

## **Colin James on Official Information Act matters for inclusion in the Open Government Partnership action plan – revised.**

17 March 2016

This is a revised version of the proposal suggested to the 11 February meeting. It follows a meeting with Emma Leach, Andrew McCaw and Andrew Ecclestone of the Ombudsman's office, plus Tim Blackmore, on 1 March.

The Ombudsman's office has been prioritising recommendations from its December "Not a game of hide and seek" for action by the government. Emma, Andrew and Andrew said the office does want the government to implement all recommendations (as I called for in my 11 February note) but suggests some recommendations fit the action plan now being formulated better than others in that they are specific, measurable, answerable, relevant and time-bound, as the plan requires.

One factor is that, in Emma's words, "some recommendations require every agency to take ownership of implementation, which means it is less practical for a single government agency to take ownership for delivery of a ... commitment". So, "while an action plan commitment could be broad and ambitious, the practical delivery of a suite of more tightly defined commitments may offer the best prospect of delivering real benefits for the operation of the OIA".

The office itself has yet to devise detailed plans for implementation, including prototyping and performance measurement. My 11 February drew out of "Not a game of hide and seek" a range of deficiencies in the way the agencies surveyed for the report deal with requests, including ministerial advisers' involvement, and records of responses. These will take time to fix and to get consistency across the public service, even if ministers and agencies are willing to drive change. The Ombudsman's office is talking to 12 agencies and aims to firm up plans by end-June.

Meantime, the Ombudsman's office suggests inclusion in the action plan now being formulated of recommendations 4, 5, 6, 7, 14, 22, 31, 32 and 36. This at most a first-step move. I will return to them later.

*First*, there does not seem to be any reason why the action plan now being formulated could not include a general ambition to implement all the recommendations over the timespan of the action plan now being formulated and the next one.

As indicated in the 11 February note, there is *widespread frustration and distrust* among those requesting information under the OIA. That undermines claims that the OIA and its processes are exemplary. This frustration and distrust is particularly evident among journalists, the most important democratic channel for seeking material through the OIA and then distributing it. Without substantial commitment to change in the action plan now being formulated, it would be inappropriate for me to continue as a journalist stakeholder.

There is also the potential for international embarrassment as Steven Price picks up on and publicises these shortcomings in his reports.

Thus at the very least the action plan now being formulated should include a commitment by the Prime Minister and all ministers to implement the Ombudsman's recommendation 1: "The Prime Minister and his Ministers should issue clear, visible statements of their commitment to the principle and purposes of the OIA and their

expectations of their agencies to comply with its requirements."

That in turn leads logically to a commitment to ensure the OIA is operating properly in each agency and across the government. The Ombudsman's office's argument that it is impractical to incorporate a blanket commitment to implement all recommendations in the action plan now being formulated is no reason not to commit in principle to implementing all recommendations by the end of the action plan after the one now being formulated.

***My recommendation 1: I recommend the action plan include (1) implementation in the plan now being formulated of recommendation 1 in the Ombudsman's "Not a game of hide and seek" report, substituting "must" for "should" in each case and (2) a general statement of intent to implement all the Ombudsman's recommendations by the end of the plan after the one now being formulated.***

*Second*, the "Not a game of hide and seek" report is particularly disturbing in its sections on the role of ministerial – political – advisers. These advisers' role is to protect and advance the personal-political and party-political interests of their ministers. They have no legitimate public policy role in official information which is based on general democratic principles, not individual ministers' or parties' programmes. While it is appropriate for ministers to be notified on a "no-surprises" basis, that logically would be done as the material is being released not before it is released.

There is a practical exception for high national-security and commercial-sensitivity matters. But these should logically be identified by well established protocols that enable agencies in the first instance to identify whether a matter qualifies as an exception on those grounds and if there is doubt an independent entity such as the Ombudsman's office would be the appropriate agent to resolve that doubt, not a ministerial adviser.

Given that the act has been in force since 1982, there appears on the face of it to be no compelling reason protocols and monitoring mechanisms could not be developed rapidly, with advice from the Ministry of Justice, the State Services Commission and the Ombudsman's office, and applied during the action plan being formulated.

"Not a game of hide and seek" tentatively covers this in recommendations 16, 33 and 34 but these recommendations don't go far enough.

***My recommendation 2: I recommend that the action plan now being formulated include a commitment to develop and apply, with strict monitoring, a protocol for notifying ministers' offices of releases of information. This protocol would (1) ensure that for the purposes there being "no surprises" to the minister the minister's office is notified at the time of the release and not before and (2) would make an except only in the case high national-security or commercial-sensitivity matters, determined by agency protocols, backed in case of doubt by an independent agency such as the Ombudsman's office.***

*Third*, "Not a game of hide and seek" reports dismaying variance in agencies' systems for dealing with OIA matters. This suggests a need for urgent action.

This takes us at the very least to recommendations 2 and 3 (though also to many of

the other recommendations).

*Recommendation 2* says: "Chief executives and senior managers within agencies should review their policies, value statements, code of conduct and mechanisms for communicating to their staff, and ensure they contain clear, visible statements of their expectations that all staff will act consistently with the OIA's principle, purposes and requirements."

*Recommendation 3* says: "Both the SSC and the Ministry of Justice should take steps to fulfil their leadership roles in practice by making it a priority in their work programmes to assist agencies with the challenges they currently face in complying with the OIA and its principle and purposes."

***My recommendation 3: I recommend that the action plan now being formulated include a commitment to rapidly implement recommendations 2 and 3 of the Ombudsman's "Not a game of hide and seek" report, substituting "must" for "should" in those recommendations.***

*Fourth*, there is the Ombudsman's office's proposal that recommendations 4, 5, 6, 7, 14, 22, 31, 32 and 36 in "Not a game of hide and seek" be included in the action plan before formulated.

*Recommendation 4* says: "The Ministry of Justice should develop guidance for agencies (and consider developing a model publication scheme) on what should be included in the *Directory of Official Information* that will assist requesters to make effective, targeted OIA requests to agencies."

*Recommendation 5* says: "The Ministry of Justice should publish information about the forums it has held, the planned programme of work for future forums, and the guidance it has produced for agencies."

*Recommendation 6* says: "All agencies should ensure their websites have a page, no more than one click away from the home page, which provides the public with key information on how to make a request for official information, what the agency's internal policies and guides on processing OIA requests are, who to contact for assistance, and the information the agency supplies to the Ministry of Justice for inclusion in the *Directory of Official Information*."

*Recommendation 7* says: "Agencies should ensure their strategic plans include increasing the agency's openness and accessibility of information about its work and activities, and engagement with the public and media."

*Recommendation 14* says: "Agencies should publicly report on the OIA training their staff have undergone in the last 3 years."

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

*Recommendation 31* says: "The Ministry of Justice, in collaboration with the SSC and

Archives New Zealand, should develop a model information search policy for agencies to apply."

*Recommendation 32* says: "Agencies should publish their OIA policies including how they interpret the 'no surprises' principle and record how they apply this to individual requests."

*Recommendation 36* says: "Agencies should strengthen their procedures for considering, documenting and explaining to requesters the public interest factors considered when making a decision whether or not to withhold information under section 9 of the OIA."

***My recommendation 4: I recommend that the action plan now being formulated include a commitment to rapidly develop and apply recommendations 4, 5, 6, 7, 14, 22, 31 and 36 of the Ombudsman's "Not a game of hide and seek" report, substituting "must" for "should" in those recommendations.***

*Fifth:* There needs to be an active consultation with representatives of the news media and non-government organisations on the principles and operation of the OIA. My inclusion in the stakeholders advisory group is not adequate in that I have limited time and resources.

This could usefully be done by a commission of inquiry, which could additionally be charged with coming up with recommended amendments to the OIA to make it fit for purpose in the 2010s and a model for less-open political systems to adopt.

Consideration could be given to forming a panel or panels of journalists and media editorial executives and non-government organisations' representatives.

***My recommendation 5: I recommend the action plan now being formulate include a commitment to set up a commission of inquiry, charged with consulting widely and particularly with the news media and non-government organisations and developing (1) recommendations for changes to the Official Information Act to make it fit for purpose in the 2010s and (2) consequential changes to agency and ministerial procedures.***