

Part V

V

Procedural Provisions Relating to Access to and Correction of Personal Information

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“The amount of difficulty and expense involved in providing access to personal information will vary from case to case and cannot be known in advance. The matter should remain discretionary with, as at present, the possibility of a complaint should charges be considered unreasonable.”

- NZ Employers Federation, submission G10

“We have difficulties with the idea of charging for access to government information in an overall sense. Over the last several years now government agencies of all sorts have increased or introduced charges for information. We believe that unless carefully controlled and monitored and unless this type of charging is kept to the absolute minimum that this is bad for our democracy.”

- Commonwealth Press Union, submission G17

“We would not be happy for there to be included in the Privacy Act a blanket provision allowing a parent, or guardian of anyone under 16 to make a request on their behalf.”

- Commissioner for Children, submission L3

“We believe that personal information held by a public or private enterprise agency should be available for verification, free of charge, to the individual to whom that information relates.”

- Consumers’ Institute, submission L13

5.1 INTRODUCTION

- 5.1.1 Part V describes procedures that agencies must follow in dealing with requests for access to information under the Act or for correction of information held. The provisions are modelled on Parts II and IV of the Official Information Act 1982. They deal with such matters as who may make requests for access to information, the circumstances in which agencies may or may not charge for the provision of information, the obligation on agencies to provide assistance to individuals who wish to exercise their rights to request access to information and the manner in which information is to be made available.
- 5.1.2 There is considerable experience in relation to the procedural provisions for giving access to personal information. The provisions have been tested for many years in the Official Information Act and the Local Government Official Information and Meetings Act. It has been possible to draw heavily upon that experience in the operation of the Act over the last few years and in this review. A number of local and central government officers have shared their experience with me over the years. I have also benefited from my contact with the Ombudsmen over the period, and during this review, with staff who have been familiar with the provisions of the official information legislation or who have worked in the Ombudsmen's office, and in the published works on the official information legislation, such as the major work *Freedom of Information in New Zealand*.¹ I have also benefited from the publication of the Law Commission's *Review of the Official Information Act 1982* during the period of my own review.²
- 5.1.3 Unlike some of the novel, unusual, technical or even obscure, issues that I have dealt with elsewhere in the review, there is a wide body of experience amongst agencies themselves in working with the procedural provisions of Part V. Accordingly, I have welcomed a large number of submissions from agencies and privacy officers who work with the Act on this part of the review.³
- 5.1.4 The procedural provisions in Part V have, by and large, worked well. They closely follow provisions which were originally recommended by the Committee on Official Information (the "Danks Committee") although with some subsequent revision particularly in 1982 and 1987. While the Danks Committee undertook significant pioneering work, it was able to draw upon some earlier models in establishing these procedural provisions such as, in New Zealand, the Wanganui Computer Centre Act 1976 and, overseas, the USA legislation and an Australian bill. Useful precedents were also found in the Ombudsmen legislation, and other laws such as the Race Relations Act, in crafting provisions such as those dealing with frivolous or vexatious complaints.
- 5.1.5 However, other than the recent and relatively narrowly focused review by the Law Commission, there has been little systematic review of the procedural provisions in our information laws since 1987. While many of the changes I recommend for consideration in this area may be relatively minor I believe that they will contribute to a more effective and efficient access law. I am keen to preserve and enhance the many informal and straightforward mechanisms provided for in the Act, and modelled upon the earlier official information and Ombudsmen legislation. In this regard, our laws contrast with certain overseas freedom of information and access laws which sometimes call for an excessive degree of formality in the making and processing of access requests. I believe that the New Zealand approach also helps minimise compliance costs.

¹ *Freedom of Information in New Zealand*, 1992.

² Law Commission, *Review of the Official Information Act 1982*, October 1997.

³ Fifty submissions were received on the discussion paper from a wide variety of individuals and agencies.

SECTION BY SECTION DISCUSSION

5.2 SECTION 33 - Application

- 5.2.1 Section 33 provides that Part V of the Act applies to what is termed an “information privacy request”. An information privacy request is:
- a principle 6(1)(a) request to confirm whether an agency holds personal information;
 - a principle 6(1)(b) request to be given access to personal information;
 - a principle 7(1) request to correct personal information.
- 5.2.2 “Information privacy request” is a handy shorthand for these access and correction requests and it is a defined term in section 2. One submission suggested that a better title for these requests could be devised and proposed that they be called “personal information requests”. It is true that “information privacy request” has no ordinary meaning and is only understandable by its definition in section 33. However, that may even be an advantage compared with the plainer phrase “personal information request” since it encourages people to seek the statutory definition. On balance I do not recommend any change.

5.3 SECTION 34 - Who may make requests

- 5.3.1 Information privacy requests may be made by New Zealand citizens and permanent residents (wherever they are) and by any other individual who is *in* New Zealand.
- 5.3.2 An Australian, for instance, who may formerly have lived and worked for many years in New Zealand, has no right of access to information still held about him or her unless an information privacy request is made during a visit here. If a New Zealand agency does hold information about an individual who is neither a citizen or a permanent resident, that individual’s right of access to information should not depend on whether or not they happen to be in New Zealand at the time. After all, the fact that people are neither citizens or residents of New Zealand nor present in the country does not bar them from making a complaint if they believe that a New Zealand agency has dealt wrongly with their personal information.⁴
- 5.3.3 I recommend below that the law be changed so that the denial of the right of access to non-New Zealanders who are not present in New Zealand at the time should be done away with. Most submissions on the discussion paper agreed that the present standing requirement should be dropped.⁵ Before discussing some of the practical issues arising from the recommendation, I outline some of the considerations that have convinced me of the desirability of the change.

Importance of access and correction rights

- 5.3.4 Access and correction rights count amongst the most important and fundamental in any data protection or information privacy law. The right to obtain access to information is an essential feature in ensuring that individuals can retain some control of their privacy and the information processed about them. Denial of the right of access means that individuals would, in many circumstances, be unable to know what information is being held about them and possibly used to their detriment. The right of access allows “light to be shined in dark places” to enable the individual to find out what is known, or believed, about him or her. By obtaining access to information the individual is also in a position to ensure that other information privacy principles are adhered to.

⁴ See section 67 permits complaints by “any person”.

⁵ See submissions L4, L5, L7, L9, L12, L14, L17, L19, L23, S2, S36, S37 and S45. Submissions L10 and L22 opposed the change.

- 5.3.5 If personal information is in error, an individual may normally request correction. Foreigners are doubly penalised by section 34 since it not only denies them the right to access information to see if it is correct but also denies the right to seek correction or ask that a correction statement be placed with the information. This is simply not fair and does not accord with the spirit of an information privacy law. Nearly all submissions supported allowing people overseas having access to information held in New Zealand.⁶
- 5.3.6 Removing the bar on the right of access and correction will put right something that is clearly wrong in the Act. If New Zealand agencies are in the position of holding personal information about foreigners it is incumbent on them that they comply with the information privacy principles in respect of that information. The Act generally makes no distinction between New Zealanders and others. However, to deny the right of access and the right to correction removes one of the most important mechanisms for ensuring that the principles are indeed complied with.

International considerations

- 5.3.7 I can see no justification for the present denial of the rights to foreigners in relevant international instruments. Most particularly, the OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data provide no basis for such a distinction being made. I am not aware that the lack of foundation existing in the OECD Guidelines for the distinction made in section 34 was considered at the time the Privacy of Information Bill was being considered. Rather, the approach had been to simply carry over the procedural provisions for giving access and correction that had been in the Official Information Act. Now is an appropriate time to reconsider that matter.
- 5.3.8 Of particular concern at this time is the fact that our Privacy Act will be subject to scrutiny by the European Union as to whether it provides “adequate” protection for personal data about Europeans transmitted to New Zealand for processing.⁷ I believe that the Act offers adequate protection in virtually all respects. In some aspects its standards exceed those in Europe. However, I fear that the EU will see the non-availability of legal access and correction rights to Europeans while in Europe as a feature that is not “adequate” in terms of the Directive. This provides an incentive to change the present provisions since it would be unfortunate to have our otherwise excellent and “adequate” privacy law called into question on this one small feature.
- 5.3.9 At a general human rights level the United Nations International Covenant on Civil and Political Right provides that no-one may be subjected to arbitrary or unlawful interference with his privacy (article 17) and that everyone has the right to receive and impart information (article 19). States are to recognise and ensure the rights recognised in the Covenant without distinction of any kind including, amongst others, those based on national origin (article 2).
- 5.3.10 At a more specific information privacy level the United Nations General Assembly has adopted Guidelines for the Regulation of Computerised Personal Data Files.⁸ These guidelines are not well known since most countries with privacy laws tend either to look to the OECD Guidelines or to the Council of Europe or European Union instruments. Nonetheless, New Zealand usually takes cognisance of UN instruments notwithstanding that General Assembly resolutions are not binding.⁹

⁶ Of the 17 submissions on this issue, 14 supported change, 2 opposed or were not aware of a need for change, and 1 did not answer the question asked.

⁷ EU Directive on Data Protection, article 25.

⁸ These 1990 guidelines have been republished in *Privacy Law and Practice*.

⁹ Under section 14(c) of the Act I am directed to take account of international obligations accepted by New Zealand.

- 5.3.11 Clause 4 of the UN guidelines sets out a “principle of interested party access” which essentially refers to the right of access found in information privacy principle 6. The clause states:

“It is desirable that the provisions of this principle should apply to everyone, irrespective of nationality or place of residence.”

Legislative history

- 5.3.12 Section 34 has been carried over from section 24(2) of the Official Information Act 1982. The limitation in section 24(2) of the Official Information Act was not included as a recommendation of the Committee on Official Information and therefore the Danks report offers no explanation for it.¹⁰ Standing requirements were introduced at the select committee stage of the Official Information Bill.¹¹
- 5.3.13 It has been suggested by some commentators that some of the standing requirements existing in the Official Information Act seem rather pointless given that they can sometimes be circumvented through the appointment of New Zealand agents who can seek official information in their own right.¹² However, it is not possible to bypass the standing requirements through requests for personal information and, of course, in the Privacy Act context private sector agencies will not be subject to the Official Information Act.
- 5.3.14 It has been noted elsewhere in this report that existing statutes were heavily drawn upon as models in the drafting of the Privacy of Information Bill. Prime amongst these were the Official Information Act and the Ombudsmen Act. However, another model was the Privacy Act 1988 (Commonwealth of Australia). That statute has no direct equivalent of section 34 although section 41(4) provides that the Privacy Commissioner shall not investigate a complaint alleging a breach of information privacy principle 7 (which like in the New Zealand Act, concerns correction of personal information) unless the individual concerned is:
- an Australian citizen; or
 - a person whose continued presence in Australia is not subject to a limitation as to time imposed by law.
- 5.3.15 The Australian Privacy Act has no such restriction in respect of access complaints. However, it only covers the Commonwealth public sector and the practice there is for access complaints to be normally taken to the Australian Administrative Tribunal under the Freedom of Information Act in any case.¹³ I cannot see that the Australian model commends itself since foreigners should also be able to seek correction of inaccurate information as well.
- 5.3.16 The Wanganui Computer Centre Act 1976 is relevant to the legislative history of the Privacy Act. This contained no standing requirement of the type found in section 34. Accordingly, one of the unintended consequences of repeal of the 1976 Act is that foreigners who may have lived a portion of their lives in New Zealand but left the country will have lost their entitlement to seek criminal history information that they could have obtained under the 1976 Act. This might include, for example, details of convictions or confirmation that during that period they had no such convictions. I am confident that it was not the intention that the Privacy Act so limit pre-existing entitlements. In-

¹⁰ See Committee on Official Information, *Towards Open Government: Supplementary Report*, 1981, page 78.

¹¹ See (1982) 449 NZPD 5052.

¹² See *Freedom of Information in New Zealand*, pages 70-72.

¹³ The Australian Act covers the private sector in relation to credit reporting. There appears to be no limit on individuals seeking access to, or correction of, credit reports based upon citizenship, residence, or presence in Australia.

deed, the repeal of the 1976 Act was done in the belief that the Privacy Act would provide continuing rights and entitlements of an enhanced character. In the case of foreigners whose information is held in New Zealand this has proved not to be the case.



RECOMMENDATION 61

The standing requirements in section 34 should be abolished.

Practicalities concerning overseas requests

- 5.3.17 I considered whether the regime should give access rights based upon the existence of reciprocal rights for New Zealanders but have concluded that this would be impractical and has little to commend it. Such an approach would, for example, mean that a request from a person in Europe would have to be actioned but not one from a Pacific Island country. The position would become complicated with respect to a jurisdiction such as Australia where New Zealanders may request copies of their credit reports but otherwise have no access rights to personal information held by private sector organisations. Furthermore, any such distinction would likely *increase* rather than *decrease* compliance costs. The average agency would not be in any position to judge whether New Zealanders had access rights in another jurisdiction and it might involve more work in trying to establish this than in responding to an occasional request.
- 5.3.18 A number of submissions suggested that agencies should be permitted to make a reasonable charge for the costs of giving such access. Two submissions suggested that it should be possible to insist that the overseas requester provide a New Zealand-based agent and address to which the information could be directed.¹⁴
- 5.3.19 I do not see any merit in the latter suggestion. This would impose costs upon requesters which may be, in some cases, prohibitive. Although there may be some particular circumstances where the appointment of an agent may be a reasonable requirement, for example if the only appropriate way to give access is by way of inspection of documents, for the most part an agent will be of little assistance. On the other hand, if a requester already has an agent present in New Zealand, the agent may be a convenient conduit to give access. An example might be where an individual is pursuing an immigration application and they have a New Zealand lawyer.
- 5.3.20 Private sector agencies can make a reasonable charge for giving access whereas public sector agencies may not. A case can be made that public sector agencies should in some circumstances be entitled to make a reasonable charge for giving access to individuals who are not in New Zealand and who are neither New Zealand citizens nor permanent residents, or for meeting the additional costs of such overseas requests.¹⁵ Although the costs for sending documents or information overseas should not be exaggerated (since this is an everyday occurrence for many businesses in the 1990s), the costs are likely to be greater than giving access to a person who is in the country. There may also be some additional costs in the precautions needed to verify identity or authorisation.
- 5.3.21 I suggest that the current regime allowing private sector agencies to make a reasonable charge, as set out in section 35, should provide the basis for any charging by public sector agencies in the relevant circumstances. This might be achieved by amending section 35 or 36. The first would be appropriate if public sector agencies are to be generally permitted to make such charges for overseas requests from foreigners, the latter if an agency needs to make out a special case. Alternatively the no-charging rule could be left in place to await to see if a problem develops.

¹⁴ Submissions L9 and S36.

¹⁵ Although this might be viewed as discriminatory on the basis of national origin or citizenship, I expect that such a distinction would be considered justifiable.

“The Insurance Council would have no objection to overseas based individuals making requests for their personal information, provided the fact that they were overseas would not add compliance costs to meeting the access request.

- INSURANCE COUNCIL,
SUBMISSION L9



**RECOMMENDATION 62**

Public sector agencies should be entitled to make a reasonable charge, of the type permitted by section 35, for making information available to an individual overseas who is neither a New Zealand citizen nor permanent resident.

Adoption (Intercountry) Act 1997

- 5.3.22 The Adoption (Intercountry) Act 1997 implements the Hague Convention on intercountry adoptions. Amongst other things, the Convention provides that States must ensure that children the subject of intercountry adoptions can obtain access to information about their origins.¹⁶ The select committee studying the bill concluded that there were extensive rights of access to information already existing in the Privacy Act and that it was unnecessary to create a special regime in the Adoption (Intercountry) Act. However, the select committee noted my concern that some New Zealand adoptees living overseas might not qualify under section 34 of the Privacy Act if they no longer hold New Zealand citizenship.¹⁷ The committee recommended that there be an exception to section 34 where persons adopted under the Convention make a request for information about that person's origin. This was implemented in section 13(3) of the Adoption (Intercountry) Act which states:

“A person who is adopted in accordance with the Convention may make an information privacy request under the Privacy Act 1993 for information concerning the person's origin, notwithstanding that the person may not be a New Zealand citizen or a permanent resident of New Zealand or an individual who is in New Zealand, and section 34 of that Act shall be read subject to this subsection.”

**RECOMMENDATION 63**

If the general standing requirement in section 34 is removed then section 13(3) of the Adoption (Intercountry) Act 1997 should be repealed.

Parents and children etc

- 5.3.23 The Privacy Act allows individuals or their agents to make information privacy requests.¹⁸ There is no explicit provision for parents to exercise the right of access on behalf of children simply because of their status as guardians. Some have questioned whether this is satisfactory.¹⁹ The questioning is usually by parents and not by young people themselves.
- 5.3.24 Where information is held by a public sector agency it is possible for a parent to request information about a child and to obtain the information as might any other requester under the Official Information Act. However, the parent does not “stand in the shoes” of the child. The request is simply considered under Part II of that Act. There are more grounds for refusing requests under Part II of the Official Information Act than would apply to an information privacy request by the individual concerned. Furthermore, an information privacy request to a public sector agency is free of charge unlike a Part II Official Information Act request.
- 5.3.25 There are provisions in other statutes which enable parents or guardians to obtain information about their children. Typically these are framed around the types of information that are relevant to the duties of parents or guardians in

¹⁶ Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, article 30.

¹⁷ See Report of the Privacy Commissioner to the Minister of Justice in relation to the Adoption Amendment Bill (No 2), July 1996.

¹⁸ Privacy Act, sections 34 and 45.

¹⁹ Note that disclosures may nonetheless be permitted to be made to parents within the discretion of the agency and consistently with principle 11.

“We see no reason why even quite young children should not appoint an agent to make a request on their behalf. Nor is there anything in the Privacy Act to prevent a child or young person making a request in their own right. Of course very young children may not have the capacity. In such cases we favour an amendment to allow a parent, guardian or court-appointed custodian to make a request on behalf of the child.”

- COMMISSIONER FOR CHILDREN,
SUBMISSION L3

caring for their children. For example, parents have certain rights in relation to a child’s educational²⁰ and medical information.²¹ If there is a problem in relation to parents getting access to information about their children one remedy will be the enactment of a specific provision in the appropriate statute rather than creating a general access right under the Privacy Act which would carry significant risks of undermining privacy in some cases.

- 5.3.26 Two prime privacy risks exist in any proposal to allow parents to exercise the access rights of the individual children. The first is that it may undermine the autonomy of children, particularly older children who are quite able to exercise access in their own behalf or to appoint their parents as their agents. A parent might also seek access to information about a child unbeknownst to the child concerned and then withhold that information from the child.
- 5.3.27 The second is that parents may seek access to information in a way that undermines the privacy of their children. As children get older, more independent and develop their own personality, they do, of course, have secrets from their parents. Some are only transitory. Sometimes they confide in outside agencies. There would be circumstances where a parent exercises a right of access ostensibly on behalf of a child but in fact regardless of, or even contrary to, that child’s wishes or best interests. It is clear that the interests of a parent and child can diverge. Sometimes those interests are in conflict. It would be risky to create a regime where the parent could invariably exercise entitlements conferred on their offspring as individuals.
- 5.3.28 Some privacy laws have attempted to allow parents or guardians to exercise the access rights of their children but with safeguards which seek to ensure that the risks are minimised. Most laws which tackle this matter do not stop simply at parents and children and also deal with the position of other individuals who may not be in a position to exercise their access rights. The following illustrates how laws in Hong Kong, Australia and Canada have tackled the matter.
- 5.3.29 The Hong Kong privacy law provides that a data access request may be made by “an individual or a relevant person on behalf of an individual”.²² “Relevant person” in relation to an individual means:

- “(a) where the individual is a minor, a person who has parental responsibility for the minor;
- (b) where the individual is incapable of managing his own affairs, a person who has been appointed by a Court to manage those affairs;
- (c) in any other case, a person authorised in writing by the individual to make a data access request, a data correction request, or both such requests, on behalf of the individual.”²³

The provision does not explicitly address the risks earlier discussed. It appears that access rights of relevant persons coexist with the rights of the individuals on whose behalf they act.²⁴ Any protection from the risks mentioned would have to be found in an interpretation of the phrase “on behalf of” the individual. Commentators have suggested that “on behalf of” would justify, if not actually require, an agency to refuse access to a parent where the data had been

²⁰ See Education Act, section 77.

²¹ See Health Act 1956, section 22F. A parent or guardian is, for the purpose of this section, the representative of a child under 16. The provision is subject to rule 11(4) of the Health Information Privacy Code 1994.

²² Personal Data (Privacy) Ordinance 1995 (Hong Kong), section 18(1).

²³ Personal Data (Privacy) Ordinance 1995, (Hong Kong), section 2(1).

²⁴ Berthold and Wacks, *Data Privacy Law in Hong Kong*, 1997, page 162.

“An amendment might clarify the issues surrounding the provision of school reports, although any amendment would need to take account of the fact that a parent’s rights to information should not override an older student’s wishes.”

- MINISTRY OF

EDUCATION, SUBMISSION L11

collected from a child on the basis of confidentiality.²⁵ The same commentators criticise the provision as placing agencies in a difficult position to adjudicate on parent-child disputes without explicit statutory guidance.

5.3.30 The Health Records (Privacy and Access) Act 1997 of the Australian Capital Territory provides that:

“Where the consumer is under 18 years of age, the right of access is exercisable:

- (a) if the consumer does not have the status under this Act of a young person - by the consumer personally; or
- (b) in any other case - on behalf of the consumer by a guardian of the consumer.”²⁶

The ACT law defines “young person” to mean:

“A person under 18 years of age, other than a person who is of sufficient age, and of sufficient mental and emotional maturity, to:

- (a) understand the nature of a health service; and
- (b) give consent to a health service.”²⁷

It goes on to provide that:

“Where the consumer is a legally incompetent person, the right of access is exercisable on behalf of the consumer by a guardian of the consumer.”²⁸

5.3.31 The ACT Act, unlike the Hong Kong Ordinance, addresses the question of autonomy of young people and precludes concurrent access rights between parent and child when a young person is fully able to exercise his or her own rights.

5.3.32 A similar approach is taken in certain Canadian provincial legislation. Typically such provisions would deal not only with requests by young people, but also those who are incapacitated and the persons who may request information in respect of deceased persons.²⁹ Many such provisions still fail to address all the risks mentioned although the Alberta legislation attempts to by stating that any right or power conferred on an individual by the Act may be exercised:

“If the individual is a minor, by a guardian of the minor in circumstance where, in the opinion of the head of the public body concerned, the exercise of the right or power by the guardian would not constitute an unreasonable invasion of the personal privacy of the minor.”³⁰

5.3.33 If provision were to be made it should have at least the following features in my view:

- an explicit indication that the right of access is to be exercised “on behalf of” the young person - the intention is not to give parents and others access to personal information for their own purposes;
- young people who are capable of doing so ought themselves to be able to exercise rights of access without having to await the age of majority;

²⁵ *Ibid*, page 163.

²⁶ Health Records (Privacy and Access) Act 1997 (ACT), section 10(6).

²⁷ Health Records (Privacy and Access) Act 1997 (ACT), section 4.

²⁸ Health Records (Privacy and Access) Act 1997 (ACT), section 10(7).

²⁹ See, for example, Freedom of Information and Protection of Privacy Regulations 1993 (British Columbia), clause 3 and Freedom of Information and Protection of Privacy Act 1994 (Alberta), section 79.

³⁰ Freedom of Information and Protection of Privacy Act 1994 (Alberta), section 79(1)(d).

- concurrent rights of access should not exist for both parents and child where the child is able to exercise rights on his or her own behalf;
- an agency should be able to refuse a request notwithstanding that a person has established status as a parent where it believes it is necessary to protect the privacy of the young person.

It would probably need also to address the issue of incapacitated persons. There may also be a case to limit the scope to certain types of information. For example, it might be inappropriate for a parent to be entitled to have access to information held by an employer about a 17 year old.

- 5.3.34 It would be difficult to develop such a provision. Given the lack of evidence of a problem with parents getting access to the information they need, I do not recommend its inclusion in the Act at this time. I am particularly mindful that the Commissioner for Children’s office did not support such a provision.³¹ There are obviously legitimate needs for parents to have access to information and it is desirable that there be mechanisms for this to occur. In the public sector these already exist in the official information statutes. The existence of a significant problem in the private sector is not apparent. In respect of both educational information and health information there are also already special additional access regimes in place.

5.4 SECTION 35 - Charges

- 5.4.1 Following the earlier regime under the Official Information Act 1982, public sector agencies may not make any charge for dealing with an information privacy request. However, private sector agencies are allowed to make a reasonable charge. The intention was that an ability to charge would minimise the cost to private sector agencies of meeting requests yet ensure that the restrictions upon charging would prevent the cost from becoming an appreciable barrier to individuals who wished to exercise their access rights. The Privacy Commissioner has the power to determine upon investigation in individual cases what is a reasonable charge. There have been relatively few complaints about charges. Due to the paucity of complaints I have so far issued only one case note.³²

- 5.4.2 While the basic position is quite simply expressed - the public sector cannot charge for an information privacy request whereas the private sector may, so long as the charge is reasonable - the section is, in fact, long and complicated. It has been necessary for the section to be quite precise about what can and cannot be charged for.

- 5.4.3 Although I consider that section 35 is largely adequate in substance it is unduly complex in its drafting. It may become further complicated by the proposal to entitle public sector agencies to make a reasonable charge for making information available to an individual overseas who is neither a New Zealand citizen nor permanent resident.³³ I therefore suggest that the opportunity be taken, if possible, to re-enact the entire section in a simplified way.³⁴



RECOMMENDATION 64

Section 35 should be redrafted in a simpler fashion.

Charging for correction

- 5.4.4 A submission was made that no charge should be permitted for correcting information in response to a principle 7 request.³⁵ The present position is that a public sector agency cannot charge for making a correction whereas a private

³¹ See submissions L3.

³² Case note 7844 involved a \$336 charge which was reduced to \$122.65.

³³ See recommendation 62.

³⁴ Use of the proposed new definition of “private sector agency” will assist in simplification. See recommendation 14.

³⁵ See submission K11.

“Any system of charging is likely to be challenged by those who see ability to pay as imposing an unreasonable constraint on a democratic entitlement. But a ‘free’ system of access would be a blank cheque for the use of public resources.”

- DANKS COMMITTEE
REPORT, 1991

sector agency may make a “reasonable charge”. Critics of the ability to charge see it as objectionable that an agency which accepts that information it holds ought to be corrected should be able to charge the individual for the privilege of doing so. Rather, they would say, the agency should be obliged to put the matter right at its own expense. I agree. Indeed, agencies would have a difficult task insisting upon payment for correction in cases of information conceded to be inaccurate since they are bound to address the issue, irrespective of the information privacy request, pursuant to principle 7(2). This precise point was put by the Rt. Hon. David Lange on the second reading of the Privacy of Information Bill when he stated:

“It seems slightly odd that a charge is made for correction of information. It seems to me that, if an agency holds incorrect information, it would be a matter of useful public service and perhaps a payment should be made to the person who drew attention to the inaccuracy of the information. ... It seems to me that there is another principle of privacy that is set out in the legislation: as soon as an agency knows that there is incorrect information, it is a matter of law in terms of the bill that it has to correct it. Therefore I suggest to the Minister that it is a total waste of time to put in a provision for charging someone to correct information, because the agency must, when it knows that the information is incorrect, change it. All that a person needs to do is not to make a complaint, but just to draw the agency’s attention to the fact that the information is wrong - require it to do nothing except follow the law. There can be no possibility of that person’s receiving a charge. It is incumbent on the agency to correct it.”³⁶

- 5.4.5 Indeed, the absurdity can be taken one step further. If the individual concerned requests a private sector agency to make a correction a charge may be made. If the individual asks a friend to request the agency to make the correction no charge may be made. However, if the correction is not made the individual concerned may still lay a complaint that the agency has breached principle 7(2) in the circumstances.
- 5.4.6 Accordingly, I recommend that section 35(3)(b)(i) be repealed so that no charge may be made for the correction of information in response to an information privacy request. I do not expect this to cause any difficulty for agencies since a charge is hardly ever made. However, I suggest that section 35(3)(b)(ii) be left in place so as to allow a reasonable charge to be made, in appropriate circumstances, for the attachment of a correction statement, which often arises where the agency does not accept that the information is incorrect - and therefore differs from correction itself.³⁷ The attachment of the statement is sometimes seen as a way of resolving a complaint whether there are irreconcilable views on the accuracy of the information. However, there are rare cases where a requester might place unreasonable burdens on an agency if a charge could not be made. I have in mind the case of persons who may present excessively long statements or who repeatedly submit correction statements to “update” information on file.



RECOMMENDATION 65
Section 35(3)(b)(i) should be repealed.

³⁶ NZPD, 20 April 1993, page 14726.

³⁷ Sometimes the correction statement process is used where it *is* conceded that information is incorrect but it is not feasible, or is undesirable, to change the information held itself.

“Public sector agencies should have the option to charge. Public sector agencies work in competitive, cost recovery environments and not being able to charge conflicts with these requirements.”

- WELLINGTON CITY COUNCIL,
 SUBMISSION G12

Misuse of access right

- 5.4.7 One rationale for the right of private sector agencies to impose reasonable charges for making information available was expressed by Hamish Hancock, the Chair of the Justice and Law Reform Subcommittee studying the Privacy of Information Bill, as follows:

“Agencies, businesses, and private organisations need to be protected against people who make excessive or vexatious demands on them. Having the power to charge for giving access to information is a protection that I believe those organisations will welcome.”³⁸

- 5.4.8 The relatively few complaints about charging probably indicates that the regime is working reasonably well. In some other jurisdictions, particularly those which provide for standard charges but allow requesters to seek a waiver, there has been a high volume of charging complaints (with attendant delay in granting access until the matter is resolved). My impression (not contradicted by evidence in submissions) has been that individuals have generally been responsible in their requests and that private sector agencies have been equally responsible in the levying of charges for making information available. Had this not been the case I would have expected to receive more complaints involving refusals based upon “frivolous, vexatious or trivial” grounds (section 29(1)(j)) or concerning excessive charges (section 35). This has not happened.

- 5.4.9 It has sometimes been suggested that requesters can “misuse” the right of access by submitting numerous or repeated requests for little purpose except perhaps to fulfil an obsession or to cause an agency inconvenience. There is little evidence of this being a problem in New Zealand in relation to the personal information access right.³⁹ In the public sector personal access rights have existed for between 10 and 15 years and little problem has been detected. In the private sector the ability to make a reasonable charge for the making available of the information would generally discourage most such misuse. In both the public and private sectors agencies may also refuse a request if it is frivolous or vexatious or the information requested is trivial.⁴⁰ The submissions did not disclose any significant problem of misuse of the access rights although the NZ Employers Federation suggested in a covering letter to submission L12 that:

“A matter of concern is the ability for the Privacy Act to be used as a tactical industrial weapon. Employees, have at times, put in myriad requests for personal information, for no better reason than a desire to cause disruption. This is an abuse of the Act of which the Commissioner needs to be aware.”

- 5.4.10 Although not common, such things may happen on occasion. Certainly, such incidents have not manifested themselves in any large number of complaints to my office (which might have been expected if an employer’s response was to impose a charge or to refuse a request as “vexatious”). I suspect that such access is simply granted or the issue is forgotten as the industrial dispute is resolved. Such requests may not be motivated by desire to be vexatious but in order to obtain information relevant to the industrial dispute - albeit at an inconvenient time for the employer. It should be added that trade unions and employee

³⁸ (1993) 71 NZPD 1413.

³⁹ It is more likely that such “misuse” may occasionally arise with Official Information Act requests which need not focus upon information about the individual concerned and which can be duplicated and sent to multiple agencies at the same time. Ontario, for example, has on occasion been plagued by requesters abusing the process with, for example, one person filing 1131 appeals simply to “have fun” at the expense of government agencies. See Information and Privacy Commissioner/Ontario, *Annual Report 1995*, page 12 and *Annual Report 1996*, page 12.

⁴⁰ See section 29(1)(j).

“The ability of the private sector to charge for access and correction of information should be withdrawn. It is unreasonable that the individual should be liable for costs of access to and correction of information in the employment context when they have no choice but to provide such information in the first place. We have had examples where cost has been a significant disincentive to employees accessing information held about them.”

- FINANCE SECTOR UNION,
SUBMISSION WX1

representatives also allege that employers sometimes fail to live up to their obligations to process access requests (especially when access is being sought urgently in the prospect of bringing a personal grievance).

- 5.4.11 The important thing is that there is no empirical evidence to support any claim of significant misuse of the right of access. Although there are some isolated incidents of complainants who have pursued more than one complaint against an agency, or several agencies, through my office and in one case to the Tribunal,⁴¹ I do not have evidence of a real problem. However, if there were a problem it would become acute at the agency, not review, level and I may not have heard of it. While it was not substantiated in submissions I do not discount the possibility of a small problem existing or developing in the future.
- 5.4.12 I canvassed in the discussion paper the possibility of adopting an approach taken overseas. In at least two Canadian provinces agencies can apply to a Commissioner for an exemption entitling them to disregard a particular access request, or a series of requests, received from a particular individual. For example, section 53 of the Freedom of Information and Protection of Privacy Act of Alberta states:
- “Power to authorise a public body to disregard requests
If the head of a public body asks, the Commissioner may authorise the public body to disregard requests under section 7(1) that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body or amount to an abuse of the right of access.”⁴²
- 5.4.13 The quoted provision allows a Commissioner to consider the pragmatic effects of such a pattern of requests and their genuineness. The provision is directed towards some of the same concerns that the frivolous, vexatious or trivial, grounds for withholding in section 29(1)(j) of the Act are directed - but on a general rather than case by case basis. The power also has some similarities to the law concerning vexatious litigants. When declaring a litigant vexatious, a court may require the person to obtain leave before issuing any further proceedings. The British Columbia Commissioner under a similar power has, in several cases, authorised agencies to disregard all requests from named respondents for a period of one year. In one case he obliged the agency to deal with only one request for a further year.
- 5.4.14 An exemption power of this type, if adopted, would be directed towards the very few individuals who misuse an access right to the complete exasperation of the agencies involved. Often the work involved with processing such requests is out of all proportion to their importance. Frequently the resource directed to the few is expended to the detriment of many genuine requesters awaiting access to information.
- 5.4.15 There was support amongst people making submissions for a provision like that existing in Alberta and British Columbia. Of the 13 submissions which addressed this issue, 9 were in support.⁴³ Four submissions opposed the proposal each taking the view that section 29(1)(j), allowing for refusal of requests, was adequate for the purpose of addressing any problems.⁴⁴
- 5.4.16 I believe that the provision has merit and could work effectively in New Zealand in the tiny number of cases where there is an abuse of the right of access.

⁴¹ In the case of *Mayes v Owairaka (No. 2)*, CRT decision 25/96, 21 October 1997, an award of \$500 costs was made against the *successful* plaintiff as the case had “imposed a burden on those connected with the school staff and the Board disproportionate to the outcome.”

⁴² Note that the Alberta law combines features of both our Privacy Act and Official Information Act - but solely with public sector coverage. Therefore the power is relevant to third party requests as well as personal access requests.

⁴³ See submissions N2, N4, N7, N8, N10, N11, N12, S36 and S52.

⁴⁴ See submissions N3, N9, N15 and S42.

Consideration would have to be given to whether the function should be conferred on the Commissioner or the Tribunal. A variant on the proposal would be to enable a public sector agency, on such an application, to make a reasonable charge for giving such access notwithstanding section 35.⁴⁵



RECOMMENDATION 66

The Commissioner or the Tribunal should be empowered to exempt an agency from having to deal with a particular individual’s access request for a fixed period where it can be shown that the individual has lodged requests of a repetitious or systematic nature which would unreasonably interfere with the operations of the agency and amount to an abuse of the right of access.

Charging guidelines

5.4.17 There is an express link between sections 35 and 46(4)(b) of the Act. That latter provision provides that a code of practice may:

“In relation to charging under section 35 of this Act:

- (i) set guidelines to be followed by agencies in determining charges;
- (ii) prescribe circumstances in which no charge may be imposed.”

5.4.18 So far I have not issued a code of practice which sets guidelines to be followed by agencies in determining charges. However, in the Health Information Privacy Code 1994 I utilised the power to prescribe the circumstances in which no charge may be imposed.⁴⁶

5.4.19 There is also a link between section 35 and the provisions dealing with complaints, most notably section 78. That provision, discussed at paragraph 8.16, provides that in respect of complaints concerning the reasonableness of charges, a determination by the Commissioner is “final and binding”. These are the only types of complaints for which the Commissioner can actually issue a binding determination. In other complaints where an investigation is complete, and settlement has not been achieved, the Commissioner merely issues an opinion which may be persuasive but not binding. Complaints can thereafter be taken to the Complaints Review Tribunal (other than charging complaints).

5.4.20 In the discussion paper I canvassed the possibility of creating a special guideline power in respect of charging. This would involve transposing the existing power to issue codes of practice on the subject into a separate type of binding instrument. To date codes of practice have not appeared to be a suitable vehicle for charging complaints since they have been issued to apply only to a sector or agency, whereas charging guidelines would likely need to apply across the board. Guidelines might offer a mechanism for providing greater certainty to requesters and agencies alike.

5.4.21 The proposal for charging guidelines received a mixed response from people making submissions.⁴⁷ Those opposed to the idea anticipated that such guidelines might be overly restrictive or prescriptive and that it might be difficult to anticipate the full range of individual circumstances. In my view, many such criticisms could be met by appropriately written guidelines.⁴⁸ Some saw it as an

⁴⁵ If this variant finds favour the resulting provision might appropriately be included in section 36.

⁴⁶ Clause 6 of that code circumscribes the ability of private sector health agencies to make a charge in respect of an information privacy request.

⁴⁷ Thirteen submissions supported the notion of guidelines (L2, L4, L7, L14, L19, S2, S11, S25, G17, S6, S21 S36 and S46). Six were opposed (L9, L10, L12, L23 and G19). Three took no position but were generally sceptical.

⁴⁸ Guidelines could specify that if a charge were to be made within a specified formula it would be considered in all cases to be “reasonable”. The guidelines could be written in such a way that the reasonableness of charges exceeding or outside the formula would have to be shown in the event of a complaint thereby avoiding a complete or inflexible restriction.

“The Association supports the suggestion that the Commissioner be empowered to issue guidelines on charging for access to information. Any guidelines should, however, ensure consistency with the recovery permitted by state agencies (for example under the Official Information Act) and ensure that a fair and reasonable charge for time and copying costs may be levied.”

- NZ BANKERS’

ASSOCIATION, SUBMISSION S25



inappropriate role for the Commissioner to issue charging guidelines. However, this ignores the fact that the Commissioner already has an ability to deal with charging by code of practice.

- 5.4.22 I have not been in a hurry to issue charging guidelines under the existing power I have in respect of codes of practice. I anticipated that it would be preferable to handle a number of complaints to build up expertise in the issues before developing any such guidelines. I have been surprised by the fact that charging complaints are so infrequent. The question for guidelines was raised for discussion in anticipation that agencies may wish to have greater guidance on the subject. However, in light of the consultation on this matter I do not recommend the creation of any further statutory guideline making power on the subject for the time being. I will keep the matter under consideration and, if appropriate, issue a code dealing with the matter or offer non-binding guidelines.

5.5 SECTION 36 - Commissioner may authorise public sector agency to charge

- 5.5.1 Although public sector agencies cannot generally make any charge for dealing with an information privacy request, the Privacy Commissioner has the power to authorise a particular agency to make such a charge where the agency satisfies the Commissioner that it is being commercially disadvantaged, in comparison with any competitor in the private sector, by the prohibition upon charging. No such application has yet been made.
- 5.5.2 In some ways section 36 may be seen as a potential inroad into the “no charging” regime in the public sector for personal access requests that had existed since 1983. It had no equivalent in the Official Information Act 1982. However, it is tightly circumscribed and experience to date suggests that the generally free availability of such information is not under threat.
- 5.5.3 I have earlier recommended that the standing requirement in section 34 be removed so that agencies must respond to information privacy requests from foreigners who are not in New Zealand at the time of the request.⁴⁹ It seems appropriate to permit agencies to recover their reasonable costs in handling such requests. One way of achieving this might be by amending section 36 which would avoid generally undermining the public sector no-charging rule.

5.6 SECTION 37 - Urgency

- 5.6.1 Section 37 requires an individual seeking urgent attention to an information privacy request to provide the agency concerned with the reasons for the urgency. The provision is based upon section 12(3) of the Official Information Act 1982. However, neither Act spells out what is to happen where a request has been identified as urgent. Neither Act imposes more restricted time limits nor indicates that any consequences will be visited upon an agency where the regular time limits are missed even for an urgent request.
- 5.6.2 Failure to spell out the consequences of labelling a request “urgent” is probably less profound in respect of the Privacy Act than for requests under the Official Information Act. If an Official Information Act request is not considered in a timely fashion, the most that will likely happen on review is that access ultimately is required to be given. Under the Privacy Act regime this also will happen but the Complaints Review Tribunal might also award damages for any harm suffered through an “interference with the privacy of an individual”. It might therefore be possible for the individual requester in due course to receive

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“Information held by public sector agencies should continue to be provided to an individual free of charge. Where however the information is to be used by a private sector organisation for clear commercial advantage then the organisation should be expected to pay a contribution to the public sector agency towards the cost of providing the information.”

- CLIVE COMRIE, SUBMISSION G1

⁴⁹ See recommendation 61.

both the information to which he or she was entitled together with damages for any harm suffered as the result of any undue delay in supplying it.⁵⁰ In cases of urgency it would presumably be more straightforward for an individual to show damage and more difficult for the agency concerned to show that it mitigated the damage given that it knew that the request was truly urgent.

- 5.6.3 There would be disadvantages in too precisely spelling out the consequences of identifying a request as urgent. For instance, it may be inappropriate to simply substitute a ten-working day limit in place of the 20-working day limit when the urgency of the case involving a request for a single document may justify same day action. If the regime for dealing with urgent requests was made too rigid it might encourage false claims of urgency to be placed on the “fast track”. On the other hand, it seems unsatisfactory for section 37 to set up a process for identifying urgent requests and then to remain silent on how those must be dealt with.
- 5.6.4 The matter was considered by the Law Commission in its review of the Official Information Act. The Commission’s report did not make any recommendations but did offer some observations based upon the Ombudsmen’s experience. It noted for example that the obligation upon agencies is to respond as soon as reasonably practicable even if this takes longer than requested - some requesters with urgent requests wrongly believe that they may impose a specific timeframe upon an agency to respond.⁵¹
- 5.6.5 The Law Commission also observed the Ombudsmen have issued guidelines on responding to urgent requests in the Official Information Act context. These emphasise that while each case must be assessed on its merits, relevant factors in determining what is reasonably practicable in the context of urgent requests include:
- the volume of information which must be considered;
 - the nature of the information requested and how it is held;
 - what consultations are necessary before making a decision on the request;
 - the specified reasons for urgency; and
 - whether according priority to an urgent request would unreasonably interfere with the agency’s operations.⁵²
- 5.6.6 While wishing to avoid precisely or rigidly spelling out the consequences of identifying a request as urgent, I consider that there may be merit in amending section 37 to make it clear that in cases where a request for urgency has been substantiated, an agency is expressly obliged to make reasonable endeavours to process the request with priority. On review, this would give scope also for considering whether “reasonable endeavours” were undertaken. An onus could be placed on agencies on review to show that information which was supplied after delay was indeed provided “as soon as reasonably practicable” - which is the existing obligation.
- 5.6.7 If change is to be made there may be merit in also considering the desirability of similarly changing the official information statutes.



RECOMMENDATION 67

Section 37 should be amended to make it clear that in cases where a request for urgency has been substantiated, an agency is obliged to make reasonable endeavours to process the request with priority.

- 5.6.8 According an urgent request priority would mean other requests in a queue take longer to be processed. In agencies which receive few requests this will not be a problem. However, in large government departments, or private sector

⁵⁰ See Privacy Act, section 66(4).

⁵¹ Law Commission *Review of the Official Information Act 1982, 1997*, paragraph 161.

⁵² *Ibid*, paragraph 162 and Office of the Ombudsmen, *Practice Guidelines No. 8*, April 1995.

“This question is raised in every seminar. Participants want to know what are the determining factors for considering a request urgent and how long should they take once a request is deemed urgent.”

- KATHRYN DALZIEL,

SUBMISSION S6

agencies having substantial personal information holdings, this can mean that requests that might otherwise be dealt with on a “first come first served” basis may take substantially longer to be completed where no case is established for urgency. However, two points occur to me:

- not all requests carry the same degree of priority as section 37 acknowledges - genuinely urgent requests appropriately should jump the queue and this will not necessarily seriously harm the interests of other requesters if the resultant delays are not excessive;
- agencies with large volume of requests do need to devote sufficient resources to handling the work satisfactorily and efficiently - agencies should allow some capacity to handle urgent requests.

Urgent cases on review

5.6.9 It will be apparent from elsewhere in this report that there is an excessively long queue in my own office for complaints. It might be thought that an individual needing access urgently to particular information will have “justice denied” if they come to my office and are faced with a 12 month queue to have the matter investigated. I consider that the under resourcing, and the resultant delays in having complaints investigated, is entirely unsatisfactory for *all* complainants - and indeed respondents - and not simply those who have an urgent information privacy request. However, my office does undertake a preliminary filtering of the complaints received and will bring cases substantiated as urgent to near the front of the queue. It is worrying that as the gap between available resources and volume of complaints widens there is the risk that my investigators could become almost fully engaged on urgent requests leading to even slower movement in the remainder of the queue.

5.6.10 There is the ability within the structure of the Act for an urgent request to be processed through an agency, and then my office, in a way that could then, if necessary, be taken to the Complaints Review Tribunal with great rapidity. This has not tended to happen as yet but the mechanisms do exist. In a recommendation affecting section 92 I seek a change which will better provide for urgent cases.⁵³ Furthermore, clause 7(2) of the Complaints Review Tribunal Regulations 1996 makes provision for rapid proceedings by allowing the Chairperson of the Tribunal to abridge the time for the filing of a statement of reply in access reviews where the “urgency” of the case so requires.

5.7 SECTION 38 - Assistance

5.7.1 Section 38 imposes a duty on agencies to render reasonable assistance to individuals in making their information privacy requests.

5.7.2 Virtually all information access laws contain such a provision since requesters will need a “helping hand” from time to time and the agency holding the information is in the best position to provide that. Indeed, the provision of assistance is frequently of mutual benefit since the agency also has an interest in a request being processed with the minimum of bother.

5.7.3 I have frequently observed, as have Ombudsmen, that if agencies took more care in discussing requests for information with requesters at the time of request, many requests which through misunderstandings are declined, could be satisfied. An agency which goes out of its way to provide assistance at the time that an individual is formulating, or has just made, a request will often reap the benefit through enabling requesters to more precisely define the scope of their requests. Frequently this can involve the limitation of a request to a particular fact or document thereby relieving the agency of a more burdensome search and collation concerning whole categories of information or documents.

⁵³ See recommendation 114.

Assistance and charging

- 5.7.4 It might be noted at this point that under section 35(4) a private sector agency may make a reasonable charge for the provision of assistance. Therefore, there is some scope for cost recovery for agencies outside the public sector. While some might fear that this lends itself to exploitation for the recovery of costs incurred in unwanted, expensive, excessive or over elaborate “assistance” this has not appeared to be the case as yet. Private sector agencies have shown a great deal of responsibility within the latitude afforded by the law and, of course, the provision for complaint if a charge is not reasonable provides an appropriate safeguard.

Assistance and urgency

- 5.7.5 Commentators on section 38, and the equivalent provision in the Official Information Act, have highlighted the link between the duty to provide assistance and the provision concerning urgency.⁵⁴ They have suggested that the duty to comply includes advising a requester who seeks information urgently that the requester needs to give reasons for urgent consideration but probably does not go as far as to require the agency to advise the requesters of their ability to seek the information urgently. While I do not recommend any change to the section at this stage to make the matter explicit, I would encourage agencies to be as helpful as they can in that regard and tell requesters of the need to ask for a request to be treated with urgency if the circumstances appear to warrant it.

5.8 SECTION 39 - Transfer of requests

- 5.8.1 Section 39 imposes a duty on agencies to transfer requests “promptly”, and in any case within ten working days, to another agency where the personal information requested is believed either to be held or to be more closely connected with its functions or activities.

Where individual does not want transfer

- 5.8.2 It may be desirable to amend the procedure established in section 39 so that an agency is relieved from the obligation to transfer a request in circumstances where it has good reason to believe that the individual does not wish the request to be transferred. The agency would, of course, have to inform the individual accordingly. This would address the privacy issue which occasionally arises whereby an individual deliberately chooses to ask one agency for information not wishing it to be known to a second agency that the request is being made. An example would be where the requester is an employee of an agency and fears that he or she might be labelled a “troublemaker” if known to be seeking out information about him or her which concerns the activities of his or her own employer.
- 5.8.3 I do not intend that where a request is received by agency X for information which is believed to be more closely connected with the functions or activities of agency Y (the ground for transfer in section 39(b)(ii)) that agency X be obliged to make information available in the circumstances where transfer is presently the appropriate course. Rather, in circumstances where, for example, the requester has said “I do not want agency Y to know of my request” I would like the section amended so that this very outcome is not required by law. Instead, I anticipate agency X explaining to the requester that really only agency Y can appropriately release the information and that normally the request would have been transferred but this has not been done so as to respect the requester’s wishes. The requester would be advised to ask agency Y directly for the information if he or she wishes to proceed.

⁵⁴ See *Freedom of Information in New Zealand*, pages 75-76, and *Privacy Law and Practice*, paragraph 1038.4.

**RECOMMENDATION 68**

Section 39 should be amended so that:

- (a) an agency is relieved of the obligation to transfer a request in circumstances where it has good reason to believe that the individual does not wish the request to be transferred; and
- (b) the agency duly informs the requester, together with information about the appropriate agency to which any future request should be directed.

5.8.4 A similar issue arises under the Official Information Act and consideration could be given, at some appropriate time, to the desirability of changing that Act.

5.9 SECTION 40 - Decisions on requests

5.9.1 Section 40 provides that the agency to which an information privacy request has been made, or transferred, must decide whether the request is to be granted and, if so, in what manner and for what charge. This decision is to be made as soon as reasonably practicable and in any case within twenty working days after the day on which the request was received.

What is the “time limit”?

5.9.2 There is a link between the time limits set out in section 40 and section 66 which defines “interference with privacy” for the purposes of complaints and remedies. In particular, section 66(3) provides that failure to comply with the “time limit fixed by section 40(1)” is deemed for the purposes of section 66(2)(a)(i) to be a refusal to make information available. If the Commissioner or Tribunal is of the opinion that there is no proper basis for a decision to refuse to make information available it will amount to an “interference with the privacy of an individual” for the purposes of Part VIII of the Act.

5.9.3 The phrase “time limit fixed by section 40(1)” might have one of several meanings:

- the full phrase included in section 40(1) “as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received by that agency”; or
- just the latter part of the phrase, that is “not later than 20 working days after the day on which the request is received by that agency.”

5.9.4 It seems to me that the primary obligation is to make information available “as soon as reasonably practicable”. The reference to 20 working days is to the outer limit. If the obligation is to make information available earlier, then it does not seem in keeping with the intention of the Act for the deemed refusal, and therefore remedies, to apply only from the time at which the outer limit is reached. In many circumstances the difference will not be critical and therefore the issue has not yet manifested itself in practical problems before me or the Tribunal. However, as a matter of principle it is important since the Act envisages access being given as soon as practicable and consistent delay until 20 working days is reached will undermine that statutory objective.

5.9.5 In certain urgent cases it may be critical for information to be made available by a particular date. If it is practicable for an agency to provide the information by that date, and it does not do so, then the failure to take the necessary decision might be important in respect of remedies. For example, if the delay can be characterised as a “deemed refusal” it will be possible to promptly lodge a complaint with my office even though the matter is still within the first 20 working days of the request having been lodged. In some cases, involving public sector agencies, the individual could also lodge urgent proceedings before the courts. After the event, it may be that the availability of damages will turn upon whether information made available within 20 working days had indeed

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“We are surprised that there should be a time delay in providing access except where there is a charge. The practice in the public service has been to provide access/ information at the time of the decision, or thereafter at a time to suit the individual. The ‘decision’ has therefore been treated as meaning provision of the information/ access. It may be that if this is a problem with the Privacy Act there needs to be some amendment to the section to align the ‘decision’ and ‘access’.”

- STATE SERVICES COMMISSION,
SUBMISSION S11

been made available “as soon as practicable”. Although for most ordinary cases the difference will not be important it may be that in some instances, for reasons of urgency, the difference is critical in obtaining compensation for harm caused by the delay.

- 5.9.6 However, there are some arguments which might favour interpreting the phrase “time limit” as meaning 20 working days after the date upon which the request was received. Amongst these are:
- the phrase “time limit fixed” may connote a clearly fixed point which is difficult to ascribe to the point “as soon as reasonably practicable”;
 - the reference to “time limits” first appeared in the Official Information Act following a 1987 amendment which introduced the 20 working day reference;⁵⁵
 - the time limits provision should be utilised for failure to meet the clear outer limits for making a decision whereas section 66(4) (the “undue delay” provision) is more appropriately used for cases involving the making of a decision later than would have been “as soon as reasonably practicable”.⁵⁶ This appears to be supported by the authors of *Freedom of Information in New Zealand* where they state:

“The OIA originally imposed no time limits. Decisions had to be made ‘promptly’ or ‘as soon as reasonably practicable’. This language is still retained although the Act now imposes maximum time limits for decisions.”⁵⁷

- 5.9.7 It is necessary to clarify the issue. It is possible to simply await the Complaints Review Tribunal to make a decision on a relevant complaint to provide such guidance. This is an option to be considered. However, it may be a long time before a suitable test case comes forward. In the meantime, there is a degree of uncertainty for agencies in considering their obligations and risks under the provision and I will have to review many more cases in the interim simply on the basis of my interpretation. Many people will be fobbed off by an agency’s assertion that it has 20 working days to respond. The effect of the prevalent belief that agencies have 20 working days to respond, rather than being obliged to respond “as soon as practicable”, is detrimental to the operation of the Act.



RECOMMENDATION 69

Consideration should be given to clarifying the meaning of the phrase “time limit fixed” in section 66(3) so as to emphasise the primary obligation to give access “as soon as reasonably practicable”.

Subsections (3) and (4)

- 5.9.8 Subsections 40(3) and (4) were transferred from the Official Information Act 1982.⁵⁸ They require that a chief executive of a government department may either make the decisions on information privacy requests in person or delegate them to an authorised officer or employee, and that they may consult with anybody else about the decisions.
- 5.9.9 It was suggested in the discussion paper that these procedural provisions, being matters of the internal administration of such departments, may not be necessary or appropriate in the Act. Fifteen submissions were received in reply to a question asking whether section 40(3) and (4) could be repealed without affecting the operation of the Privacy Act. Fourteen answers replied that the

⁵⁵ Official Information Act 1982, section 28(4).

⁵⁶ This is not to suggest that section 66(4) is to be limited to such delays - the subsection is relevant to delays that occur *after* the taking of the decision.

⁵⁷ *Freedom of Information in New Zealand*, 1992, page 80.

⁵⁸ Official Information Act 1982, sections 15(4) and (5).

subsections could safely be repealed.⁵⁹ Of particular note, given that the subsections deal with administrative provisions concerning Government departments, both the Ministry of Justice and State Services Commission agreed that the subsections could be repealed.⁶⁰

5.9.10 A similar issue in relation to sections 15(4) and (5) of the Official Information Act was recently examined by the Law Commission.⁶¹ The Commission noted the origins of the Official Information Act provisions which had been included in 1987 amendments as a result of concerns expressed about that Act's operation in its early years. It also examined the provisions in practice and appeared to find them largely unnecessary in today's conditions. The Law Commission recommended that sections 15(4) of the Official Information Act should be repealed but that section 15(5) should be retained and perhaps broadened.

5.9.11 I note the Law Commission's recommendation to repeal section 15(4) of the Official Information Act and take the view that the equivalent section 40(3) of the Act should also be repealed. However, given the somewhat different considerations in the Privacy Act 1993 to the Official Information Act I do not see the need to retain, or broaden, section 40(4). I recommend its repeal also.



RECOMMENDATION 70

Section 40(3) and (4) should be repealed.

5.10 SECTION 41 - Extension of time limits

5.10.1 Section 41 provides for extending the time limits for making decisions on requests (section 39) or for transferring requests to another agency (section 40). Extension is permissible if:

- the request is for a large quantity of information or necessitates a search through a large quantity of information, and meeting the original time limit would unreasonably interfere with the operations of the agency; or
- consultations necessary to make a decision on the request are such that a proper response cannot reasonably be made within the original time limit.

5.10.2 The section provides that the extension of the time limit is made by the agency itself and is given effect to by giving or posting notice of the extension to the requester within twenty working days of receipt of the request. The notice is required to:

- specify the period of the extension;
- give the reasons for the extension;
- state that the requester has the right to complain to the Commissioner about the extension; and
- contain such other information as is necessary.

5.10.3 The provisions governing extension of time limits are modelled upon those in the Official Information Act. The Law Commission recently reviewed the provision for extension of time limits in that Act and noted that not all requests can be answered in the prescribed period. A power of extension is required for some large or difficult requests. It noted that the manner in which legislation expresses such a power presents several questions. The questions posed by the Law Commission would seem to have as much relevance in this context. The questions were:

- who should exercise the power in the first instance?
- on what grounds should it be exercisable?
- should the power be capable of being exercised more than once?

⁵⁹ See submissions L4, L5, L7, L9, L12, L13, L17, L19, L22, S11, S13, S18, S36 and S42.

⁶⁰ See submissions L22 and S11 respectively.

⁶¹ Law Commission, *Review of the Official Information Act 1982, 1997*, paragraphs 193-205.

- should there be an outer time limit on it?
- what provision should there be for review?⁶²

5.10.4 The Law Commission considered that the answers to the first and last questions should, in respect of the Official Information Act, be as at present. This also is my conclusion in respect of the personal access regime in the Privacy Act. That is to say, the agency which is handling the request should make the decision and give notice to the requester of the extension, the reasons for it, and the right to complain to the Privacy Commissioner: section 41. Complaints are handled by the Privacy Commissioner about extensions: section 66(2)(a)(v). I do not favour the approach provided for in some overseas access laws whereby an extension is granted or approved by a Commissioner.⁶³

Multiple extensions

5.10.5 The generally accepted interpretation of section 15A of the Official Information Act, and therefore presumably section 41 of the Act, is that the time for response can be extended only once - that action must be taken within 20 working days of receipt of the request. The Law Commission in its review agreed that the power should be limited in that way, and although it considered the possibility that something unforeseen might arise in the course of the extension requiring a further extension, it had no evidence of this being a problem in practice. The Law Commission did not propose any change to section 15A to allow multiple extensions of the time limit for responding to requests.⁶⁴ I know of no problem in respect of the Privacy Act suggesting a need for multiple extensions and also recommend no change.

Grounds for extension

5.10.6 The grounds for extension are the same in the Official Information Act and in the Privacy Act. The Law Commission considered whether there should be any further grounds. In particular it noted that there was a further ground in section 29A of the Official Information Act for the extension of time limits for compliance with requirements of the Ombudsmen. Section 93 of the Act corresponds to section 29A. It too has an additional ground permitting extension of a time limit for compliance with a requirement of the Privacy Commissioner, namely where:

“(c) The complexity of the issues raised by the requirement are such that the requirement cannot reasonably be complied with within the original time limit.”

5.10.7 The Law Commission recommended that the complexity of the issues raised by the request should be added to the grounds for an extension of time under section 15(1).⁶⁵ I agree that a similar recommendation should be made in respect of section 41.



RECOMMENDATION 71

Complexity of the issues raised by a request should be added to the grounds for an extension of time under section 41(1).

⁶² *Ibid*, paragraph 174

⁶³ See, for example, Freedom of Information and Protection of Privacy Act 1994 (Alberta), section 13(1) and Freedom of Information and Protection of Privacy Act 1992 (British Columbia), section 10(1), each of which provides for extension of time limits “with the Commissioner’s permission”. The British Columbia Information and Privacy Commissioner handled 107 requests by public bodies for time extensions in 1995/96 (source: Office of the Information & Privacy Commissioner of British Columbia, *Annual Report 1996/97*, page 55).

⁶⁴ Law Commission, *Review of the Official Information Act 1982, 1997*, paragraph 176.

⁶⁵ *Ibid*, paragraph 183.

Outer time limit

5.10.8 The Law Commission did not directly answer its question as to whether there should be an outer time limit placed upon extension. However, clearly the Commission was of the opinion that no such express limit was needed since no recommendation was made. I make no recommendation to place an express outer limit on the extension. At present, no problems have been uncovered justifying the need for such a change. Furthermore, the general obligations, and the provision for complaint, would seem to provide appropriate safeguards against excessive and unnecessary extensions.

“As soon as reasonably practicable”

5.10.9 In the discussion of section 40 I outlined the risks to access entitlements of an attitude that a response could be made within the outer limits prescribed by the Act rather than, as intended, “as soon as reasonably practicable”. In line with my recommendation in respect of section 40,⁶⁶ section 41 should also be revised. In particular, I suggest that the notice advising an individual of an extension of time limits should be given as soon as reasonably practicable not simply within the outer time limit.

**RECOMMENDATION 72**

Section 41(3) should be amended by replacing the phrase “within 20 working days” with “as soon as reasonably practicable, and in any case not later than 20 working days”.

5.11 SECTION 42 - Documents

5.11.1 Section 42 sets out the ways in which information contained in a document may be made available. Unless there are good reasons for providing the information in another form, the information is to be made available in the way preferred by the person requesting it. I have recommended elsewhere that the marginal note to this section be changed from “documents” to a more informative “making documents available”.⁶⁷

5.11.2 The term “document” is defined in section 2. I have recommended that consideration be given to adopting a new definition of “document” in section 2 in conjunction with any redefinition of the term in the proposed Evidence Code.⁶⁸

Origin and operation of provision

5.11.3 Section 42 is closely modelled upon section 16 of the Official Information Act 1982. There have been a number of opinions rendered upon the provision by the Ombudsmen and these have provided guidance to me in the exercise of my complaints function and by agencies in applying section 16. Furthermore, I have considered a number of complaints which have raised issues under section 42 and have reported on one of these in a case note.⁶⁹ In that case, the agency held voluminous files relating to the individual stretching back over twenty years. The agency had declined to provide a photocopy of the entire contents, as had been requested, but had instead invited the complainant to view his files and had offered to photocopy any parts that he wished to take away. I found this arrangement to have been reasonable in the circumstances.

5.11.4 The provision has also been the subject of judicial consideration in at least one case. The District Court considered whether or not making information available would impair efficient administration in *Police v Evans*.⁷⁰ In that case, the

⁶⁶ See recommendation 69.

⁶⁷ See recommendation 2.

⁶⁸ See recommendation 11.

⁶⁹ Case note 7602.

⁷⁰ [1996] DCR 65.

defendants applied, pursuant to their right to personal information under the Privacy Act, for tape copies of audio recordings that had been obtained by interception warrants. The defendants had been charged with a number of offences of receiving, breaking and entering, and conspiring to break and enter. The Police transcribed 508 evidential telephone conversations taken from 345 tapes, and this written transcription was proposed to be supplied to the defendants. Moreover, the Police were prepared to permit counsel, presumably with clients present if requested, to listen to the actual tapes at the police station. However, the defendants requested that copies of the personal information be made available in the form of actual audio recordings. The judge considered the issue, and other issues relating to access to the information, and held that the Police had satisfied the requirement of section 42(2)(a).

- 5.11.5 The provision on documents has as its origin a clause in the bill prepared by the Danks Committee.⁷¹ The Danks Report indicated that the clause had been based upon a provision in a 1978 Netherlands law. Given its age, the provision continues to work remarkably well.
- 5.11.6 In the last 20 years there have been remarkable changes in the form of documents and the methods for making them available; one need only consider the developments in photocopying, as a method of everyday reproduction, and faxes, as a method of transmission. Those are not in any sense “cutting edge” technologies. More recently we have the commonplace use and exchange of computer disks and CD-Roms, electronic transmission through private networks and the Internet, scanning of documents, optical character recognition software, voice recognition software - the list could go on.
- 5.11.7 Section 42 has stood the test of time through being expressed in relatively general terms. The phrase “providing the person with a copy of the document” may have begun its life with the notion of carbon copies and mimeographs in mind. However, it just as easily encompasses photocopying, the production of duplicate floppy disks or the printing of “hard copies” from a computer.
- 5.11.8 However, section 42 is not simply intended as a general statement of principle - the methods listed particularise the ways in which information in the form of a document may be made available. For this reason, while retaining the generality of aspects of section 42(1) I have considered whether there may be benefit in particularising some of the forms in which documentation might be made available. However, having studied the provision it is not apparent that it can be successfully improved in that respect. Change in that regard, if it were to occur, would have to appear in the definition of “document”. I have canvassed elsewhere whether that should be made more particular or more general to take account of new technology.⁷²

Loans of documents

- 5.11.9 It has been suggested that the provision should provide that an agency may make a document available by lending it to the individual for a reasonable period. This is already provided for in the Quebec public sector access law.⁷³ While section 16(1)(a) presently speaks of giving the person “a reasonable opportunity to inspect the document”, “inspection” unlike “loan” does not carry the connotation of a requester’s possession of the document for a period.

⁷¹ Committee on Official Information, *Towards Open Government: Supplementary Report*, 1981, pages 71-72. The provision appears to actually give stronger rights to the individual requesting access than had been contemplated in the Danks provision which only provided that the agency giving access would be “guided” by the preference of the person requesting the information.

⁷² See paragraphs 1.4.71 - 1.4.73.

⁷³ An Act respecting Access to Documents held by Public Bodies and the Protection of Personal Information (Quebec), section 13(3).

5.11.10 In many cases an agency may consider a loan of original documents as an unacceptable risk in terms of efficient administration.⁷⁴ The agency could refuse a requested loan under section 42(2)(a) for this reason. However, it should be remembered that the access contemplated is only by the individual concerned and in many cases the individual's and the agency's interests will coincide in having the document on loan protected and duly returned.

5.11.11 I do not see huge scope for the lending of documents in circumstances where access is currently being provided in other ways. Nonetheless, it may be argued that in the circumstances where a loan of documents will suitably meet the needs of both requester and agency the option should be expressly allowed for in the Act. In terms of compliance costs, there may be occasions where an agency will, under this proposal, be able to offer a loan of the original documentation and not have to meet copying costs. In such circumstances the individual may read the documents and, if a copy is to be made, bear his or her own costs. Notwithstanding such considerations I have decided not to recommend adoption of the idea as I fear that some requesters will seek to have a loan of documents in inappropriate circumstances and this alone would attract a measure of dispute and complaints.

5.12 SECTION 43 - Deletion of information from documents

5.12.1 Section 43 provides that where there is good reason for withholding some of the information contained in a document, the other information in that document may be made available by releasing a copy of the document with such deletions or alterations as are necessary.

5.12.2 The process of deletion of information from documents is one means by which the individual right of access is maximised while protecting competing interests. It provides a "middle way" between withholding a complete document, because something in that document may properly be withheld, or releasing that document, to the detriment of the interests protected by the various good reasons for withholding information.

5.12.3 When deleting material from documents it is often a simple matter to strike out certain passages. For practical reasons, the method that I recommend is to make a copy of the relevant page of the document, strike out the material to be withheld with a black marker pen, and then re-photocopy. Unless this final process of re-photocopying the page is undertaken it may be possible that the underlying material remains legible in certain conditions.

5.12.4 For agencies handling a high volume of requests there are also photocopying machines now available which can copy documents with portions enclosed by special marker pen which automatically mask the excised portions. The application of this technology overseas to the task has enabled the saving of time on an otherwise laborious manual task while leaving on file a clean copy of an entire document, with highlighted excised portions, easily amenable to review by a complaints body such as my office. I am aware of such machines being used in the law enforcement and social security contexts in Canada and the USA.

5.12.5 Section 43 was modelled on a provision in the Official Information Act which was itself recommended by the Danks Committee.⁷⁵ The provision has been

⁷⁴ If this ground was not seen as sufficient to refuse a loan in inappropriate circumstances, it could be provided, if the idea was adopted, that any loan is to be made in the sole discretion of the agency. The Act also implicitly allows the agency to place conditions on the loan - section 66(2)(a)(ii).

⁷⁵ See Official Information Act 1982, section 17, and Committee on Official Information, *Towards Open Government: Supplementary Report*, 1981, page 72.

the subject of a variety of opinions from the Ombudsmen which have been of assistance to me in my work. I also have rendered opinions which touch upon the deletion of information from documents and have occasionally included these in case notes. In one case note I described a complainant who wished to obtain access to information contained in two letters alleging that she had been involved with selling drugs at a school. In that case a typed copy of the letter was provided with certain material deleted. Typing was necessary since the handwriting might have identified the informant which was the information appropriately withheld in that case.⁷⁶

5.13 SECTION 44 - Reason for refusal to be given

- 5.13.1 Section 44 provides that where an agency refuses an information privacy request, it must give the requester:
- the reason for the refusal;
 - the grounds in support of that reason if the individual so requests; and
 - information concerning the right to complain to the Privacy Commissioner.
- 5.13.2 Section 44 is a critical provision. In drafting terms, it owes its immediate origin to section 19 of the Official Information Act. However, in terms of the international approach to information privacy it has as its origin the “individual participation principle” in the OECD Guidelines.⁷⁷

5.14 SECTION 45 - Precautions

- 5.14.1 Section 45 requires agencies to take appropriate precautions to ensure that personal information requested under principle 6(1)(b) is released only to the individual to whom it relates or to that individual’s duly authorised agent.
- 5.14.2 This provision is another one derived from the Official Information Act. It is unusual in that it is an area where there has been deviation, perhaps of some significance, from the recommendation of the Danks Committee. The clause recommended by Danks did not include any equivalent of section 45(b)(ii) which anticipates requests being made by an agent of the individual. Instead, the Danks clause would have required agencies to have adopted procedures to ensure that the information intended for an individual “is received only by that individual in person”.⁷⁸
- 5.14.3 The change to permit the making of access requests by agents is not simply a small drafting matter or consequent upon the Danks Committee failing to have considered an issue. Instead, the Danks Committee *expressly* made the following comments:

“This follows the concept of the Wanganui Computer Centre Act 1976 provisions ...

“To minimise the danger that the right of access will be misused by others no provision is made for information to be given to an agent, eg. a relative or a solicitor.”⁷⁹

- 5.14.4 It does not appear that widespread problems have been caused by agents misrepresenting or exceeding their authority in seeking access to information. However, I am aware of cases where persons who have obtained authorisation for information to be released to them to misrepresent themselves as an indi-

⁷⁶ Case note 2438.

⁷⁷ OECD Guidelines, clause 13(c).

⁷⁸ Committee on Official Information, *Towards Open Government: Supplementary Report*, 1981, page 79.

⁷⁹ *Ibid*, page 79.

vidual's agent.⁸⁰ I am also aware of a case where it was alleged that the agent, or authorised person, further misrepresented the position by photocopying an authorisation given for one purpose onto a fax to an agency making it appear that the individual had specifically authorised the access request. In such circumstances, the obligation on agencies to take precautions to ensure that information is only released to the individual or the individual's duly authorised agent become particularly important.

- 5.14.5 While there is naturally a desire by many agencies to be as helpful as possible, and to act upon remote requests, appropriate precautions must be taken to ensure that information only arrives in the correct hands. In the case of a faxed request, for example, it may be appropriate to commence work on assembling the requested information on the basis of such a request but to indicate to the requester that the original signed authorisation must be sighted before the information will be released. Similarly, telephone requests can sometimes be checked by taking the caller's telephone number and ringing back to a number held on file.

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⁸⁰ The difference is that an agency is bound to deal with access request properly made by an agent in accordance with the requirement of the Act whereas disclosure, even to an authorised person, remains in terms of the Act a discretionary matter for an agency.

