

Report of Chief Ombudsman  
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# Not a game of hide and seek

Report on an investigation into  
the practices adopted by central  
government agencies for the  
purpose of compliance with the  
Official Information Act 1982

December 2015

Office of the Ombudsman  
Tari o te Kaitiaki Mana Tangata



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Chief Ombudsman

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## Executive summary

The Official Information Act 1982 (OIA) is a key tool and safeguard in New Zealand's democracy. The Court of Appeal stated *'the permeating importance of the Act is such that it is entitled to be ranked as a constitutional measure'*.<sup>1</sup> It established the principle that official information held by government agencies shall be made available to the public unless there is good reason for withholding it. It expressly stated that the purposes for doing this were to:

- progressively increase the availability of official information to enable more effective participation, promote accountability and enhance respect for the law and promote the good government of New Zealand; and
- protect official information to the extent consistent with the public interest and the preservation of personal privacy.

My Office was appointed Parliament's independent watchdog on the operation of the OIA when it was passed on 17 December 1982, and has investigated complaints about government OIA decision-making for almost 33 years. In recent times I have been aware of growing public concern and criticism about practices that were perceived to have developed within government agencies when dealing with requests for information. This has the potential to erode public trust and confidence in both the effective operation of the OIA and the integrity of our democratic institutions.

Over the past year, I have carried out a comprehensive review of the operation of the OIA with the assistance of 12 selected government agencies. I considered how they were led, organised and allocated their resources. I reviewed their policies, systems, practices and I considered the environment in which they operate, and how the public viewed their ability to obtain information from them.

I also considered my Office's role as Parliament's independent watchdog on access to information decisions. This review was conducted using my powers under section 13(3) of the Ombudsmen Act 1975 (OA). This provides an Ombudsman with the tools needed to conduct such investigations, but does have two key limitations in the context of the operation of the OIA: the Police are to all intents and purposes excluded from my OA jurisdiction, and I also cannot investigate the actions of Ministers and their officials under this Act. I can, and do, investigate the decisions of the Police and Ministers under the OIA in relation to individual requests for information.

My investigation involved reviewing over 2,500 submissions and survey responses, interviewing approximately 300 officials and requesters, conducting 37 visits to agencies and reviewing thousands of agency records (digital and paper based) and countless academic articles, speeches, research papers, reports, news articles, blogs and tweets about the OIA.

Overall, I found the OIA has caused greater openness and transparency about the plans, work and activities of the Government and increased the ability of the public

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<sup>1</sup> Commissioner of Police v Ombudsman [1988] 1 NZLR 385 at page 391.

to participate in the making and administration of New Zealand's laws and policies. It has also led to greater accountability in the conduct of public affairs. The principle and purposes of the OIA remain sound. I found that most of the time, agencies were compliant in the way they operated the OIA on a daily basis. However, there were five key areas where I found there to be increasing risks and vulnerabilities in the way the OIA was being administered in the current environment. These need to be addressed in order to protect the effectiveness of this constitutional measure, and ensure it achieves its purposes.

## Leadership and culture

Achieving the purposes of the OIA depends largely on the attitudes and actions of those in leadership ie, Ministers, chief executives and senior managers within agencies. When it is clear to staff that leaders respond to requests for official information positively and view it as an opportunity to operate in a more transparent, engaging and accountable manner, they will do the same.

I found government agencies were receiving mixed messages from Ministers as to their expectations in terms of compliance with the OIA and more generally with the promotion of openness and accountability and enhanced public engagement. This has enabled doubt and suspicion to grow amongst the public as to whether their requests for access to official information will be treated appropriately and in accordance with the law by Ministers and their agencies. It is important that this is corrected.

I found chief executives and officials holding senior leadership positions within agencies did understand their legal obligations and were committed to the principle and purposes of the Act. They understand the benefits to their agency of becoming more open and transparent and some are actively taking steps to ensure they foster such a culture within their organisation by incorporating them into their vision, values and code of conduct. Lack of awareness and understanding at their level would therefore not seem to be a reason for any non-compliance occurring within agencies.

However, over 40% of the current and former government workers who responded to my survey advised that they did not know whether their chief executive or senior managers have a 'pro-disclosure' attitude towards the release of information. While many believed that the internal culture of openness and access to information had improved within their agency, there was a distinct lack of bold, visible messaging by agencies' senior leaders to their staff. I also found many agencies did not have basic information on their websites as to how the public could make a request and the types of information they can ask for.

For most agencies, providing information to the public is still seen mostly as a reactive, operational task rather than a planned strategic intention that will benefit other areas of the agency's work. Without a strategic framework in place with associated responsibilities and accountabilities at executive level, making requests under OIA remains a key vehicle for the public to obtain access to information about the government's activities. On one level, this is no bad thing, since people are always likely to want to access information that those working in government have not considered useful or important to publish. But on another, the absence of such frameworks

indicates agencies will continue to be concerned with managing demand rather than introducing supply-side improvements that are likely to provide greater value for money in the long run.

I did observe a growing desire within agencies to push more information about their work and activities out into the public domain and assist requesters with providing access to valuable data on a regular basis. Many agencies were routinely publishing a lot of their corporate information, statistics and data voluntarily, although this was quite variable. Some agencies were deliberately choosing to provide more information to requesters than had been asked for. A number of agencies were publishing their responses to OIA requests on their website so that others could also read them. This was primarily done to provide the requester (and the public) with context and prevent misunderstanding or misinterpretation of the information and/or the agency's activities. These steps were often taken on the advice of the ministerial/political advisor.

I found evidence that suggested a small number of ministerial officials were attempting to limit the scope of requests for official information or change an agency's proposed decision for unwarranted reasons. Such attempts were rejected by agency officials and the final decisions made by the agency were compliant with the OIA. I have alerted the Prime Minister's office to this type of engagement occurring, and have received an assurance that all Ministers and their staff are reminded regularly of their obligations under the OIA. While I cannot investigate the actions of ministerial/political advisors under the OA, I have strengthened my Office's investigation processes to ensure that such instances are identified and reported and my Office intends to develop a model protocol for all agencies that will govern their consultations and briefings on OIA requests. Its application in practice will be monitored and reported on publicly by my Office.

The Ministry of Justice and the State Services Commission (SSC) have OIA leadership roles which have not been fully realised. They have ascribed this to a lack of resources and competing priorities. The SSC has provided support to senior officials on an ad-hoc basis and is currently the lead agency for New Zealand's membership of the Open Government Partnership.<sup>2</sup> The Ministry of Justice has established a practitioners' forum, developed a number of guides and publishes the Directory of Official Information biennially. However, my investigation has found a number of areas that agencies are currently finding challenging which both SSC and the Ministry of Justice could, and in my view should, provide support, assistance and guidance as an ongoing priority. These include:

- establishing and maintaining effective relationships with Ministers and their advisers whilst also maintaining the independence required to make their own OIA decisions;
- developing a strategic framework for the proactive disclosure of official information; and
- providing clear, detailed guidance on the information agencies should be proactively publishing.

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<sup>2</sup> The Open Government Partnership is an international multi-stakeholder initiative of governments and civil society committed to making governments more open, accountable, and responsive to citizens. Launched in 2011, New Zealand joined in 2014. <http://www.opengovpartnership.org/country/new-zealand>

## Organisation structure, staffing and capability

Government agencies have put in place structures and personnel that demonstrate they consider responding to OIA requests is part of their core business. The type of model used to manage OIA requests, and where they were located in an organisation's structure, had little effect on the agency's ability to comply with the Act. Each model has benefits and risks which needed to be provided for.

Most agencies have set up a separate gateway for the media to make requests for official information. While this demonstrates a willingness to engage and inform journalists about the work of the agency, it also presents risks to the agency in terms of the consistency of decisions (both in terms of content and timing), particularly if agencies do not have either a unified system for logging requests and enquiries, or share their logs or registers of requests and enquiries with the officials who dealt with requests for the same information received via other gateways. In addition, many requests for information were not being counted as OIA requests and were processed and responded to outside the agency's policies and procedures. As a result, agencies were at risk of not complying with the Act's requirements or understanding their OIA workload, true compliance rate and resource requirements.

The responsibility for making decisions on OIA requests was most commonly delegated to tier 3 managers and above. This had the benefit of successfully leveraging more resources from the agency's senior leadership team when compliance became problematic and ensuring appropriately senior staff could manage any difficulties or disagreements with the Minister's office regarding an agency's proposed response.

Most officials assigned OIA responsibilities within an agency had other duties or responsibilities to carry out. While this may meet the government's expectations of *'doing more with less'*, I found there was an adverse impact on the capacity of an agency to respond to requests *'as soon as reasonably practicable'* by expecting officials responsible for answering OIA requests to also be responsible for other work as well. This was felt most acutely when an agency did not have resilience arrangements in place for when these staff were absent, had competing priorities arising from their other work or there was a sudden flood of requests that needed to be processed.

The level of training provided by agencies to their staff on the OIA varied widely. Most government agencies (79%) did not require their senior managers (who were often the decision makers) to undertake any level of OIA training. Many government workers (60%) who responded to my survey also said they had not received any OIA training from their agency in over four years. Agencies are therefore vulnerable to unintended bad habits embedding into practice and decisions being made that may be out of date with current approaches of the Ombudsman. It can also leave their decision makers vulnerable to undue influence from those working in Ministers' offices who may wish to limit or change their decision for unwarranted reasons.

## Internal policies, procedures and systems

While it is not a legislative requirement, nor an assurance that compliance with the OIA will occur, the Ombudsmen encourage agencies to develop policies and resources to assist staff to meet the requirements of the OIA consistently. They provide a tailored

point of reference to assist staff to undertake their role. I found this to be particularly important in an agency where a high volume of OIA work exists, staff turnover is an issue or where the agency is heavily reliant on one or two knowledgeable individuals to respond to OIA requests.

All the agencies examined in our review had readily accessible policies and procedures for staff as to how they expected OIA requests to be handled. The same could not be said for Ministers' offices, with many simply relying on the OIA itself.

The policies and procedures of the 12 selected agencies involved in this investigation were reviewed by my Office for accuracy, relevancy and ease of use and understanding. I found a number of good examples that were suitable for the agency concerned. Most had templates and checklists to assist officials with processing requests and ensuring compliance with the OIA's legal requirements. However, I found there were gaps and assumptions common in many policies that created vulnerabilities for agencies. These related to:

- the distinction between an OIA request and a Privacy Act request, a section 23 OIA request for a statement of reasons, and a Part 4 request by a company or other corporate body asking for information about themselves;
- the number of extensions an agency can make to the time limit for making a decision on a request;
- managing the time limit for transfers;
- the use of personal mobile devices, text messages and personal email accounts;
- what comprises a reasonable search for information;
- the working day count when requests are received electronically; and
- the application of the *Cabinet Manual's* 'no surprises' principle.

It was universally accepted by all the agencies assisting me with this investigation that effective record-keeping and information management policies and systems are vital enablers for compliance with the OIA. Changes in technology are altering the way officials carry out their work, including how they create, manage and use information. It is also changing the expectations of those seeking access to official information. As a result, most agencies subject to my investigation acknowledged that in respect of their own systems, policies and procedures:

- they were having difficulty keeping pace with the changes and expectations;
- they did not always enable specific information to be identified and accessed easily;
- they still stored their information in shared drives or in an out-dated or inadequate electronic document and records management system; and/or
- they weren't adequate to support the volume, complexity or breadth of requests for information they sometimes receive.

I found some agencies were in the process of introducing new information management strategies, with supporting governance committees, policies and systems



aimed at meeting these challenges. But others were still applying a hands-off, self-reliant approach to information management. It was therefore not surprising that agencies advised that one of their most common difficulties in meeting their obligations under the OIA was finding and retrieving the requested information.

Most agencies (78%) had no policies in place for the proactive disclosure of information. As a result, opportunities for publishing information to assist the public's understanding of an agency's work (and reduce suspicion or media speculation) were often missed. In the absence of policies around proactive disclosure, there is more of a risk that agencies could release information that:

- contains personal information about an identifiable individual;
- contains commercially sensitive information;
- contains information that was provided to the agency in confidence or is the subject of a confidentiality agreement;
- harms New Zealand's international relations, the maintenance of the law or would otherwise be withheld if requested under the OIA;
- infringes copyright;
- is defamatory; or
- is redacted so significantly as to change its meaning.

## Current practices

Theory is one thing, but the effectiveness of the OIA is largely dependent on the practice of those charged with implementing it on a day-to-day basis within agencies. Most agencies that provided media with a separate gateway to request information were vulnerable to not complying with the OIA if their officials suggested that a request had to be put in writing before it would be processed or they did not provide templates or scripts for officials to use when refusing requests orally or by email. Similarly, officials who may have established relationships with stakeholders such as interest groups are also at risk of failing to comply with the Act by not recognising their OIA obligations when the group seeks information.

I am not convinced that these instances were a deliberate attempt by agencies to avoid their obligations under the OIA. Rather, it is more likely to be an unintentional gap in practice that is more likely to be caused by referring to such requests as *media enquiries*, or the relevant officials in less public-facing parts of an agency not understanding their obligations. These can be addressed by the provision of policies, templates and training, as well as the clear messages from senior management mentioned earlier.

Many agencies complained about the challenges in responding to broad, wide-ranging and multiple, frequent requests, yet were reluctant to use the tools in the OIA to manage these.

- Many agencies' policies required that requests for access to official information

made by the media, members of parliament, and political party research units should be exempt from charging. The OIA does not provide for such an outright exemption. Agencies are entitled to consider release subject to a reasonable charge as a means of meeting a request for a large amount of information.

- Many agencies were not inclined to consult the requester and provide them with assistance to refine their request.
- Some agencies were also reluctant to refuse requests on the basis that the information could not be made available without substantial collation and research, even when there seemed to be a reasonable basis for doing so.

Instead, most agencies chose to extend the time limit and try to meet the request, or to redefine and interpret the scope of the request by themselves.

Requesters confirmed they often had difficulty articulating their request and found it challenging to refine it appropriately as they didn't understand how the information was held. Some would occasionally overcompensate for this by sending in multiple, frequent requests which differed only slightly from the other requests they had made. This behaviour could make officials within agencies suspicious of the requester's motives, particularly if the requester was from the media or a political party, and rather than consult the requester they would sometimes choose to redefine or interpret the scope of the request themselves. While I am satisfied that most of the decision letters I have seen included details of how the request had been interpreted so the requester could challenge the interpretation, this practice makes the agency unnecessarily vulnerable to claims of 'gaming' the requester and manipulating the final response to suit a particular purpose.

I explored why there was a reluctance to use the legitimate tools available to agencies in the OIA when dealing with the challenges they were facing. I found current practices were heavily influenced by the current media and political environment agencies believed they operated in.

Officials in agencies reported that they have experienced what they consider to be unfair attacks and inappropriate, misleading reporting by media after responses and official information have been provided. As a result, there was a general perception that many media requests are not driven by a desire to inform the public properly on the activities of the government but rather on obtaining a '*gotcha*' headline and sensationalising information. The impact of these experiences was not always an increased tendency for agencies to resort to blanket refusals. Rather, agencies had become extremely careful as to *how* the information should be released, with great consideration often being given as what additional information should be included to provide context and to enable understanding and informed reporting. Some agencies have decided to publish their responses on their website after it is released to the media to mitigate these concerns.

I also found that the political environment in which government agencies operate and make their decisions has had an impact on how responses to OIAs are prepared in practice. MMP Governments often require ongoing consultation and negotiation between coalition partners in order to progress policy and legislative programmes. Ministers now have ministerial/political advisors, whose role is focused on serving the

particular Minister and their priorities and agenda. The *Cabinet Manual* requires agencies to 'be guided by a "no surprises" principle' when briefing their Minister on their operations. While there is no requirement in the OIA for agencies to advise their Ministers about requests received and decisions proposed, it does recognise that while the chief executive is the ultimate decision maker, this does not 'prevent the Chief Executive ... from consulting a Minister ... in relation to the decision [they] propose to make.'<sup>3</sup>

While many requesters find this ability of chief executives to consult their Minister on proposed decisions to be unpalatable, I do not think it is unreasonable for a Minister to want (and expect) to be made aware of requests that could result in them having to deal with a controversial or sensitive issue, such as by way of questions in the House or from the media, if information is released by an agency for which they are responsible. Indeed, it would be naive to expect or require them not to in the MMP environment. It would also be naive to expect officials within agencies to disregard the possible political impact of disclosing information they hold to the public and not advise their Minister. The Minister's office may be aware of harms or consequences that could result from release of the information of which an agency may not be fully cognisant. Compliance with the OIA does not equate to a requirement that a Minister must be kept unaware of what their agency is doing when it comes to responding to requests for official information.

I reviewed a number of interactions between Ministers' offices and agencies on OIA requests and interviewed those involved with these consultations to understand and confirm the practice that occurred within agencies. I found this varied considerably and there was not in fact a standard practice (apart from the initial consideration of the OIA request when it was first received as to whether it should be included in the weekly advice to Ministers). The interpretation certain agencies applied to the 'no surprises' principle when preparing responses to requests did make them vulnerable to not complying with their legal obligations under the OIA.

- Those that believed it required them to seek 'clearance' or 'approval' from the Minister on the proposed response to requests for official information would be abdicating the chief executive's responsibilities and accountabilities under the OIA and would therefore be in breach of section 15(4) of the OIA.
- Those that provided the Minister with a copy of the proposed response to an OIA under the auspices of an 'FYI' or 'no surprises' 3-5 days prior to advising the requester of the decision would be in breach of section 15(1) of the OIA as it suggests the agency is delaying the release of a decision it has made.

If an agency genuinely needs to consult the Minister on its proposed response before finalising a decision on a request, it should say so - in its policies, its referrals (eg, consultation email or cover note to the Minister's office) and its correspondence with the requester. Purporting to do otherwise creates doubt as to who is making the decision and whether the final response is being manipulated for political reasons rather than in accordance with the provisions in the OIA, and suspicion as to whether delays are occurring for tactical reasons (such as to reduce the newsworthiness of the information).

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3 See Official Information Act 1982, s 15(5).

My investigation found that the Minister's contribution to an agency's proposed response often resulted in:

- enhancements to a proposed response - by encouraging more information about the government's activities or position on an issue to be released;
- queries as to the ground for refusal being relied on being appropriate and suggesting more information could be released than what was being proposed;
- quality assurance on the draft refusal letter by including advice to the requester they could seek a review by the Ombudsman about the decision; and
- advice being sought as to the media enquiries and communications that would likely follow as a result of release and suggestions as to proactive release of additional information in order to ensure the public were informed appropriately.

However, I also saw evidence of ministerial/political advisors using the opportunity they were given to review the response prior to release under the auspices of an *'FYI'*, to try to convince the agency to change the final decision the agency had made by seeking to:

- limit the scope of the request;
- alter the decision proposed by the agency; and/or
- reduce the additional contextual information the agency proposed to include in the response.

A number of the submissions received also described bitter, confrontational discussions with Ministers and their ministerial/political advisors about certain OIA responses. My investigation found agencies experiencing this type of interaction rejected those demands in the final response, unless they considered them valid to incorporate in their final decision. Other agencies used a number of strategies in order to establish and maintain a healthy, functioning relationship. In all cases, I found agencies understood that the chief executive was the decision-maker, and would be accountable for the decision unless it transferred it to the Minister. None of the chief executives believed it would be career limiting to stand their ground on OIA responses, although some observed that it could make for a difficult and challenging relationship with their Minister.

In principle, I see no reason why a Minister or their advisers should not be informed of any OIA requests agencies are processing at any stage during that process, so long as there is no improper pressure or political manipulation of either the substantive decision or the timing of the delivery of the agency's response to the requester. The *'no surprises'* principle is intended to assist orderly government decision-making and enable public trust and confidence by ensuring decision-makers are better informed before making decisions or responding to enquiries and legitimate scrutiny (whether by the media, opposition parties or citizens). However, if it is applied incorrectly by Ministers and their officials, the principle may be misused to defeat the proper operation of the OIA by providing an opportunity for officials to apply improper pressure or political manipulation to either the substantive decision or the timing of the delivery of the agency's response to the requester.

My Office will develop a model protocol for all agencies that governs their consultations

and briefings on OIA requests with Ministers' offices which:

- acknowledges the roles and responsibilities of the Minister and the chief executive with reference to the guidance in the *Cabinet Manual*;
- acknowledges that a 'no surprises' principle is expected to operate in the relationship between an agency and its Minister;
- makes the distinction between consultations under section 15(5) of the OIA and 'no surprises' briefings or referrals; and
- requires the outcomes of any consultations to be recorded.

The protocol should be adopted and published by agencies and its application in practice monitored by my Office regularly. It could also form part of a code of conduct for ministerial advisers, which the SSC has indicated it is considering.

## Performance monitoring and learning

OIA requests, responses and complaints provide a rich source of information that can be used by agencies to:

- ensure consistency in decision-making;
- understand what the public and key stakeholders are really interested in (and where proactive release could be used to reduce an agency's workload);
- flag any stakeholder/third party relationship issues that might be occurring;
- identify where business units may be struggling or under pressure;
- inform management decisions and budget bids regarding internal resource allocation, training needs and system improvement requirements;
- flag any compliance issues and gaps in any policies and procedures; and
- fast track and inform any Ombudsman investigations and reviews.

However, most agencies had difficulty providing me with information about:

- the amount of staff resources they were applying to respond to OIA requests;
- the number of requests for official information they received (from all access points);
- who their requesters were;
- the subject matter of requests;
- any consultations involved;
- any transfers or extensions of time needed; and
- the outcome of decisions on requests.

Those agencies that were capturing information and data about their requests for official information used a variety of methods. The effectiveness of the method used

by an agency to track compliance and ensure consistency depends on both the sophistication of the tool itself and from assigning a sufficiently senior and respected official to operate it and monitor the agency's daily management of requests and who could demand action if the agency was at risk of non-compliance.

I found most agencies had some performance measures for some of their OIA work. They were usually directly linked to the 20 working day maximum time limit for responding to requests. Occasionally demand driven quantity measures were included, but rarely were the quality of responses or proactive disclosures of information measured. I also found some unusual counting practices occurring in some agencies. Most only acknowledged OIA requests that were processed in a certain way and did not include requests for information usually dealt with by their media and communications team or by other staff. Some included their Minister's OIA requests, responses to Parliamentary questions and ministerial correspondence as part of their own agency's OIA compliance statistics. Reporting this way means neither the public nor the agency itself is in a position to recognise the true picture of an agency's capacity and capability to carry out its OIA function.

Record-keeping of agencies' decisions on OIA requests was very sporadic. I found some agencies recorded neither the decision nor any consultations that occurred during the process. Such practices are likely to be contrary to the requirements of the Public Records Act 2005. Failure to keep a record of decisions makes it difficult for other staff within agencies to locate similar, previous requests, ensure consistency of decision-making or justify departure from past responses. It could also inhibit the ability of agencies to adequately explain the basis for the original decision to an Ombudsman.

All agencies provided weekly reports to their Minister about some of the OIA requests they received. This included some media requests and some requests from opposition parties and special interest groups where it was considered important for the Minister to be briefed. For many agencies, there was no blanket decision to include all requests by certain requesters in these weekly reports. Rather, it was a discretion exercised by officials within the agency as to what the Minister ought to be briefed on.

The level and type of reporting to the agency's chief executive and senior management about the OIA requests its agency had on hand was not as consistent or regular as their reporting to Ministers on the requests received.

Many requesters were frustrated by my Office's inability to investigate complaints about decisions of agencies in a timely manner and were concerned that agencies could be factoring into their decision on withholding information the time it would take an Ombudsman to investigate a complaint. The perception that this may be occurring is sufficient to cause a review of my own Office's practices and ensure its early resolution processes and proactive investigation capabilities are fully realised.

## Conclusion

Following a comprehensive examination of how agencies have organised and resourced themselves and currently operate in practice, I am satisfied that agencies are compliant with the OIA most of the time and government officials working within these agencies have a genuine desire to ensure that they are compliant.

My investigation found that both requesters and agencies have perceptions, biases and suspicions arising from past poor experiences. I found most agencies were unaware of the areas where they were vulnerable to non-compliance and were willing to address these where they could, so as to rebuild public trust and confidence in the operation of the OIA by their agency. I found requesters who rely on the effective operation of the OIA within agencies have been confused, frustrated and found it difficult to engage with agencies at times. Many requesters assumed that an agency's non-compliance or lack of engagement was deliberate and intentional, which then created a spiralling cycle of distrust and suspicion. This has led to increased concern and criticism about how the OIA is operating.

If the OIA is to achieve its purposes and continue to be effective over time, it needs to be used properly by everyone – the media, politicians, researchers, special interest groups and the public, as well as government agencies. Anyone who acts unfairly in either making or responding to a request can contribute to and encourage a chilling effect on how the OIA operates in practice.

Most of my recommendations are couched in general terms and address what I believe are achievable improvements to the way the OIA's requirements, principle and purposes are implemented by agencies to assist themselves and the public and correct any misconceptions. It is up to each individual agency to examine its own performance and decide how best to implement these recommendations in light of its own circumstances.

My Office will continue to work with the 12 selected agencies to ensure any areas of vulnerability that may have been identified during the investigation of their particular agency's practices are addressed appropriately. Other agencies who wish to seek my Office's assistance are welcome to contact the Ombudsman's Policy and Professional Practice Advisory Group.

In addition, my Office will be issuing new comprehensive guidance and resources for all agencies to assist them to achieve excellence in their policies, practices, systems, organisation and decision-making. This will include the development of a model protocol for agencies and officials to govern consultations and briefings with their Minister's office on OIA requests, a maturity model, and a self assessment tool for agencies to measure their compliance and identify any areas of weakness.

It is my Office's intention to commence a programme of proactively reviewing agencies' practices against the requirements of the OIA using the own motion powers under the OA and publicly report on these. It will also investigate and report on the performance of the sector overall again, to ensure the public have continuing trust and confidence in this important constitutional measure.

If the OIA is to achieve its purposes and continue to be effective over time, it needs to be used properly by everyone – the media, politicians, researchers, special interest groups and the public, as well as government agencies. Anyone who acts unfairly can contribute to and encourage a chilling effect on how the OIA operates in practice.

## Summary of recommendations

### Leadership and culture

1	The Prime Minister and his Ministers should issue clear, visible statements of their commitment to the principle and purposes of the OIA and their expectations of their agencies to comply with its requirements.
2	Chief executives and senior managers within agencies should review their policies, value statements, code of conduct and mechanisms for communicating to their staff, and ensure they contain clear, visible statements of their expectations that all staff will act consistently with the OIA's principle, purposes and requirements.
3	Both the SSC and the Ministry of Justice should take steps to fulfil their leadership roles in practice by making it a priority in their work programmes to assist agencies with the challenges they currently face in complying with the OIA and its principle and purposes.
4	The Ministry of Justice should develop guidance for agencies (and consider developing a model publication scheme) on what should be included in the <i>Directory of Official Information</i> that will assist requesters to make effective, targeted OIA requests to agencies.
5	The Ministry of Justice should publish information about the forums it has held, the planned programme of work for future forums, and the guidance it has produced for agencies.
6	All agencies should ensure their websites have a page, no more than one click away from the home page, which provides the public with key information on how to make a request for official information, what the agency's internal policies and guides on processing OIA requests are, who to contact for assistance, and the information the agency supplies to the Ministry of Justice for inclusion in the <i>Directory of Official Information</i> .
7	Agencies should ensure their strategic plans include increasing the agency's openness and accessibility of information about its work and activities, and engagement with the public and media.



## Organisation structure, staffing and capability

8	Agencies should review their OIA organisational model and ensure any risks are mitigated.
9	Agencies should ensure there is sufficient resilience in their structure to respond to contingencies such as staff absences, departures, and sudden surges in the number of OIA requests.
10	Agencies who have provided a separate gateway for the media to make requests for official information should ensure all officials dealing with OIA requests have access to each others' logs or registers.
11	Agencies should ensure compliance with the OIA is specifically included in all employees' job descriptions.
12	Agencies should ensure that compliance with the OIA and information management policies is included in key performance indicators for staff and compliance is monitored and reviewed annually.
13	<p>Agencies should ensure all staff undergo some level of regular OIA and information management training, tailored appropriately for their role in the agency. This includes:</p> <ul style="list-style-type: none"> <li>• those who are 'on the frontline' and receive or process requests;</li> <li>• those who make decisions or recommendations that could affect others which may subsequently result in requests for access to personal information or for the reasons for a decision; and</li> <li>• senior managers with delegations to make OIA decisions.</li> </ul>
14	Agencies should publicly report on the OIA training their staff have undergone in the last 3 years.

## Internal policies, procedures and resources

### OIA policies

- 15 Agencies should review their OIA policies to ensure they provide accurate guidance and sufficient coverage so as to avoid any gaps or incorrect assumptions that could create vulnerabilities in compliance. They should consider seeking the assistance of the Office of the Ombudsman when doing so.
- 16 Agencies should ensure their interpretation of the *'no surprises'* principle contained in any OIA policy is not characterised as seeking a **clearance** or **approval** by their Minister on an agency's proposed response to any OIA requests.

### Information management policies & systems

- 17 Agencies should develop and implement an information management strategy (that has OIA compliance and public participation needs at its core, alongside other business needs of the agency) and ensure they have a senior manager assigned specific responsibility for its implementation.
- 18 Agencies should review their information management and record keeping policies to ensure they include guidance on managing emails and text messages created and received for business purposes, regardless of whether they are held on an agency-owned or a personal device.
- 19 Agencies should review their information management systems to ensure they are adequate to meet the needs of the business, including the need to search for and retrieve records efficiently in order to deal with requests made under the OIA.
- 20 Agencies should provide regular training to staff on information management and record keeping policies and monitor compliance with these policies.
- 21 Agencies should have redaction software to assist them with preparing information for release in formats enabling easy reuse of the information.

## Proactive release policies

- 22 Agencies should ensure they have a comprehensive policy concerning the proactive release of information they hold, which includes how to maximise the benefits of proactive release while also managing risks that may arise from the release of certain types of information.

## Tools and resources

- 23 Agencies should review their websites and ensure these contain accessible guidance for requesters to assist them when making requests for official information.
- 24 Agencies should develop tools and resources for requesters to assist them to make focused requests for official information.
- 25 My Office should provide requesters with training, support and guidance in how to make requests for official information effectively.
- 26 The Ministry of Justice and the SSC should champion the development of tools and resources by agencies to assist requesters.

## Current practices

27	Agencies should review their practices to ensure that the identity of the requester, their mode of engagement, or any practices do not impinge on the requirements to make a decision that is appropriate under the OIA and communicate it to the requester <i>'as soon as reasonably practicable'</i> .
28	Agencies should ensure consultation with requesters takes place at an early stage to identify the information being sought, or before refusing to make information available because of the collation and research challenges.
29	Agencies should review their charging policies to ensure that they do not exempt certain types of requesters from the application of the OIA's provisions.
30	The Ministry of Justice should review and update its charging guidelines.
31	The Ministry of Justice, in collaboration with the SSC and Archives New Zealand, should develop a model information search policy for agencies to apply.
32	Agencies should publish their OIA policies including how they interpret the <i>'no surprises'</i> principle and record how they apply this to individual requests.
33	My Office should develop and publish a model protocol on agencies' consultations and briefings on OIA requests with Ministers' offices, and monitor its application. The development of this protocol should be done in consultation with the SSC, Cabinet Office, Department of Prime Minister and Cabinet and the Ministry of Justice.
34	The SSC should consider how this model protocol may be linked to a Code of Conduct for ministerial officials/political advisors.
35	Agencies should review their policies and tools available for staff to ensure they capture the legal requirements for responding to requests for information that may be received and replied to via email or by phone.
36	Agencies should strengthen their procedures for considering, documenting and explaining to requesters the public interest factors considered when making a decision whether or not to withhold information under section 9 of the OIA.

## Performance monitoring and learning

37	My Office, in consultation with the Ministry of Justice and the SSC, should develop a suite of performance measures for agencies to apply to their official information activities (including proactive disclosures).
38	Agencies should ensure they are counting their OIA workload and compliance rates accurately.
39	Agencies should separately report on their Minister's OIAs or PQs or ministerial correspondence rather than in the one performance measure.
40	Agencies should ensure they have a fit for purpose OIA logging and tracking system which is easy to use and actively monitored.
41	Agencies should record the final decision on an OIA request and if it is to refuse, the basis for that decision, including the outcome of any consultations involved.
42	Agencies should ensure their chief executive and senior leadership team receive regular reporting on compliance capabilities in handling OIA requests, apparent themes or trends in the requests being received, sensitive issues and proactive disclosures.
43	Agencies should ensure any Ombudsman decisions are shared and discussed openly with OIA practitioners in the agency.
44	My Office should work with agencies to develop a standardised model for data collection of OIA requests to enable high quality analysis and compliance.
45	My Office should ensure its early resolution process is implemented and works effectively for the majority of official information complaints we receive.
46	My Office should provide updated OIA guidance to agencies, and continue to provide training and assistance to agencies in developing OIA policies and procedures.
47	My Office should develop a maturity model and associated resources based on the findings from this investigation to enable agencies to self-assess performance and capabilities.
48	My Office should conduct regular own-motion investigations into agencies' OIA compliance and practices and report publicly.

## Introduction

The OIA was passed into New Zealand law on 17 December 1982. It established the principle that government information shall be made available unless there is good reason for withholding it. In doing so, it reversed the presumption of secrecy in the Official Secrets Act 1951 (which it repealed). The then Prime Minister Rt Hon. Rob Muldoon referred to the OIA as a '*9 day wonder*',<sup>4</sup> as he did not think it would change much in the way the Government operated. The Minister of Justice who promoted it at the time, Hon. Jim McLay described it as '*one of the most significant constitutional innovations*'<sup>5</sup> in decades.

Since its introduction in 1982, the OIA has made a major contribution to enabling access to official information for New Zealanders. It has contributed to a shift towards greater openness and transparency by government agencies in their work and increased public participation in the making and administration of laws and policies, compared with how agencies operated under the official secrets regime. It has also led to greater accountability in the conduct of public affairs.

However, the effective operation of the OIA by agencies that must comply with its provisions has also been the subject of significant challenges, particularly in recent times as a result of the matters set out below.

- The evolving environment in which government agencies operate.
  - In 1993,<sup>6</sup> New Zealand adopted the mixed member proportional electoral system which has a number of defining characteristics such as:
    - › political parties ranking their candidates on a party list, influenced by their abilities, performance and reputation; and
    - › the requirement to negotiate and manage relationships with coalition partners.
  - There have been significant changes in the public sector. Machinery of government reforms have seen agencies merge, their functions change, constraints placed on their budgets and resources and the outsourcing of work and services to the private sector. There has been a high turnover of personnel, a loss of institutional knowledge and new expectations as to how government agencies should to carry out their work.
  - The evolution of the media industry from a daily news cycle to one which operates 24 hours a day, 7 days a week, accompanied by a proliferation of mobile devices and social media sites providing the ability to capture, share and receive information almost immediately and express and disseminate opinions widely and unpredictably within minutes.
- The rapid pace of change in technologies.

Since its introduction in 1982, the OIA has made a major contribution to enabling access to official information for New Zealanders.

4 Gilling, B. *The Ombudsman in New Zealand*. Wellington, Dunmore Press, 1998. p.91.

5 Hon J K McLay (23 July 1981) 439 NZPD 1908.

6 The binding referendum was held on 6 November 1993 with the first MMP elections held on 12 October 1996.

- Agencies are now able to receive, create, use, manipulate and store information electronically. This has given rise to challenging issues in terms of information management and the ability of agencies to identify and extract information in response to requests. At the same time, it has also greatly reduced many of the costs involved in assembling and publishing information.
- The public are able to make requests for information more easily, can choose to obtain it in a wider variety of formats and have higher expectations of agencies' capabilities to respond.
- The complexities of the interaction with other legislation and related Government policies and initiatives, such as:
  - the Privacy Act 1993;
  - the Public Records Act 2005;
  - the Declaration of Open and Transparent Government;
  - the NZ Government Open Access and Licensing Framework;
  - the Open Government Information and Data programme;
  - the New Zealand Data and Information Management Principles;
  - the New Zealand Data Futures Partnership; and
  - the Open Government Partnership.

The OIA was amended in 1987, had certain rights of access to personal information shifted to the Privacy Act in 1993, and has been reviewed twice by the Law Commission in 1997 and 2012,<sup>7</sup> which led to a small number of amendments to the Act in 2003 and 2015. Overall, it has remained a stable piece of legislation for over 30 years. No New Zealand Government has attempted to make changes to the OIA which weaken the rights of the public.

However, in recent times I have been aware of growing concern and criticism about practices perceived to have developed within government agencies when dealing with requests for official information under the Act. These took many forms including:

- complaints and anecdotal reports to my office that requesters were being treated differently because of who they were, particularly members of the media, politicians, political party research units and special interest groups;
- media reports<sup>8</sup> that the application of the 'no surprises' principle was making it harder for requesters to obtain access to official information;
- allegations that agencies' processes for responding to OIA requests had been

7 Law Commission, *Review of the Official Information Act 1982*. (NZLC R40, 1997) and Law Commission, *The Public's Right to Know*. (NZLC R125, 2012).

8 Fisher, D. 'OIA a bizarre arms race'. *New Zealand Herald*, 23 October 2014. Retrieved on 23 November 2015 from [http://www.nzherald.co.nz/opinion/news/article.cfm?c\\_id=466&objectid=11347187](http://www.nzherald.co.nz/opinion/news/article.cfm?c_id=466&objectid=11347187)

circumvented for political gain,<sup>9</sup> and

- media reports<sup>10</sup> of the current Prime Minister's public comments about the government's approach to responding to requests for official information in a timely manner.

These have the potential to erode public trust and confidence in the effective operation of the OIA.

As a new parliamentary term commenced in late 2014, I considered it timely to review OIA practices across a range of central government agencies, and to select a small number of agencies to assist. Therefore, on the eve of the 32<sup>nd</sup> anniversary of the OIA in New Zealand, 16 December 2014, I announced my intention to investigate government practices in administering the Act under section 13(3) of the OA.<sup>11</sup>

## Objective

The objective of this investigation was to:

- examine the attitudes, policies, practices and procedures adopted by government agencies generally, in order to establish how well they were complying with the requirements of the OIA;
- identify good practices, areas of weakness or vulnerability and practices that could give rise to non-compliance; and
- recommend improvements where needed.

It is important to be clear that my investigation has not involved a re-examination of individual decisions made by the agencies or my Office in relation to specific requests for official information.

## Methodology

The investigation was carried out between December 2014 and November 2015. It was not practicable, nor did I consider it necessary, to examine the practices of all government agencies subject to the Ombudsman's jurisdiction to gain a general understanding of how they were implementing the OIA. Rather, I advised 12 central government agencies<sup>12</sup> that they had been selected for this investigation as being

9 Hager, N. *'Dirty Politics: how attack politics is poisoning New Zealand's political environment.'* Nelson: Craig Potton Publishing, 2014.

10 Radio New Zealand *'PM admits Govt uses delaying tactics'*. 16 October 2014. Retrieved on 23 November 2015 from [www.radionz.co.nz/news/political/257009/pm-admits-govt-uses-delaying-tactics](http://www.radionz.co.nz/news/political/257009/pm-admits-govt-uses-delaying-tactics); New Zealand Taxpayers' Union, *'Prime Minister's OIA Admission Disturbing'*. 16 October 2014. Retrieved on 23 November 2015 from <http://www.scoop.co.nz/stories/PO1410/S00167/prime-ministers-oia-admission-disturbing.htm>

11 Office of the Ombudsman. *'Chief Ombudsman launches major review of OIA practices'*. 17 December 2014. Retrieved on 23 November 2015 from <http://www.ombudsman.parliament.nz/newsroom/item/chief-ombudsman-launches-major-oia-review-in-the-public-sector>.

12 Accident Compensation Corporation, Department of Corrections, Ministry of Education, Ministry of Foreign Affairs and Trade, Ministry of Health, Ministry of Justice, New Zealand Customs Service, New Zealand Defence Force, New Zealand Transport Agency, Ministry of Social Development, Ministry of Transport, State Services Commission.



representative of current central government agencies':

- understanding of the OIA;
- processes developed to meet compliance obligations; and
- difficulties in meeting their OIA obligations and the reasons for these difficulties.

I also anticipated that my investigation would assist these agencies to identify where they may be vulnerable and could (and should) improve in order to discharge their OIA responsibilities more effectively.

The 12 agencies were selected against the following criteria:

- agencies that were subject to the OA;<sup>13</sup>
- size of agency according to the number of full time equivalent (FTE) employees;
- number of OIA requests received per year (where data exists);
- number of OIA complaints to the Ombudsman;
- number of OIA delay complaints upheld by the Ombudsman;
- length of time taken to respond to OIAs (where data exists);
- broad coverage of the core public sector; and
- inclusion of at least one agency that has been cited for embodying OIA good practice, as well as those cited for poor practice.

In addition to investigating the 12 selected agencies, I also sought relevant information from other agencies subject to the OIA.

The investigation involved seeking information via a survey of 75 national-level central government agencies (including the 12 selected agencies) and 27 Ministers' offices<sup>14</sup> that are subject to the OIA and against whom my Office has received 10 or more OIA complaints.<sup>15</sup>

The survey was conducted in two parts between December 2014 and April 2015 and sought details about the agencies':

- OIA policies, procedures and practices;
- organisational structure, resourcing and staff training;
- performance measures, monitoring and data collection;
- proactive disclosure and stakeholder engagement programmes; and

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13 This review is being conducted of my own motion pursuant to the powers given to an Ombudsman under the Ombudsmen Act 1975 (OA). *'I am not able to investigate under the Ombudsmen Act the actions of the New Zealand Police or Ministers.'*

14 The full list of agencies is set out in Appendix 1.

15 If the agency had existed for less than 5 years, then an average of at least 2 complaints per year of existence qualified it for inclusion in the survey.

- information management and record keeping systems.

In addition to the 12 selected agencies, the 90 agencies (including Ministers) who participated in the survey were asked to provide this information pursuant to section 19 of the OA as third parties to my investigation.

The 12 selected agencies' responses to the survey were assessed against the requirements of the OIA. Where the legislation states that the agency must meet a particular requirement, this was considered to be an auditable element of compliance with the legislation. Where, as a matter of good public administration (rather than as a legal duty), the agency would have been expected to have put in place systems, policies or practices to enable it to meet its obligations under the OIA, a qualitative assessment of the extent to which the agency had done so was undertaken.

Between July and November 2015 additional evidence was gathered from the 12 selected agencies through the following processes:

- on-site visits to the agencies;
- formal interviews and discussions with relevant staff<sup>16</sup> about their experiences in applying the OIA;
- surveys of requesters who had engaged with these agencies;
- surveys of public servants and others who had worked in the agencies;
- examination of the agencies' website content;
- a review of the agencies' records, reports and performance measures;
- a review of the agencies' internal resources such as intranet content, information and data collection systems;
- examination of the agencies' corporate documentation such as business plans, training programmes and materials, position descriptions and key performance indicators, policies and procedures;
- a review of sample OIA request files including correspondence between agency officials and others in the development of responses; and
- a review of sample communications and reports between agencies and their Minister's office about OIA requests.

Overall, the agencies involved were co-operative. In October and November 2015, the public were invited to comment on their experiences and perception of the operation of the OIA in the New Zealand public sector via a series of surveys. Before they were launched, I sought comments on the draft questions from international experts on freedom of information<sup>17</sup>, and amended them in light of the feedback received.

<sup>16</sup> Relevant staff included chief executives, their deputies and general managers as well as those within the agencies who were responsible for responding to official information requests and media enquiries; stakeholder engagement; strategic planning and operational performance; information management; human resources workforce planning, staffing and training; frontline reception; legal; policy; and ministerial consultations.

<sup>17</sup> Professor Alasdair Roberts, Professor of Public Affairs at the Truman School of Public Affairs, University of Missouri and Maurice Frankel OBE, Director, Campaign for Freedom of Information.

- The first survey asked for the public's experiences of making requests to the 12 selected agencies specifically. I received 87 completed survey responses.
- The second survey asked the public for their experiences of making requests to central government departments and agencies' generally and sought their perceptions of agency approaches to openness. I received 69 completed survey responses.
- The third survey sought the experiences and perceptions of those who work or had worked in government agencies - both employees and contractors. I received 996 completed surveys.

The surveys could be completed on-line via the Ombudsman's website or provided to me in hard copy. The public were also given the option of making a separate submission about a specific issue of OIA practice if the survey format was not suitable.

I asked the 12 selected agencies to advertise our surveys on their own websites and intranets. All but one Chief Executive agreed to do so. I was disappointed to receive advice from the Office of the State Services Commissioner that the Commissioner did not agree to advertising my surveys on the SSC's website and intranet. As a result, it was not surprising that I received no responses from current or former employees or contractors from the SSC to inform this investigation. When I asked the Commissioner about this, he told me that he had concerns about the quality of the survey: *'In particular, parts of it contained leading questions which in my view may well lead to unduly negative and unbalanced survey results'* and this was the reason why he had decided not to publicise the surveys on SSC's website.

Members of the media, including the parliamentary press gallery and the leaders of all the political parties in parliament were also invited and encouraged to make submissions about the successes and challenges they had experienced in accessing official information from government agencies.

Oral and written submissions were received from a number of journalists, union representatives and academics. Meetings were held with opposition party researchers, current and former ministerial/political advisors and Prime Ministerial chiefs of staff and Ministers.

My findings and recommendations relate to five key areas that have an impact on OIA compliance in government agencies, namely:

- Leadership and culture
- Organisation structure, staffing and capability
- Internal policies, procedures, resources and systems
- Current practices
- Performance monitoring and learning

Where individual agencies were identified in my report, I provided them with the opportunity to review and comment prior to it being finalised.

This report is the result of my enquiries and the further comments I have received.

My findings and recommendations relate to 5 key areas that have an impact on OIA compliance capability in government agencies, namely:

1. Leadership and culture
2. Organisation structure, staffing and capability
3. Internal policies, procedures, resources and systems
4. Current practices
5. Performance monitoring and learning



## Leadership and culture

The enactment of the OIA in 1982 reversed the presumption of secrecy of official information under the Official Secrets Act 1951 to one of availability *'unless there is good reason for withholding it.'*<sup>18</sup> Parliament's intention was to promote openness and accountability within public sector agencies and enhance public participation in the making and administration of laws and policies by the government, whilst also enabling the withholding of official information that ought to be protected, consistent with the public interest and personal privacy.<sup>19</sup>

However, simply having the OIA in place does not, of itself, guarantee these outcomes. Achieving the purposes of the OIA depends largely on the attitudes and actions of Ministers, chief executives, senior managers and officials within agencies who administer the Act. In particular, the actions and expectations need to be more than simply minimum compliance. Ministers, chief executives and senior managers should take the lead in not only requiring and championing consistency with the principle and purposes of the OIA, but also promoting them.

When it is clear to staff that their leaders respond to requests for official information positively and view it as an opportunity to operate in a more transparent, engaging and accountable manner, they will follow. In other words, the environment that is created, led, managed and supported by senior managers, chief executives and Ministers will, in my view, determine the degree of compliance and good administrative practices operating within an agency.

Achieving the purposes of the OIA depends largely on the attitudes and actions of Ministers, Chief Executives, senior managers and officials within agencies who administer the Act.

<sup>18</sup> Official Information Act 1982, s 5.

<sup>19</sup> Official Information Act 1982, s 4.

Conversely, if the leadership does not demonstrate or tell its officials regularly:

- what it expects;
- how it wants them to operate; and
- how accessible, helpful and open the agency should be in its dealings with the public and key stakeholders seeking information,

the effective operation of the OIA will be limited and the principle and purposes of the Act undermined. Senior leaders' attitudes are crucial to compliance and good practices operating in an agency. A critical area of my investigation therefore focused on:

- the attitudes and level of commitment agency leaders (Ministers, chief executives and senior managers) were perceived to have to the concepts of openness, accountability and transparency and engaging with the public;
- whether agency staff considered their leaders promoted a culture that supported compliance with the OIA and encouraged openness about work and activities; and
- the challenges these leaders faced in their role and how these were managed.

I also considered the specific leadership roles the SSC and Ministry of Justice had with regard to the OIA.

- The Danks Committee<sup>20</sup> saw the SSC had a key role under the proposed OIA to 'stimulate change in public sector attitudes and practices' and to:

*...work with departments and agencies to develop systems and standards which can help them carry out their responsibilities under the new legislation and advise on mechanisms, develop training programmes and co-ordinate the preparation of first-line information aids such as directories of Government organisations and their functions and powers.*

However, since the enactment of the State Sector Act 1988, the role of the SSC to provide oversight and guidance has been constrained, with central government agencies being provided extensive autonomy to manage their own budget and operate their own systems.

- The Ministry of Justice has been responsible for administering the OIA since 1982. In practice this has meant that the Ministry must be consulted about proposed legislative amendments to the OIA and take the lead role in issuing any drafting instructions. It also has two functions specifically set out in the OIA.
  - Section 20 requires that it publishes at least every two years a *Directory of Official Information* that contains details about each department and organisation subject to the Act and the information they hold; and

The environment that is created, led, managed and supported by senior managers, chief executives and Ministers will, in my view, determine the degree of positive compliance and good administrative practices operating within an agency.

<sup>20</sup> Committee on Official Information. *Towards Open Government*. Wellington: Government Printer, 1981.

- Section 46 provides the Ministry with a discretion to advise or assist a department or organisation to act in accordance with the OIA.<sup>21</sup>

Finally, if the purposes of the OIA are being promoted and supported in an agency and an open and transparent culture genuinely exists, the need to make OIA requests should be more of an exception rather than the norm for people wanting access to information about the government's activities. My investigation therefore included consideration of the circumstances in which agencies were not only willing to release and publish information proactively to meet the public interest and citizens' needs, but also the extent to which this was actually occurring and the level of deliberate planning that was involved.

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<sup>21</sup> These functions were transferred from the SSC in 1989.

## Key indicators of good practice in leadership and culture

Ministers, chief executives and senior managers can demonstrate their leadership in various ways. Key indicators of good practice are set out below.

- ✓ The relevant Minister, chief executive, senior managers and leaders are seen to routinely demonstrate a commitment to their agency meeting its OIA obligations and foster a culture of openness about the work of the agency, for example by:
  - demonstrating clear knowledge and support of the OIA's requirements;
  - making clear, regular statements to staff and stakeholders that support the OIA's principle and purposes and reminding staff of their obligations;
  - requiring training and regular refresher courses for staff;
  - encouraging staff to identify areas for improvement and providing the means for suggesting and implementing them when appropriate; and
  - making examples of good practice visible (within the agency and externally).
- ✓ The agency has a strategic framework which gives effect to a commitment to promote OIA compliance, good practices, a culture of openness and continuous improvement, and which is supported by operational plans, work programmes, resources and reports to senior management.
- ✓ The chief executive/senior leadership team oversees the agency's practices and compliance with the OIA, the effectiveness of its structures, resources, capacity and capability via regular reporting. Any issues are actively considered and addressed.
- ✓ The agency has established an appropriate framework for promoting an OIA culture.
  - Individuals and committees in leadership roles have been commissioned to take up an active role in the management of information.
  - A senior manager has been assigned specific strategic responsibility and executive accountability for OIA practices including proactive disclosure.
  - Senior managers have accountabilities for OIA compliance.
  - Decision makers are given appropriate delegations and are trained on agency policies and procedures and OIA requirements.
  - Managers report routinely on OIA requests and compliance issues (which go beyond the timeliness of the response).
- ✓ The agency has an internal culture open to the release of information (which extends beyond those who have the primary responsibility for handling OIA requests) whereby all staff:

### Excellence in OIA Leadership and culture

- ✓ The Minister, chief executive and senior managers of an agency actively and visibly promote a culture of positive OIA compliance and good administrative practices in order to achieve the legislation's purposes as set out in section 4.
- ✓ The agency has a strategic framework established to foster a culture of openness that promotes OIA compliance, good practices and continuous improvement which is supported by operational plans, work programmes, resources, and reporting to senior management.
- ✓ Staff are comfortable proactively identifying areas for continuous improvement in the systems and practices that support and complement the operation of the OIA in the agency, and are confident that useful suggestions will be acted upon.
- ✓ The agency ensures detailed up-to-date information is readily available to the public on what official information the agency holds and how it can be accessed or requested by the public and its stakeholders. This is regularly reviewed taking into account the needs and expectations of the public and other stakeholders.
- ✓ The agency has a proactive disclosure and engagement strategy with active supporting programmes, that causes information to be published regularly which is well signposted.

- are trained to the appropriate level for their job on OIA policies and procedures and understand the legal requirements so that they can apply them to their work;
  - are encouraged to identify opportunities for improvement in the agency's practice (including areas where proactive disclosure can be increased) and have seen them considered and where appropriate implemented and documented in relevant policies and procedures; and
  - have compliance with the OIA in their job descriptions, key performance indicators, routine reports to managers and performance reviews and professional development plans.
- ✓ The agency has a visible and explicit statement of its commitment to openness and transparency about its work (including current and planned activities).
  - ✓ The agency recognises and encourages participation and access to information by the public and stakeholder groups in its strategic and communications plans.
  - ✓ The agency provides detailed up-to-date information for the public (which is regularly reviewed) on:
    - what official information it holds;
    - how it can be accessed or requested by the public and its stakeholders;
    - how to seek assistance;
    - what the agency's OIA policies and procedures are (including charging); and
    - how to complain about a decision.
  - ✓ The central access points for the public to request official information:
    - are easy to find;
    - cater for people requiring language assistance or who have hearing, speech or sight impairments;
    - cater for frequent requesters; and
    - are regularly reviewed and updated.
  - ✓ The agency actively assists people to identify and access information.
  - ✓ The agency has an active programme of proactive disclosure and stakeholder engagement which includes two-way engagement where the agency seeks and listens to the public's information needs such as via:
    - regular stakeholder meetings and surveys;
    - reviewing and analysing requests and media logs; and
    - reviewing and analysing website searches,



and responds by proactively disclosing information the public wants and needs in a timely way.

- ✓ The agency publishes information regularly which is well signposted about:
  - the agency's role, responsibilities, functions and services;
  - the structure of the agency including various divisions or groups;
  - internal rules and policies, circulars and guidelines relating to decisions or recommendations that will affect members of the public;
  - details of current or planned policy/work programmes, including background papers, options, cabinet papers, consultation documents;
  - corporate information relating to the expenditure, procurement activities, auditing reports and performance;
  - monitoring data and information on matters the agency is responsible for;
  - information provided in response to OIA requests; and
  - other information held by the agency in the public interest.
- ✓ The agency makes information available in different formats, and open file formats.
- ✓ The agency's position on copyright and re-use is clear.
- ✓ The public and the agency's other stakeholders have a perception that the agency is open and transparent.

## Findings

### Setting the tone from the top

#### Ministers

None of the officials interviewed during this investigation could identify any key statements made by their Ministers publicly supporting the operation of the OIA. However, many officials and members of the public and media recalled the following widely reported statement made by the Prime Minister on 16 October 2014:

*Sometimes we wait the 20 days because, in the end, Government might take the view that's in our best interest to do that.<sup>22</sup>*

I am still regularly asked to comment on the Prime Minister's statement, despite the remark being made over a year ago. At the time it was made, my Office contacted the Prime Minister's office about the statement and received an assurance that the Prime Minister and his office did follow proper processes when managing OIA requests. I recently received a letter from the Prime Minister advising me that:

*It has always been my expectation that Ministers and Government agencies will meet their statutory obligations under the [OIA].*

My concern is that public statements from our leaders such as that made by the Prime Minister last year, without prompt public correction, creates an enduring perception that the current Government is not committed to the legal requirements nor the principle and purposes of the OIA. It creates doubt and suspicion amongst the public and media commentators that their requests for access to information about the government's activities may not be responded to appropriately. In short, it erodes trust. It suggests that the current Government leadership is not genuinely committed to openness and transparency, and enabling the public to have timely access to information. It also could be interpreted by government agency chief executives and those in leadership positions that non-compliance with the legal requirements in the OIA for responding to requests may be acceptable, and even encouraged, when political interests are involved.

I note that on 16 June 2015, the Prime Minister did make the following statement in the House in response to a written question querying his expectation of a Minister to comply with the time limit and other decision-making requirements contained in the OIA:

*I expect all Ministers to comply with statutory requirements.<sup>23</sup>*

Given the mixed messaging government agencies and the public have been receiving from Ministers and the poor perception of their commitment to the OIA it can create, a key focus in my interviews and this investigation was to determine the

22 Radio New Zealand 'PM admits Govt uses delaying tactics'. 16 October 2014. Retrieved on 23 November 2015 from [www.radionz.co.nz/news/political/257009/pm-admits-govt-uses-delaying-tactics](http://www.radionz.co.nz/news/political/257009/pm-admits-govt-uses-delaying-tactics)

23 Response to Question for written answer 7533 (2015).

actual expectation chief executives believed their Minister(s) had of them and their agency in meeting their OIA obligations in practice.

I met with the chief executives<sup>24</sup> of the 12 selected agencies. All advised me that they believed their relevant Minister was not only aware of the governing principle of availability, the purposes of the OIA and the statutory time limit requirements, but that they also understood the power and utility this legislation had to engage and inform the public on the activities in their portfolio. All the chief executives I spoke to were able to recall conversations with their Minister(s) where they had expressly discussed ensuring compliance with the OIA in their agency. Many noted that the procedures for engagement and advice on OIA requests their agency received were discussed at their first meetings with their Minister(s). However, some of those procedures have created challenges for some of these agencies and made them vulnerable to not achieving compliance (which I discuss in more detail in the **Current Practices** chapter of this report). When I surveyed current and former workers in government agencies, 54% did not know whether their Minister was pro-disclosure, and 67% did not know whether their Associate Minister was pro-disclosure.

Nonetheless, I am satisfied that those in leadership positions in agencies do understand the OIA's principle, purposes and core requirements, and they advised me that their Ministers expect them to act in accordance with these. Lack of awareness and understanding at their level would therefore not seem to be a reason for any non-compliance occurring within an agency.

## Chief executives and senior managers

I am satisfied that all chief executives and senior managers interviewed understand most of their obligations under the OIA, the value of having it operate effectively and the importance of fostering a culture whereby staff are supported and encouraged to administer the OIA consistently with its principle and purposes. Various chief executives advised me:

- *Compliance with the OIA can be a tool for effective government. It ensures strong, accountable institutions which will encourage others to invest in New Zealand and grow the economy. Compliance can be a political incentive in itself.*
- *Chief Executives of government agencies have a role to protect the constitutional importance of the OIA. Our actions should not undermine but rather promote this important piece of legislation. We are the custodians of it and must be careful to conduct our business with deep regard to the constitutional importance of this legislation.*
- *I want my agency to be (and be considered to be) more open, accessible, transparent and accountable ... The OIA is a tool for building trust and confidence. It's a vehicle that can be used to demonstrate culture and messages from our leaders that providing access to information about our work is core business. How well we do here impacts on our reputation.*

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24 One Chief Executive was unable to meet and nominated a senior manager to meet with me instead.

However, most could not point to bold visible statements they had made (either internally to staff or publicly) of their commitment to the OIA and to openness about their agency's work and activities. I note a number of senior managers did not consider a lack of such visible statements were necessarily reflective of a lack of commitment to the requirements of the OIA. One senior manager stated:

*Culture comes from behaviour, modelling day to day interactions and leadership – not through organisational artifacts.*

However, when I surveyed current and former workers in government agencies:

- 43% said they did not know whether their chief executive was pro-disclosure of official information; and
- 40% said they did not know whether their senior managers (deputy secretaries and general managers) were pro-disclosure of official information.

Furthermore, a lack of bold visible messaging will not enable the public to have trust and confidence in how their requests for access to official information will be treated – especially when there is mixed messaging from the Government's leadership and social media makes it very easy to find statements, commentary, opinions or tweets that suggest otherwise.

My investigation did however, find evidence of good practices that were encouraging:

- The Chief Executive of the New Zealand Customs Service via one of her weekly bulletins, advised staff about their obligations under the OIA and promoted the publication of articles reinforcing this message on its intranet. I note one article included this message to staff:

*...the OIA is a constitutionally important piece of legislation that has a significant impact on Customs and the information we hold. It was designed to make government activities more open and transparent to the public. ... The OIA therefore has two very important roles. It provides for proper access to official information and it protects official information to the extent consistent with the public interest and the preservation of personal privacy... Customs gets a significant number of OIA requests each week and so it is important that staff know how to properly respond to such requests. Providing information should be viewed as a constitutionally important role rather than a chore and is a key part of [our] operations and role in the public sector. However, not knowing the process and missing the strict statutory timeframes under the OIA can lead to complaints to the Ombudsman as well as have a negative impact on Customs' reputation with the general public. This means it is important that we all manage the information we create as part of our work here so that it is easily retrievable when dealing with OIA requests.*

A lack of bold visible messaging will not enable the public to have trust and confidence in how their requests for access to official information held by an agency will be treated.

While this arose after a number of media reports suggested there was a less positive culture operating within the agency, this was a good initiative. However, I note this message was published almost 18 months ago and it would be timely to repeat it.

- ACC had reviewed its statement of values to ensure it included the following:

***Fair and open***

*This value is about the management of 'yes' and 'no' – making sure people understand the reasons behind our decisions and our desire to be fair in all our dealings with our customers. It entails having the flexibility to make judgment calls to suit individual cases. And it's about people knowing exactly what they're entitled to from ACC.*

- The Ministry of Foreign Affairs and Trade requires all its employees to sign a *Code of Conduct Declaration* whereby they acknowledge that:

*3.29 The general principle of the Official Information Act 1982 is that information should be made available to New Zealanders on request, unless there are good reasons for withholding it [which are] detailed in the Act.*

Perhaps the most pleasing indicator of a growing culture of openness and access to information is the following result from my survey of current and former workers in government agencies, as to their impression as to how the culture is changing in the agency they chose to tell me about.

### Survey results

#### OIA experience of current and former workers in government agencies

Overall, what is your impression of the access to information culture of the agency, and has it changed over time?



This is also consistent with the meetings I had with chief executives about their agency's approach to demonstrating its commitment to the principle and purposes of the OIA. One Chief Executive advised me:

*There has been a philosophical change within the organisation that the Minister is comfortable supporting ie, that the OIA is not just a piece of legislation that should be complied with, but it is also a core tool/mechanism for engagement. I see there is value in providing more information than is being asked for, more context to guide the conversation around the issue that information is being sought about. Previously responding to OIAs was very much thought of as a defensive exercise and requests viewed as challenges to the work of the agency. In the last year, we have moved to an approach of promoting transparency as much as possible, no matter whether it is good news or bad news. The agency is maturing in its approach to responding to OIAs. It is better to provide our own context about the work that we do.*

Others said:

- *When I first started, requests were taken literally, narrowly and interpreted strictly and the response was the absolute minimum. But that is a very defensive attitude and one that doesn't achieve much. When you are under attack, you must be active and jump in – release more, give context, publish your story and don't hide it. What have we got to hide? This is what we know, what we do and it belongs to us. I do not believe in one line answers to requests. We should be providing more information and set the information in context.*
- *Ministers are becoming more comfortable and confident that the OIA is a valuable tool for the Government to explain and gain support for policy programmes and enable the public to have trust and confidence in what it is doing. There is real value in doing this well. Responses can demonstrate how the Government is progressing against its priorities. It is a worthwhile tool for Government leaders to promote good decisions and responses.*

However, there is clearly still work to be done. Members of the media advised me:

- *For the story, I wanted to better understand how the system worked. I requested to speak to the policy expert in the area. This was refused and consequently I had to send approximately 20 questions to the [agency], which were then dealt with under the OIA. The response was insufficient and partially incorrect, and I ended up with having to return the questions two more times, before finally giving up without the information. This could have been resolved with a 'background' phone call.*
- *Generally speaking, there has been no fundamental shift in the way the public service operates in terms of proactively releasing information. It is astonishing that it is 31 years since the Act came into force and there is no sign of agencies classifying information at the point it is created or received. Not only is the public service not geared towards openness, it has not created sufficient systems to allow citizens to access information which is proactively released. The number of requests made by [our media organisation] each year would be cut in half – at least – were agencies truly engaged with the principles of the Act in a way which sought to create channels by which citizens could access information from the moment it was created or received. ... Key documents should be crafted with the intent of release from the point of creation.*

New Zealand Herald journalist David Fisher also gave a speech last year to public officials in Wellington where he said:

*The difference between when I started 25 years ago and now is astounding when it comes to dealing with the public service. If I was writing a story then which in any way touched on the public's interaction with the government, I would pick up the phone and ring an official. It was really that easy. ... Now, the interviews are gone. We speak to public servants when they have something really good to boast about, or really bad to apologise for. ... The rest of the time we don't really know what the other party is doing. We still need information so we find other ways to get it. Increasingly, as interviews fell away we would send OIA requests. The less you spoke to us, the more we asked for...<sup>25</sup>*

## Leadership agencies

The SSC and the Ministry of Justice have leadership roles in respect of supporting the effective administration of the OIA and promoting the Act's purposes of openness, accountability and enhanced public participation. However, I do not consider that either agency has fully realised their leadership role.

### State Services Commission

The SSC describes its purpose, in its most recent four year plan, as to 'lead a high-performing State Services that New Zealanders can be proud of and trust to deliver outstanding results and value for money'.<sup>26</sup> It says:

*Achieving its ambition to lift the performance of the State Services will require the State Services Commission (SSC) to increase collaboration across agencies to improve customer experience and deliver results for Government. SSC's role is to work with leaders across the State Services to change the way agencies think, organise and operate. We're shifting our approach, from setting policy and the framework for change, to assisting agencies to work at pace across agency boundaries to deliver improved customer services and results.<sup>27</sup>*

The Commissioner advised me that his agency has provided support and assistance to officials working in other agencies when they were having difficulties in discussing proposed OIA responses with their Minister's office. Assistance usually took the form of privately discussing the challenges officials were facing. On occasion, it has extended to providing personnel resource support and legal advice. However, this was not on a regular basis. Many senior officials I talked with during the course of my investigation who had experienced challenges with OIA requests, and in particular with their Minister's office, did not access the SSC for support but preferred to seek advice from their peers in other agencies on how to manage issues.

The Commissioner confirmed there was a gap in the current system of support and leadership for agencies when they experienced challenges that the SSC

<sup>25</sup> David Fisher's speech was published online a week later on 23 October 2014 [www.nzherald.co.nz/opinion/news/article.cfm?c\\_id=466&objectid=11347187](http://www.nzherald.co.nz/opinion/news/article.cfm?c_id=466&objectid=11347187)

<sup>26</sup> State Services Commission, Four Year Plan 2015-2019, page 1.

<sup>27</sup> Ibid.



ought to fill, but it has been constrained from doing so due to limited resources. Since the passage of the State Sector Act, there are no longer permanent heads of departments. Chief executives are usually on fixed term contracts with performance agreements and accountabilities attached. The Government's recent public sector reform programme '*Better Public Services*'<sup>28</sup> has made machinery of government changes, and requires agencies to take steps to improve their performance and enhance the delivery of their services with reduced resources and within tight financial constraints. Working with agencies on how this can best be achieved when it comes to challenges that arise when responding to OIA requests is a gap that the SSC could, and in my view should, properly fill.

I note that the SSC has issued guidance on its website for agencies on an occasional basis when it sees them facing particular challenges. These include:

- OIA requests for draft reports, correspondence and advice;<sup>29</sup>
- release of official information: guidelines for co-ordination<sup>30</sup> (including consultations and transferring of requests);
- responding to requests during the election period;<sup>31</sup> and
- publication of chief executive credit card, gifts and hospitality expenses.<sup>32</sup>

My investigation has found that agencies are currently finding it challenging to comply with the OIA and would benefit from regular support and guidance from the SSC on issues such as:

- establishing and maintaining effective relationships with Ministers and their advisers in order to comply with the '*no surprises*' principle,<sup>33</sup> whilst also maintaining the independence of the agency's decision-making and compliance with the requirements of the OIA;
- protecting the boundaries between an agency's operational independence and its responsibilities to its Minister; and
- developing for agencies (in consultation with the Ministry of Justice, the Department of Internal Affairs and Land Information New Zealand) the elements of a model strategic framework that promotes the proactive disclosure of official information in order to advance open, accountable and engaged government.

In my opinion, providing this level of support and assistance would be consistent

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28 The Better Public Services Programme was launched by Prime Minister John Key on 15 March 2012 and resulted in amendments to the State Sector Act 1988, the Public Finance Act 1989, and the Crown Entities Act 2004 [www.ssc.govt.nz/bps-background-material](http://www.ssc.govt.nz/bps-background-material)

29 State Services Commission, '*SSC Guidance: Official Information Act (OIA) requests for draft reports, correspondence and advice*'. 10 September 2014. Retrieved on 23 November 2015 from [www.ssc.govt.nz/oia-guidance-sept14](http://www.ssc.govt.nz/oia-guidance-sept14)

30 State Services Commission, '*Release of Official Information: Guidelines for Co-ordination*'. 26 September 2002. Retrieved on 23 November 2015 from [www.ssc.govt.nz/official-information-release-guidelines](http://www.ssc.govt.nz/official-information-release-guidelines)

31 State Services Commission, '*Guidance for the 2014 Election Period: State Servants, Political Parties and Elections*'. 25 February 2014. Retrieved on 23 November 2015 from [www.ssc.govt.nz/election-guidance](http://www.ssc.govt.nz/election-guidance)

32 State Services Commission, '*Disclosure of Chief Executive Expenses*', 30 August 2013. Retrieved on 23 November 2015 from [www.ssc.govt.nz/ce-expenses-disclosure](http://www.ssc.govt.nz/ce-expenses-disclosure)

33 The 'no surprises' principle is articulated in paragraph 3.16 of the Cabinet Manual, [www.cabinetmanual.cabinetoffice.govt.nz/3.5](http://www.cabinetmanual.cabinetoffice.govt.nz/3.5). The principle and how it operates in practice are considered later in this report.

with SSC's purpose and recently stated intentions, and demonstrate it is working to fulfill its leadership role in making the government more open and responsive.

The State Services Commissioner disagrees with this position, and considers that *'it is neither practical nor desirable for the Commission itself to assume responsibility for all systems and processes that operate across the state sector'*. The Commissioner stated the reasons for his view as follows:

*In common with all other State sector entities, the SSC needs to prioritise its efforts on those things it considers will have the greatest impact on our overarching objectives.*

*I recognise that the core issues for agencies working with the Official Information Act is one of guidance and oversight, but this is not the system leadership role that SSC is set up to provide.*

The Commissioner stated, both in discussion with me and in writing that:

*...the State Services Commission is currently not resourced to carry out such a role nor has it been a high priority for us to provide this service to the system. This is an appropriate position to take and it is not our intention to broaden our role into this area in the future unless ministers otherwise determine or resource.*

## Ministry of Justice

The Ministry of Justice is responsible for administering the OIA and has two specific statutory functions under the Act, namely to publish an updated *Directory of Official Information* every two years and provide advice or assistance to agencies to act in accordance with the OIA.

The Ministry has ensured that the *Directory of Official Information* is updated on its website every two years as required by section 20 of the OIA, with the last update published in December 2013. The intention of the provision is that requesters are able to *'obtain information and to effectively exercise their rights under [the OIA]'*.<sup>34</sup> The entry for each agency follows the same format, with information about the agency arranged under the following headings, as applicable:

- Acts administered or relevant Acts
- Functions and responsibilities
- Structure
- Records
- Documents relating to decision-making processes
- Publications
- Future changes
- Contact, including a list of addresses, telephone and fax numbers and electronic information

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<sup>34</sup> Official Information Act, s 20(4).

I have reviewed the content of these entries. The information contained therein is often very limited and unlikely to be of much assistance to requesters wanting to obtain specific official information by way of an OIA request to the agency. Section 20(1) of the OIA requires a more detailed description to be published of the categories of documents each agency holds, as well as:

*...a description of all manuals, and similar types of documents which contain policies, principles, rules or guidelines in accordance with which decisions are made...*

I note section 20(3) of the OIA requires each agency to 'assist the Ministry of Justice' to comply with the requirements for publication of the directory by providing it with relevant and accurate information, and I believe there is a real opportunity for the Ministry to provide detailed up-to-date guidance to assist both agencies and requesters alike. Such guidance could be analogous to guidance found in some freedom of information jurisdictions overseas, on the production of 'publication schemes' documents (which set out the classes of information an agency will make available proactively).

As discussed later in this report, I have found that one of the key challenges that both agencies and requesters currently struggle with is the scope of OIA requests. Requesters often don't know how to articulate what they are seeking due to their limited understanding of what information the agency holds. Agencies are often then struggling with broad, wide ranging requests that are likely to require substantial collation and research to answer. The Ministry of Justice's statutory role in ensuring a quality *Directory of Official Information* that assists requesters in making effective requests is one which I do not consider has currently been fully realised. Clear, detailed guidance on the information agencies should provide for the *Directory* and proactively publish is needed, and production of this would be consistent with the Ministry's role under sections 20 and 46 of the OIA. Modern web and information management technologies should enable this publication to have far greater utility than was possible in paper form in the 1980s.

While I was unable to identify any occasions where the Ministry of Justice provided advice or assistance to an individual agency under section 46 of the OIA, I note that it has been actively working with multiple agencies to improve the public sector's capabilities overall by:

- hosting on-going cross-public sector official information practitioners' forums for agency officials with OIA responsibilities, with a view to establishing a community of knowledge and shared experiences;
- developing a number of practical guidance resources<sup>35</sup> to assist agencies with applying the provisions of the OIA in their day to day work, including:
  - processing a basic OIA request;
  - responding to large and broadly defined requests;
  - contacting people who have requested information under the OIA; and

Requesters often don't know how to articulate what they are seeking due to their limited understanding of what information the agency holds.

35 All finalised guidance resources are now published on the Public Sector Intranet.

- managing OIA requests under the 'no surprises' policy.

The Ministry has also begun a revision of the *Charging Guidelines for Official Information Act 1982 Requests*.

I found some confusion in some agencies about the role of the forums, the Ministry's intentions for them, and who from each agency could most usefully participate. However, I welcome the Ministry's initiative to address the absence of an inter-agency liaison group or community of practice on the OIA. The Ministry is to be applauded for actively working with agencies to provide guidance on areas they find challenging. This is an initiative that should be encouraged and further developed. The Ministry advised me that the development of more guidelines is desirable, but that it is constrained by limited resources. I encourage the Ministry to share the guidelines and tools it has created with the public by publishing them on its website, as this would help to enhance requesters' confidence that the Ministry is working to fulfill its leadership role under the OIA.

## Strategic framework

All chief executives and senior managers advised me that responding to requests for official information is considered part of their core business, and they saw benefits for their agency in increasing the openness and accessibility of information about its work and activities. However, my investigation did not find this sentiment included in any agency's strategic plans or high level business plans that I reviewed. Rather, providing access to information about its work and activities was still seen primarily as a reactive, operational task with the main focus on the efficient processing of requests.

It is therefore not surprising that I was unable to find any senior managers within an agency who had been assigned specific strategic responsibility and executive accountability for ensuring their agencies not only complied with the OIA, but also ensured that information was, where possible, published proactively and made accessible in accordance with a stated strategic intention.

There were certainly roles, responsibilities and delegations assigned to officials within the agencies I investigated to make decisions on OIA requests and ensure day to day compliance, and websites were used to make information publicly available (both of which I discuss in more detail in the **Organisational structure, staffing and capability** chapter of this report). But at a strategic leadership level, most agencies were still at the stage of deciding the extent to which they were willing to be proactively open and accessible about their work and only taking an ad-hoc approach.

For the public, this means that the OIA remains a key vehicle for seeking access to official information about the activities of government. They are dependent on this legislation being administered effectively within an agency to pull the information out rather than have the benefit of agencies voluntarily making information accessible. I note that nearly half (45%) of OIA users who responded to my survey said that they considered *'all government agencies need to publish more information about the work that they are doing'*.

For the public, lack of a strategic framework means that the OIA remains a key vehicle for seeking access to official information about the activities of government.

It is important to note at this stage that I did however, find excellent examples of active development of stakeholder engagement programmes. These incorporated consideration of the types of information certain agencies' key stakeholders might be interested in having access to that could be made available proactively (I discuss this in more detail later in this chapter).

## Accessibility

In addition to the provision of a more useful *Directory of Official Information* discussed above, I also considered whether agencies had generated detailed, up to date information that was readily available to the public about the official information the agency holds, and how it can be accessed or requested. As websites are an integral communication tool between agencies and the public, my investigation involved reviewing the content of agencies' websites and speaking to the officials responsible for managing them.

We all agreed that a website can be a valuable tool for an agency to:

- demonstrate to the public that it understands what they would like to know about its activities;
- explain its functions and operations and the type of information it holds;
- provide detailed, current information about what information it holds and how it can be accessed; and
- enable and promote openness, accountability and genuine public participation in its work and activities.

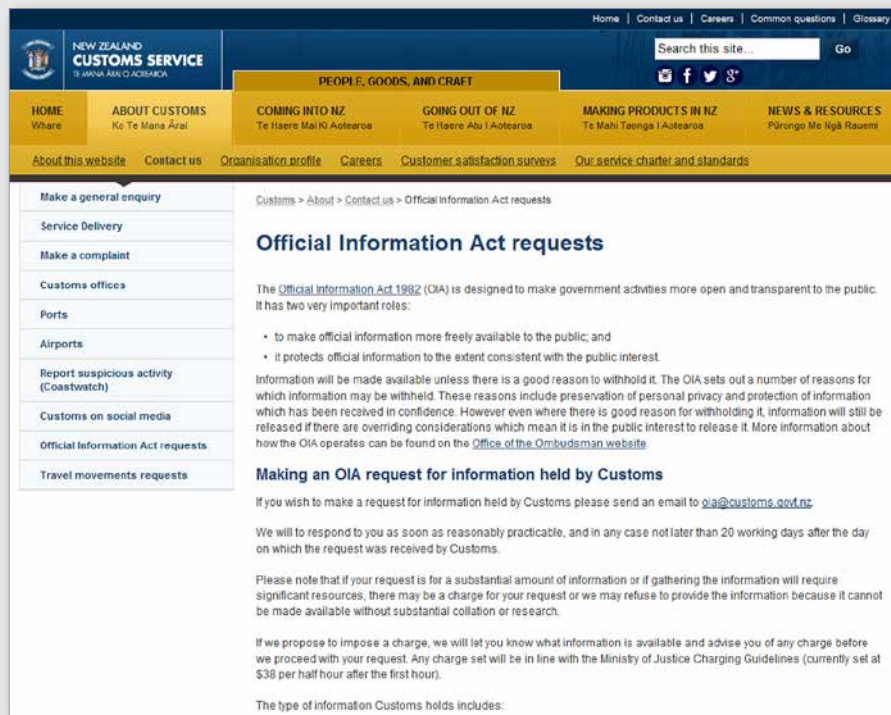
I was therefore disappointed to find that:

- many agencies did not have the basic information on their websites about how to make a request for information, who to contact, and what could be asked for;
- most agencies did not publish on their websites their OIA related policies (such as charging policies) or any guidance on how to phrase requests;
- some agencies pages on making requests for information were buried deep in the website and difficult to find; and
- a number of websites could not support or link to an agency's social media platforms.

I note that a number of agencies were in the process of reviewing and upgrading their website and I did find a number of good examples of website pages that helped the public to make OIA requests.

Many agencies did not have the basic information on their websites about how to make a request for official information, who to contact, and what could be asked for.

## Example of good website information New Zealand Customs Service



### Culture of openness

All officials interviewed saw the value in proactive disclosure for their agency, not only in terms of getting ahead of a wave of requests on an area of obvious public interest, but also in demonstrating a commitment to openness, accountability and a willingness to engage and inform the public about the agency's activities, rather than relying on interpretation or speculation by others. Half of survey responses (50%) that I received from people who work or had worked in government agencies agreed. Some agencies chose to do this by:

- using their OIA responses as a mechanism for disclosing more information to provide context and promote understanding;
- voluntarily releasing and publishing information about projects or activities the agency was undertaking; and/or
- establishing formalised stakeholder engagement programmes.

### Responses to OIA requests

I found widespread evidence of agencies deliberately choosing to provide more information than had been asked for by a requester in order to provide context. This was often done not only at the suggestion of officials within the agency preparing the responses but also as a result of consultations with the relevant Minister's

office pursuant to the agency's interpretation of the 'no surprises' principle. This was pleasing to see, given the rising level of suspicion that responses to OIA requests are not being prepared in the spirit that Parliament envisaged.

I explored with agencies the rationale for deliberately choosing to provide more information than had been asked for by a requester. More often than not, I was advised that this was to provide context and prevent misunderstanding or misinterpretation of the information at issue and/or the agency's activities. However, officials were also aware that once the information was released to the requester, the agency had no control as to how it was used, interpreted or reported (unless conditional release had been agreed). I note a number of agencies such as the Reserve Bank, The Treasury and the New Zealand Transport Agency (NZTA) frequently publish their responses to some OIA requests online, so that they are publicly available to everyone to read, which is to be commended.

However, my investigation also found evidence of attempts by a small number of ministerial/political advisors to limit the scope of requests and change the agency's proposed decision on certain requests for unwarranted reasons, for example:

- *The Minister's office did not want the Ministry to release draft cabinet papers and engagement documents that revealed changes made after they were considered.*
- *The Minister would like us to withhold all drafts because they are insubstantial even though they fall within the scope of the request.*
- *The Minister prefers a blanket approach to withholding briefing papers.*

I discuss my findings about this form of interference in the **Current practices** chapter of this report. At this point however, it is clear such instances are inconsistent with promoting a culture of openness by an agency's leader.

Even if a Minister's office did not support a proposed response of the agency, all the chief executives and agency officials I spoke to confirmed that they understood the law makes it the agency's responsibility to make the final decision and they would be accountable for the decision. Overwhelmingly, the responses I received about this type of interaction were consistent with one Chief Executive's comments:

*It is very clear (and I am very clear) that responding to OIAs is my responsibility and I will be accountable for the response.*

I questioned whether they considered it could be fatal or limiting to their own career to disagree with the Minister and send out a response to an OIA that they had been asked to change. None of the chief executives believed it would be, although some observed that it could make for a difficult and challenging relationship. I was advised by a number of senior officials:

- *When issues arise with the Minister's office on the appropriate response to an OIA request, there is no doubt that at the forefront of an official's mind is the impact this engagement might have on progressing other work, policy programmes that are underway. Medium and long term relationships need to be looked after and managed which means building trust. The nature of the political environment means one bad decision can have an enduring effect.*

I note a number of agencies frequently publish their responses to OIA requests online so that they are publicly available to everyone to read.

- *For a weak CEO, it can run away from them if the Minister or their officials start to bully them and they don't push back but allow it to happen. CEOs must always hold the line – but they must do so elegantly and not be dramatic or necessarily force [the issue] on the spot. They may have to choose their timing and tread carefully as they have a relationship with their Minister to maintain while still doing the job they were employed to do. Mutual trust must be established. Without trust, it just won't work.*

In the examples I viewed, the agency did not alter its final decision so that it was contrary to the OIA's requirements and to the detriment of the requester. While I have no jurisdiction to investigate the actions of Ministers under the OA, I have alerted the Prime Minister's office of this type of pressure occurring. I received confirmation that all Ministers and their staff are reminded regularly of their obligations under the OIA. I have also strengthened my investigation processes to ensure that any such instances are identified and reported.

I found a number of agencies had also established pages on their website which took the form of disclosure logs listing the information that has been released in response to an OIA request. These tended to be updated weekly and were a good way of agencies making requested information available more widely, where it was lawful and appropriate to publish this information. One opposition party agreed in its submission that *'it's useful when agencies proactively publish requests to see what has already been asked.'* Not only did this initiative provide easy, instant access to information already released by agencies and avoid repeat requests, but it also enabled the public to have a greater understanding of what information the agency holds and can be requested.

### **Voluntary release of information**

While there is no legislative requirement to do so under the OIA, many agencies now voluntarily and routinely publish a wide range of information on their website and to the public, including:

- corporate documents such as their Statements of Intent, Four Year Plans, briefings for an incoming Minister, annual reports, operational expenses, gifts and hospitality;
- managerial papers such as planning documents, evaluation and monitoring reports, Performance Improvement Framework reports, internal policies and operational guidelines, and regulatory impact statements; and
- information related to the functions of the agency such as statistics, datasets, policy proposals, discussion and consultation documents, cabinet papers, research papers, investigation reports, articles in journals and other publications.

The depth and variety of such voluntary releases of information vary between agencies and according to their different functions. I note a number of agencies such as the Ministry of Education<sup>36</sup> and The Treasury<sup>37</sup> have pages on their website

36 Ministry of Education, *'Information releases'*. 26 November 2015. Retrieved on 27 November 2015 from [www.education.govt.nz/ministry-of-education/information-releases/](http://www.education.govt.nz/ministry-of-education/information-releases/)

37 The Treasury, *'Information Releases by the Treasury'*. 30 November 2015. Page retrieved on 1 December 2015 from [www.treasury.govt.nz/publications/informationreleases](http://www.treasury.govt.nz/publications/informationreleases)



where they list:

- the information releases they have made;
- when they occurred; and
- where the public can locate the substantive information.

The screenshot shows the Ministry of Education website (education.govt.nz). The header includes navigation links for 'ABOUT US' and 'CONTACT US', and a search bar. Below the header are four main navigation buttons: 'HOME', '0-6 YEARS Early Learning', '5-19 YEARS School', and '16+ YEARS Further Education'. To the right are buttons for 'PARENTS', 'EDUCATION SYSTEM', and 'MINISTRY OF EDUCATION'. The main content area is titled 'Information releases' and contains a list of links to various information releases, such as 'Partnership Schools | Kura Hourua information release' and 'Secretary of Education disclosure of expenses'. A sidebar on the right lists various categories like 'OUR ROLE AND OUR PEOPLE', 'CONTACT THE MINISTRY', 'STRATEGIES AND POLICIES', etc., with 'INFORMATION RELEASES' highlighted.

The Ministry of Transport publishes an *Indicative Publications Timeline* on its website<sup>38</sup> which is updated quarterly and provides the public with the month it plans to proactively release corporate/governance, policy and strategy documents, statistical research and other information.

Many agencies publish data, statistics and regular reports on their websites. For example:

- the Ministry of Health publishes health data and health statistics that is collected and produced by itself and the wider health sector;<sup>39</sup>
- the Department of Corrections proactively publishes quarterly monitoring reports on prison performance and statistics on sentences, orders being served in the community and the offender population; and

38 Ministry of Transport, 'Ministry of Transport Indicative Publications and Engagement Timeline'. 30 November 2015. Retrieved on 1 December 2015 from [www.transport.govt.nz/about/publications/ministry-of-transport-indicative-engagement-timeline/](http://www.transport.govt.nz/about/publications/ministry-of-transport-indicative-engagement-timeline/)

39 Ministry of Health, 'NZ health statistics'. 21 October 2014. Retrieved on 1 December 2015 from [www.health.govt.nz/nz-health-statistics](http://www.health.govt.nz/nz-health-statistics)

- the Ministry of Social Development provides links to data and information releases about social housing.<sup>40</sup>

Proactively releasing information benefits the agency by ensuring the public are kept up to date and accurately informed about its work and activities 'in their own words' and avoiding the need to apply resources to the processing of requests for this information. Requesters enjoy the faster provision of information, and any concerns they might otherwise hold about the actions of the agency due to rumour and speculation may be reduced or avoided.

I was however surprised to learn that not all agencies that had attempted proactive release of information experienced a reduction in the number of OIA requests they received. Rather, many agencies advised that they continued to receive a high number of requests about the particular issue the public wanted to find out about. The benefit of proactively releasing information for these agencies seemed to include:

- a decrease in broad, wide-ranging and repeat requests on an issue;
- an increase in targeted, specific requests for information which made responses easier to prepare; and
- an enhanced reputation for being transparent and open (the New Zealand Defence Force was ranked *'the most transparent and least corrupt in the region'* in a report released at last month's ASEAN Defence Ministers conference in Malaysia).<sup>41</sup>

I also explored the initial reaction and level of acceptance amongst those in senior leadership positions when voluntary release of information was raised within the agency and relevant Minister's office. The response was mixed. I found it was common for final decisions about proactively releasing more information than had been requested under the OIA, or publishing information voluntarily to be taken cautiously, with a degree of nervousness and usually only after wide-ranging consultation with many officials in the agency's communications, policy and legal teams and the Minister's office. This was due to agency perception of misreporting of information that had been previously released and sensational 'gotcha' headlines that agencies believed resulted in information being taken out of context and/or the public being misinformed. The majority of officials consulted during this investigation confirmed that past experiences of how information was treated following release makes it difficult for agencies to encourage their officials to adopt an open attitude and promote proactive disclosure of information.

The submissions I received from members of the media were mixed on this issue. Many agreed that their requests were responded to more cautiously by agencies, but one journalist advised that it was *'very rare for a story to arise from an OIA. OIA tend*

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Past experiences of how information was treated following release makes it difficult for agencies to encourage their officials to adopt an open attitude and promote proactive disclosure of information.

40 Ministry of Social Development, *'Social Housing Purchasing Intentions'*. 15 April 2015. Retrieved on 1 December 2015 from [www.msd.govt.nz/about-msd-and-our-work/work-programmes/housing/purchasing-intentions/index.html](http://www.msd.govt.nz/about-msd-and-our-work/work-programmes/housing/purchasing-intentions/index.html)

41 Transparency International New Zealand, *'New Zealand Defence Force given good marks in just released index'*, 5 November 2015. This index does not relate specifically or solely to OIA responses but considers all ways an agency demonstrates transparency and integrity. Retrieved 23 November 2015 from [www.transparency.org.nz/docs/2015//Defence-Index-Gives-New-Zealand-A-Crimes-Bill-Passed.pdf](http://www.transparency.org.nz/docs/2015//Defence-Index-Gives-New-Zealand-A-Crimes-Bill-Passed.pdf)

*to be pieces in the puzzle.'*

However, I am heartened by the experiences of those agencies that do publish information proactively and would encourage others to learn from their experiences and follow their example, particularly those in leadership roles such as the SSC and the Ministry of Justice.

### **Deliberate and targeted stakeholder engagement**

Processing OIA requests is core business for agencies. One senior manager described it as being:

*...one of the terms of the government's social contract with New Zealanders that allows them to spend their money and make policies and laws which will interfere with their lives. It's a very real mechanism for ensuring the mandate for this amount of power over people in New Zealand is legitimate and applied with integrity.*

However, responding to OIA requests can place a significant administrative burden on agencies. For each request, the OIA expects them to:

- respond within a statutory time limit;
- locate, collate and review all the information requested;
- consider what the impact of release might be;
- seek advice and consult third parties if needed;
- prepare information for release or provide reasons why it won't be made available; and
- ensure requesters are advised of their right of review by the Ombudsman.

The purposes of the OIA make it clear that this was never intended to be the sole mechanism by which the public could find out about the activities of the government. Section 4(a)(i) in particular states that one of the purposes of the OIA is *'to increase progressively the availability of official information in order to enable the more effective participation in the making and administration of laws and policies'*. This does not restrict its scope to availability in response to a direct request, but envisages a progressive opening of the doors into government, whereby both reactive and proactive openness combine to create the necessary environment to facilitate participation.

I was pleased to find that a number of agencies recognised this and had commenced or were in the process of developing detailed stakeholder engagement programmes which involved:

- identifying who their key stakeholders were;
- understanding their needs and expectations including how they wished to be informed of the agency's activities; and
- seeking their input at appropriate stages to ensure a quality outcome.

These programmes were informed by extensive workshops and regular meetings and discussions by agency officials with their key stakeholders about the type of information they would like to access regularly. It also involved monitoring any trends in requests for information and website searches so the agency could understand what the public and their key stakeholders wanted to have access to information on.

Perhaps not surprisingly, I found the chief executives with commercial backgrounds more inclined to prioritise proactive disclosure and engagement initiatives as they were familiar and comfortable with the concept of keeping stakeholders informed and satisfied as a corporate driver.

For government agencies, it is the members of the public that are the government's stakeholders who wish to be kept informed about their government's activities. Yet I note that often neither the general public nor the media were classed as a key stakeholder by agencies when developing these engagement programmes. One media organisation submitted:

*The Act is a significant legislative tool enabling open and transparent government – a cornerstone for a functioning society. There is a close relationship between open and transparent government and another critical cornerstone for a modern democracy – that of a diverse, free and independent media. The Act is a critical part of the media's ability to connect society with open and transparent government.*

For government agencies, it is the members of the public who are the government's stakeholders that wish to be kept informed about their government's activities.

The survey responses I received from OIA users indicated that the public were seeking information from agencies for a range of purposes, but usually for:

- personal interest;
- professional or work purposes;
- reporting on matters of public interest or of interest to the public;
- general curiosity or interest in an issue;
- research; and/or
- meeting a performance indicator.

Common sense, as well as administrative convenience, suggests that agencies should strive to push out to the public as much information as possible of their own volition, without waiting for formal requests from the public for the information. This type of focused engagement<sup>42</sup> with the public and the media should be included in agencies' strategic planning. It would also be consistent with the open government initiatives the Government has committed to, as discussed earlier in this report.

42 Other agencies have conducted this kind of activity on an ad-hoc basis in the past such as:

Department of Internal Affairs, 'Gaming Review and Gambling Act', 2001-2003. Retrieved on 23 November 2015 from [http://www.dia.govt.nz/Pubforms.nsf/wpg\\_CabinetPapers\\_GAMREV?OpenView](http://www.dia.govt.nz/Pubforms.nsf/wpg_CabinetPapers_GAMREV?OpenView)

Ministry of Business Innovation and Employment, 'Review of Financial Markets Conduct Act'. Retrieved on 23 November 2015 from <http://www.mbie.govt.nz/info-services/business/business-law/financial-markets-conduct-act>

## Good example of stakeholder engagement planning Ministry of Transport

The Ministry of Transport has recently developed a stakeholder engagement and communications toolkit which provides staff with a range of tools, advice and templates that can be used when planning engagement or consultation activities and communication initiatives.

When considering what stakeholder engagement meant to the Ministry, it found:

- An underlying principle of stakeholder engagement is that people are given the opportunity to influence the decision-making process.
- Stakeholder engagement should be early, often, open and delivered as widely as possible.
- Stakeholder engagement is undertaken for a variety of reasons; to share, listen, consult, explore or collaborate with stakeholders.
- Stakeholder engagement is the process by which we involve people who may be affected by our decisions, or can influence the implementation of our decisions.
- Stakeholder engagement can take many forms, from an informal contact (like an email discussion), to formal engagement (such as a workshop to discuss a consultation paper).



[www.transport.govt.nz](http://www.transport.govt.nz)

## Recommendations

1	The Prime Minister and his Ministers should issue clear, visible statements of their commitment to the principle and purposes of the OIA and their expectations of their agencies to comply with its requirements.
2	Chief executives and senior managers within agencies should review their policies, value statements, code of conduct and mechanisms for communicating to their staff, and ensure they contain clear, visible statements of their expectations that all staff will act consistently with the OIA's principle, purposes and requirements.
3	Both the SSC and the Ministry of Justice should take steps to fulfil their leadership roles in practice by making it a priority in their work programmes to assist agencies with the challenges they currently face in complying with the OIA and its principle and purposes.
4	The Ministry of Justice should develop guidance for agencies (and consider developing a model publication scheme) on what should be included in the <i>Directory of Official Information</i> that will assist requesters to make effective, targeted OIA requests to agencies.
5	The Ministry of Justice should publish information about the forums it has held, the planned programme of work for future forums, and the guidance it has produced for agencies.
6	All agencies should ensure their websites have a page, no more than one click away from the home page, which provides the public with key information on how to make a request for official information, what the agency's internal policies and guides on processing OIA requests are, who to contact for assistance, and the information the agency supplies to the Ministry of Justice for inclusion in the <i>Directory of Official Information</i> .
7	Agencies should ensure their strategic plans include increasing the agency's openness and accessibility of information about its work and activities, and engagement with the public and media.





## Organisation structure, staffing and capability

Responding to OIA requests has been a core function of New Zealand's central government agencies for over 30 years. It is therefore expected that agencies will have organised their structure and resources to ensure they are able to meet their legal obligations under the OIA. A 'one size fits all' approach will not succeed. A suitable structure will depend on the size of the organisation, its responsibilities, and the amount of interest in the information it holds. It may be sufficient for some agencies subject to the OIA to have just one person responsible for responding to OIA requests. Others may require a centralised hub, or a coordinating unit, to respond to requests effectively and efficiently. Some may assign their legal team, their communications team or their policy team to respond to requests.

Before I commenced my investigation, I expected that it would be likely that most agencies would use a number of different staff in different parts of their agency to handle an OIA request, such as:

- those who first receive a request for information (which can arrive in any part of the agency);
- possibly a coordinating OIA person or unit, with responsibility for overseeing or managing the response process;
- the officials who are required to identify and find the information subject to the request;
- the officials who may need to provide advice about issues to consider when making a decision on the request;

A 'one size fits all' approach will not succeed. A suitable structure will depend on the size of the organisation, its responsibilities, and the amount of interest in the information it holds.



- officials involved in consultations with any third parties that could be affected by the agency's final decision; and
- those with the delegation to make the final decision to release information or refuse the request.

I am conscious that in certain circumstances the OIA can be confusing and complex to apply. There are time limits and processing requirements to be met. Decisions on requests must be made pursuant to one of three different parts of the OIA.<sup>43</sup> Many decisions require the balancing of competing interests, and the reasons for refusal are listed in a number of different sections within the OIA. Requesters have a right to expect that their requests for official information will be managed by agency staff who have a sound knowledge of the requirements of the OIA and the processes to be applied in order to ensure a correct and timely decision is made. The level of training given to staff responsible for responding to OIA requests within agencies is therefore critical to the effective administration of the OIA within an agency. Consequently this issue of staff training formed a key part of my enquiries.

I was also aware that agencies had been subject to the Government's public sector reform programme '*Better Public Services*'<sup>44</sup> in recent years. This required agencies to take steps to improve their performance and enhance the delivery of their services with reduced resources and within tight financial constraints. The SSC noted on its website that:

*The key to doing more with less lies in productivity, innovation, and increased agility to provide services. Agencies need to change, develop new business models, work more closely with others and harness new technologies in order to meet emerging challenges.*<sup>45</sup>

It seemed to me likely that many or all of the staff involved in responding to an OIA request had been either the subject or product of these reforms, and would have other responsibilities and priorities which could impact on their capacity to process requests '*as soon as reasonably practicable*,<sup>46</sup> such as:

- information and records management responsibilities;
- advising on and preparing responses to parliamentary questions and ministerial correspondence;
- developing policy, delivering services or making regulatory decisions;
- providing legal advice;
- maintaining the agency's website; and
- managing the agency's public relations and stakeholder engagement programmes and/or responding to media enquiries.

43 Official Information Act, Parts 2, 3, and 4.

44 The Better Public Services Programme was launched by Prime Minister John Key on 15 March 2012 and resulted in amendments to the State Sector Act 1988, the Public Finance Act 1989, and the Crown Entities Act 2004. Retrieved on 23 November 2015 from [www.ssc.govt.nz/bps-background-material](http://www.ssc.govt.nz/bps-background-material)

45 State Services Commission, '*Better Public Services*'. 18 September 2015. Retrieved on 23 November 2015 from [www.ssc.govt.nz/better-public-services](http://www.ssc.govt.nz/better-public-services)

46 Official Information Act 1982 s 15(1).

A key focus of my investigation was therefore to consider:

- what structures agencies had put in place;
- how agencies had arranged their resources; and
- how agencies ensured they had sufficient capability,

to manage information, respond to OIA requests and demonstrate a culture of openness, transparency and enhanced public engagement about their work and activities. These decisions would be pivotal to the effective performance of an agency, not only in meeting its legal obligations under the OIA, but also in applying good practices that promote the principle and purposes of the Act on a daily basis.

## Key indicators of good practice in organisation structure, staffing and capability arrangements

- ✓ Appropriate, flexible structures have been established within the agency to deal with OIA requests that reflect:
  - the size of the agency;
  - the number or percentage of staff performing OIA functions in the agency;
  - the percentage of time these staff are also required to undertake other functions;
  - the number of requests received (and from whom ie, public, media, other); and
  - the need to respond within statutory time limits.
- ✓ OIA functions are appropriately resourced with roles and responsibilities clearly defined.
  - There is a person with specific responsibility for coordinating and tracking responses, and they have the authority and support to ensure compliance.
  - Decision makers are sufficiently senior to take responsibility for the decision that needs to be made and are given appropriate training and delegations.
  - Decision makers are available to make decisions (and resilience arrangements exist).
  - The OIA function is located in an appropriate unit or area within the agency.
  - Service performance and quality standards are set and actively monitored.
  - Resources, capacity, capability and practice is actively monitored and reviewed to ensure OIA compliance (and issues are addressed).
  - There is regular reporting up to the chief executive and senior management of OIA performance.
- ✓ Training at all levels on the requirements of the OIA is provided regularly.
  - Awareness on policies, procedures and systems is provided to all staff at induction.
  - Additional training for senior managers, decision makers and staff with OIA specific responsibilities is provided to support their work.

### What excellence looks like

- ✓ The agency has sufficient personnel resources and an appropriate, flexible structure to manage OIA requests.
- ✓ There are clear and fully functioning roles, accountabilities, reporting lines, delegations and resilience arrangements across the agency to manage OIA requests.
- ✓ Decision makers are sufficiently senior to take responsibility for the decision that needs to be made.
- ✓ There is regular monitoring and reporting to the chief executive of the agency's performance on meeting its OIA obligations.
- ✓ All staff are trained on the agency's OIA obligations and associated policies and procedures. Training is role specific, revised and updated and refreshers are routine.
- ✓ The agency routinely exceeds its obligations under the OIA.

- Regular refreshers are provided for all staff.
- Training is given on information management and record-keeping.
- ✓ The process for staff to assess and make decisions on OIA requests is clear, understood, up-to-date and applied.
  - Agency staff know what an OIA request is and what to do with it.
  - User-friendly, accessible resources, guidance and 'go to' people are provided.
  - The agency can and does meet its OIA requirements.

## Findings

### Organisation structure

All of the agencies surveyed had at least one official who was assigned the responsibility for handling requests received under the OIA. This confirmed to me that responding to requests for information was considered part of the core activities of a government agency that needed to be resourced.

The type of model agencies operated to manage their OIA requests varied:

- 44% operated a fully centralised model – where both the coordination and processing of OIA requests is performed for the most part, by staff in a single central OIA hub;<sup>47</sup>
- 12% operated a partly centralised model – where both the coordination and processing of OIA requests is performed, for the most part by staff in more than one OIA hub;
- 34% operated a mixed model – where the coordination of OIA requests is performed, for the most part, by staff in the organisation's OIA hub(s) but most of the processing is performed by other staff in the organisation; and
- 8% operated a decentralised model – where the coordination and processing of OIA requests is performed, for the most part, by staff outside an OIA hub (and usually such organisations have no OIA hub).

Those with OIA hubs located them in either their:

- corporate team (43%);
- office of the chief executive (22%);
- legal team (15%); or
- other (20%).

I considered whether the type of model agencies operated to manage their OIA requests and where they were located in the organisation's structure had any effect on their ability to comply with the Act. Many agencies had shifted from one model to another in recent years as a result of growth in size, restructure or change in operations.

I found there to be risks and benefits with each model that an agency needs to be aware of and make provision for.

- The more centralised a system is, the greater opportunity the agency has for developing a centre of excellence and expertise in dealing with OIA requests.

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<sup>47</sup> 'OIA hub' was defined as a person or group of people within the organisation whose role includes the coordination and processing of OIA requests across a wide range of subject matter for the whole organisation or for a major division of a large organisation and which, by virtue of that function, operates as the primary OIA resource for the organisation or division.

Agencies who centralised the coordination and processing of the requests had greater control over meeting their time limit obligations. However, there were more steps involved in identifying and locating information and more meetings required to discuss the potential decision on a request. The time taken to formulate the decision and prepare a response tended to take longer as officials working in the hub were less familiar with the information that was the subject of request. The response was usually prepared by a senior, experienced staff member (often from the legal team). Other staff within the agency were aware of this and tended to contact these officials for any general questions about OIA related issues.

- Agencies that devolved the preparation of the OIA responses to other staff who were the subject-matter experts tended to have better quality responses as they were familiar with the information and could provide context and additional information to enhance the answer. Those that kept tracking logs were able to demonstrate that it was usually quicker for them to identify and locate all the information falling within the scope of a request. They were also more likely to propose proactive release of official information to inform the public more broadly.
- Centralising the coordination of requests enabled management to have strong oversight of their compliance with the OIA's requirements. It also provided an ability to track trends in requests and identify any issues with meeting time limits or proposed draft responses early so that they could be escalated or managed effectively.
- The more devolved a system was, the greater knowledge staff needed to have of their agency's obligations under the OIA and the more reliant they were on resources being available to assist them to carry out their responsibilities. Devolving the responsibility for preparing responses to OIA requests too far down the organisational structure risked poor or inconsistent decisions if staff were too junior or inexperienced, or had insufficient knowledge and training on the requirements of the Act. There was also a risk that they could be more easily persuaded to provide an alternative response by ministerial/political advisors. Some agencies had managed this by requiring the legal team or OIA unit to review draft responses for quality assurance prior to them being sent. However, one agency considered this presented a risk in itself as the legal team's focus when reviewing a response was on avoiding any legal liabilities for the agency, rather than also considering any pro-disclosure opportunities.
- Centralising the coordination and processing of OIA requests placed a heavy reliance on a small number of knowledgeable staff members to ensure the agency's obligations were met. Other staff in the agency were often less likely to see OIA requests as core business, but rather the business of that particular OIA official or team. One agency also found that a constant diet of OIAs without respite caused 'burn-out' amongst their OIA specialists.
- Placing a heavy reliance on a small number of staff to respond to all the agencies' OIA requests could cause capacity problems when there is was a flood of requests on a particular topic, or if staff were on leave or had resigned which created a sudden loss of OIA expertise. In centralised models, it was therefore important for agencies to have sufficient resource capability and

resilience arrangements in place to ensure it was able to cope and comply with the number and complexity of the requests it received. My investigation found a number of OIA officials had taken it upon themselves to develop their own guidelines and procedures to protect the agency if they were away. Half of current and former workers (49%) in government agencies who responded to my survey did not think agencies would be able to cope with a sudden increase in the number of OIA requests and provide quality responses.

## Media requests

Most agencies (81%) had set up a separate gateway for the media to seek access to official information – usually in the form of a direct line in to the agency’s communications or media team. While some members of the media considered this an effective arrangement for their purposes, I did receive submissions from a number of journalists who advised me that:

- *Dealing with a media or comms team can prove more of an invitation for interference than an advantage.*
- *It only works for public agencies to have a central point of contact for regular media requesters so they can respond by phone or email quickly.*
- *Some agencies’ media teams would not return my phone calls and were very evasive when I wanted to make an OIA request.*
- *I felt blacklisted from one agency and kept being taken off the media list.*
- *Media requests tend to be processed through the communications team within agencies and attract more attention and editing as a result. This has a significant impact on the way information is presented, what information is presented and when information is presented – an impact which is not appropriate nor justified under the OIA.*

Separate access points can leave agencies vulnerable to providing inconsistent advice and decisions on requests for the same information made by others (such as the general public or opposition parties) who approach the agency for information through a different gateway. The ability for relevant staff across the agency to access intake logs and records of both current requests and past decisions is an important tool to ensure consistency of decisions (both in terms of content and timing). My investigation found that some agencies kept logs of media requests which were not accessible to other units within the office also dealing with OIA requests. I have encouraged them to share this information with their colleagues.

I considered whether media requesters should be treated differently, able to ‘queue-jump’ and have their requests dealt with more quickly and differently than other requesters seeking access to official information held by an agency. The OIA does not allow for prioritisation of requests based on the identity of the requester. I was pleased to find that no such prioritisation by virtue of identity was made by any of the agencies when their requests are processed by the OIA team. I was also pleased to find that members of the media did not expect special treatment either.

Providing a separate gateway for media to make their requests is not prohibited under the OIA. Approaching the media team is an additional avenue available

The OIA does not allow for prioritisation of requests based on the identity of the requester.

to journalists seeking official information. Sending an email or completing an online OIA request form via the agency's website are other avenues which any requester, including journalists, can utilise. However, as my former colleague Ombudsman David McGee noted in his 2012 investigation into the Ministry of Education's management of OIA requests about proposed school closures,<sup>48</sup> if separate and inconsistent processes for managing requests develop in an agency, that is unacceptable under the OIA. Ordinary members of the public must not be disadvantaged or forced to wait longer for a response to their request because a different type of requester has been accorded priority, uses a particular avenue provided by the agency or calls it a media enquiry rather than an OIA request. All requesters must have the same ability to make a request for information either orally or in writing and for it to be responded to within the same time limits that apply to anyone else. A member of the media approaching the agency's media or communications team within these agencies should not be accorded preferential treatment simply because they are media and working to publication deadlines. However, there may be valid reasons for urgency which justify priority treatment of a request. The OIA recognises that a requester can ask for their request to be treated as urgent, but requires that they provide the agency with '*reasons for seeking the information urgently*'.<sup>49</sup>

If separate and inconsistent processes for managing requests develop in an agency, that is unacceptable under the OIA.

My investigation included discussions with the receptionists of the 12 selected agencies, members of their media teams and OIA processing units and a review of the agency's policies and procedures for OIA requests made orally. I found no evidence that the public's requests for routine information were treated differently or responded to in a less timely manner because of the different avenues they utilised to make requests, nor that any requests for urgency were not considered on their merits. However, I discovered that agencies were not recognising all requests for information as OIA requests, nor were they recording all media requests on the same system. As discussed later in this report, the lack of consistent data collection prevents me from determining whether the media are either advantaged or disadvantaged in relation to other requesters.

## Roles and responsibilities

### Delegations

While the chief executive of the agency is the accountable decision maker on requests for official information,<sup>50</sup> most delegated this authority for practical reasons. These delegations were usually made clear in the OIA policies that I reviewed. I considered the level to which OIA decision-making within an agency was delegated. Of the 12 selected agencies, the delegation to respond to formal OIA requests<sup>51</sup> was usually limited to tier three managers and above. This demonstrated to me the importance the chief executive had accorded to the agency's responses

48 Ombudsman David McGee QC, '*Investigation into Ministry of Education's management of OIA requests about proposed school closures*', 18 December 2012, p 13.

49 Official Information Act 1982, s 12(3).

50 Official Information Act 1982, s 15(4).

51 This does not include most media '*enquiries*' or requests for information made by telephone.



to OIA requests.

I note that for some agencies, this was a recent change and more junior officials had in the past been able to make decisions on requests. When I explored the rationale for the change, I found the key driver was a shift in the attitude of the agency's leadership to OIA requests now being considered a core business activity for the agency which could have a detrimental impact on the agency's reputation if it got a response wrong or failed to meet its obligations under the OIA.

I reviewed the quality of the decisions by making a random selection within agencies and my own Office's records. This included potentially politically sensitive requests. There was little evidence that having requests dealt with at a more senior level resulted in significantly better decision-making or the release of any more (or less) official information than previously.

However, what was apparent was that where requesters were dealt with by senior level staff, there was improved understanding by officials of:

- what OIA requests the agency had on hand; and
- the need for sufficient resources to enable compliance, meet performance measures and ensure quality decisions.

These officials usually 'had the ear' of the senior leadership team (SLT) when it came to accessing or prioritising limited resources to ensure OIA compliance.

For those agencies who experienced strong ministerial interest in the OIA requests they receive or responses they are drafting, I found it was important that the agency's delegates were at a sufficiently senior level to ensure the independence of the final decision was preserved.

## Capacity

As expected, most agencies confirmed that the officials assigned OIA responsibilities within an agency had other duties or responsibilities to carry out. However, they were only able to provide rough estimates of the amount of time they spent on their OIA work. Their other duties most commonly related to:

- preparing responses to parliamentary questions;
- drafting ministerial correspondence;
- responding to media enquiries;
- training staff; or
- preparing legal advice.

While most agencies (84%) were unable to give an accurate account of the total time spent on handling OIA requests, the same percentage of agencies surveyed (84%) also advised that they believed the resourcing was appropriate and the way they were organised was sufficient for them to cope with the number of requests they receive and respond within the statutory time limits. I was therefore surprised to be advised later in the same survey that over one third of agencies (37%)

For those agencies who experienced strong ministerial interest in the OIA requests they receive or responses they are drafting, it is important that the agency's delegates are at a sufficiently senior level to ensure the independence of the final decision is preserved.

considered resourcing as one of the key challenges in meeting their OIA obligations. Similarly, only 35% of current and former public servants who responded to my survey believed agencies allocated sufficient resources to responding.

While it may meet the Government's expectations of *'doing more with less'*, I found there was an adverse impact on the capacity of an agency to respond to requests *'as soon as reasonably practicable'* by expecting officials responsible for answering OIA requests to have a number of other competing priorities. This was felt most acutely when an agency did not have resilience arrangements in place when these staff were absent or when there was a sudden flood of requests that needed to be processed.

Further, my investigation discovered that many requests for information received by agencies were not in fact being treated as OIA requests, were dealt with outside the agencies' policies and processes, and were not counted in an agency's reported statistics. These generally took the form of direct emails and phone calls to agency staff, requests for corporate or statistical information, media enquiries and other forms of requests for official information that agencies tended to characterise as general business-as-usual enquiries. The workload for agencies was therefore potentially even greater than that which they had actually described in our first round of surveys. This also creates risks around provision of OIA compliant responses.

This lack of comprehensive recording of OIA workloads creates difficulties for agencies to:

- accurately assess the level of resourcing they need to adequately respond to the requests they receive;
- develop appropriate workforce plans and budget bids; and
- demonstrate how efficient and responsive they actually may be in respect of OIA requests.

With limited quality data and largely anecdotal evidence, I am unable to make specific conclusions and recommendations about improving any capacity issues. Rather my recommendations must relate to proper recording and compilation of good quality internal data about how these resources are applied in agencies.

## Training & capability

Depending on the type of model an agency applied, I found there were a number of different staff in different parts of the agency that needed to carry out their roles effectively if the agency was to comply with the OIA's requirements. For compliance with the OIA to occur within an agency, all those involved in dealing with a request need to understand their agency's legal obligations, internal processes and each others' assigned roles and responsibilities, and carry out their own role appropriately. My survey of current and former workers in government agencies found:

- 55% believed that *'compliance with the OIA'* was part of their job description; and

- 65% believed that *'compliance with information management policies'* was part of their job description.

Yet neither featured highly in key performance indicators for staff, nor in any performance reviews and professional development planning for staff.

My survey also found:

- 25% of staff advised their agency monitored and reviewed their compliance with the OIA annually; and
- 36% of staff advised their agency monitored and reviewed their compliance with the agency's information management policies annually.

My investigation also found that the type of training, its content and the range of staff it was provided to varied widely between agencies. An agency's OIA training framework should encompass the following matters.

- Induction training
- Introductory basic awareness course (for all)
  - Overview of the OIA – key principle and purposes
  - What is official information and what does a request look like
  - Processing requirements
  - The role of the OIA officials within the agency
  - Information management and record keeping requirements
  - Practical case studies and checklists
  - Guidance on accessing any relevant internal tracking systems
  - Key guidance and resources available to staff
- Advanced course (for specialists)
  - Proper application of the public interest and harm tests
  - Dealing with sensitive requests (commercial, political, personal)
  - Dealing with broad, complex requests covering a large volume of information
  - Dealing with requests seeking information in non-traditional forms
  - Managing consultations with third parties and Ministers under the *'no surprises'* principle
  - How to handle inquiries and investigations by the Ombudsman
- Refresher courses and seminars
- *Train the trainers* courses
- Web-based training modules

For compliance with the OIA to occur within an agency, all those involved in dealing with a request need to understand their agency's legal obligations, internal processes and each others' assigned roles and responsibilities, and carry out their own role appropriately.

Many current and former workers (60%) in government agencies who responded to my survey believed they either had not received any training or any training they had received was more than four years ago. Most (72%) said any training they had received was in the form of a general overview of the OIA and other related legislation.

Most agencies surveyed (86%) said they provided in-house training. Most had been developed by officials who had primary responsibility for processing OIA requests. My Office reviewed the policies, procedures and training materials of the 12 selected agencies and found most to be of good quality. Further, I am satisfied from our interviews, evidence gathering and on-site observations that those assigned the responsibility to oversee responses to OIA requests were committed and experienced practitioners who understood the procedural requirements of the Act, and had access to resources and advisers to assist them.

However, I was concerned to find that 79% of agencies did not require their senior managers to undertake any level of OIA training. This was usually justified on the basis that they handled OIA requests every day, had years of experience themselves in dealing with OIA requests and/or had experienced practitioners, legal advisers and those working in the OIA unit of the agency to advise them on any final decision they were unsure about.

I appreciate that many of these senior managers may have experience and good support mechanisms in place. However, the lack of training is a concern to me, as I am sure it will be to the public. Relying on an individual's knowledge and past experience to make the appropriate decision ignores the benefits of ongoing training and regular refreshers (which include understanding any changes in the law or new opinions issued by an Ombudsman), and leaves agencies vulnerable to unintended bad habits that tend to grow and embed into practice. It does not demonstrate an agency's commitment to support and grow the professional development of their staff or to ensuring that compliant decisions are made in the context of current good practices. It can also leave a decision-maker vulnerable to the undue influence of those working in Ministers' offices who may wish to limit or change their decision for spurious or unwarranted reasons.

When my Office provides OIA training to agencies, the consistent feedback from even experienced officials is that they have learned a great deal. One agency manager commented recently *'Wish I could have learned this three years ago when I started in the role'*.

Requiring regular training for senior managers would demonstrate leadership from the top, test officials' understanding and knowledge, promote efficiencies and consistency in decision-making, and demonstrate that responding to OIA requests is core business which is prioritised and valued by leadership. It would also enable greater trust and confidence by the public in the agency's decision-making and its commitment to applying the provisions of the OIA appropriately.

Similarly, those that make decisions or recommendations which can affect others should be provided training about the records they should be keeping about that decision, and how to manage requests for reasons why the decision

Requiring regular training for senior managers would demonstrate leadership from the top, test officials' understanding and knowledge, promote efficiencies and consistency in decision-making, and demonstrate that responding to OIAs is core business which is prioritised and valued by leadership.

or recommendation was made. Without good record keeping, agencies will be vulnerable to not being able to provide a sufficiently accurate statement of reasons if requested under the OIA.<sup>52</sup> Many officials working in human resources units within agencies, or in agencies that make regular (service provision or regulatory) decisions which directly affect individuals, were familiar with the provisions of the Privacy Act. They confirmed that they had received training on the requirements of that Act and regularly received requests from individuals wanting to understand the reasons why a particular decision or recommendation had been made about them. However, my investigation found many of these officials were not familiar with the OIA requirements for managing requests which invoke the right of access to reasons for decisions or recommendations affecting the requester.

It is therefore my view that all senior managers and decision makers should be required to participate in appropriately tailored OIA training – and this should be a matter of policy across all agencies. I am aware that resources are constrained and issues can be complex. My Office has a Policy and Professional Practice Advisory Group that can support agencies in enabling this to occur by:

- providing free training workshops and materials;
- advising agencies on proposed OIA processes and procedures; and
- reviewing in-house training materials that an agency may have developed for its staff.

Over the years a number of agencies have accessed these services free of charge and this is a resource for agencies to ensure their staff (at all levels) receive training and refreshers appropriate to their position and engagement with the OIA. In addition my office's website<sup>53</sup> has a suite of guidelines, case notes and opinions for agencies on processing requests for official information and considering the application of various grounds under the OIA.

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52 Official Information Act 1982, s 23.

53 Office of the Ombudsman, 'Resources and Publications'. Retrieved on 3 December 2015 from [www.ombudsman.parliament.nz/resources-and-publications](http://www.ombudsman.parliament.nz/resources-and-publications)

## Recommendations

8	Agencies should review their OIA organisational model and ensure any risks are mitigated.
9	Agencies should ensure there is sufficient resilience in their structure to respond to contingencies such as staff absences, departures, and sudden surges in the number of OIA requests.
10	Agencies who have provided a separate gateway for the media to make requests for official information should ensure all officials dealing with OIA requests have access to each others' logs or registers.
11	Agencies should ensure compliance with the OIA is specifically included in all employees' job descriptions.
12	Agencies should ensure that compliance with the OIA and information management policies is included in key performance indicators for staff and compliance is monitored and reviewed annually.
13	<p>Agencies should ensure all staff undergo some level of regular OIA and information management training, tailored appropriately for their role in the agency. This includes:</p> <ul style="list-style-type: none"><li>• those who are 'on the frontline' and receive or process requests;</li><li>• those who make decisions or recommendations that could affect others which may subsequently result in requests for access to personal information or for the reasons for a decision; and</li><li>• senior managers with delegations to make OIA decisions.</li></ul>
14	Agencies should publicly report on the OIA training their staff have undergone in the last 3 years.





## Internal policies, procedures and resources

While it is not a legislative requirement, nor an assurance that compliance with the OIA will occur, the Ombudsmen encourage agencies to develop or adopt policies and procedures that will assist staff to consistently apply the requirements of the OIA. This is particularly important in an agency where:

- a high volume of OIA work exists;
- staff turnover is an issue, especially when it involves a loss of experienced staff with institutional memory;
- it operates a model where employees across the organisation are required to do much of the work to prepare responses to requests; or
- it is heavily reliant on one or two knowledgeable individuals to respond to OIA requests.

Ideally, the policies and procedures should:

- provide an easy-to-understand, accessible guide to assist those with OIA responsibilities to do their job effectively;
- provide accurate guidance and comprehensive coverage on the administration of the OIA;
- not be so complicated or risk averse that they have a detrimental impact on an agency's ability to comply with the statutory time limits;
- not confuse and complicate unnecessarily the decision-making process on a particular request;



- set out the position of an agency in regard to proactive release and publication of information and the management of any risks associated with this;
- link to other related policies, such as information management, privacy and stakeholder engagement; and
- be relevant to the size, structure, delegations and OIA arrangements provided for within the particular agency.

Given that a number of staff working in different areas within an agency are likely to be involved in:

- receiving or creating information in a variety of formats, modes and versions;
- using information for the various activities of the agency; and
- considering whether others should be given access to information,

it is important that they are supported by good systems, tools and resources that enable them to not only deliver their work effectively, but also ensure any OIA requests are processed in accordance with the requirements of the Act. With regard to the latter, this includes resources and systems which will enable the agency's authorised decision-makers to:

- be confident that all the information falling within the scope of a request has been identified;
- consider the impact of the requested information's potential disclosure;
- obtain advice and authoritative guidance on any issues with making the information available; and
- form a decision about release or refusal, which is supported by the legislation and consistent with other similar decisions that may be made within the agency.

In addition, while the OIA does not impose explicit information management requirements on agencies, there is no doubt that good record-keeping and proper management of information are critical. Without them:

- agencies are unlikely to be able to collate information to fulfil the *Directory of Official Information* obligations;<sup>54</sup>
- agencies will be unable to identify and retrieve requested information efficiently;
- records that ought to be retained (if not for publication, then at least for preserving corporate memory and maintaining the quality of future decision-making) may be destroyed; and
- effective service delivery and the management of resources will be difficult to achieve.

My investigation did not involve detailed consideration of the records management

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54 Official Information Act 1982, s 20(3).

practices of the agencies involved. However, I did consider:

- whether it appeared that agencies had effective information management systems for their work and activities;
- the agency's policies pertaining to information management and using the system provided;
- whether staff were trained to create, store and undertake a high quality search for information; and
- what this meant when someone sought access to information under the OIA.

In addition, I reviewed the audit trail of selected OIA requests and considered whether there had been any deliberate failure to create records or search for requested information. My findings in that respect are discussed in the **Performance monitoring and learning** chapter of this report.

## Key indicators of good practice in policies, procedures and tools

- ✓ The agency creates or adopts OIA related policies and procedures which:
  - are accurate and promote good decision-making;
  - give effect to the legislation;
  - are clear and user-friendly; and
  - are appropriate for the agency given its size, current structure and the OIA requests it receives.
- ✓ The agency's OIA policies and procedures cover the areas listed below.
  - Identifying the type of OIA request received (Part 2, 3 or 4 of the OIA) and distinguishing from Privacy Act requests.
  - Identifying the scope of the request.
  - Consulting with and assisting the requester.
  - Logging requests against a standardised definition.
  - Acknowledging receipt of the request.
  - Establishing statutory time limits and tracking the handling of the requests.
  - Identifying who in the agency should respond to the request.
  - Establishing criteria for deciding whether, and if so, how a response to a request should be provided urgently.
  - Managing potential delays (including the reasons for them, the escalation process and invoking the extension provision).
  - Identifying the information at issue.
  - Searching, finding and collating the information at issue.
  - Charging for the release of information.
  - Transferring requests and advising the requester.
  - Consulting officials within the agency and third parties.
  - Making a decision (whether to release the information, and if so in what manner and for what charge, if any).
  - Imposing condition on release where appropriate.
  - Recording reasons for each item of information withheld, and the agency's consideration of the public interest in release where required.
  - Advising the requester of the decision.

### What excellence looks like

- ✓ The agency has comprehensive, accurate and appropriate OIA policies and procedures (given its size, current structure and amount of OIA requests it receives) which promote good practices and a positive OIA culture.
- ✓ All OIA related policies and procedures are user-friendly, readily accessible to staff and the public, and reviewed regularly.
- ✓ The agency has a comprehensive, accurate and appropriate information management strategy supported by policies, procedures and systems that enable accessibility, sound record keeping and promote the OIA's principle and purposes.
- ✓ The agency has full, accurate policies and procedures for proactive disclosure that support the principles of the OIA and manages risk for the agency.
- ✓ The agency has useful tools to support its work and enable effective access to information (either proactively or on request).

- Preparing information for release (including deletions).
- ✓ The agency has a record keeping and information management strategy with supporting policies and procedures that cover:
  - creating, organising, maintaining and storing records;
  - managing and modifying records;
  - the security of information;
  - retaining, retrieving and disposing of records;
  - both manual and electronic records (personal email accounts, instant messaging and text messages);
  - staff training;
  - assigned responsibilities and performance criteria for records and information management by staff;
  - the provision of secure audit trails; and
  - annual/periodic audits of records.
- ✓ The agency has policies and procedures for proactive disclosure that include:
  - developing a structured list of information held by the agency;
  - ensuring it is updated regularly;
  - identifying and listing the types of information that should be proactively disclosed;
  - managing the publication of submissions received in response to any public consultations undertaken by the agency;
  - managing risks with proactive disclosure such as inadvertently disclosing personal information, information supplied in confidence or information that is subject to third party copyright; and
  - detailing how and where the information can be accessed (and for what charge).

- ✓ The agency has useful tools including:
  - templates;
  - checklists;
  - 'go to' people;
  - tracking and monitoring systems,
  - information management systems;
  - redaction technologies to assist the preparation of information for release;  
and
  - access to authoritative guidance on the application of the OIA's provisions.
- ✓ The agency's policies and procedures are fully operational and resourced.
- ✓ All staff have ready access to the agency's policies and procedures, are trained on them and are expected to comply with them.
- ✓ The agency's policies and procedures are reviewed regularly and staff are kept up to date about any changes made.

## Findings

### Existence of OIA policies and procedures

All the agencies examined in our review had readily accessible policies and procedures for staff as to how they expected OIA requests to be handled. The same could not be said for all Ministers' offices. A number of Ministers advised me in their survey responses:

*The Official Information Act 1982 is the main guidance for policies/procedures relating to OIA requests and complaints.*

While I recognise that Ministers delegate much of the preparation of a response to their portfolio agencies, they remain the accountable decision-maker on requests made or transferred to them. If they fail to have policies and procedures to guide their staff, they are unnecessarily increasing their risk of non-compliance.

Each agency's policies were reviewed and scrutinised by my Office for accuracy, relevance and ease of use and understanding. While 75% of current and former workers in government agencies who responded to my survey believed the policies and procedures of their agency were useful and consistent, I found some of the policies were limited in coverage and/or not current. The latter was usually due to a recent restructure, implementation of a new internal system, or a delay in updating the policy to include the amendments to the OIA that came into effect on 26 March 2015.<sup>55</sup>

The particular examples of policies and procedures I viewed were variable but some were high quality, practical resources prepared by clearly knowledgeable practitioners. Some policies and procedures had actually been developed by the officials with primary responsibility for overseeing the OIA response process of their own volition, rather than as a deliberately planned activity required by management. They were generated after these individuals first took up the position and found they had minimal resources or policies to rely on. They decided to document their processes for others to use. While I am disappointed at the circumstances these officials found themselves in, I consider their initiative to be indicative of the genuine commitment these individuals have to the OIA and to ensuring their agency is able to comply with its statutory obligations on an ongoing basis.

I also found that a number of agencies are currently in the process of completely reviewing and redesigning their policies so that they can be accessed electronically by agency staff in future, with training programmes included in the rollout plan.

<sup>55</sup> See the guide on our website 'Changes to the Ombudsmen Act and official information legislation' March 2015. Retrieved 3 December 2015 [www.ombudsman.parliament.nz/system/paperclip/document\\_files/document\\_files/952/original/changes\\_to\\_the\\_oa\\_and\\_oi\\_legislation\\_-\\_march\\_2015.pdf?1427827593](http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/952/original/changes_to_the_oa_and_oi_legislation_-_march_2015.pdf?1427827593)

## Coverage and accuracy of OIA policies and procedures

I found some policies and procedures that agencies produced to support their OIA request processing and decision-making were light in coverage and only referred to certain key provisions in the Act such as the statutory time limits and decision-making requirements. As noted earlier, a number of Ministers advised us that the only resource their ministerial staff needed to refer to was the OIA itself. In those cases, it was therefore not surprising to later be advised by agencies associated with their portfolio that they had experienced frustrating discussions with ministerial officials about the proper application of the OIA when draft responses and proposed decisions were being considered.

My investigation found a number of good examples that were clear, accurate, user friendly and comprehensive in their coverage of OIA provisions.<sup>56</sup> While these were suitable for their own agency, if they were to be shared, it will be important to bear in mind that they may not be entirely suitable when applied to another agency that is of a different size, has a different function and delivers a different type of work. In addition, even the best of these excluded some OIA requests from their scope. It is frequently argued that, if straightforward oral requests have to be dealt with as OIA requests, then it will be impossible to process them efficiently. My opinion is that all agencies should have OIA policies and procedures that are sufficiently flexible to accommodate both big and small requests appropriately. Providing immediate responses to simple requests received on the telephone should be possible in any good OIA process. My Office has an advisory service<sup>57</sup> available to agencies who wish to obtain support or guidance in the adoption and modification of OIA policies and/or training of their staff.

In any event, there should be basic uniformity about the coverage and interpretation of the OIA provisions regarding processing and decision-making as, after 33 years, they are fairly well settled. I note that the Ministry of Justice has established a practitioners' forum run by its Electoral and Constitutional Team which meets regularly with a view to sharing knowledge and expertise on issues such as:

- how to scope requests;
- engaging with requesters;
- the duty to consider consulting with requesters in certain circumstances;
- using a risk assessment matrix; and
- transferring, notifying and consulting with Ministers' offices.

After reviewing the policies and procedures I received through the surveys of all 102 agencies and Ministers, I found the following common gaps or assumptions that created vulnerabilities for agencies.

- There was often no, or very limited reference to, or guidance on the distinction

There should be basic uniformity about the coverage and interpretation of the OIA provisions regarding processing and decision-making as, after 33 years they are fairly well settled.

<sup>56</sup> Ministry of Transport, Ministry of Education.

<sup>57</sup> The Ombudsman's Policy and Professional Practice Advisory Group is available for agencies and requesters who need advice on OIA requests.

between requests relating to personal information that must be considered as either:

- a Privacy Act request;
- a Part 2 OIA request;
- a Part 3, section 22 OIA request for policies, guidelines, rules and principles affecting a person;
- a Part 3, section 23 OIA request for a statement of reasons; or
- a Part 4 section 24 OIA request from a company or other body asking for information about itself.

For agencies that make decisions or recommendations that could affect others in their personal capacity (such as internal promotions or external recruitment decisions, commercial procurement or tender decisions, funding or benefit recommendations or decisions), it is particularly important to have these provisions of the OIA included in their guidance to their staff. Requesters have a **statutory right** to any information that falls within Part 3 or Part 4 of the OIA, subject only to a more limited set of withholding grounds than a Part 2 request. Without this guidance, agencies could be vulnerable to challenges about the proper application of the relevant provisions of the OIA to a particular request, or even that they have responded under the correct Act.

- I frequently observed a statement in agencies' policies to the effect that an agency can only issue one extension to the statutory time limits set out in the OIA. However, the OIA does not place any limit on the number of extensions an agency can make on any of the time limits set out in sections 14 and 15 of the Act, as long as the extensions are made within the original 20 working day maximum time limit. Rather, section 15A places restrictions on the circumstances **when** an agency may validly extend the time limits and **how** the requester must be given notice of the extension.<sup>58</sup>
- The majority of the policies I reviewed were silent on the ability of an agency to extend the time limit for making a decision as to whether to transfer a request to another agency (including its Minister) for response. This was an important gap in guidance for officials when they were in dispute with third parties as to the appropriate decision on a request. While section 14 of the OIA states that an agency must make any decision to transfer a request to another agency for response *'no later than 10 working days after the day on which the request was received'*, the extension provision in section 15A allowing an extension to be made within the original 20 working day time limit also applies to the transfer time limit. In other words, if it becomes apparent to an agency on days 11-20 that the decision should properly be transferred to another agency subject to the OIA or the Local Government Official Information and Meetings Act 1987, it is still entitled to extend the time limit for making that transfer decision to a later date and advise the requester accordingly. The requirements of sections 14, 15 and 15A of the OIA will need to be complied with in the

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58 Official Information Act 1982, s 15A.



agency's correspondence with the requester when making an extension and any suggestion of 'gaming' this provision would attract strong scrutiny by the Ombudsmen. In all cases, it will be important that the transfer of the request does not have the effect of narrowing its scope or excluding relevant information. The agency that received the request should identify the relevant information first, and if necessary, transfer that information along with the request, or transfer only part of the request.

- The policies and procedures I reviewed were often silent on the use of personal mobile devices, text messages and personal email accounts for work purposes insofar as OIA requests were concerned. However, some agencies do allow for information to be created and used in these forms as part of officials' work practices. The Chief Archivist recently issued a report which included guidance on the creation, collection and storage of text messages on these devices.<sup>59</sup> Agencies should ensure their policies include this guidance so that a proper search for requested information includes that which may be stored on these devices.
- There were varied levels of guidance for officials in their policies and procedures on where they should search for information that might fall within the scope of a particular request. While the OIA does not articulate what is considered a reasonable search, before section 18(e) is relied on to refuse any request for official information on the basis that information does not exist or cannot be found, I would expect agencies to record the details of their search, including where relevant:
  - hard copy files (desks, filing cabinets and storage sites – both internal and external including archives);
  - records management systems and other databases;
  - computer drives and files (including personal drives and files if necessary);
  - email accounts;
  - USB memory sticks and other portable storage devices;
  - mobile phones, tablets and other portable ICT equipment (official and personal);
  - home computers where staff may be working from home;
  - notepads, diaries and calendars; and/or
  - audio and video recordings.

When undertaking electronic searches for information, I would also expect agencies to record for future reference the keyword and other search terms used. This level of recording by an agency is important for audit purposes and to enable the agency to properly assist my Office with the investigation of any

When undertaking electronic searches for information, I would also expect agencies to record for future reference the keyword and other search terms used

<sup>59</sup> Chief Archivist Marilyn Little, *Managing text messages under the Public Records Act 2005*, 15 September 2015. Retrieved 3 December 2015 from [archives.govt.nz/advice/public-records-act-2005/managing-text-messages-under-public-records-act-2005](http://archives.govt.nz/advice/public-records-act-2005/managing-text-messages-under-public-records-act-2005)

subsequent OIA complaint.

- I note from the survey responses I received from agencies that the most common means of receiving OIA requests is now by email.<sup>60</sup> However, the majority of policies were silent on when the working day count began if a request was received electronically. Given the strict statutory time limits in the OIA and the consequences of them being breached,<sup>61</sup> it would be prudent for agencies to note in their policies that the Electronic Transactions Act 2002 states:

### 11 **Time of receipt**

*An electronic communication is taken to be received,—*

- a. in the case of an addressee who has designated an information system for the purpose of receiving electronic communications, at the time the electronic communication enters that information system; or*
- b. in any other case, at the time the electronic communication comes to the attention of the addressee.*

This means that an OIA request is considered to be 'received' at the time it enters the agency's designated information system ie, email or website inbox, irrespective of whether that is outside normal business hours for the agency. An agency will be vulnerable to breaching the various time limits in the OIA if its policies do not make it clear that the OIA working day count will start on the next working day when an email or online request has been received before midnight.

- Most agencies' policies contained additional procedural steps in their OIA process in order to comply with the following guidance set out in the *Cabinet Manual*:<sup>62</sup>

### **Ministers and officials**

3.16 *The style of the relationship and frequency of contact between Minister and department will develop according to the Minister's personal preference. The following guidance may be helpful.*

- a. In their relationship with Ministers, officials should be guided by a 'no surprises' principle. They should inform Ministers promptly of matters of significance within their portfolio responsibilities, particularly where these matters may be controversial or may become the subject of public debate.*

However, the interpretation of what the 'no surprises' principle required in

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60 44% of agencies said they received requests by email every week, 26% by post or fax and 16% via their website.  
61 The recent amendment to section 28(4) of the OIA provided the Ombudsman with a new function to investigate and review an agency's failure to make and communicate its decision on a request for official information 'as soon as reasonably practicable'.  
62 'Cabinet Manual'. April 2008. Retrieved on 3 December 2015 from [www.cabinetmanual.cabinetoffice.govt.nz/3.5](http://www.cabinetmanual.cabinetoffice.govt.nz/3.5)

practice varied from agency to agency. The most common interpretation was for agencies to inform their Minister(s) of all requests for information received by a certain type of requester, usually members of parliament, opposition party research units and media. Others interpreted it to require their Minister(s) to be informed of certain types of requests for information that were considered sensitive, controversial or would likely give rise to questions to the Minister from the media or in the House.

I found many policies made it clear that if the manner of informing the Minister pursuant to the *'no surprises'* principle included providing a copy of the proposed response to an OIA request, this would be in the form of an *'FYI'* or a *'consultation'*. However, I did find a small number of policies which characterised it as a *'clearance'* or *'approval'*. This would suggest that the authorisation of the final decision was no longer by the chief executive of the agency as required by section 15(4) of the OIA, but rather from the Minister – but without any valid, formal transfer under the OIA having occurred. In those instances, the practices of the agency were examined in detail by interviewing agency officials and reviewing documents and correspondence with the Minister's office on any OIA requests and proposed responses. In these cases, according to the material I have seen, I found the chief executive of the agency concerned did make the final decision and there was no transfer of responsibilities in practice. The relevant agencies understood the false impression their policies were giving and immediately amended them.<sup>63</sup>

## Information management policies & systems

It was universally accepted by the 12 selected agencies that effective record keeping and information management policies and systems are vital enablers for compliance with the OIA. Changes in technology are altering the way officials carry out their work (including how they create, manage and use information) and the expectations of those seeking access to information. As a result, most of the 12 selected agencies acknowledged that in respect of their own systems, policies and procedures:

- they were having difficulty staying relevant and keeping pace with the rapid changes and expectations;
- they did not always enable specific information to be identified and accessed easily;
- they still stored their information in shared drives and not in an electronic document and records management system; and/or
- they weren't adequate to support the volume, complexity or breadth of requests for information they sometimes receive.

It was universally accepted that effective record keeping and information management policies and systems are vital enablers for compliance with the OIA.

<sup>63</sup> I discuss my findings on agencies' application of the Cabinet Manual's *'no surprises'* principle in more detail in the Practices chapter of this report.

### Survey 3

OIA experience of current and former workers in government agencies.

You told us that the agency you chose to comment about does not allocate sufficient resources to comply with its OIA obligations. Please tell us what additional resources you think are needed.

	Response
It needs to invest in better workflow IT systems so processing is more efficient	37%
It needs to invest in better information/records management systems so information is easier to store and retrieve	46%
It needs to invest in (better) redaction software to have more efficient disclosure processes	26%
It needs to invest in gathering more/better business intelligence to learn where things can be improved	34%
It needs to invest in a better website to enable more proactive publication or greater 'findability' of information	32%
It needs to invest in a better intranet (or an intranet) to assist with internal communication and access to policies and procedures	28%
It needs to employ more people in the central request processing team (Official correspondence unit, Government Affairs, etc)	33%
It needs to employ more people in the information management team	24%
It needs to employ more people in elsewhere in the organisation	24%
It needs to invest in more or better training on the OIA	72%
It needs to invest in more or better training on how to store and find information	50%
It needs to invest in improved policies, procedures or guidance	33%
Other	36%

I found some agencies were in the process of introducing new information management strategies, with supporting governance committees, policies and systems aimed at meeting these challenges. A common priority for these agencies was improving the efficient capture, storage, search and retrieval of information to enhance their overall capabilities and performance. However, few were explicitly considering proactive disclosure and responding to OIA requests as part of this.

Many other agencies did not have an overarching information management strategy, nor a senior manager with specific strategic responsibility and executive accountability for information management compliance. Rather their focus tended to be on delivering lower level operational projects and/or ICT specific deliverables without the longer term strategic needs of the agency in mind.

Most agencies (85%) had information management and record keeping policies, but I found they varied in content and currency. Some were under active review at the time of my enquiries and were being updated to include guidance on managing text messages and emails, whereas others were silent and did not acknowledge that these ways of creating and receiving information were used within their agency. As mentioned earlier, the Chief Archivist's recent report on *Managing Text Messages under the Public Records Act 2005*<sup>64</sup> will be a good starting point for agencies to refer to when reviewing and updating their policies.

I found that all the information management and record keeping policies of the 12 selected agencies were accessible to staff on their respective intranets and new employees were introduced to them as part of their induction. However, as noted earlier in this report, the level of ongoing training and guidance provided to staff in relation to record creation, maintenance and disposal was usually not high. Rather, most staff relied on their peers or the agency's intranet for guidance and their manager's oversight to ensure they complied with the policies. Regular, direct engagement with the agency's information management personnel was not common.

The hands-off, self-reliant approach to information management that I found commonly operating in agencies does not demonstrate a culture genuinely committed to enabling ready access to information. I note that only 35% of survey responders who work or had worked in government agencies said that compliance with their agency's information management policies was one of their key performance indicators for annual performance reviews and development plans. Further, one of the most common difficulties agencies said they faced in meeting their obligations under the OIA was in finding and collating all relevant information falling within the scope of requests. I also note that in the submissions I received from requesters they cited their most common difficulties in obtaining access to information from agencies included how to describe the information they were seeking and delays in receiving the information.

Sound information management and record keeping policies and systems accompanied by compliant practices can not only benefit the agency's performance in managing these difficulties but also assist the requester to articulate more clearly the information they are seeking to obtain a timely response.

In addition, the rapid advance in information communication and technology means the cost of assembling and publishing information has been reduced greatly. As a result, there are great opportunities for agencies to use these technologies to proactively release information they hold which are not yet being realised.

## Form in which information is disclosed

My investigation found that agencies were frequently releasing information to

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64 Archives New Zealand, 'Managing text messages under the Public Records Act 2005: A review by the Chief Archivist'. 15 September 2015. Retrieved on 23 November 2015 from [www.archives.govt.nz/advice/public-records-act-2005/managing-text-messages-under-public-records-act-2005](http://www.archives.govt.nz/advice/public-records-act-2005/managing-text-messages-under-public-records-act-2005)

requesters in a form that does not enable them to use it easily. Most commonly, this was when agencies made a decision to only partially release requested information. They would tend to redact any withheld information from a printed copy of the relevant document and photocopy the remaining information onto paper overprinted with *'Released under the Official Information Act'*. This would then be scanned into a PDF and sent to the requester. Agencies that prepared information for release this way explained that this was to ensure any redactions were properly made.

However, a number of requesters said receiving the information in this form compromised their ability to make efficient use of the information as it was akin to receiving *'a collection of photographs'*, rather than actual text which could be searched or copied and pasted. Agencies should also be alert to particular accessibility needs of the requester. For example, releasing a PDF may not be providing information in an accessible form to a person with a visual impairment. Section 16(2) of the OIA requires agencies to make the requested information available in the way preferred by a requester (subject to certain exceptions). I note many requesters acknowledged that they had not informed the agency of a preferred form, when making their original request. Common sense suggests that information created in (for example) a word processing or spreadsheet software package should be made available in the same format, unless there is good reason not to do so.

Half of agencies (50%) advised me that they do not have computer software to assist officials with redacting digitally created and held information. As a result, officials apply more laborious methods to mitigate the risk of inadvertently disclosing information which there is good reason to withhold under the OIA. Investment in such redaction software would not only streamline these types of processes, but also enable requesters to be given official information in a more usable format.<sup>65</sup>

Investment in redaction software would not only streamline processes but also enable requesters to be given official information in a more usable format.

## Proactive disclosure policies

Most of the agencies I surveyed (78%) said they had no policies in place for the proactive disclosure of official information. For most agencies, any proactive disclosure was done on an ad-hoc basis. Opportunities for the planned publication of information to assist the public's understanding of an agency's work (and reduce suspicion or media speculation) were often missed. These opportunities included:

- the development of a new policy or initiative;
- a change in policy, functions, legislation or day to day operations;
- an external event occurring; or
- one or more media enquiries or requests for information.

Without effective proactive disclosure policies in place, I found agencies were

<sup>65</sup> Redaction software would also enable agencies to generate accurate reports on where in the document information has been withheld and for what reason.

vulnerable to a number of risks that can arise if and when they decide to voluntarily release information. This is particularly relevant if the information they would like to publish:

- contains personal information about an identifiable individual;
- contains commercially sensitive information;
- contains information that was provided to the agency in confidence or is the subject of a confidentiality agreement;
- could harm New Zealand's international relations, the maintenance of the law or would otherwise be withheld if requested under the OIA;
- could infringe copyright;
- could be defamatory;
- is redacted so significantly as to change its meaning;
- is not provided in open accessible formats; or
- is not able to be readily located or accessed.

While section 48 of the OIA protects agencies from civil or criminal proceedings when information is released in good faith in response to an OIA request, the same statutory protections do not apply to information that is proactively disclosed by an agency. Having carefully considered policies in place for proactive disclosure will enable the agency to ensure they are not exposed to civil or criminal sanctions when releasing information, while also enabling them to realise the benefits of regular proactive disclosure. I am pleased to note that the Cabinet Office has recently updated its guidance to agencies on proactive publication of Cabinet papers and minutes.<sup>66</sup> This is to be encouraged and built upon.

## Tools and resources

I was pleased to find agencies had developed and identified a number of tools and resources to assist their officials with processing OIA requests and complying with the Act's requirements.

- Most agencies had developed a number of templates to enable staff to comply with the notification and decision-making requirements set out in the OIA in any formal correspondence with requesters. Overall, most enabled a high level of compliance with the OIA. I note that the Ministry of Transport and Ministry of Education had a complete set of templates to accompany their policies as well as checklists for officials to use.
- I found agencies were increasingly automating their OIA support resources by developing e-learning modules for their staff about their policies and the Act's requirements. Some agencies included a link to the time limit response

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<sup>66</sup> Cabinet Office Notice (15) 3.

calculator on the home page of the Ombudsman's website. This was frequently utilised by OIA staff to quickly and accurately calculate the working day time limits that applied to individual requests.

- The Ministry of Justice has established a page on the *Public Sector Intranet* where agency OIA practitioners can find practical guidance and resources.
- Two of the 12 selected agencies had, in previous years, identified OIA champions working within different teams in their respective agencies who would act as their team members' first 'port of call' or 'go-to people' for any enquiries about the OIA. This seemed to me to be a good initiative which in recent times had lapsed due to a lack of resilience arrangements following those individuals' leaving the agency.
- Many agencies accessed the case notes and opinions published by the Ombudsman since the OIA was introduced in 1982. This information is discoverable through a search tool on the Ombudsman's website.<sup>67</sup>
- A growing number of agencies also contact my Office directly for advice on applying the provisions of the OIA in response to requests.<sup>68</sup> My office has a Policy and Professional Practice Advisory Group<sup>69</sup> whose role includes providing free support to agencies in:
  - training their staff;
  - designing and reviewing OIA policies and processes; and
  - applying the provisions of the OIA appropriately to any individual OIA requests.

Finally, while there has certainly been some growth and innovation in the resources, tools and support for agency officials responsible for processing requests, the same could not be said for assistance to requesters wanting to access information from these agencies on how to formulate their requests.

I reviewed agencies' websites for guidance on:

- how to make a request for information;
- how to be specific and best describe the information they are seeking; and
- how to ask for help from the agency.

I found some agencies had no information at all on how to make a request and most other websites only contained general information at best.

Most agencies (70%) confirmed they struggled with the volume and scope of requests they were receiving. When I explored this issue further with the 12 selected agencies, I found this usually related to the lack of specificity or due particularity of

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<sup>67</sup> These are currently being updated and will be re-published in 2016.

<sup>68</sup> In the 2014-15 reporting year, my Office was contacted by agencies 168 times seeking direct advice, an increase of 63% as compared to the 2013-14 reporting year.

<sup>69</sup> Office of the Ombudsman, 'Improve fairness for all'. Retrieved on 3 December 2015 from [www.ombudsman.parliament.nz/what-we-do/improve-fairness-for-all](http://www.ombudsman.parliament.nz/what-we-do/improve-fairness-for-all)



the requests made. Requesters interviewed during this investigation agreed that it was often difficult to articulate what they were seeking as they did not know how best to describe it. I note that the Law Commission made a similar observation in 2012:

*...many people who wish to request information do not have much knowledge of how best to do so, or even of how the Act works. Nor do some of them understand the sorts of information that the various agencies hold, or the pressures placed on agencies by large requests.<sup>70</sup>*

I found this to be the case not only for members of the public but also political party research units and journalists. Yet there are few tools or resources developed by agencies with the specific intention of assisting requesters to formulate their requests, other than an official contacting the requester and discussing their request. I note the Ministry of Justice has produced a guideline for officials on contacting requesters.<sup>71</sup>

In order to mitigate these challenges, I encourage agencies to develop tools and resources for requesters to assist the making of requests for access to the information they hold. Options could include:

- website guidance on how to make a request for information;
- a visible and accessible OIA adviser within the agency whose role is to assist requesters to articulate the information they are seeking;
- more detail about information the agency holds in the *Directory of Official Information*;
- an 0800 number or online advice portal that requesters can access for assistance on how to phrase their requests more clearly; and
- a list, updated every month, of the titles of files it holds.<sup>72</sup>

I note that the Law Commission made similar recommendations in its report three years ago.

In my view, it would be consistent with both the Ministry of Justice's responsibilities for administering the OIA and the SSC's priorities 'to lift the performance of the State Services ... by increased collaboration across agencies to improve customer experience and deliver results' for these leadership agencies to champion the development of tools and resources by agencies to assist requesters.

Yet there are few tools or resources developed by agencies with the specific intention of assisting requesters to formulate their requests.

<sup>70</sup> Law Commission 'The Public's Right to Know' (NZLC R125, 2012), p 170.

<sup>71</sup> Ministry of Justice, 'Guidance on contacting requesters'. This document, which is only accessible by agencies with access to the Public Sector Intranet, can be retrieved from [psi.govt.nz/OIAGuidance/Guidance%20on%20contacting%20requesters/Public%20sector%20OIA%20guidance%20-%20Contacting%20requesters%20-%20A5%20printable%20version.pdf](https://psi.govt.nz/OIAGuidance/Guidance%20on%20contacting%20requesters/Public%20sector%20OIA%20guidance%20-%20Contacting%20requesters%20-%20A5%20printable%20version.pdf)

<sup>72</sup> Similar to the lists required to be published by Australian Federal Government agencies under a Senate Order. See, for example, Department of Prime Minister and Cabinet, 'Departmental indexed file lists'. Retrieved on 3 December 2015 from [www.dpmc.gov.au/pmc/accountability-and-reporting/departmental-indexed-files](http://www.dpmc.gov.au/pmc/accountability-and-reporting/departmental-indexed-files)

## Recommendations

### OIA policies

- 15 Agencies should review their OIA policies to ensure they provide accurate guidance and sufficient coverage so as to avoid any gaps or incorrect assumptions that could create vulnerabilities in compliance. They should consider seeking the assistance of the Office of the Ombudsman when doing so.
- 16 Agencies should ensure their interpretation of the *'no surprises'* principle contained in any OIA policy is not characterised as seeking a **clearance** or **approval** by their Minister on an agency's proposed response to any OIA requests.

### Information management policies & systems

- 17 Agencies should develop and implement an information management strategy (that has OIA compliance and public participation needs at its core, alongside other business needs of the agency) and ensure they have a senior manager assigned specific responsibility for its implementation.
- 18 Agencies should review their information management and record keeping policies to ensure they include guidance on managing emails and text messages created and received for business purposes, regardless of whether they are held on an agency-owned or a personal device.
- 19 Agencies should review their information management systems to ensure they are adequate to meet the needs of the business, including the need to search for and retrieve records efficiently in order to deal with requests made under the OIA.
- 20 Agencies should provide regular training to staff on information management and record keeping policies and monitor compliance with these policies.
- 21 Agencies should have redaction software to assist them with preparing information for release in formats enabling easy reuse of the information.

### Proactive release policies

- 22 Agencies should ensure they have a comprehensive policy concerning the proactive release of information they hold, which includes how to maximise the benefits of proactive release while also managing risks that may arise from the release of certain types of information.

## Tools and resources

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|----|---|
| 23 | Agencies should review their websites and ensure these contain accessible guidance for requesters to assist them when making requests for official information. |
| 24 | Agencies should develop tools and resources for requesters to assist them to make focused requests for official information.                                    |
| 25 | My Office should provide requesters with training, support and guidance in how to make requests for official information effectively.                           |
| 26 | The Ministry of Justice and the SSC should champion the development of tools and resources by agencies to assist requesters.                                    |



## Current practices

Theory is one thing, practice is another. The effectiveness of the OIA is largely dependent on those charged with implementing it on a day to day basis and how they manage the realities of giving effect to the legislation. I was particularly mindful of the following observation from Professor Alasdair Roberts:

*Whether an FOI law succeeds ... depends heavily on the predispositions of the political executives and officials who are required to administer it. ...critics in many jurisdictions argue that FOI laws have been weakened by the emergence of internal practices designed to ensure that governments are not embarrassed or surprised by the release of certain kinds of politically sensitive information. However, it is often difficult to confirm the existence of such internal practices, or to gauge what influence they have on rights granted in legislation.<sup>73</sup>*

My investigation therefore included a series of on-site visits and meetings with the officials who are assigned to deal with OIA requests and related work within the 12 selected agencies.

<sup>73</sup> Roberts, A. 'Administrative Discretion and the Access to Information Act: An 'Internal Law' on Open Government?', Canadian Public Administration, 45 no. 2 (Summer 2002), 175-194.

The focus of these inquiries into current practices was threefold.

1. To understand the environment in which the officials operated and how their policies, procedures and relationships with others involved in OIA requests worked in practice.
2. To consider the administrative practices occurring within agencies, including:
  - a. whether the identity of the requester mattered;
  - b. how officials determined the scope of requests;
  - c. how officials managed searching for and locating requested information; and
  - d. whether there were any timeliness or other compliance issues and if so, whether there was a common cause.
3. To consider the practices involved in reaching a substantive decision on a request including:
  - a. applying the provisions of the OIA when formulating a decision;<sup>74</sup>
  - b. consulting third parties (including Ministers) and managing any potential demands or expectations they may have;
  - c. the impact of the political environment and media environment and any risk management practices being applied; and
  - d. the quality of communication and engagement with the requester during the decision-making process.

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<sup>74</sup> I did not examine the individual application of withholding grounds to individual requests outside the complaints my office had already received and investigated.

## Key indicators of good practice

- ✓ The practice in an agency aligns with its policies and procedures.
- ✓ OIA staff have a thorough technical knowledge of applying the OIA and the agency's policies and procedures.
- ✓ All staff have a good general awareness of the agency's OIA obligations.
- ✓ The agency is coping with the volume and complex nature of recent OIA requests.
- ✓ The agency is making appropriate decisions within the time limits required by the OIA.
- ✓ The agency understands how to apply the withholding grounds and the countervailing public interest test under the OIA.
- ✓ Ministerial and third party involvement is appropriate and recorded.
- ✓ Where an issue needs escalating within the agency the process works.
- ✓ The content of letters and files demonstrate compliance with the OIA.
- ✓ There are no recurring issues arising from practice in OIA processing or substantive decision-making.
- ✓ The agency is recording in sufficient detail why it applied the selected ground to each redaction, to facilitate compliance with section 19 of the OIA.
- ✓ Stakeholders are satisfied with their experience.

### What excellence looks like

- ✓ The behaviours and practices of the agency's staff consistently demonstrate an understanding and commitment to the principles of the OIA, their agency's obligations, policies and procedures and promote a positive proactive culture.
- ✓ OIA staff have a thorough technical knowledge of applying the OIA.
- ✓ The agency is coping with the volume and complexity of requests and responses are provided as soon as reasonably practicable.
- ✓ Decisions are reasonable, compliant and documented, with valid grounds where access is refused.
- ✓ Ministerial and third party involvement is appropriate.
- ✓ Requesters receive information in a usable format.

## Findings

### Identity of the requester

I found that in practice, the identity of the requester did matter to agencies. While the media, members of parliament, political party research units and certain other stakeholders may not be the most prolific users of the OIA for many agencies, I found that agencies tended to treat these requesters differently in terms of:

- access options for making requests;
- communicating decisions;
- reporting on their requests; and
- charging decisions and consultations relating to the management of broad requests.

### Access options

As discussed in the **Organisation structure, staffing and capability** chapter of this report, 81% of agencies surveyed confirmed they had set up a separate gateway for the media to seek access to information – usually in the form of directly emailing or calling the agency's communications or media team. While providing a separate gateway for the media to make their requests is not prohibited under the OIA, I explored whether there was any impact in practice and, in particular, whether this resulted in a disadvantage to the ordinary public requester, or the media.

Survey responses indicated that 75% of media requesters believed their requests were processed more slowly than those from other type of requesters, and none believed their requests had been processed more quickly.

I reviewed the OIA logs and media logs of agencies that operated separate media teams and noted that the majority of media requests were quick fact checks or confirmation of information already known. Their responses were usually provided immediately or within hours of their requests being received and they were usually characterised as 'media enquires', rather than OIA requests. There were no additional clearances or consultations required by the agency in providing these quick turnaround responses. If the public asked for similar information orally or by email through the agency's other OIA gateways, I found the turnaround in providing a response was of a similar timeframe with no additional clearances or consultations required. There was no disadvantage in terms of the timeliness or consistency of the response compared with that received by the media via the media gateway.

I note that the mode of communicating the decision had the greatest impact on the time it took for a requester to receive a response. Agencies generally provided responses to requests for information in the same form the request was received, irrespective of who the requester was. On its face, this would not breach the *'as soon*

as reasonably practicable<sup>75</sup> time limit requirement (unless there were circumstances where it would be reasonably practicable to communicate the decision sooner).

I was also concerned to ensure that those receiving oral requests in both the media/communications team and elsewhere in the agency understood that when a request was made orally, the statutory time limits commence the day after the request is received. My investigation found that not all officials did understand this. If the request for information was considered substantive or complex by the recipient, they would sometimes ask for the request to be put in writing.

While confirming the request in writing is good practice to ensure that there is no subsequent dispute as to what has been asked for, there is no requirement in the OIA for the request to be made in writing. If requests meet the requirements of section 12,<sup>76</sup> the agencies' legal obligations for responding have already been triggered and they will be liable for not complying with these if their staff do not progress requests appropriately. Agencies can mitigate this risk by improving their training, resources and policies.

Media submissions I received also advised:

*Requests for comment and information are treated differently when a request is made 'under the Act' versus an inquiry not specific as under the Act ie, journalists are often advised information they have requested needs to be made via the Official Information Act which appears to have become a shorthand for slower handling of the request.*

## Communicating decisions

Of greater concern to me was that if the agency's response to a 'media enquiry', general public enquiry or contact from an interest group was to decline to provide the information being requested in an email or telephone call, the decision was unlikely to be communicated in accordance with section 19 of the OIA, which requires that the agency:

- provide the reason for the refusal and, if requested, the grounds in support of that reason; and
- advise the requester that they may complain to the Ombudsman about this decision and seek an investigation and review of this decision.

Submissions I received from the media supported this:

*Reasons are often not well communicated. This has resulted in cynicism within the media that reasons given are genuine.*

I was unable to find any evidence of such decisions being compliant with the requirements of the OIA, nor were my concerns allayed in discussions with agency

<sup>75</sup> Official Information Act 1982 s 15(1).

<sup>76</sup> Section 12 defines an OIA request as any request for specified official information held by an agency that is made by a person who is in New Zealand, has a place of business in New Zealand, is a New Zealand citizen or permanent resident.



officials from the media or OIA teams. However, I do not consider that this is evidence of a deliberate attempt by agencies to avoid their obligations under the OIA. Rather, I consider this is more likely an unintended gap in practice that has resulted from referring to these types of requests colloquially as ‘media enquiries’ or ‘general enquiries’ rather than media or public OIA requests. This gap can be addressed in policies, templates and training.

I found that some agencies were also responding differently to requests received via the online FYI tool.<sup>77</sup> In some instances, they would seek the requester’s postal or personal email address as means of establishing their eligibility under section 12 of the OIA, but then send the final response to that address rather than via the FYI email address from which the request was originally received. In some cases this was a deliberate practice to avoid harassment of staff. However, in the majority of occasions where it is unnecessary to send a response offline (as no need for conditional release arises), this does create a perception that an agency is deliberately avoiding broader public access to the decision than would otherwise occur by sending its response to the FYI email address.

### Impact of reporting on timeliness

I found that many agencies provided daily or weekly reports to the Minister on the *media enquiries* they had received and responded to in accordance with their interpretation of the *Cabinet Manual’s* ‘no surprises’ principle. However, this was usually after the decisions had been made and did not have an impact on the timeliness of the responses.

I also found that requests by the media for official information that did not fall within the agency’s category of *media enquiries*, but which were referred for processing by the OIA team (because it was a more substantive request for information) were often automatically required to be subject to additional consultation procedures under the ‘no surprises’ principle, along with those received from members of parliament, political party research units, and in some cases interest groups. This practice is likely to have a detrimental impact on the timeliness of responses when compared with the same request made by a member of the public (which I discuss in more detail later in this chapter of the report).

### Exemptions from charging

Finally, I found the identity of the requester did have an impact on decisions involving the possibility of charging for the provision of information. Many policies I reviewed specifically provided that the following groups should be considered exempt from charging:

- members of parliament;
- parliamentary research units; and
- media organisations.

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77 [www.fyi.org.nz](http://www.fyi.org.nz)

This was on the basis that their use of the OIA serves two of the main purposes of the Act – to enable more effective participation in the making and administration of laws and policies, and to promote the accountability of the Ministers of the Crown and officials. The Law Commission reviewed this practice in 2012 with reference to parliamentary research units and concluded that:

*...access to official information is an important tool for opposition parties to be able to scrutinise government policy, and that parliamentary research units should not usually be charged for reasonable requests. However, there is no reason why unreasonable political requests should be completely exempt. Voluminous and unrefined requests from parliamentary research units can cause a great deal of expenditure of resources. The charging mechanism should be available to agencies as a defence mechanism in appropriate cases, regardless of the source of the request. The public interest waiver should provide the flexibility for appropriate charging of MPs and incentivise these requesters to ensure that requests have a sufficient public interest basis in order to qualify for a waiver of charges.<sup>78</sup>*

I agree with this approach and believe it should apply to all types of requesters. The OIA does not provide for an outright exemption based on the identity of a requester or their role in its charging provisions. Nor did I find many members of the media who believed they ought to be exempt from charging, although some worked for organisations that had a policy not to accept any charge for the provision of official information.

However, my concern was to ensure that in practice, any type of policy that recommended exemptions from paying a charge based on the identity of a requester should not be perversely applied by agencies to prevent information being released. While the Law Commission characterised the ability to charge as a ‘defence mechanism’, I also view it as a means of making information available which might otherwise be refused on the basis of substantial collation and research.<sup>79</sup> Most members of the media and parliamentary research units I received submissions from believed that agencies were too quick to refuse their requests on the basis of substantial collation or research:

*Agencies are frequently declining requests on the basis that the information is too time consuming to collate, without offering any opportunity to consult on how the scope of the request may be narrowed to address this concern.*

My investigation found no evidence that agencies’ refusals on the basis of substantial collation and research were driven by the charging exemption policies for these requesters.

However, I did find that refusals were more likely to occur if the agency decided not to consult the requester about their request and treat it on its face as an overly broad and unmanageable request. Half of OIA requesters who responded to our survey (50%) said the agency rarely or never consulted them about their request before it was refused under section 18(f) of the OIA. Yet I found many examples

The OIA does not provide for an outright exemption based on the identity of a requester or their role in its charging provisions.

<sup>78</sup> Law Commission ‘The Public’s Right to Know’ (NZLC R125, 2012), p 211.

<sup>79</sup> Official Information Act 1982, s 18(f).

where agencies' consultations with requesters had enabled satisfactory responses to be provided, despite what had originally seemed to the agency to be an unmanageable request that could have been refused.

It is true that the OIA does not **require** consultation when a request is likely to be refused for the reason that making the information available would require substantial collation and research. Rather, it imposes a duty on agencies to 'consider whether consulting with the [requester] would assist that person to make the request in a form that would remove the reason for refusal.'<sup>80</sup>

However, as a matter of good practice and evidence of an agency's genuine commitment to openness, engagement and a willingness to assist in the provision of official information about its work and activities, I consider consultation should be a standard step for an agency to take when dealing with broad requests (no matter who the requester is) and should be included in its policies and procedures.

## Identifying all the information falling within the scope of a request

More than one third of surveyed agencies (37%) confirmed that finding and collating all the relevant information falling within the scope of a request was one of their greatest difficulties. Some (22%) said this had increased in the past five years.

With most government information now being created and stored electronically, the volume of information held by government agencies has increased exponentially. Emails, drafts, comments on drafts, and multiple versions of information held in an agency's records systems can all potentially fall within the scope of an OIA request. In addition, I found a number of agencies are increasingly receiving requests for bulk data and the entire contents of their databases rather than individual documents. One media organisation confirmed:

*[Our organisation] is developing – as other media organisations abroad have – a data journalism capability. The growth of data and the value it has to a media organisation is immense. Recent OIA requests have seen [our organisation] seek large databases of information, which is requiring a shift in practice and thinking on the part of the receiving agencies. We are at foundation level now and it is likely the complexity of such requests will grow, particularly as the creation of such data increases.*

While the Government says it is relying on insights derived from data to drive policy making, other actors in the policy debate also seek data to enable them to contest or improve the proposed initiatives. Some interest groups supplied my investigation with emails which indicated that agency officials sometimes did not treat requests for data as OIA requests.

In practice, this has given rise to a number of issues that both agencies and requesters find challenging to cope with.

Consultation should be a standard step for an agency to take when dealing with broad requests (no matter who the requester is) and should be included in its policies and procedures.

80 Official Information Act 1928, s 18B.

- Requesters often have difficulty articulating their request and are unable to refine it appropriately if asked, as they don't tend to understand how the information is held.
- Requesters tend not to understand the capabilities of, and limitations on, agencies to identify and extract the information they are seeking and therefore can be unwilling to refine their request if asked.
- When information related to a particular policy, activity or report is searched for, the number of records identified can often be high.
- Sometimes technical literacy can be an issue with officials needing to seek the assistance of an IT specialist to extract the information (which can be expensive and time-consuming).
- How to release certain types of official information can be complicated with agencies having difficulty providing it in the form a requester prefers.

As discussed earlier, in order to meet their obligations, agencies are now heavily reliant on their information management systems and staff practices in order to be in a position to search, locate and retrieve all the requested information effectively and efficiently.

My investigation found that agencies are at high risk of not being able to identify all information falling within the scope of a request, not only due to the way they manage and store information, but also due to how they search for it when a request has been received.

As a result, agencies are vulnerable to either inadvertently making the wrong decision or being perceived to be deliberately applying poor search practices to OIA requests so as not to identify all the requested information. Requesters provided me with a number of examples where they had received leaked information but had difficulties obtaining it officially on request from the agency, on the basis that it could not be found from the searches conducted. One Minister agreed that delays due to the inability to search well would understandably create suspicion.

I considered the practices agencies applied to identify all the information falling within the scope of a request. For agencies operating a centralised hub<sup>81</sup> to manage their OIA processes, it was common for the OIA official overseeing the preparation of a response to notify the relevant areas within their agency they believed were likely to hold the information and ask them to search for it. This included any information they considered ought not be released. Staff working in those areas (as well as those who worked in agencies that operated a more devolved model to manage their requests) were then expected to use their knowledge to search for and locate the information from the various information repositories of the agency. If no particular team could be identified, or no information could be found, the OIA official tended to issue a general request to all parts of the agency for assistance. In both cases, the various teams within the agency were expected to make a proper search for all the information (irrespective of format)

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81 Refer to the Organisation Structure chapter of this report for definitions.

held by the agency and provide copies of all relevant information they found to the coordinator for consideration.

This method of searching and locating information is heavily reliant on individual officials' skills, knowledge and instincts, as well as their relationships with their colleagues, and did not provide me with confidence that a reasonably comprehensive search was always being undertaken by agencies to find all the information falling within the scope of an OIA request.

I accept that with electronic communications and the growth of digital information, the challenges for agencies to find and retrieve information are increasing. However, the OIA enables people to make requests for *'any specified official information'* held by an agency. Agencies are expected to know where and how they hold their information in order to respond to OIA requests properly, and there should be a clear direction for staff in policy as to where they are expected to look to find information and how to do so. I have provided general guidance on the ideal contents of such a policy in the **Internal policies, procedures and resources** chapter of this report and would encourage the Ministry of Justice, together with SSC and Archives New Zealand, to develop a model policy for agencies to apply. This policy should include a requirement that staff keep a record of how, when and where they searched (including the databases and search terms used) in order to demonstrate they conducted a reasonable search in response to an OIA request.

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## Volume and broad requests

During this investigation agencies advised me the greatest difficulties they faced in meeting their obligations under the OIA were:

- volume of requests (42%); and
- complex and widely defined requests (62%).

My investigation found evidence that agencies were indeed receiving:

- vague or extremely broad requests;
- requests for large numbers of documents; and
- multiple, frequent requests from the same requester which differed only slightly from other requests they had made.

None of the officials interviewed denied their obligation to respond to requests appropriately under the OIA and most accepted that these requests were for the most part, genuine. However, many were frustrated at the impact responding to these types of requests had on an agency's limited time and resources. Some questioned the requester's motives, particularly if the request was from the media or an opposition political party and appeared to have already been asked many times before *'with only one or two words different'*.

I was surprised to find a reluctance to use the tools available in the OIA when dealing with these types of requests.

Requesters have statutory obligations that they must comply with when making requests. Section 12(2) of the OIA requires that they must specify their requests with *'due particularity'* so that an agency is able to identify the information requested. When requesters have made a vague or unclear request so that an agency finds it difficult to identify the particular information being sought, an agency also has a statutory duty under section 13 of the OIA to provide the requester with reasonable assistance to make the request in a manner that will comply.

Many requesters acknowledged that it was difficult to specify the information they were seeking in words that aligned with the agency's terminology. I received submissions which advised:

*...continuing work and education is needed to ensure journalists and members of the public use the Act effectively and that requests are sufficiently specific to ensure ease of handling and efficient execution of the requests. ... It is our view that public servants should help journalists to effectively frame requests to avoid 'fishing' expeditions and time wasting requests. Some agencies manage this well. Others do not.*

I found a number of agencies did contact requesters to seek clarity about the information they were seeking and were successful in doing so. They were able to conduct a targeted search to find the information quickly and the requester was in a better position to obtain the information they were seeking. If requesters weren't willing to clarify their request, agencies were more likely to be entitled to assess a vague or unclear request as not having been specified with due particularity<sup>82</sup> and decline to continue processing the request under the OIA.

What concerned me however, was the incidence of agencies (sometimes in consultation with their Minister's office) choosing to redefine or interpret the scope of a request themselves without contacting the requester first. While I am satisfied that most decision letters included details of how the request had been interpreted so the requester could challenge this interpretation, this practice makes the agency unnecessarily vulnerable to claims of 'gaming' the requester and manipulating the final response to suit a particular purpose. Submissions I received said:

*The overall impression left is that the release of information is not the starting point.*

*They seem to start with the presumption of withholding not release.*

Contacting the requester early in the process to discuss their request would avoid these perceptions and help achieve good outcomes for both them and the agency.

The agency has many valid options available to it under the OIA to manage requests for large volumes of information or frequent, persistent requests. These include:

- extending the time limit to respond;
- consulting the requester to discuss refining the request;
- charging for the supply of the information requested; and

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82 Official Information Act 1982, s 12(2).

- refusing on the basis of substantial collation and research.

My investigation found that when dealing with large and/or frequent requests, agencies tended to resort only to extending the time limit to respond. I also explored why agencies preferred not to use the other tools in the OIA that were legitimate for them to apply in these circumstances.

The common explanation my Office was given was that if the requester was a member of the media or opposition political party, the agency feared it would likely be publicly portrayed as trying to either manipulate the scope of the request, unreasonably charge for official information or refuse to be transparent and open about its work. Yet these are legitimate tools in the OIA specifically designed for use when these circumstances arise. I note the Law Commission in its most recent review came to similar conclusions and recommended new provisions which provided clarity as to how these provisions would be validly used, but did not seek to replace those which are already available for agencies to apply.<sup>83</sup>

As the tools for managing these challenges are in the OIA, but are not being used by agencies, I needed to understand what was occurring in the current New Zealand media and political environment that made these tools seemingly irrelevant.

## Media environment

Agencies have experienced what they consider to be unfair attacks and inappropriate, misleading reporting by the media after responses and official information have been provided. As a result, I found there was a general perception that many media requests are not driven by a desire to inform the public properly on the activities of the government but rather on obtaining a 'gotcha' headline and sensationalising information.

The OIA does not allow an agency to refuse access to information because of the potential for misreporting, misleading headline making or selective reporting about what is released. However, it does provide for release of information subject to reasonable conditions as an alternative to an outright refusal. I note this is rarely used by agencies when dealing with media requests (with the exception of embargoes) and was rejected by both the media and officials when proposed as a means of ensuring an agency's response was reported fully.

New Zealand Herald journalist David Fisher confirmed in a speech<sup>84</sup> he gave to public officials last year that the media:

*...don't trust you. By commission or omission, we think those who handle our OIA requests don't have the public interest at heart. We don't trust the responses we get. Of course we may be completely wrong. We may have made a terrible mistake. But how could we know otherwise? You don't talk to us anymore. You're too scared to. Caught between the Beehive and the media, you don't know which to face. Or at*

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83 Law Commission 'The Public's Right to Know' (NZLC R125, 2012), R 35-42 pp 157-163.

84 Fisher, D. 'OIA a bizarre arms race'. New Zealand Herald, 23 October 2014. Retrieved on 23 November 2015 from [www.nzherald.co.nz/opinion/news/article.cfm?c\\_id=466&objectid=11347187](http://www.nzherald.co.nz/opinion/news/article.cfm?c_id=466&objectid=11347187)

*least, that's the impression we have. And again we may be completely wrong.*

There is no doubt that agencies and their Ministers feel vulnerable to negative impacts arising from the publication of incomplete or misinterpreted information by the media. A number of chief executives and senior managers described it to me in the following ways:

- *We feel that more and more journalists are using the OIA as a way to make stories and headlines and 'ankle tap' agencies for the headline rather than being responsible reporters of information. Agencies are now becoming more careful and tactical with the responses they prepare and ensuring context and messaging is accompanying the response. The OIA is supposed to be a tool for instilling trust and confidence in the work of the government, explaining what is happening and why things are being done. But the truth won't make a headline. Irresponsible reporting can have the effect of derailing a good project and will make an agency be more careful and considered in how we prepare a response to a request about it.*
- *These days the media are so powerful and fast and can manipulate information so quickly and it can take agencies too long to correct the damage caused by misreporting.*
- *Sensational headlines can damage important work that we are doing. Our Minister then has to rebuild relationships that have been undermined by a misleading, bad headline. Media move on to the next story but the damage for us can take a long time to recover from.*
- *The modern media do not feel they have a responsibility to ensure that their actions don't impact on the effective operation or the principles of the Act. They don't have the same level of professionalism as in 1982. They seem less focused on informing the public about the agencies' actions, intentions and perspective but rather seem to be driven by a desire to humiliate, embarrass and sensationalise. It's not really information but bullets that are being released.*
- *Media are good at combining news with views - to the point where it's difficult to tell the difference between commentary or opinion and the facts. Providing opinion or analysis is fine but it is supposed to be clearly separate from reporting the facts.*
- *Agencies are concerned about the bad news story. This is because of the way the media and MPs are prone to use the information they provide in response to requests. It's important to ensure the information is provided in context and explained when we release it. We may not be able to control how it is reported but we can make more information available to encourage accurate reporting.*
- *Our risk averseness to engaging with the media and telling our story means opportunities are missed and the gap is filled by others' assumptions.*

I note that the Danks Committee warned of this when it made its recommendations for the Official Secrets Act to be replaced by the OIA in 1981:

*The essential purpose of the new system we propose is to improve communication between the people of New Zealand and their government. The effectiveness of the reforms recommended by the Committee will depend largely on the attitudes of those directly concerned – not only of Ministers and officials but also individuals, interest groups and the public media. A new approach will be required from*



*Ministers and officials, to place greater emphasis on the positive information functions of the Government.*

*By making intelligent and fair use of the official information that is made available, the interest groups and the media can in turn encourage ministers and officials to adopt a still more open approach, and thus speed the process of change. Unfair or inept use of information may have the opposite effect. Balance is a goal that can seldom be fully achieved, but if it is not actively sought after the credibility of those involved may suffer. Bodies responsible for upholding the standards of the media may wish to reconsider their own procedures in the light of this report.<sup>85</sup>*

The media have an important role in our democracy to responsibly report and inform the public about the activities of the Government and public sector agencies. The media industry is undergoing an evolution whereby newspapers are read online, the rolling 24 hour news expectations established by cable news networks are being overtaken by instant or on-demand services, and interactive expectations are being driven by the internet, social media, and websites that the public can access from their mobile devices any time they like. A Minister observed that:

*Articles in the morning paper are more often than not a summary of everything that was written on social media the day before. The competition to publish first is intense and goes beyond traditional media outlets to include bloggers and anyone who is able to use social media to release information or comment on a matter of the day.*

To create impact and get noticed, the media are finding their reports need to be short, snappy and entertaining so that they can be quickly read, shared and commented upon. One senior manager advised me 'scandal or controversy about what we do trumps ordinary reporting any day of the week.'

I note Dr Sarah Baker, Communications Lecturer at Auckland University of Technology, recently observed:

*My research into current affairs programmes from 1984 to 2014 shows the removal of politics and serious subject matter from current affairs programmes and a move to entertainment oriented subjects, a trend that accelerated from the 1980s to 1990s and with even greater examples of 'tabloidisation' in the 2000s ... There are issues and news that need to be explored that do not fit into a quick news story or sound bite. These considerations must be a priority for broadcasters no matter what the commercial considerations are.<sup>86</sup>*

My investigation found that posting misleading, inaccurate and sensational headlines, and 60 second video reports about the work agencies are carrying out is having an effect. However, the impact is often not in respect of the decision whether or not to release the requested information. Rather, extremely careful consideration was given to **how** the information should be released ie, what additional information should be provided for context and to enable understanding

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85 Committee on Official Information. 'Towards open government'. Wellington: Government Printer, 1981, p 7.

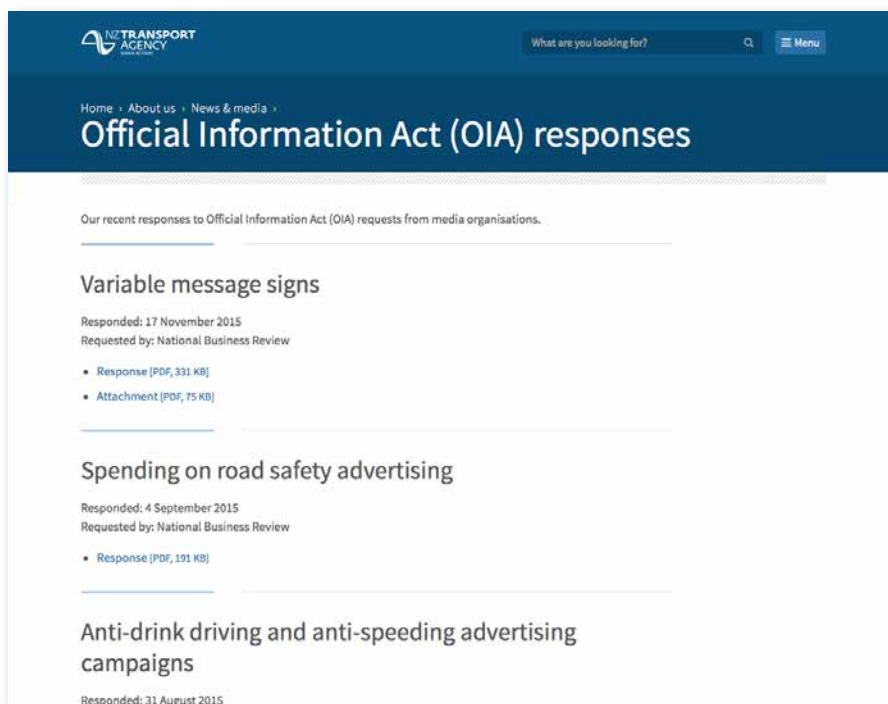
86 Baker S, 'The declining state of public affairs programmes in New Zealand', Evening Report, 26 May 2015.

and informed reporting. This is consistent with an observation one journalist made:

*I have been told by officials ... when reporting on an OIA made by a member of the public that 'we would have gone over that more thoroughly if it was going to be [a journalist].*

I note that some agencies such as the NZTA also publish their responses to most OIA requests from the media on their website<sup>87</sup> a short time after the response is provided to the media organisation which has made the request. I applaud this initiative as it enables members of the public and other media outlets to have access to the agency's original response to the OIA request to obtain further explanation beyond the entertaining headline if they wish to; and it provides a means of mitigating concerns the agency might have about misrepresentation or misreporting by the requester. Wider public release rather than withholding information, along with routine proactive release of information, is the best strategy, as it is consistent with the purposes of the OIA and demonstrates the agency's commitment to openness and communication about its work. In addition, and paradoxically, those organisations that routinely present an open face to the public are much less vulnerable to the suspicion that feeds sensationalism in media reporting.

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## Political environment

There is no doubt that the political environment in which government agencies

87 New Zealand Transport Agency, 'Official Information Act (OIA) responses'. Retrieved 1 December 2015 from [www.nzta.govt.nz/about-us/news-and-media/official-information-act-oia-responses/](http://www.nzta.govt.nz/about-us/news-and-media/official-information-act-oia-responses/)

operate and make their OIA decisions is very different from that which existed in 1982 when the Act was enacted. New Zealand's move to adopt the mixed member proportional (MMP) electoral system has intensified the contest between the political parties. However, politicisation of the OIA is not new. Opposition parties in all democratic systems will seek information to discredit the government by looking for evidence of mismanagement, conflict or scandal. Governments, on the other hand, are focused on promoting their agenda, issuing good news stories and avoiding the release of information that might damage their reputation. However, MMP has altered the political dynamic significantly, notably through markedly increasing the need for parties to make agreements with other parties (which is common to all proportional representation systems), and through the creation of the 'party list'. Under MMP, MPs that thrive are promoted up their party's list and those that suffer can lose their ranking in a very public manner. One Chief Executive observed:

*MMP has had a big influence. While it has made New Zealand more democratic, it has also made our environment more political. Politicians are all struggling to the top – they want to be heard and establish credibility or destroy the credibility of others. The quickest way of obtaining the latter is to get headlines and find (or invent) a scandal.*

A former Chief of Staff also confirmed:

*MMP has made a big difference to how the OIA is used by politicians. There is no doubt it can be an effective political tool for discrediting the Government or disrupting consultations with coalition partners and derailing internal discussions and decisions that are needed to progress the Government's agenda. MMP requires consultation and talking to each other to get things done, including getting the numbers to pass the legislation. All sides realised early on after MMP came into being that the OIA can be a powerful instrument for politicians to make political capital on the actions of an agency and a Government and disrupt any plans.*

They nevertheless said the OIA is an essential component of New Zealand's democratic arrangements. One noticeable development in the New Zealand political environment under MMP, particularly in the last 15 years, is that Ministers now have ministerial/political advisors whose role revolves around the particular Minister and their own interests or priorities. This role includes:

- managing consultations and acting as liaison between the Minister and key stakeholders, interest groups, agencies and coalition partners; and
- considering their Minister's specific interests through the provision of advice on policies, work programmes, priorities, responses to OIA requests and parliamentary questions and preparing for any questions or challenges arising from them.

In my discussions with current and former ministerial/political advisors, Ministers, chiefs of staff and agency officials, I found that all believed that these advisors were an established part of the New Zealand MMP political landscape.

However, I also found that they are often advising not only the Minister but also the government agency on their responses to OIA requests and managing any

Politicisation of the OIA is not new.

consultations that take place. By doing so, both Ministers and agencies are always vulnerable to the perception that agency's responses to official information requests have been the subject of political interference.

The *Cabinet Manual* is quite clear in its guidance about what is required to manage the relationship between Ministers and officials effectively:

- 3.16 *The style of the relationship and frequency of contact between Minister and department will develop according to the Minister's personal preference. The following guidance may be helpful.*
- a. *In their relationship with Ministers, officials should be guided by a 'no surprises' principle. They should inform Ministers promptly of matters of significance within their portfolio responsibilities, particularly where these matters may be controversial or may become the subject of public debate.*
  - b. *A chief executive should exercise judgement when deciding whether to inform a Minister of any matter for which the chief executive has statutory responsibility. Generally a briefing of this kind is provided for the Minister's information only, although occasionally the Minister's views may be a relevant factor for the chief executive to take into account. In all cases, the chief executive should ensure that the Minister knows why the matter is being raised, and both the Minister and the chief executive should act to maintain the independence of the chief executive's decision-making process.*
  - c. *It would clearly be improper for Ministers to instruct their departments to act in an unlawful manner. Ministers should also take care to ensure that their actions could not be construed as improper intervention in administrative, financial, operational, or contractual decisions that are the responsibility of the chief executive...*
  - h. *Ministers should bear in mind that they have the capacity to exercise considerable influence over the public service. Ministers should take care to ensure that their intentions are not misunderstood, and that they do not inappropriately influence officials, or involve themselves in matters that are not their responsibility. Particular care should be taken with officials who are unlikely to have frequent or direct contact with Ministers, who may be less familiar with the principles, conventions, and working guidelines that govern the interaction between the public service and Ministers...*
- 3.17 *Ministers should ensure that staff and advisers in their offices understand the principles governing the Minister's role and the Minister's relationship with public service officials and entities in the state sector. Like Ministers, staff in Ministers' offices must take care to ensure that they do not improperly influence matters that are the responsibility of others...*
- 3.19 *In addition to taking advice from the public service and other parts of the state sector, Ministers may take advice from other sources, including political advisers in their offices. Political advisers have an important role in supporting Ministers to manage relationships with other political parties, to manage risk, and to negotiate support for policy and legislative initiatives.*

3.20 A Minister may involve political advisers in policy development and other areas of work that might otherwise be performed within the Minister's department. The Minister and the chief executive must establish a clear understanding to ensure that:

- a. departmental officials know the extent of the advisers' authority; and
- b. proper accountability exists for results and financial requirements under the Public Finance Act 1989.

There is no requirement in the OIA for agencies to advise their Ministers about requests received and decisions made. However, both the OIA and the Cabinet Manual do make provision for agencies to consult their Minister prior to a decision being made.

- Section 15(5) of the OIA recognises that while the chief executive of the agency must make the decision on the request (unless it is validly transferred to another agency), this does not:

*...prevent the chief executive of a department or any officer or employee of a department from consulting a Minister of the Crown or any other person in relation to the decision that the chief executive or officer or employee proposes to make on any request.*

- Paragraph 8.41 of the *Cabinet Manual* also recognises that:

*...a department may consult its Minister about any request for official information it receives [and] should advise its Minister if it intends to release any information that is particularly sensitive or potentially controversial. The decision on how to respond to the request must nonetheless be made by the department, in accordance with the Official Information Act 1982.*

Many requesters do not find this ability of agencies to consult their Minister on OIA requests palatable. There has been significant commentary and criticism by requesters that it enables political interference in an agency's final response. One media organisation submitted:

*The way in which responses are handled according to explicit process is enough to conclude that it creates rich ground for political interference in the way information is released to the public. Officials are required to consider the political impact information might have and the consequences of that for Ministers.*

I do not think it is unreasonable for a Minister to want (and expect) to be made aware of requests that could result in them having to deal with a controversial or sensitive issue, such as by way of questions in the House or from the media, if information is released by an agency for which they are responsible. Indeed, it would be naive to expect or require them not to in the MMP environment. It would also be naive to expect officials within agencies to disregard the possible political impact of disclosing information they hold to the public and not advising their Minister.

Compliance with the OIA does not equate to a requirement that a Minister must be kept unaware of what their agency is doing when it comes to responding to requests for official information. However, how agencies interpret the 'no surprises' principle when it comes to the processes they apply when preparing responses to

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How agencies interpret the 'no surprises' principle when it comes to the processes they apply when preparing responses to requests can have an impact on their ability to comply with their legal obligations set out in the OIA.

requests can have an impact on their ability to comply with their legal obligations set out in the OIA.

### Interpretation of the 'no surprises' principle and the OIA

My investigation found that agencies have interpreted the 'no surprises' principle in 3.16 of the *Cabinet Manual*, and the ability to consult their Minister under s15(5) of the OIA and 8.41 of the *Cabinet Manual*, in different ways when designing their internal processes for managing OIA requests.

- Inclusion in the agency's weekly report to the Minister(s) was a common mechanism to advise Ministers on certain (or all) OIA requests they had received, and update them on progress in preparing particular responses.
- Some agencies had weekly 'relationship' meetings between agency officials and ministerial/political advisors which involved discussions about the OIA requests received that week and progress on particular responses.
- Some agencies provided their Minister with a copy of their proposed draft response to certain (or all) OIA requests 3-5 days prior to release to the requester.

As noted earlier in this chapter, many agencies had written into their internal policies and procedures as a standard requirement that their Minister(s) should be advised of any requests received from certain requesters, usually:

- members of parliament;
- political party research units;
- media;
- lobbyists and recognised interest groups; and
- private individuals that may attract media attention.

Many agencies also included a standard requirement that draft responses should be provided to the Minister at least 3-5 working days before the due date if they proposed the release of information:

- that is potentially sensitive;
- was on a subject matter that is controversial and could lead to questions to Ministers;
- which contains facts, opinions and recommendations that were considered '*especially quotable or unexpected*'; or
- that reveals important differences of opinion between Ministers.

I note this is consistent with the SSC's guidelines<sup>88</sup> on coordination and consultation between government departments about requests for official information.

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88 State Services Commission, 'Release of Official Information: Guidelines for Coordination', 2002. Retrieved on 1 December 2015 from [www.ssc.govt.nz/official-information-release-guidelines](http://www.ssc.govt.nz/official-information-release-guidelines)

I reviewed a number of interactions between Ministers' offices and agencies on OIA requests and interviewed those involved with these consultations to understand and confirm the practice that actually occurred within agencies. I found this varied considerably and there was not in fact a standard practice as the written policies suggested (apart from the initial consideration of the OIA request when it was first received as to whether it should be included in the weekly advice to Ministers). Rather, I found:

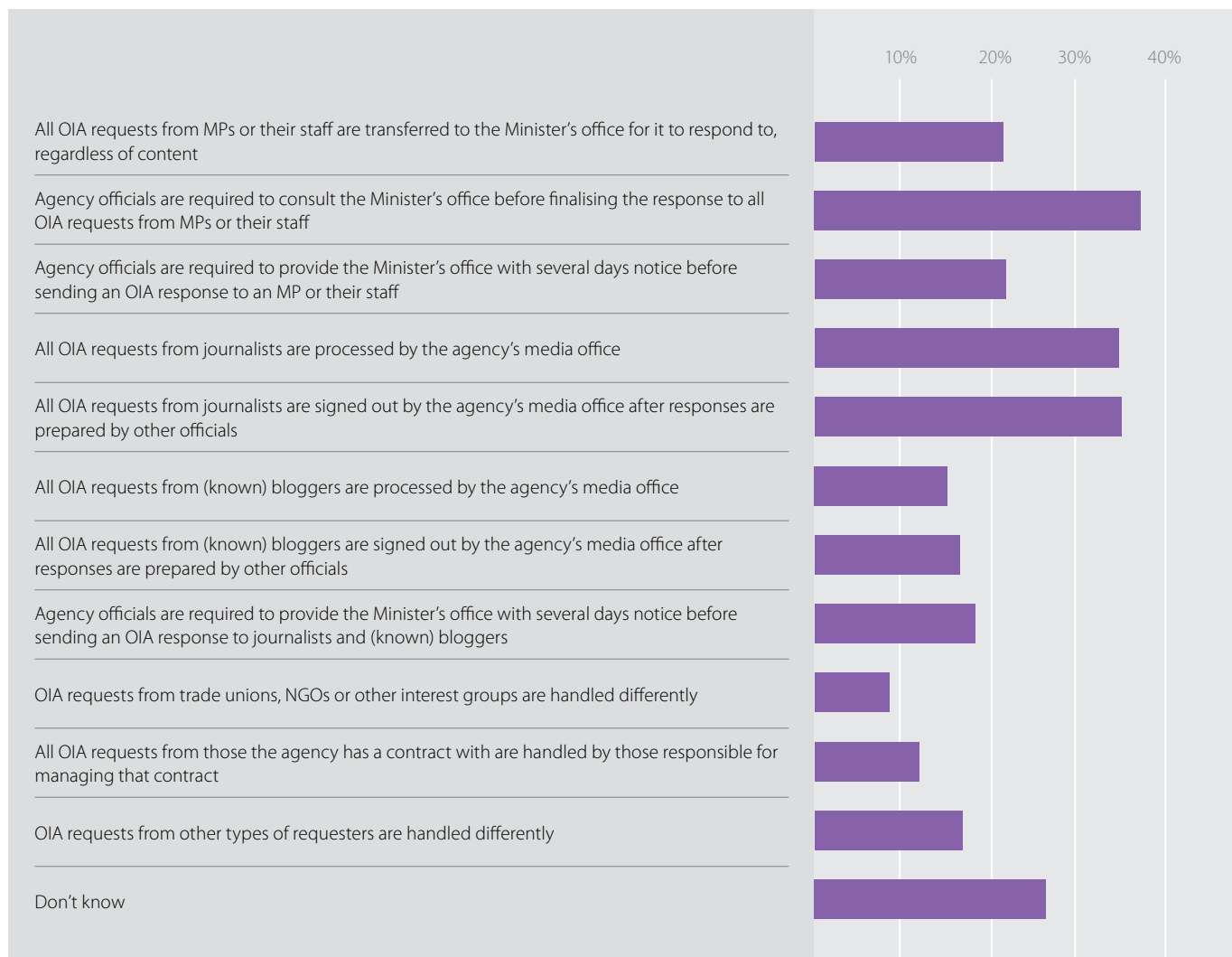
- some agencies advised the Minister's office of every request from these types of requesters;
- many agencies were far more selective and only engaged their Minister's office on the responses they considered could be sensitive or potentially controversial (as agreed by their chief executive or delegated senior manager);
- some agencies referred draft OIA responses to the Minister as an 'FYI', but with the invitation to provide feedback before it was sent out;
- many agencies referred draft responses for genuine consultation; and
- some agencies referred draft responses for 'clearance' or 'approval'.

This variation in practice was confirmed by responses to my survey of current and former workers in government agencies.

### Survey 3

#### OIA experience of current and former workers in government agencies

You told us that OIA requests from certain types of requesters are (or appear to be) handled differently. Is it your perception or understanding that one or more of the options below apply in the agency you chose to comment about?



I found that more often than not, the agency's policy and practice on engaging with their Minister on the OIA requests they received was driven by the Minister's demands and expectations rather than the agency's. If the Minister wanted to see everything, that would be the agency's standard practice. When the Minister was comfortable with the approach the agency was taking, less consultation was sought. A number of chief executives observed:

- *Newer Ministers tend to model their management on senior Ministers and want to be seen by their colleagues as a strong manager and in control of their agency and any risks. This could sometimes lead to brinkmanship over what information ought to be released under the OIA. Chief Executives need to be aware that political*



*incentives rather than compliance with the OIA could be a key driver for a Minister in trying to influence a decision that is the Chief Executive's to make. Chief Executives need to stand firm.*

- *Some Ministers understand the difference between Minister and Chief Executive and what the boundaries are. A senior Minister is more confident in their position on the party list and will understand the political environment. Others are more nervous and are aware that when there are shuffles of portfolios, there will be winners and losers so they will invoke strong risk management strategies on certain requests.*
- *Ministers have a tendency to be risk averse. They are watching their colleagues go up and down the party list and come and go from the Cabinet table. They are worried about getting re-elected in three years time. Ministers (and their political advisers) definitely have a tendency to push for the literal response only. But Chief Executives' roles and responsibilities are clear.*
- *Ministers have a different perspective that they can contribute on a response to an OIA. This can be a good thing but it can also be a risk and invite interference. For CEOs the best way to have a healthy relationship is to understand they are the politically elected officials with a party agenda to implement in three years. CEOs need to listen, be responsive to the Minister's position, priorities and drivers. However CEOs also need to be clear that they are the one who is accountable and must not be bullied into making a decision they are not willing to be held accountable for.*

However, the current and former ministerial/political advisers and chiefs of staff had a different view and advised me:

- *Some Chief Executives see the role of the political/ministerial adviser very narrowly and just limited to advising the Minister. In fact, they have a much broader role under MMP. They consult, obtain contestable advice and engage with key stakeholders and will be aware of harms that could result in the release of information that an agency's official may not have considered or been aware of when preparing the response.*
- *An agency's OIA decision is not made in a vacuum. The Minister's adviser understands the broader context in which the response will be released and can advise agencies on what more could be said. It is natural there will be tension at times between what a Chief Executive believes is the appropriate response under the OIA and the ministerial adviser's view. A good political adviser will apply a strategic lens over the proposed response and be able to advise what else should be provided proactively and prepare their Minister for questions they might be faced with.*
- *The Minister is the one responsible for the policy direction. The agency has to implement it. They do not always have the same insight on where the harm might be if information is released. Sometimes they have tunnel vision and don't always see the bigger picture. We understand the Minister's perspective and can add value and quality to ensuring the right response is given.*
- *Sometimes a decision by an agency to release information can prejudice the Minister's decision making and consultations that are necessary with coalition partners. The Cabinet decision is not always the end of the matter. There may be discussions and negotiations still continuing and other decisions to be made. We know this whereas an agency may not. It's important to know what requests they've*

*got so they can be transferred. If we can't transfer, at least we can give more details about what's still to come. But I don't think we're very good at doing that to be honest.*

- *The agency might be the one making the decision but it's not the Chief Executive who is asked to comment or is challenged about it in the House. Ministers should know about it and be aware of it. They are the ones that have to discuss it publicly.*
- *My Minister is the one that gets asked about these decisions. My job is to make sure he doesn't get blindsided walking across the black and whites to the House. I need to know what OIAs are in so he can be prepared. That's only fair - and ultimately an informed Minister who can comment properly is in the public interest. A 'gotcha' moment might make headlines but is not really in the public interest.*
- *Chief Executives are expected to be apolitical but they are not making their decisions in an apolitical environment. When they make a decision on an OIA request or proactively release information, it is the Minister who is asked questions about it in the corridors of Parliament by the media and in the House by the opposition parties. They need to be (and are entitled to be) prepared.*

I note that a number of opposition parties also accepted that:

- *Of course political advisers do have a role and a perspective on an OIA – it comes with the territory under MMP. However, there is a difference between knowing about a request and being ready for any questions that may come from a response and holding it up or trying to change the decision that is not theirs to make.*
- *A Minister's political adviser is usually across the issue and understands the Minister's agenda and thinking. Under MMP we would be ignorant to think they wouldn't be interested in our requests. That's how the system works. If we were in power, we would be the same. But they need to understand the law. They aren't the ones making the decision. Anything they do should be within the confines of the law. I do think they often start from a place of what should be withheld which isn't right. But we can't pretend it isn't happening – and wouldn't happen. The fact is we're asking the requests because we're a political party. We're testing and challenging the government's policies and plans to show why our way is better – that's why we're asking in the first place.*

One experienced Minister observed that:

*The existence of political advisors provides an important protection for the impartiality of public sector officials who are required to maintain political neutrality. The role of the political advisor is known and the fact that the political advisor is more inclined to protect the Ministers political interests when they give their advice, should not surprise anyone.*

There is no doubt in my view that the current practices around the consultations on requests with the Minister's office are driven more by personalities, personal relationships, and political nervousness arising from the media and political environment, rather than any policy or legislative requirements in the OIA. As a result, some agencies' practices can make them vulnerable to enabling interference by Ministers' offices in the preparation of final responses that may be inappropriate and blur the responsibilities and accountabilities expected in the OIA and by the public.

### **Vulnerabilities for agencies seeking clearance or approval from the Minister**

Seeking clearance or approval from a Minister on responses to requests for official information is an abdication of the agency's responsibilities and accountabilities under the OIA and would be in breach of section 15(4).

### **Vulnerabilities for agencies adopting an 'FYI' practice**

Providing the Minister with the agency's proposed response to an OIA request under the auspices of an 'FYI' or 'no surprises', 3-5 days prior to the 'due date' for release is not provided for under the OIA, no matter who the requester is. The OIA does not provide for a 'due date' for making and communicating a decision. Rather, section 15(1) of the OIA requires a decision to be made and communicated *as soon as reasonably practicable*. The practice of providing an 'FYI' 3-5 days prior to release makes an agency vulnerable to breaching the time limit obligations in the OIA. It suggests the agency has drafted its response and made the decision 3-5 days prior to the final decision being released. Upon complaint, this practice would likely result in an Ombudsman finding that the agency was acting contrary to law by failing to comply with section 15(1) of the OIA. Section 28(4) of the OIA enables an Ombudsman to investigate such failures as a deemed refusal of the request.

If the agency was genuinely providing the Minister with a copy of the response as an 'FYI' to ensure there are 'no surprises', there is no need for the communication of the agency's decision to the requester to be delayed a further 3-5 days. I note that media teams do tend to operate genuine 'FYI' reports to their Minister by advising them via either daily or weekly reports of the requests received (often termed 'media enquiries') and the responses.

If the agency genuinely believes it needs to consult the Minister on its proposed response prior to finalising a decision on a request, then it should be open about this and say so both in its policies, its referrals (eg, consultation email or cover note to the Minister's office) and its correspondence with the requester. Section 15(5) of the OIA provides for such consultation to occur.

Some agencies (19%) also stated that one of the main reasons they failed to communicate a decision within the statutory time limits was consultation with the Minister's office. The impact on meeting the time limit for genuine consultation with the Minister's office under section 15(5) can be managed by a valid extension under section 15A(1)(b) of the Act. However, a delay in the agency receiving a response from a Minister from an 'FYI' consultation or sign-off does not meet the test for a valid extension to be made.

I was advised that most agencies would send their proposed response to the requester on the 20<sup>th</sup> working day if they had not heard back from the Ministers' office. Others admitted that they would end up breaching their obligations because they were still waiting for their Minister's feedback regarding their proposed draft. Agency staff were unclear about what they were waiting for and acknowledged that delays could run into weeks. For requesters, they saw it as:

Seeking clearance or approval from a Minister on a response to requests for official information is an abdication of the agency's responsibilities and accountabilities under the OIA.

If the agency genuinely believes it needs to consult the Minister on its proposed response prior to finalising a decision on a request, then it should be open about this and say so.

*...representing an unacceptable politicisation of the release of official information where managing risk becomes a significant driver rather than honouring the intent of the Act to ensure the availability of information to New Zealanders.*

A number of submissions I received from journalists advised my investigation that in their experience, it was very unusual to receive a response by the 20<sup>th</sup> working day and they would sometimes employ the tactic of asking other people to make the request for them to obtain a quicker response. I received submissions from journalists advising:

- *A default position appears to exist within many government entities that information requested is frequently released on or about the 20-day deadline, rather than 'as soon as is practicable' as required under the Act.*
- *Deadlines are often missed with insufficient or no reasons given.*
- *For most journalists, delay can have the same impact as refusal by removing the newsworthiness of the information and possibly the exclusivity of the story.*

One experienced Minister confirmed that past Governments irrespective of their political persuasion, have from time to time made decisions about the release of information (whether proactive or in response to a request) to maintain political advantage.

*All Governments have been guilty of using 'dump days' for political advantage and administrative convenience.*

*Sometimes Governments decide to release the information more widely, not just to the requester, because it suits us.*

Such practices generate the perception that political interference in a requester's attempt to access official information has occurred. It can have an enduring harmful effect on the trust and confidence in the Government's commitment to the principle and purposes of the OIA. At the *International Conference of Information Commissioners* my Office hosted in 2007, the then President of the Law Commission, Rt Hon Sir Geoffrey Palmer agreed:<sup>89</sup>

*...the mere existence of... doubts and suspicions is a serious matter. The aim of the Act is not just open government, but surely that it should be clearly and observably open. Both openness and the appearance of openness are necessary for requesters and the wider public to be confident that the principle of open government is actually operating.'*

Providing the Minister's office with the agency's draft response as an 'FYI' or 'no surprises' referral 3-5 days prior to release is misleading when the agency is in fact waiting for the Minister's comment or feedback (and possibly clearance or approval), before the final response is sent out. It creates doubt as to who is making the decision and whether the final response is being manipulated for political reasons rather than in accordance with valid considerations under the OIA, and suspicion

89 Rt Hon Sir Geoffrey Palmer, President Law Commission, 'A Hard Look at the New Zealand Experience with the Official Information Act after 25 years', pg 15-16. 10th World Conference of the International Ombudsman Institute, Wellington, New Zealand, November 2012.

as to whether delays are occurring for tactical reasons (such as to reduce the newsworthiness of the information). One journalist believed:

*Most Chief Executives see themselves as servants of the Minister. The chances of getting any information out of the Department that is politically sensitive or would hold the Minister accountable is almost nil.*

During my enquiries I did see evidence of the Minister's contribution to a proposed agency's response take the following beneficial forms.

- Enhancing a proposed response by encouraging more information about the government's activities or position on an issue to be released.
- Querying the ground for refusal being relied on as being defensible and suggesting more information could be released than what was being proposed.
- Providing quality assurance on the draft refusal letter by including advice to the requester that they could seek a review by the Ombudsman about the decision.
- Seeking advice about the media enquiries and communications that would likely follow as a result of release and querying whether proactive release of additional information could be actioned in order to ensure the public were informed appropriately.

However, I also saw evidence of ministerial/political advisors working in a Minister's office using the opportunity they were given to review the 'FYI' response for 3-5 days prior to release to try to convince the agency to change the final decision that the agency intended to make by seeking to:

- limit the scope of the request;
- alter the decision proposed by the agency; and/or
- reduce the additional contextual information the agency proposed to include in the response.

In the examples I saw, the affected agencies rejected those demands in the final response, unless they considered them valid to incorporate in their final decision. This is consistent with some of the survey responses I received from current and former workers of government agencies.

- *The Minister's office prefers that requests are interpreted as narrowly as possible, unless interpreting them more broadly would allow the response to include information that makes them look good.*
- *The Minister's Office makes suggestions and will start dialogue about issues they may see in the material. I would not say that the Minister's office changes or attempts to change the agency's view.*
- *I feel confident in the current systems that all requests and responses are handled appropriately.*

During my enquiries I did see evidence of the Minister's enhancing a proposed response by encouraging more information about the government's activities or position on an issue to be released.

However, I also saw evidence of ministerial/political advisors working in a Minister's office using the opportunity they were given to review the FYI response for 3-5 days prior to release to try to convince the agency to change the final decision that the agency intended to make.

### Survey 3

Current and former workers perceptions of the frequency and kind of involvement of minister or their staff in how the agency responds to OIA requests the agency has received

	Routinely inappropriate	Occasionally inappropriate	Neutral	Occasionally beneficial	Routinely beneficial
Changing, or attempting to change, the agency's interpretation of the scope of the request	9.21%	28.29%	37.83%	19.41%	5.26%
Changing, or attempting to change, the agency's view on whether the time limit for making a decision on the request needs to be extended	4.79%	17.12%	45.55%	23.97%	8.56%
Changing, or attempting to change, the agency's view on whether responsibility for responding to the request should be transferred to the Minister, or to another agency	4.35%	13.41%	53.26%	21.01%	7.97%
Changing, or attempting to change, the agency's response to a request in order to make it consistent with another agency's or a Minister's response to a related request	7.94%	18.41%	47.29%	19.86%	6.50%
Changing, or attempting to change, the agency's view on whether the OIA provides good reason to withhold the information requested	9.49%	30.06%	34.81%	17.41%	8.23%
Changing, or attempting to change, the agency's view on what public interest factors should be considered, and/or where the balance of public interest in disclosure lies	8.30%	23.88%	44.98%	15.92%	6.92%

*NB Percentage of responses after 'unknown' was excluded.*

However, I also received comments in the survey of current and former workers from government agencies which indicated that officials feared their agency would agree to the demands made by the Minister's office because it needed to maintain a good relationship, or had other policy decisions to get through their Minister and choosing which battle to fight:

- *While I have no direct experience of ministers or their staff influencing the OIA process, I am sure that it happens on occasion.*
- *Over the past few years I've noticed staff coming under increasing pressure from their managers to 'please' the minister in other aspects of Department work and I would be surprised if OIA requests were any different.*

Many of the submissions received during my investigation also described bitter, confrontational discussions with Ministers and their political advisers about certain OIA requests. Those that did not have this experience seemed to have used a number of strategies in order to establish and maintain a healthy, functioning relationship, as set out below.

- There was usually an initial series of meetings where roles and responsibilities were discussed and accepted. This was especially important between the chief executive and the Minister and subsequently between the officials who would be engaging with the Minister's office on a regular basis. Different Ministers had different expectations, pressures, concerns and drivers. Chief executives may also have specific statutory functions distinct from their Minister which may need to be discussed and clarified as to what that means in practice. Officials recognised it was important to understand what was agreed, what the Minister's policy priorities are, as well as how they wished to be kept informed in accordance with the 'no surprises' principle, while also ensuring the boundaries between roles were protected.
- Agency officials who engaged with Ministers' offices were usually at tier 2 level or had significant experience working with ministerial/political advisors. As such, they were in a position to quickly escalate to the chief executive any demands or matters of disagreement that risked interfering with their statutory accountabilities and responsibilities.
- Officials worked hard on maintaining a close, positive engagement with ministerial/political advisors from the start with regular weekly meetings. These were aimed at building a relationship of trust and obtaining a good understanding of what the ministerial/political advisors' concerns might be, so as to avoid confrontations or manage disagreements effectively. I found most agency officials understood and accepted the role of the ministerial/political advisors and saw the benefits of their insight in the preparation of responses to OIA requests, particularly when it came to providing contextual information to accompany the response with a view to pre-empting any questions the Minister may subsequently expect to receive about the issue.
- Agreed boundaries and processes needed to be clearly understood by all and vigorously protected, particularly in regard to who was the decision-maker on OIA responses. One official informed my investigation that ministerial/political advisors invariably tried to contact the more junior staff within the agency and demand changes be made to a proposed response. Another agency confirmed they had also experienced this practice but had made it clear to their own staff from the outset that if any such contact was made outside the agreed process with the Minister's office, officials were instructed to redirect ministerial/political advisors to the nominated contact in the agency.

Where there is disagreement about a response the agency intends to send, the OIA is unequivocal – it is the agency's decision to make and the chief executive who is accountable.<sup>90</sup> If it becomes apparent from these discussions that the information

Where there is disagreement about a response the agency intends to send, the OIA is unequivocal – it is the agency's decision to make and the Chief Executive who is accountable.

90 Official Information Act 1982, s 15(4).

is more closely connected to the Minister's functions,<sup>91</sup> the agency should transfer the request to the Minister for response. Section 14 of the OIA is not a discretionary provision. It is a mandatory requirement for such transfers to take place if the grounds are made out. However, disagreement over the response is not, in itself, a reason to transfer. The person dealing with the request must have a genuine belief that the information is more closely connected with the Minister's functions before transfer can legitimately occur. In addition, I note that the Cabinet Manual states:

8.42 *On being consulted, the Minister may take the view that information, which the department considers should be released, should not be released. In such a case, transferring the request to the Minister may be an appropriate way forward, **if** the requirements of section 14 of the Official Information Act 1982 can be satisfied. Each case of this kind needs to be carefully handled at a senior level within the department, with reference to the Minister if necessary. [emphasis added]*

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91 An agency should transfer a request to a Minister if the information relates to executive policy or decision-making functions **and** release would prejudice the Minister's or Cabinet's ability to perform those functions properly. If the information relates more closely to operations and policy implementation, then the agency should be the decision-maker on the request.



## Example of working together to improve the quality of the consultation process

### Ministry of Foreign Affairs and Trade

Officials within the Ministry of Foreign Affairs and Trade have worked with officials in their Minister's office to develop quality assurance and sign off sheets that met the needs of both agencies and have enabled section 15(5) consultations to be completed more quickly in recent times. These sheets require staff who work on a request to record and summarise in one place information about the request such as:

- Maximum time limit for response (and details of any extension)
- Subject matter of the request
- Type of requester
- Agencies consulted
- Background and interpretation of the request
- Any potential risks to the Minister or Ministry
- Summary of the information to be released
- Outline of any information to be withheld
- Identity of officials who had reviewed the response (such as subject matter expert, OIA manager, legal, communications and/or senior manager)

When we spoke with the officials in both agencies, they believed that by developing this tool together, they have been able to improve the quality of their OIA responses and achieve greater efficiency in the management of OIA requests during any consultation process.



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I explored with agencies why they had tended not to take this course of action when there was a strong difference of opinion with their Minister about the release of official information. I was advised that this disagreement usually only became apparent well after the time limit in the OIA for making the decision to transfer a request had passed. I have already discussed this misconception in the *Internal policies, procedures and resources* chapter of this report and remain of the view that transferring the request can be a genuine option to consider should such circumstances arise, and can be done legitimately by applying the provisions of the OIA, including extending the time limit for transfer when necessary and appropriate.

In principle, I see no reason why a Minister or their advisors should not be informed of any OIA requests agencies are processing at any stage during that process, so long as there is no improper pressure or political manipulation of either the substantive decision or the timing of the delivery of the agency's response to the requester. The 'no surprises' principle is intended to assist orderly government

decision-making and enable public trust and confidence by ensuring decision-makers are better informed before making decisions or responding to enquiries and legitimate scrutiny (whether by the media, opposition parties or citizens). It seems to me that the phrase ‘no surprises’ has developed an unfortunate connotation that the principle is designed to avoid legitimate scrutiny and is tantamount to ‘no embarrassments’.

However, if it is applied incorrectly by Ministers and their officials, the principle may be misused to defeat the proper operation of the OIA by providing an opportunity for improper pressure or political manipulation to influence either the substantive decision or the timing of the delivery of the agency’s response to the requester. This can have the effect of enabling accountability to be avoided or reduced, or opportunities for meaningful participation to be missed. One experienced Minister identified that the real issue about the role of the ministerial/political advisor is where they stray and take over the role of the Minister:

*There will be times where they may be the eyes of the Minister, and on occasion they speak on behalf of the Minister, but they cannot make decisions as if they are the Minister.*

I considered how other jurisdictions dealt with this issue of preventing improper political influence, whilst maintaining the agency’s ability to brief and consult their Minister appropriately. In Queensland and New South Wales, their freedom of information (FOI) legislation contains provisions which make it an offence to direct a person engaged in preparing FOI responses to make a decision which the person believes is not the decision that should be made under their Act.<sup>92</sup> The Queensland Information Commissioner has also issued a *Model Protocol for Queensland Government Departments on Reporting to Ministers and Senior Executives on Right to Information and Information Privacy Applications*.

When the possible adoption of these initiatives in New Zealand was discussed with chief executives, officials working in Ministers’ offices, members of the media, opposition research units and other requesters, I found there was overwhelming rejection of the option that new offences be added in the OIA. Rather, the strong preference was for initiatives which would promote a culture of improved practice and a stronger role for my Office in the form of ongoing monitoring and reporting of the practices occurring within agencies.

In my view, the development, publication and regular monitoring of a model protocol for all agencies that governs their consultations and briefings on OIA requests with Ministers’ offices would:

- restore public trust and confidence in agency responses, namely that they had not been the subject of improper ministerial interference;
- provide agencies with a tool to rely on when disagreements occur; and
- ensure ministerial/political advisors are accountable for their actions.

In principle, I see no reason why a Minister or their advisors should not be informed of any OIA requests agencies are processing at any stage during that process, so long as there is no improper pressure or political manipulation of either the substantive decision or the timing of the delivery of the agency’s response to the requester.

The ‘no surprises’ principle is intended to assist orderly government decision-making and enable public trust and confidence by ensuring decision-makers are better informed before making decisions or responding to enquiries and legitimate scrutiny (whether by the media, opposition parties or citizens).

<sup>92</sup> Queensland Right to Information Act 2009, s 175 and NSW Government Information (Public Access) Act 2009, ss 117-118.

It would be important that such a protocol:

- acknowledges the roles and responsibilities of the Minister and the chief executive with reference to the guidance in the *Cabinet Manual*;
- acknowledges that a 'no surprises' principle is expected to operate in the relationship between an agency and its Minister;
- makes the distinction between consultations before a decision is made under section 15(5) of the OIA and 'no surprises' briefings; and
- requires the outcomes of any consultations to be recorded.

My Office will therefore develop such a protocol in consultation with the SSC, Cabinet Office, Department of Prime Minister and Cabinet and the Ministry of Justice and will seek input from chief executives and the public during this process. It is possible that such a protocol could form part of a code of conduct for ministerial/political advisors, which the SSC has indicated it is considering,<sup>93</sup> and whose production I would support. The State Services Commissioner has advised me:

*...my office will be available to work with your office in developing a protocol if required.*

*However, I am sceptical about the practicality of your suggestion that SSC could look to enforce the protocol through any code of conduct that is developed. I am concerned that too heavy handed an approach could impact negatively on successful implementation of any such code of conduct.*

*The existing SSC code of conduct operates, deliberately, at a high principles level. While development and consultation on a code of conduct for ministerial advisors is yet to occur, I would anticipate that any such code would operate in a similar way that of SSC's current code of conduct. It is extremely unlikely that it would be appropriate to implement or enforce a specific protocol through the mechanism in the way that is suggested in your report. Including this reference in your report is likely to impact on our consultation process, by focusing participants on a specific outcome that we think is unlikely.*

## Complexity and quality of the final decision

While agencies are often the experts regarding the information they hold, many find making decisions on whether this information should be made accessible to requesters increasingly complex. My investigation included reviewing randomly selected requests, the processing steps taken, the consultations involved, the formulating of the final decision and the communications with the requester.

I found the process applied by staff usually followed the agency's documented policies and procedures, but many agencies' guidance was very thin on how to

93 State Services Commission, 'Questions and Answers about the Code of Conduct'. October 2014. Retrieved on 1 December 2015 from [www.ssc.govt.nz/node/9580](http://www.ssc.govt.nz/node/9580)  
State Services Commission, 'Briefing to the Incoming Minister of State Services'. October 2014. Retrieved on 1 December 2015 from [www.ssc.govt.nz/resources/9676/all-pages](http://www.ssc.govt.nz/resources/9676/all-pages)

apply the withholding grounds in the OIA. Some agencies' records were incomplete and the basis for final decisions on requests was not always clear. I discuss my findings on this in more detail in the *Performance monitoring and learning* chapter of this report.

As you might expect, the issues agencies struggled with varied considerably depending on the work and activities of the agency, but included the consideration of:

- information created early in the policy development process;
- personal information;
- sensitive security or defence related information;
- information concerning international relationships; and/or
- commercially sensitive information.

Many of the submissions I received from the media and opposition parties indicated that they believed their requests for any of these types of information was more likely to be subject to delay and refusal for spurious reasons.

From the records I reviewed, the decision-making process did not present grounds for concern. Rather, I found the issues considered were relevant and appropriate. Discussions and consultations focused on the harm that might result if the requested information was released and whether that could be mitigated, rather than who the requester was or what they may do with the response. The officials who were involved in those discussions (from within the agency and the Minister's office) appeared to understand the general provisions of the OIA and the agency's obligations, and were guided by the OIA's principle of availability. Where I found they struggled was with the complexity of application in the particular circumstances. Without stronger guidance, officials were vulnerable to reverting to a risk avoidance mentality when making the final decision. Doing so can easily create the impression with requesters that their requests have been refused because it is politically inconvenient for the information to be released at that time, and that the grounds for refusal of the request are known to be weak at the time, and will be rejected by an Ombudsman following an investigation.

The quality of communications to requesters also varied enormously. Some were excellent and included far more information than the requester asked for in order to provide context and understanding. However, when the decision was to decline a request for information under section 9 of the OIA, I found many agencies' communications were weak in explaining to the requester the public interest factors in favour of release that they had taken into account when coming to the decision. This could be addressed by enhancing the templates agencies used to prompt officials to include this explanation in their decision letters. Almost all the formal, signed correspondence I viewed was compliant with the OIA's administrative requirements, although delays were not uncommon.

The records demonstrated that officials responsible for overseeing responses to OIA requests were dedicated to a quick turnaround, a compliant process and providing a good service to the requester. However, their efforts could be constrained by:

- difficulties locating or extracting information from record-keeping systems;

The decision-making process did not present grounds for concern. The issues considered were relevant and appropriate. Discussions and consultations focused on the harm that might result if the requested information was released and whether that could be mitigated, rather than who the requester was or what they may do with the response.

When the decision was to decline a request for information under section 9 of the OIA, I found many agencies' communications were weak in explaining to the requester the public interest factors they had taken into account when coming to that decision.

- time spent obtaining information or a response from another team within the agency; and/or
- delays in certain matters which required additional consultations including with their Minister's office.

When agency staff communicated with requesters via email, the quality and statutory compliance of the correspondence dropped dramatically. The advice given to requesters was often quite casual and non-compliant with the OIA. I saw many examples of extension notices and decisions sent to requesters by email that were non-compliant, despite the agency having policies and templates available for staff to use to avoid this. This is a vulnerability many agencies are currently exposed to, which is easy to remedy by training and additional fit for purpose templates.

When agency staff communicated with requesters via email, the quality and statutory compliance of the correspondence dropped dramatically.

## Recommendations

27	Agencies should review their practices to ensure that the identity of the requester, their mode of engagement, or any practices do not impinge on the requirements to make a decision that is appropriate under the OIA and communicate it to the requester <i>'as soon as reasonably practicable'</i> .
28	Agencies should ensure consultation with requesters takes place at an early stage to identify the information being sought, or before refusing to make information available because of the collation and research challenges.
29	Agencies should review their charging policies to ensure that they do not exempt certain types of requesters from the application of the OIA's provisions.
30	The Ministry of Justice should review and update its charging guidelines.
31	The Ministry of Justice, in collaboration with the SSC and Archives New Zealand, should develop a model information search policy for agencies to apply.
32	Agencies should publish their OIA policies including how they interpret the <i>'no surprises'</i> principle and record how they apply this to individual requests.
33	My Office should develop and publish a model protocol on agencies' consultations and briefings on OIA requests with Ministers' offices, and monitor its application. The development of this protocol should be done in consultation with the SSC, Cabinet Office, Department of Prime Minister and Cabinet and the Ministry of Justice.
34	The SSC should consider how this model protocol may be linked to a Code of Conduct for ministerial officials/political advisors.
35	Agencies should review their policies and tools available for staff to ensure they capture the legal requirements for responding to requests for information that may be received and replied to via email or by phone.
36	Agencies should strengthen their procedures for considering, documenting and explaining to requesters the public interest factors considered when making a decision whether or not to withhold information under section 9 of the OIA.





## Performance monitoring and learning

The OIA does not impose specific requirements on agencies in relation to the record-keeping and management of requests they receive for access to information. However, the Ombudsmen have consistently advocated maintaining a full audit trail of the:

- issues considered;
- policies and procedures applied;
- consultations undertaken; and
- information relied upon,

that led to a decision, recommendation or action by an agency.<sup>94</sup> Formulating a decision on a request for access to information is no different. Once this information is recorded, agencies potentially have a wealth of information that can be used to inform business planning and future decisions concerning access to information – but only if it is captured in a way that facilitates subsequent analysis, and regular monitoring and reporting occurs.

The benefits of doing this for an agency are many. Information about OIA requests, responses and complaints can be used by an agency to:

- preserve agency memory;

<sup>94</sup> See the guide on our website, 'Good decision making' [www.ombudsman.parliament.nz/system/paperclip/document\\_files/document\\_files/413/original/good\\_decision\\_making.pdf](http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/413/original/good_decision_making.pdf)



- ensure informed consistency in decision-making;
- enable continuity following key staff transfers and departures;
- understand what the public and their key stakeholders are actually interested in and identify any new trends in people seeking access to information where proactive release could reduce workload;
- indicate any stakeholder/third party relationship issues that may be arising;
- identify when a business unit may be struggling or under pressure;
- inform management decisions and budget bids regarding internal resource allocation, training needs and system improvement requirements;
- identify compliance issues and gaps in any policies and procedures;
- fast track and inform any Ombudsman inquiries, and investigations and reviews; and
- review, report and learn about making good decisions.

Gathering this type of business intelligence on agencies' interactions with their 'customers' is routine in the private sector in order to drive performance improvement and innovation.<sup>95</sup>

A key focus of my investigation, in determining how committed agencies were to ensuring compliance with the OIA requirements and to the principle and purposes of the OIA, was to examine:

- whether, and if so, to what extent, agencies were recording information about the OIA requests they had received and were making decisions on; and
- whether agencies had established systems to analyse this information to understand how they were performing and identify opportunities for improvement in responding to OIA requests and providing access to information generally.

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<sup>95</sup> This issue is explored in the guide on our website, *Effective complaint handling* [www.ombudsman.parliament.nz/system/paperclip/document\\_files/document\\_files/427/original/effective\\_complaint\\_handling.pdf](http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/427/original/effective_complaint_handling.pdf)

## Key indicators of good practice in performance monitoring and learning

- ✓ There are meaningful and appropriate performance measures for responding to OIAs linked to the agency's strategic or operational plans and key performance indicators which are actively monitored. These could include the following.
  - **Quantity** eg, the number of requests coming in, from which sources and the number processed.
  - **Efficiency** eg, duration of request handling processing time, the number or responses that exceeded legislative time limits, the reasons for any delay.
  - **Quality** eg, outcome of any internal quality assurance reviews and/or external reviews of decisions and processes and whether or not the results of those reviews provide evidence of any systemic problems.
  - **Proactive release** eg, any common types of requests identified, any steps taken to consider whether or not the relevant information could be made available proactively, for example on the agency's website.
- ✓ There is a person in the agency who is responsible for maintaining a system of recording, tracking and monitoring OIA requests, agency decisions (and Ombudsman decisions).
- ✓ As a minimum, the following statistics should be recorded by the relevant units handling requests (including media units):
  - the total number of OIA requests;
  - the type of request received eg, Part 2, 3 or 4 of the OIA or Privacy Act;
  - the subject/information being sought;
  - the type of requester eg, individuals, companies, journalists, lobby / community groups, NGOs, politicians, legal representatives, agents, prisoners or government agencies;
  - the person or team it was allocated to (and when);
  - the number of working days taken to make and communicate a decision;
  - any third parties consulted, and if so which ones, when and their views;
  - any extensions to the maximum time limits for transfer or decision and the reasons for them;
  - any delays and if so, the reason for this;
  - the decision made (including transfer) and reasons for any refusal or delays;
  - whether a charge was required to be paid and if it led to abandonment of

### What excellence looks like

- ✓ The agency has an established system for capturing meaningful information about all its OIA related activities and where other pressures for publication of information are (or could) arise in a manner which facilitates easy analysis.
- ✓ The agency has established appropriate and relevant performance measures for how it responds to requests for official information.
- ✓ The agency has developed an effective system for regular self-monitoring and reporting on performance to all appropriate levels (including senior management).
- ✓ The agency uses information to learn and continually improve its official information activities, and inform its strategic planning and operational business priorities across the agency.

the request;

- when refusing a request under section 18(d), the date when the information was released; and
  - the outcome of any Ombudsman investigation and reviews.
- ✓ The use of the website is regularly monitored for:
    - what information is being sought;
    - what information is being accessed; and
    - how often is information being accessed.
  - ✓ The agency monitors Ombudsman decisions and publications, and reports these to the relevant staff, including all OIA decision makers.
  - ✓ Information is used to inform decisions about improving OIA related activities, policies and procedures, systems, training and resource needs, website content, and proactive publication decisions.
  - ✓ There is regular reporting to senior management, and at least quarterly reporting to the chief executive, about the agency's management and performance in respect of OIA requests.
  - ✓ There are regular reviews at a senior level of policies and responsibilities relating to OIA activities, which cover:
    - compliance with policies and procedures – process, timeliness, substantive decisions;
    - related policies – record keeping, charging, communications (proactive release);
    - structure and systems – capacity and capability of current systems to meet OIA obligations; and
    - regular monitoring of trends and action taken in form of proactive release where it is apparent there is a public interest in the information.
  - ✓ There is a process for identification of opportunities for improvement in OIA decisions, resources and structure to be identified by staff and actioned where appropriate.
  - ✓ Information is analysed to learn where the agency could improve its stakeholder relations or increase (where appropriate) opportunities for public participation.

## Findings

### Meaningful performance measures

Most of the 12 selected agencies had performance measures for some of their OIA work, which they made public via their annual report. They were usually directly linked to the 20 working day maximum time limit for making a decision on an OIA request. Occasionally, demand driven quantity measures were included, but rarely were the quality of responses and proactive disclosures of information measured and reported on by agencies.

My investigation found some unusual counting practices when it examined the performance measures of agencies:

- Many agencies only counted and reported on the OIA requests that were processed through their OIA hub in their performance measures. They did not count daily requests for information that may have been received by other agency staff by phone or email which were often responded to outside the formal OIA process. Similarly, they did not include media requests for information that were usually dealt with by their media or communications team when reporting on their OIA activities in their annual report. By not reporting on these, agencies were unnecessarily leaving themselves open to a public perception that they did not recognise these as OIA requests. They were also doing themselves a disservice as to the amount of requests for official information they were actually responding to and the resources they were applying to enable the information they hold to be accessed by the public, as the OIA intended.
- Some agencies included the assistance they provided in preparing responses to their Minister's OIA requests as part of their own agency's compliance statistics. When one agency was asked to recalculate their OIA timeliness performance without their Minister's offices response times included, their compliance rate improved and a truer picture of their performance could be ascertained. While I accept that assisting the Minister with preparing draft responses to certain OIA requests is clearly OIA related work being carried out by the agency, it should be separately measured and reported given the agency has no control over the timeliness or quality of the final decision and is not accountable for these under the Act.
- Some agencies grouped and reported collectively on OIA responses, parliamentary questions and ministerial correspondence with their OIA performance measures. This masked the performance and compliance achievements of a core function of government agencies. Reporting this way means that neither the public nor the agency itself is in a position to recognise the true picture of its capacity and capability to carry out its OIA functions.

As a result, my investigation found that an agency's workload and compliance rate was potentially greater than that which was being measured and reported to the public. It is therefore not surprising that 48% of agencies had indicated in their survey responses to me that having sufficient resources to deal with OIAs was an

increasing challenge. However, a lack of accurate, uncomplicated supporting data will create difficulties for these agencies to:

- assess and quantify the level of resourcing they actually need to adequately respond to the requests for information they receive;
- develop appropriate budget bids and workforce plans; and
- demonstrate accurately how efficient and responsive they are.

There should be basic uniformity in the performance measures agencies apply to their official information activities (including proactive disclosures). Establishing a consistent suite of performance indicators together with regular monitoring, would assist agencies to identify where any improvements are needed. While my Office could develop this tool on its own, I consider it is important that the Ministry of Justice and the SSC are involved and take appropriate responsibility for its development.

There should be basic uniformity in the performance measures agencies apply to their official information activities (including proactive disclosures).

## Capturing information

### Process information

It was clear when the agency survey responses started to return that there was limited tracking and monitoring of OIA related activities occurring within agencies. As discussed earlier, I found agencies had difficulty providing information about:

- the amount of staff resources they were applying to respond to OIA requests;
- the number of requests for official information they received (from all access points);
- who their requesters were;
- the subject matter of requests;
- any consultations involved;
- any transfers or extensions of time needed; and
- the outcome of decisions on requests.

Yet this information was rightly acknowledged by agencies to be sufficiently important to have policies and systems in place to manage them. Those agencies that were capturing information and data about their OIA requests used a variety of methods. For some, the most effective and efficient way of capturing this information was to populate a spreadsheet. Others were developing or operating more sophisticated automated systems which could be searched, enabled reports to senior management to be prepared about compliance rates and team pressures, and enabled trend analysis to be conducted from the results.

I found that the effectiveness of the method used by an agency did not come from the tool or method it used to capture information. Rather, it was apparent from my Office's on-site interviews and observations that an agency's compliance rate,

particularly in meeting the OIA's statutory time limits, was more likely to be high if there was a person in the agency who had:

- the specific responsibility of operating a system of recording, tracking and monitoring OIA requests from the moment they entered the agency through to the final decision being communicated to the requester; and
- the ability to demand action, escalate any non responsiveness and report when statutory time limits that needed to be met were approaching.

### Substantive decision records

I found that the record keeping of final decisions made by agencies on OIA requests could be very erratic, with some agencies:

- not recording the final decision on a request at all;
- recording only the date the final decision was made;
- recording the potential ground under the OIA to be relied on to refuse the information only in handwriting on a copy of the requested information;
- recording that consultations and discussions with legal, policy, ministerial advisers or third parties had occurred – but not recording the content of those discussions or the outcome; and/or
- summarising the basis for the final decision and the views of those consulted in an internal QA form or by final summary memorandum to the delegated decision maker.

Agencies that do not record the consultations and other relevant information relied on to formulate a decision made on an OIA request could well be acting contrary to section 17 of the Public Records Act.<sup>96</sup>

If the agency's final decision was to the refuse any part of the request for official information, a failure to keep adequate records could also inhibit the agency's ability to explain to an Ombudsman why it came to the decision **at the time it was made**.<sup>97</sup> Given the impact some refusals of requests for access to information can have on individuals' lives and on the ability of the public to understand why decisions have been made, to effectively participate and to hold agencies accountable, this is a serious vulnerability that needs to be rectified by those agencies.

Agencies that do not record the consultations and other relevant information relied on to formulate a decision made on an OIA request could well be acting contrary to section 17 of the Public Records Act.

<sup>96</sup> Section 17 of the Public Records Act requires agencies to create and maintain full and accurate records of its affairs, in accordance with normal, prudent business practice and maintain these in an accessible form, so they are able to be used for subsequent reference.

<sup>97</sup> Section 29A of the Official Information Act requires the agency to provide the Ombudsmen upon request with any information related to the investigation.

Information is analysed, reported and used by the agency to learn and improve

### Reports to the Minister

All agencies provided weekly reports to their Minister(s) which included summarised information about some, if not all, of the OIA requests and 'media enquiries' they had received. As discussed earlier, many senior managers with responsibility for overseeing OIA requests also met with ministerial/political advisors on a weekly basis to inform them more generally of the OIA requests that the agency had received and gauge any particular interest the Minister may have in how the agency intended to respond.

### Reports to the chief executive and senior managers

The level and type of reporting to the chief executive and senior leadership team (SLT) was not as consistent or regular as the reporting to Ministers.

- Some agencies only conducted exception reporting to the chief executive and SLT ie, where a request appeared sensitive in subject matter, was likely to attract media attention or have an impact on the agency's reputation, or the response was chronically delayed.
- Some agencies reported to the chief executive and SLT weekly on all requests received from media, MPs, opposition parties and key stakeholders.
- Some agencies reported weekly to the chief executive and SLT on general compliance rates, key issues arising, resource needs and proactive disclosure options; and presented in person monthly to SLT.

I found all agencies that captured information were able to use it to inform their daily operational decisions and ensure their capacity to make decisions within the statutory time limits was maintained. However, this was only the case if the right people had access to the data. For example, a number of legal advisers we interviewed confirmed their willingness to be involved in training and assisting teams that may be under pressure or struggling with preparing responses to OIA requests. However, the process by which they provided their assistance and advice within their agency often relied on direct requests for help rather than them having access to monitoring reports and being in a position to proactively offer to engage with colleagues.

Those that attended SLT meetings were able to report first hand to senior managers on any pressures or compliance issues and were able to obtain temporary relief or assistance to ensure performance and service levels did not deteriorate. They were also able to promote the proactive disclosure of information where they had observed, from the requests they were handling, a growing public need or desire to access certain information.

I found most agencies regularly monitored the use of their website and social media platforms and prepared monthly or quarterly reports for the SLT on:

I found all agencies that captured information were able to use it to inform their daily operational decisions and ensure their capacity to make decisions within the statutory time limits was maintained.

- the number of users who visited the site and pages viewed;
- demographics of visitors and the types of devices they were using;
- what was being searched for;
- the sites that referred visitor traffic to their website; and
- what information was being downloaded.

This enabled agencies to make informed decisions about developing website content, publishing more information on the website, and improving its usability and accessibility.

However, agencies that did not record the subject matter of OIA requests they were receiving, limited their ability to identify themes or trends in requests to inform such decisions about website content and the proactive release of information their stakeholders are interested in obtaining. As a result, these agencies were heavily dependent on the perceptions of the individual officials who had been allocated the responsibility for responding to requests. In those cases, my investigation found little evidence of such opportunities for proactive release being identified and actioned regularly.

## **Learning from past decisions**

Failure to record the outcome of past decisions made it difficult for other staff within agencies to locate similar, previous requests so as to either ensure consistency of decision-making or justified departure from any past responses. My investigation found a number of media teams within agencies did not have access to the OIA team's database and/or vice versa. They were often kept on separate systems. As discussed earlier, this increases the risk of inconsistent decisions within an agency as well as the potential for undue delay in providing a requester access to official information they are seeking, depending on which access point within an agency was used.

I found Ombudsman opinions were reviewed and discussed within an agency, but usually only by the legal team. This was justified by some on the basis that an Ombudsman's opinion related to refusals and all agency refusals had to be reviewed by the legal team before they went out. However, I consider that information about these opinions should be circulated beyond the core advisers to the officials and OIA practitioners who are involved in original decision-making, and discussed openly with them as part of keeping their knowledge of the operation of the OIA up-to-date.

## **Monitoring by the Ombudsman**

I record that a number of requesters expressed frustration at my Office's inability to investigate the decisions made by agencies under the OIA in a timely manner. Many were aware that my Office has experienced a significant increase in complaints



about the acts and decisions of agencies in recent years.<sup>98</sup> This has affected our ability to progress investigations relating to requests for information quickly, and has the potential to translate into a reluctance by complainants to approach my Office with issues. If this were to happen, my Office would not be alerted to legitimate concerns about the administrative conduct of public sector agencies nor be in a position to recommend systemic improvements and prevent unfair practices. Nor would my Office be in a position to report to Parliament on the fairness of government activities, the quality of the services being provided, and any necessary remedial action.

While I am pleased to note that the increase in complaints my Office is experiencing does not indicate a lack of belief in the Ombudsman's role as an effective watchdog on decisions on request for access to official information, a number of requesters advised me that they believed agencies are factoring into their decision on withholding information the time it might take my Office to investigate a complaint:

- *We have noticed agencies increasingly respond late to our OIA requests or provide only part answers. ...We believe these agencies are well aware the Ombudsman is overloaded with work and unable to provide a timely response to our complaints. As a result some agencies operate with little regard for their responsibilities under the Act.*
- *Another big issue is the time it takes for an OIA complaint to be dealt with by your office. Departments are snubbing their noses at your office because they know too well that by the time an issue is investigated and a ruling made, the issue will be a dead duck and the relevant Minister will not be breathing down their necks about it.*
- *Agencies do respond to Ombudsman findings but unfortunately they are few and far between. Currently government rely on the time lag to avoid immediate consequences of misusing the Act, and it is disheartening to know that if you have an issue with release there is little you are able to do about it.*

While I was unable to find evidence of this in my investigation of the 12 selected agencies, the perception that this may be occurring together with my concern about delays in my Office's investigation process is sufficient to cause me to review my own Office's practices.

Against the same standards by which I assess other agencies, it is clear that my Office has struggled with insufficient resilience arrangements when experienced investigating staff left, new staff were in training and a flood of complaints came in. My Office's investigation practices have not, to date, been flexible enough to cope with the volume and complexity of complaints it was receiving. I advised Parliament for the 2014/15 reporting year that my Office failed to meet all of its timeliness performance targets:<sup>99</sup>

One media organisation commented:

*There is a currency to timeliness of information and this is devalued when*

<sup>98</sup> The Office of the Ombudsman Annual Report 2014-15 advised that it had received the second highest ever number of complaints and other contacts in its history.

<sup>99</sup> The Office of the Ombudsman Annual Report 2014-2015 p 75.

*[there are delays]. The decrease in value is not simply an inability of media to tell stories when it wants to tell stories – it has the effect of distancing the public from the primary purposes laid out in the Act. A delay of months, and commonly years, weakens the ability of the public to ‘effective participation in making and administration of laws and policies’ and ‘to promote the accountability of Ministers of the Crown and officials’. The consequence of this is to degrade the ability of the Act to ‘enhance respect for the law and to promote good government’. Delays run contrary to the legislative aim that citizens have ‘proper access’ to official information and that ‘information shall be made available unless there is good reason for withholding it’.*

I agree and have openly said that:

*...the ability of people to access information they need to function more effectively in society and make sure the democratic process is working is fundamental to the development of trust in government and government processes. People need to know they can have some input into the system and actually influence events through submissions and other processes of democratic engagement. But if you can’t access the information you need in the time you need it, or if you feel you are at the mercy of the bureaucracy and its convenience, things can start to unravel. There are issues for concern but they have been identified and we are actively working to address them.<sup>100</sup>*

An effective watchdog on the operation of the OIA is one that not only investigates the complaints it has referred to it in a timely manner but also one which actively investigates and monitors the official information activities of agencies who apply it every day and reports on what it finds. In nearly 33 years, I note this is only the fourth<sup>101</sup> time the Ombudsman has conducted an own-motion investigation into how the OIA is being applied by agencies.

All requesters supported a more proactive role for my Office in investigating agencies’ policies, systems and practices regularly and reporting on them openly, as well as providing requesters with assistance on how to use the OIA effectively. Media organisations submitted:

*We would welcome ongoing dialogue with government agencies and the Office of the Ombudsman to ensure our staff have appropriate training and awareness of ways to maximise efficiency. We would be open to taking part in ongoing training exercises with public servants to explain the media’s interest.*

Similarly, agencies overwhelmingly agreed that more proactive engagement, assistance and guidance are needed from my Office, particularly as to:

- what is expected of them in terms of good practice;

An effective watchdog on the operation of the OIA is one that not only investigates the complaints it has referred to it in a timely manner but also one which actively investigates and monitors the official information activities of agencies who apply it every day and reports on what it finds.

100 Chief Ombudsman Dame Beverley Wakem, ‘New Zealand’s Official Information Act: Still fit for purpose?’, Public Sector, April 2015, p 21.

101 Chief Ombudsman Dame Beverley Wakem & Privacy Commissioner Marie Shroff ‘Information fault lines: Accessing EQC Information in Canterbury’, 19 December 2013; Ombudsman David McGee QC, ‘Investigation into Ministry of Education’s management of OIA requests about proposed school closures’, 18 December 2012; Ombudsman Mel Smith, ‘Investigation into the actions of the Department of Labour in regard to an Official Information Act complaint’, 24 February 2004.

- the criteria they should be measuring themselves against; and
- advice on areas in which they may be vulnerable and how these are best addressed.<sup>102</sup>

My Office will continue to work with the 12 selected agencies in the first instance, with a view to developing a maturity model and associated resources to enable agencies to self-assess their own practices, capabilities and performance.

In future, my Office intends to conduct regular own-motion investigations into agencies' OIA compliance and practices and report publicly.

My Office is currently upgrading the guidance available on the Ombudsman website, and will continue to provide training and assistance to agencies in developing OIA policies and procedures.

In addition, both requesters and agencies supported the implementation by my Office of an early resolution process for investigating OIA complaints.

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<sup>102</sup> The State Services Commission's most recent Integrity and Conduct Survey (2013) found that only 24% of State servants who responded were familiar with my Office's guidance on the OIA.

## Recommendations

37	My Office, in consultation with the Ministry of Justice and the SSC, should develop a suite of performance measures for agencies to apply to their official information activities (including proactive disclosures).
38	Agencies should ensure they are counting their OIA workload and compliance rates accurately.
39	Agencies should separately report on their Minister's OIAs or PQs or ministerial correspondence rather than in the one performance measure.
40	Agencies should ensure they have a fit for purpose OIA logging and tracking system which is easy to use and actively monitored.
41	Agencies should record the final decision on an OIA request and if it is to refuse, the basis for that decision, including the outcome of any consultations involved.
42	Agencies should ensure their chief executive and senior leadership team receive regular reporting on compliance capabilities in handling OIA requests, apparent themes or trends in the requests being received, sensitive issues and proactive disclosures.
43	Agencies should ensure any Ombudsman decisions are shared and discussed openly with OIA practitioners in the agency.
44	My Office should work with agencies to develop a standardised model for data collection of OIA requests to enable high quality analysis and compliance.
45	My Office should ensure its early resolution process is implemented and works effectively for the majority of official information complaints we receive.
46	My Office should provide updated OIA guidance to agencies, and continue to provide training and assistance to agencies in developing OIA policies and procedures.
47	My Office should develop a maturity model and associated resources based on the findings from this investigation to enable agencies to self-assess performance and capabilities.
48	My Office should conduct regular own-motion investigations into agencies' OIA compliance and practices and report publicly.





# Conclusion

I commenced this investigation because of what I perceived to be growing concern and criticism that government agencies were not complying with the requirements of the OIA, nor acting in accordance with its principle and purposes when making decisions about the accessibility of official information they held. Following a comprehensive examination of how agencies have organised and resourced themselves and currently operate in practice, I am satisfied that the OIA itself is fundamentally sound, but it is not always working in practice.

On the positive side of the ledger, agencies are compliant with the OIA most of the time and most government officials working within these agencies have a genuine desire to ensure that they are compliant.

I found chief executives and senior managers who:

- understand their obligations under the OIA;
- see the value of having the OIA operate effectively within their agency;
- recognise the importance of fostering a culture whereby their staff are supported and encouraged to administer the OIA consistently with its principle and purposes; and
- acknowledge the benefits of proactive disclosure and engagement with the public.

I found that the core group of OIA staff in agencies were committed to their areas of responsibility and to ongoing improvement in OIA practice.

I found that leadership agencies such as the SSC and the Ministry of Justice wanted to provide assistance where they could but were constrained by resources and competing priorities.

I also found that the OIA has achieved great gains in the openness and transparency of government agencies and enhanced the public's ability to participate in the making and administration of laws and policies in many areas. A lot of official information is now publicly released regularly and voluntarily by agencies, with many trialling new proactive disclosure initiatives such as developing targeted stakeholder engagement programmes, disclosure logs, voluntary official information and data set releases and contextualised responses to OIA requests.

Where I have found that agencies are vulnerable to non-compliance with the OIA, I have not found evidence of deliberate obstruction but rather the unintended consequences of various attempts to:

- organise themselves when there are limited resources to allocate the processing of requests for official information as well as deliver other work;
- develop their own policies and guidance aimed at ensuring compliance but which contain gaps, misinterpretation or allow for interference when put into practice;
- try to meet the expectations of two masters ie, the public under the OIA and the Minister under the 'no surprises' principle;
- operate in an environment which can be highly political, suspicious, aggressive and unforgiving;
- cope with the fast pace of technology that has enabled the volume of official information to grow significantly and increased the demands and expectations of requesters as a consequence; and
- manage constrained resources, staff with limited training and a loss of experience and institutional knowledge.

I am satisfied that agencies were unaware of most of the areas where they may not have been compliant with the OIA and are willing to address these so as to rebuild trust and confidence in the operation of the OIA by their agency.

Requesters who rely on the effective operation of the OIA within agencies have been frustrated and found it difficult to engage with officials at times. I found that many requesters assumed that an agency's non-compliance or lack of engagement was deliberate and intentional, which then created a cycle of distrust and suspicion. One opposition party agreed:

*...this is a reinforcing circle, where information is unreasonably withheld, so journalists/opposition parties sense something's up and dig further for 'gotchas', making ministries and ministers more inclined to withhold info etc.*

This was caused variously by:

- a complicated environment where the OIA response is at times considered to be embedded in a political context that can be career limiting for Ministers and

have a negative effect on their relationships with agency officials, and used by the media in ways which are perceived to be swift, blunt and misleading;

- mixed messaging from Ministers and a lack of bold, visible statements and actions by those in leadership within agencies as to their expectations in terms of compliance with the OIA and more generally with the promotion of openness, accountability and enhanced public participation as the OIA intended;
- officials within agencies being confused as to how to apply the OIA and comply with the guidelines in the *Cabinet Manual* on keeping their Minister informed appropriately;
- well-meaning practices that invite opportunities for ministerial/political advisors to influence more than they ought to and sometimes on matters where they have no legitimate place;
- agencies not acting consistently in their processes or decision-making;
- different and more risk averse treatment of requests by the media and interest groups;
- some suspicious and unsupported requesters who have struggled to communicate what they really want;
- failure to take advantage of technology and capture a wealth of information that could improve agency performance and enhance their workforce planning; and
- missed opportunities to provide evidence of genuine commitment to the OIA principle and purposes.

As a result, it is clear to me that both requesters and agencies have perceptions, biases and suspicions arising from past poor experiences. This has led to increased concern and criticism about how the OIA is operating. The Danks Committee recognised this was a potential risk when it recommended New Zealand change from an official secrets regime to one of increased openness, accountability and public participation.

If the OIA is to achieve its purposes and continue to be effective over time, it needs to be used properly by everyone – the media, politicians, researchers, special interest groups, and the general public, as well as government agencies. Anyone who acts unfairly can contribute to and encourage a chilling effect on how the OIA operates in practice.

I was disappointed at the limited Government support of the Law Commission's recommendations for improvement, following its review of the official information legislation in 2012.<sup>103</sup> Many of the amendments proposed by the Law Commission would have assisted both requesters and agencies to manage the challenges I have found they continue to face as a result of the environment they now operate in. Without these, the development of good policies and practices have become

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<sup>103</sup> Law Commission 'The Public's Right to Know' (NZLC R125, 2012).



critical in order to ensure compliance with the OIA and its principle and purposes is maintained.

Most of my recommendations are couched in general terms and address what I believe are achievable improvements to the way the OIA's requirements, principle and purposes are implemented by agencies to assist both themselves and the public, and to correct any misconceptions. It is up to each individual agency to examine its own performance and decide how best to implement these recommendations in light of its own circumstances. My Office will continue to work with the 12 selected agencies to ensure any areas of vulnerability that may have been identified during the investigation of their particular practices are addressed appropriately. Other agencies who wish to seek my Office's assistance are welcome to contact our Policy and Professional Practice Advisory Group.

In addition, my Office will be issuing new comprehensive guidance and resources for all agencies, to assist them to achieve excellence in their policies, practices, systems, organisation and decision-making. This will include updated guidelines as well as the development of a model protocol for agencies and officials to govern consultations and briefings with their Minister's office on OIA requests, a maturity model and a self assessment tool for agencies to measure their compliance and identify any areas of weakness.

It is my Office's intention to commence a programme of proactively reviewing selected agencies' practices against the requirements of the OIA using my own-motion powers under the OA and to publicly report on these, to ensure the public have continuing trust and confidence in this important constitutional measure.<sup>104</sup>

I acknowledge and thank those members of the public, media, opposition parties, chiefs of staff, ministerial advisers, Ministers, chief executives and agency staff who contributed to this investigation – either through making submissions, completing surveys, providing material and/or making themselves available for interview.

I am particularly grateful for the assistance and cooperation provided by the 12 selected agencies. While I could have used my coercive powers under the OA to require the production of documents, summons witnesses and put officials on oath,<sup>105</sup> I did not need to. Everyone I encountered readily cooperated and these agencies genuinely wanted to find out where they were vulnerable and how they could do better to ensure the OIA was applied effectively within their agency. The response rate in the surveys of current and former public officials indicates the level of commitment our government officials have in the work that they do.

I note that the public were less forthcoming in responding to the surveys, and I was unable to determine precisely why that was. It could be interpreted many ways – from a loss of confidence in the OIA and the work of my Office, to a demonstration that a significant proportion of the public believed with so much official information now being made available on a regular basis, the OIA was working for them. During the course of my investigation, various media agencies and journalists were asked

The development of good policies and practices are critical in order to ensure compliance with the legislation and its purposes is maintained.

104 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 at page 391.

105 Ombudsmen Act 1975, s 19(2).

why they hadn't reported on our public consultation opportunities. The replies were frank and honest:

- *It wasn't sexy enough.*
- *There's a lot going on at the moment so wasn't a priority.*

In any event, the findings of my investigation overall are encouraging and demonstrate that the OIA does provide a strong framework for enabling open and transparent democratic government in our country. I do not believe the OIA is fundamentally deficient. The principle and purposes of the OIA continue to be as sound as ever. However, it is how the OIA is applied in practice every day that matters. While this has its challenges, I am satisfied that agencies and requesters have a genuine desire for the OIA to operate effectively and will work to ensure that it does. But they only know what they know and the Ombudsman's role as watchdog is to investigate and inform agencies where they need to be vigilant, make changes to ensure compliance, take opportunities to promote the principle and purposes of the OIA, and demonstrate their commitment to openness, accountability and public engagement. I note the Minister who originally introduced the OIA Bill into our House of Representatives, recently observed 33 years on:<sup>106</sup>

*...it is one of the most important pieces of constitutional legislation in this country's history. ...It will always be tested and in one sense that's a good thing. It's a very active piece of legislation.*

New Zealand is in the enviable position where the effective operation of this constitutional measure is not reliant on legislative change and those who use it have all said they want it to work as intended. We all have a role to ensure that it does. Information is the currency of democracy and my Office will play its part in ensuring the OIA is not devalued.

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106 Sir James McLay KNZM, QSO Interview on The Nation, TV3, 17 October 2015.

Not a game of  
hide and seek

## Appendix

### Agencies surveyed (including Ministers)

Accident Compensation Corporation	Heritage New Zealand Pouhere Taonga	Ministry for Women
AgResearch Limited	Housing New Zealand Corporation	Museum of New Zealand Te Papa Tongarewa Board
Airways Corporation of New Zealand Limited	Human Rights Commission	New Zealand Customs Service
Arts Council of New Zealand Toi Aotearoa (Creative New Zealand)	Inland Revenue Department	New Zealand Defence Force
Broadcasting Commission (New Zealand on Air)	Institute of Environmental Science and Research Limited	New Zealand Film Commission
Canterbury Earthquake Recovery Authority	KiwiRail Holdings Limited	New Zealand Fire Service Commission
Children's Commissioner	Land Information New Zealand	New Zealand Institute for Plant and Food Research Limited
Civil Aviation Authority of New Zealand	Landcorp Farming Limited	New Zealand Lotteries Commission
Commerce Commission	Law Commission	New Zealand Post Limited
Crown Law Office	Maritime New Zealand	New Zealand Qualifications Authority
Department of Conservation	Ministry for Culture and Heritage	New Zealand Security Intelligence Service
Department of Corrections	Ministry for Primary Industries	New Zealand Transport Agency
Department of Internal Affairs	Ministry for the Environment	Pharmaceutical Management Agency
Department of Prime Minister and Cabinet	Ministry of Business, Innovation and Employment	New Zealand Police
Earthquake Commission	Ministry of Defence	Privacy Commissioner
Education Review Office	Ministry of Education	Public Trust
Environmental Protection Authority	Ministry of Foreign Affairs and Trade	Quotable Value Limited
Financial Markets Authority	Ministry of Health	Radio New Zealand Limited
Government Communications Security Bureau	Ministry of Justice	Reserve Bank of New Zealand
Health and Disability Commissioner	Ministry of Maori Development	Serious Fraud Office
	Ministry of Pacific Island Affairs	Solid Energy New Zealand Limited
	Ministry of Social Development	
	Ministry of Transport	

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Southern Response Earthquake  
Services Limited

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Sport New Zealand

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State Services Commission

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Statistics New Zealand

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Te Reo Whakapuaki Irirangi (Maori  
Broadcasting Funding Agency)

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Television New Zealand Limited

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Tertiary Education Commission

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Transport Accident Investigation  
Commission

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Transpower New Zealand Limited

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The Treasury

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Worksafe New Zealand

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Office of Hon Gerry Brownlee

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Office of Hon Steven Joyce

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Office of Hon Paula Bennett

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Office of Hon Dr Jonathan Coleman

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Office of Hon Amy Adams

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Office of Hon Chris Finlayson

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Office of Hon Simon Bridges

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Office of Hon Anne Tolley

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Office of Hon Dr Nick Smith

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Office of Hon Murray McCully

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Office of Hon Nathan Guy

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Office of Hon Nikki Kaye

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Office of Hon Tim Groser

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Office of Hon Michael Woodhouse

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Office of Hon Todd McClay

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Office of Hon Peseta Sam Lotu-liga

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Office of Hon Maggie Barry

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Office of Hon Craig Foss

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Office of Hon Jo Goodhew

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Office of Hon Paul Goldsmith

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Office of Hon Peter Dunne

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Office of Hon Te Ururoa Flavell

 **Ombudsman**  
Fairness for all

