

23 December 2010

Official Information Legislation Review
Law Commission
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1. **The Public's Right to Know**

- 1.1 We refer to the Law Commission's Issues Paper 19, September 2010, 'The Public's Right to Know.
- 1.2 We provide information about us and the key issues for us in the Issues Paper below. In addition, we have set out the questions in the Issues Paper in the attached appendix and outline our thoughts in respect of those questions where we consider we can provide most perspective.

2. **The Guardians and the New Zealand Superannuation Fund**

- 2.1 This submission is made by the Guardians of New Zealand Superannuation ("**Guardians**"). The Guardians is an autonomous crown entity that was established in 2002 to manage and administer the New Zealand Superannuation Fund (the "**Fund**"). The Fund is not a legal entity but a pool of Crown assets. The Fund size as at 31 October 2010 is NZD17.66 billion.

3. **Commercial nature of our business**

- 3.1 The Guardians is under a statutory duty to invest the investment funds under their management on a prudent, commercial basis and to manage and administer those funds in a manner consistent with:
 - Best-practice portfolio management.
 - Maximising return without undue risk.
 - Avoiding prejudice to New Zealand's reputation as a responsible member of the world community.
- 3.2 The Guardians undertake a range of investment activities that it believes will add value over and above the returns generated by passive investments in the asset classes contained within the reference portfolio. This includes three broad areas of value-adding activity.

3.3 The first category of value-adding activity is capturing active returns through investing in private markets and/or selecting and investing through active managers. For instance investment strategies in:

- Infrastructure (e.g. purchase with Infratil of Shell downstream assets).
- Timber (e.g. Ownership of Kaingaroa Forest in partnership with Harvard Endowment Fund).
- Private Equity and Property (investment in multiple private equity and private equity real estate partnerships and other collective investment vehicles).
- Rural land.
- New Zealand direct.

3.4 The second is strategic tilting or 'swimming against the tide'. The third category is portfolio completion (closely managing fees and costs).

3.5 Like any other investment business, we have commercial relationships with investment managers, private equity funds, counterparties and suppliers. The agreements governing these relationships include terms that are commercially sensitive for the third party and/or for us. In addition, from time to time we hold market sensitive information (i.e. inside information) and have procedures in place to manage the risk under insider trading laws.

3.6 More information about how we invest the Fund can be found in our annual report, Statement of Intent and additional information on our website (www.nzsuperfund.co.nz).

4. Protection against certain actions potentially unavailable

4.1 As discussed below (Section 5), we consider there is risk to us of reverse freedom of information complaints in the context of our commercial activities.

4.2 The protections in the Act (section 48) may not be available to us. In particular, we make off-shore investments on a regular basis in accordance with agreements that are subject to foreign laws. Any bar on proceedings in the Act will not necessarily effectively protect the Guardians from suit because a New Zealand statute cannot directly speak to the Courts of another jurisdiction. That is, a New Zealand statute cannot direct a foreign court to excuse a breach of that country's own laws. Whilst defences under private international law may be available in certain cases, this highlights the need for the commercial prejudice and subject to confidence grounds to be adequately robust and flexible enough to protect agencies like the Guardians. In addition, consistent and principled decisions by the Ombudsman assist in providing greater commercial certainty.

5. The Guardians' Approach to Transparency

5.1 We have included in our Annual Report (pages 34-35) a description of our approach to transparency.

5.2 The Annual Report section we have referred to also describes the broad range of the material we proactively release as well as our performance in transparency surveys by third parties. The San Fransisco-based Sovereign Wealth Fund Institute publishes

the Linaburg-Maudell Transparency Index and the Guardians has rated 10/10 since inception of the index. We also include reference to the survey published by the Washington-based Carnegie Endowment for World Peace where the Guardians were rated a clear first among the 26 sovereign wealth funds which were signatories to the Santiago Principles.

6. The Guardians' History of Official Information Act Requests

- 6.1 As a relatively young organisation we have had limited experience with the application of the Act. Requesters have tended to focus on our decisions in relation to responsible investment issues such as investment in companies involved in the nuclear weapons industries. We have also received a number of requests relating to our approach to investing in New Zealand.
- 6.2 We have received approximately 30 requests. We have provided the information as soon as reasonably practicable and have never exceeded the 20 working-day limit. Our decisions to withhold have been referred to the Ombudsman on several occasions and were queried by the Ombudsman on two occasions. In keeping with what we have said about being a relatively young organisation, the appeals to the Ombudsman were for older requests and, as we have become more familiar with the process, our response times have sharply declined. We believe we have a constructive relationship with the Ombudsman.
- 6.3 Queries where we have had least experience to date but which we consider will be the most difficult for us, are where we are asked for information relating to specific investments or proposed investments, investment managers or the investment activities and terms such as fees of those managers.
- 6.4 We think that such requests are likely to increase as the Fund grows in size and becomes better known through its activities in New Zealand and offshore. Anecdotally (through conversations with peer funds and general searches), we understand that freedom of information legislation can be used by people who are more interested in gaining insights for commercial reasons rather than to scrutinise the machinery of government.

7. Questions and Contacts

- 7.1 Please contact us should you require any elaboration on any of the responses or comments made in our letter to you.

Yours faithfully



Sarah Owen
General Counsel

ISSUES PAPER - QUESTIONS

2. Scope of the Acts

Q1 Do you agree that the Schedules to each Act (OIA and the LGOIMA) should list every agency that they cover?

No specific comment at this time.

Q2 Do you agree that the schedules to the OIA and LGOIMA should be examined to eliminate anomalies and ensure that all relevant bodies are included?

No specific comment at this time.

Q3 Do you agree that SOEs and other crown entity companies should remain within the scope of the OIA?

No specific comment at this time.

Q4 Do you agree that council controlled organisations should remain within the scope of the LGOIMA?

No specific comment at this time.

Q5 Do you agree that the Parliamentary Counsel Office should be brought within the scope of the OIA?

No specific comment at this time.

Q6 Do you agree that the OIA should specify what information relating to the operation of the Courts is covered by the Act?

No specific comment at this time.

Q7 Should any further categories of information be expressly excluded from the OIA and the LGOIMA?

Please note our comments under the heading "Protecting Commercial Interests" (Chapter 5).

3. Decision-making

Q8 Do you agree that the OIA and the LGOIMA should continue to be based on a case-by-case model?

Yes. We consider that an approach such as exemptions by categories of document is clumsy, likely to continually need to be updated and does not address the key point which is the substance of the information.

Q9 Do you agree that more clarity and more certainty about the official information withholding grounds can be gained through enhanced guidance rather than through prescriptive rules, redrafting the grounds or prescribing what information should be released in regulations?

Yes. We think that any concerns with consistency of approach would be better addressed through a focus on education, guidelines and the publishing of case notes.

Q10 Do you agree there should be a compilation, analysis of, and commentary on, the case notes of the Ombudsmen?

Yes. See above.

Q11 Do you agree there should be greater access to, and reliance on, the casenotes as precedents?

Yes. See above.

Q12 Do you agree there should be a reformulation of the guidelines with greater use of case examples?

Yes.

Q13 Do you agree there should be a dedicated and accessible official information website?

Yes.

4. Protecting good government

Q14 Do you agree that the "good government" withholding grounds should be redrafted?

We have no comment on section 9(2)(f)(Constitutional Conventions).

We consider that a situation where advice is given orally, or simply not given at all and the associated risks to the public record are real. In our view, while the use of the ground in (9)2(g) ("free and frank" expression) is likely to arise infrequently, it is an important protection. For ease of reference we record the section (9)2(g):

- g) maintain the effective conduct of public affairs through—
 - (i) the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty; or
 - (ii) the protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment; or

We do not understand the following statement by the Law Commission:

*"However, given that all these bodies have relationships with Ministers we are currently not inclined to make a change, but ..."*¹

Our understanding of this provision is that it applies to the expression of opinions between members/employees of an organisation in the course of their duty and need not be with the Minister. We would be concerned if it was the Law Commission's view that this ground should only apply to communications by or between or to Ministers of the Crown.

We consider that the questions that the Ombudsman poses to assist in the application of this ground are helpful.² However, the hurdle for reliance on this ground set out in the commentary by the Ombudsman is too high (especially when coupled with the public interest test).

For example, in order for the Guardians to be successful it is important that a range of investment ideas, including those at the untested or more extreme end of the spectrum, are able to be tabled and debated without fear of individuals who promote those ideas being ridiculed or exposed to undue criticism. If the threshold for this ground is set too high individuals will be incentivised to act in a manner that protects their interests. A situation where more and more advice is provided orally, or not at all, is contrary to good policy and the principles of open access to information that the Act seeks to protect.

A balance must be struck.

Q15 What are your views on the proposed reformulated provisions relating to the "good government" grounds?

We agree that the grounds should cover both 'opinions' and 'the provision of advice'.

¹ Law Commission's Issues paper, Paragraph 4.39.

² Ibid Paragraph 4.29

5. Protecting commercial interests

Q16 Do you think the commercial withholding ground should continue to be confined to situations where the purpose is to make a profit?

For ease of reference we record the section:

- (b) protect information where the making available of the information—
 - (i) would disclose a trade secret; or
 - (ii) would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; or

We think that the approach taken by the Ombudsman is more restrictive than what is contemplated by the wording of the Act itself and that such a reading down is not justified.

Whether a party's commercial position has been prejudiced should be addressed on a case-by-case basis and the nature or purpose of the organisation should be a factor taken into account in making that judgment, rather than a qualifying hurdle.

In particular, a person who is in a "commercial position" may or may not be in the business of making a profit. In addition, in theory a person could be in a commercial position but choose not to utilise that commercial position. However, such a person would wish to preserve that position to ensure it was available for use in the future. For instance, specific knowledge gained by the Guardians in the course of the development of a strategic tilting framework could have value to a third party. However, the Guardians may not wish to 'sell' that intellectual property and indeed may be prepared to license it at no cost to say, another crown financial institution.

Q17 If you favour a broader interpretation, should there be a statutory amendment to clarify when the commercial withholding ground applies?

The Guardians favour the deletion of the word "unreasonably", which introduces an unnecessary and unhelpful hurdle that is adequately addressed by the application of the "public interest" test.

The Guardians favour the wording used in section 43(2) of the Freedom of Information Act 2000 (UK): "**would, or would be likely to, prejudice the commercial interests of any person** (including the public authority holding it)"

Whether a party's commercial position is or is likely to be prejudiced should be the initial matter for enquiry. Once this is established, the public interest test is applied to determine whether it is reasonable or appropriate to nevertheless disclose the information.

Q18 Do you think the trade secrets and confidentiality withholding grounds should be amended for clarification?

The preliminary work we have done (as briefly outlined below) suggests to us that we may have less ability to preserve commercially sensitive information than other funds and this may negatively impact on our ability to do business. In addition, it increases the risk of reverse freedom of information complaints where we may not be afforded the protection under the Act (this is described in our covering letter). We would welcome consideration by the Law Commission of this issue.

As you will anticipate from the nature of our activities, one of the key grounds for withholding information that we are likely to seek reliance on is the confidentiality obligations as set out below:

- (ba) protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—
- (i) would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or
 - (ii) would be likely otherwise to damage the public interest; or

Obligations of confidentiality are expressly provided for in many types of third party engagements and in a number of transactions. For instance:

- Investment management agreements.
- Limited partnership agreements in the context of private equity or real estate funds.
- Negotiations and due diligence in the context of potential acquisitions of businesses or shares.
- The provision of information by managers in the context of our assessment of them including such information as the particularities of investment strategies.
- ISDAs and related documentation with counterparties.
- Custody and collateral management.
- Supply contracts such as advisers, IT services, proxy voting services, leases for office space etc.

It is critical to the discharge of our investment obligations that the pool of potential investment and related third parties continue to be willing to deal with us without fear of disclosure of information that they regard as proprietary and commercially sensitive.

In order to maximise returns to the funds we invest, we seek out firms and opportunities that meet our conviction hurdles and our investment needs. We may be one of a number of investors that seek access to these third parties. While we may invest considerable sums of money by New Zealand standards, the amount we trust to any one firm can often be a small fraction of the total. That amount, too, is often but a small fraction of the total sums invested, or advised upon, by the firm.

We have not undertaken comprehensive legal research on the approach of various jurisdictions to freedom of information legislation and its application in the context of sovereign wealth funds. However, we have identified some sovereign wealth funds that we consider 'peer funds' and have set out below their approach to this issue.

Peer Fund	Position under Freedom of Information Laws
Future Fund	In Australia, the Finance Minister announced in November 2009 that the Future Fund would be listed in Schedule 2 of the Freedom of Information Act 1982 (Cth), exempting the Fund from the Act in respect of requests related to acquiring, realising or managing its investments (similar to the current exemption in Schedule 2 for the Reserve Bank in respect of its open market operations and dealings in the currency market).
Canadian Pension Plan Investment Board	The head of the Canada Pension Plan Investment Board shall refuse to disclose a record requested under the Access to Information Act 1985 that contains advice or information relating to investment that the Board has obtained in confidence from a third party if the Board has consistently treated the advice or information as confidential. ³
Public Sector Pension ("PSP") Investment Board	Under the Access to Information Act 1985, the PSP Investment Board is subject to the same exemption provision as the Canadian Pension Plan Investment Board in respect of records obtained in confidence from third parties. ⁴ In addition, the PSP Investment Board is further exempted from disclosure of records containing trade secrets or financial, commercial, scientific or technical information that belongs to, and has consistently been treated as confidential by the PSP Investment Board. ⁵ Section 20 also provides a general exemption in respect third party information, but which is subjected to a "public interest test".
OMERS Ontario Municipal Employees Retirement System	OMERS was subject to the Ontario Freedom of Information and Protection of Privacy Act ("FOIPPA") from 1987 until 1 July 2010. It is no longer subject to the Act as a result of an amendment to Regulation 460 (enacted under the FOIPPA). Regulation 460 sets out which bodies are classified as "institutions" and therefore subject to the requirements of the FOIPPA. OMERS was excluded from Regulation 460 as a result of the amendment that took effect on 1 July 2010.
OTPP Ontario Teachers Pension Plan	OTPP is not listed in Regulation 460 as an "institution" (see above) so it would appear that this organisation is not subject to the requirements of the FOIPPA. We have not managed to confirm whether OTPP are subject to the Act or exempt from the Act through other regulations or through its governing legislation.
CALPERS	The California Public Records Act exempts certain records held by state agencies from disclosure under the Act, including: preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business (provided that the public interest in withholding those records clearly outweighs the public interest in disclosure), information received in confidence etc. State agencies however are not prohibited from disclosing such categories of information. ⁶
Queensland Investment Corporation (QIC)	Under Schedule 2 of the Right to Information Act 2009 (Qld), QIC is exempt from disclosure of information under the Act in respect of its "functions" (except as they relate to community services obligations). This will include its various investment functions
Pension Protection Fund (Note this UK fund is not considered a peer fund by us)	Under section 43 of the Freedom of Information Act 2000 (UK), information is exempt from disclosure if it constitutes a trade secret or would be likely to prejudice the commercial interests of any person (including the public authority holding it). Section 41 provides that any information is exempt if it was obtained from a third party and its disclosure would

³ Access to Information Act 2006, c. 9, s. 148.

⁴ Ibid, c. 9, s. 148.

⁵ Ibid, c. 9, s. 147.

⁶ Government Code Section 6254 - California Public Records Act

Peer Fund	Position under Freedom of Information Laws
	constitute a breach of confidence by any person. Both sections are subject to the section 17(3) "public interest" test.
Pension Reserves Investment Trust (PRIT) Fund. (Note this UK fund is not considered a peer fund by us)	Confidentiality of certain records. Any documentary material or data made or received by a member of the PRIM board which consists of trade secrets or commercial or financial information that relates to the investment of public trust or retirement funds, shall not be disclosed to the public if disclosure is likely to impair the government's ability to obtain such information in the future or is likely to cause substantial harm to the competitive position of the person or entity from whom the information was obtained. The provisions of the open meeting law shall not apply to the PRIM board when it is discussing the information described in this subdivision. This subdivision shall apply to any request for information covered by this subdivision for which no disclosure has been made by the effective date of this subdivision. ⁷

The Guardians itself does generate 'trade secrets' and confidential (including inside information) information. Accordingly, we think that an amendment to clarify that the section 9(2) grounds also apply to information generated by the agency would be desirable.

Q19 Do you agree that the official information legislation should continue to apply to information in which intellectual property is held by a third party?

No specific comment at this time.

Q20 Do you have any comment on the application of the OIA to research work, particularly that commissioned by third parties?

No specific comment at this time.

Q21 Do you think the public interest factors relevant to disclosure of commercial information should be included in guidelines or in the legislation?

We consider that the purpose and the activities of the organisation are relevant to the public interest factors. It is difficult to assess the public interest in a vacuum without taking into account the reason Parliament established the organisation at the heart of the request, and the activities associated with that purpose.

We agree that these factors are better left to guidelines, case notes and discussion.

Q22 Do you experience any other problems with the commercial withholding grounds?

To date we have had few requests where we have had to consider the application of these grounds, particularly in the context of specific investments or investment managers. We think that such requests are likely to increase as the

⁷ Mass General Law Chapter 32 Section 23 (management of retirement funds).

Fund grows in size and becomes better known through its activities in New Zealand and offshore. Should that occur and we are unable to withhold commercially sensitive information, we consider this will severely curtail our access to investment opportunities. However, this is yet to be tested.

6. Protecting privacy

Q23 Which option do you support for improving the privacy withholding ground:

Option 1 – guidance only, or;

Option 2 – an “unreasonable disclosure of information” amendment while retaining the public interest balancing test, or;

Option 3 – an amendment to align with principle 11 of the Privacy Act 1993 while retaining the public interest test, or;

Option 4 – any other solutions?

No specific comment at this time.

Q24 Do you think there should be amendments to the Acts in relation to the privacy interests of:

(a) deceased persons?

(b) children?

No specific comment at this time.

Q25 Do you have any views on public sector agencies using the OIA to gather information about individuals?

No specific comment at this time.

7. Other withholding grounds

Q26 Do you agree that no withholding grounds should be moved between the conclusive and non-conclusive withholding provisions in either the OIA or LGOIMA?

No specific comment at this time.

Q27 Do you think there should be new withholding grounds to cover:

(a) harassment;

(b) the protection of cultural values;

(c) anything else?

We note that the Issues Paper does not discuss the withholding ground section 9(2)(k) (information may be withheld if that is necessary to prevent the disclosure or use of official information for improper gain or improper advantage). The Law Commission states⁸ that it might be said that one of the withholding grounds in the Act assumes a knowledge of purpose. For the reasons outlined in the Issues Paper under "Purpose of Request", it is likely that there is little value in requiring requesters to provide the purpose of their request and their real name. However, this does give rise to the question as to whether the ground in 9(2)(k) is of any use. Consideration could be given to reformulate the grounds so that the agency can form the reasonable view that the information could be used for improper gain or improper advantage based on the facts and circumstances existing at the time of the request.

Q28 Do you agree that the "will soon be publicly available" ground should be amended as proposed?

No specific comment at this time.

Q29 Do you agree that there should be a new non-conclusive withholding ground for information supplied in the course of an investigation?

No specific comment at this time.

Q30 Do you have any comments on, or suggestions about, the "maintenance of law" conclusive withholding ground?

No specific comment at this time.

8. The Public Interest Test

Q31 Do you agree that the Acts should not include a codified list of public interest factors? If you disagree, what public interest factors do you suggest should be included?

No specific comment at this time.

Q32 Can you suggest any statutory amendment which would clarify what "public interest" means and how it should be applied?

No specific comment at this time.

Q33 Do you think the public interest test should be contained in a distinct and separate provision?

⁸ Ibid. section 9.4

No specific comment at this time.

Q34 Do you think the Acts should include a requirement for agencies to confirm they have considered the public interest when withholding information and also indicate what public interest grounds they considered?

No. We do not think this should be legally required. The legal requirement for agencies to undertake this assessment exists already. This would be better addressed by further information and discussion on the application of the current law.

Practically, failure to undertake this assessment is likely to become apparent through Ombudsman review or subsequent information requests.

9. Requests – Some problems

Q35 Do you agree that the phrase “due particularity” should be redrafted in more detail to make it clearer?

Yes. We think your suggested wording (“The request must be clear, and should refer as precisely as possible to the information that is required.”) is clearer for the requester and, as a result, will assist the agency. We note also that additional help should be given, particularly to smaller agencies with fewer resources to facilitate a discussion with the requester with the aim of defining more closely what the requester is looking for. This would save time for both the requester and the agency and likely produce a more satisfactory outcome for the requester in terms of information gained.

Q36 Do you agree that agencies should be required to consult with requesters in the case of requests for large amounts of information?

No. This should not be made a requirement. There is incentive for the agency to do this now as outlined above. We think adding additional requirements on the agency is likely to be less effective than ensuring that agencies understand the benefits of consultation with the requester.

10. Processing requests

Q37 Do you agree the Acts should clarify that the 20 working day limit for requests delayed by lack of particularity should start when the request has been accepted?

Yes.

Q38 Do you agree that substantial time spent in “review” and “assessment” of material should be taken into account in assessing whether material can be released, and that the Acts should be amended to make that clear?

Yes.

Q39 Do you agree that "substantial" should be defined with reference to the size and resources of the agency considering the request?

Yes.

Q40 Do you have any other ideas about reasonable ways to deal with requests that require a substantial amount of time to process?

No.

Q41 Do you agree it should be clarified that the past conduct of a requester can be taken into account in assessing whether a request is vexatious?

No. Formerly vexatious persons should have the right for each case to be considered on its merits. As a practical matter, a request from a formerly vexatious requester will put agencies on alert to the need to examine the request critically. Similarly, we imagine the Ombudsman would utilise a similar approach should the request require the involvement of the Ombudsman and the Ombudsman has previous experience with the requester.

Q42 Do you agree that the term "vexatious" needs to be defined in the Acts to include the element of bad faith?

The inclusion of bad faith seems to be a higher threshold than vexatious. "Bad faith" imports elements of dishonesty and fraud whereas "vexatious" is more closely related in meaning to annoyance, harassment or abuse of the request process i.e. through continuity of requests.

Note also that neither vexatious nor bad faith deals with misuse of the regime for commercial purpose. See however improper gain or advantage under 9(2)(k).

Q43 Do you agree that an agency should be able to decline a request for information if the same or substantially the same information has been provided, or refused, to that requester in the past?

Yes.

Q44 Do you think that provision should be made for an agency to declare a requester "vexatious"? If so, how should such a system operate?

No. The cost of such a system is likely to outweigh the cost of assessing individual requests from such a person.

Q45 Do you agree that, as at present, requesters should not be required to state the purpose for which they are requesting official information nor to provide their real name?

Yes.

Q46 Do you agree the Acts should state that requests can be in oral or in writing, and that the requests do not need to refer to the relevant official information legislation?

No specific comment at this time.

Q47 Do you agree that more accessible guidance should be available for requesters?

Yes.

Q48 Do you agree the 20 working day time limit should be retained for making a decision?

Yes.

Q49 Do you agree that there should be express provision that the information must be released as soon as reasonably practicable after a decision to release is made?

No specific comment at this time.

Q50 Do you agree that, as at present, there should be no statutory requirement to acknowledge receipt of an official information request but this should be encouraged as best practice?

Yes.

Q51 Do you agree that 'complexity of the material being sought' should be a ground for extending the response time limit?

Yes.

Q52 Do you agree there is no need for an express power to extend the response time limit by agreement?

Yes.

Q53 Do you agree the maximum extension time should continue to be flexible without a specific time limit set out in statute?

Yes.

Q54 Do you agree that handling urgent requests should continue to be dealt with by

Ombudsmen guidelines and there is no need for further statutory provision?

Yes.

Q55 Do you agree there should be clearer guidelines about consultation with ministerial offices?

Yes. In particular a minimum time for notification from one agency to another of a request relevant to that agency in order to facilitate data gathering and assessment of what, if any, information should be withheld.

Q56 Do you agree there should not be any mandatory requirement to consult with third parties?

No.

Q57 Do you agree there should be a requirement to give prior notice of release where there are significant third party interests at stake?

No. Most agencies will either be required to do this under the contracts they have with third parties or will recognise that it is prudent to advise third parties of this matter. Including additional obligations (with the attendant consideration of the implications of not providing notice) would seem to overcomplicate the legislation.

However, if it was considered that notice should be legislated, then we consider that the formulation recommended ("notice would be required to third parties where there is good reason for withholding information, but the agency considers this to be outweighed by public interest factors.") is appropriate.

Q58 How long do you think the notice to third parties should be?

No specific comment at this time.

Q59 Do you agree there should be provision in the legislation to allow for partial transfers?

Yes.

Q60 Do you agree there is no need for further statutory provision about transfer to Ministers?

No specific comment at this time.

Q61 Do you have any other comment about the transfer of requests to ministers?

No specific comment at this time.

Q62 Do you think that whether information is released in electronic form should continue to depend on the preference of the requester?

Yes.

Q63 Do you think the Acts should make specific provision for metadata, information in backup systems and information inaccessible without specialist expertise?

It may be better that this is addressed by amending section 18(f) (that the information requested cannot be made available without substantial collation or research). In particular, extending the concept of substantial collation or research to substantial resources expended.

Q64 Should hard copy costs ever be recoverable if requesters select hard copy over electronic supply of the information?

No specific comment at this time.

Q65 Do you think that the official information legislation needs to make any further provision for agencies to place conditions on the re-use of information, or are the current provisions sufficient?

We think that practically it would be difficult and expensive to enforce any condition on use of released material by the recipient. Expressly providing for the ability to impose conditions in the Act would do little to alter this unless this was coupled with enforceability provisions which would seem inconsistent with the thrust of the Act.

Q66 Do you agree there should be regulations laying down a clear charging framework for both the OIA and the LGOIMA?

No specific comment at this time.

Q67 Do you have any comment as to what the framework should be and who should be responsible for recommending it?

No specific comment at this time.

Q68 Do you agree that the charging regime should also apply to political party requests for official information?

No specific comment at this time.

11. Complaints and Remedies

Q69 Do you agree that both the OIA and LGOIMA should set out the full procedures followed by the Ombudsmen in reviewing complaints?

Yes.

Q70 Do you think the Acts provide sufficiently at present for failure by agencies to respond appropriately to urgent requests?

Yes.

Q71 Do you agree with the existing situation where a person affected by the release of their information under the OIA or the LGOIMA cannot complain to the Ombudsman?

Yes. We think that this would:

- add a whole new level of complexity and costs to the regime;
- have the effect of making agencies more cautious about releasing information; and
- do little to 'rectify' the situation as it occurs once the information is made available.

Q72 Do you agree there should be grounds to complain to the Ombudsmen if sufficient notice of release is not given to third parties when their interests are at stake?

If notice requirements are introduced then it makes sense to introduce complaint mechanisms.

Q73 Do you agree that a transfer complaint ground should be added to the OIA and the LGOIMA?

No specific comment at this time.

Q74 Do you think there should be any changes to the processes the Ombudsmen's follows in investigating complaints?

No specific comment at this time.

Q75 Do you agree that the Ombudsmen should be given a final power of decision when determining an official information request?

Yes, provided that decisions of the Ombudsman remain subject to judicial review where the Ombudsman makes a procedural error, including in circumstances where "the Ombudsman is plainly and demonstrably wrong".⁹

This approach ensures that the decision making process is not drawn out and provides certainty in circumstances where contracts require the Guardians not to disclose information except where required by law.

This approach also contains costs associated with OIA requests and is an effective forum for lay persons to participate which is critical given the very purpose of the Act is aimed at enabling lay persons to have access to information.

Q76 Do you agree that the veto power exercisable by Order in Council through the Cabinet in the OIA should be removed?

Yes. To preserve the separation of powers, the Executive should not be left to determine the extent of its own disclosure of official information.

Q77 Do you agree that the veto power exercisable by a local authority in the LGOIMA should be removed?

No specific comment at this time.

Q78 If you believe the veto power should be retained for the OIA and LGOIMA, do you have any comment or suggestions about its operation?

No specific comment at this time.

Q79 Do you agree that judicial review is an appropriate safeguard in relation to the Ombudsmen's recommendations and there is no need to introduce a statutory right of appeal to the Court?

Yes, having a statutory right of appeal will increase uncertainty (as it is more difficult to determine the point at which disclosure is required by law) and compliance costs.

Q80 Do you agree that the public duty to comply with an Ombudsman's decision should be enforceable by the Solicitor -General?

Yes.

Q81 Do you agree that the complaints process for Part 3 and 4 official information should

⁹ *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180.

be aligned with the complaints process under Part 2?

No specific comment at this time.

Q82 Do you agree that, rather than financial or penal sanctions, the Ombudsmen should have express statutory power to publicly draw attention to the conduct of an agency?

No specific comment at this time.

Q83 Should there be any further enforcement powers, such as exist in the United Kingdom?

No. There does not appear to be substantial non-compliance with the Act which would warrant the additional cost and complexity of this. As noted above, there are considerable commercial and reputational imperatives which put pressure on agencies to comply. Incentives through matters such as the KPIs of Chief Executives governed by the State Sector Act may also be a more effective way of addressing this issue.

Proactive Disclosure

Q84 Do you agree that the OIA should require each agency to publish on its website the information currently specified in section 20 of the OIA?

No. Information required to be provided by an agency should be considered upon the establishment of the agency and specified in its establishing legislation, as it is for the Guardians.

Each agency differs in terms of its size and nature and a one size fits all disclosure requirement is neither needed nor likely to add anything of use to those seeking specific information held by an agency.

Q85 Do you think there should be any further mandatory categories of information subject to a proactive disclosure requirement in the OIA or LGOIMA?

We consider that mandatory disclosure of information is better dealt with by the legislation governing the entity. For instance the publishing of an annual report (including reference to investment managers used) and statement of intent as per the Crown Entities Act 2004 and the governing legislation specific to the Guardians and the Fund e.g. the New Zealand Superannuation and Retirement Income Act 2001.

Oversight and other functions

Q86 Do you agree that the OIA and LGOIMA should require agencies to take all reasonably practicable steps to proactively release official information?

No. Agencies should be encouraged to be transparent and those who seek to reduce time spent on reactively communicating through OIA requests will proactively release relevant information without being 'required' to.

Q87 Should such a requirement apply to all central and local agencies covered by the OI legislation?

We think there is a distinction between crown entities which are largely commercial in operation and public decision or policy making bodies. Such mandatory disclosure may be more relevant to the latter.

Q88 What contingent provision should the legislation make in case the "reasonably practicable steps" provision proves inadequate? For example, should there be a statutory review or regulation making powers relating to proactive release of information?

No specific comment at this time.

Q89 Do you think agencies should be required to have explicit publication schemes for the information they hold, as in other jurisdictions?

No. Particularly not in respect of agencies such as the Guardians.

Q90 Do you agree that disclosure logs should not be mandatory?

Yes.

Q91 Do you agree that section 48 of the OIA and section 41 of the LGOIMA which protect agencies from court proceedings should not apply to proactive release?

If proactive release is mandated then the agency should be afforded protection for that release (and this would extend to those using the information). If the release is voluntary then the agency should not have protection from court proceedings.

Q92 Do you agree that the OIA and the LGOIMA should expressly include a function of providing advice and guidance to agencies and requesters?

Yes, provided that this is streamlined and provided efficiently i.e. online.

Q93 Do you agree that the OIA and the LGOIMA should include a function of promoting awareness and understanding and encouraging education and training?

Yes. This is central to the effective operation of the Act and the fulfilment of its purpose.

Q94 Do you agree that an oversight agency should be required to monitor the operation of the OIA and LGOIMA, collect statistics on use, and report findings to Parliament annually?

No. The replication of agencies and reporting and the compliance costs that come with such structures should be avoided unless there is a compelling reason for their implementation. The operation of the Act should be able to be adequately monitored via the sample seen by the Ombudsman each year.

Q95 Do you agree that agencies should be required to submit statistics relating to official information requests to the oversight body so as to facilitate this monitoring function?

See above at 94.

Q96 Do you agree that an explicit audit function does not need to be included in the OIA or the LGOIMA?

See above at 94.

Q97 Do you agree that the OIA and the LGOIMA should expressly enact an oversight function which includes monitoring the operation of the Acts, a policy function, a review function, and a promotion function?

See above at 94.

Q98 Do you agree that the Ombudsmen should continue to receive and investigate complaints under the OIA and the LGOIMA?

Yes.

Q99 Do you agree that the Ombudsmen should be responsible for the provision of guidance and advice?

Yes.

Q100 What agency should be responsible for promoting awareness and understanding of the OIA and LGOIMA and arranging for programmes of education and training for agencies subject to the Acts?

The Ombudsmen would seem best placed to carry out this function.

Q101 What agency should be responsible for administrative oversight of the OIA and the LGOIMA? What should be included in the oversight functions?

No specific comment at this time.

Q102 Do you think an Information Commissioner Office should be established in New Zealand? If so, what should its functions be?

No. See above at 94. If anything the Ombudsman should be provided with more resources.

Q103 If you think an Information Commissioner Office should be established, should it be standalone or be part of another agency?

See above at 102.

Local Government Official Information and Meetings Act 1987

Q104 Do you agree that the LGOIMA should be aligned with OIA in terms of who can make requests and the purpose of the legislation?

No specific comment at this time.

Q105 Is the difference between the OIA and LGOIMA about the status of information held by contractors justified? Which version is to be preferred?

It is difficult to justify any difference between these Acts. The Guardians prefer the LGOIMA formulation for the fact that it acknowledges the practical fact that if an agency does not hold or have access to information it cannot provide it to others.

Other Issues

Q106 Do you agree that the official information legislation should be redrafted and re-enacted.

No specific comment at this time.

Q107 Do you agree that the OIA and the LGOIMA should remain as separate Acts?

No specific comment at this time.

Q108 Do you have any comment on the interaction between the PRA and the OI

legislation? Are any statutory amendments required in your view?

No. We see the Acts as being complementary. The PRA defines the scope of information that must be held by agencies in accordance with normal, prudent business practice and the OIA provides for public access to information held by an agency. Whether the definition of "public record" is sufficient for its purpose under the PRA is a matter that justifies a separate Commission inquiry. The definition of "information" under the OIA does not seem to us to be relevant to such an inquiry.