points out of scope]**
- **[Out of scope – Appendices 2 and 3]**

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