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Ready or not?

A report on the public sector,
the OIA, and the pandemic

Te Kaitiaki Mana Tangata Aotearoa
The Ombudsman New Zealand

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Executive summary

Leadership and strategy

Messaging from senior leaders

I have stated in past official information practice investigations that senior leaders set the tone, culture, and conduct of their agency. To that end, it is my expectation that senior leaders clearly signal their agency's commitment to openness and the principle and purposes of the OIA to their staff and to the public. In addition to regular statements reinforcing their approach and expectations around information disclosure, leaders should model openness through their actions. These actions should include providing staff with systems, support, and training to facilitate the release of information.

I found that there has been an overall improvement in staff's perception of agency CEs' messaging around disclosure of information under the OIA, and openness more generally, since my predecessor's investigation. This is immensely encouraging. Leaders should ensure their words and actions promote openness on a continuing basis, in order to build an organisational culture that is open to the release of information.

Another improvement I noted since the 2015 investigation was the prominence of OIA content on agencies' websites. All agencies I investigated now have dedicated OIA webpages that contain helpful information for those seeking

official information, including links to proactively released information. This is an overt message to the public about agencies' commitment to providing access to official information. Some agencies, however, had limited data about the type of information they produce, and such data would help requesters to formulate targeted requests.

Agencies should:

- continue to build a strong culture around openness through regular messaging from senior leaders to staff, and through leaders modelling transparency; and
- ensure websites contain information that helps requesters formulate their requests and find published information.

OIA reporting to drive performance improvement and inform strategy

Stewardship of an agency's official information system requires that agency leaders have clear oversight of their agency's OIA compliance and practices. This can be achieved through regular OIA performance reporting to senior leaders. Analysis of this information should also be used to inform an agency's strategic framework around OIA compliance and transparency.

I found that many agencies' internal OIA reporting was focused mainly on the timeliness statistics reported to the Public Service Commission | Te Kawa Mataaho (Te Kawa Mataaho). Many agencies are missing the opportunity to collect a wider range of information about their OIA-handling process and outcomes. However, the point is not to simply collect information for its own sake, but to analyse and use it as a tool to drive performance improvement and improve OIA-handling capability.

Te Kawa Mataaho has announced that it will collect and publish an expanded range of OIA data, in addition to the current metrics of OIA timeliness and the number of OIA responses published by each agency. I consider this is a step forward in the transparency and accountability of public sector agencies' OIA performance, and I anticipate the expanded reporting required from Te Kawa Mataaho will help drive improvements in these aspects. These performance measures should also be used in CEs' performance objectives to reflect their ultimate accountability for their agency's OIA performance.

I also suggest agencies include media information requests in the data they report to Te Kawa Mataaho, to reinforce that these requests are subject to the OIA and to present a truer picture of the agency's OIA workload and performance.

Responding to OIA requests and proactively releasing information is part of an agency's core business, and OIA compliance does not happen by accident. Just like any other aspect of performance, agencies must have a strategy to help ensure they achieve their objectives relating to transparency and OIA

compliance. As an accountability measure, an agency's strategy around OIA compliance and the proactive release of information should feature in public-facing corporate documents.

Agencies should:

- collect and analyse a greater range of OIA data to drive performance improvement and inform strategy;
- ensure that their CEs meet stewardship performance objectives, by ensuring they actively seek reporting on wider OIA performance metrics to evaluate and monitor the performance of their agencies; and
- include media information requests in OIA reporting.

Proactive release of information

Staff survey respondents indicated a maturing culture within agencies around the proactive release of information. This is reflected in the improvement in the percentage of OIA responses proactively released by agencies since this measure was first reported by Te Kawa Mataaho in 2016/2017, and in an increase in the number of agencies with proactive release policies since my predecessor's investigation in 2015.

A number of factors may have contributed to this improvement. In addition to improved messaging from agency leaders around openness, strong leadership around proactively releasing information has also been demonstrated at the state sector leadership level by Te Kawa Mataaho. The Government's requirements that agencies publish Cabinet material and information about COVID-19 may also have contributed to agencies' increasing acceptance of proactively releasing information.

Proactively releasing information aligns with one of the purposes of the OIA; to increase progressively the availability of official information. It may also reduce agencies' OIA workload by pre-empting some requests, or helping requesters make more targeted requests. Agencies' proactive release practices should be underpinned by comprehensive policy. This helps to embed and safeguard agencies' practices, ensuring that they continue even in the absence of key staff or when the agencies' resources are challenged.

In contrast to 2015—when none of the 12 agencies had proactive release policies—almost all the agencies in my current investigation had a policy to guide their proactive release practice. Although this is excellent progress, there were notable gaps in some of these policies. Some did not include guidance around the timing of publication or how to ensure information was released in a way that optimised its accessibility. Some policies were very narrow in scope—for example, relating only to the agency's process around the proactive release of Cabinet material or OIA responses.

Agencies should:

- review and update proactive release policies to ensure they are comprehensive and focused on the principles and purposes of the OIA;
- publish their proactive release policies; and
- provide links to proactively released information from their OIA webpages.

Culture, systems and practices

Information management and record-keeping

Good information management (IM) systems and record-keeping practices are fundamental drivers of OIA compliance. The existence of such systems and practices helps to ensure that all information within the scope of an OIA request is identifiable and retrievable by staff tasked with preparing responses to OIA requests.

As stewards of their agencies' IM practices, CEs and senior leaders must promote a culture of robust record-keeping and compliance with the Public Records Act 2005 (PRA).¹¹ This should include ensuring that staff have access to, and attend, ongoing training in these areas. Record-keeping training should convey the importance of the free flow of information for New Zealand's democratic process, as well as highlighting the link between good record-keeping and the agency's ability to fulfil its OIA obligations.

I found evidence of vulnerability within the IM systems and/or record-keeping practices of all 12 agencies. Disappointingly, several agencies appeared to have acted contrary to law in relation to section 17 of the PRA, which requires that agencies create, maintain, and store records accessibly.¹²

Many agencies' staff noted that their IM systems were cumbersome, or that the array of systems made it unclear which should be used for what information. Some staff said that, as a result of these complexities, information would be stored outside the shared systems. I am concerned about the impact this may have on the retrieval of information when it is requested under the OIA. Where IM systems have vulnerabilities, the risk may be mitigated by ensuring staff have sound record-keeping practices and good knowledge of the use of IM systems to store and to retrieve information. It is troubling, then, that insufficient training on IM and record-keeping was another issue identified in most of the agencies investigated, with eight of the 12 agencies given action points relating to record-keeping training.

¹¹ See [Public Records Act 2005](#)

¹² See [Public Records Act 2005, s 17](#)

I noticed a commonality in the record-keeping culture in almost all Media Teams in the agencies I investigated. When I requested sample media files from the agencies, I frequently found that records were either missing or could not be easily retrieved by the agencies. It appears that sound record-keeping is not embedded in their work processes, nor promoted by leaders as a vital activity.

I saw a similar issue in some OIA Teams. Those teams were generally good at keeping records of OIA requests, responses, and internal emails, but most agencies I investigated did not appear to have a strong culture of keeping records of oral discussions, nor of the rationale behind OIA decision-making.

Agencies should:

- actively promote a strong culture around record-keeping, particularly in their Media Teams and in relation to decision-making processes in OIA Teams;
- ensure record-keeping training is available to staff on an ongoing basis. Training should highlight the link between record-keeping practices and compliance with relevant legislation, and the importance of the free flow of information to New Zealand's democratic process;
- identify whether new information-sharing platforms are in use following COVID-19 lockdowns, and ensure record-keeping requirements resulting from these are understood by staff and embedded in their policies and practices; and
- develop systems to ensure all information within the scope of an OIA request is identified, particularly where vulnerabilities in their IM systems have been identified.

OIA handling by Media Teams

Most of the agencies I investigated have a Media Team responsible for handling information requests from the news media. These Media Teams operate separately from centralised OIA Teams, which typically process information requests from the public. While separating requests in this way is not unreasonable in itself, I am concerned that some of the practices associated with this method of request handling has helped to create a false perception that media requests are not OIA requests and, as a result, that agencies do not need to adhere to OIA obligations when handling them.

I was disappointed to see multiple examples of agencies' Media Teams breaching section 19 of the OIA, which states that, when refusing a request, agencies must give to the requester the reason for the refusal and inform them of their right to complain to me.¹³ This exemplifies, and is the inevitable result of, what appears to be a widespread misapprehension that media information requests do not fall under the OIA. This perception is simply incorrect.

13 See [Official Information Act 1982, s 19](#)

I consider that Media Teams require a fundamental cultural change, which should be driven and supported by agency leaders, and may be aided through targeted training for staff in those teams. The requirements under the OIA when refusing a request are not onerous and do not need to impede efficient handling of media information requests. Indeed, I have found that the additional steps agency OIA Teams often go through are entirely self-imposed—created by the agency and not a requirement of the OIA itself. The process for considering and responding to an OIA request is only as difficult or painful as the agency makes it for itself.

Throughout my investigation, I note there appears to be a growing mistrust within the news media of agencies' mechanisms for providing information and, most concerningly, a growing scepticism about the utility of the OIA itself. This has revealed itself in a number of high-profile news articles.

This scepticism appears to have been fuelled by the false dichotomy between 'media requests' and 'OIA requests' drawn by many public sector agencies. If a media information request is straightforward, the Media Team will typically respond within days or even hours. However, when the Media Team considers an information request is complex, voluminous and/or if it considers that withholding grounds may apply, it will generally send the request to the agency's OIA Team, which typically takes closer to the maximum allowable timeframe under the OIA—being 20 days—to provide a response. The longer timeframe may be due in part to the increased complexity of the request, but also to agencies' self-imposed peer-review and sign-out processes, which are not a requirement under the OIA.

From the perspective of the news media, it is easy to see how the difference in OIA request-handling practices can be perceived as agencies 'using the OIA' to delay the provision of information.

In addition to the harmful perception that has developed around the OIA being used as a tool to obfuscate and undermine transparency, I have another concern about the 'two-tier' system of information-request handling. Most agencies do not have a system for responding to requests that are both complex and urgent. My investigation has shown that agency Media Teams can handle straightforward information requests swiftly, but they are not equipped to handle complex information requests. OIA Teams, while having that expertise, are often hampered by lengthy review and sign-out processes. I encourage agencies to develop systems to ensure that all requests can be handled as soon as reasonably practicable, regardless of which business unit handles them. Agencies should consider how OIA Teams and Media Teams can work together more efficiently to leverage their respective capabilities.

Agencies should:

- ensure that media information requests are handled in accordance with the OIA. This should be driven through a cultural shift in Media Teams, led and supported by senior leaders;
- prioritise OIA training for Media Teams; and

- develop systems to ensure agencies comply with the legislative requirement to make and communicate their decisions on official information requests as soon as reasonably practicable.

Interactions with Ministers on OIA requests

When interacting with Ministers' offices on departmental OIA requests (that is, requests made to government departments), agencies must differentiate between situations where the Minister's input is required to allow the agency to make a good decision (consultation) and those which involve informing the Minister of a decision the agency has already made, under the 'no surprises' principle (FYI responses). In either case, agencies' interactions with Ministers must be configured in such a way that the agency is able to meet its timeliness obligations under the OIA.

I found that a number of agencies employed a blanket approach to their treatment of FYI responses, sending them to the Minister's office three to five days before the final date they were due to the requester under the OIA. While there may be occasional exceptions, an OIA response sent to a Minister's office on an FYI basis should be sent at the same time or just before it is sent to the requester. Otherwise, the agency risks breaching its statutory obligation to provide a response to the requester as soon as reasonably practicable. In addition, allowing several days to consider a response may lead to the perception that input from the Minister is being sought by the agency that might alter the decision planned for release.

Agencies' practices around ministerial interactions should be embedded in sound policy. I was encouraged to see that several of the agencies I investigated have developed written agreements with Ministers' offices since my predecessor's investigation in 2015. However, some agencies' policies have gaps in key areas, such as a lack of specificity about the process to follow in the event of a disagreement, and a lack of clarity around the timeframes for providing responses (or summaries, where applicable) to their Minister's office. I encourage all agencies to develop a written policy agreed with their Minister's office, which sets out their mutual understanding and intentions when engaging with each other on OIA requests. This may be based on or guided by the matters covered by the *Model protocol on dealing with OIA requests involving Ministers*, published by my Office.¹⁴ Once settled, I would also encourage agencies to publish this so it is transparent to everyone; enables trust in the process for handling a request; and clarifies the differences between consultation and FYI situations.

Typically, agencies' primary contact in their Minister's office on departmental OIA responses is a Private Secretary seconded from the agency. One of the roles of a Private Secretary is to assist with ministerial interactions, and to use their experience and judgement to identify when, and what aspects of, a response should be drawn to the Minister's attention. It is not their role to provide feedback on responses

14 Office of the Ombudsman | Tari o te Kaitiaki Mana Tangata, *Model protocol on dealing with OIA requests involving Ministers* (1 July 2017). See www.ombudsman.parliament.nz

unless this is requested by the agency in the context of a consultation, nor to act as an additional layer of peer review. Agencies should ensure secondees to Ministers' offices have sufficient training and guidance to undertake their role.

Agencies should:

- develop clear and transparent processes for dealing with ministerial interactions on department OIA responses and ensure these are embedded in a written policy, ideally agreed with the Minister's office, and published;
- cease any blanket approaches to providing departmental OIA responses to Ministers under the 'no surprises' principle three to five days before the 'date due' to the requester. Instead, each response should be treated on its merits and, where an FYI is necessary, should be sent at the same time or just before the response is sent to the requester. Opportunities should also be identified where a summary, or the topic of the response, can be provided to a Minister to fulfil the 'no surprises' obligation; and
- ensure that Private Secretaries receive sufficient training to undertake their role in relation to ministerial interactions on departmental OIA requests.

Official information requests handled by OIA Teams

As stewards of their agencies' official information systems, CEs and senior leaders must ensure appropriate resources, staff capacity and resilience measures to handle their agency's OIA workload. All staff should receive OIA training appropriate to their role in the OIA process, including about the constitutional importance of the OIA, and about the importance of good record-keeping practices to facilitate OIA compliance. Agencies' OIA request-handling processes should not interfere with their timeliness obligations under the OIA. Where agencies' OIA processes include multiple layers of review, decision makers must be available to make decisions, or must have resilience arrangements in place.

The COVID-19 crisis did not diminish my expectations of agencies' OIA practices. I consider that the free flow of information was crucial during the pandemic, when maintaining public trust was key in supporting effective democratic processes.

Overall, it is my view that the agencies under investigation coped well with the very challenging situation presented by the initial 2020 lockdown, in particular. On short notice, public sector staff had to adapt to working differently—away from their office, remote from colleagues, and accessing work information from their homes. Although timeliness is not the only important measure of OIA performance, it nonetheless speaks to the commitment and adaptability of staff that reported OIA timeliness in the 12 agencies I investigated dropped by only 1.2 percentage points on average during the reporting period that included the 2020 lockdown.¹⁵ Agencies and staff are to be applauded for this.

¹⁵ Compared to the same reporting period in the previous year.

Those agencies which experienced a more significant decrease in OIA timeliness were those with insufficient technological resources to equip OIA Teams while working from home, and/or those that diverted personnel resources from the OIA-processing function. Having identified those vulnerabilities, agencies should ensure that, in future, they have sufficient resources to fulfil their OIA obligations in the event of a pandemic or similar event.

In my view, agencies' continued strong performance in the face of the crisis COVID-19 presented also speaks to the adaptability of the OIA itself. As noted above, shortly before the first lockdown, I was asked to provide advice on whether OIA requirements should be amended or suspended due to the pandemic. I gave my view that no amendments were necessary, due to the existing mechanisms within the OIA that allow agencies to deal flexibly with official information requests, including extending the timeframe to make and communicate a decision. In hindsight, I remain convinced that this decision was the right one. In my view, suspending or amending legislative requirements regarding the provision of information would have only weakened public trust and confidence in executive government during a time when trust and the free flow of information were crucial.

Respondents to my post-lockdown staff survey reported the most significant practice change brought on as a result of the lockdown was the transition to electronic peer review and sign-out processes, where previously some agencies had relied on hard copies. In the spirit of good process stewardship, I consider that, where agencies identify a more efficient process, they have an obligation to embed this into their practices and policies. I am pleased that staff also reported this practice change had been maintained in respect of internal review and sign out.

Unfortunately, this has not been the case across all agencies in respect of ministerial interactions—with some agencies' practices reverting, post-lockdown, to inefficient and time-consuming paper-based methods. In addition to the impact on timeliness, there is a potential impact on record-keeping. If feedback is handwritten on a paper version of a document, this can be lost if staff are not assiduous about scanning and saving amended copies into electronic records systems. I encourage agencies to review their processes relating to ministerial interactions to ensure they are maximally efficient and do not risk records being lost (or stored in a manner that does not facilitate retrieval).

Some agencies' staff reported their OIA sign-out processes as cumbersome—requiring review and approval from five or more different officials. To help ensure compliance with the agencies' timeliness obligations under the OIA, agencies must achieve a balance between OIA decision makers being suitably senior and ensuring that the agencies' OIA sign-out procedures are not unduly lengthy. Like the transition to electronic review and sign-out, any efficiencies identified in this aspect of the sign-out process during lockdown should also be incorporated into business-as-usual practice.

I found that many agencies did not keep full records of their decision-making process around responding to OIA requests. In particular, OIA Teams did not often appear to keep records of oral discussions relating to the agency's decision, nor any public interest factors the agency considered in favour of releasing information. It is important for agencies to create and maintain full records of decision-making processes relating to OIA decisions. Not only is this a requirement under section 17 of the PRA,¹⁶ it enables agencies to provide the grounds for their decisions if required by the requester and in the event of a complaint made to me.

Where relevant, agencies should also record the administrative steps taken to respond to requests, such as the search terms used by staff, and the time taken to search for information. As a result of a recommendation made by my predecessor in 2015, Te Kawa Mataaho and Archives New Zealand | Te Rua Mahara o te Kāwanatanga have produced a model search protocol which may assist agencies.¹⁷

I found that OIA training was an area of vulnerability for many agencies, with nine out of the 12 agencies given action points suggesting improvements. For example, many agencies did not deliver targeted training to OIA decision makers, nor to their Media Teams. I encourage agencies to ensure targeted, role-specific OIA training is available for all staff, which should include promoting awareness of sound record-keeping to facilitate OIA compliance. I can advise agencies that my staff are available to assist with developing and/or delivering training, on request.

Given the importance of information access to New Zealand's democratic process, I consider that OIA awareness and compliance should be specifically included in staff's performance objectives.

Agencies should:

- review any changes to OIA practice that occurred as a result of lockdowns and identify where these were more efficient than the previous status quo. Any improvements to process should be embedded in practice and policy;
- review the OIA training needs of staff and ensure sufficient, targeted training is available to staff at all levels;
- ensure sound record-keeping in relation to the OIA decision-making process is embedded into practice and policy; and
- include OIA awareness and compliance in staff's performance objectives, to a level appropriate to their role.

¹⁶ See [Public Records Act 2005, s 17](#)

¹⁷ Archives New Zealand | Te Rua Mahara o te Kāwanatanga, 'How to develop an OIA information search policy' (last updated 23 June 2022) at 5.1. See www.archives.govt.nz

Accessibility

Agencies must ensure that all released or published information is optimised in line with the New Zealand Government Web Standards,¹⁸ to enable it to be accessible for all users, including those with disabilities. This includes providing material in a format that accommodates the use of assistive technology (such as screen readers), as well as ensuring that information is searchable and any visual elements are tagged with alternative text. Agencies can refer to my guide which provides advice on making information accessible.¹⁹

During this investigation I saw that gradual improvement has been made in this area, with some agencies moving away from the practice of watermarking documents, which can inhibit their accessibility. There is still work to be done to ensure that agencies routinely release and publish information in a searchable format and not as 'image only', as well as ensuring visual elements are tagged with alternative text. However, many agencies assured me that they were actively working towards ensuring the accessibility of official information they release or publish.

Agencies should:

- ensure all digital communications and publications are compliant with the New Zealand Government Web Accessibility Standard; and
- ensure the use of redaction software or the application of watermarks to documents released under the OIA, or proactively released, does not inhibit their accessibility.

¹⁸ New Zealand Government | Te Kāwanatanga o Aotearoa, 'NZ Government Web Standards'. See www.digital.govt.nz

¹⁹ Office of the Ombudsman | Tari o te Kaitiaki Mana Tangata, *Proactive release: Good practices for proactive release of official information* (8 June 2020), p. 11. See www.ombudsman.parliament.nz

