Submission: The merits of a review of the Official Information Act.

18 April 2019

FYI.org.nz appreciates this opportunity to help inform a decision on a potential Official Information Act review.

Summary

We strongly favour a comprehensive review of New Zealand's official information regime[1], including the legislation itself. Changes in technology and real-world practice have rendered even the 2012 Law Commission review out of date. While recent work on improved practice is appreciated, legislative changes are required to make further progress.

The review should actively seek the involvement and views of casual OIA requesters who use the law in their personal capacity. Such users' experiences of the OIA are often quite different from professional requesters such as journalists.

We firmly believe that our Official Information regime is for everyone, and that ensuring it works well for all requesters can enhance New Zealand's democracy in ways well beyond mere access to information itself.

Our background

Founded in 2010, FYI.org.nz is a non-government civic technology project to make the OIA more accessible to the general public. It does this primarily by operating a website which guides users through the request process, sends the request, keeps track of associated correspondence and responses, and publishes it all online.

[1] By referring to the Official Information regime we include both the OIA and LGOIMA. Both should be reviewed together, and local and central government OI law should be aligned.

The majority of our users are therefore casual requesters making requests in their personal capacity, usually without significant experience or knowledge of law and government.

This submission is informed by our experience helping people make nearly 10,000 OIA and LGOIMA requests.

Legislation informs practice

We note the decision to be made - as described in the call for submissions - is whether to focus on practice improvements or review legislation. We believe both are required, as legislation is the primary driver of practice. We see this, for example, in the lack of priority given by public sector managers to creating and improving the systems and processes to fully meet their Official Information obligations.

This can be contrasted with health and safety. Where improvements in health and safety practice have occurred, this can be traced directly to an improved legislative regime which has focused the minds of managers and directors. Penalties and remedies in official information practice need not be overly punitive or draconian to drive home for decision-makers the importance of compliance with Official Information law.

The lack of provision in the legislation for any significant consequences when officials (or Ministers or Councillors) break the law appears to have led to a number of poor practices. There are many such examples, but some of these which we have seen impact particularly on casual requesters are briefly summarised below.

A two-speed system

Many agencies appear to run a two-speed system with level of service depending on the nature of the request and requester. The fast track sees answers given in hours or days; the slow track involves delaying tactics and eventual responses on or after the legal maximum time limit.

Contentious requests, which may show an agency in a poor light, take the slow track. Sometimes an exception is made when the requester is a professional (such as news media, a political party, or a lobbyist), and the agency knows a news story will soon be published for which they wish to influence the narrative. This does not apply to general public requesters, who are disadvantaged in comparison.

Resourcing and training

We see significant variability in the resources given to meeting Official Information legal obligations. This includes whether a team or individual is tasked with handling requests, the resources available to perform that function, and training of employees and contractors to understand the law.

This lack of resourcing is a symptom of the lack of importance given to OIA/LGOIMA compliance by leadership, and a lack of funding sought, received, and allocated. When budgets are tight, Official Information is one of the first areas to suffer, along with the agency's intrinsically linked records and information management function.

State Services Commission statistics show that timeliness remains a significant problem. Despite the law requiring decisions "as soon as reasonably practicable," responses are still disproportionately received on or after the last allowable day. Whether from a lack of people to process requests, a lack of support by the rest of the organisation, or a lack of investment in systems and processes: the most common cause is low prioritisation by leadership.

While most agencies ensure their workers are trained to understand (for example) the State Services Code of Conduct, and many are trained to understand their public records obligations, training on Official Information Act obligations seems to be rare and usually limited to the immediate OIA officer. The former Chief Ombudsman's 2015 report, *Not a game of hide and seek*, also indicated that if all staff do receive training, it is generally of a very superficial nature during their initial induction as employees. This is despite any request for information to any member of an agency being an Official Information request (whether formal or not).

We see frequent cases of agency officials misleading requesters as to their rights under the law. For example, users are often told - wrongly - that they "must" complete a particular form, visit an office, or contact an agency through a specific channel. We generally attribute this error to a lack of training rather than malice.

In this way, non-professional requesters suffer disproportionately when misled as to their rights.

Eligibility games

The OIA sets criteria for who is eligible to make a request. Thankfully it is rare that agencies attempt to verify this eligibility. When we do see eligibility evidence demanded, it sometimes appears to be intended to delay the request or discourage the requester from proceeding. Sadly this tactic is frequently successful.

In the worst cases we have seen eligibility requirements abused as a low level form of intimidation, exploiting the power imbalance between a private individual and an agency which may hold significant power such as in law enforcement or welfare.

The Ombudsman has made it clear[2] that eligibility must not be used to impose an unnecessary barrier to requests, yet this behaviour continues.

We see no reason for the eligibility requirement to remain. The LGOIMA has no such eligibility requirement and does not suffer for it. Likewise, there are no eligibility criteria for making requests under the freedom of information laws of New Zealand's peers, the USA and UK. Eligibility should not be seen as a tool for workload reduction or hiding unflattering information. In our view, OIA requesters perform a valuable civic service by shining a light on government, and New Zealand gives up significant value by refusing requests from ineligible requesters.

[2] *Requests made online: A guide to requests made through fyi.org.nz and social media*, April 2016 http://www.ombudsman.parliament.nz/resources-and-publications/documents/requests-made-online

Privacy and consultations

It is perhaps unsurprising that certain requests are handled as a public relations "problem" to be solved; this is intrinsic to a law that helps shift the balance of political power towards the public and away from those in power. However the current legislation facilitates this in ways which unfairly impact on the privacy rights of individual requesters.

Responses are often forwarded to the Chief Executive for approval, and this is not a problem. However the "no surprises" policy of recent governments also leads to many responses being forwarded to a Minister's office before release. OIA s 15(5) specifically allows consulting a Minister in order to make a decision. This section is not just being used when a Minister could conceivably hold information relevant to making an OIA decision, but as a matter of course on any potentially embarrassing request. This causes unnecessary delays - often by weeks.

More concerning is that the requester's private information is shared with the Minister along with research on their background, associations, past behaviour, and guesses at what they will do with the information. We can see no justification for this, as the requester's identity should not have any bearing on the OIA decision. It is a breach of privacy rights.

Requesters' details have also been shared with third parties during the "consultation" phase or to subsequent requesters, and this is similarly a breach of privacy. In an egregious case, requesters' identities and contact information was shared with a journalist in the full knowledge that this would be published. It appeared to be a form of retaliation.

The Ombudsman this month released new guidance that sharing private information with third parties (though seemingly not ministers) under the guise of consultation is unacceptable. We believe this should go further, and could be made explicit in the law.

The way forward

This submission has sought to summarise some of the problems encountered particularly by personal users of the Official Information regime. We intentionally

have largely avoided prescribing specific solutions to these problems as we strongly believe in the Open Government Partnership principle of a genuinely open co-creation process.

This should include exploration of ways to improve the freedom of information regime in New Zealand in ways which work best for everyone: professionals and non-professionals, agencies and requesters.

We look forward to taking part in that process.

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