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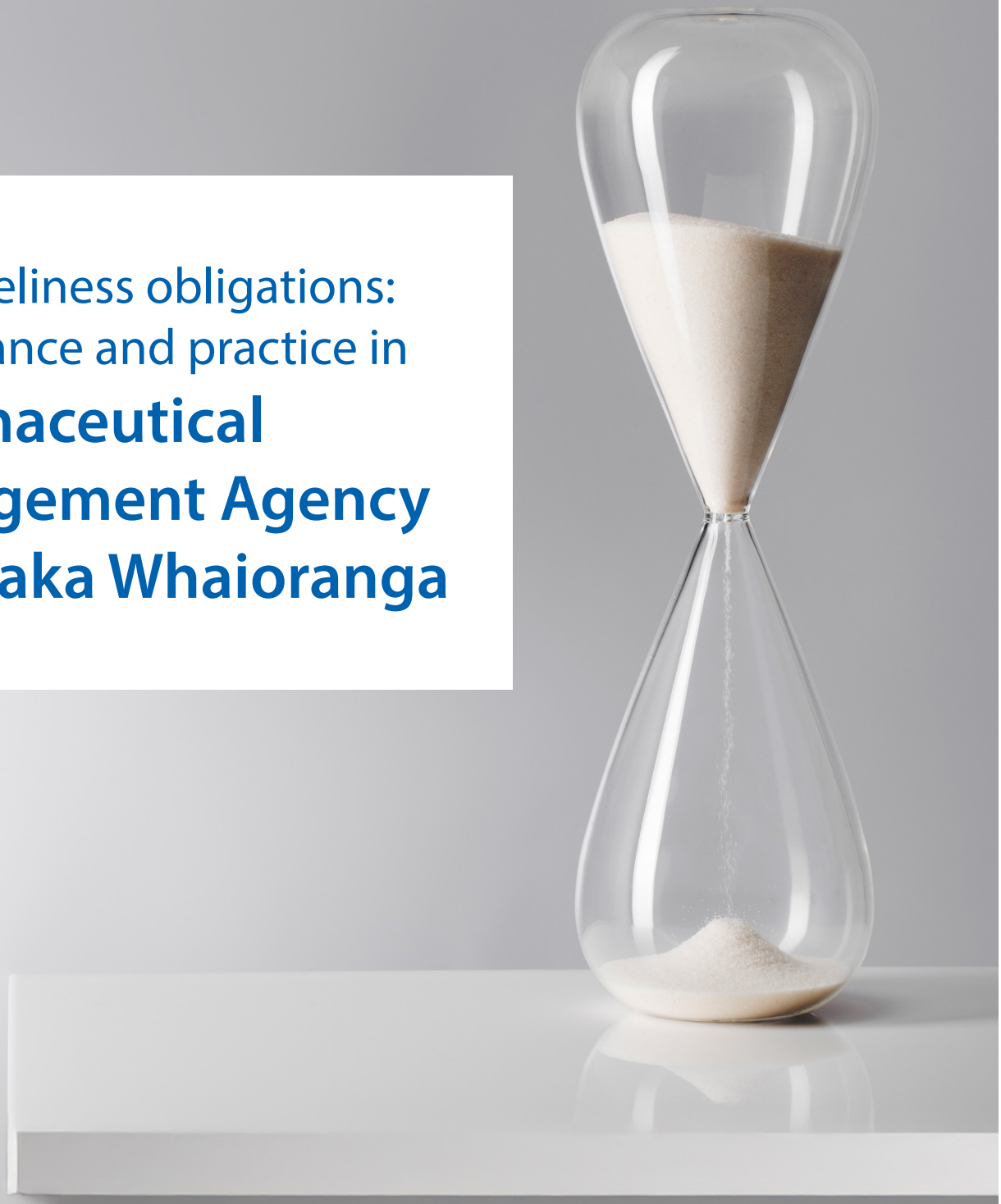
OIA timeliness obligations: Compliance and practice in **Pharmaceutical Management Agency Te Pātaka Whaioranga**



Te Kaitiaki Mana Tangata Aotearoa
The Ombudsman New Zealand

October 2024

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Final opinion of the Chief Ombudsman

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Opinion of the Chief Ombudsman October 2024

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Introduction

I initiated this investigation into agencies' compliance with Official Information Act 1982 (OIA) timeliness obligations, in part, because of concerns that were raised with me—especially from journalists—that the OIA is being used as a bureaucratic tool to stifle the flow of information.[1]

The OIA exists to promote transparency and accountability and to enable the public to participate in government decision-making. It is a critical measure that protects our democracy by enabling the people of New Zealand to access information in order to understand what its Government is doing, or planning to do and as a result have the opportunity to influence Government thinking. It also provides a means for people to understand why the Government has made certain decisions or recommendations. An informed and participatory citizenry understands and is able to trust its elected officials and government agencies – even if they don't necessarily agree with every action and decision that is made.

Timely access to information about the plans, actions and decisions of a Government is essential in a democracy and without it, trust and confidence in a Government can quickly be eroded. To this end, in New Zealand our OIA requires agencies to make decisions on requests for official information as soon as reasonably practicable—and no later than 20 working days from the day after the request is received.[2] The OIA also requires that, if the agency decides to release some or all of the requested information, it must do so promptly.[3]

As a pillar of New Zealand's constitutional framework, it is crucial the OIA is working well—and that it is perceived to be working well. Public trust in our access to information systems is important, and a perception that the legislation is not fit-for-purpose may erode that trust. In my report *Ready or Not?* published in September 2022 I concluded that the OIA itself is fundamentally sound and that the core public service is increasingly transparent and open.[4] Essentially, the problems I identified in that report stemmed from the administrative arrangements that had been put in place to respond to information requests, rather than the provisions of the Act itself.

Concerns about delays appear to be at odds with the data reported by the Public Service Commission | Te Kawa Mataaho (PSC) on agencies' OIA timeliness compliance. The most recent statistics (1 July – 30 December 2023) show that, on average, core public sector agencies met the maximum statutory time limit over 98 percent of the time.[5] The statistics also show a continued upward trend since the first reporting year, 2015/16, when agencies reported meeting OIA timeliness obligations only 87.6 percent of the time.[6] The publication of OIA statistics makes agencies publicly accountable for their results, which has driven

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1 Initiated under s 13(1) and 13(3) OA 1975

2 See s 15(1) OIA 1982

3 See s 28(5) OIA 1982

4 Link to the Office of the Ombudsman's *Ready or not*? Thematic report of the Chief Ombudsman – September 2022

5 Link to PSC's Latest OIA statistics 13 March 2024

6 Link to PSC's Latest OIA statistics released 4 September 2019

performance improvement in the reported criteria. The PSC's regime of OIA data publication is extremely valuable for this reason.

However, as with all data, it has limitations. The statistics typically measure when *a decision* is made and communicated to a requester but not necessarily when *information* is provided to the requester. For example, an agency may inform a requester of its decision, or extend the deadline for making its decision, within the required 20 working days but provide the information at a later date. In these cases, agencies will be able to report an 'on time' response, but the PSC reporting does not reveal whether or not the agency provided the information to the requester promptly.

Current OIA statistics reporting may have some perverse effects on agency behaviour. The focus on reporting against a 20 working day 'target' may be overshadowing the primary obligation, which is that agencies respond to requesters '*as soon as reasonably practicable'*. Twenty working days is a limit,[7] not a target. Collecting data on whether or not a decision has been made within 20 working days is straightforward for the agency to calculate and track. What amounts to '*as soon as reasonably practicable*' requires consideration of all the surrounding circumstances on a case-by-case basis, so it's not surprising the 20 working day measure is being used. Nevertheless, agencies must adhere to the primary obligation to make a decision as soon as reasonably practicable.

My investigation explored whether there is veracity to journalists' claims that the OIA is not working as intended, to ensure that official information is made available in a timely manner. I also explored a little deeper how agencies were managing their processes in terms of the OIA statistics that are reported to and published by PSC.

Background

In December 2022, I notified the Chief Executives of seven public sector agencies of the commencement of my self-initiated investigation under the Ombudsmen Act 1975.[8] The agencies are:

- Department of Internal Affairs | Te Tari Taiwhenua;
- Department of Prime Minister and Cabinet | Te Tari o te Pirimia me te Komiti Matua;
- Health New Zealand | Te Whatu Ora;
- Kainga Ora | Housing New Zealand;
- The Pharmaceutical Management Agency | Te Pātaka Whaioranga;
- Transpower New Zealand Limited; and

[7] Unless a valid extension of the time limit is made by the agency, pursuant to s 15A OIA 1982.

[8] See also the Office of the Ombudsman's media statement announcing investigation on 5 December 2022 and the terms of reference.

- Treasury | Te Tai Ōhanga.

They represent a variety of agency types and functions. Some agencies are involved in high profile public policy reforms and some have received high public and media interest. The selected agencies range in size, and in the number of OIA requests received.

The Chief Ombudsman (the Ombudsman) has jurisdiction to investigate '*any decision or recommendation made, or any act done or omitted*' by public service agencies or organisations named in Parts 1 to 1C and 2 of Schedule 1 of the Ombudsmen Act.[9]

The purpose of this investigation was to examine the practices and processes agencies use to meet their overarching obligations under the Official Information Act 1982 to:

- make a decision on requests for information '*as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received*' (section 15(1)); and
- release information without undue delay (section 28(5)).

This included examining the following practices and processes related to this overarching timeliness obligation:

- the use of extensions;
- transfers of requests;
- the approach to urgent requests;
- refusals of requests for the reason that the information 'is or will soon be publicly available';
- sign-out processes;
- involvement of media and/or communication teams in requests, and their processes and practices;
- interactions with Ministers' offices on agency OIA requests;
- the duty on agencies to give reasonable assistance; and
- any impact of the application of the Government's proactive release policies to decisions on individual access requests.

My investigation involved consideration of the agencies' supporting administrative structures, leadership and culture, policies, processes, practices, decision-making and record-keeping.

My investigation included a review of:

- publicly available material;

[9] See ss 13(1) and 13(3) OA 1975

- relevant complaints to the Ombudsman;
- OIA timeliness statistics published by PSC;
- An agency questionnaire seeking internal documents and commentary relating to official information processing and practice;
- a sample of OIA request files; and
- a sample of media information request files.

In addition, I undertook an online survey of the public.

My investigation included meetings with a number of key people to assist my understanding of each agency's OIA culture, processes, and practices:

- a selection of staff and managers in different departments/teams involved in making decisions about, and preparing responses to, official information requests;
- a selection of staff from Minister's offices; and
- the Chief Executive of each agency.

Over the course of this investigation, there was a change in government. The discussion in this report relates to past and present Ministers from different administrations. My opinion relates only to the agency's practice during the period in which my investigation took place, being December 2022 to October 2024.[10]

About Pharmac

Pharmac was set up as a joint venture in 1993.[11] It became a Crown entity in 2001—a standalone organisation accountable directly to the Minister of Health.[12] According to Pharmac's website, it is responsible for:[13]

- managing the list of vaccines, medicines and devices that get subsidised in the community;
- promoting responsible use of medicines; and
- managing which hospital medicines are funded, and national contracts for some devices used in public hospitals.

[10] On occasions, I may look at material from outside the investigation period where particular issues warrant further investigation.

[11] Link to Pharmac's History of Pharmac webpage

[12] Specifically, Pharmac is a 'Crown agent' and must give effect to government policy when directed by the responsible Minister (see Schedule 1, and s 7(1)(a), Crown Entities Act 2004)

[13] Link to Te Kāwanatanga o Aotearoa | New Zealand Government Pharmaceutical Management Agency, PHARMAC webpage

It makes decisions about which medicines and related products are funded from the national Combined Pharmaceutical Budget (CPB). Pharmac's primary legislative objectives are detailed in the Pae Ora (Healthy Futures) Act 2022. It also has obligations under the Crown Entities Act 2004 and the Public Service Act 2020.

The Minister of Health takes responsibility for Pharmac's performance and in 2023, for the first time, a Minister was specifically designated responsibility for Pharmac—the Associate Minister of Health (Pharmac). A board of up to six members governs Pharmac. The role of the Board and expectations of the organisation are set by the Associate Minister of Health, who also appoints the Chair and Deputy Chair.[14] The Chief Executive is appointed by the Board.

The Senior Leadership team comprises the Chief Executive and seven directors – two of whom started in 2021 and three in 2023.[15] According to the 2022/2023 Annual Report, Pharmac employs 156.5 full-time equivalent staff.[16]

My investigators met with a number of Pharmac staff and I spoke to the Chief Executive as part of my investigation. There have been a number of significant events for Pharmac in the period leading up to, and during, my investigation, including:

- The Ministerial-appointed, independent review of Pharmac conducted between March 2021 and February 2022, resulting in 33 recommendations.[17] Referred to as 'the 2022 independent review' in this report.
- The health sector reforms resulting from the Pae Ora (Health Futures) Act 2022 that came into effect on 1 July 2022,[18] including the transfer of responsibility for the ongoing management and purchase of COVID-19 vaccines to Pharmac.[19]
- Increases to the CPB announced in May 2022,[20] and confirmation of CPB funding for the next four years in 2024,[21] with which the operating budget '*has not kept pace*.'[22]
- A funding increase of $604 million over four years in late June 2024.[23]

[14] See s 28 Crown Entities Act 2004

[15] Link to Pharmac's Organisational structure webpage

[16] Link to Pharmac's Annual Report 2022-2023

[17] See Ministry of Health's Pharmac review webpage for interim and final reports, and the Government's response. See The Pharmac review webpage for Pharmac's final response to the outcomes of the review.

[18] Link to the Ministry of Health's Statutory framework webpage

[19] See Pharmac's Annual Report 2021/22, p7

[20] See Pharmac's media statement Pharmac will use biggest budget increase ever to fund more medicines for more New Zealanders, 19 May 2022, and Pharmac's Year in Review 2023, p7

[21] See Associate Minister of Health David Seymour's media statement Government saves access to medicines, 29 April 2024

[22] See Pharmac's Briefing to the Incoming Minister of Health, 29 November 2023, p14

[23] See Pharmac's media statement Funding boost means more medicines for more New Zealanders, 24 June 2024

My opinion

I commenced this investigation because of concerns raised by some that the OIA is a bureaucratic tool used to stifle the flow of information, and a growing perception that official information requests are not processed in a timely manner. While I did not find evidence of Pharmac misusing the OIA, I did identify a number of concerning issues, which are detailed in this report.

A drop in Pharmac's OIA timeliness statistics in 2022 was primarily due to only one staff member being responsible for responding to OIA requests, ministerial correspondence and parliamentary questions (all of which have statutory timeframes). There was a sudden workload increase in OIA requests and parliamentary questions combined with the single staff member having several unexpected and lengthy absences outside of their control. This inevitably led to a backlog of OIA requests, which took some time for Pharmac to recover.

My opinion is that Pharmac acted unreasonably by not allocating sufficient resourcing to ensure it could meet statutory OIA timeliness obligations. However, I have not made a recommendation in this instance because Pharmac has taken steps to address the issue as outlined below.[24] I am pleased that measures are in place to minimise the risk of a drop in OIA timeliness occurring again, and that since the drop in 2022, the data shows year-on-year improvements to OIA timeliness.

However, there is scope for further improvement. I have suggested 31 action points to improve Pharmac's OIA systems and processes, which I believe will complement the changes Pharmac has already made.

Pharmac was provided the opportunity to comment on my provisional opinion and I have taken its comments into consideration in forming my final opinion. The response to my provisional opinion noted that Pharmac welcomes my report and endorses all action points without reservation. In addition, Pharmac has developed an implementation plan with associated monitoring and reporting timeframes. Pharmac also noted that some of the action points can be implemented in a short timeframe. It states '*the rest, especially those involving embedding of systems and processes, are likely to take longer to implement but are still achievable and practicable*'.

I would like to extend my thanks to all Pharmac staff who participated in my investigation. I greatly value their contribution to my investigation. I look forward to following Pharmac's progress on my action points over the next year, during which time I will seek updates periodically.

Peter Boshier
Chief Ombudsman

[24] See *OIA team structure and resilience.*

Summary

Leadership and culture

Pharmac operates in a context where the providers of pharmaceutical products and medical devices expect their commercial information to be protected. Pharmac and the New Zealand public may also benefit from the protection of certain commercial information. However, Pharmac also has obligations under the OIA to be open and transparent. Managing this tension can be challenging. In this context, I consider it essential for leaders to be especially vocal about the legal obligation under the OIA that the '*principle of availability*' underpins decision making on information requests.[25]

It appears that senior leadership messaging around the OIA is somewhat infrequent and indirect. There is an opportunity for the Chief Executive and senior leaders to engage in greater promotion of the OIA and the importance of transparency to all staff. In addition, I note that Pharmac does not currently have a high-level OIA strategy. I see benefit in Pharmac creating a strategic, future focused framework setting out an organisational approach to OIA compliance. Pharmac should prioritise the development of an OIA strategy or plan, with associated responsibilities and accountabilities at the Senior Leadership team level, and promote it to all staff.

I consider staff members' attitudes to the OIA to be an indication of an agency's overall culture. One indication of a robust OIA culture is when OIA work is prioritised and valued by staff wider than those directly responsible for processing OIA requests. The Chief Executive acknowledged that some staff may perceive the OIA as an adjunct to their primary roles. It is up to the Chief Executive to be clear to all staff that responding to OIA requests is core business. I am concerned that staff and senior leaders' may have a negative attitude towards OIA requesters, which became apparent with the publishing of a number of internal emails in October 2023. While the release of these emails under the Privacy Act indicates that Pharmac's information release system works to a degree, this negative attitude towards an OIA requester strongly suggests an unhealthy OIA culture.

I appreciate that some work has been done to improve the organisational culture; however, there is still an opportunity for senior leadership to further improve in this area. The Chief Executive and senior leaders should role model openness and transparency (for instance by attending OIA training) and embed these principles at Pharmac. I also encourage the Chief Executive to consider ways to improve staff attitudes to the OIA, including increasing OIA training for all staff.

Senior leaders should have clear oversight of their agency's OIA compliance and practice through regular performance reporting. Senior leaders receive a weekly OIA email list and a monthly OIA performance report which aid in keeping OIA responses 'on track' as they move through the handling process. However, a spike in OIA workload still led to a backlog in 2022. Pharmac should ensure reporting about the handling of OIA requests is actioned in a timely

[25] See s 5 OIA 1982

manner so it can identify and prevent future backlogs. In addition, more data on the handling of OIA requests should be collected and reported, including information about time spent on OIA processing across Pharmac. Without accurate information about the time spent processing OIA requests it will be difficult for senior leaders to make appropriate decisions about staffing levels, and to determine what resilience measures should be in place.

The amount of OIA responses Pharmac has proactively released over the years has fluctuated. I am pleased Pharmac is currently developing a Proactive Release Policy to support its initiatives. Once finalised, I suggest Pharmac considers making the Proactive Release Policy available on its website. In relation to refusing information under section 18(d) of the OIA ('*information requested is or will soon be publicly available*'), a reference to this should be included in OIA guidance material.

Action points
The Chief Executive and senior leaders should regularly seek opportunities to promote the OIA.
Prioritise the development of a high level OIA strategy or plan, with associated responsibilities and accountabilities at the Senior Leadership team level, and promote it to all staff.
The Chief Executive and senior leaders should actively role model openness and transparency, and attend OIA training.
Chief Executive to consider ways to improve staff attitudes to the OIA, including increasing OIA training for all staff.
Ensure reporting about the handling of OIA requests is actioned in a timely manner to identify and prevent future backlogs.
Collect, analyse, and report to senior leaders more data on the handling of OIA requests, including information about time spent on OIA processing, in line with my suggestions.
Include information on refusals under section 18(d) in OIA guidance material.
Continue developing the Proactive Release Policy, and consider publishing it on Pharmac's website.

Organisation structure, resourcing and training

Pharmac has a centralised model for handling OIA requests, which are the responsibility of the Government Services team. That team is also responsible for ministerial correspondence and parliamentary questions. However, until April 2022, this team was reliant on one full time equivalent staff member. When resources are tight and priorities need to be established, it is critical that Pharmac's ability to respond to OIA requests is not put at risk and resourcing is prioritised accordingly. The detrimental impact on OIA timeliness in 2022 due to under

resourcing was significant and is deeply concerning to me as it appears to have directly impacted its ability to comply with the law.

As stated above, my opinion is that Pharmac acted unreasonably by not allocating sufficient resourcing to ensure it could meet statutory OIA timeliness obligations. However, I have not made a recommendation in this instance because I am satisfied Pharmac has taken steps to address the issue. This includes bringing in additional staff to help Government Services with the workload, and completing an internal OIA process review (the results of which were then acted upon by doubling the size of the Government Services team from one full-time, permanent staff member to two). In addition, Pharmac apologised to some requesters and explained why their OIA responses were late.

However, it appears that so far, Pharmac has only developed short-term solutions to its capacity issues when it should consider long-term resourcing solutions. It also needs to build OIA capability across the organisation. In my view, continually using short-term solutions will not solve the underlying resourcing issue. Instead, resolving the workload issue requires the Senior Leadership team taking a longer term, strategic view to ensure they are able to consistently meet their legal obligations.

I remind Pharmac that OIA is core business and I expect it to organise its structure and resources to ensure it is able to meet its legal obligations under the OIA. I urge Pharmac to implement long-term resilience measures in the event of increased OIA workload pressure.

All staff are required to attend OIA training at induction, and Pharmac should update the Induction Pack as per my suggestions. There should also be targeted OIA training for the Communications team and senior leaders on a regular basis.

Pharmac has made progress on its OIA guidance documents since this investigation commenced, including the addition of an OIA intranet page and OIA decision making memo template. The OIA intranet page should be updated as per my suggestions. I encourage Pharmac to continue to prioritise and resource the development of OIA guidance materials, particularly the OIA Policy, and consider publishing them.

Action points
Implement long-term resilience measures to ensure Pharmac can meet OIA timeliness obligations in the event of increased OIA workload pressure.
Update the Induction Pack as per my suggestions.
Provide targeted OIA training to the Communications team and senior leaders on a regular basis.
Update the OIA intranet page as per my suggestions.
Continue to prioritise and resource the development of OIA guidance materials, and consider publishing them.

OIA handling by the Communications team

A request for information must be handled in accordance with the OIA, irrespective of whether it is handled by the Communications Team, an OIA Team, or any other part of the agency. Overall, the Communications team does an exemplary job of responding to requests '*as soon as reasonably practicable*', offering responses within only hours or days. I am pleased that staff also provide good assistance to requesters. However, there are areas that could be improved, such as the Media Policy being updated.

Action point
Update the Media Policy as per my suggestions.

Information management and record keeping

The responsibility for Pharmac's information management system, Objective, is held by one full time equivalent staff member. Therefore, in the event of staff absence or unexpected circumstances, Pharmac should ensure resilience measures exist to allow the agency to continue meeting its Public Records Act 2005 obligations.

I saw some evidence to suggest that OIA record keeping discipline could be improved. Pharmac should amend record keeping practices to ensure full and accurate records are kept of substantive correspondence (including telephone conversations, meetings and verbal discussions) with requesters, and records of any material internal discussions, are created and maintained. To support this, I encourage Pharmac to update the Records and Information Management Policy and OIA decision making memo as per my suggestions. Assessing staff training needs and providing regular refresher training to all staff on information management and record keeping will also assist.

Action points
Ensure resilience measures exist to allow Pharmac to continue to meet Public Records Act obligations in the event of staff absence or unexpected circumstances.
Amend OIA record keeping practices to ensure full and accurate records of substantive correspondence (including telephone conversations, meetings and verbal discussions) with requesters, and records of any material internal discussions, are created and maintained.
Update the Records and Information Management Policy and OIA decision making memo as per my suggestions.
Assess staff training needs and provide regular refresher training to all staff on information management and record keeping.

OIA team practice

My investigators conducted a review of sample OIA files and met with a number of Pharmac staff. The following OIA practice issues were identified:

- Acknowledgement of OIA requests was inconsistent. Pharmac should update its OIA acknowledgement templates as per my suggestions and ensure all OIA requests are acknowledged within two working days of receipt.
- Weekly OIA triage meetings are occurring. Pharmac is working toward improving the process and keeping a record of the outcome.
- There is no information on handling urgent requests in OIA guidance. This information should be added, incorporating my suggestions, and be circulated to subject matter experts. This information should also be included on Pharmac's *Making an OIA request* webpage so OIA requesters are aware that they have the right to request urgency.
- Pharmac should consider ways to increase suppliers' exposure to, and awareness of, the OIA. There is also no information on consulting with third parties in the OIA guidance, so I suggest Pharmac consider including this information.
- Record keeping gaps made it difficult to understand the events leading up to extensions. Pharmac should clarify who is responsible for making a decision on OIA extensions, and update the OIA guidance accordingly. Consideration should also be given to reporting the number of extensions, reasons for extensions, and the working day the extension was made to the Senior Leadership team. Further, an adequate record of the rationale for seeking an extension should be kept.
- There does not appear to be a clear authorisation framework. This indicates a lack of clarity over who is the final decision maker on OIA requests. Pharmac should ensure its delegations register contains clear information about the roles that hold responsibility for making decisions on OIA requests on behalf of the Chief Executive by finalising the Delegated Authority Policy for operational delegations and sharing it with all staff. In addition, OIA process mapping should include peer review and sign-out.

Action points
Update OIA acknowledgement templates as per my suggestions and ensure all OIA requests are acknowledged within two working days of receipt.
Continue to focus on improving the process for triaging OIA requests and keep a record of the outcome.
Make sure information on handling urgent requests is included in OIA guidance, incorporating my suggestions, and circulated to subject matter experts.
Ensure there is clear messaging on Pharmac's *Making an OIA request* webpage for information requesters, advising them of their right to request urgency.
Consider ways to increase suppliers' exposure to, and awareness of, the OIA.
Consider adding information on consulting with third parties in OIA guidance.
Clarify who is responsible for making a decision on extensions and update guidance accordingly.

Action points
Consider reporting the number of extensions, reasons for extensions, and the working day the extension was made to the Senior Leadership team.
Keep an adequate record of the rationale for seeking an extension.
Finalise the Delegated Authority Policy for operational delegations and share it with all staff.
Make sure OIA process mapping includes peer review and sign-out.

Ministerial interactions

The Minister of Health takes responsibility for Pharmac's performance and in 2023, for the first time, Pharmac was appointed a dedicated Minister—the Associate Minister of Health (Pharmac). My investigation considered interactions between Ministers and Pharmac on agency OIA requests.

Pharmac said it is rare for agency OIA responses to be sent to the Minister for either consultation or notification. When they are sent for notification (FYI), it appears the responses are sent to the Minister's office one or two days before they are sent to the requester. I am pleased meeting attendees said Pharmac does not wait to hear back from Ministers' offices before sending responses to requesters.

There were no examples of interference by Ministers' offices in decision making on agency OIA requests seen in the sample OIA files reviewed by my investigators. In fact, there was an example of a staff member telling the Minister's office that they were not seeking clearance or approval for a notified (FYI) OIA request. This demonstrates that staff are aware of the difference between notification (FYI) and consultation, and are able to convey that clearly to a Minister's office.

However, I encourage Pharmac to develop a written agreement with Ministers' offices on handling agency OIA requests, and to consider publishing it on the OIA webpage.[26] Further, Pharmac should make sure OIA guidance material includes information on the notification of, and consultation with, Ministers' offices on agency OIA requests.

Action points
Develop a written agreement with Ministers' offices on handling agency OIA requests, and consider publishing it on the OIA webpage.
Make sure OIA guidance material includes information on the notification of, and consultation with, Ministers' offices on agency OIA requests.

[26] Such as the Ombudsman's '*Model protocol on dealing with OIA requests involving Ministers'*.

OIA timeliness and complaint statistics

The PSC and the Ombudsman publish OIA performance data about government agencies every six months. Respectively, these are:

- OIA request timeliness statistics collected by the agency and reported to PSC; and
- OIA complaints data reported by the Ombudsman relating to the number and type of OIA complaints made against agencies, and the results of those complaints.

PSC timeliness data

For the purpose of the PSC reporting regime, an 'on time' response is one in which the agency made and communicated a decision to the OIA requester not more than 20 working days after the day the request is received; or transferred the request to another agency not more than ten days after the day the request is received. It is important to note that *communicating a decision* to the requester does not necessarily mean that requested information is provided on that date. For example, an agency could decide to extend a request, decide to decline it in full, or decide to grant a request with release of the information at a later date, and communicating this to the requester within 20 working days is reported as an on-time response.

The number of official information requests Pharmac has completed since 2015 (when PSC first started collecting OIA data) fluctuates, but more recently ranges between 60 and 100 requests a year. Over the eight years for which reported data is available, OIA requests were almost always responded to within the legislative timeframe.

However in 2022, Pharmac's reported timeliness statistics dropped. For the six month period of 1 January to 30 June 2022, Pharmac completed 83 OIA requests with a timeliness rating of 81.9 percent. For the six month period of 1 July to 31 December 2022, Pharmac completed 88 OIA requests with a timeliness rating of 78.4 percent. Not only did the number of working days to respond increase to 35.4 average days in the second half of 2022 but so too did the number of extensions in the same period (39.8 percent). Pharmac also published fewer than usual OIA responses (21.5 percent).

In the latest OIA statistics released for the six month period of 1 July to 31 December 2023, Pharmac completed 95 OIA requests with a timeliness rating of 98.9 percent. For the six month period of 1 January to 30 June 2023, Pharmac completed 98 OIA requests with a timeliness rating of 96.9 percent. When compared with other Crown entities since 2015, Pharmac's timeliness performance is above average—except for the period 1 January and 31 December 2022.[27] I am pleased that it appears that Pharmac's OIA timeliness performance has improved significantly since 2022.

[27] For comparison with all public sector and Crown entity averages from 2015 on, see PSC's OIA statistics webpage.

Complaints to the Ombudsman

I publish complaints data on the same schedule as PSC's timeliness data. The existence of a complaint against an agency should not, of itself, be considered evidence of the agency having done anything wrong. Similarly, an agency receiving a high number of complaints is not necessarily meaningful – this may simply be a factor of the agency receiving a high number of requests, or the public genuinely wanting to test the integrity of the decision on a request with the independent Officer of Parliament. Where complaints data can indicate issues with an agency's OIA handling is when those complaints result in a finding against the agency.

For the time period of 1 October 2022 to 25 October 2023, there were nine OIA complaints to the Ombudsman about Pharmac. Two of those complaints were relevant to timeliness. One complaint was not sustained and the other was withdrawn.

Leadership and culture

My expectations

It is my expectation that leaders make clear, regular statements to staff and to the public in support of the principle and purposes of official information legislation, and the importance of openness more generally.

An agency's culture around transparency and openness, and the strength of its OIA practices flows from the attitudes, messaging and actions of its senior leaders and, in particular, those of the chief executive. In terms of timeliness I expect chief executives to communicate clearly that compliance with the OIA is not only about achieving 'on time' compliance with the quantitative, 20 working day timeframe but also the primary requirement of the OIA to make and communicate a decision *'as soon as reasonably practicable'*.

Words, however, are not enough. Staff receive signals from senior leaders not only through overt messaging but through their actions. However vocal leaders may be about the importance of openness and timely compliance with the OIA, the message is diluted if they do not also role model openness, and provide staff with the systems, resources and support to facilitate the timely release of information.

Responding to OIA requests and proactively releasing information is part of an agency's core business. OIA compliance does not happen by accident. Just like any other aspect of performance, agencies must have a strategy to help ensure they achieve their objectives relating to transparency and OIA compliance. As an accountability measure, an agency's strategy around OIA compliance and the proactive release of information should feature in public facing corporate documents.

My findings

Senior leader messaging about the OIA

Pharmac operates in a context where the providers of pharmaceutical products and medical devices expect their commercial information to be protected. Pharmac and the New Zealand public may too benefit from the protection of certain commercial information. However, Pharmac also has statutory obligations under the OIA to be open and transparent. Managing this tension can be challenging. In this context, I consider it essential for leaders to be especially vocal about the legal obligation under the OIA, including that the '*principle of availability*' underpins decision making on information requests.[28]

All staff should understand the '*principle of availability'*, which states that information shall be made available unless there is good reason for withholding it. The OIA provides a variety of good reasons to withhold official information from the public. It is up to leaders to ensure staff are fully aware of their obligations under this constitutional legislation.

The Chief Executive said they have *'advised staff that as public servants we should role model the expectations set by the public service commission, which includes ensuring we meet our obligations under the OIA.'* A staff meeting attendee said that circulation of a weekly email identifying OIA requests on hand was a regular prompt for those involved to respond in a timely manner, and they considered the Chief Executive '*has been pretty clear all the way through that this is important*'. However, other staff meeting attendees were unclear about when such messaging occurred.

In the Chief Executive's staff update on 9 June 2022, she referred to a letter I sent all agencies about COVID-19, where I said COVID-19 was '*no longer a valid excuse for delays*'. The Chief Executive said to staff that '*while this letter wasn't aimed at us*', it was a reminder to staff to respond to OIA requests in a timely manner '*so we can maintain our stellar record*'. The Chief Executive also mentioned the OIA in a staff meeting in 2023, which was primarily focused on Privacy Act obligations. A record of the meeting presentation said staff should '*Remember to keep all communications (verbal and written, including on MS Teams) professional since it may be that we be required to disclose them externally under the OIA*'.

My investigators were advised by a staff meeting attendee that when the OIA data for July to December 2023 showed an improvement in timeliness (see *OIA timeliness and complaint statistics)*, the results were shared internally, and the Government Services team were congratulated by other staff.[29] I am pleased that Pharmac is making improvements in this area. However, it appears that senior leadership messaging around the OIA is somewhat infrequent and indirect. I encourage the Chief Executive and senior leaders to continually seek out opportunities to promote the importance of the OIA. Staff should regularly be reminded of the

[28] See s 5 OIA 1982

[29] The Government Services team is responsible for coordinating Pharmac's OIA responses.

'*principle of availability*' and the requirement to respond to OIA requests '*as soon as reasonably practicable*'.[30]

Action point
The Chief Executive and senior leaders should regularly seek opportunities to promote the OIA.

OIA strategy

When Pharmac was asked about high-level strategies or plans for meeting OIA obligations, it referred to the government's 2022 independent review which '*publicly outlined key commitments that Pharmac has made and is implementing around greater openness and transparency.*'[31] This included '*sharing more impactful information about what work is being done at Pharmac*' such as publishing plain language summaries of assessments ranked in the *Options for Investment* list and improving the *Application Tracker*. Pharmac also cited other documents, such as the Code of Conduct, the Records and Information Management Policy, and digital recordings guidance as documents that help it meet OIA obligations.

After the government-initiated independent review, Pharmac commenced an internal OIA process review in November 2022, which found '*no overarching strategy describing how Pharmac will maintain compliance with the OIA*'. Details of the internal OIA process review are outlined below in *Organisation structure, resourcing and training*.

Pharmac does not currently have a high-level OIA strategy. I encourage Pharmac to prioritise the development of an OIA strategic framework that includes a commitment to foster a positive official information culture. The Chief Executive, senior leaders, teams handling information requests, and all staff, have a role in ensuring Pharmac can give effect to the OIA. A strategic framework would document how Pharmac plans to achieve ongoing:

- compliance with the OIA;
- good OIA practice;
- sufficient capacity and capability in OIA-handling;
- a culture of openness and transparency; and
- continuous improvement.

I would expect the strategy to address how the Chief Executive and senior leaders promote and role model compliance with the OIA on a regular and ongoing basis (as I discussed above in *Senior leader messaging about the OIA*). The development of such a strategy would provide the Chief Executive with an opportunity to raise awareness of the OIA to all staff, and would reinforce that responding to OIA requests is core business. The strategy should also address

[30] See s 15(1) OIA 1982

[31] Link to Pharmac's Final Response to Outcomes of the Pharmac Review webpage

how Pharmac's Senior Leadership team will be alerted early to potential risks to the timeliness of its OIA responses, and what it will do to swiftly mitigate this risk.

Pharmac will only be able to meet the '*open government*' goals required of it under the Public Sector Act 2020[32] and—in turn, achieve its stated desire '*to be a trusted, respected part of the health and disability system*'[33]—when its organisational culture has transparency and openness at its core. A strategic OIA framework would help Pharmac move towards consistent, principles-based OIA practice.

Action point
Prioritise the development of a high level OIA strategy or plan, with associated responsibilities and accountabilities at the Senior Leadership team level, and promote it to all staff.

OIA culture

Pharmac is a unique agency that brokers contracts with international companies to purchase pharmaceuticals and medical devices, while also providing policy development and analysis expertise. This means it holds a range of information, which, as it states on its website, '*is confidential, commercially sensitive, or personal*'. The website goes on to state:[34]

> *Pharmac therefore needs to balance the need to respect the confidential or sensitive nature of information it holds, while seeking to achieve transparency and ensuring it complies with its legal obligations.*

I consider staff members' attitudes to the OIA to be an indication of an agency's overall culture. One indication of a robust OIA culture is when OIA work is prioritised and valued by staff wider than those directly responsible for processing OIA requests. When staff across the organisation have a positive attitude about the OIA, and understand the underlying principle of availability, the OIA system is healthier and requests are processed more efficiently.

It was evident that staff considered the key to the success of Pharmac's purchasing model is its ability to maintain confidentiality around the prices it pays. According to a staff meeting attendee, Pharmac's supplier contracts are the most important information it holds. The message to staff to not release '*commercial information*' is an intrinsic part of the Pharmac culture – a staff meeting attendee said it forms part of the '*water cooler'* talk. Another staff meeting attendee said it is Pharmac's commercial arrangements and '*behind the scenes*' role that puts it in a complex position when it comes to being transparent with the public in a timely manner.

I acknowledge that responding to requests for official information that contain, what staff called '*commercially sensitive'* information can be complex. This is why each OIA request must

[32] See s 12 Public Sector Act 2020 and PSC's Open government webpage

[33] See Pharmac's Final Response to Outcomes of the Pharmac Review, 14 November 2022, p19

[34] Link to Pharmac's Operating Policies and Procedures Manual 4th Ed webpage (updated 14 November 2022)

be dealt with on a case-by-case basis. I (and previous Ombudsmen) have repeatedly stated this advice in our final opinions on complaints made about agencies' decisions to withhold commercial information.[35] Staff should understand that commercial information is not automatically or absolutely protected. The grounds for protecting it require that release would create a very real risk of prejudice or disadvantage to the agency's commercial activities or negotiations. If it is being withheld to protect a third party's commercial position, the prejudice has to also be unreasonable. The identified disadvantage should then be weighed against other public interest factors in releasing the material.

The OIA provides legitimate reasons to withhold information of this nature from the public. However, it is also vitally important that the public can request information about decisions that have such a huge impact on their lives. This enables the rationale for decision making and public expenditure to be open to scrutiny by those whom the decisions affect, and allows greater public participation in government decision making. It is important that staff understand there may be situations where the public interest factors outweigh the prejudice in release, in which case the OIA requires it to be released. Staff should not apply a blanket test, which may lead to a decision being overturned on review.

As I said earlier, Pharmac's mandate to purchase pharmaceuticals and medical devices on behalf of New Zealanders is unique. However, the requirement to maintain confidentiality around some commercial information is not unique as many public sector agencies hold this type of information. As outlined in *Senior leader messaging about the OIA*, I suggest Pharmac's senior leaders address concerns about balancing highly sensitive information with transparency and openness by actively championing positive engagement with official information legislation.[36]

The Chief Executive acknowledged that some staff may perceive the OIA as an adjunct to their primary roles. She said that Pharmac is a small Crown entity, with a focus on pharmaceuticals and medical devices, and staff are mostly subject matter experts (such as health practitioners, health economists and procurement specialists). Therefore, it is a challenging task to make the OIA '*part and parcel of every staff member's role*'. Adhering to the OIA is a statutory obligation, which all agencies are expected to meet as part of core business. It is up to the Chief Executive

[35] For examples, see the following Office of the Ombudsman case notes where the decision to withhold was upheld:

- Chief Ombudsman's opinion on OIA complaints about the refusal of Covid-19 vaccine contracts (2023);
- Request for expenditure on goods and services provided by Palantir Technologies (2018);
- Request for tender scores for successful tenderer (2013); and
- Request for business plan for Christchurch Convention and Exhibition Centre (2018).

See also the Office of the Ombudsman's Commercial information: A guide to sections 9(2)(b) and 9(2)(i) of the OIA

[36] See the Office of the Ombudsman's *OIA compliance and practice in the New Zealand Defence Force*, 2021, p19, as an example.

to be clear to all staff that responding to OIA requests is core work, especially when there is a known or concerning perception otherwise.

I am also concerned about staff and senior leaders' having a negative attitude towards a journalist (and OIA requester) which became apparent when a number of internal emails were published in October 2023.[37] The emails contained '*unprofessional comments*' by '*some staff*' and were released as a result of a Privacy Act request from the journalist. I consider it vitally important for senior leaders and staff to maintain a professional attitude toward OIA requesters. The publishing of these emails under the Privacy Act indicates that Pharmac's information release system works to a degree. However, I am concerned that staff were writing these emails about a journalist who was seeking information. This negative attitude towards an OIA requester strongly suggests an unhealthy OIA culture.

It appears some steps have been taken to address the culture concerns. The Board issued a statement accepting a plan from the Senior Leadership team to improve Pharmac's organisational culture, which included an apology from the Chief Executive.[38] The proposed actions include engaging an external party '*to assist the senior leadership team and the Board with work underway on the culture of Pharmac*' and '*update induction for all new Pharmac staff and external advisors to ensure a stronger focus on responsibilities as public servants'.* I understand that a *Living Our Values* work stream is also underway to enhance Pharmac's organisational culture.

I also note that several staff meeting attendees said some new employees have not worked for a Crown entity or for the public service before. In my meeting with her, the Chief Executive said that Pharmac operates at arm's length from government, which is appropriate for a Crown entity. The PSC states on its Crown entities webpage that '*Crown entities are … set up at 'arm's length' from ministers to deliver a range of government services and make some decisions independently'*.[39] However, it also states that '*Ministers expect Crown entities to consider themselves as part of the wider public sector and to bring a public service ethos to their entities and their governance*.'[40]

I suggest Pharmac ensure adequate training for staff who have come from the private sector, where they may not have had exposure to the transparency and public accountability measures expected of them when working at a Crown entity. As mentioned above, I discuss training further in *Organisation structure, resourcing and training*.

It appears that some staff views towards the OIA are less-than-enthusiastic, particularly among staff who were not directly responsible for processing OIA requests. This issue is discussed further in *OIA team practice*. However, it is also clear that there are staff who are committed to

[37] See Rachel Smalley: Inside the minds of Pharmac's leadership team, New Zealand Herald, 6 October 2023

[38] See Pharmac media statement Pharmac Board endorse action plan to enhance organisational culture, 27 October 2023

[39] See PSC's Crown entities webpage

[40] See PSC's Boards as leaders: organisational culture webpage as part of its guidance for Crown entities.

a more publically transparent Pharmac.[41] A few staff meeting attendees said they consider Pharmac '*wants to do the right thing*', but does not currently have adequate processes in place.

While I appreciate some work has been done to improve the organisational culture, there is still an opportunity for senior leadership to further actively role model openness and transparency, and to embed these principles at Pharmac. I suggest Pharmac's Chief Executive takes the lead to ensure all senior staff are confident and knowledgeable about their OIA obligations and open government principles. All senior leaders should stress the importance of the OIA as core business, ensuring all staff are provided with adequate OIA training, and senior leaders also attend this training (discussed further in *Organisation structure, resourcing and training*).

According to some staff meeting attendees, there has been a recent attitude shift in staff understanding that the OIA is a core part of their roles, and in messaging from senior leaders. This indicates that, with sufficient drive from the Chief Executive and senior leaders, the implementation of my suggested action points will go some way toward improving Pharmac's internal OIA culture. However, if action is not taken to champion a strong OIA culture, which is led from the top, improvements to OIA practices may be ineffective or unsustainable.

Action points
The Chief Executive and senior leaders should actively role model openness and transparency, and attend OIA training.
Chief Executive to consider ways to improve staff attitudes to the OIA, including increasing OIA training for all staff.

OIA reporting to improve performance

My expectations

Senior leaders should have clear oversight of their agency's OIA compliance and practice, and the effectiveness of its OIA structures, resources, capacity and capability through regular performance reporting, just as they would any other aspect of the agency's core business.

OIA performance reporting to an agency's chief executive and senior leaders should focus on more than just reported timeliness. Timeliness is important, but not at the expense of poor quality decisions, or if it drives the reporting of a 'rosy' picture masking capability and capacity issues. Efficiency is also important, and reporting should capture the duration of request handling, the number of responses that exceed legislative maximum time limits, and the reasons for any delay.

Meeting the timeliness measure does not necessarily mean that requesters receive information within 20 working days of their request. It also does not reveal to what extent

[41] From meetings, the sample of OIA file review, and from reviewing proactively released documents.

agencies are meeting their primary timeliness obligation of responding 'as soon as reasonably practicable.'

Collection and analysis of a range of OIA performance data[42] ensures senior leaders recognise and /or address:

- emerging themes or trends in information requested;
- OIA response quality;
- opportunities for proactive release of information;
- resourcing or capacity issues; and
- capability issues and opportunities to upskill/train staff.

Analysis of this information should be used to inform an agency's strategic framework describing how it intends to achieve OIA compliance, good practice, and a culture of openness and transparency.

I suggest agencies include media information requests in the data they report to the PSC, to reinforce that these requests are subject to the OIA and to present a truer picture of an agency's OIA workload and performance.

My findings

As part of this investigation, I considered how Pharmac managed its timeliness obligations during periods of high OIA workload and what may have contributed to a marked drop in timeliness in 2022 (as mentioned in *OIA timeliness and complaint statistics*).

Pharmac's OIA register provided a detailed, month-by-month view of the number of OIA requests Pharmac was handling in 2022. The data indicates there was a sharp increase in the number of OIA requests received from March 2022, and the number of decisions sent dropped from then onwards, becoming most apparent two months afterwards. Staff meeting attendees confirmed that the increase in OIA requests resulted in a backlog from May 2022, which took approximately eight months to clear. I discuss some of the contributing factors to the peaks and troughs that occurred in 2022, and the measures Pharmac has put in place to meet its timeliness obligations in the future, in *Organisation structure, resourcing and training*.

According to staff meeting attendees, a weekly email list of OIA requests goes to Pharmac's Senior Leadership team, managers and the Communications team every week to show where

[42] OIA performance data agencies should collect and analyse includes, for example:

- the number, length and reason for extensions;
- the outcome of the request (granted in full, granted in part, refused in full, withdrawn or abandoned);
- the grounds on which information was withheld or the request refused; and
- staff time spent processing official information requests, including the time spent assisting in processing requests by staff who are not in core OIA roles.

More information about OIA data collection is available in my OIA self-assessment tool for agencies.

each request is in the process (using a traffic light ranking system). This adds a layer of visibility and allows managers to note if there is an OIA request that needs input from them or their team. It also gives them the opportunity to proactively follow-up with their staff if a request appears 'stuck'. In addition, the Senior Leadership team receives a monthly performance reporting dashboard (the dashboard) in the form of a spreadsheet which includes a 100 percent timeliness target for OIA requests. It also has space for '*Commentary*', or an explanation of results.

As referenced above, there was an increase in the number of OIA requests received in March 2022, and the number of decisions sent per month dropped to the lowest number in May 2022. However, it appears the dashboard did not alert the Senior Leadership team to the OIA backlog until July 2022. I note that senior leaders (including the Chief Executive) were receiving a weekly email list of OIA requests, which would have included details of the emerging workload pressures. An example from early May 2022 states:

> *We have a total of 25 active OIAs as of 2 May, with 16 OIA responses due over the coming two weeks; 2 OIA responses past due/extended.*

These 25 requests were all assigned to one Government Services Advisor, who was also responsible for Ministerial correspondence and parliamentary questions. Even if the dashboard was not yet reflecting the true scale of the backlog, the weekly email list was beginning to. It is curious then, that an email was still sent to all staff after the backlog started about maintaining Pharmac's '*stellar record*' on OIA timeliness (as referenced in Senior leader messaging about the OIA above).

A staff meeting attendee said the Senior Leadership team was aware that timeliness had dropped in 2022 from the monthly OIA reporting it received. However investigators were told that staff felt senior leaders only seemed to respond when the OIA model actually failed—and was reflected in PSC's six monthly OIA reporting regime—despite repeated warnings from staff before this point was reached. A number of staff meeting attendees told my investigators there was no contingency plan to manage workload fluctuations of that magnitude at that time. Another staff meeting attendee observed that Pharmac was simply not prepared for the increase in Government Services workload.

I am disappointed that the Chief Executive upon receipt of reporting, and warnings from staff, indicating a drop in timeliness and issues facing the Government Services team did not take immediate action to ensure that statutory OIA timeframes were met. I expect reporting that identifies emerging workload issues to inform planning and resourcing decisions and that it is acted on promptly. Leaders should take steps to alleviate timeliness issues as soon as they can, rather than taking action only when the publicly available statistics reflect declining performance. In addition, as discussed in *Organisation structure, resourcing and training*, expecting one staff member to assume responsibility to process an increase in requests would no doubt have been challenging for that person.

The Chief Executive said that the Government Services team's workload is now being actively managed:

> *The Team Leader, Government Services, and their manager are responsible for escalating to the leadership team, including myself, when workloads are high. There are a range of options for us to address periods of high need, although as a small organisation of 170 staff, this is a challenge for us across the board in all the work that we do.*

Investigators were told the Senior Leadership team is now tracking OIA numbers in more '*granular detail*'. The Chief Executive also gets regular updates on the OIA capability improvements the Government Services Team Leader is working on. I was pleased to learn the Chief Executive is establishing a direct communication channel to the Government Services team. I encourage all senior leaders to heed early indicators that workload is increasing (as opposed to when it has reached unmanageable levels), and take immediate action.

I am pleased that since February 2024, the Board has been receiving updates on Pharmac's OIA improvement activities and the timeliness of its OIA responses as part of the Communications and Government Services Report.[43] Prior to that, the Board's Audit and Risk Committee had been receiving '*six monthly annual legislative compliance monitoring results*', including reporting against compliance with the OIA.

The focus of my investigation is timeliness. However, I would not wish for an undue focus on timeliness to result in swift, but poor quality decisions. It is also important that senior leaders promote quality, efficiency and process improvement. I consider Pharmac may be missing the opportunity to collect and analyse further information about its OIA performance, in addition to timeliness, as I described in *My expectations*.

In terms of monitoring and reporting on resource and capacity issues, it may assist Pharmac to implement a method to determine how much time directorates spend processing OIA responses. This could be as simple as asking relevant staff to tally or estimate their time spent on OIA responses weekly or monthly, and reporting this to senior leaders. This would provide senior leaders with a benchmark against which to identify any variances and determine any changes needed to be made to OIA resourcing or process.

Without accurate information about the time spent processing OIA requests, and workload, it will be difficult for senior leaders to make appropriate decisions about staffing levels, and to determine what resilience measures can be put in place during busy periods where increased workloads threaten the agency's ability to adhere to statutory OIA timeliness obligations. This is discussed in more detail under *Organisation structure, resourcing and training*.

Action points
Ensure reporting about the handling of OIA requests is actioned in a timely manner to identify and prevent future backlogs.
Collect, analyse, and report to senior leaders more data on the handling of OIA requests, including information about time spent on OIA processing, in line with my suggestions.

[43] See Pharmac's Board Meeting Minutes (23 February 2024)

The role of proactive release of information

My expectations

The OIA was not intended to be the only mechanism through which the public could access official information. Proactive release is the practice of publishing official information that is not subject to an information request under the OIA. Sound proactive release practices complement a well-functioning process for responding to OIA requests. These mechanisms, in concert, help agencies to progressively increase the availability of official information to the people of New Zealand, which is one of the purposes of the OIA.[44] In addition, a 2020 Organisation for Economic Co-operation and Development (OECD) report noted that '*disseminating accurate and timely information*' (may) '*counteract mis- and disinformation*.'[45]

A free flow of information about the work of the government strengthens accountability, facilitates informed public participation in government decision making, and improves public trust and confidence in government. Proactively releasing information may have the added benefit, for agencies, of reducing the OIA workload which may positively impact an agency's ability to comply with timeliness obligations. It may remove the need for some requests altogether; or help requesters to make their requests with greater particularity. A targeted, specific request for information will, in turn, make the OIA response easier, and quicker to prepare.

Agencies' proactive release practices should be underpinned by comprehensive policy in order to ensure a consistent approach across the organisation to releasing information. It is best practice for agencies to publish their proactive release policies, in order to facilitate accountability and transparency. Senior leaders must also ensure that staff are supported to enact the policy through implementing adequate processes and systems and fostering a positive culture within their organisation around the proactive release of information.

Just like the OIA process, building a strong culture around the proactive release of information requires on-going, positive messaging from senior leaders. Staff receive signals from senior leaders not only from overt messaging, but from their actions.

Agencies should take care that proactive release does not become a default mechanism for avoiding the timely consideration and release of information in response to OIA requests.

Under section 18(d) of the OIA, agencies *may* refuse a request if the information is or will soon be publicly available. However, this is a discretion which I expect agencies to use reasonably and with regard to all the circumstances, including the timeliness expectations in the OIA.

In order to justify refusal on the basis information *will soon be* publicly available, the agency must be reasonably certain that the requested information will be released in the immediate future (and be able to articulate when and where). In a situation where information is scheduled to be released proactively, but that is some time away, any intervening OIA request

[44] See s 4 OIA 1982

[45] Link to OECD Policy Responses to COVID-19, Transparency, communication and trust: The role of public communication in responding to the wave of disinformation about the new Coronavirus

will need to be independently assessed, rather than refusing it under section 18(d). In addition, where an agency has relied on section 18(d) of the OIA to refuse information on the basis that it will soon be publicly available, I consider it is good practice for the agency to contact the requester to let them know once the information is available.

Further information is available in my guides, *Proactive release: Good practices for proactive release of official information*;[46] and *Publicly available information: A guide to section 18(d) of the OIA and section 17(d) of the LGOIMA*.[47]

My findings

My investigators discussed Pharmac's practice of proactively releasing information with relevant staff; reviewed the agency's draft policy around the proactive release of information; and reviewed information proactively released on Pharmac's website.

In the 2023 calendar year, Pharmac published 26.4 percent of its OIA responses on its website. Although this is above the 17.6 percent average of published OIA responses across all other Crown agents, it is a notable decrease from when Pharmac first started publishing OIA responses in 2019, when 48.3 percent of its OIA responses were published. This percentage has fluctuated over the years due to '*resourcing constraints*'.

I was pleased the Chief Executive told me she could see the value in proactively releasing information, and Pharmac was publishing as much as possible. In addition, a number of staff meeting attendees said they would like Pharmac to proactively release more information, but this was limited by a lack of resources. As outlined above in *My expectations*, both healthy OIA practices and proactive release practices allow agencies to increase the availability of official information to the people of New Zealand.

Also outlined in *My expectations*, under section 18(d) of the OIA, agencies may refuse a request if the information is or will soon be publicly available. When staff were asked about the use of this section of the OIA, one staff meeting attendee said the expectation of the Government Services Team Leader is for this refusal ground to only be used when information will be published within six weeks. Another said they had used this section when information was to be published online within two weeks, and another said this happened with media information requests, but only within a very short timeframe.

It does appear that Pharmac considers the use of this section on a case-by-case basis. There does not appear to be any blanket rule on the number of days or weeks to justify refusal on the basis information will soon be publicly available.

If relying on this section of the OIA to refuse information, an agency must be reasonably certain that the requested information will be released in the immediate future (and be able to articulate when and where). Pharmac does not currently have guidance outlining its

[46] Link to the Office of the Ombudsman's Proactive release: Good practices for proactive release of official information

[47] Link to the Office of the Ombudsman's Publicly available information: A guide to section 18(d) of the OIA and section 17(d) of the LGOIMA

expectations in relation to using section 18(d) of the OIA. I suggest including this information in the OIA guidance the Government Services team is developing (discussed further under *Organisation structure, resourcing and training*) and then promoting it across the agency.

It is positive that Pharmac proactively releases a range of information on an ad hoc basis, as distinct from OIA responses, including:

- manuals (such as Board Governance, or Operating Policies and Procedures);
- medicine notices;
- minutes / records (for the Board, Committees or Advisory Groups); and
- data (such as Named Patient Pharmaceutical Assessment on exceptions pathway funding decisions).

In addition, one of the biggest proactive release initiatives by Pharmac recently was in response to multiple OIA requests about the funding of Trikafta, a medication for treating cystic fibrosis. There are multiple benefits to releasing information of this type. Not only do the community have more information about a topic of high public interest, but proactively releasing information may also benefit Pharmac by reducing OIA requests or it can help requesters make more targeted requests. Such action may positively impact its ability to comply with OIA timeliness obligations.

I am pleased the Government Services Team Leader provided me with an early draft of a Proactive Release Policy. Once finalised, having a written policy in place will increase Pharmac's ability to deliver on its proactive release initiatives. I encourage Pharmac to consider making this policy available on its website. I also encourage Pharmac to continue to increase the proportion of OIA responses it proactively releases. Not only will this align with the intentions of the Open Government Partnership, but it will reinforce this statement from Pharmac's OIA intranet page, which states: [48]

> *Releasing information enhances public sentiment and trust in our organisation and the work that we do.*

Action points
Include information on refusals under section 18(d) in OIA guidance material.
Continue developing the Proactive Release Policy, and consider publishing it on Pharmac's website.

[48] Link to the Open Government Partnership website homepage

Organisation structure, resourcing and training

My expectations

The effectiveness of the OIA is largely dependent on those who implement it on a day to day basis, and how they apply the resources available to them to manage the realities of complying with that law. Official information practices should demonstrate understanding, compliance, and commitment to the principles and requirements of the OIA and related legislation, including the PRA.

Compliance with the OIA is not a 'nice to have'. It is a legislative requirement and is core business for any government agency in our democracy, no matter the policies or other priorities of the Government of the day. I expect agencies to organise their structure and resources to ensure they are able to meet their legal obligations under the OIA considering each agency's size, responsibilities and the amount of information held. This should include appropriate staff capacity to handle the OIA workload.

Agencies should also have resilience measures in place which allow them to cope with surges in demand for OIA requests, or staff absences. As I discussed earlier in *OIA reporting to improve performance and inform strategy*, agencies' OIA reporting should allow them to identify any capacity or capability issues, and actively monitor the agency's ability to meet its statutory timeliness obligations.

I appreciate the increasing challenges that all agencies face in managing limited funds and the corresponding impact on staff numbers. I can only reiterate that maintaining compliance with OIA obligations is a legal requirement and core business. The OIA is a fundamental part of New Zealand's democratic and constitutional framework and the importance of complying with this legislation should be reflected in the resources and training assigned to it.

I expect that:

- agencies have the *capacity* to meet official information obligations with clear and fully functioning roles, accountabilities, reporting lines, delegations and resilience arrangements; and
- agencies have the *capability* to meet official information and record keeping obligations with user-friendly, accessible resources and guidance supported by regular training.

I expect agencies' OIA handling processes to be agile and flexible enough to operate efficiently and remain a priority, even in circumstances such as the significant workforce reductions that are taking place in the public sector this year and are likely to continue. During such times, it could be tempting to dismiss the OIA as a low-priority, compliance activity. However, effective administration of the OIA, as well as a strong focus on the proactive release of information, is never more important than in times of stress and uncertainty. It is crucial that the information on which impactful decisions are based is available to, or can be requested by, the public so the rationale for decision making is transparent and open to scrutiny by those whom the decisions affect. This proved true during the challenges of the 2020 COVID-19 pandemic.

Every public servant has a role in making information accessible – whether directly as a member of an OIA or media team or indirectly by creating and storing information in a way that facilitates its later access. All staff need to understand their agency's legal obligations to ensure compliance with OIA and record keeping requirements appropriate to their role and responsibilities. This should include ensuring that staff have access to, and attend, ongoing training in these areas. Record keeping training should convey the importance of the retention and free flow of information for New Zealand's democratic process, as well as highlighting the link between good record keeping and the agency's ability to fulfil its OIA obligations in a timely way.

Training is vital and should encompass the following:

- training at induction (including training on information management and recordkeeping);
- introductory basic awareness of key OIA and record keeping principles;
- advanced courses for specialists covering, for example;
    - proper application of the public interest and harm tests;
    - dealing with urgent requests;
    - dealing with requests the agency deems 'sensitive';
    - dealing with broad, complex requests;
    - managing consultations with third parties and Ministers;
- additional training for senior managers and decision makers; and
- refresher courses and seminars.

My findings

OIA team structure and resilience

Pharmac has a centralised model for handling OIA requests. The Government Services team coordinates Pharmac's responses to OIA requests, as well as parliamentary questions, ministerial correspondence and (more recently) Privacy Act requests. As of mid-2024, the team comprises a Team Leader and a Senior Advisor—both permanent, full time roles. A second Senior Advisor was assisting on a short-term secondment from late April 2024 through June 2024. Pharmac was also hiring for a Senior Advisor on a 12 month fixed term contract to replace the secondee.

The Team Leader reports to the Manager, Public Affairs and Government Services, who in turn reports to the Director Equity and Engagement. The Government Services team moved to its current directorate in September 2023, the day the Team Leader started at Pharmac.

The OIA function has undergone significant changes since 2020. For instance, during the course of this investigation the function has been included in several directorates - first Engagement & Implementation, then Strategy, Policy and Performance (temporarily while an organisation-

wide structure change was occurring), and it is currently in the Equity and Engagement directorate.

I am concerned that between September 2020 and March 2022, there was only one staff member responsible for responding to OIA requests, parliamentary questions, and ministerial correspondence. When relying on one individual there is a risk of a single point of failure if that staff member is unavailable. An agency also risks losing institutional knowledge should that staff member move on from the organisation. In addition, one staff member only has limited capacity if the agency experiences a sudden and unexpected increase in workload. This is especially evident when the work they are responsible for has statutory timeframes that must be met.

In Pharmac's case, this did actually occur. As stated above in *OIA timeliness and complaint statistics*, Pharmac's OIA timeliness decreased in 2022, which Pharmac said was due to the unexpected and lengthy absence of the sole staff member responsible for responding to OIA requests. There was also an increase of both OIA requests and Parliamentary questions in March and April 2022.[49] The monthly performance reporting dashboard shows parliamentary questions were likely prioritised over OIA requests, considering their 100 percent timeliness target was consistently met during that same time period (which was further supported by a staff meeting attendee). These factors created a backlog of OIA requests that took eight months to complete (the backlog was discussed in *Leadership and culture*).

I note that the single staff member conscientiously attempted to meet Pharmac's OIA obligations. However, when there is only one staff member responsible for processing OIA requests, and an increase in workload combined with inadequate contingency planning, a backlog is inevitable; and it took some time for Pharmac to recover. The detrimental impact on the Pharmac's OIA practice due to the under resourcing of the Government Services team at that time is significant, and deeply concerning to me. Therefore, it is my opinion that Pharmac acted unreasonably by not allocating sufficient resourcing to ensure it could meet statutory OIA timeliness obligations.

However, I have not made a recommendation in this instance because Pharmac has taken steps to address the issue. As a short-term fix, Pharmac brought in a mix of secondees, fixed term staff and temporary employees to help Government Services with the workload.[50] In addition, Pharmac apologised to some requesters and explained why their OIA responses were late. In November 2022, an internal OIA process review was completed '*to identify the root causes of the performance issues and avert a future reoccurrence*'. This review found the OIA

[49] Link to New Zealand Parliament's Written questions webpage where responses are published.

[50] Pharmac introduced the following resources to address the OIA backlog and Government Services workload:

- April 2022 – repurposed a fixed term Policy Advisor role to support the Government Services function;
- mid-September 2022 to July 2023 – hired a fixed term Government Services Advisor;
- late September 2022 through March 2023 – seconded a Senior Government Services Advisor; and
- April 2023 to April 2024 – hired a temporary employee to help the Government Services team, who a few months later took on a fixed term role as a Government Services Advisor, and continued in the fixed term role even when the permanent Government Services Advisor role became vacant in July 2023.

model was not fit-for-purpose and highly dependent on one staff member. In response, Pharmac took steps to improve the resilience of its OIA model by doubling the size of the Government Services team from one full-time, permanent staff member to two, with the addition of a Team Leader.

Following the review, an internal OIA process improvement project started in early December 2022, which resulted in a proposal for an automated IT system for both OIA requests and general enquiries (which would replace the Excel spreadsheet for tracking OIA requests). I am pleased that Pharmac has proposed processing improvements that could positively impact on OIA timeliness. However, a staff meeting attendee said the system is currently on hold because the investment involves a significant financial component. I encourage Pharmac to continue exploring this as an option as its budget allows.

The Government Services team workload increased again at the end of 2023, and three Senior Advisors from the Ministry of Health were seconded in approximately two week increments over a seven week period to assist the Team Leader and Advisor. This was organised through PSC's workforce mobility function.[51] In addition, in April 2024, the Advisor role was changed to a Senior Advisor position to further reduce Pharmac's vulnerability should the Team Leader be absent.

According to staff meeting attendees, other Pharmac staff with OIA and ministerial correspondence experience (primarily Communications team staff), could step in to help the Government Services team if there is a surge of work. However, there is a risk that when the Government Services team experiences increased OIA workloads, there is a concurrent increase in the workloads of other teams, which may make it difficult to redeploy staff from other internal teams. Instead, in the past, Pharmac has had to rely on short-term external secondees, to assist.[52]

Pharmac did take steps to address the backlog, by providing extra resource and seeking to understand why the backlog occurred. However, workload projections conducted in 2024 indicate that Pharmac is tracking to receive its highest ever number of OIA requests, ministerial correspondence and parliamentary questions.[53] I encourage Pharmac to continue actively monitoring intake and use this business intelligence to inform future long-term resourcing needs, building OIA capability across the organisation.

In my view, continually using short-term solutions will not solve the underlying resourcing issue. Nor does it give me any sustained confidence that this organisation is committed to prioritising this work. Instead, resolving the workload issue requires the Senior Leadership team taking a longer term, strategic view, preferably documented as part of the overarching OIA strategy I suggested in *Leadership and culture*. I reiterate that responding to OIA requests is core business and must be resourced accordingly. I encourage Pharmac to keep considering how it can best support the OIA function and prepare for any increases in workload. This

[51] PSC's workforce mobility function can be activated if an agency drops below the 90 percent threshold in the six monthly OIA timeliness statistics.

[52] This has occurred twice in six months (November / December 2023; and 24 April to 30 June 2024).

[53] Staff meeting attendees said this is partly the result of Pharmac having a dedicated Minister for the first time.

includes addressing any vulnerabilities in terms of availability of resource when workloads increase and there is a risk of a single point of failure.

Staff meeting attendees pointed out that due to the '*leanness*' of Pharmac, single points of failure exist across the organisation. This has the potential to cause delays to OIA timeliness throughout different steps in the response process. For instance, one potential point of failure is covered further in *Information management and record keeping*, as there is a only one staff member responsible for Objective, which I find concerning.[54] A number of staff meeting attendees said the lack of resourcing in these areas is because Pharmac's operating budget has remained the same for years while it's 'to do' list and the Combined Pharmaceutical Budget has increased.[55] I remind Pharmac that I expect it to organise its structure and resources to ensure it is able to meet its legal obligations under the OIA.

In addition, Pharmac appears to have responded slowly to resolve resourcing issues in the past, a factor that contributed to its drop in OIA timeliness standards in 2022. For instance, although a senior OIA practitioner had been seconded to the Government Services team to assist short-term, my investigators were told it took several months to bring in this extra, temporary resource. Overall, I expect agencies to have organisational resilience measures in place in the event of a spike in the OIA workload or the sudden unavailability of staff due to illness or attrition. I am pleased that Pharmac has now put resilience measures in place. However, I encourage the Chief Executive to ensure there are long-term, sustainable solutions to increases in OIA workload.

For instance, there may be a pool of staff who have adequate OIA knowledge that allows them to be redeployed to the Government Services team or able to assist other business units in the event of growing OIA workload pressure. In addition, guidance, policies, procedures and training are all vital to support Pharmac's staff to 'step in' as required. I discuss the importance of resources below. Cross-agency OIA networks may also be useful to discuss possible approaches. I encourage Pharmac to include details of long-term sustainable solutions to resourcing in an overarching OIA strategy (discussed in *Leadership and culture*).

Action point
Implement long-term resilience measures to ensure Pharmac can meet OIA timeliness obligations in the event of increased OIA workload pressure.

OIA training

Pharmac has said that all new staff received OIA training as part of its induction programme. A staff meeting attendee said this consisted of a '*light touch*' OIA presentation delivered every two months to new staff. I received a copy of the February 2023 version of the presentation which contained a high level overview of the OIA and stated on one slide, '*Responses required*

[54] Objective is Pharmac's information management system.

[55] See Pharmac's *Briefing to incoming Minister of Health Dr Shane Reti*, November 2023, p14

within 20 working days', and on another slide, '*OIA decisions must be provided within 20 working days after the request is received (extension is possible)*'.

This misrepresents the legal requirement, and is something I see often. Section 15(1) of the OIA in fact requires a decision on an OIA request to be made and communicated to a requester '*as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received*' (unless an extension is made). I was pleased to learn that in October 2023, the Board directed Pharmac to update its induction programme and introduce learning modules to more fully reflect its public sector role (including its OIA obligations) as annual mandatory training for all staff.[56]

It is positive that the new Introduction to the OIA PowerPoint (launched in March 2024), includes a reference to '*as soon as reasonably practicable*', as well as the principle and purposes of the OIA. The intention is that all staff must complete this module in the first four weeks of starting at Pharmac, and then each following year. As discussed in *Leadership and culture*, a number of Pharmac staff come from the private sector, where they may not have had the same expectations of transparency and accountability. It is imperative that staff who do not have a public sector background receive a proper introduction to the OIA. New Pharmac staff also complete PSC's Public Sector Induction, which briefly references the OIA.[57]

In addition, staff receive a Pharmac Induction Pack, which has a paragraph on '*Our Official Information Act obligations*'. It states, '*There is a statutory timeframe to respond – the Policy team manages this process with input from Legal.*' I suggest Pharmac include reference to '*as soon as reasonably practicable*' in this guidance, and correct the name of the team that handles OIA requests. Staff meeting attendees said training for new staff in the Government Services team has varied over the years, but usually comprises one-on-one targeted training on the OIA between team members.

A staff meeting attendee said the Communications team did not receive targeted OIA training. While some in the Communications team might have received basic OIA training as part of their induction to Pharmac, it is crucial they also receive targeted OIA refresher training on a regular basis. As I discuss in *OIA handling by the Communications team*, a request for information held is an OIA request, and the Communications team must respond to these in accordance with the law. Targeted OIA refresher training is particularly important if the Communications team is providing additional support or coverage for the Government Services team. I understand the Communications team will have to complete the mandatory OIA modules like the rest of staff, but additional, dedicated training on the OIA aspects unique to their role would be beneficial.

It does not appear Pharmac has provided senior leaders with any targeted OIA training recently. As mentioned in *Leadership and culture*, the Board endorsed an action plan to help Pharmac improve its organisational culture. One way Pharmac's senior leaders, including the Chief Executive, could role model the *Living Our Values* ethos is by attending formal OIA

[56] See Pharmac's media statement Pharmac Board endorse action plan to enhance organisational culture and Memorandum for Pharmac Board Meeting, 27 October 2023

[57] Link to PSC's Public Sector induction webpage

training on a regular basis. This would send a clear message that senior leaders are committed to the purposes and principle of the OIA. I appreciate some senior leaders may have OIA experience and good support mechanisms in place. However, relying on an individual's knowledge and past experience to make the appropriate decision underestimates the benefits of ongoing training and regular refreshers, including keeping up-to-date with any changes in law or new opinions I issue.

My office has launched a new online learning platform, Te Puna Mātauranga, and '*The OIA for Ministers and Agencies*' course may be a useful addition to Pharmac's OIA training programme.[58] My staff are also available to assist with developing or delivering training, on request.

Action points
Update the Induction Pack as per my suggestions.
Provide targeted OIA training to the Communications team and senior leaders on a regular basis.

OIA guidance

Pharmac said it has an OIA desk file and '*accompanying process chart*' for the Government Services Advisor, which was drafted in 2019 but has never been finalised. Therefore, the OIA desk file is not '*fully operational*' and does not '*always reflect the daily practices of this role.*' A staff meeting attendee said there is an intention to update the OIA desk file, but the Government Services team does not have the capacity. I note the OIA desk file includes details on 'Rescoping' (clarification), 'Transferring', 'Extension', 'Withholding' and 'Declining', but does not include detail about the review and sign off process. Pharmac also provided a draft OIA FAQ from April 2023, which it intended '*to finish and release…as soon as resourcing allows*' but this had not occurred by the time of writing.

Several staff meeting attendees acknowledged that Pharmac's OIA processes and procedures are not well documented, but I am encouraged by the progress made since late 2023. An OIA decision making memo template has been produced, as well as a dedicated OIA intranet page (which includes a video for staff '*giving a brief overview of the OIA and staff obligation*'). All Pharmac OIA templates are updated and being used (pending review by Pharmac's Plain Language Officer). An OIA Policy is drafted and awaiting endorsement by the Senior Leadership team.

Further improvements planned for 2024 including updating the OIA desk file (mentioned above) to reflect current processes and practices, drafting a guide for complex and sensitive OIA requests, finalising a guide with Pharmac-specific examples of common OIA grounds for withholding information, and OIA process mapping. Pharmac also shared that staff '*will refer to Ombudsman publications for guidance*'.

[58] Link to the Office of the Ombudsman's Te Puna Mātauranga webpage

Currently the OIA intranet page appears to be the only place where OIA roles are clearly defined at Pharmac. A staff meeting attendee said the intention of the OIA intranet page was for it to eventually become a '*one stop shop*' for all OIA guidance. The OIA intranet page currently states:

> *Pharmac is expected to answer 100% of Official Information Act requests within the legislative timeframe. Typically, a response is required within 20 working days from the date received by Pharmac.*

As stated above in *OIA training*, it is a common misunderstanding that decisions on OIA requests should be made and communicated to a requester in 20 working days. However, section 15(1) of the OIA actually states a decision be made '*as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received*' (unless an extension is made). I suggest the OIA intranet page is updated to include this wording.

I acknowledge that Pharmac has a number of initiatives underway to improve and document its OIA processes. Despite this progress, I am concerned that Pharmac does not yet have an up-to-date, finalised OIA policy or procedure. I suggest prioritising resourcing to ensure the OIA strategy, processes and guidance material are completed as soon as possible. My office is available to review this and other OIA resources if that is of assistance. Further, once all OIA guidance documents are developed, they should be communicated to all staff. Pharmac should also give consideration to publishing its OIA guidance.

I am in no doubt that Pharmac would benefit from documenting its OIA processes. In the event that OIA expertise is not available, having these resources means other staff can quickly and easily step in to assist. This is one resilience measure Pharmac should have in place to ensure it meets its OIA obligations, particularly during periods of high workload or staff absences. Documented practices, roles and responsibilities would reduce time spent explaining the OIA process so OIA responses are provided to requesters as soon as reasonably practicable.

Action points
Update the OIA intranet page as per my suggestions.
Continue to prioritise and resource the development of OIA guidance materials, and consider publishing them.

OIA handling by the Communications team

My expectations

A request to an agency for information the agency holds[59] is, by definition, an official information request.[60] This means the request for information must be handled in accordance with the OIA, irrespective of who is making the request or whether it is submitted to the Communications team, the OIA team, or any other part of the agency.

For the sake of clarity I want to state unequivocally that media information requests *are* OIA requests, with the core legislative obligations those confer. So that agencies and the media do not misunderstand my expectations, I want to be equally clear about what this does *not* mean: I do not expect that all requests for information must be transferred to OIA teams to be processed. As I stated above, the OIA does not require a 'formal' process for the handling of requests.

My expectation, simply, is that the same OIA obligations must be met for information requests handled by Communications teams as for information requests handled by OIA teams, including:

- timeliness (including the requirement to respond as soon as reasonably practicable);
- providing assistance to requesters;
- providing reasons for refusal; and
- informing the requester of their right to complain to me about a refusal.

These requirements are not onerous, do not require complex processes, and do not need to impede the efficient and timely handling of media information requests.[61] It does, however, require that staff in Communications teams must be sufficiently trained and competent in the OIA to allow them to identify information requests and to be aware of the obligations under the OIA that they must adhere to when responding to them. In particular, these staff need to ensure responses to information requests adhere to OIA timeliness obligations and, where any aspect of the request is refused, they must adhere to the agency's obligations under section 19 of the OIA to give the requester the reason for its refusal and to advise them of their right to make a complaint to me.

The OIA places obligations on requesters, as well as on agencies. Requesters must specify with '*due particularity*' the information they wish to access.[62] I expect requesters to do so, and to

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[59] Media teams also field requests for an agency to generate fresh comment on an issue, and requests to interview officials. Requests of this type are *not* covered by the OIA as they are not requests for information *already held* [emphasis added] by the agency.

[60] With some exceptions detailed in s 2 of the OIA 1982; and information requests for personal information made by that person or their authorised representative, which are considered under the Privacy Act 2020.

[61] Link to the Office of the Ombudsman's Requesting official information – a brief guide for media

[62] Link to s 12 OIA 1982

engage with agencies' OIA systems in a manner that recognises that agencies' resources are finite and shared among all New Zealanders. Requesters should be as specific as they can to identify the information they are seeking and be open to communicating with agencies to refine or clarify their request if required. Broad and unclear requests can result in delays. It is in the requester's best interest to work with the person who is answering the request to understand what is being sought and consider narrowing the request if it is too broad.

My findings

Speaking broadly, the agencies I investigate tend to have several separate paths for handling information requests. For instance, agencies typically have an OIA team, which handles requests for information received from the public; and, they typically have a separate team responsible for communicating with the news media, including responding to media requests for information. A different team may also handle general enquiries. The team that deals with media information requests at Pharmac is generally the Communications team.

The Communications team comprises a Team Leader, a Principal Advisor, two Senior Advisors, an Advisor and a Graphic Designer – all permanent, full time roles. The Communications Advisor predominately handles the media information requests, though others in the team can help if needed. An external communications firm also assists Pharmac with public relations work.

Both the Communications team and the Government Services team are in the Equity and Engagement directorate (first mentioned in *Organisation structure, resourcing and training*) and report to the same manager. Several staff meeting attendees described the teams as having a close working relationship with an open flow of information. A number of staff meeting attendees also said they understood why there could be a perception of conflict with the Government Services team (whose primary function concerns transparency) and the Communications team (whose primary function concerns the overall public opinion of Pharmac) sitting side by side.

The Communications team receives most media information requests through the media inbox. During my investigation, there were as few as seven and as many as 24 requests per month, recorded on a spreadsheet. The Communications team is starting to differentiate between requests from the media for information held (media information requests) and requests from the media for comment or an interview, but media information requests are not yet included in the six monthly OIA timeliness statistics provided to PSC.

Pharmac's media centre webpage includes information to help requesters decide whether to contact Pharmac or a different area of the health sector.[63] This is also where Pharmac has published its Media Policy (reviewed in October 2023). It states their approach to media engagement is '*to be as open and responsive as possible.*'[64]

[63] Link to Pharmac's Media centre webpage

[64] Link to Pharmac's Media Policy

The Media Policy requires the Communications team to respond to all media requests in a timely manner. It also requires all staff to help by providing information quickly as the '*turnaround times for these are hours not days*'. A staff meeting attendee said staff were diligent about prioritising media requests. The Media Policy also states that:

> *All media releases and responses must comply with:*
>
> - *The Official Information Act 1982. This means we think about the duty to make information available but also consider whether there are grounds for withholding the information under the Official Information Act.*

To gain further understanding of the processing of media information requests, my investigators requested a selection of media files. Overall, the Communications team does an exemplary job of responding to requests '*as soon as reasonably practicable*', offering responses within only hours or days.

I saw no examples of information withheld from media information requests handled by the Communications team, so I am unable to determine whether accurate reasons for refusal are provided. I am pleased a staff meeting attendee said the media information response template includes wording about a requester's right to complain to the Ombudsman.

The sample files may not have included requests that were refused as staff meeting attendees said the Communications team generally pass on information requests to the Government Services team if:

- the requester asked for the information 'under the OIA';
- a request is large;
- the Analysis team have to run reports; or
- information may have to be withheld or refused.

Some staff meeting attendees had conflicting views about whether or not the Communications team ever withheld or refused information under the OIA. I suggest this is clarified. Even if the Communications team only refuses or withholds information on rare occasions, staff should still be aware that the decision must be communicated in accordance with section 19 of the OIA. This section requires Pharmac to:

- provide the reason for the refusal and, if requested, the grounds in support of that reason; and
- advise the requester that they may make a complaint to the Ombudsman and seek an investigation and review of this decision.

Communicating decisions in accordance with section 19 also provides assurance that there is consistency between the information request decisions made by OIA teams and those made by communications teams. I suggest the Media Policy is updated with this information, as well as stipulating that media information requests are official information requests.

As covered in *Organisation structure, resourcing and training*, the Communications team would also benefit from targeted OIA refresher training on a regular basis, which should reinforce the message that when a media information request is fully or partially refused, this must be done in accordance with the OIA.

Action point
Update the Media Policy as per my suggestions.

Information management and record keeping

My expectations

I expect agency chief executives to ensure information management (IM) systems are fit for purpose, to enable effective capture, maintenance and retrieval of all agency information in a form that is readily accessible. This includes system design, training for staff, and use in practice. As stewards of their agencies' IM practices, chief executives and senior leaders must promote a culture of robust record keeping and compliance with the Public Records Act 2005 (PRA). This is critical for facilitating the timely release of information.

Along with good processes for responding to requests for information and for proactive disclosure of information, it is essential that agencies have sound IM practices to enable them to readily identify, retrieve and make a principled and timely decision about information that has been requested. Good record keeping is fundamental to the practice of any public organisation, and it is the bedrock on which sound OIA practice is based. Information requested under the OIA can only be made available if it has been created and maintained in a way that enables ready identification and retrieval.

Specifically, the PRA obliges all public sector entities to create and maintain accessible records '*in accordance with normal, prudent business practice*'.[65] My expectations in respect of an agency's records and IM practices are no more onerous than the statutory requirements of the PRA. I expect agencies to:

- document handling of official information requests, including the steps taken to search for the requested information, the information identified as a result, and the reasons for decisions on that information; and
- ensure records and IM practices facilitate official information compliance, by ensuring it is generally easy to search for and find requested information.

Ideally, all agencies would have fit-for-purpose IM systems which are user friendly and which facilitate easy storage, organisation, and retrieval of information held by the agency. I understand that agencies are constrained by budgets and that upgrading or transitioning to a new information system is far from an overnight process. In this context, it is especially

[65] See s 17(1) PRA 2005

important that agencies ensure there is enough guidance and training available for staff that emphasises robust record keeping practices and mitigates known vulnerabilities in an agency's IM systems.

My findings

To gain an understanding of how Pharmac processes OIA requests, my investigators reviewed a selection of OIA files from April 2022 to May 2023. Some of these cover the period in which OIA timeliness dropped. I was pleased there were a few examples of good record keeping practices seen in the sample OIA file review. My investigators noted some Microsoft Teams conversations recorded, and an OIA file where an information search was saved. However, the review also highlighted some potential improvements to Pharmac's OIA record keeping practices, which are discussed below.

Pharmac's IM system, Objective, is used as a workflow tool for OIA requests.[66] Staff meeting attendees held mixed views about Objective. There is induction training for new staff in their first week, which includes a handbook, how to search Objective, and references to what the staff helping with OIA requests need to know. Targeted training is also available and staff praised the responsiveness of the Senior Advisor Information Management, who is able to help run searches in Objective. Staff are able to 'snapshot' a search in order to rerun it (which can save time later), and there is an audit trail for every document so it easy to see who has viewed it.

As mentioned in *Organisation structure, resourcing and training*, there is only one staff member responsible for Objective. I am concerned about Pharmac's ability to meet its obligations under the PRA and OIA should this staff member suddenly be unavailable. Pharmac should ensure it has resilience measures in place for this function.

A staff meeting attendee said it was the responsibility of the Government Services team to save emails containing advice from the Legal team within the OIA file folder in Objective (although the Legal team also save a copy within their own Objective folders). Investigators were told that emails tended to be sent only when the legal advice was formal, substantive and formed a clear position. Otherwise, if a low-risk, straightforward verbal conversation is held between the Government Services team and Legal team, there may not be an email trail.

Record keeping gaps were identified in most of the OIA files reviewed, including two examples of gaps in records for several months. No explanation was included in the files about the events that took place in those periods. Emails were identified in the OIA files that mentioned phone conversations that had taken place, but there were no further records included in the files. In addition, scoping, information searches and decision making for multiple OIA requests on the same topic were not recorded. A number of OIA files were missing records of the outcomes of internal consultations and discussions, such as verbal conversations, that the files indicated had taken place. For instance, two OIA files were missing the outcome of

[66] Link to Objective

consultation between subject matter experts and third parties that emails in those files referred to having occurred.

Pharmac was asked about the gaps in the OIA files. In response, it said it is '*unlikely that there are additional communications to be found due to resourcing constraints.*' The response also referred to the OIA backlog, and that there may have been work completed that was not easily documented (such as searching and assessing whether information was in scope). In addition, the response said Pharmac is a small organisation and many internal discussions take place in person:

> *We also note that OIAs are discussed between the Government Services, Legal and Media teams in a weekly OIA Triage meeting – advice is often given verbally, particularly where the position is unlikely to be contentious legally, reflective of resourcing constraints across the teams involved. Where a matter is less clear cut, written advice is provided (previously by email but now more commonly as part of the [OIA] decision memo).*

Further, when reviewing media files from the Communications team, Pharmac advised that '*Due to the tight timeframes of media requests, conversations often occur in person or on phone calls. These conversations are not documented*.'

Pharmac's current practices put it at risk of breaching section 17(1) of the PRA, which requires agencies to '*create and maintain full and accurate records of (their) affairs*'.

I suggest Pharmac amend its record keeping practices to ensure full and accurate records of substantive correspondence (including substantive telephone conversations, meetings and verbal discussions) with requesters, and records of any material internal advice and decisions on OIA requests, are created and maintained. This would ensure there is a record of information scoping, administrative steps, and decision making for OIA requests. The requirement to create and maintain full and accurate records of substantive matters could be fulfilled through the use of file notes or follow up emails (saved to Objective) to document what was discussed verbally.

Record keeping is a vulnerability for Pharmac. There is a risk that incomplete records may create an impression of lengthy periods of time where staff took no action to advance the processing of the relevant OIA request. Failure by an agency to keep adequate records may also lead to suspicions about who or what has influenced the decision. In addition, keeping a comprehensive record around the agency's decision making on OIA requests will make it easier to deal with multiple requests on the same subject matter and respond to an Ombudsman in the event of an investigation.

I am pleased Pharmac has started using an OIA decision making memo (as referenced above in *Organisation structure, resourcing and training*) which, if used correctly, prompts staff to record the decision making leading up to a response, including internal and external consultation. I encourage Pharmac to consider updating the OIA decision making memo to

include details of searches undertaken for information. Archives New Zealand has also developed an OIA information search policy.[67]

Further, when an OIA request includes emails, the Government Services team may be dependent on subject matter experts searching their individual inboxes, which could result in missing emails. Pharmac should consider ways to avoid this occurring, such as developing an email search checklist or parameters to help aid staff when they are asked to provide email correspondence.

Pharmac stated it has improved some of the Communications team record keeping practices (as of January 2024):

> *We file emails sent to journalists (often the main response) in Objective. We have now started to file the entire email trail.*

I am pleased the Communications team is filing all of the emails within the IM system that relate specifically to decision making for media information requests. While I do not expect records to be kept of every single interaction between staff members, I do expect records of substantive matters to be routinely created and managed as part of normal business practice.

Pharmac has a Records and IM Policy, which was reviewed March 2023. The Records and IM Policy states:

> *Pharmac kaimahi are responsible for:*
>
> - *Creating full and accurate records*
> - *Using the Objective EDRMS to store and manage all corporate records and information, including appropriate physical and digital correspondence*

I suggest the Records and IM Policy is updated to stipulate that pertinent verbal discussions also be recorded.

I am pleased the Records and IM Policy references the OIA and proactive release, and that it applies to newer digital records like Microsoft 365 content and social media, as well as metadata. The Records and IM Policy states, '*Pharmac will conduct regular training and monitoring of kaimahi's understanding in their record and information management responsibilities…*' However, there does not appear to be refresher training on IM and record keeping following the initial few months of induction. I also note that Archives New Zealand (NZ) conducted an audit of Pharmac's records in April 2022 that found '*Compliance with the IM Policy is not actively monitored*'.[68] Therefore, I suggest Pharmac conducts an assessment of staff training needs and provides regular refresher training on IM and record keeping to all staff.

[67] See Archives New Zealand's OIA information search policy webpage

[68] Link to Archives New Zealand's Public Records Act 2005 audit report on Pharmac

These measures should also be bolstered by increased messaging from senior leaders to promote record keeping disciplines and signal Pharmac's commitment to maintaining sound IM practices.

Action points
Ensure resilience measures exist to allow Pharmac to continue to meet Public Records Act obligations in the event of staff absence or unexpected circumstances.
Amend OIA record keeping practices to ensure full and accurate records of substantive correspondence (including telephone conversations, meetings and verbal discussions) with requesters, and records of any material internal discussions, are created and maintained.
Update the Records and Information Management Policy and OIA decision making memo as per my suggestions.
Assess staff training needs and provide regular refresher training to all staff on information management and record keeping.

OIA team practice

My expectations

Regardless of its size, an agencies' OIA structure and processes must be sufficiently flexible to enable a response within legislated OIA timeframes. I expect that agencies' OIA-handling processes, particularly relating to sign-out and peer review, do not interfere with timeliness obligations under the OIA. Agencies should also have a process for identifying and handling urgent requests.

The OIA must be adhered to in every respect, including the appropriate use of transfers, extensions, providing reasonable assistance, and provisions for withholding and refusing information.

Given the importance of information access to New Zealand's democratic process, I consider that OIA awareness and compliance should be specifically included in staff's performance objectives.

My findings

Official information requests completed by OIA teams tend to go through a process cycle. This cycle includes steps such as acknowledgement, triage, allocation to subject matter experts (SMEs), clarifying or refining, information search and collation, consultation internally and externally, application of any withholding grounds, applying redactions, decision making, drafting letters, review and sign-out. There are additional steps in the process if the request is extended or transferred. The whole OIA cycle can involve many staff who need to complete their part in a timely manner. Where possible, I make a distinction between practices that were in place in 2022—when Pharmac's timeliness statistics dropped—and after.

Receiving a request

At Pharmac, information requests usually arrive by email through an enquiry inbox. If the staff member monitoring the inbox cannot answer the request promptly, it is passed to the Government Services team, where it is logged and tracked through a spreadsheet as an OIA request.

According to Pharmac's November 2022 internal OIA process review:

> *Requests sometimes come in and are not allocated for a week...*

When there is a delay in the Government Services team receiving an OIA request internally, there can be additional pressure on the OIA practitioner and SME to respond in a timely manner. There was one example of this occurring in the sample of OIA files reviewed. A request was emailed directly to a staff member who was on leave, so it was not passed to the Government Services team for eight working days.

As stated in *Organisation structure, resourcing and training*, I understand that administrative errors may occur from time to time. However, Pharmac should mitigate – as much as possible – the risk of this scenario arising again in the future. For instance, senior leaders and the Government Services team should continue raising awareness of the OIA to staff outside of the Government Services team. As OIA guidance documents become finalised, these should be promoted internally to staff as resources.

An issue with acknowledging OIA requests was also identified in the sample OIA file review. Of the OIA files reviewed, at least a third did not appear to have been acknowledged. Of those acknowledged, at least a third were sent on or after the fifth working day, and the information contained in the acknowledgement was inconsistent. For instance, several included an incorrect maximum statutory deadline to make and communicate a decision to the requester. Pharmac would benefit from acknowledging every OIA request within two working days of receipt and using an acknowledgement template for consistency.

I note Pharmac now uses two templates for acknowledging OIA requests. The Government Services team started using the templates after the date range of the files reviewed for this investigation (as stated above in *Information management and record keeping*, the selection of OIA files dated from April 2022 to May 2023).

Both templates state:

> *As required under the Official Information Act 1982, Pharmac will respond to your request within 20 working days. You should receive a response on or before deadline [highlight added to 'deadline'].*

Pharmac should update its OIA acknowledgement templates to include the following:

- an explanation that a decision will be made on the request as soon as reasonably practicable (and no later than 20 working days from the date of receipt);[69] and
- an explanation that if a decision cannot be made within that timeframe, an extension may be notified.[70]

My office has a template that may prove useful.[71] Further, the OIA acknowledgement email template should also include details of Pharmac's understanding of the information requested.

Action point
Update OIA acknowledgement templates as per my suggestions and ensure all OIA requests are acknowledged within two working days of receipt.

Triaging

Staff meeting attendees said the Government Services team hold a weekly triage meeting on a Monday, attended by the Team Leader Communications and a member of the Legal team. Some scoping and delegation of OIA requests happens during this meeting, and the rest usually happens within the Government Services team on a day-to-day basis. Sometimes a SME or their manager are contacted about scoping. A staff meeting attendee said most discussions occur verbally and writing down the outcomes are determined on a case-by-case basis. They also noted there is room for improvement.

There was evidence of one triage meeting in the sample OIA file review, and other OIA files indicated that legal or communication advice was identified as being needed at the outset, particularly regarding scope of requests for high profile topics. However, if that advice was provided, it was not documented. I addressed this issue in *Information management and Record keeping*.

I am encouraged that staff could see the benefit of triaging OIA requests. One staff meeting attendee said it is better to spend more time upfront scoping a request in order to ensure it is understandable, to gauge the request size, and Pharmac's ability to answer within a deadline. As discussed in *Organisation structure, resourcing and training*, the Government Services team has implemented an OIA decision making memo to accompany each request, which has the potential to capture some of the outcomes from the weekly triage meeting and other discussions, including the agreed scope.

Action points
Continue to focus on improving the process for triaging OIA requests and keep a record of the outcome.

[69] See s 15 OIA 1982

[70] See ss 15A(1)(a) and (b) OIA 1982

[71] Link to the Office of the Ombudsman's Template letter 1: Acknowledgement letter

Requests for urgency

My expectations

A requester may ask that a request be treated as urgent, and must give the reasons for seeking the information urgently.[72] An agency should consider any request for urgency, and assess whether it would be reasonable to give the request priority.

If urgency is requested, the agency's legal obligations remain the same:

- to make and communicate the decision on the request as soon as reasonably practicable and no later than 20 working days after the day on which the request was received; and
- to release any official information without undue delay.[73]

However, what is considered '*as soon as reasonably practicable*' in the particular circumstances may be heavily influenced by the reasons for urgency. It is therefore good practice to discuss an urgent request with the requester. This may enable:

- agencies to clarify the competing priorities that would need to be side-lined in order to accord urgency to the request;
- requesters to clarify the reasons for urgency, in light of these competing priorities; and
- requesters to clarify the intended scope of their request, or to prioritise particular information, allowing decisions on certain information to be made sooner rather than later.

I then expect agencies to:

- assess the requester's reasons for seeking urgency (do they impact on the assessment of when it is *reasonably* practicable to make information available and/or merit the request being accorded priority over other work, including other official information requests?);
- decide whether to accord urgency to the request and record that reasoning contemporaneously; and
- advise the requester of this decision, and (if applicable) provide an indicative timeframe for response.

I expect agencies to establish guidance for deciding whether and, if so, how a response to a request should be provided urgently, and publish this on the agency's website. Publishing the guidance on the agency's website ensures the process for making decisions on requests for urgency is transparent to requesters.

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[72] See s 12(3) OIA

[73] Agencies should be aware that s 15(2) OIA 1982 allows for a reasonable charge to fixed, having regard to the cost of labour and material involved in making the information available, and to any costs incurred pursuant to a request to make the information available urgently.

Requesters can of course also seek a review by the Ombudsman as to how their request was considered (which may also be done under urgency). A contemporaneous record of the agency's assessment will not only promote accountability and transparency of the decision but also enable a swift Ombudsman review process for all parties.

My findings

Pharmac does not currently have any written guidance on processing urgent OIA requests. However, a staff meeting attendee said the Government Services team do their best to accommodate urgent requests if they have capacity. I note that agencies should consider whether the reasons provided by the requester for seeking urgency merit the request being accorded priority over other work.[74] I am pleased that the sample OIA files included internal emails from the Government Services team to SMEs, which indicates the SMEs are informed if requesters have asked for their request to be treated urgently.

I suggest the OIA guidance Pharmac is developing includes a section on responding to urgent requests, and this information is shared with SMEs. The section should encompass:

- the indicators for deciding whether, and if so, how a response to an OIA request should be provided urgently;
- the process for consulting the requester and assessing the requester's reasons for seeking urgency (for example, whether they merit their OIA request being accorded priority over other work, including other OIA requests);
- the process of deciding whether to accord urgency to the OIA request;
- how the OIA handling process will be expedited and/or prioritised; and
- advising the requester of this decision, and (if applicable) providing an indicative timeframe for response.

Once developed, the process around handling urgent OIA requests should be included in OIA training and shared with staff agency-wide, in particular those whose role in the OIA process might be impacted, such as SMEs.

I note Pharmac's *Making an OIA request* webpage currently does not include information for requesters on their right to request urgency.[75] I suggest that this information is published on the webpage, including the criteria for deciding whether, and if so, how a response to an OIA request should be provided urgently. Publishing the criteria on the webpage ensures that the process for making decisions on requests for urgency is transparent to requesters.

[74] Where the requester has asked for an urgent response, agencies can consider charging for any costs incurred pursuant to the effort to make the information available urgently. See section 15(2) of the OIA.

[75] Link to Pharmac's Making an OIA request webpage

Action points
Make sure information on handling urgent requests is included in OIA guidance, incorporating my suggestions, and circulated to subject matter experts.
Ensure there is clear messaging on Pharmac's *Making an OIA request* webpage for information requesters, advising them of their right to request urgency.

Engagement with subject matter experts (SMEs)

At many agencies, SMEs play an important role in the OIA process as they search for material and may provide context on information.

The November 2022 internal OIA process review found that it was not always clear who was responsible at Pharmac for collating information. The internal review and a number of staff meeting attendees said that a former staff member in the Government Services team, who had a lot of institutional knowledge, was relied on to complete searches of Objective for information within scope of many OIA requests. This practice meant that searches performed by this staff member were completed in a timely manner; but when new Government Services staff were hired from outside of Pharmac, they had to rely on SMEs to do searches (at least initially), which was an adjustment for the SMEs.

A staff meeting attendee said SMEs were made aware of the change when new Government Services staff started, and some staff found it difficult to make the adjustment due to their workload. A memorandum drafted for senior leaders about the internal OIA process review said some staff thought '*gathering information is not within the scope of their role*'. However, these issues were being remedied. This reinforces the importance of documenting processes and clearly defining roles. When changes occur, these should be communicated to staff and any corresponding written guidance updated accordingly. It also highlights the importance of the Chief Executive and senior leaders clearly stating to staff that responding to OIA requests is core business.

The November 2022 internal OIA process review also found that OIA tracking relied '*heavily on the memory of individual staff members*', resulting in OIA requests falling '*through the gaps during busy periods.*' This led to '*very late*' requests from the Government Services team to SMEs to search for information. The OIA file review conducted by my investigators showed a few examples of the Government Services team asking SMEs for information on the first or second working day after the request was received. However, in several cases it took longer for staff to contact the SMEs.

While SMEs should endeavour to provide the information within scope of a request to the Government Services team as soon as possible, it is also good practice for the Government Services team to provide an indicative timeframe to SMEs outlining the date they need the information. This should be determined on a case-by-case basis. Confirmation could be sought from the SME about the reasonableness of the timeframe and whether a longer time/consequent OIA extension may be required (and if so, why). A date for providing information was not always given, and when it was, it appeared to be anywhere from two

working days to 13 working days. Further, the OIA file review included examples of responses not being provided by SMEs in a timely manner, so the Government Services team had to follow-up.

Staff meeting attendees said the process has changed since this time and SMEs are now given approximately one to two weeks to provide information to the Government Services team for an OIA request. Staff said that about half of the time, SMEs are able to provide the information within a day or two of the Government Services team asking, whereas the other half of the time, it will take a week or two.

While I am pleased that SMEs usually provide the material sooner than the deadline, there is a risk that the requirement to make and communicate a decision on an OIA request no later than 20 working days after receipt of the request can sometimes overshadow the obligation to do this *'as soon as reasonably practicable'*. Each OIA request should be considered on a case-by-case basis, and there should be no 'blanket' rule on the number of working days SMEs have to collate information. It should be made clear to SMEs that OIA responses are to be provided to requesters '*as soon as reasonably practicable*'.

The Government Services team have a role in promoting this concept with the broader agency, but it needs to be supported by senior leaders. The words and actions of senior leaders should reflect that compliance with the OIA is a legal requirement and core business. As outlined above in *Leadership and culture*, a healthy OIA culture organisation-wide will enable OIA requests be processed in a timely and efficient manner.

Extensions

My expectations

An agency may extend the maximum time limits for both transferring a request and making a decision and communicating it to the requester—but only if certain criteria are met. These are:

- there must be a valid reason for the extension, either:
    - 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 to the request cannot reasonably be made within the original time limit.
- the extension must be for *'a reasonable period of time having regard to the circumstances'*; and
- the decision to extend the maximum time limit must be communicated to the requester within 20 working days after the day on which the request was first received by the agency.

In terms of reported timeliness through the PSC, an OIA request is considered to be 'on time' if a valid extension is communicated to the requester within 20 working days. Agencies should not be tempted to gain credit for an 'on time' response by communicating an extension to a requester where the reason is not a valid one under the OIA.

To use the extension provisions of the OIA incorrectly in order to bolster timeliness statistics is a breach of the legislation. It is also a missed opportunity to report honestly to senior leaders on the agency's performance. Senior leaders will only become aware of capacity or capability issues that need improvement through honest and clear reporting, as I discussed earlier under *Leadership and culture*.

Agencies may not extend response times just because an influx of requests or a lack of resource or planning has slowed response times for individual requests, or where an administrative error has delayed consideration of a request.

Furthermore, section 15A(1)(b) of the OIA only permits an extension for the reason of consultation, if necessary consultations are such that a proper response cannot reasonably be made within the original time limit. The multiple elements in this section must all be made out in each case. It will generally be hard to show that internal consultation within an agency, or peer review and sign-out processes, justify an extension under this ground. An agency is expected to know what information it holds, and to know its business well enough to be able to understand the impact of releasing that information, within the usual maximum timeframe for making a decision on a request. Nor is any 'FYI' process with Ministers considered to be 'consultation'.

I expect agencies to integrate into their OIA process an early, initial check that identifies those requests that are likely to require an extended timeframe for making and communicating a decision on a request, along with communicating this to the requester as soon as possible. An early check will help identify time pressures which helps avoid OIA breach, such as the improper use of the extension provisions. It also allows the agency to consider other options which may allow it to fulfil its timeliness obligations without relying on an extension, such as contacting the requester to assist them to narrow or refine their request.

If a statutory deadline is – or will be – missed due to error, a high number of requests, or mismanagement of competing workloads, I consider it good practice for the agency to contact the requester as soon as possible to inform them of the missed deadline, provide a new deadline, and apologise for the delay. I expect agencies to record these instances in OIA timeliness statistics[76] as a missed due date – not as an extension.

My findings

As discussed in *OIA timeliness and complaint statistics*, there was an increase in Pharmac's use of extensions in the second half of 2022. Of the extended OIA files my investigators reviewed, all were extended within the 20 working day maximum statutory timeframe. For OIA requests

[76] This refers to internal reporting, and the agencies timeliness statistics as reported to PSC.

extended under section 15A(1)(b), staff meeting attendees said the general consultation period is four to five working days.[77] Some consultations were external and some were internal.

Consulting with external third parties when information affects them is not a requirement under the OIA but, when conducted appropriately, it is good practice. It gives a third party a chance to comment before information that relates to them is released and it helps an agency make an informed decision.

Some of the large, international companies that Pharmac consults with may not be overly familiar with how the OIA operates in New Zealand. I understand contracts with some new suppliers include a clause that the company must be consulted on the release of information that relates to them. I am pleased Pharmac is updating the consultation clause in its contracts. Along with this, Pharmac should consider ways to increase suppliers' exposure to, and awareness of, the OIA. Pharmac should consider including this type of information on its website. Pharmac does not currently have any written guidance on consulting with third parties under the OIA. I suggest Pharmac include a section on this topic in the OIA guidance it is developing.

A number of issues were identified in the sample OIA file review. For instance, there were several examples of administrative delays, which are not valid reasons to extend, that contributed to the request requiring an extension. In these cases, there was no evidence that the administrative delay was considered in the extension rationale. In one example, an OIA request was not passed to the SME for the document search for nine working days. In another example, a SME forwarded an emailed OIA request to the Government Services team on the same day it was received, but a follow-up email to the SME asking about progress with collating the information was not sent until working day 16. As mentioned above in *Receiving a request*, there were examples of acknowledgements being sent well after receipt of the OIA request. For one OIA file that was extended, there is no evidence to suggest that work was completed on this file until the day prior to the acknowledgement being sent on working day 17.

In other files, record keeping gaps made it difficult to understand the events leading up to extensions. While it was clear from the files that internal consultations were necessary, it was difficult to discern whether it was '*reasonably*' possible for Pharmac to respond within the original time limit. I cover record keeping in more detail in *Information management and record keeping*.

There did not appear to be a 'blanket' rule on the number of working days OIA requests were extended for, which aligns with the requirement in the OIA that extensions should be for *'a reasonable period of time having regard to the circumstances'*. The majority of examples were extended on working day 20, and the others were extended on working day 19. One staff meeting attendee said OIA requests were extended close to working day 20 because of the complexity of discussions required (for example, about withholding grounds). Another staff

[77] See s 15A(1)(b) OIA 1982: *'consultations necessary to make a decision on the request are such that a proper response to the request cannot reasonably be made within the original time limit'*

meeting attendee said Pharmac is now trying to be '*really intentional*' about using extensions and how many days to extend. They said a request is generally extended close to working day 20 because staff are doing their best to complete it within the maximum statutory timeframe.

As outlined in *My expectations* above, I expect agencies to integrate into their OIA process an early initial check that identifies where an extension might be required and communicate this to the requester as soon as possible. A staff meeting attendee concurred with this, stating that it is better to identify at the outset if a request cannot be responded to within 20 working days so there is time to refine, or let the requester know in advance, it may need to be extended due to the amount of information. However, they said it can be unclear if a request will need to be extended until close to working day 20. Pharmac should be mindful that a general practice of extending requests on or close to working day 20 could lead to a perception that extensions are being used to manage workloads rather than being used for the reasons stipulated in the OIA.

I am concerned that it is not currently clear who is responsible for making the decision to extend. According to one staff meeting attendee, it is a joint decision made by the Government Services Team Leader and the Government Services team member who is handling the OIA request. A different staff meeting attendee said the decision is made following a discussion between the Government Services team and SMEs. The draft OIA desk file says:

> *The GSA* [Government Services Advisor] *should consult with the relevant SMEs and TL* [Team Leader] *on length of extension to be applied.*

It is positive that OIA specialists as well as staff with subject matter expertise are involved in making decisions about whether to extend or not, and for how long. Further consideration could be given to including senior leaders to oversee the decision. I note that regardless of who makes the decision on OIA requests at Pharmac, a decision on an extension is still a decision under the OIA, and should be approved by an appropriately authorised staff member. I discuss authorisations below under *Review and sign-out practices*.

In addition, consideration should be given to reporting the number of extensions, the reason for extensions, and the day at which the extension took place, to the Senior Leadership team. This would provide improved oversight of extensions, and whether they are being used appropriately. Senior leaders could then identify instances where extensions are not communicated to requesters as soon as possible.

Finally, I remind Pharmac to keep an adequate record of the rationale for seeking the extension, which could be incorporated into the OIA decision making memo.

Action points
Consider ways to increase suppliers' exposure to, and awareness of, the OIA.
Consider adding information on consulting with third parties in OIA guidance.
Clarify who is responsible for making a decision on extensions and update guidance accordingly.

Action points
Consider reporting the number of extensions, reasons for extensions, and the working day the extension was made to the Senior Leadership team.
Keep an adequate record of the rationale for seeking an extension.

Review and sign-out practices

My expectations

Agencies' OIA Teams typically require all OIA responses to go through a process of peer review and 'sign-out'. This usually begins with a peer of the draft of the response reviewing the response for format, spelling and grammar; proceeding to principal advisors, managers, SMEs and general managers in accordance with the agency's requirements. The more complex or 'sensitive' a response is considered to be, the more likely it is to also be reviewed by Legal and/or Media teams, and to pass through multiple levels of review before eventually being signed out. It is easy to see how agencies' sign-out procedures can add significant time to the OIA process, particularly if these steps occur consecutively rather than concurrently.

I note that these steps are not a requirement of the OIA; they are self-imposed by each agency.

By contrast, Media teams often have far fewer hurdles to clear to provide a response, and often staff at an Advisor level are empowered to send responses directly to media requesters with minimal, if any, review steps.

In order to meet the requirements of section 15(4) of the OIA, in the interests of accountability, and to ensure transparency for the requester in relation to who the decision maker was,[78] the signatory to OIA responses should be that of an authorised decision maker. Alternatively, it should be made clear that the email is sent on behalf of the authorised decision maker, with an appropriate record kept of the decision maker's approval. I expect the roles and responsibilities of decisions makers to be clearly defined and well understood.

Agencies must ensure that their sign-out procedures achieve a balance between OIA decision makers being suitably senior, and agencies not being at risk of breaching timeliness obligations under the OIA, including the requirement to make and communicate a decision as soon as reasonably practicable. Excessively stringent and multi-layered sign-out procedures may:

- increase pressure on staff required to complete OIA responses in a compressed timeframe;

[78] In *The Chief Executive of the Ministry of Social Development v L* [2018] NZHC 2528 [26 September 2018], the High Court found that anonymous decisions were contrary to principles of natural justice, as people could not detect or challenge bias if they did not know who the decision makers actually were.

- put agencies at risk of breaching their obligation to make and communicate a decision to the requester as soon as reasonably practicable, and to provide information to the requester without undue delay; and
- impact the quality of OIA responses, as staff have less time to consider the relevant issues and compose a response.

I expect agencies to scrutinise their sign-out process and establish practices which are flexible and proportionate, and do not threaten the agency's ability to make and communicate a decision as soon as reasonably practicable.

My findings

My investigators reviewed a sample of OIA request files. I am concerned that internal peer review and sign-out processes were not always clearly recorded in the OIA files.

In addition, there were a number of examples of the scope of an OIA request appearing to change when the SMEs started reviewing the OIA response and collated information. The late re-scoping of requests was also referenced as part of the November 2022 internal OIA process review:

> *The sign off process is overly long with too many opportunities for SME review which can result in the re-scoping of requests.*
>
> *…*
>
> *On occasion OIAs are re-scoped later in the process when the information is being readied for release, which causes delays as the request is again parsed between different staff.*

A memorandum drafted for senior leaders about the internal OIA process review said there are '*overly long reviews and signoffs embedded into the process.*' A staff meeting attendee said an earlier practice sometimes included multiple SMEs reviewing OIA responses. This would lead to differing opinions on whether to withhold and/or refuse information, which would cause delays until everyone could agree. The Manager, Policy and Government Services was the signatory on OIA letters at the time. As noted above in *Triaging*, a renewed focus on strengthening the triage process appears to have helped Pharmac eliminate the issue of re-scoping OIA requests at the review stage. The weekly email list of OIA requests (covered above in *Leadership and culture*) provides oversight of what OIA requests the Government Services team has on hand, and which SMEs should be involved in the response from receipt of a request.

Staff meeting attendees said the current process is that a Government Services team member drafts the content, and a SME and the Government Services Team Leader peer review the response in Objective. Occasionally the Legal team or Communications team will also see a response initially flagged at the triage meeting, and very rarely, the Senior Leadership team. Typically, the Government Services Team Leader (tier four) is the signatory on OIA letters, except on the rare occasion where it would be more appropriate for a different staff member to do so.

A staff meeting attendee said the current sign-out process typically takes one to two working days. Another staff meeting attendee said the Communications team are given between two and five working days to provide context on some OIA responses. This happens concurrently to the review and sign-out processes. Once signed, the Government Services team send the OIA response and save it in Objective.

I am concerned that it appears Pharmac has not been operating with a clear authorisation framework. Staff meeting attendees had conflicting views about who the final decision maker is on OIA responses. One meeting attendee said it is the SME's manager who signs off on the content of the OIA response, while two meeting attendees said it is the Government Services Team Leader. Another meeting attendee said either the Government Services Team Leader or the Manager Public Affairs and Government Services made the decision.

A staff meeting attendee said accountabilities were not communicated to them, and '*delegation frameworks*' were unclear. The Chief Executive has acknowledged that, '*There are still opportunities to improve our processes through good documentation to provide clarity to staff on their roles and responsibilities*'.

Another staff meeting attendee said they considered some delegations were not as evident as they could have been, but Pharmac is making improvements in this area. For instance, Pharmac is currently progressing a draft *Delegated Authority Policy* for operational delegations to clarify roles and responsibilities, which was due to be completed by 30 June 2024. Once finalised, the operational delegations schedule should be circulated to all staff to raise awareness of who the final decision makers on OIA responses are.

Clear, delegated authority will alleviate confusion about staff member authorisations and accountabilities. It will also provide a definitive escalation process when resolving matters where there is a difference of opinion. Further, as mentioned above in *Organisation structure, resourcing and training*, I understand OIA process mapping is planned for 2024. I expect this to include details of peer review and sign-out.

Despite the issues identified above, one staff meeting attendee said there were less layers of review and sign off than at other government agencies they had worked. I am pleased there has been significant progress made since the November 2022 internal OIA process review.

Action points
Finalise the Delegated Authority Policy for operational delegations and share it with all staff.
Make sure OIA process mapping includes peer review and sign-out.

Ministerial interactions

My expectations

My investigation focused on OIA requests made to agencies, termed 'agency OIA requests' (as opposed to Ministerial OIA requests, which are those for information held by, or more closely

connected to, the Minister). There is no requirement in the OIA for agencies to advise their Ministers about agency OIA requests received and decisions made.

However, both the OIA and the Cabinet Manual make provision for agencies to consult their Minister prior to a decision being made where reasonably necessary, ie. when the requested information is of concern to the Minister because, for example, they supplied the information or it is about their functions or activities. The decision maker on agency OIA requests remains the Chief Executive (or an official of the agency whom the Chief Executive has duly authorised).[79]

In addition, the Cabinet Manual recognises that the relationship between Ministers and Chief Executives should be guided by the '*no surprises'* principle.[80] This principle is defined in the Cabinet Manual, and states that:

> *As a general rule, [officials] should inform Ministers promptly of matters of significance within their portfolio responsibilities, particularly where these matters may be controversial or may become the subject of public debate.*

Agencies' interpretation of the '*no surprises*' principle—as it pertains to preparing responses to agency OIA requests—can impact their ability to comply with their legal obligations under the OIA, which include timeliness obligations. When interacting with Ministers' offices on agency OIA requests and responses, it is essential that agencies differentiate between:

- consultation with the Minister which the OIA provides for– where the Minister's input on an agency OIA request is required to assist the agency to make a decision; and
- notification or 'FYI' to the Minister of the agency's decision on an agency OIA request, in accordance with the 'no surprises principle' in the Cabinet Office Manual.

An appropriate timeframe to consult or notify on an OIA response is dependent on the individual circumstance of each case:

- When consultation is required, the Minister's office should be afforded a reasonable period of time within which to provide appropriate comment in relation to the proposed decision. Once comment is received the agency may proceed to make a decision. If no comment is received within the agreed period, the agency will need to consider its options to extend the timeframe for responding to the request, or to transfer the request to the Minister, or make a decision without the Minister's comment.
- Notification or FYI decisions should, where possible, be notified to the Minister at the same time as they are communicated to the requester, as this has no bearing on the substantive decision already made by the agency.[81] However, I accept that in some cases a short period of advance notice may be required to enable the Minister to be properly

[79] See s 15(4) OIA 1982

[80] See s 3.26 of the Cabinet Manual 2023

[81] Link to the Office of the Ombudsman's case note on Ministerial notifications and the obligation to communicate decisions 'as soon as reasonably practicable'

> briefed so that they are able to respond appropriately to any public enquiries and legitimate scrutiny that is expected.

In either case, agencies' interactions with Ministers must be configured in such a way that the agency is generally able to meet the OIA requirement to make and communicate the decision on a request as soon as reasonably practicable and no later than 20 working days. I expect agencies to identify opportunities where a brief summary, or even just the topic of the response can be provided to a Minister to fulfil the 'no surprises obligation', rather than providing the full response to the Minister as a default in all cases.

An agency's notification or 'FYI' process with Ministers' offices is not about seeking clearance, approval, or sign-off from the Minister. As my predecessor, Chief Ombudsman Dame Beverley Wakem commented:[82]

> *Seeking clearance or approval from a Minister on responses to requests for official information is an abdication of the agency's responsibilities and accountabilities under the OIA and would be in breach of section 15(4) [of the OIA].*

Public sector chief executives have to manage the relationship with their Ministers and be cognisant of the political landscape within which they work. This is a reality for chief executives and, of course, I acknowledge it. However, my expectation is that both chief executives and Ministers maintain their obligation to uphold the law.

To ensure the maintenance of good working relationships while also fostering public trust, it is important that agency chief executives and Ministers are clear with each other and open with the public as to how they deal with agency OIA requests.

I encourage all agencies to develop a written policy or agreement, which reflects the process that has been agreed with their Minister's office, and which sets out their mutual understanding and intentions when engaging with each other on OIA requests. This may be based on or guided by the matters covered by the *Model protocol on dealing with OIA requests involving Ministers* I have published.[83] The use of my Model Protocol is endorsed in the Cabinet Manual.[84] Once settled, I would also strongly encourage this to be published so it is transparent to everyone; enables trust in the process for handling a request; and clarifies the situations in which the agency may seek legitimate input from a Minister (consultation), and when comment is not being sought (FYI).

I must acknowledge the reality that feedback on OIA responses is sometimes given to agencies by Ministers' offices even where the response is sent purely on an FYI basis. I recognise that what may be sent as an FYI may raise issues which the Department may not have been aware of and which may justify a different approach being taken on a response. This can create a murky, but sometimes legitimate middle ground between FYI and consultation. It should be the exception, not the rule, and this means it is important for agencies and Ministers' offices to

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82 See the Office of the Ombudsman's Not a Game of Hide and Seek, p 113

83 Link to the Office of the Ombudsman's Model protocol on dealing with OIA requests involving Ministers

84 See s 8.53 of the Cabinet Manual 2023

develop and maintain clear boundaries and processes for the matters on which Ministers are likely to need to comment, and to document relevant decision making.

If a Minister suggests changes on an agency OIA request, the changes should not automatically be made. Under the law, the decision remains with the Department. A request from a Minister for changes should be escalated to the appropriate senior leader and consideration given to whether the changes should be made or not.

As stated above, I expect the majority of FYI notifications to be sent to Ministers' offices at the same time or shortly before the response is sent to the requester; and, for agencies to identify opportunities where the response in full need not be sent. This should ensure a balance between providing timely responses to requests while still enabling Ministers to prepare for public commentary around release in appropriate cases.

However, in those cases—which should be exceptional—where the agency considers their Minister's office needs several days to review and absorb the content of the response, the timeframe should be confirmed with the Minister's office and the agreed timeframe should be recorded. Otherwise, it becomes more likely that the Ministers' office may believe it is able to provide feedback under the no surprises/FYI notification process. This creates several risks:

- a potential impact on timeliness – if the response sits with a Minister's office for an excessive period of time, the agency risks breaching its obligation to make and communicate a decision *'as soon as reasonably practicable'*; and
- the potential for the Ministers' office to be perceived as unlawfully interfering with the decision of the agency on the OIA response, and politicising the release of information.

If a Minister's office, after considering the decision under the 'no surprises' FYI notification process, wishes to offer information or context to the agency that may warrant the agency reconsidering the decision it has made on the request, this is not necessarily inappropriate.[85] In fact, in order for the OIA to operate effectively, this additional information should be provided so that the right decision in law is made by the agency. However, I expect that any advice or feedback in this these circumstances:

- must be made in line with the reasons for refusing requests under OIA;
- *should not* be communicated as a directive from the Minister or from the Minister's office, as this would be an inappropriate interference, creating doubt about who is the decision maker on the request; and
- *should be* scrupulously recorded by the agency in a manner that facilitates retrieval, for example, in the event of an investigation by an Ombudsman.

[85] For example, the Minister's office may wish to offer a view that requested information which is proposed to be released is likely to result in a harm protected under the OIA, or the agency appears not to have understood either the weight of the harm, or the countervailing public interest in releasing the information.

The Cabinet Manual states that, in the event of a disagreement between an agency and a Minister about a decision on an OIA request, it may be appropriate for the agency to transfer the request to the Minister, providing certain criteria are met.[86]

Agencies should not rely on a private secretary in the Minister's office being a routine step in their review process for OIA requests. Responses provided to the Minister on an FYI basis should be full, final and signed before being sent to their Minister's office.

My findings

The Minister of Health takes responsibility for Pharmac's performance and in 2023, for the first time, Pharmac was appointed a dedicated Minister—the Associate Minister of Health (Pharmac).

Pharmac does not have a written agreement to guide the process of dealing with agency OIA requests involving Ministers, but staff meeting attendees described the unwritten process for interactions with the Ministers' offices. A staff meeting attendee said a communications report is emailed to Ministers' offices once a week, which includes a list of all agency OIA requests received and responses sent. The list includes the requester (anonymised), topic and date (received and sent).

The Government Services Team Leader is the staff member responsible for liaising with the Private Secretary and a staff meeting attendee said they decide whether to send agency OIA requests to a Minister's office for consultation or notification (FYI). As outlined above in *My expectations*, 'consultation' is when Ministers are given a reasonable period of time to provide appropriate comment in relation to an OIA request or response. 'Notification' (FYI) is when an OIA response is provided to the Minister so they are aware of the release of information.

Pharmac said it is rare for OIA responses to be sent to the Minister for either consultation or notification. A staff meeting attendee said the current practice is to consult with Ministers' offices on agency OIA requests if there is information in scope that contains material that primarily concerns them. A Minister's office is notified (or provided FYI) about an agency OIA response if the Minister might be asked to comment publicly on it.

The Chief Executive said there are no formal arrangements with Ministers' offices about consultations, due to the '*very low volume of requests that require Ministerial consultation*'. However, a staff meeting attendee said the consultation period is five working days.

In regards to notification (FYI), a staff meeting attendee said it is sent one to two working days prior to a response being sent to a requester. They said sometimes the full response is sent and sometimes a summary. Another staff meeting attendee said Pharmac does not wait to hear back from Ministers' offices on FYI notifications before sending agency OIA responses to requesters. This was confirmed by examples seen in the sample OIA file review.

[86] See s 8.55 of the Cabinet Manual 2023

There were no examples of interference by Ministers' offices in decision making on agency OIA requests seen in the sample OIA files reviewed by my investigators. There was one example of the Minister's office replying to a notification only to be told:

> *To be clear – this is an FYI – we are not seeking clearance, approval or sign-off.*

This demonstrates that staff are aware of the difference between FYI and consultation, and are willing to convey that clearly to a Minister's office if required.

However, a clear, written agreement approved by both parties could be beneficial to ensure clarity around roles and responsibilities in relation to agency OIA requests. One staff meeting attendee said a written agreement with Pharmac's Minister is not necessary due to the non-hierarchical nature of the office, and the current Private Secretary being very experienced. However, I am concerned that when there is a reliance on institutional knowledge, when those staff members leave, the knowledge becomes lost.

As mentioned above in *My expectations*, I have developed a model protocol on dealing with OIA requests involving Ministers. Used as a written agreement or in another way, the intention is to be a practical starting point for agencies and their Ministers to discuss and decide upon clear criteria for managing agency OIA requests. Once finalised, I encourage Pharmac to consider making this agreement available on its OIA webpage. I also suggest Pharmac consider including information on ministerial interactions in its OIA guidance, as unwritten process can allow for grey areas to develop. My office has produced a guide on this topic to assist agencies.[87]

Action points
Develop a written agreement with Ministers' offices on handling agency OIA requests, and consider publishing it on the OIA webpage.
Make sure OIA guidance material includes information on the notification of, and consultation with, Ministers' offices on agency OIA requests.

[87] Link to the Office of the Ombudsman's Dealing with OIA requests involving Ministers: A guide to transfer, consultation, and the notification of decisions on OIA requests

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