

From: [Gareth Derby](#)
To: [Moore-Jones, Anna](#)
Cc: [Yu-Lina George](#); [Connell, Elisha](#); [Tom Nelson](#)
Subject: RE: OIA exceptions in legislation
Date: Tuesday, 21 November 2023 2:17:17 pm
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image003.jpg](#)

Hi Anna

Apologies for not getting in touch sooner, I only got back from holiday last week and had a lot to catch up on.

I'd be very happy to meet with you sometime next week, and have time on most days except Monday. I'd likely be accompanied by Tom Nelson of my team, and have copied him in accordingly. If you can possibly send through a few times/dates and we can check our joint availability, perhaps?

I recall that the Chief Ombudsman expressly considered Commitment 7 and the matter of OIA exemptions in his submission on the draft Fourth National Action Plan, which was published by PSC here <https://ogp.org.nz/assets/New-Zealand-Plan/Fourth-National-Action-Plan/Part-1-Collation-of-public-submissions-received-for-New-Zealands-Fourth-National-Action-Plan-draft-8-March-2023.pdf>. See pages 46 through 47 for the relevant part of the Chief Ombudsman's submission. Hopefully that's a useful starting point for discussion.

Otherwise, very happy to meet with you to work through the various examples, etc.

Kind regards

Gareth Derby

Principal Advisor Strategic Advice

Office of the Ombudsman | Tari o te Kaitiaki Mana Tangata

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From: Moore-Jones, Anna <xxxx.xxxxxxxx@xxxxxxxx.xx>
Sent: Monday, 20 November 2023 3:10 pm
To: Gareth Derby <xxxxxx.xxxxx@xxxxxxxxx.xxxxxxxx.xx>
Cc: Yu-Lina George <xxxxxx.xxxxx@xxxxxxxxx.xxxxxxxx.xx>; Connell, Elisha <xxxxxx.xxxxx@xxxxxxxx.xx>
Subject: RE: OIA exceptions in legislation

Kia ora Gareth,

I hope that you are well. I am just following up on the below in relation to Commitment 7 of the [Fourth Open Government Action Plan](#) which looks at strengthening the scrutiny of legislative clauses that override the disclosure requirements of the OIA.

We would be interested in speaking with you at the end of this week or sometime next week, if possible?

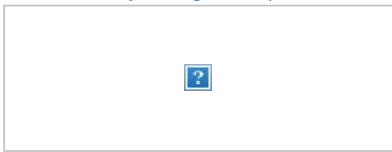
We have recently completed some research on laws that include OIA exemptions, particularly to examine the rationale for exemptions being added and also to test how easy it is to find this information. It would be helpful to get your thoughts on what we've found through this work so far and to learn more about the guidance provided by your office around this topic.

We look forward to hearing from you.

Ngā mihi nui,
Anna

Anna Moore-Jones ([she/her/ia](#))
Policy Advisor – Kaitātari Kaupapa
Electoral and Constitutional Team | Policy Group
DDI s9(2)(a) | **Ext s9(2)(a)**

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Pae tukutuku: justice.govt.nz | electoralreview.govt.nz



From: Moore-Jones, Anna
Sent: Wednesday, 8 November 2023 1:29 pm
To: 'Gareth Derby' <xxxxxx.xxxxxx@xxxxxxxxxxxxxxxx.xx>
Cc: Connell, Elisha <xxxxxx.xxxxxx@xxxxxxxx.xxx.x>
Subject: RE: OIA exceptions in legislation

Kia ora Gareth,

I hope that you are well. I just wanted to follow up on my colleague Elisha's email below.

We would be interested in speaking with you when convenient over the next few weeks. We would find it helpful to get your thoughts on what we've found through our research on OIA exemptions so far and to learn more about the guidance provided by your office around this topic.

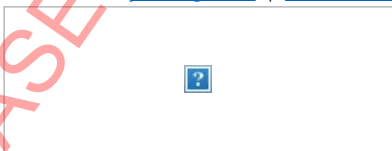
Is there a time/day in the next few weeks that might be most suitable for you?

We look forward to hearing from you

Ngā mihi nui,
Anna

Anna Moore-Jones ([she/her/ia](#))
Policy Advisor – Kaitātari Kaupapa
Electoral and Constitutional Team | Policy Group
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Wahi mahi: Justice Centre – Level 6, 19 Aitken St, Wellington
Īmera: xxx.xxxxxxxxxx@xxxxxx.xxx.xx
Pae tukutuku: justice.govt.nz | electoralreview.govt.nz



From: Connell, Elisha <xxxxxx.xxxxxx@xxxxxxxx.xxx.x>

Sent: Wednesday, 1 November 2023 1:41 pm
To: Gareth Derby <xxxxxx.xxxxx@xxxxxxxxxxxxxxxx.xx>
Cc: Moore-Jones, Anna <xxxx.xxxxxxxxxx@xxxxxxxx.xxxx.xx>
Subject: RE: OIA exceptions in legislation

Kia ora Gareth,

Thanks for meeting with Adam Carter and I back in June to discuss our work on Commitment 7 of the [Fourth Open Government Action Plan](#) which looks at strengthening the scrutiny of legislative clauses that override the disclosure requirements of the OIA.

I wanted to circle back to see if you might have time to meet in the coming few weeks to discuss our progress with this work and potential next steps?

Since we met, Adam Carter has left the Ministry and Anna Moore-Jones has joined our team as an Advisor and will be taking over this work. Anna has recently been on secondment at the Electoral Commission, but will be returning next week and we would both be pleased to meet with you at a convenient time.

We have recently completed some research on laws that include OIA exemptions particularly to examine the rationale for exemptions being added and also to test how easy it is to find this information. It would be helpful to get your thoughts on what we've found through this work so far and to learn more about the guidance provided by your office around this topic.

We look forward to being in touch.

Ngā mihi,
Elisha



Elisha Connell (she/her)
Senior Policy Advisor | Electoral and Constitutional
Civil and Constitutional Unit | Policy Group
Ministry of Justice | Tāhū o te Ture
Ps9(2)(a) | **Ext s9(2)(a)**
xxxxxx.xxxxxx@xxxxxxxx.xxxx.xx | justice.govt.nz

From: Gareth Derby <xxxxxx.xxxxx@xxxxxxxxxxxxxxxx.xx>
Sent: Wednesday, 14 June 2023 10:07 am
To: Carter, Adam <xxxx.xxxxxx@xxxxxxxx.xxxx.xx>
Cc: Connell, Elisha <xxxxxx.xxxxxx@xxxxxxxx.xxxx.xx>; Yu-Lina George <xxxxxx.xxxxxx@xxxxxxxxxxxxxxxx.xx>
Subject: RE: OIA exceptions in legislation

Hi Adam

Thank you for explaining the next steps and the matters in respect of which you anticipate wanting the Ombudsman's views. I'd be very happy to chat next week about the degree of the Ombudsman's involvement.

While I note your wish not to leap into the substance too quickly, it nevertheless might help if I point out two additional resources that seem to sit neatly alongside the publicly available material you've already identified as relevant:

- [Chief Ombudsman's submission to the Ministry on its consultation on whether to conduct an OIA review](#). The Chief Ombudsman made some relevant comments on pages 6-8.
- [Guidance on when to engage the Ombudsman in law reform proposals](#), in particular the section on official information jurisdictions (paragraphs 8-10).

It hopefully adds some context on what kind of matters the Ombudsman considers might trigger the expectation to

consult in line with the LDAC guidelines and Cabinet Manual. Very happy to supplement this in further discussions, of course!

Kind regards

Gareth Derby

Principal Advisor Strategic Advice

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From: Carter, Adam <xxxx.xxxxxx@xxxxxxxx.xxxx.xx>

Sent: Wednesday, 14 June 2023 9:39 am

To: Gareth Derby <xxxxxx.xxxxxx@xxxxxxxxxx.xxxxxxxx.xx>

Cc: Connell, Elisha <xxxxxx.xxxxxx@xxxxxxxx.xxxx.xx>

Subject: RE: OIA exceptions in legislation

Kia ora Gareth,

As mentioned below, we have begun work on commitment 7 of the OGP action plan. Commitment 7 is about strengthening scrutiny of Official Information Act exemptions in legislation.

We have done some initial work to identify current scrutiny mechanisms and guidance. These include:

- the obligation to consult the Ombudsman in the Cabinet manual on proposals impacting access to official information
- the LEG paper template
- LDAC guidelines

We have also reviewed commentary on the use of secrecy clauses such as in Law Commission report from 2012 on the OIA.

However, we are still very much in the planning stages and keen to get a better understanding from the Ombudsman about:

- Any reflections in providing feedback to agencies on proposals which limit disclosure in legislation outside the OIA.
- Reflections on the effectiveness of the current prompts (such as the LEG paper template reminding agencies to contact the ombuds where a proposal impacts the OIA)
- Any other resources such as guidance that the Ombudsman provides to agencies.
- Some technical questions such as what kinds of provisions meet the s 18(c)(i) and 52(3) tests.

Perhaps before we get into these questions you would be available for an initial discussion next week about how the Ombudsman would like to be involved in this project?

Ngā mihi

Adam



Adam Carter

Policy Advisor | Electoral and Constitutional Policy
Civil and Constitutional | Policy Group
Ministry of Justice | Tāhū o te Ture
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National Office | Justice Centre | 19 Aitken Street
DX Box SX10088 | Wellington
adam.carter@justice.govt.nz | justice.govt.nz

From: Yu-Lina George <Yu-Lina.George@ombudsman.parliament.nz>
Sent: Tuesday, 13 June 2023 8:48 am
To: Carter, Adam <Adam.Carter@justice.govt.nz>
Cc: Connell, Elisha <Elisha.Connell@justice.govt.nz>; Gareth Derby <Gareth.Derby@ombudsman.parliament.nz>;
Tom Nelson <Tom.Nelson@ombudsman.parliament.nz>
Subject: FW: OIA exceptions in legislation

Kia ora Adam

Thank you for your email. Gareth Derby, Principal Advisor, Strategic Advice Team, will be happy to assist in this regard.

Ngā mihi

Yu-Lina George
Acting Manager, Strategic Advice Team
Office of the Ombudsman | Tari o te Kaitiaki Mana Tangata

Phone **s9(2)(a)** | DDI **s9(2)(a)** | Cell **s9(2)(a)**
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From: Carter, Adam <Adam.Carter@justice.govt.nz>
Sent: Friday, 9 June 2023 9:24 am
To: Info <info@ombudsman.parliament.nz>
Cc: Connell, Elisha <Elisha.Connell@justice.govt.nz>
Subject: OIA exceptions in legislation

Kia ora,

I'm looking for someone in the Ombudsman's office to engage with on the Ministry of Justice's commitment in the

[Open Government Partnership Fourth National Action Plan](#). Commitment number 7 is about strengthening scrutiny of Official Information Act exemptions in Legislation.

At this stage we were hoping just to have a chat about how the Ombudsman would like to be involved in this project.

Would be great if you could direct me to the relevant team/person.

Ngā mihi



Adam Carter

Policy Advisor | Electoral and Constitutional Policy
Civil and Constitutional | Policy Group

Ministry of Justice | Tāhū o te Ture

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RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

From: [Moore-Jones, Anna](#)
To: [s9\(2\)\(a\) @Parliament.govt.nz](#); [s9\(2\)\(a\) @parliament.govt.nz](#)
Cc: [Connell, Elisha](#); [Kerkin, Sarah](#)
Subject: RE: A query - research around exemptions to the OIA
Date: Tuesday, 30 January 2024 11:54:00 am
Attachments: [image001.jpg](#)

Kia ora [s9\(2\)\(a\)](#) and [s9\(2\)\(a\)](#)

It was lovely to speak with you today – thank you for coming across.

As discussed, we will make sure to check past you any reporting on the NAP4 which mentions the Office of the Clerk.

We hope that we will eventually be able to add further layers of ‘fishhooks’ to improve scrutiny of OIA exemptions.

For next steps, we will now discuss this project with LDAC and be back in touch when relevant.

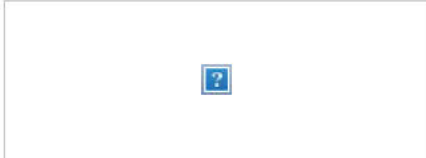
Ngā mihi nui,
 Anna

Anna Moore-Jones ([she/her/ia](#))
 Policy Advisor – Kaitātari Kaupapa
 Electoral and Constitutional Team | Policy Group

Wahi mahi: Justice Centre – Level 6, 19 Aitken St, Wellington

Īmera: anna.moore-jones@justice.govt.nz

Pae tukutuku: justice.govt.nz | electoralreview.govt.nz



From: [s9\(2\)\(a\) @Parliament.govt.nz](#)>
Sent: Wednesday, 24 January 2024 5:39 pm
To: Moore-Jones, Anna <Anna.Moore-Jones@justice.govt.nz>; [s9\(2\)\(a\) @parliament.govt.nz](#)>
Cc: Connell, Elisha <Elisha.Connell@justice.govt.nz>; Marques, Erika <Erika.Marques@justice.govt.nz>; Kerkin, Sarah <Sarah.Kerkin@justice.govt.nz>
Subject: RE: A query - research around exemptions to the OIA

Mōrena koutou

Thanks for your message. This is an interesting topic, re the need to be alert to exemptions eroding the OIA’s effectiveness.

Would 12.45 pm on Thursday work for you? Apologies for the late notice. Alternatively, a time on Friday might work.

Cheers

[s9\(2\)\(a\)](#)

From: Moore-Jones, Anna <Anna.Moore-Jones@justice.govt.nz>

Sent: Tuesday, January 23, 2024 5:27 PM

To: s9(2)(a) <[@parliament.govt.nz](mailto:parliament.govt.nz)>; s9(2)(a) s9(2)(a) <[@Parliament.govt.nz](mailto:Parliament.govt.nz)>

Cc: Connell, Elisha <xxxxx.xxxxxx@xxxxxx.xxxx.x>; Marques, Erika <xxxxx.xxxxxx@xxxxxx.xxxx.xx>; Kerkin, Sarah <xxxxx.xxxxxx@xxxxxx.xxxx.xx>

Subject: RE: A query - research around exemptions to the OIA

Kia ora koutou,

I hope that everyone has had a lovely start to the year.

As Sarah explained below, we have been doing some research on exemptions to the Official Information Act 1982. This is for a commitment that the Ministry is leading within the [Fourth National Action Plan](#) under the Open Government Partnership.

I **attach** a *draft* paper summarising this project and the research we have carried out. We have also been talking to several different agencies to consider how different mechanisms could be improved to assist with public transparency of the rationale for OIA exemptions in legislation.

The start of the year has passed quickly, and busily, so I understand we have little time now before s9(2)(a) leaves. Would you both have time to meet with us sometime over the next week or so? For example, maybe a time Thursday afternoon or Friday this week. We can try to be flexible to when would be most suitable for you to chat briefly.

I look forward to hearing from you.

Ngā mihi nui,
Anna

Anna Moore-Jones ([she/her/ia](#))
Policy Advisor – Kaitātari Kaupapa
Electoral and Constitutional Team | Policy Group

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Pae tukutuku: justice.govt.nz | electoralreview.govt.nz



From: Kerkin, Sarah <xxxxx.xxxxxx@xxxxxx.xxxx.xx>

Sent: Tuesday, 12 December 2023 10:13 am

To: s9(2)(a) <[@Parliament.govt.nz](mailto:Parliament.govt.nz)>; s9(2)(a) s9(2)(a) <[@parliament.govt.nz](mailto:parliament.govt.nz)>

Cc: Moore-Jones, Anna <xxxx.xxxxxx@xxxxxx.xxxx.xx>; Connell, Elisha <xxxxx.xxxxxx@xxxxxx.xxxx.x>

Subject: RE: A query

Thank you both. Mid to late January would work well for me. I'm taking off at the end of the week, and am away for a month (hurrah!)

The issue the team has been working on is clauses excluding the application of part or all of the Official

Information Act. They've pulled together some useful research and just need to tidy it up a bit before it's fit for external consumption. We'll send it across to you once its complete so you can see the issue for yourselves. It would be great if we can meet before s9(2)(a) goes away, if we can wrangle calendars...

I've copied in the team – Anna and Elisha have been doing all the hard yards on this. I'm just swanning in and making some introductions

In the meantime, I hope you both have the opportunity for some downtime. Election years bring their unique challenges and it looks like we're all hitting the ground running next year.

Sarah



Sarah Kerkin (Dr/she/her)
Kaitohutohu Matua | Chief Advisor
Office of the Deputy Secretary Policy
Te Rōpū Kaupapa Here | Policy Group
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Please note I don't work Wednesdays

From: s9(2)(a) <[s9\(2\)\(a\)@Parliament.govt.nz](mailto:s9(2)(a)@Parliament.govt.nz)>
Sent: Monday, 11 December 2023 1:16 pm
To: s9(2)(a) <[s9\(2\)\(a\)@parliament.govt.nz](mailto:s9(2)(a)@parliament.govt.nz)>; Kerkin, Sarah <Sarah.Kerkin@justice.govt.nz>
Subject: RE: A query

Kia ora Sarah
Yes, definitely keen to catch up about this. I'll be around in Jan (off on leave in early/mid Feb).
I remember meeting you when I briefly looked after Justice Ctte before s9(2)(a) picked it up in 2018.
Hope you're well; talk soon.
Cheers
s9(2)(a)

From: s9(2)(a) <[s9\(2\)\(a\)@parliament.govt.nz](mailto:s9(2)(a)@parliament.govt.nz)>
Sent: Monday, 11 December 2023 1:08 PM
To: Kerkin, Sarah <Sarah.Kerkin@justice.govt.nz>
Cc: s9(2)(a) <[s9\(2\)\(a\)@Parliament.govt.nz](mailto:s9(2)(a)@Parliament.govt.nz)>
Subject: RE: A query

Kia ora Sarah

Nice to hear from you. Great to hear that MOJ has been doing some work on this. In the first instance, send anything you have to me and s9(2)(a) (copied above). s9(2)(a) who I recall you know, is the Principal Clerk (Procedure) in the Parliamentary Law and Practice team, which is involved in work like this, and I can take care of things on the select committee side.

It would be good to organise a time for a quick catch up about this work, and we can fill you in on a few developments on our end too. It'll be tricky to find a time before the end of the year though – would mid/late Jan work for you?

s9(2)(a)

From: Kerkin, Sarah <xxxxx.xxxxxx@xxxxxxx.xxx.xx>
Sent: Monday, 11 December 2023 12:10 PM
To: s9(2)(a) <[s9\(2\)\(a\)@parliament.govt.nz](mailto:s9(2)(a)@parliament.govt.nz)>
Subject: A query

Kia ora s9(2)(a)

Long time no hear – hope life in the standing orders committee is treating you well.

Some colleagues here at Justice have been doing some work that may align quite neatly with the advice on bills that select committee clerks put together for the committees when a bill is first referred to them. I thought it might be helpful if we brought this to someone's attention and was hoping you could point me in the right direction.

Ngā mihi

Sarah



Sarah Kerkin (Dr/she/her)
Kaitohutohu Matua | Chief Advisor
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Please note I don't work Wednesdays

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Meeting with Ombudsman 13/12/2023

1pm-1.40pm

Attendees: Gareth Derby (Principal Advisor, Ombudsman), Anna Moore-Jones (Advisor, E+C), Elisha Connell (Senior Adviser, E+C)

Meeting purpose – for MOJ to report back on work so far and to better understand the guidance Ombudsman provide and to explore further how they could support this work.

Initial outline of issue

Gareth was interested in our terms of reference for this work.

Anna shared details about the scope of the commitment and work so far and provided an update on the research that has been completed to date for the OGP commitment. Also noted details about the disclosure statement template and guidance and how this doesn't appear to be a viable way to strengthen guidance.

Advised that we'll be putting together an options paper and talking with civil society in the New Year.

Select Committee

Gareth also enquired if there would also be potential for us to consult with select committees. He noted that sometimes things had arisen during the select committee stage around OIA exemptions. Gareth noted that Select Committee stage is also a typical place for OIA exemptions to arise and there is little scrutiny of it from that stage. Pondered what potential there is to provide better guidance/scrutiny here. Anna advised this hadn't been part of our next steps

Gareth also discussed that in some cases OIA exemptions are created accidentally and are not considered at all by the agencies. Also sometimes it is simply that old legislation is modernised without change or by adopting a similar legacy Act so problem of OIA exemption remains. Sometimes agencies may accidentally carve out the OIA.

Agencies that are looking to update legislation sometimes just wholesale adopt previous regimes that had OIA carve outs. E.g. civil aviation bill s9(2)(g)(i). Gareth to look for further examples and share.

Ombudsman

Gareth noted that many times the Ombudsman is only notified at a late stage in the process.

Guidance – Gareth to look at guidance offered by Ombudsman and will share.

Guidance around OIA is front and centre for Ombudsman. They see the issue of OIA carve outs/exemptions as an important issue. Ombudsman see that curtailing OIA wouldn't be justified without good reason.

Gareth also noted that the Chief Ombudsman (and the Solicitor-General) have made strong comments on the inappropriateness of curtailing the OIA especially during a national emergency as was proposed during peak COVID era. Ombudsman has a continued interest in the issue of OIA exemptions (especially as improving this issue may reduce workload for Ombudsman and prevent/mitigate issues from arising). They are keen to be kept informed. They would like to know

about the research and see if they were consulted on the legislation. May also be helpful for us to document whether the ombudsman was consulted on these Acts.

OIA exemption should only be for a clear demonstrable need. Discussed links to BORA and constitution.

Discussed the difference between OPC as an independent crown entity with strong consultation requirements vs the Ombudsman as an Officer of Parliament with no legislative requirement to consult. This was seen as one reason that OPC has clear provision to indicate where issues are not appropriate and provide advice where the Ombudsman may not necessarily have the same pathway as must maintain independence as a different arm of government.

Vetting things with the Privacy Commissioner is an established process, why doesn't this same process exist for the OIA re. the Ombudsman? What is the justification for the Privacy Commissioner being consulted – because there's a statutory requirement. The Ombudsman role has become a bit blurry. Suggested there could be potential for gov agencies to consult Ombudsman more regularly/systematically.

Next steps:

- Gareth to share details about examples of legislation where agencies have adopted previous legislative regimes with OIA carve outs and Ombudsman has provided advice.
- Gareth to share guidance offered by Ombudsman on OIA/OIA exemptions.
- MOJ to provide research so can compare and add additional knowledge as to whether Ombudsman was consulted on the exemption and the context to that conversation and eventual decision on the exemption
- Ombudsman keen to remain informed of this work and provide assistance/support where useful.

From: [Moore-Jones, Anna](#)
To: "[Jenny Vickers \[DPMC\]](#)"
Cc: [Connell, Elisha](#)
Subject: RE: Assistance with CabGuide connection - Open Government Partnership NAP4
Date: Friday, 26 January 2024 3:39:00 pm
Attachments: [image001.jpg](#)

Kia ora Jenny,

Thank you for meeting with us last week.

We appreciated your offer to make a quick addition to the CabGuide website to include more reference to the OIA within the Writing a Paper section. I think this would be useful so that policy makers might consider the OIA (including any proposed exemptions) a bit better at that stage. (I have forgotten where you suggested you would include this reference/link but I look forward to seeing it!)

We will work through any additional updates and get back to you over the coming weeks with suggested edits, where relevant.

Ngā mihi nui,
Anna

Anna Moore-Jones ([she/her/ia](#))
Policy Advisor – Kaitātari Kaupapa
Electoral and Constitutional Team | Policy Group

Wahi mahi: Justice Centre – Level 6, 19 Aitken St, Wellington
Īmera: anna.moore-jones@justice.govt.nz
Pae tukutuku: justice.govt.nz | electoralreview.govt.nz



From: Jenny Vickers [DPMC] <Jenny.Vickers@dpmc.govt.nz>
Sent: Wednesday, 10 January 2024 10:15 am
To: Moore-Jones, Anna <Anna.Moore-Jones@justice.govt.nz>
Cc: Connell, Elisha <Elisha.CConnell@justice.govt.nz>
Subject: RE: Assistance with CabGuide connection - Open Government Partnership NAP4

You don't often get email from jenny.vickers@dpmc.govt.nz. [Learn why this is important](#)

No problems Anna. Wednesday would suit me better. Thanks!

Jenny

From: Moore-Jones, Anna <Anna.Moore-Jones@justice.govt.nz>
Sent: Wednesday, 10 January 2024 10:13 am

To: Jenny Vickers [DPMC] <xxxxx.xxxxxxx@xxxx.xxxx.xx>
Cc: Connell, Elisha <xxxxxx.xxxxxxx@xxxxxx.xxxx.xx>; Diana Hawker [DPMC] <xxxxx.xxxxxxx@xxxx.xxxx.xx>
Subject: RE: Assistance with CabGuide connection - Open Government Partnership NAP4

Kia ora koutou,

Thank you - I appreciate you getting back to me.

Yes, we would be interested in speaking with you, Jenny, sometime over the coming few weeks, as suits you, to consider a potential update to the CabGuide.

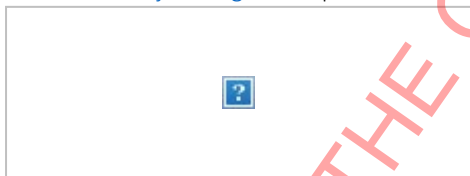
We are working through various mechanisms to try to improve the references that are made to the Official Information Act 1982. We have spoken with Treasury about disclosure statements and will also soon be talking to LDAC.

Would you be available to chat on the morning of either Wednesday or Thursday next week? We have flexibility, however, so please let me know if another day/time suits better.

Ngā mihi nui,
Anna

Anna Moore-Jones ([she/her/ia](#))
Policy Advisor – Kaitātari Kaupapa
Electoral and Constitutional Team | Policy Group
DDI s9(2)(a) | **Ext s9(2)(a)**

Wahi mahi: Justice Centre – Level 6, 19 Aitken St, Wellington
Īmera: xxxx.xxxxxxx@xxxxxx.xxxx.xx
Pae tukutuku: justice.govt.nz | electoralreview.govt.nz



From: Jenny Vickers [DPMC] <xxxxx.xxxxxxx@xxxx.xxxx.xx>
Sent: Wednesday, 10 January 2024 9:08 am
To: Moore-Jones, Anna <xxxx.xxxxxxx@xxxxxx.xxxx.xx>
Cc: Connell, Elisha <xxxxxx.xxxxxxx@xxxxxx.xxxx.xx>; Diana Hawker [DPMC] <xxxxx.xxxxxxx@xxxx.xxxx.xx>
Subject: RE: Assistance with CabGuide connection - Open Government Partnership NAP4

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Kia Ora Anna

The CabGuide is a living resource that gets updated as needed, so if you consider that there are updates that could be made to make it a more useful tool for agencies, then I'm very happy to chat about them. It is essentially a practical guide to Cabinet processes, which supplements the Cabinet Manual, circulars, and other such information, and is primarily intended as a 'how to'

guide for public servants. We try not to use it as a source of repetition, but as a compliment and/or signpost for other info out there.

Kind regards
Jenny

From: Diana Hawker [DPMC] <xxxxx.xxxxxx@xxxx.xxxx.xx>
Sent: Tuesday, 9 January 2024 1:13 pm
To: Moore-Jones, Anna <xxxx.xxxxxxxxxxxxx@xxxxxxxx.xxxx.xx>
Cc: Connell, Elisha <xxxxxx.xxxxxxx@xxxxxxxx.xxxx.x>; Jenny Vickers [DPMC] <xxxxx.xxxxxx@xxxx.xxxx.xx>
Subject: RE: Assistance with CabGuide connection - Open Government Partnership NAP4

[UNCLASSIFIED]

Hi Anna,

Jenny Vickers is your best contact for the CabGuide – I've copied her into this email and she will be back in the office from tomorrow.

Regards
Diana

From: Moore-Jones, Anna <xxxx.xxxxxxxxxxxxx@xxxxxxxx.xxxx.xx>
Sent: Wednesday, 20 December 2023 11:11 am
To: Diana Hawker [DPMC] <xxxxx.xxxxxx@xxxx.xxxx.xx>
Cc: Connell, Elisha <xxxxxx.xxxxxxx@xxxxxxxx.xxxx.x>
Subject: Assistance with CabGuide connection - Open Government Partnership NAP4

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Kia ora Diana,

I am in the Electoral + Constitutional policy team at Justice and am working on the [Open Government Partnership Fourth National Action Plan](#). The Ministry leads a commitment within this action plan to improve scrutiny of exemptions to the Official Information Act 1982 (OIA).

I hoped that someone in your team would be able to direct us to an appropriate person responsible for the CabGuide? We are interested in understanding more about the role of the CabGuide and how it is maintained and updated.

We have carried out research on several pieces of legislation with exemptions and assessed current guidelines for policy agencies regarding the OIA. Our research has illustrated that there is a variance between agencies in the public rationale that is provided for any exemptions, and there are some potential areas where guidance could be strengthened.

As part of this work, we are also speaking to different agencies about how current guidance could be improved to assist agencies to give proper consideration to the OIA in new legislation.

We have spoken with Treasury and the Ombudsman, and would also be interested in speaking with someone about the CabGuide early in the new year.

We appreciate your assistance and hope that you have a lovely holiday break.

Ngā mihi nui,
Anna

Anna Moore-Jones ([she/her/ia](#))
Policy Advisor – Kaitātari Kaupapa
Electoral and Constitutional Team | Policy Group
DDI s9(2)(a) | **Ext s9(2)(a)**

Wahi mahi: Justice Centre – Level 6, 19 Aitken St, Wellington
Īmera: xxxx.xxxxxxxxxx@xxxxxxxx.xxxx.xx
Pae tukutuku: justice.govt.nz | electoralreview.govt.nz



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Meeting with Jenny Vickers, DPMC to discuss Cabinet Guide, 17 January 2024

Meeting purpose: To discuss feasibility of updating CabGuide

Attendees: Anna Moore-Jones, Elisha Connell and Jenny Vickers (DPMC)

CabGuide is aimed at public servants and for people in ministers' offices.

Can be updated fairly easily.

Jenny recently worked with MoJ to update the guide around human rights.

CabGuide is not a primary resource – practical how to guide, much softer in its language, more practical than Cab Manual. E.g. human rights info includes a little bit of repetition, but isn't the primary source.

Cab paper template can be trickier to make changes. They can make little tweaks, but more substantive changes require at least PM approval. They try to keep the cab paper template shorter than 10 pages. If there is something that will come up on a case by case basis it may not be suitable to include in the template.

Jenny suggested that just doing an update to the guide may be a place to start.

Jenny suggested pasting the content from the CabGuide into a word doc and playing with wording. Look at OIA page itself. Under proactive release there is a page with details about OIA. Could also add a link under the section 'when you're writing a paper.'

Next steps:

Review sections Jenny suggested and consider potential updates.

Consider if a link could be added, e.g. that links to ombuds guidance or MoJ webpage (noted that MoJ website didn't have particularly comprehensive info so an update to this may also be warranted). A link could also be added to the LDAC supplementary material if this is developed.

There may also be opportunity to discuss ombuds thoughts on guidance – perhaps there are key points they may recommend adding/adjusting?

Update Sarah Kerkin with details we've gained from speaking with Jenny.

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Tuesday 30 January 2024 (10.30-11am)

Attendees: Sarah Kerkin, s9(2)(a) s9(2)(a) , Elisha Connell, Anna Moore-Jones

Notes

The Office of the Clerk's advice to Select Committee is about raising potential issues and questions for the committee to ask. It is largely based on the LDAC guidelines. It was noted that LDAC guidelines include little about the OIA and scrutiny of exemptions.

Office of the Clerk agreed that this topic would be a good inclusion to their Legislative Scrutiny work and that they can take it back to their leadership for discussion. However, there are a lot of resource pressures on the Office at the moment and the practical side of implementing any change to the guidance or legislative scrutiny work that they do might not be possible at this time.

A lot of the time the individuals that are carrying out legislative scrutiny within the Office are not legally trained so need guidance and authority from other sources to assist them to be well equipped in completing the scrutiny and advising the committee. Currently they each complete an 8hr training through Victoria University.

Office of the Clerk noted that the best vehicle would be a reference within Disclosure Statements and RIS as that would also then assist them with their legislative scrutiny. MOJ discussed the slower timeframe of changing disclosure statements that was indicated in their conversation with TSY.

But discussed that maybe MOJ could do a bit more at RIS stage to flag issues and comment on other people's Cabinet papers etc so as to set an example for good process on this topic.

Then discussed the role of Cab Guide, Ombudsman, and Parliament within this work.

Also referenced a statutory requirement that was passed some years ago but does not appear to have been implemented by PCO {*unclear what mechanism exactly? Part 4 or 5 PCO guidance on disclosure statements.....parliamentary approval of contents by resolution?*}.

Office of the Clerk illustrated that between 2015-2020 any legislative scrutiny they did was ad-hoc and not done on all pieces of legislation. Their authority to complete legislative scrutiny was given to them in 2020 by the Standing Orders committee.

The Office is carrying out a huge work programme to operationalise the 2023 Review of Standing Orders which is probably the biggest change to Select Committee since 1985. Therefore, it might not be possible to also consider and include this issue within a new work programme given current resource pressures.

However, in future, they can add the issue to the categories to be considered within their Legislative Scrutiny guidance but would need to do a training session on it and it can be hard to find time in peoples diaries for such a training.

MOJ outlined timeline and reporting requirements of NAP4 and OGP. Agreed that would show Office of the Clerk any reporting that referenced them given the importance of maintaining constitutional independence.

Any guidance should cover what principles are for the OIA and any exemptions as well as what OIA exemptions might look like (as they are not necessarily obvious).

Next Steps

- MOJ to talk to LDAC about potential inclusion of issue within guidance
- MOJ to keep in touch with the Office of the Clerk and update them on progress
- Office of the Clerk to take issue to managers to consider updating processes/guidance for legislative scrutiny

Meeting with s9(2)(a) and s9(2)(a), Office of the Clerk, 30 January 2024

Attendees: s9(2)(a) (Principal Clerk of Committee), s9(2)(a) (Principal Clerk (Procedure)), Sarah Kerkin (Chief Advisor, ODS), Anna Moore-Jones (Advisor, E+C), Elisha Connell (Senior Adviser, E+C)

Purpose - to discuss potential involvement of Office of the Clerk in supporting Commitment 7.

Sarah provided an introduction to Commitment 7. In considering this work, she noted she had immediately thought of the scrutiny work that the Clerk of the House had started. It struck her that this is an area that committees could start to look at.

s9(2)(a) noted that what stood out to him in the research paper was the range of different ways that the OIA can be affected.

Sarah advised that she would be discussing the paper/issue with LDAC and noted that she felt there was a gap in the guidelines and that these could be reviewed and supplementary guidance developed.

Sarah noted her support for the 'disinfectant power of sunlight.' The Office of the Clerk doesn't need to have the answers, but can shine light on the issue and encourage policy makers to consider things further.

s9(2)(a) thought the issue looks like a good candidate for legislative scrutiny and is happy to take it back to leadership to propose that it's included in their programme. However, noted that it may not be suitable to do so at this time given the following:

- Resourcing for staff training around this issue/legislative scrutiny
- Potential reduction to their budget (which could result in the scrutiny initiative being stopped)
- Significant recent changes to select committees (staff have been very focused on these changes and unsuitable to bring in further changes at present)
- A lack of LDAC guidance on this issue (this is needed if training is to be given to staff and for staff to refer to on an ongoing basis)

It was noted that it can be more challenging for the Office of the Clerk to identify things that aren't there as such (ie an exemption).

s9(2)(a) noted that the disclosure statement would be a good trigger. Also noted the RIS as another place that the issue could be flagged. s9(2)(a) noted that they do rely on RIS as can't always be across large bills. Anna explained advice we had received from Treasury and DPMC around editing templates.

Sarah noted that the Office of the Clerk is not the 'final fence at the top of the cliff,' there are other safety nets/mechanisms, however essentially each one does not catch everything, e.g. LDAC doesn't review every bill. If there is something that the Office of the Clerk could pick up and add to the work that they're doing it will help to layer the 'safety nets.'

Sarah noted that exemptions can be valid, but need to be done in a careful considered way.

s9(2)(a) noted the Office of the Clerk emphasises their independence, and if work is conducted, or Office of the Clerk is noted in reporting, they would wish to see this to ensure they're comfortable with content.

s9(2)(a) also discussed that there is a parliamentary interest in this issue. There is an open question as to whether OIA exemptions hinder parliament's access to this information. He noted that this angle could support interest in this issue.

Next steps

Sarah summarised the discussion and advised that next steps would be to discuss the issue with LDAC, but wouldn't pursue further with Office of the Clerk at this stage, though would report back after discussion with LDAC. She noted that she could share an update on LDAC's timeframes in due course.

s9(2)(a) noted that he would share an update about the meeting with their management/leadership team. He also requested that we email him so he has written confirmation that we will check wording with them if Office of the Clerk is noted in our reporting/work (confirmation email sent 30 January 2024).

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Open Government Partnership Fourth National Action Plan: Commitment 7 – OIA exemptions research summary

Drafted by the Electoral and Constitutional policy team at the Ministry of Justice

Note: this is not government policy nor agency advice.

Purpose of paper

1. This paper is intended to outline research carried out by the Ministry of Justice as part of its work leading Commitment 7 on scrutiny of exemptions to the Official Information Act 1982 (OIA) within the Fourth National Action Plan of the Open Government Partnership.

Background

2. The Open Government Partnership (OGP) is an international agreement by governments to create greater transparency, increase civic participation and use new technologies to make their governments more open, effective, and accountable.
3. National Action Plans (NAP)¹ are created out of ideas put forward by the public and civil society. These ideas are then developed into potential “commitments” by civil society, members of the public and government agencies. The NAP works to a two-year cycle and is regularly assessed on progress with commitments.
4. New Zealand’s Fourth National Action Plan (NAP4) was published in December 2022 after several weeks of consultation on a draft plan.
5. The Public Service Commission are responsible for the Open Government Partnership programme.

Commitment 7

6. Commitment 7 of NAP4 arose from an idea of the NZ Council for Civil Liberties. The Ministry of Justice is the lead agency on Commitment 7.
7. Commitment 7 is replicated below:

¹ [Fourth National Action Plan | Open Government Partnership \(ogp.org.nz\)](https://ogp.org.nz)

Commitment 7 – Strengthen scrutiny of Official Information Act exemptions in Legislation

Objective: To strengthen the scrutiny of legislative clauses that propose to override the disclosure requirements of the Official Information Act 1982.

Ambition: To strengthen the guidance and procedures agencies must follow in relation to the scrutiny of new legislative clauses that propose to override the disclosure requirements of the Official Information Act 1982 in relation to certain information.

Status quo: Civil society representatives are concerned that current legislative processes regarding proposed clauses to exempt certain information from the release provisions of the Official Information Act 1982 are not adequate. This may result in OIA exemption clauses being introduced when they are not needed.

There are now more than 85 clauses in legislation that override the presumption of availability of official information found in section 5 of the Official Information Act 1982. More than 20 have been added as a result of legislation introduced since 2019.

Civil society representatives consider such confidentiality provisions may be applied too broadly or only permit disclosure in limited circumstances. This can result in OIA requests being refused under the OIA as being 'contrary to the provisions of a specified enactment'.

There are current safeguards in place, which include the legislative process, guidelines and the Legislative Design and Advisory Committee. It is also the Ministry of Justice's (MoJ) role, for example, to provide advice on Bills that interface with the OIA. This commitment will propose recommendations to strengthen guidance and controls around this process. This may include consultation with the Office of the Ombudsman.

8. When considering the objective outlined within Commitment 7, after publication of the NAP, the Ministry of Justice identified three additional or sub-objectives, which are:
 - **Supporting policy analysis.** Ensuring agencies are giving due consideration to maintaining the integrity and purpose of the OIA, before they propose alternative disclosure regimes. Understanding how the OIA works with other legislation can also prevent legal ambiguities and other issues later down the track.
 - **Increasing transparency.** Ensuring that where an OIA exception provision is included in a Bill, that the justification is explicit and can easily be assessed during the Parliamentary process.
 - **Supporting good regulatory stewardship.** If guidance is created, then it could set the foundation for future work. Guidance could support agencies to review any existing OIA exceptions in their current legislation in light of changing circumstances and operational experience, as part of their ongoing regulatory stewardship programmes. E.g., reassessing need for exceptions if copying provisions from older legislation.

9. The Ministry notes that during the formation of Commitment 7 it was agreed that the following matters were **out of scope**:
- whether the OIA should override confidentiality provisions in other legislation
 - taking a position on whether [existing] exception clauses have been used in excess
 - taking a position on whether exception clauses should be used less often or more narrowly in the future
 - whether agencies are correctly applying the OIA when an exception clause is engaged.

What are OIA exemption clauses?

10. OIA exemptions are legislative clauses that propose to override the disclosure requirements of the OIA. OIA exemptions take a number of forms which range from legislation explicitly modifying the effect of the OIA to full confidentiality clauses in legislation.
11. Section 18 (c) (i) of the OIA provides that an OIA may be refused on the grounds that making certain information available would “be contrary to the provisions of a specified enactment”. Section 52(3)(a) of the OIA states that nothing within the Act derogates from “any provision which is contained in any other enactment and which authorises or requires official information to be made available”.
12. Through our research, the Ministry of Justice has identified the following categories of exemptions (although the list is not exhaustive):
- legislation explicitly modifying the effect of the OIA
 - legislation creating an alternative regime to the OIA
 - confidentiality clauses creating an exemption to the OIA
 - confidentiality provisions making s18(c)(i) exception available
 - legislation amending the OIA
 - amending the definition of ‘official information’ in other legislation.

Purpose of research

13. The OIA has a number of withholding grounds. The Ministry wanted to know why lawmakers have considered additional protections are needed to limit when official information can be disclosed.
14. The Ministry also wanted to know how publicly available information is on the rationale for any such exemptions.

Research methodology

15. Eleven pieces of legislation were selected from a list provided by the NZ Council for Civil Liberties in submission during development of the NAP. It was decided that more recent pieces of legislation would be most useful as, after a certain date, less electronic

information is available and easily finding publicly available information was a key purpose of the research.

16. Research was carried out by scanning through various documents including Cabinet papers, disclosure statements, briefings, departmental reports, select committee reports and so on.

17. A summary of findings from this research is explained below.

Overall themes of research

- ❖ Acts with more fulsome disclosure statements generally had more publicly available information about the rationale for the OIA exemption (i.e. information about the exemption was more publicly accessible).
- ❖ Consultation with MoJ, the Ombudsmen and OPC specifically on the Acts' exemption provisions (rather than on the legislation as a whole) meant that the purpose for the OIA exemption was much clearer by the time the Act was passed.
 - Therefore, consultation with these agencies, and other similar actions, could be built more concretely into the legislative process and, for example, LDAC guidelines.
- ❖ As it stands, some of the Acts looked at in this scan appeared to repeat and clarify OIA withholding grounds.

Detail of themes and findings

18. Legislation administered by the Ministry of Justice, as well as those where the Ministry of Justice was consulted, generally had more information publicly available on the rationale for the OIA exemption. For example, the Criminal Cases Review Commission Act 2019, of which the Ministry of Justice is responsible, made appropriate use of the disclosure statement in providing rationale for the exemption provision.²

19. Several OIA exemptions related to investigative bodies. For example, in the Criminal Cases Review Commission Act, the OIA applies “except in any correspondence or communication that has taken place between the member or employee of the Commission and any person, in relation to an investigation by the Commission.”³ Civil liberties groups have made a case for exemptions of this kind as providing a lack of transparency.

20. In a number of Acts that were examined, OIA exemption provisions offered assurance to stakeholders that information would be sufficiently protected. This may be due to concerns about the application of the “public-interest override test” or the application of the OIA in situations of high commercial sensitivity and/or privileged information.

21. In some cases where all the information would have been withheld under the OIA, an exemption provision has still been included in the legislation to outline that the relevant

² [NZ Legislation Disclosures](#)

³ Clause by clause analysis, Committee of Whole House, November 2019 (pages 32-33)

information would be withheld in its entirety. For example, this occurs in the Civil Aviation Act 2023⁴ and the Screen Industry Workers Act 2022⁵.

22. The New Zealand Infrastructure Commission/Te Waihanga Act 2019 outlines a statutory power to collect information from agencies about legally privileged contracts held with private companies.⁶ To safeguard the commercially sensitive information and to encourage the sharing of this information for the purposes of the Infrastructure Commission, the exemption provision restates the OIA on points of national security, privacy of persons, legal privilege and judicial independence. (The Organic Products and Production Act 2023⁷ is a similar example.)
23. Finally, in the Acts examined, there were occasions where OIA exemption provisions supported clarification of the application of the OIA to certain bodies or in certain contexts. For example, section 25 of the Venture Capital Fund Act 2019 uses the wording “To avoid doubt...”, when indicating the difference between Guardians (who are not exempt) and the investment vehicle they facilitate (which are exempt).⁸

Scrutiny Mechanisms

24. There are several opportunities throughout the policy cycle for public sector agencies to consider and discuss the rationale for a proposed exemption to the OIA. Many of these mechanisms would then ensure any rationale is made publicly available.
25. As part of Commitment 7, the Ministry of Justice is working to discuss, with each relevant agency, future improvements to scrutiny mechanisms.
26. Some of the different mechanisms available are outlined below:

⁴ Section 198, [Civil Aviation Act 2023](#)

⁵ Section 64, [Screen Industry Workers Act 2022](#)

⁶ Sections 24 and 25, [New Zealand Infrastructure Commission/Te Waihanga Act 2019](#)

⁷ Section 60, [Organic Products and Production Act 2023](#)

⁸ [Venture Capital Fund Act 2019](#)

Scrutiny Mechanism	Outline of relevant aspect within mechanism	Analysis Comment
Cabinet Manual 2023 Edition Paragraph 8.41 Cabinet Manual 2023 (dpmc.govt.nz)	2023 edition: "The Ombudsman should be consulted on policy and legislative proposals with implications for access to official information. This can include when a proposal is made to exclude particular information from the Official Information Act 1982. See the Ombudsman's <i>Guidance on when to engage the Ombudsman in law reform proposals.</i> "	Significantly strengthened from previous [2017] edition. However, no mention of consulting the Ministry of Justice.
Cab Guide Department of Prime Minister and Cabinet (DPMC) Cabinet paper consultation with departments Department of the Prime Minister and Cabinet (DPMC)	Policy proposals leading to legislation. It is mandatory to consult: <ul style="list-style-type: none"> • the Parliamentary Counsel Office for all proposals for legislation and amendments to legislation and regulations • the Ministry of Justice: <ul style="list-style-type: none"> ○ to ensure consistency with the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993, and the Privacy Act 2020 ○ for proposals for new criminal offences, infringements, or penalties (including civil pecuniary penalties), or to alter existing ones ○ for proposals to create, amend, or remove the jurisdiction of a court or tribunal; that involve access to court information; or which may impact on court-based procedures and workloads 	The CabGuide specifically requires that the Ministry of Justice is consulted on the Privacy Act but not the OIA. General consultation with MOJ may include consideration of the OIA, but this consultation may not be explicitly noted/publicly recorded.
Disclosure statement guidance and template (Treasury) Disclosure Statements for Government Legislation: Technical Guide for Departments The Treasury New Zealand	Question 4.9 of the disclosure statement asks: "Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?"	There is a gap in any questions relating to the OIA or other safeguards such as Ombudsman oversight. By way of contrast, questions 3.5 and 3.5.1 are about interaction with the Privacy Act and whether agency has consulted the Privacy Commission.

Scrutiny Mechanism	Outline of relevant aspect within mechanism	Analysis Comment
<p>Legislative Design Advisory committee (LDAC) guidelines</p> <p>Paragraph 20.5</p> <p>LDAC-Legislation-Guidelines-2021-edition.pdf</p>	<p>In relation to creating a new public body: “All public bodies should be subject to the Ombudsmen Act 1975, the Public Audit Act 2001, the Public Records Act 2005, and the Official Information Act 1982 (or the Local Government Official Information and Meetings Act 1987). The Acts discussed in this section are key mechanisms by which government bodies are held accountable for their activities. They should apply to all new bodies and existing bodies unless there are compelling reasons for them not to.”</p>	<p>Guidance focusses on whether <u>an agency</u> is subject to the OIA as a whole.</p>
<p>Cabinet Legislation (LEG) paper template</p> <p>Paragraph 15</p> <p>Cabinet paper template – introducing a bill Department of the Prime Minister and Cabinet (DPMC)</p>	<p>“If the legislation will amend the existing coverage of the Ombudsmen Act 1975, the Official Information Act 1982, or the Local Government Official Information and Meetings Act 1987, explain why. Consult the Office of the Ombudsman on this issue and summarise its views.”</p>	<p>Practically, this is an important backstop to remind agencies to consult the Ombudsman as they are completing the LEG paper. While definition of “amend the existing coverage” could be expanded, this text seems proportional to other kinds of backstops in the template. However, there is no mention of consulting the Ministry of Justice.</p> <p>Templates are updated from time to time.</p>
<p>Ombudsman guidance: when to engage the Ombudsman in law reform proposals</p> <p>Paragraphs 6 - 9</p> <p>Guidance on when to engage the Ombudsman in law reform proposals </p>	<p>Para 9: “If changes to the OIA/LGOIMA, exemptions from the OIA/LGOIMA, or the establishment of alternative official information regimes are under consideration, the Ombudsman should be consulted. The Ombudsman’s view is that the OIA and LGOIMA should apply as broadly as possible as a general regime guiding official information practices across the public sector. The courts have long recognised the OIA as being ‘constitutional’ in nature. In addition, the OIA is one of the vehicles by which New Zealanders may exercise their fundamental freedom to seek and receive information, as enshrined in section 14 of the New Zealand Bill of Rights Act 1990. It follows that the application of the OIA, as a constitutional measure which reflects fundamental freedoms, should only be curtailed where there is clear justification. The OIA/LGOIMA contain a tried and tested regime which balances the competing interests in accessing information held by public agencies. Creating alternate</p>	<p>Strong statement from the Ombudsman on a general presumption in favour of relying on the OIA.</p> <p>Assumes case-by-case consideration rather than something conducive to guidance.</p>

Scrutiny Mechanism	Outline of relevant aspect within mechanism	Analysis Comment
<p>Ombudsman New Zealand</p> <p><i>Note – LGOIMA is the local government equivalent to the OIA</i></p>	<p>regimes is generally unnecessary or misguided, and will inevitably involve complex and often unintended interactions with the OIA/LGOIMA.”</p>	
<p>Other scrutiny mechanisms</p>	<ul style="list-style-type: none"> - legislative statements - policy paper templates - parliamentary scrutiny processes (office of the clerk + select committee) 	<p>No current requirements that are relevant.</p>

Conclusion and Next Steps

27. The NAP4 two-year cycle finishes at the end of 2024. As part of each National Action Plan, relevant agencies must complete six-monthly report-backs to civil society and the public. There are two further report-back sessions to be completed before NAP4 finishes.
28. A core aspect of the Open Government Partnership is building relationships with civil society so the Ministry will carry out targeted engagement with civil society in early 2024 to consider various options for improving scrutiny of exemptions to the OIA.
29. Any change to scrutiny mechanisms is a long-term process and may not align with the timeframes required by OGP NAP4. This does not prevent work continuing on an ongoing basis to constantly improve transparency and open government.

Legislation Design and Advisory Council (LDAC) meeting notes, 15 February 2024

Background: Anna Moore-Jones, Advisor E&C, and Elisha Connell, Senior Advisor E&C, attended part of the LDAC meeting held on 15 February 2024 to provide a short presentation on OGP Commitment 7 and recent research completed. LDAC had been sent a paper discussing the research prior to the meeting. Sarah Kerkin, LDAC Deputy Chair, was unable to join remotely due to an internet outage.

Opening comments:

Mark Steel, LDAC Chair, expressed that LDAC is interested in the issue of OIA exemptions and sees this as an important area of concern. LDAC is willing to support efforts to review/strengthen guidance. Appreciated the paper sent to LDAC prior.

Discussion following the presentation:

Existing guidance:

Is this matter covered in the LDAC guidelines already? There is passing reference to OIA in guidance. LDAC is aware that they have previously given advice where they've advised that an agency hasn't given a rationale for an OIA exemption. s9(2)(g)(i)

Stuart McGilvray, Chief Legal Adviser, Office of the Ombudsman, noted there isn't a central place where guidance is given around this issue/OIA. There is an inconsistent approach across the statute book and OIA exemptions often don't work (this area is messy). He wondered if guidance could be developed, either by the Ombudsman or LDAC and queried if it could be an area for supplementary guidance.

Potential approaches to new guidance:

Perhaps some slightly stronger presumptions could be provided, i.e. you should proceed on the basis that the OIA and Privacy Act apply. Maybe there is some language LDAC can develop around these areas. LDAC is particularly sensitive to the circumstances that agencies face, but this can drift into a situation where it is easy to provide justification.

There are three situations where OIA exemptions may be sought:

- Special commercial grounds s9(2)(g)(i)
- Temporal aspect – temporal aspect of secrecy – probably justifiable
- Agencies try to use the OIA for just when they should proactively release information – this is borrowing a concept from the OIA.

For the first situation, it's easy to have a firm view, but for the third situation, there is uncertainty about how to approach this.

When a similar issue was discussed/addressed by LDAC, there was a temptation to decide when there were certain instances where things were more justifiable than others. This is problematic as it provides a 'train track' for how people approach it. It would be a case of navigating this and noting that these are the kinds of things that could be considered.

Anna noted that it may not be so much a case of defining what circumstances, but more about outlining that this is something agencies should be considering.

Stuart McGilvray noted that it may be more difficult for LDAC to take too strong a position, but that the Ombudsman could provide a firmer stance. He noted that this may be an opportunity for the Ombudsman to provide stronger guidance. He suggested that LDAC guidance could perhaps be jointly produced with the Ombudsman.

It could be difficult to suggest that agencies should have a rationale and seek guidance, as people will then seek guidance around what kind of rationale to provide.

At MBIE, staff receive training on the OIA, but it's a one-off session and may not enable staff to have sufficient knowledge/familiarity to approach this issue.

Two points:

- If large numbers of OIA exemptions occur this would create a parallel regime.
- If there is a genuine reason for withholding information this can be done. From an efficiency perspective this is easy to understand if the information is never going to be released. The question is whether there is already an ability to withhold the information.

With respect to potential adjustments to current LDAC guidance, an LDAC member queried if the OIA should be added to the constitutional issues in Chapter 4.

Consideration of public interest:

Experience from MBIE is that staff may not always have a strong grasp of the OIA, and have apprehension around the balancing test. Generally, public service skills/knowledge on the OIA needs to be improved.

More could be done to give effect to public interest.

LDAC further discussed public interest, and it was noted that sometimes there is a lack of understanding about what public interest means (sometimes it is misunderstood as something the public is interested in).

Additional comments:

In the private sector, companies aim is to get around the OIA and to find ways to do that.

An LDAC member was interested in knowing how many of the proposed OIA exceptions in past years have been reviewed by LDAC. (Seemingly not very many, if any).

With respect to open government, often government agencies might say they would prefer that information is not provided, rather than provided with the caveat that it needs to be kept confidential. Addressing this prevents the creation of secret submissions.

Potential ways that LDAC could help:

Mark Steel (LDAC Chair), suggested there may be four ways LDAC could support this issue:

- LDAC could be more alert during their consideration of bills s9(2)(g)(i)
s9(2)(g)(i)

- LDAC could highlight the Ombudsman's role and existing capability (LDAC can do more to advise/state there is this entity that exists).
- More specific guidance could be developed i.e. supplementary.
- LDAC can contribute to efforts to support departmental capability – most likely through the webinar series (he noted there is lots of room to strengthen departmental capability)

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

From: s9(2)(a)
To: [Moore-Jones, Anna](#)
Cc: [Connell, Elisha](#); s9(2)(a)
Subject: RE: Potential for Discussion? - Open Government Partnership - Commitment within the Fourth National Action Plan
Date: Wednesday, 20 March 2024 10:36:56 am
Attachments: [image001.jpg](#)
[image002.jpg](#)

Thanks Anna.

A decision to override the OIA is usually taken during the policy development stage of a bill and sanctioned by Cabinet prior to the issue of drafting instructions. Our task at PCO is to draft in accordance with Cabinet policy approvals so when PCO receives a drafting instruction to insert a provision overriding the disclosure requirements of the OIA that is supported by a Cabinet approval our task is to implement that instruction. Our role in the legislative process will often come too late to be of very much influence in the policy decision.

As you note, there are several resources that provide guidance on the development of legislation. The LDAC guidelines are a very good resource (chapter 20.5 discusses the OIA) and I understand that the Ministry of Justice has already had a conversation with LDAC about the development of further guidance around criteria for OIA exemptions. That seems a very good avenue to pursue.

Regards
s9(2)(a)



s9(2)(a) | Principal Parliamentary Counsel
 Parliamentary Counsel Office | 2 The Terrace | PO Box 18 070 | Wellington 6160
 M s9(2)(a) | E s9(2)(a) | [@pco.govt.nz](#)

From: Moore-Jones, Anna <Anna.Moore-Jones@justice.govt.nz>
Sent: Monday, March 18, 2024 3:07 PM
To: s9(2)(a) <@pco.govt.nz>
Cc: s9(2)(a) <@pco.govt.nz>; Connell, Elisha <Elisha.CConnell@justice.govt.nz>
Subject: RE: Potential for Discussion? - Open Government Partnership - Commitment within the Fourth National Action Plan

CAUTION: This email originated from outside the PCO. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Kia ora s9(2)(a)

Thank you for reading the paper.

While the project may be around policy decisions, we hoped that taking a “swiss cheese” kind of approach might be useful – as in, trying multiple different approaches for ensuring that the issue is raised at multiple levels ahead of enactment. We hoped that this might provide various opportunities for the rationale for any exemption to be made publicly available.

We are therefore interested in asking you:

- Are there any places that could trigger both PCO and agencies to consider why an exemption is being included before drafting is complete? For example, in instances where legislation is largely being copy/pasted, could there be an opportunity for PCO to flag any OIA exemptions that might be carried across?
- What is the training that kaimahi at PCO complete e.g. does it include training around constitutional pieces of legislation like the OIA? Could any future training reference this issue as one for consideration during drafting?
- What guidance is provided from PCO that might include reference to this consideration when carrying out drafting instructions and/or drafting itself? Could it be included in, for example, a future newsletter update?

We hope that this is of assistance. We look forward to discussing this where appropriate.

Ngā mihi nui,
Anna

Anna Moore-Jones ([she/her/ia](#))

Policy Advisor – Kaitātari Kaupapa
Democracy and Open Government Team | Policy Group

Wahi mahi: Justice Centre – Level 6, 19 Aitken St, Wellington

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From: s9(2)(a) [@pco.govt.nz](mailto:s9(2)(a)@pco.govt.nz)
Sent: Monday, 18 March 2024 1:12 pm
To: Moore-Jones, Anna <xxxx.xxxxxxxxxx@xxxxxxxx.xxxx.xx>
Cc: s9(2)(a) [@pco.govt.nz](mailto:s9(2)(a)@pco.govt.nz); Connell, Elisha <xxxxxx.xxxxxxxxx@xxxxxxxx.xxxx.x>
Subject: RE: Potential for Discussion? - Open Government Partnership - Commitment within the Fourth National Action Plan

Hi Anna,

Thank you for your email and attached paper.

The attached paper helpfully outlines the project and the work that MoJ has done to date identifying the number and type of provisions in our legislation overriding the disclosure requirements in the OIA.

As these “overrides” would seem to be more related to policy decisions than drafting decisions I’m wondering how I can best help and what information/assistance you are specifically seeking from PCO.

It would be helpful to have your responses before we arrange a meeting to ensure a useful discussion.

Regards
s9(2)(a)



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From: Moore-Jones, Anna <Anna.Moore-Jones@justice.govt.nz>
Sent: Friday, March 15, 2024 4:11 PM
To: s9(2)(a) <@pco.govt.nz>
Cc: s9(2)(a) <@pco.govt.nz>; Connell, Elisha <Elisha.Connell@justice.govt.nz>
Subject: RE: Potential for Discussion? - Open Government Partnership - Commitment within the Fourth National Action Plan

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Kia ora Cathy,

Thank you for being willing to meet and discuss this project.

When might be suitable for you in the next few weeks? We are happy to be flexible to your schedule.

For your information, **attached** is a summary of this project and the work completed so far. I hope that this will be of assistance to you ahead of our discussion.

Ngā mihi nui,
Anna

Anna Moore-Jones ([she/her/ia](#))
Policy Advisor – Kaitātari Kaupapa
Democracy and Open Government Team | Policy Group

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From: s9(2)(a) [@pco.govt.nz](mailto:s9(2)(a)@pco.govt.nz)
Sent: Friday, 8 March 2024 11:48 am
To: Moore-Jones, Anna <xxxx.xxxxxxxxxx@xxxxxxxx.xxx.xx>
Cc: Connell, Elisha <xxxxxx.xxxxxxx@xxxxxxxx.xxx.x>; s9(2)(a) [@pco.govt.nz](mailto:s9(2)(a)@pco.govt.nz)
Subject: RE: Potential for Discussion? - Open Government Partnership - Commitment within the Fourth National Action Plan

Kia ora Anna,

Thank you for the opportunity to contribute “;-)

Our go-to person on information sharing and privacy matters is s9(2)(a) .

s9(2)(a) is out of the frame today but has a flexible schedule next week.

s9(2)(a) contact details are: s9(2)(a) [@pco.govt.nz](mailto:s9(2)(a)@pco.govt.nz) or s9(2)(a)

Before making contact, you may wish to provide Cathy with any relevant material (in addition to the National Plan provided via the link below).

Ngā mihi,

s9(2)(a)

From: Moore-Jones, Anna <xxxx.xxxxxxxxxx@xxxxxxxx.xxx.xx>
Sent: Friday, March 8, 2024 11:02 AM
To: s9(2)(a) [@pco.govt.nz](mailto:s9(2)(a)@pco.govt.nz)
Cc: Connell, Elisha <xxxxxx.xxxxxxx@xxxxxxxx.xxx.x>
Subject: Potential for Discussion? - Open Government Partnership - Commitment within the Fourth National Action Plan

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Kia ora s9(2)(a)

I am in the Democracy and Open Government policy team at Justice and am working on the [Open Government Partnership Fourth National Action Plan](#). The Ministry leads a commitment

within this action plan to improve scrutiny of exemptions to the Official Information Act 1982 (OIA).

I hoped that you or someone in your team would be interested in talking with us about any relevant guidance/work at PCO that could be considered as part of this work?

We have carried out research on several pieces of legislation with exemptions and assessed current guidelines for policy agencies regarding the OIA. Our research has illustrated that there is a variance between agencies in the public rationale that is provided for any exemptions, and there are some potential areas where guidance could be strengthened.

As part of this work, we are also speaking to different agencies about how current guidance could be improved to assist agencies to give proper consideration to the OIA in new legislation. We have spoken with Treasury, the Ombudsman, and LDAC, among others, and would also be interested in speaking with someone at PCO sometime over the next few weeks, where suitable.

We look forward to hearing from you.

Ngā mihi nui,
Anna

Anna Moore-Jones ([she/her/ia](#))

Policy Advisor – Kaitātari Kaupapa

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From: [Gareth Derby](#)
To: [Moore-Jones, Anna](#)
Cc: [Connell, Elisha](#); [Yu-Lina George](#)
Subject: RE: Update around Commitment 7 of the Open Government Partnership
Date: Friday, 12 April 2024 10:35:14 am
Attachments: [image001.jpg](#)
[image002.jpg](#)

Hi Anna

The closest we have is the Ombudsman's [Guidance on when to engage the Ombudsman in law reform proposals](#) which includes the following section:

Ombudsmen Act 1975 jurisdiction

6. The Ombudsman has a general role under the Ombudsmen Act to investigate complaints about public bodies and undertake own-motion reviews across the public sector. This jurisdiction is broad and diverse, allowing the Ombudsman to act as a general watchdog over various public entities.
7. According to the LDAC guidelines, where new bodies are being established to exercise public power the Ombudsman should be included as an oversight body.⁵ Agencies should consult the Ombudsman if there is any proposal to deviate from that principle. A new agency has to be brought within the Ombudsman's jurisdiction by adding it to Schedule 1 of the Ombudsmen Act.⁶

Official Information jurisdictions

8. The Ombudsman supports the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987 by investigating and reviewing complaints and conducting systemic monitoring of official information practices across agencies.
9. If changes to the OIA/LGOIMA, exemptions from the OIA/LGOIMA, or the establishment of alternative official information regimes are under consideration, the Ombudsman should be consulted. The Ombudsman's view is that the OIA and LGOIMA should apply as broadly as possible as a general regime guiding official information practices across the public sector. The courts have long recognised the OIA as being 'constitutional' in nature.⁷ In addition, the OIA is one of the vehicles by which New Zealanders may exercise their fundamental freedom to seek and receive information, as enshrined in section 14 of the New Zealand Bill of Rights Act 1990. It follows that the application of the OIA, as a constitutional measure which reflects fundamental freedoms, should only be curtailed where there is clear justification.
10. The OIA/LGOIMA contain a tried and tested regime which balances the competing interests in accessing information held by public agencies. Creating alternate regimes is generally unnecessary or misguided, and will inevitably involve complex and often unintended interactions with the OIA/LGOIMA.

And the footnotes:

- 5 At [20.5] and [28.9].
- 6 This can be done by Order in Council, see s 32 Ombudsmen Act 1975.
- 7 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385

I've included the Ombudsmen Act part as inclusion within the schedules of the Ombudsmen Act generally makes the agency subject to the OIA as well.

Kind regards

Gareth Derby

Principal Advisor Strategic Advice

Office of the Ombudsman | Tari o te Kaitiaki Mana Tangata

DDI [**s9\(2\)\(a\)**](tel:s9(2)(a)) | Phone [**s9\(2\)\(a\)**](tel:s9(2)(a)) | Fax [**s9\(2\)\(a\)**](tel:s9(2)(a))

Email Gareth.Derby@ombudsman.parliament.nz | www.ombudsman.parliament.nz

PO Box 10152, Level 7, SolNet House, 70 The Terrace, Wellington



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From: Moore-Jones, Anna <Anna.Moore-Jones@justice.govt.nz>
Sent: Thursday, 11 April 2024 4:01 pm
To: Gareth Derby <Gareth.Derby@ombudsman.parliament.nz>
Cc: Connell, Elisha <Elisha.Connell@justice.govt.nz>; Yu-Lina George <Yu-Lina.George@ombudsman.parliament.nz>
Subject: RE: Update around Commitment 7 of the Open Government Partnership

Kia ora Gareth,

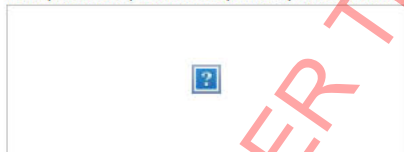
Thank you for getting back to me. We appreciate receiving these links to relevant submissions!

We did just want to confirm with you whether the Office of the Ombudsman offers any guidance around proposed OIA exemptions? I understand that you've recently developed training/guidance on the OIA, but am not completely clear about whether there is any specific guidance related to proposed exemptions?

Ngā mihi nui,

Anna Moore-Jones ([she/her/ia](#))

Policy Advisor | Democracy and Open Government policy team



From: Gareth Derby <Gareth.Derby@ombudsman.parliament.nz>
Sent: Wednesday, 10 April 2024 3:06 pm
To: Moore-Jones, Anna <Anna.Moore-Jones@justice.govt.nz>
Cc: Connell, Elisha <Elisha.Connell@justice.govt.nz>; Yu-Lina George <Yu-Lina.George@ombudsman.parliament.nz>
Subject: RE: Update around Commitment 7 of the Open Government Partnership

Hi Anna

Apologies for not getting back to you sooner. Thank you very much for the update.

I think at this stage we don't need to seek further information, but I am happy to be kept in the loop with regards to the submissions being made public. However we'd of course be happy to discuss anything you seek further

clarification on at this stage.

Further to the last meeting, I believe I mentioned the Chief Ombudsman's:

- submission on the Civil Aviation Bill, which is located here: https://www.parliament.nz/resource/en-NZ/53SCTI_EVI_115765_TI2218/a70ff58e4e179cfd122cee45887470fbcdf1d471
- submission on the Public Service Legislation Bill, located here: https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/52SCGA_EVI_93134_GA3993/chief-ombudsman (page 4 onwards)

This reflects a long line of submissions, including:

- a 2012 submission on the Mixed Ownership Model proposals: <https://www.ombudsman.parliament.nz/sites/default/files/2022-02/Submission%20of%20the%20Ombudsmen%20on%20the%20Mixed%20Ownership%20Model%20Bill.pdf>
- a 2013 submission on partnership schools proposals: <https://www.ombudsman.parliament.nz/sites/default/files/2022-02/Submission%20of%20the%20Ombudsmen%20on%20the%20Education%20Amendment%20Bill.pdf>

There are no doubt others which a deeper trawl might uncover, but I suggest they'd simply show the Ombudsman has consistently suggested the OIA regime should apply to agencies and/or specific information held by agencies in the absence of a very good reason not to, on the basis that the OIA typically already provides the ability to protect information where it warrants protection in the public interest. However if you would like me to find further (public) examples, I'd be happy to do a deeper trawl!

Kind regards

Gareth Derby

Principal Advisor Strategic Advice

Office of the Ombudsman | Tari o te Kaitiaki Mana Tangata

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From: Moore-Jones, Anna <xxxx.xxxxxxxxxxx@xxxxxxxx.xx>

Sent: Wednesday, 3 April 2024 3:52 pm

To: Gareth Derby <xxxxxx.xxxxxx@xxxxxxxxxx.xxxxxxxx.xx>

Cc: Connell, Elisha <xxxxxx.xxxxxxx@xxxxxxxx.xx>

Subject: Update around Commitment 7 of the Open Government Partnership

Kia ora Gareth,

I hope that you are well and had a lovely long weekend.

We wanted to give you an update on this commitment under the Open Government Partnership as have

progressed various tasks since we last spoke. This includes:

- Completed paper summarising research on OIA exemptions (**attached**)
- Meetings with various agencies including a presentation to LDAC in February
 - o We are waiting to hear confirmation from LDAC on next steps but think there may be opportunity for supplementary guidance or a webinar, and that this might include work to make better reference to the Office of the Ombudsman's role/guidance in this area.
- Consultation with civil society as part of the partnership
 - o We provided a paper to civil society organisations outlining options for improving various scrutiny mechanisms/guidance for public servants and have received several submissions. We are still collating feedback but note that a few have commented on the role of the Office of the Ombudsman in this area but many suggestions are also out of scope of the current commitment/OGP.

We are happy to meet to discuss anything or to provide further information, such as about the feedback from consultation, if you would like. We're also currently working through how we can share the submissions publicly and can keep you updated on this.

We also always welcome any further details you might have of relevant examples of advice and/or guidance from the Office of the Ombudsman as discussed at our last meeting.

Ngā mihi nui,

Anna

Anna Moore-Jones ([she/her/ia](#))

Policy Advisor – Kaitātari Kaupapa

Democracy and Open Government Team | Policy Group

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