

25 May 2016

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Local Government Act 2002 Amendment Bill (No 2)

Purpose

1. We have considered whether the Local Government Act 2002 Amendment Bill (No 2) ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared with the latest version of the Bill (19710/7.0). We will provide you with further advice if the final version of the Bill includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression). Our analysis is set out below.

The Bill

4. The Bill amends the Local Government Act 2002 ('the Act'). It aims to enable more flexible local government service delivery, governance and infrastructure arrangements, without councils needing to amalgamate. In particular, it enables:
 - a. greater use of council-controlled organisations
 - b. council-led reorganisations
 - c. a broader range of functions to be transferred between local authorities
 - d. the Local Government Commission ('the LGC') to take a more proactive role, including by initiating and prioritising investigations into reorganisations, subject to guidance and criteria, and
 - e. requests for information created or received by the LGC under the Official Information Act 1982 ('the OIA'), subject to certain restrictions.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

5. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form. The Supreme Court has noted that freedom of expression extends to the right to seek access to and search official records, subject to competing considerations such as the protection of privacy interests and the orderly and fair administration of justice.¹

¹ *Mafart v Television New Zealand* [2006] 3 NZLR 18 at [7].

Application of the OIA to information created or received by the LGC

6. The Bill makes the LGC subject to the OIA.² However, clause 19 inserts new s 35A into the Act, which applies to information created or received by the LGC in the course of:
 - a. an investigation under s 31 of the Act on matters relating to a local authority or local government
 - b. a dispute referred to the LGC for resolution under new s 31H, and
 - c. the determination of an appeal or objection under s 19R of the Local Electoral Act 2001 (which relate to local authority representation).
7. New s 35A provides this information is not official information for the purposes of the OIA until the investigation, dispute resolution or determination has been completed.
8. Currently the LGC is not subject to the OIA at all. The Bill therefore ensures greater transparency and accountability in respect of the LGC's functions. However, as new s 35A allows information to be withheld until the relevant process is complete, the provision may be seen to limit s 14 of the Bill of Rights Act.

Is this limitation justified under s 5 of the Bill of Rights Act?

9. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry may be summarised as follows:³
 - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?
10. New s 35A aims to protect the integrity and effectiveness of the LGC's investigation, dispute resolution and appeal determination processes. We consider this to be a sufficiently important objective to justify some limitation on the freedom of expression. The Law Commission's 2012 report on New Zealand's official information legislation recognised this objective, in the context of investigations and inquiries, as one which may warrant a new ground for withholding information.⁴
11. The limit is rationally connected to this objective. Deferring the OIA's application until decisions are finalised will allow the LGC to perform its investigative, dispute resolution and appellate functions more freely. It minimises the risk that decision-making could be

² Schedule 5 of the Bill amends the Ombudsmen Act 1975 to include the LGC within Schedule 1 of that Act. This amendment renders the LGC an 'organisation' whose information is defined as 'official information' under the OIA.

³ *Hansen v R* [2007] NZSC 7 [123].

⁴ The Law Commission recommended the OIA should allow information to be withheld where necessary to protect information which has been provided to an agency in the course of an investigation or inquiry, and disclosure is likely to prejudice the conduct or outcome of that inquiry; New Zealand Law Commission *The Public's Right to Know: Review of the Official Information Legislation* (NZLC R125, June 2012), recommendation 24 at p 130. The Government response indicated it would keep this recommendation under review and consider whether to progress it as competing priorities allow; *Government response to Law Commission report "The public's right to know: review of the official information legislation"* 4 February 2013: www.justice.govt.nz/publications/global-publications/g/government-response-to-law-commission-report-on-the-publics-right-to-know-review-of-the-official-information-legislation (last accessed 24 May 2016)

constrained or otherwise influenced by obligations to release information on which those decisions are to be based.

12. Currently there is no clear ground under the OIA for withholding information gathered or produced in the course of investigative processes.⁵ The limit applies only to the LGC's investigative, dispute resolution and appellate functions. It defers rather than ousts OIA obligations. We therefore consider the limit impairs the freedom of expression no more than reasonably necessary to ensure the integrity of the protected processes.
13. The Act provides that the LGC is to be treated as a commission of inquiry under the Commissions of Inquiry Act 1908.⁶ The Inquiries Act 2013, which governs new commissions of inquiry, contains a similar provision to new s 35A.⁷ The comparatively limited effect of new s 35A reflects both the LGC's characterisation as a commission of inquiry and its new functions and greater governmental control under the Bill. In combination with the factors in paragraph 12 above, we consider this supports the conclusion that the limit is in due proportion to the importance of the objective.
14. We therefore consider the limit new s 35A places on s 14 of the Bill of Rights Act is justified under s 5 of that Act.

Conclusion

15. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

⁵ See footnote 4. Section 9(2)(g)(ii) of the OIA allows information to be withheld to maintain the effective conduct of public affairs through the protection of members of organisations (among others) from improper pressure or harassment. This withholding ground may not apply in the context of new s 35A's more generalised objective.

⁶ Local Government Act 2002, s 34. The Commissions of Inquiry Act 1908 preceded the Inquiries Act 2013, and has been preserved for the functioning of organisations created under it (such as the LGC).

⁷ Inquiries Act, s 32(2)(b). Section 32(2)(b) exempts any documents relating to the internal deliberations of an inquiry from the OIA provided the document is created by a member of the inquiry, or provided by an officer of the inquiry.