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**New Zealand’s Official Information Act: Public Policy, Accountability  
and Participation**

**THIS PAPER**

This paper makes some observations in respect of New Zealand’s Official Information Act (OIA) from the perspective of having to apply it within a New Zealand Public Service Department.

It makes some comment regarding the context for the OIA and changing practice in respect of how information is made available. It also discusses some issues that arise in its application to “sensitive requests” in particular.

Lastly, this is applied to a practical example of the arrangements one New Zealand Government Department has introduced to manage OIA requests.

**INTRODUCTION**

The Official Information Act is one of several pieces of legislation that provides for New Zealand’s approach to “open government”. It was the first of several laws passed in the 1980s and 1990s to make access to information of various kinds more free.

The OIA replaced the Official Secrets Act (OSA), which operated as its name implied – public officials applying the OSA started from the presumption that the State should keep information secret. The OIA states that “information shall be made available unless there is good reason for withholding it”. Its provisions set out a clear regime that often works in requestors’ favour:

- requests are to be responded to within twenty working days, with the opportunity to extend the time allowed once (and once only)
- access to information is almost always at no cost to the requestor
- the OIA expects public officials to ensure that requests reach the right part of Government (within ten working days at most)
- the OIA does not provide for “classes” of information – any information can be requested, including that stored in people’s heads
- it sets out subjective criteria on which access decisions are made; a “public interest” is usually weighed against the harms that might result from the release of information
- there is a free process of review by a body that is independent of both public officials and the Executive (the Ombudsman).

### **The Official Information Act: Primus Inter Pares**

The Ombudsman and the Courts have both described the Official Information Act as a statute of constitutional importance<sup>1</sup>, saying “*the permeating importance of the Act is such that it is entitled to be ranked as a constitutional measure*”.<sup>2</sup>

The OIA walks, talks and looks like a constitutional measure. It sets out constitutional or political ethics<sup>3</sup>; it relates these to the principle of the Executive Government’s

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<sup>1</sup> Ombudsmen's own-motion investigation of Department of Corrections in relation to the detention and treatment of prisoners, 2005, <http://ombudsmen.govt.nz/cms/imagelibrary/100169.doc>

<sup>2</sup> Commissioner of Police v Ombudsman 1 NZLR [1988] 385, p.391

<sup>3</sup> Dicey, Introduction to the Law of the Constitution, 10th edition, Macmillan & Co Ltd, New York, 1962, p.417

responsibility to Parliament; it is pervasive and influences almost all Government activities.

The OIA is also just one of several features of the New Zealand system of Government that promotes transparency and accountability. Others have been added or enhanced since the OIA was passed in 1982:

- an overhauling of New Zealand's parliamentary Select Committees in 1985 expanded their roles to enable fuller consideration of Government policies and expenditure
- in 1987 the Local Government Official Information and Meetings Act was passed, making more available the information held by local authorities
- in 1988 the State Sector Act and in 1989 the Public Finance Act were passed which are, along with the Official Information Act, generally seen as the three legs of transparent and accountable practice in New Zealand Government
- these two Acts were passed alongside extensive public sector management reforms in the 1980s and 1990s that established "policy" departments, "delivery" departments, and gave some departments "monitoring" roles in respect of others
- the Privacy Act, passed in 1993, limits the use of personal information by the Government and provides individuals with rights of access to information held about them
- the Fiscal Responsibility Act, passed in 1994, sets out measures to provide transparency in the management of the Crown accounts
- the establishment and enhancement of independent parliamentary authorities, some with extensive powers of review, such as the Privacy Commissioner, Ombudsmen, the Office of the Controller and Auditor-General, and the Health and Disability Commissioner.

## THE OIA, PUBLIC OFFICIALS, AND CHANGING PRACTICE

While the work of public servants is open to scrutiny from a variety of sources, the Official Information Act is the most pervasive. “Official information” means *any* information held by any Minister of the Crown in his or her official capacity, or by a Department, or by an Organisation listed in the Schedule to the Act. There are no “class exemptions” for particular kinds of information, or for documents with particular classifications.

The OIA has had a considerable impact on the way public officials work. Some changes may in part reflect that New Zealand’s public policy process has developed in the OIA’s presence; policy is a recognised discipline today in a way that it was not in 1982, and many departments did not then have “policy” functions. “Public policy” has developed in the presence of requirements that public officials operate in a transparent and accountable manner.

A former head of the Cabinet Office has observed that one impact of the OIA has been an improvement in the quality of advice. There is simple cause and effect at work in this. Public officials’ advice can be an important part of the decision-making process, and saying that a document “does not say what was meant” is not a reason to withhold it. Such documents are released and scrutinised, and this provides an additional incentive for officials to take care to say what they mean, and to avoid giving apparently subjective advice.

In the presence of scrutiny, the public policy process in New Zealand has also sought ways to be proactively open. Government has increasingly chosen to publicly consult on various proposals and policies, with this becoming much more prevalent during the 1990s. While consultation is not governed by any single set of Government requirements, the Courts have required that consultation should be “*the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done.*”<sup>4</sup>

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<sup>4</sup> West Coast United Council v Prebble (1988) 12 NZTPA 399

This has increased accountability and participation. Where Government chooses to consult it is required, before it finally takes decisions, to explain what options it has considered and why it favours the course of action it does. Though in some cases, so much consultation has at times been underway in individual communities that the term “consultation fatigue” has been coined to describe the difficulty the communities have had in keeping up with multiple, simultaneous efforts by public officials to engage with them.

### **“Sensitive” Information: A Reducing Category?**

Over the past decade in particular there have been major and permanent changes to the availability of information and the ways people can make use of it. These changes are still in progress. Many citizens now have the means in their homes or on their desks to engage with the democratic process. New technology enables them to ask for information, get it, and to share their views with as many others as their views interest.

With so much information available without the need to even request it, it is less of an event for holders of official information to release more. Information is released into the presence of a growing quantity of other related information. It is more likely to be looked at in context, and less likely to cause harm.

The increasing availability of information is consistent with the OIA’s principles. One of its two main purposes starts

*“to increase progressively the availability of official information ...”.*

There has been a considerable change since the OIA was passed in what information, of various kinds, is made available. For example, while Cabinet Papers<sup>5</sup> are commonly made available today, this availability has evolved over time since the Act was passed in 1982.

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<sup>5</sup> The Cabinet Office describes Cabinet as “the central decision making body of executive government. It reconciles Ministers' individual responsibilities with their collective responsibility and is the ultimate arbiter of all government policy”. Cabinet papers are provided to the Cabinet to provide advice and seek decisions.

Public Officials and Ministers alike have argued that papers to Cabinet and, sometimes, Ministers required a degree of frankness that could not withstand the prospect of release to the public.<sup>6</sup>

Each release has moved the “accepted practice” on slightly and made future arguments to withhold other information harder. Sometimes papers have been made pro-actively and widely available rather than being released in response to individual requests. Increased ease of distribution of information has enabled this to happen more.

For example, in 2001, the Government undertook a major review of regulation of the Gaming Sector. Numerous Cabinet papers had been considered and these were published together on the department’s website at the request of the Minister of Internal Affairs. These papers enabled any person to participate, in an informed way, in the Select Committee process. The same approach was taken in respect of major reform to the social welfare system in 2004. Advice provided to Ministers and Cabinet throughout the review and policy process was made available to requestors on a CD-ROM.

These releases (which are often termed either “pro-active” or “managed” releases) may relate to various processes and include a variety of information, and are not made under the terms of the Official Information Act. Some are packages of documents that respond to large hypothetical requests. While these releases may be prepared on the same basis as OIA responses, they are not covered by the provisions of the OIA. There is no requestor, and there is therefore no one to (for example) consult with over what information the (hypothetical) request covers, what drafts should be included, or to explain deletions to.

While pro-active releases may not be covered by the same requirements as information released under the OIA, they can be made at the same time as events or announcements occur, enabling public officials and Ministers of the Crown to be held to account without the delay that would be required to process requests. These releases can also be tested once the same information is provided in response to actual OIA requests.

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<sup>6</sup> The OIA provides for information to be withheld on these terms, particularly where the release of information would prevent similarly frank advice from being provided in future.

## MANAGING WHAT'S LEFT: "SENSITIVE" OIA REQUESTS

The overwhelming majority of OIA requests are dealt with without difficulty. There is comprehensive guidance for decision-makers. That material includes: the Ombudsmen's guidance, which reflects the results of years of iterative application of the Act, the report "Towards Open Government"<sup>7</sup> based on which the OIA was drafted, and a review of the OIA that was undertaken by New Zealand's Law Commission in 1997<sup>8</sup>. The Office of the Ombudsmen is also readily available to provide advice.

Even given this assistance, a small percentage of requests raise issues for decision-makers. These requests may for example raise compelling reasons both to make available what has been requested, and to withhold it because of harm that might be caused by release, with no clear "right decision". Often, requestors feel strongly that the information should be released.

There are a number of factors that can require consideration in these requests, but I will look at three here, as they are relevant to how public service departments manage OIA requests, which is what is discussed last:

1. the Official Information Act itself
2. the policy process, Ministers, and Public Servants
3. the OIA's Principle of Availability.

### **The Official Information Act and "Sensitive Requests"**

There are many things that can make a request "sensitive". But it should be acknowledged that it is the OIA itself that plays the greatest part in making them so.

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<sup>7</sup> "Towards Open Government" (Danks Report), Committee on Official Information, 1980, <http://ombudsmen.govt.nz/cms/imagelibrary/100166.pdf>

<sup>8</sup> "Review of the Official Information Act 1982", NZ Law Commission, 1997, <http://www.lawcom.govt.nz/ProjectReport.aspx?ProjectID=42>

As New Zealand's Chief Ombudsman has said, the OIA is not "open-and-shut" legislation<sup>9</sup>. Information is not released in response to a clear set of objective rules. Instead, decision-makers must weigh up to the best of their ability competing and subjective considerations. The Chief Ombudsman adds that this is not a bad thing - the pursuit of absolute simplicity in applying the Act "*risks undermining one of the unique features of the New Zealand legislation, namely that each case should be considered on its merits, particularly where there are competing public interest considerations favouring both withholding and disclosure in the circumstances of a particular case*".

Nevertheless, the consideration of a request may require a series of decisions that each require subjective judgements to be made:

- what information is covered and should be considered for release
- whether the information relates most closely to the work of the department, and whether other parties covered by the OIA may also hold relevant information
- whether others should be consulted on its release
- what is the public interest in releasing the information
- what harm might be caused by its release, and how this balances against the public interest
- whether there are alternatives to withholding the information if a harm might be caused.

For simple requests, these considerations may be easily made. But for some requests, these judgements can be difficult. Terminology may be understood differently by the requestor and the department, opinions may differ on the consequences of releasing particular information, the evidence for and potential severity of a harm may be unevenly balanced, or the information requested may have been poorly kept (something which

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<sup>9</sup> Open and Shut Legislation? The Official Information Act: Address to LexisNexis Information Law Conference, 21 July 2006, John Belgrave, Chief Ombudsman, paper can be found at [www.ombudsmen.govt.nz](http://www.ombudsmen.govt.nz)

should not be allowed to disadvantage a requestor). An unusual but genuine example is provided below.

**EXAMPLE**

A requestor lodges an OIA request with the Minister who is responsible for a significant review. The Minister releases, on advice from the department, a set of documents that they are advised match the request. The total pool of documents considered has been significant.

The requestor replies, saying that they believe there are some relevant documents that may not have been considered for release. Officials believe they have managed the request appropriately, and a senior manager asks that an auditor review the request. The auditor's findings are that indeed some relevant documents were not considered.

The staff responsible for managing the OIA request, on reading the audit results, disagree with the auditor's interpretation of the wording of the original request. The Manager responsible for commissioning the audit report also disagrees with the interpretation. A response is sent to the requestor, advising them that all the relevant material has been considered.

The requestor complains to the Ombudsman, who investigates the management of the request. Few records have been kept of how staff managed the request, and initially the Ombudsman has only the subjective view of departmental staff to rely on. The best documented approach to the request is that offered by the audit report, with which the Ombudsman agrees.

In this example it is a very simple part of the process of responding to an OIA that has been mis-judged. But in respect of requests that are complex or "sensitive" for some reason, as in any subjective process, the wrong judgement is sometimes made.

This becomes a particular problem where there is no clear record of how decisions were made, and the reasons for decisions can be called into question. The decisions may be investigated by the Ombudsman, whose approach is not necessarily to say whether a department has arrived at the most correct possible answer under the OIA. Their focus is often on determining whether decision-makers had a reasonable basis to make the decisions they did, i.e. whether a reasonable and thorough process was followed.

Their questions may include: Was there sufficient investigation into what information was available? Did the decision start from a clear view of what was sought, with consultation of the requestor to clear up doubt? Were any harms based on a reasonable assessment of the facts, or were they merely asserted? What options were considered other than simply withholding the information requested?

It is at least as important in these circumstances for a good process to have been followed, and preferably documented, as it is for a “right” decision to have been made. Particularly when sensitive or controversial requests are being managed, if a department has made a poor decision, the inability to explain *why* may render a requestor less likely to readily accept the simplest and most honest explanation (i.e. with the best of intentions, we got it wrong).

### **The Policy Process, Ministers and Public Servants**

There are particular judgements to make in respect of requests relating to the policy-making process. The process and OIA requests made about it can span the activities of Ministers of the Crown and public servants.

In New Zealand, the public service and the Executive operate separately. Public servants are politically neutral. The “Public Service Code of Conduct”, published by the State Services Commission, describes the convention of political neutrality in the following way:

*“Public servants are required to serve the Government of the day. They must act to ensure not only that their department maintains the confidence of its Ministers, but also to ensure that it is able to establish the same professional and impartial relationship with future Ministers.”*

*This convention of political neutrality is designed to ensure the Public Service can provide strong support for the good government of New Zealand over the long term.*

*Public servants have a long-established role in assisting with development as well as implementation of policy. This role may be performed in different ways and at different levels from department to department. Public servants are responsible for providing honest, impartial, and comprehensive advice to Ministers, and for alerting Ministers to the possible consequences of following particular policies, whether or not such advice accords with Ministers' views."*

It is both inevitable and proper that Ministers and public officials will see different reasons under the OIA to consider withholding or releasing material. The OIA regards Chief Executives and Ministers as separate entities, i.e. they respond to OIA requests separately.

There are two provisions of the OIA that are particularly relevant to Cabinet and policy-making information. The first is s9(2)(f), which allows information to be withheld, subject to the public interest test, "*if, and only if, it is "necessary" to withhold the information requested in order to:*

*"Maintain the constitutional conventions for the time being which protect –*

- (i) The confidentiality of communications by or between or with the Sovereign or her representative;*
- (ii) Collective and individual ministerial responsibility;*
- (iii) The political neutrality of officials;*
- (iv) The confidentiality of advice tendered by Ministers of the Crown and officials."*

The OIA does not set out what a constitutional convention is or how one should be identified, though it acknowledges the evolutionary nature of the convention with the use of the words “for the time being”, which implies that the requirement for confidentiality may change over time.<sup>10</sup> In practice, and due in part to that practice having been well documented by successive Ombudsmen, there is now a good understanding of how this applies to common situations.

The second provision is s9(2)(g), which allows information to be withheld (again, subject to the public interest test) “*where necessary to maintain the effective conduct of public affairs through*

- (i) *the free and frank expression of opinions by or between or to Ministers of the Crown ... or officers and employees of any Department ... in the course of their duty, or*
- (ii) *the protection of such Ministers, ... officers and employees from improper pressure or harassment”.*

This provision recognises the need for some aspects of the policy making process to have some protection, at least while they are in progress. The Act provides for the avoidance of pressure that might curtail decisions being made in a considered way, including through things such as “the offering of blunt advice or effective consultation and arguments”.<sup>11</sup>

These provisions are considered carefully by the Ombudsman, and there is no “blanket protection” for any advice between public servants and Ministers. For example, requests may include in their scope documents that record that Ministers and public servants have taken a different view on a particular issue. The OIA provides no special protection in these cases, and the position of the Ombudsman has long been that the release of such

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<sup>10</sup> *Cabinet, Policy Documents and Freedom of Information: The New Zealand Experience*, Lecture by Robert Buchanan, given on 11 October 1990

<sup>11</sup> *Towards Open Government* (Danks Report), Committee on Official Information, 1980, page 19 <http://ombudsmen.govt.nz/cms/imagelibrary/100166.pdf>

information can reinforce confidence in the public service's neutrality. In these cases Ministers may not even be consulted on a request; they may simply be advised of what is to be released.

In practice, there are many possible circumstances that impact the application of both the provisions set out above. Three among them are:

First, the stage the policy process has reached. If advice is still being generated, there may be an interest in a requestor knowing what that advice is about. If the advice has been tendered, there may be an interest in knowing how and when decisions may be taken. Once decisions have been taken and announced, information will often need to be released. If a policy process has stalled, then the protection offered by the OIA's provisions may reduce – there may at least be an interest in knowing what broad options or issues were last considered.

Secondly, the planned *later* stages of a policy or other process are relevant to the level of public interest in releasing information. If there will be no further opportunity for requestors to comment on a proposal, then it may be sufficiently in the public interest for information to be released that some harms are outweighed.

Thirdly, these requests may span across the respective responsibilities of Ministers and public servants. The workings of this have recently changed in New Zealand, with the move to a proportional representation electoral (Mixed Member Proportional, or MMP) system. The first election under this system took place in 1996.

In these cases, information may relate to an issue that is the subject of a political process between the Government and the political parties that may support it. This part of the decision-making process can be legitimately protected by the OIA.

Considerations in deciding how to respond include whether a political process may be in train that the OIA might apply to, and the nature of the information held. It may be appropriate simply to advise the Minister of a release because the information does not relate to their responsibilities, or to consult them because they are an affected party. All

or part of the request may appropriately be transferred if the information held relates more closely to the functions of the Minister than the department.<sup>12</sup> While often these distinctions are clear, sometimes they can be argued and require careful consideration.

It is a credit to the OIA that its principles apply equally well, without amendment, to a proportional system. But coalition governments can make for more complex decision-making processes and a greater variety of them. The few requests that pose challenges are important to make well.

The points made in this section are not intended to be exhaustive, and they do not pose difficulty in respect of a great number of requests. In some respects they reflect that the OIA is a product of New Zealand's system of government; both are based on broad principles and work where these are applied well. In respect of the practical application of the OIA they do reflect an important lesson – that there are cases where making good decisions in respect of OIA requests require a genuine understanding of *both* sets of principles (those underpinning both the OIA and the workings of government itself) and the ability to reason across them.

### **The OIA's Principle of Availability**

After everything has been considered, there may be little to separate the public interest in releasing information from the potential harms that could arise from doing so. To release the information may seem as compelling a decision as withholding it.

In considering these requests, there are several ways to make your way through the Official Information Act and identify a third important practical consideration beyond

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<sup>12</sup> Section 14(b) of the Act provides that a request should be transferred where the information to which the request relates:

- “(i) *Is not held by the Department or Minister of the Crown or organisation but is believed by the person dealing with the request to be held by another Department or Minister of the Crown or organisation, or by a local authority;*  
*or*
- (ii) *Is believed by the person dealing with the request to be more closely connected with the functions of another Department or Minister of the Crown or organisation, or of a local authority...*”

(1) the harms caused by release and (2) the public interest. Section 2 of the OIA sets out that “information” is a separate consideration from “documents”. So decision-makers should consider release of the substance of a document even if the document itself cannot be released.

There is also the Principle of Availability, which underpins the whole Official Information Act. It is set out in section 5 of the Act:

*“Principle of availability – The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.”*

Because one of the purposes of the Act is to make information more freely available, the Principle of Availability can also ask decision-makers to look beyond binary decisions that either (a) the public interest outweighs any particular harms, or (b) the harms outweigh the public interest.

Both sections of the OIA suggest that decision-makers should look at options for potential compromise.

**EXAMPLE**

A Parliamentary Select Committee has invited submissions on a matter of public interest, and a requestor wishes to make a submission. A Government Department is preparing a research report that is relevant to the content of their submission but it will be published several days after the closing date for submissions.

The requestor lodges a request with the department for the report, which is declined as the report is still undergoing changes prior to its publication. The requestor lodges an appeal with the Ombudsman, who seeks to broker a compromise option between the department and the requestor.

The report is released to the requestor, on the condition that it be used only for the purposes of the submission, which will remain confidential within the Select Committee process until it has been considered - long after the publication of the report the requestor asked for.

There are long-standing options, such as inviting requestors to view large collections of information that are too large to copy, and providing summaries of information that cannot be released in detail (or where deletions would be impractical, for example rendering a document incomprehensible).

Another approach is to provide more information to requestors than they have sought. A request that seeks information on the audit of a particular programme, for example, might be responded to with that and other information, such as whether all the audit's recommendations have been implemented, whether further reviews of the programme have been undertaken, and how it compares to other programmes. The total package of material released may be less likely to create the harms that individual pieces of information might.

These are all good examples of the way the OIA asks decision-makers not simply to look at whether a particular document should be released, but *how it can be made available*. Where requests are “sensitive”, finding ways to do this not only makes for good administration of the OIA – it finds a way through what otherwise can seem a ‘stalemate’ of the public interest and one or more harms.

## **APPROACHES TO THE MANAGEMENT OF OIA REQUESTS**

Different departments have different ways of managing OIA requests, often reflecting very different needs. Approaches generally fall into one of three categories:

1. Departments may refer all OIA requests to their legal team.
2. A manual or other guidance may be issued to staff on how to apply the Act, with requests managed entirely by subject matter experts. A “postbox” function may exist within the organisation to monitor timeliness and provide some basic quality assurance.
3. The department may have a centralised function with expertise in applying the OIA. This is often co-located with other related functions, such as providing responses to Written Parliamentary Questions, replying to requests made under the Privacy Act, and drafting responses to Ministerial Correspondence.

Different approaches meet the needs of different departments. Some small departments receive only a small number of requests, and receive fewer still that provide challenges in applying the OIA appropriately. For them, very basic processes may be entirely satisfactory - particularly given the very good guidance that is available from the Ombudsman.

For larger departments, which may have significant traffic in requests, and where some requests raise difficult questions, the requirements are different. Based on the above, these requirements could include:

- staff who understand the OIA and can reason with reference to its principles
- a culture of systematic decision-making and of keeping a good record of how decisions are made (i.e. a ‘professional’ culture)

- strong connection to senior management, who among other things are most likely to understand the likely consequences of the release of particular information.

### **One Department's Approach**

The Ministry of Social Development (MSD) is a good example of a department that manages some “sensitive requests”. It manages 600+ OIA requests per year. Some of these relate to matters of significant public interest. For example MSD plays a key role in the protection of children and provides advice on matters such as how and in what circumstances the State should contribute to peoples' income.

In 2004 MSD started from first principles in looking at how it managed OIA requests, to better meet requirements such as those set out above. It established a “Ministerial and Executive Services Team” (MAES), the role of which includes responsibility for managing OIA requests. MAES' approach is to:

- take on people who have an interest in the democratic process
- make decisions on requests transparent, and keep good records of what decisions are based on\
- make sure that what is done is led from the top.

### **Getting the Right People**

Staff managing OIA requests are recruited to have an interest in the democratic process. The OIA requires that decisions are argued in these terms, and this understanding can be helpful to be able to assist requestors even with requests that are straightforward, i.e. to consider what information might be helpful if this is broader than that requested.

These staff have good access to senior management, and they gain an understanding of the context in which the organisation works. It was also hoped that these roles would

provide opportunities to develop people who could take a broad-based view of the workings of government into their careers as public servants.

### **Transparent Decision-Making**

A set of tools has been developed that helps staff to make decisions, and record their reasoning. Instead of trying to make inherently subjective considerations rules-based or otherwise objectively made, there is a written record for each request of how various potential harms were weighed against the public interest, how the material sought by a request was identified, and who was consulted.

Questions asked include:

- Has the requestor asked for an urgent response?
- Can the information be identified, and can it be found? What do you think the requestor is asking for?
- Will answering the request require substantial collation and research?
- What is the particular public interest in release?
- What are any countervailing harms?
- How do these weigh up?
- Are there any ways to help the requestor without causing these harms?

A culture exists of file-noting discussions with key parties, keeping all emails and correspondence relating to the management of a request, and using this to provide clear, plain english advice.

## **Led From The Top**

The organisation's commitment to being open to scrutiny is led by the Chief Executive (CE), who expects senior managers to engage with the OIA process. Decisions on individual requests are taken by the CE or the Deputy Chief Executives (DCEs) that head up each division of MSD. Their decisions are taken based on their and their staffs' view of what consequences a release might have.

MAES "owns" the process of ensuring the material is properly collated, getting subject matter experts' and senior managers' views on the potential consequences of release, and considering these alongside the OIA's provisions.

In some cases, responses are commissioned by the CE or DCEs directly; within a few days of a complex or sensitive request arriving, they provide a view to MAES staff on where they believe there may be harms in releasing information, who may need to be consulted, and may discuss how a response may approach these. This discussion is finished once information has been collated and assessed.

## **Results**

The clearest quantitative result of moving to a different approach was a more than halving of complaints made to the Ombudsman about MSD's handling of OIA requests.

Other, less quantifiable, results were also evident:

1. The relationship with some requestors improved. Staff were engaging with them more to ensure they understood what had been requested, and offering to provide other information that might also be helpful. It turned out that not every requestor always knew exactly what they wanted, and that help was often appreciated.
2. "Sensitive" requests were managed better. By the time a decision was made, staff were able to explain why, in terms of the OIA's provisions, they had reached the view they had. Decisions were better communicated to requestors, and staff were more likely to look for compromises - like

providing summaries of information, other related information, or giving a commitment to make the information available when they could.

3. As a consequence of 1 and 2 above, more information was made available, consistent with the purposes of the Act.
4. Within the organisation, understanding of the OIA started to improve. People were being engaged in a structured process that had clear decision-making principles. Talking about “harms from release” couched the OIA in terms they could better engage with.

MAES has continued to develop its approach since it was established, and has been the subject of interest by other departments. The group has also expanded beyond an initial focus of training MSD staff in how the OIA works, to improving staff familiarity with the parliamentary and democratic process.

## **CONCLUSION**

The OIA is a simple but pervasive piece of legislation that works alongside other measures to enable scrutiny of the activities of government. It requires decision-makers to think about requests, and has helped encourage them to make information available more generally and outside the OIA’s terms.

The overwhelming majority of requests made under the OIA are easily managed. But some are “sensitive” - the “answer” to the OIA’s provisions is not clear and there may be a significant interest in the information that is sought.

Particularly where sensitive requests are received, the best way to make decisions is to be able to engage with the OIA on its own terms, i.e. to weigh up practical harms against the democratic principles the Act sets out. Some potential problems are solved when withholding the information sought is not looked at as the only way to mitigate potential harms from release.

The ease of application of the OIA should not be overshadowed by the few cases in which it can be challenging to apply. These cases are not a “problem” with the OIA. They arise because both the OIA and democracy itself are about the careful balancing of competing considerations. It is in the nature of both that some decisions *should* require careful and principled consideration.

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