

17 March 2024

Democracy + Open Government policy team
Ministry of Justice : Tāhū o te Ture

Response to request for feedback on paper about improving scrutiny of OIA exemptions under Commitment 7 of New Zealand's fourth Open Government Partnership (OGP) National Action Plan (NAP)

This submission has been developed by Trust Democracy, an incorporated society that was established in 2019 to strengthen public discourse, education and research about democracy in Aotearoa New Zealand.

Need for a more open, thorough review that upholds the principles of open government and stewardship

'Open government' is one of the principles enshrined in the Public Service Act 2020 (PSA) that public sector agencies are required to uphold, and give effect to, along with other principles, including 'stewardship'. Upholding these principles, ensures the 'constitutional and democratic government' purpose of the Act is supported.¹ From the communication we have received from the Ministry of Justice on Commitment 7, it appears that the Ministry is conducting a very limited review of the large number of exemptions that currently exist to the disclosure requirements set out in the Official Information Act 1982. This seem incongruous given the 'constitutional' nature² of the OIA and its function as one of the "key mechanisms by which government bodies are held accountable for their activities."³ Given the proliferation of exemptions in recent years, and the current Government's extraordinary use of urgency, which limits legislative scrutiny, the need for an open and thorough review is a necessity. Trust Democracy therefore strongly encourages the Ministry to give more weight to upholding the principles of open government and stewardship in the delivery of Commitment 7.

Another reason for the Ministry to use the concept of 'open government' to structure its work on Commitment 7 is that it is an Open Government Partnership (OGP) commitment! 'Open government' is usually understood as public participation, public accountability and public access to information/transparency in relation to government policy and decision making,⁴ and the OGP's principles and guidance reflect this.

¹ See s.11 and s.12 of the Public Service Act 2020.

² See the Ombudsman guidance cited in the table on page 8 of the discussion document.

³ See Paragraph 15 of the Legislation Design Advisory Committee template cited in the table on page 7 of the discussion document.

⁴ Ecclestone A, Booth K, Wright S (2023), 'Open government: A 40-year gestation and still in labour', *Public Sector*, IPANZ: Spring.

Targeted consultation inappropriate for this issue, especially as it is an OGP commitment

Trust Democracy takes issue with being the subject of a ‘targeted engagement’. Through the active participation of a number of our members, Trust Democracy, along with a number of other civil society actors, devoted considerable time and effort to having the issue of ‘OIA exemptions’ put on the Government’s public policy agenda through the OGP NAP mechanism. While we appreciate being notified about the Ministry’s consultation, this is an important public issue that needs to be openly and publicly considered and worked through.

Furthermore, Trust Democracy is concerned that the use of ‘targeted engagement’ seems to be a common and growing practice across public agencies. We consider it a pernicious engagement strategy that is not only contrary to the principle of ‘open government’ but also contrary to the sort of good policy making practice set out by the Policy Community Engagement Tool (PCET),. The adoption by the Public Service of the PCET is the subject of the first commitment of the fourth NAP. The linkages between NAP commitments is important. Even a stakeholder analysis, which the PCET recommends as part of policy and engagement processes, would have identified multiple interested parties (e.g. constitutional academics, the Law Commission, journalists/media organisations, the National Council of Women, etc) in addition to the civil society organisations that took part in the development of the commitment and the general public.

Consequence of ‘targeted engagement’ and the General Manager’s comments

As a consequence of the Ministry’s decisions to use ‘targeted engagement’ and to invite Trust Democracy to comment on the Ministry’s work, Trust Democracy has been publicly named in the *Newsroom* article of 8 March 2024 and associated with a consultation practice we do not support.⁵

We also take issue with the disingenuous comments attributed to the Ministry’s General Manager for Civil and Constitutional Policy in the *Newsroom* article. She claims that the Ministry “expect[ed] that civil society organisations will involve their wider networks as part of their input to the engagement process”. However, the Ministry’s email of 23 February 2024 that invited Trust Democracy to comment on the discussion paper does not ask Trust Democracy to forward the invitation to anyone else. Furthermore, by allowing only three weeks for comment, the Ministry has not allowed sufficient time for a volunteer-run organisation such as Trust Democracy to develop a response with members let alone wider networks.

These decisions and actions do not, in our opinion, uphold important public service values set out in s.16 of the PSA, namely to be accountable, trustworthy and respectful. In light of this, we considered not providing any feedback on the content of the discussion document. Our decision to provide the following comments stems from our long-term commitment to the OGP process.

Comments on the discussion document

While our confidence in the Ministry has been dented, Trust Democracy would like to acknowledge the research and analysis that has been undertaken to produce the discussion paper. We support the three additional sub-objectives set out in paragraph 9, and consider the analysis presented as well as the research summarised in the Appendix to be useful and necessary, but insufficient on its own.

⁵ S Sachdeva (2024), [‘Govt’s shadowy work on secrecy clauses criticised’](#), *Newsroom*, 8 March 2024.

We would like more clarity about who decided the out-of-scope matters set out in paragraph 10 and the basis for this. OGP commitments are supposed to be co-created by government and civil society. Three of our members were heavily involved in the development of the NAP. As far as we know, these out-of-scope matters were not discussed by civil society representatives, or the Public Service Commission's OGP Expert Advisory Panel during the co-creation process. Perhaps the Ministry means merely that they were agreed between it and the Public Service Commission. If so, it is disingenuous to imply that such limitations were agreed with the civil society organisations who suggested a far stronger commitment on this topic. Given the findings of the research set out in the Appendix – it is concerning that a partial review of OIA exemption clauses has identified cases for which the purpose/rationale for the exemptions is lacking – the Ministry should review the out-of-scope matters and consider re-scoping its work on this commitment.

Reviewing the 'scrutiny mechanism' table on pages 7 and 8, Trust Democracy is surprised that proposed OIA exemption clauses are not mandatorily reviewed by Crown Law for compliance with section 14 of the New Zealand Bill of Rights Act 1990, which, as the Ombudsman guidance notes, is how "New Zealanders may exercise their fundamental freedom to seek and receive information" as required by Article 19 of the International Covenant on Civil and Political Rights.⁶ As the OIA is a key instrument by which these fundamental freedoms and rights are given effect in New Zealand, the Ministry should consider why this scrutiny mechanism is not currently in force and how it can be made mandatory.

From our perspective, the plethora of scrutiny mechanisms set out in the section entitled 'Scrutiny Mechanisms' serves to highlight the fragmented nature of New Zealand's policy and legislative ecosystem. While it is useful to set out the formal instruments in the table on pages 7 and 8, this review also needs to consider the actual policy practices of agencies and whether they comply with the formal requirements. If further research finds that significant non- or poor-quality compliance is an issue, additional measures will need to be considered. For example, in addition to training and guidance, quality systems, as used in many professional settings, may need to be implemented or strengthened to ensure reliability and to drive quality improvement.

In terms of the options for improving scrutiny mechanisms, Trust Democracy is pleased that the Ministry will be able to progress some measures within the NAP timeline, and understands that some other measures are likely to be implemented in the foreseeable future, albeit after the NAP4 deadline. Trust Democracy does not have a problem with this as long as the rationale is publicly explained and that any lessons learned from commitment 7 implementation are shared publicly.

Trust Democracy is not convinced by the Cabinet Office's intransigence regarding the Policy and LEG templates and guidance. Given the constitutional nature of this issue, the potential need for Prime Ministerial approval is not a sufficient reason to not update guidance, etc. As this work is being conducted as an OGP commitment, Trust Democracy suggests that the Ministry seeks support from Minister Willis, the responsible minister, and the Public Service Commissioner to encourage agencies to progress this work.

An independent review for any future review of the OIA

Since the Government has indicated that it may conduct a full review of the OIA during its term of office, Trust Democracy would like to provide advice about how this should be done. We consider that the OIA is similar to electoral law as both are about fundamental democratic rights and

⁶ See the Ombudsman guidance cited in the table on page 8 of the discussion document.

freedoms that are sometimes in conflict with the preferences of politicians, their parties and the public service. Trust Democracy therefore strongly recommends that any review be conducted by an independent panel (e.g. similar to the recent Independent Electoral Review)⁷ and/or through the deliberations of a representative mini-public (e.g. such as the citizens' assemblies used in Ireland).⁸ Central agencies, and the Ministry of Justice in particular, have conflicts of interest that are too substantial for them to conduct such a review.

⁷ <https://electoralreview.govt.nz>

⁸ See, for example, <https://trustdemocracy.nz/2023/07/democratic-innovation-hunger/>