



**PROACTIVE DISCLOSURE IN NEW ZEALAND  
WHAT NEW ZEALAND CAN LEARN FROM THE INTRODUCTION  
OF PROACTIVE DISCLOSURE IN SPAIN**

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The Official Information Act 1982 (OIA) establishes a robust framework into which proactive disclosure legislation could be introduced. This report analyses what New Zealand can learn from the new proactive disclosure legislation in Spain, and establishes key recommendations concerning the introduction of legislation and other forms of regulation in this area in New Zealand.

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## 1 EXECUTIVE SUMMARY

The Official Information Act 1982 (OIA) establishes a robust framework into which proactive disclosure legislation could be introduced. This report analyses what New Zealand can learn from the new proactive disclosure legislation in Spain, and establishes three key recommendations concerning the introduction of legislation and other forms of regulation in this area in New Zealand:

1. Compliance with proactive disclosure legislation must be enforceable and realistic.
2. The legislation must have at its core *both* the interests of the public *and* the interests of all affected entities.
3. Proactively disclosed information must be easy to locate and user-friendly for everyone.

## 2 BACKGROUND

"Government information is a form of infrastructure, no less important to our modern life than our roads, electrical grid, or water systems".<sup>1</sup> This is the affirmative stance adopted in a 2012 Law Commission Review which calls for the inclusion of proactive disclosure provisions in the Official Information Act 1982 (OIA). The OIA is designed to "promote the accountability of Ministers of the Crown and officials [...] and to promote the good government of New Zealand".<sup>2</sup> Proactive disclosure provisions would assist in meeting these aims, particularly considering that, under the OIA, "information shall be made available unless there is good reason for withholding it".<sup>3</sup> A report prepared by the former Chief Ombudsman Dame Beverley Wakem in 2015 noted that, in New Zealand, "most agencies (78%) had no policies in place for the proactive disclosure of information. As a result, opportunities for publishing information to assist the public's understanding of an agency's work (and reduce suspicion or media speculation) were often missed."<sup>4</sup> Accordingly, she recommended that the State Services Commission and the Ministry of Justice develop "a strategic framework for the proactive disclosure of official information" and provide "clear, detailed guidance on the information agencies should be proactively publishing".<sup>5</sup>

This report examines the experience of one country which has recently introduced a proactive disclosure regime: Spain. Spain has taken a slightly different approach to that recommended in Dame Beverley's report, opting, in legislation, to establish a series of principles which proactively disclosed information should conform to, providing a high-level detailed list of what information should be proactively published, and establishing a new body for transparency oversight. This report, however, does not take a specific view on the most suitable approach for the New Zealand context. Instead, it sets out to analyse Spain's legislation with regard to those aspects which may present a learning opportunity for New

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<sup>1</sup> Law Commission, 'Review of Official Information Act Legislation' (2012) at 252. See: <http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R125.pdf>

<sup>2</sup> *The Official Information Act 1982*. Long title reads as follows:

"An Act to make official information more freely available, to provide for proper access by each person to official information relating to that person, to protect official information to the extent consistent with the public interest and the preservation of personal privacy, to establish procedures for the achievement of those purposes, and to repeal the Official Secrets Act 1951"

<sup>3</sup> *Ibid.*

<sup>4</sup> Office of the Ombudsman, 'Not a Game of Hide and Seek', Report of Chief Ombudsman Dame Beverley Wakem DNZM, CBE (December 2015), at 7 and 84. See: [http://www.ombudsman.parliament.nz/ckeditor\\_assets/attachments/401/oia\\_report\\_not\\_a\\_game\\_of\\_hide\\_and\\_seek.pdf?1449533878](http://www.ombudsman.parliament.nz/ckeditor_assets/attachments/401/oia_report_not_a_game_of_hide_and_seek.pdf?1449533878)

<sup>5</sup> *Ibid* at 4.

Zealand generally, such findings being of potential interest at a legislative level but equally in regard to any best practice guidelines for the release or quality of information, and for agencies considering what information they might proactively publish. To these ends, it establishes three key recommendations concerning the introduction of proactive disclosure legislation and best practice in New Zealand.

### **3 OVERVIEW OF SPAIN'S TRANSPARENCY ACT**

#### **3.1 Function and aim**

Spain's Act 19/2013, of 9 December, on Transparency, Access to Public Information and Good Governance<sup>6</sup> (referred to as the Transparency Act) filled a void in Spanish legislation. It brings together, and strengthens, provisions across a range of acts, with the three key aims of:

- increasing transparency through proactive disclosure legislation;<sup>7</sup>
- outlining rights of access to public information and the information request process; and
- setting forth good governance obligations public entities must comply with.

#### **3.2 Scope of Proactive Disclosure and Information Request Obligations**

The scope of the Transparency Act is broader than that of the OIA. As stipulated in Articles 2 and 3, the provisions concerning proactive disclosure (Articles 5-8) and right to access information through information by request (Articles 12-24) broadly apply to:

- His Majesty the King, Central Government (Congress and Senate)<sup>8</sup> and any organisations who report to the government;
- Regional and local forms of government;
- The Constitutional Court, the Ombudsman and other judicial bodies;
- Public businesses and organisations;
- Political parties, trade unions and chambers of commerce; and
- Private entities receiving a certain amount of public funding.

#### **3.3 Right of Access to Public Information and Request Process**

The Act notes that right of access to information is a constitutional right (Article 12). To request information, applicants should send the requests to the entity<sup>9</sup> in possession of the information they are seeking (Article 17). The applicant must include identifying information, but not, necessarily, their motivation for requesting the information. Decisions should usually

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<sup>6</sup> Act 19/2013, of 9 December, on Transparency, Access to Public Information and Good Governance (Unofficial English translation). When summarising material I have sometimes used my own translation of the original Spanish version, which can be downloaded from the same URL. However, all quotes in English come from the translation provided. See:

[http://transparencia.gob.es/transparencia/transparencia\\_Home/index/Sobre-el-Portal/Ley-de-Transparencia.html](http://transparencia.gob.es/transparencia/transparencia_Home/index/Sobre-el-Portal/Ley-de-Transparencia.html)

<sup>7</sup> "Proactive disclosure" is referred to as "active publicity" throughout the unofficial translation of the Act. The former term is much more widely accepted and is used in this report. It is interchangeable with "proactive release" and "proactive publication".

<sup>8</sup> Referred to in the Act as the "Central State Administration".

<sup>9</sup> Throughout this document, "entity" is understood to refer to a legal entity.

be notified within a month, although the concept of negative administrative silence applies, meaning that if no notification is received, the applicant is to understand the request was denied (Article 20). An appeals procedure is also outlined (Articles 23-24). The Act provides for various broad limitations to right of access to information. An entity may decline a request if it compromises "administrative responsibilities of oversight", "[e]conomic and commercial interests", "[e]nvironmental protection" (Article 14) or the protection of personal data (Article 15).

### 3.4 Good Governance

The Good Governance obligations (Articles 25-32) apply to members of Central Government and those who report to them (Article 25). Those affected must act transparently in their roles, avoid conflicts of interest, avoid discriminatory treatment and exercise due diligence (Article 26). This section also covers financial and disciplinary infractions, where publishing legally privileged information is a serious infraction (Articles 28-29). It is noteworthy that compliance with the Transparency Act is not listed under either of these articles, instead being vested entirely in the Council on Transparency and Good Governance (Article 34).

### 3.5 Council on Transparency and Good Governance

The *Consejo de Transparencia y Buen Gobierno* (CTBG) is a newly formed body responsible for overseeing compliance with the Act (Article 34). The Council is subject only to the provisions in Articles 33-40. According to the Act, the CTBG "acts autonomously and is fully independent" (Article 33). It comprises a suitably qualified chair elected by parliament, as well as parliamentary representation and financial experts (Articles 36, 37). It must create reports on how the act will be implemented nationally and report annually to parliament.

## 4 PROACTIVE DISCLOSURE

In this section, an overview of the proactive disclosure requirements in Spain's Transparency Act is presented, followed by a detailed breakdown of those articles which affect the majority of the subjects the legislation applies to (this excludes Article 7 and Article 8h). In this breakdown, the relevant provisions are stated or summarised and information on their compliance in the public sector is provided where this is available.<sup>10</sup> Taking the stance that the legislation itself is partly to blame for the unsatisfactory levels of compliance, a series of recommendations, aimed at both increasing compliance and making the legislation in question more relevant to end-users, are set out, where these could be applicable in a New Zealand context.

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<sup>10</sup> Where compliance is indicated, this is taken from pages 18-21 of a study on the application of the Transparency Act carried out by Acreditra and promoted by the Council on Transparency and Good Governance. See section 4 for more information on these organisations and their roles. The study covers compliance with the Act during roughly its first year after entry into force. Because the Act only entered into force at regional and local level at the end of last year, no data on compliance at these levels is available yet. See:

Estudio sobre la situación de la aplicación de la Ley 19/2013, de 9 de diciembre, de Transparencia, Acceso a la Información Pública y Buen Gobierno, en las entidades que configuran el Sector Público de la Administración General del Estado

<https://drive.google.com/file/d/0BzZV66dM4HCTUHUyRTJ6UElyYWM/view?usp=sharing>

Proactive disclosure principles specified for the equivalent information on page 69-70 are added in for reference. The report contains further details on what exactly constitutes compliance or non-compliance with the indicators on pages 67-75 not presented here.

#### 4.1 Requirements in Brief

The provisions relating to proactive disclosure (Articles 5-11) contain principles or guidelines which the information must comply with, the types of information to be published, and the obligation for Central Government to create a Transparency Portal.

#### 4.2 Location, User-friendliness and Updating of Information

Article 5 stipulates that information should be published in a way which is:

- "clear, structured and comprehensible for those concerned";
- in reusable and interoperable formats (meaning that it will work with different interfaces);
- easily accessible to persons with a disability; and
- free of charge.

Article 10 requires the creation of a Transparency Portal containing all of the information the Central Government is required to publish.

These principles lay a solid foundation which New Zealand could build on in determining a similar set to employ at a legislative level. In Spain, almost half of entities in the public sector have a designated transparency portal or section on their website where proactively disclosed information can be found, and it is extremely positive that such a step is required in Spain's legislation. In practice, a logical way of ensuring that all of the required information is easy to locate for interested parties may involve the creation of a clearly labelled portal or section of each entity's website for the publication of official information (e.g. "administrative and financial information" would make a better label than "company resources" or "links"). This section could contain:

- links to all documents published, including the date published or last modified, and including information archives;
- appropriate metadata (tags, keywords, DOI) for the identification and categorisation of information;
- an indication of cases where information is forthcoming; and
- an indication of all cases in which any general regulations to publish certain types of information are not applicable to the entity at this time.

New Zealand's legislation should further require the date of publication or last modification, and archives of past information to be published. In Spain, two fifths of public sector entities published relatively up-to-date information as at the end of 2015, even though the current version of the Transparency Act does not stipulate the above specifications on dates and archives.<sup>11</sup> Regulations should be drawn up concerning what constitutes the sufficient updating of information.

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<sup>11</sup> Both these points are amended in a bill developing the Spanish Act currently under consideration: Proyecto de Real Decreto XX/2015 por el que se aprueba el reglamento de desarrollo de la ley 19/2013, de 9 de diciembre, de transparencia, acceso a la información pública y buen gobierno. See:

The information published by public sector entities in Spain gained extremely low ratings for its clarity and comprehensibility, almost always lacking introductory explanatory material, tables and graphics. The information was also almost never published in a reusable format. These statistics emphasise the importance of creating regulations or guidelines to accompany the legislation which define what constitutes "clear" and "comprehensible" information.<sup>12</sup> As regards the need for reusable formats, the Spanish legislation states that these are merely "preferable", although going on to retrospectively strengthen that position by stipulating that "[t]he appropriate mechanisms shall be established to enable the [...] reuse of the information published". In New Zealand, we would almost certainly be in a position to take a more affirmative stance by definitively requiring reusable formats, and it would be beneficial for regulations to more precisely define what this term encompasses.<sup>13</sup>

A promising two fifths of public sector entities in Spain displayed accessibility certification for people with a disability. In New Zealand, where this is not already the case, applicable guidelines concerning the accessibility of information should be created, referencing extant international accessibility standards and drawing on accessibility guidelines already published.<sup>14</sup>

### 4.3 Types of Information Published

In determining legislation or best practices concerning what information should be proactively disclosed in New Zealand, investigation into the types of information most often read, searched for and requested by the public should be carried out. The analysis should also account for the results of the "public interest test", which considers further circumstances in which there is good reason for proactively releasing information.<sup>15</sup> Tools used could include numerical data on webpage views, past OIA request records,<sup>16</sup> and surveys of both the public and entities on the broad topic of what sorts of information they believe should be obligatorily publically available. The following section summarizes the information which must be disclosed in Spain, along with some of its shortcomings and what we might learn from this data in New Zealand.

#### 4.3.1 Information about the entity

Article 6 requires the publication of "the duties [entities] perform, their applicable regulations, and their organisational structure". The structure should be laid out in an organisational chart

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<http://www.tesoro.es/sites/default/files/leyes/pdf/Sleg7614.pdf>

<sup>12</sup> A comprehensive list of tips on the subject, themselves written with accessible language, is available from <http://plainlanguage.gov/howto/quickreference/quicktips.cfm>

<sup>13</sup> Regulations could require the information published to be in accordance with the Open Definition: <http://opendefinition.org/od/2.1/en/>

<sup>14</sup> See: The Web Content Accessibility Guidelines (WCAG 2.0): <http://www.w3.org/WAI/WCAG20/glance/>  
 Tips for creating accessible PDFs (Adobe): <https://helpx.adobe.com/acrobat/using/create-verify-pdf-accessibility.html>

<sup>15</sup> The Public Interest test is discussed at length in guidance recently released by the Office of the Ombudsman. See: <http://www.ombudsman.parliament.nz/newsroom/item/new-guide-the-public-interest-test>

<sup>16</sup> The Former Chief Ombudsman's report (above at footnote 4) also suggests agencies could make use of OIA requests in the following ways (at 11):

"ensure consistency in decision-making; understand what the public and key stakeholders are really interested in (and where proactive release could be used to reduce an agency's workload); flag any stakeholder/third party relationship issues that might be occurring; identify where business units may be struggling or under pressure; inform management decisions and budget bids regarding internal resource allocation, training needs and system improvement requirements; flag any compliance issues and gaps in any policies and procedures; and fast track and inform any Ombudsman investigations and reviews".

which "identifies the heads of the different bodies, as well as their profile and career". The "annual and multi-annual plans and programmes" of public administrations must further be published, including goals set and "activities, resources and deadlines" for attaining these. Finally, evaluations of compliance with these plans must be published.

Compliance across the public sector was moderately good (over half) concerning the publication of duties, regulations and organisational structure. On the other hand, only about 15% of entities published plans and programmes, and almost none published evaluations. The discrepancies indicate that New Zealand would need to carefully analyse what organisational information is currently published by which types of organisation, such that anything newly required does not call for such substantial change as to make compliance with the requirements unenforceable. This may also mean providing greater specificity around which types of entity are required to publish what information, to avoid an unnecessarily bare minimum of information being published across the board.

As Manuel Villoria<sup>17</sup> notes in discussing Spain's Act, it is important for the legislation to use the terminology which best denominates the specific types of documents required, in order to:

- (a) minimise confusion in regards to which types of documents need published; and
- (b) make the information which is published easier to search for and identify.

New Zealand should take this advice on board.

#### **4.3.2 Publishing Contracts and Agreements**

Article 8 a) and b) require that the following information be published:

- contracts, including their subject matter, duration, and information on the tendering process and outcome;
- modifications to contracts, and decisions on their withdrawal and waiver (if applicable);
- minor contracts;
- statistics on the percentage of budget allocated per tender procedure;
- agreements signed, including their purpose and term of duration, the signatories with mention of who is providing the goods or services, any economic obligations agreed upon and any amendments; and
- similar information pertaining to management delegation agreements (these have traditionally been used to avoid Spain's more stringent public procurement requirements).<sup>18</sup>

These provisions are generally positive, especially considering that over half of the entities in the public sector are complying with the obligations to publish contracts, while just under half

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<sup>17</sup> Manuel Villoria, 'Proactive Disclosure in the Transparency, Access to Information and Good Governance Act: Possibilities and Shortcomings' (June 2014). See:

[http://transparencia.gencat.cat/web/.content/pdfs/governobert/governobert\\_1\\_en.pdf](http://transparencia.gencat.cat/web/.content/pdfs/governobert/governobert_1_en.pdf)

<sup>18</sup> Ibid, at 33.

are publishing agreements. Transparencia Internacional España recommend that post-contractual information is also published to reduce the prevalence of fraud at this later stage.

In New Zealand, an independent body would ideally be commissioned to carry out research taking into account the needs of a range of parties directly involved in or affected by contracts, to best determine what information can fairly be expected to be published.

It is also noteworthy that only 1 in 10 public sector entities published management delegation agreements; many probably did not have any but this was not stated explicitly. Thus, if New Zealand legislation includes any cases where organisations may not currently be affected by all provisions, it must also be stipulated that entities must indicate when this is the case, if compliance is to be enforced.

### **4.3.3 Publishing Financial information**

Article 8 (c)-(e) requires the following information to be published:

- public grants and assistance awarded (with amount, objective, purpose, and beneficiaries);
- budgets;
- "updated, understandable" information on budget implementation;
- compliance with Public Administration objectives on budget stability and financial sustainability;
- annual accounts; and
- external audit and monitoring reports.

The regulations themselves are generally positive. Compliance in the public sector is highest with the publication of annual accounts by over half of entities, followed by the publication of budgets and auditing by just over a third of entities. Meanwhile, the required supplementary information on budgets is seriously lacking, and there is also limited information provided on public grants and assistance (as stated elsewhere, entities should be legally required to clarify when they are not affected by particular provisions).

As Villoria points out,<sup>19</sup> private donations to political parties do not have to be published under this legislation. For the sake of comprehensiveness, New Zealand may consider noting in any new proactive disclosure legislation or guidelines concerning best practice that such a provision is already required, and doing likewise for any other isolated cases where proactive disclosure does already exist, such that the legislation is all-encompassing.

Meanwhile, as Daniel Amoedo from Transparencia Internacional España notes,<sup>20</sup> it is somewhat unjust that the private entities falling under the scope of Article 3 are forced to publish the entirety of their budgets, including the sections with no relation to public funding. Such sections are unlikely to be of particular public interest. This regulation seems especially

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<sup>19</sup> Villoria (above at 17), at 35.

<sup>20</sup> Interview with Daniel Amoedo from Transparencia Internacional España conducted for this report on May 6, 2016. Amoedo had access to official clarifications from the CTBG affirming that Article 8d) on budgets does indeed apply to the whole of the budgets of the private entities who fall under its scope.

arbitrary in light of the wording of Article 3,<sup>21</sup> which favours to a considerable degree the percentage of public funding in a private entities' gross earnings over the actual amount of public funding received. A fairer system, as Amoedo proposes, would require only the information in Article 8(c) on the use of public funding received to be publicised.

Regarding audits, Villoria notes that it would be ideal for any internal as well as external, audits and inspections to be published,<sup>22</sup> one option which could be considered in New Zealand.

#### **4.3.4 Publishing Information to Aid with the Transparency of Senior Officials**

As stipulated in Article 8 (f) and (g), the following information must be published:

- "annual remuneration of senior officials and heads of the entities";
- the severance pay, where a post is relinquished; and
- resolutions on compatibility of public employees and senior officials for exercising private activities after relinquishing their posts.

Compliance with these provisions in the public sector is low on all fronts, with under a third of entities providing the remuneration of senior officials, and almost none complying with the other objectives or stating openly that these are not applicable to them at this time. As Villoria notes, the legislative failure to properly define "senior officials" at regional and local level<sup>23</sup> constitutes a serious loophole<sup>24</sup> because a loose interpretation of it would mean sub-national elected officials, judges and public prosecutors, mayors, and members of local council would not be forced to comply with it. This omission is a good example of the care that must be taken to ensure that the scope of application of all provisions is considered at both national and sub-national levels.

#### **4.3.5 Statistics assessing service compliance**

Article 8(i) requires the publication of "[t]he statistical information necessary to assess the level of compliance and quality of public services which are [the responsibility of all affected subjects], in the terms defined by each competent administration". Compliance with this provision in the public sector is extremely low. This is not surprising, considering:

- that the provision was not further defined or elaborated on;
- that publishing such information would presumably require some form of quantitative investigation to take place, in turn requiring the provision of organizational resources towards these ends; and
- that the concept of allowing each administration to define how it will statistically evaluate compliance with its services seems fundamentally flawed.

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<sup>21</sup> As regards private entities which fall under the scope of Article 3, Article 3 states:

"Private entities that receive, during a period of one year, public grants or subsidies totalling more than €100,000, or when at least 40% of their annual revenue comes from public grants or subsidies, provided that the amount is at least €5,000."

<sup>22</sup> Villoria (above at 17), at 40.

<sup>23</sup> The terms "senior officials" and "heads of entities" in the unofficial translation of the Act are translations of "altos cargos" and "máximos responsables de las entidades" respectively.

<sup>24</sup> Villoria (above at 17), at 46-47.

Given that it is difficult, if not impossible, to establish a form of all-encompassing compliance evaluation for services which would be of public interest and relevance, it would seem more logical to deal with this very pertinent issue in regulations rather than legislation. In creating regulations, it is important to keep in mind the need for their compliance to consider what reasonable resource allocation for this purpose would involve, and to thus streamline and simplify any investigative processes as much as possible (e.g. by providing survey and evaluation templates).

#### **4.3.6 Information relevant to property holdings**

Under Article 8(j), Public Administrations must publish records of their real property holdings. Villoria finds this to be a useful step forward in Spain, although it would also have been useful for it to cover moveable assets<sup>25</sup> such as inventories of museum holdings. In New Zealand, the question would arise as to whether this type of information is of sufficient public interest to merit its proactive disclosure.

#### **4.4 Protection of Personal Data**

The Transparency Act states that protection of personal data can limit the proactive disclosure of information (Article 5). In Article 15, it lays out the steps to take when particular limits to information access are in place.<sup>26</sup>

Unsurprisingly, this principle has an almost perfect compliance rating (26% higher than the next best level of compliance, in fact). The issue in Spain, as Daniel Amoedo of *Transparencia Internacional España* has pointed out,<sup>27</sup> is that the provisions are rather too easy to comply with. If an entity were to claim that proactive disclosure was limited by protection of personal data, this provision may well automatically prevail, given that the information can apparently not be released in order to certify that protection of personal data is, in fact, a concern.

In New Zealand, given the general awareness among entities of the benefits of proactive transparency measures and our longstanding disposition towards a culture of providing information in good faith through information requests, it seems far less likely that this particular reasoning would knowingly be falsely provided. There is some debate, however, as to whether proactive disclosure legislation in New Zealand should protect agencies from criminal proceedings where they release information that does contain personal data in good faith.<sup>28</sup>

#### **4.5 Proactive disclosure of information provided upon Request**

Article 21 of the Transparency Act states that Public Administrations will "[ensure] the availability on the appropriate website of the information to which access is requested most frequently." It does not, however, set any parameters for determining how often the register of information requests should be analysed to determine this trend, nor what constitutes "most frequently".

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<sup>25</sup> Villoria (above at 17), at 56.

<sup>26</sup> As laid out in article 15 of the Act, these limits arise from stipulations laid out in an existing data protection law, and from the need to protect personal data in most cases concerning infringements of law

<sup>27</sup> Interview with Daniel Amoedo from *Transparencia Internacional España* conducted for this report on May 6, 2016.

<sup>28</sup> For the views of the 2012 Law Commission and Former Chief Ombudsman Dame Beverley Wakem on this issue respectively, see page 282 (Law Commission, above at 1) and page 87 (Wakem, above at 4).

In New Zealand, publishing so-called disclosure logs (i.e. proactively releasing OIA requests) is already seen to be best practice among a number of New Zealand government agencies.<sup>29</sup> A brief title is given to each request to assist the public in locating it through a search engine. Favouring this trend would likely prove a time-saving strategy with the added benefit of increasing perceived transparency.

## 5 COMPLIANCE

### 5.1 Composition and roles of organizations overseeing Compliance

As we have seen, in the case of Spain, this role is primarily assigned to the Council on Transparency and Good Governance (CTBG). As Article 36 details, the Council consists of:

- a remunerated chairperson, nominated by the equivalent of the Minister of Finance and elected by Parliament;
- governmental representatives (from Congress, Senate and a Public Administrations office);
- a representative from the Ombudsman's Office; and
- separate fiscal, auditing and data protection representatives.

In brief, the role of the Council is to:

- evaluate compliance with the Act and prepare an annual report on their findings in this area to be presented to Parliament;
- draw up best practice recommendations and guidelines pertaining to the Act; and
- raise public awareness about the new legislation and promote upskilling for professionals affected by the changes.

Further to this, Additional Provision 7 stipulates that the Government "shall approve a training plan in transparency for Central State Administration civil servants and personnel, together with an information campaign for citizens". To this end, a not-for-profit called the Spanish Transparency Accreditation Association, ACREDITRA, was established,<sup>30</sup> mainly comprising newly designated Transparency Consultants and Auditors. The objectives of ACREDITRA include:

- evaluating the transparency of public administrations and private organisations;
- providing transparency accreditation for public administrations and private organisations;
- establishing a permanent framework for collaboration with the Public Administration; and
- organising informative and educational events on the Act.

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<sup>29</sup> For instance: New Zealand Transport Agency, 'Official Information Act (OIA) responses'. <http://www.nzta.govt.nz/about-us/news-and-media/official-information-act-oia-responses/> Ministry of Education, 'Information releases'. <http://www.education.govt.nz/ministry-of-education/information-releases>. The Treasury, 'Information Releases by the Treasury'. <http://www.treasury.govt.nz/publications/informationreleases>

<sup>30</sup> ACREDITRA: Naturaleza, Misión y Objetivos <http://acreditra.com/naturaleza-mision-y-objetivos/>

The CTBG and ACREDITRA have recently signed a collaboration agreement<sup>31</sup> to better meet these intersecting objectives.

## 5.2 Perceived versus Actual Compliance with the Proactive Disclosure Legislation

ACREDITRA and the CTBG recently collaborated on the first annual study<sup>32</sup> reporting on compliance in the national Public Sector, comprising the entities for whom the Act entered into force in December 2014.

It is worth noting that the report itself is a praiseworthy example of compliance with the Transparency legislation: it was easy to find, clearly structured with a contents slide and tables summarising the results (with detailed findings at the back in annexes), and written in accessible language. The only complaint would be that it is unclear whether ACREDITRA alone, or (ideally) ACREDITRA in collaboration with the CTBG, designed the system of indicators used to quantitatively measure compliance.<sup>33</sup>

Of the 121 entities surveyed by the report, 85% believed they met all or most of the proactive disclosure requirements. Disturbingly, the entities believed themselves to be about 47% more compliant with the legislation than the quantitative analysis of the websites of 194 entities in fact shows.<sup>34</sup> Only 1 in 20 entities managed to comply with a minimum of 60% of ACREDITRA's interpretation of the legislation—which, admittedly, is on the ideal but rigorous side.

Ambiguities in, and other difficulties with, the legislation itself are clearly not the only deterrent from making more proactive efforts to comply with the legislation. Part of the problem, as the report by ACREDITRA and the CTBG note,<sup>35</sup> is that, before the legislation took effect, entities had virtually no public-facing transparency mechanisms in place, leading to complacency in their perceived compliance ratings. Given the anonymity of the entities surveyed, there would be little, if any, reason to purposefully over-report on these indicators, leading us thus to conclude that entities genuinely believe themselves to be abiding by the law. It is noteworthy, however, that over half of entities did not believe significant organisational change to be necessary to implement the requirements,<sup>36</sup> nor did they have particular intentions of implementing larger changes—the first step of which would be implementing training and raising awareness on transparency, a move which just a quarter of entities showed any initiative to undertake.<sup>37</sup> Therefore, while there is apparent motivation to comply with the Act, many of the actions necessary to truly make progress in this area are not being conceptualised, not to mention implemented, by the entities in question. Entities clearly want to increase their transparency with minimal shifts from their current practices, which, even accounting for considerations around resource management, is a trend particularly problematic in Spain (more so than in New Zealand). Due to this lack of initiative, Spain is witnessing first-hand the need for transparency training to be compulsory for all affected entities, and New Zealand would do well to ensure such a procedure is also implemented here following any large relevant legislative change.

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<sup>31</sup> Convenio CTBG ACREDITRA <https://drive.google.com/file/d/0BzZV66dM4HCTOGp0UGtHOXozdkU/view>

<sup>32</sup> Estudio sobre la situación de la aplicación de la Ley 19/2013 (above at 10).

<sup>33</sup> Ibid at 66.

<sup>34</sup> Across all entities, levels of perceived compliance averaged 8/10 while analysed compliance scored 3.3/10. Ibid at 58.

<sup>35</sup> Ibid at 58.

<sup>36</sup> Ibid at 32.

<sup>37</sup> Ibid at 30.

In the interests of fairness in the act of determining compliance, a list of compliance indicators entities will be graded against should be publicised, including, in particular, the standards considered as full compliance. The study by ACREDITRA and the CTBG lists such indicators<sup>38</sup> and a similar type of listing was published by ACREDITRA.<sup>39</sup> The frequency with which compliance will be monitored and reported on must also be established (annually in Spain (Article 38)).

### **5.3 Increasing Compliance**

#### **5.3.1 Prioritisation of Resources**

As the Spanish case has repeatedly demonstrated, the behaviour of the entities en masse have a certain amount of power. The more difficult it is to comply (because of the need for more complex information not already available or collated to be prepared), the less likely entities are to meet their obligations. High rates of non-compliance make compliance less enforceable.

Therefore, in order for entities to prioritise full compliance, it is paramount that they understand why doing so is a comparatively efficient and beneficial use of their time. To that end, in formulating the legislation, both current publishing habits of organisations and the likely demand for information from the public must be accounted for, such that compliance would appear to be a realistic and well-reasoned aim, from the entities' point of view. It must be emphasised that convincing entities of the rationale behind the legislation, apart from being the most ethically appropriate means of increasing compliance, will almost certainly be the most effective also.

Complying for any other reason is more likely to lead to a superficial result where obligations are met at a bare minimum out of sheer necessity, rather than a genuine desire to satisfy the legislation in all its particulars, having been persuaded of the intrinsic merits of doing so.

#### **5.3.2 Compliance incentives**

The fact that 4 of 5 companies are not taking steps to maintain or implement transparency certification in Spain<sup>40</sup> does not mean that this would necessarily be the case in New Zealand, given that the concept of operating transparently is far less new here. To that end, transparency certification may also act as an effective compliance incentive in New Zealand, particularly if at least a base level of certification could be awarded upon full compliance with all the applicable transparency legislation and regulations. Such certification, as is common practice with accessibility certification, for instance, could be publicly displayed on the entity's website.

#### **5.3.3 Holding entities accountable**

It is essential that all entities understand how and by whom they will be held legally accountable for non-compliance. Spain's Act is not forthcoming in this regard. Article 9 indicates that the CTBG has legal power to penalise the Central Government for non-compliance, but it does not specifically mention whether it also has jurisdiction over the rest of

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<sup>38</sup> Ibid at 70-75.

<sup>39</sup> This listing was the indicators for the comprehensive transparency accreditation system designed by ACREDITRA which were published in March 2015. The system is advertized as being demanding and going beyond the scope of the Act, although it does have four certification levels. See: <http://acreditra.com/2015/03/26/acreditra-presenta-sus-indicadores-de-certificacion-en-las-i-jornadas-nacionales-de-transparencia/>; <http://acreditra.com/el-sistema-de-acreditacion/>

<sup>40</sup> Estudio sobre la situación de la aplicación de la Ley 19/2013 (above at 10) at 31.

the public sector nationally, or over private entities.<sup>41</sup> As New Zealand will be aware, this imprecise situation undermines the power of the legislation in the eyes of its subjects.

One non-judicial method of holding entities accountable would involve the publication of their levels of compliance (by the CTBG or civil society), a step Transparencia Internacional España has recommended to the CTBG.<sup>42</sup> Indeed, in New Zealand we could consider taking this recommendation a step further and establishing through legislation that compliance reports, which include tables indicating levels of compliance by entity, be published. The idea would be for such tables to be published in a prominent way garnering media attention.

## 6 CONCLUSIONS AND RECOMMENDATIONS

### 6.1 Compliance with proactive disclosure legislation must be enforceable and realistic.

- The human resources for monitoring compliance must be set forth, and such monitoring must occur regularly (e.g. annually, as is the case in Spain). 5.3.3
- A rubric for assessing compliance with proactive disclosure legislation should be published. The language used should cater to the need for affected entities to better understand their obligations. 5.3.3
- The compliance ratings of all entities, as established by the monitoring process, could be made public to hold entities accountable to the public. 5.3.3
- The legislation should require entities to publish some form of proactive disclosure checklist such that they are required to make clear when certain provisions are not currently applicable to them. 4.2, 4.3.2
- The legislation must make its scope of application patently obvious, ensuring in particular that nebulous terms like "senior officials" are properly defined. 4.3.4
- Vague clauses not backed up by regulations or guidelines will create higher levels of non-compliance, undermining the strength of the legislation. 4.3.5, 5.3.1, 5.3.3

### 6.2 The legislation must have at its core *both* the interests of the public *and* the interests of all affected entities.

- Prior to the detailed consideration of what information should be proactively disclosed, analysis should be carried out to determine what sorts of information the public and civil society actually look for, and what information entities are already producing. The ultimate goal would be to make the greatest amount of information likely to be in demand available as is realistic for maintaining good levels of compliance. Overly demanding obligations will only create frustration and distract from the purpose of the legislation. 4.3, 4.3.3, 5.3.1

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<sup>41</sup> Daniel Amoedo from Transparencia Internacional España has provided access to consultations with the CTBG indicating that the CTBG does not have direct legal privilege over private entities.

<sup>42</sup> Observaciones al borrador de Plan Estratégico 2015-2020 del Consejo de Transparencia y Buen Gobierno (Junio 2015). See:

[http://webantigua.transparencia.org.es/reunion\\_tie\\_ctbg/observaciones\\_tie\\_ctbg.pdf](http://webantigua.transparencia.org.es/reunion_tie_ctbg/observaciones_tie_ctbg.pdf)

- Proactive disclosure legislation must ensure that concerns regarding the protection of personal data are respected but do not act as a barrier to the publication of information. 4.4
- Compliance incentives can be positive and desirable, but the ultimate aim should be to convince entities of the validity of the legislation in its own right. 5.3.2, 5.3.1

### **6.3 Proactively disclosed information must be easy to locate and user-friendly for everyone.**

- The legislation should contain a similar set of principles to those found in Article 5 of the Spanish Transparency Act. It should also ensure the date information was published or last modified is required and should recommend the inclusion of metadata. 4.2
- Clarity in the legislative terminology determining what needs to be published is paramount; lacking this, compliance is hindered and the information which is published will be harder to locate. 4.3.1
- Regulations or guidelines should be published on best practices for providing clear, understandable, accessible, reusable and up-to-date information. 4.2

## 7 ACKNOWLEDGEMENTS

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## 8 ANNEX 1: PROACTIVE DISCLOSURE COMPLIANCE RATINGS FOR THE PUBLIC SECTOR

Below is a listing of the proactive disclosure compliance ratings in the public sector in 2015, as taken from a study by the Spanish Transparency Accreditation Association ACREDITRA, endorsed by the Council on Transparency and Good Governance.<sup>43</sup>

### 8.1 Proactive Disclosure Principles

- Structured information: existence of a portal or specific transparency section. 4.8
- Clarity and ease of comprehension: existence of introductory texts which use "accessible language" to present the concepts referred to in the contents proactively disclosed. 2.6
- CLARITY and ease of comprehension: the information contained is accompanied by graphics or illustrations to facilitate the understanding and clarity of technical or complex contents proactively disclosed. 1.6
- Clarity and ease of comprehension: tables are published providing an overview of the information. In the case of contracts, agreements, management delegation agreements, and grants and assistance, tables are published with this information. 0.6
- Updated information: sufficient updating of information (publication of information relative to the July-September period of 2015 [the study being conducted between October and December] on contents such as list of contracts, statistics on the means of contracting and budgetary reports). 4.0
- Regular information: publication of past records of information such as budgets, annual accounts and formalized contracts. 3.2
- Accessibility: accessibility certification for persons with a disability. 3.9
- Protection of personal data: compliance with protection of personal data. 9.6
- Reuse of information: use of reusable formats. 0.2

### 8.2 Proactive disclosure contents: Institutional, Organizational and Planning Information

- The duties of the entity. 6.5
- The list of applicable regulations relevant to the entity. 7.0
- An updated organizational chart. 6.1
- The heads of the different entities, as well as their profile and career. 5.4

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<sup>43</sup> Estudio sobre la situación de la aplicación de la Ley 19/2013, de 9 de diciembre, de Transparencia, Acceso a la Información Pública y Buen Gobierno, en las entidades que configuran el Sector Público de la Administración General del Estado at18-21. See: <https://drive.google.com/file/d/0BzZV66dM4HCTUHUYRTJ6UElyYWM/view?usp=sharing>

- The entity's plans and programmes. 1.5
- Reports and indicators evaluating compliance with the plans and programmes. 0.2

### **8.3 Proactive disclosure contents: Economic, Budgetary and Statistical Information**

- Contracts effected by the entity. 6.0
- Statistical data on the percentage of the total budget of contracts awarded through the different procedures. 6.1
- The agreements signed by the entity. 4.2
- The management delegation agreements signed by the entity. 1.2 (if not applicable, this should be stated)
- Public grants and assistance awarded. 1.5 (if not applicable, this should be stated)
- The entity's budgets. 3.7
- Information on the state of budget implementation. 0.9
- The entity's annual accounts. 5.8
- Account auditing and monitoring reports. 3.5
- Annual remuneration received by senior officials and heads of entities. 3.1
- Severance pay received where a post is relinquished. 0.7 (if this does not exist, this should be stated)
- Resolutions on authorization or recognition of compatibility. 0.8
- Information on the degree of compliance and quality of the services offered by the entity. 0.5