ISSUES PAPER - QUESTIONS

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

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?

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

In terms of CRIs, yes but the distinction between CRIs/SOEs (who are required to undertake commercial activities in order to return a profit) and core government agencies needs to be recognised. Sufficient safeguards must exist to protect against disclosure of information of or commissioned by third parties dealing with the CRI, or that would undermine the commercial interests of the CRI or otherwise place the CRI at a commercial disadvantage (e.g. release of information to competitors or information that is otherwise proprietary; the compliance cost associated with the OIA also puts the CRI at a commercial disadvantage).

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

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

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

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

Yes (from the viewpoint of a CRI):

- **Information that is disclosed to the CRI by a third party in confidence;**
- **Information that is generated by a CRI on behalf of a third party (e.g. client data, proposals, reports, intellectual property);**
- **Copies or details of contracts with third parties;**
- **Information that is subject to legal privilege (otherwise withholding**

grounds should be conclusive and not overridden by public interest);

- **Information requested for a purpose that is inconsistent with the purpose and intent of the OIA (i.e. for a commercial as opposed to a genuine public interest purpose) – the requester should be required to specify the purpose for which the information is requested, when making a request.**

While the information at the first 3 bullet points above may be information held by a CRI, it is not information 'of the CRI' and should not be considered official information (as its stands the OIA fails to recognise this), especially where the third party is not an organisation itself subject to the OIA. It makes it difficult for a CRI to operate in the marketplace when it cannot give sufficient assurances to its customers around non-disclosure of commercially sensitive information.

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

Yes.

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, other than in the case of section 9(2) which is deficient and requires amendment (fails to take into account information generated on behalf of a client/third party (e.g. where a third party has commissioned a CRI to undertake research).

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

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

Yes, provided this is for guidance only and does not result in the agency having to build a case based on precedent whether to withhold or disclose (we consider compliance costs to be substantial enough, and would not want to see a process that is more onerous than that currently existing).

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

case examples?

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

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

Yes, these provisions (in particular free and frank expression of opinion) could benefit from some re-drafting (to achieve greater clarity around their application).

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

It is unclear how this ground applies to organisations outside of core government (e.g. CRIs), as the emphasis seems to be on the effective conduct of public affairs and policy matters.

The words "to maintain the effective conduct of public affairs" could be deleted, or reworded as follows: "to maintain the effective conduct of public affairs or for the crown agency or entity to otherwise maintain the ability to effectively fulfil its function".

We would be in favour of the "free and frank" ground being extended to cover both opinions and advice. We do not believe this would significantly reduce the amount of information released to requesters, it simply gives greater certainty/clarity around intent of application of the "free and frank" ground.

"We also wonder whether information of a preliminary nature (e.g. documents of a preliminary nature/early drafts) should give rise to grounds to withhold information if it could too easily be mis-interpreted or viewed/used out of context, or where disclosure would serve no useful purpose or be counter-productive.

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

No, this is too limiting and fails to recognise the broader drivers of a business. The commercial position of the business (whether a third party or the party subject to the OIA) could be unreasonably prejudiced as a result of the disclosure of information relating to activities carried out for purposes other than profit.

Some good examples of this are already set out in the issues paper. Some

further examples would include:

- **Activities that are carried out for strategic reasons;**
- **An industry good organisation (e.g. a third party dealing with a CRI) that may be carrying out activities not for the profit of the organisation, but instead for the benefit of its members.**

We put forward that "commercial activities" is arguably too narrow even without the "for profit" purpose, and suggest "business activities" would be a better term to use.

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

No, in the guidelines would be fine.

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

Yes:

- **Trade secrets – the guidelines currently state that 9(2)(b)(i) is primarily aimed at trade secrets of a third party. It should cover trade secrets of the agency.**
- **Confidentiality generally - the confidentiality withholding grounds should be amended to cover information generated on behalf of a third party (e.g. a third party commissioning research from a CRI) such as client data and reports, and information relating to third party projects where confidentiality is express or implied (if such information is to continue fall within the scope of the OIA).**

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, for the same reasons set out at Q20.

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

Information that is held by a CRI on trust for or which is generated on behalf of a third party a third party or otherwise relates to a project commissioned by a third party (in particular where the third party commissioning the work is itself not subject to the OIA) should not be considered official information, therefore should be excluded from the application of the OIA. Reports, intellectual

property and the like generated by a CRI on behalf of a third party are usually owned by the third party and confidentiality usually applies. We cannot envisage a situation where a customer would be in favour of the release of information it had commissioned and itself elected to keep secret. It is unreasonable for a CRI to be under an obligation to disclose such information and as a result be forced to argue against its release, its inclusion creates uncertainty for the CRI and the customer and results in the CRI and the customer incurring unnecessary compliance and administrative costs in having to respond to a request for such information. Lastly, we cannot see how the inclusion of such information in the application of the OIA fits with the purpose and intent of the OIA.

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

In the guidelines, provided they are as examples only and not limiting. Paragraph 5.42 seems to give examples that are both for and against public interest, but does not differentiate.

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

They are difficult to apply as currently drafted (as such we are in support of these being amended as set out herein), and it is difficult for the OIA timeframes to be met when third party consultation is required.

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

Option1 – 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?

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

(a) deceased persons?

(b) children?

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

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?

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

(a) harassment;

(b) the protection of cultural values;

(c) anything else?

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

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

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

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?

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

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

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.

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

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

It is in the agency's interest to consult, this happens already, we don't think there is a need to mandate it.

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. We often receive very broad requests and often have to work with the person making the request to clarify the scope. The 20 working days should not commence until we have clarity around the scope of the request.

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?

No.

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

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?

Yes.

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

Yes.

It should be noted that the frivolous and vexatious ground are found to be difficult to apply.

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?

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?

No. The requester should be required to state the purpose for which they are requesting the information, and they should not be entitled to request information for a purpose that is inconsistent with the purpose of the OIA:

- **Otherwise how can an assessment be made as to improper gain or advantage.**
- **Knowing the purpose is helpful in determining what information is required.**
- **Often we receive requests that we consider are inconsistent with the purpose and intent of the OIA, some are made for a commercial purpose not a public interest purpose. Recently we had a request for information relating to budgeted building expenditure by a market research company trying to establish the size of the market for a building company client. The information was provided (it was considered more straightforward to provide the information than argue against its release, and to provide the information for free rather than look to impose a charge) but we consider requests like these to be somewhat cheeky (an abuse of the OIA process, and wasteful of our time and resources).**
- **An agency should be entitled to understand the purpose for which the information will be used, so that it can duly mitigate against any potential harmful impact following release of the information.**

The requester should be required to provide their real name, for transparency, so that we can mitigate any potential harmful consequences arising from release, and so that we can duly manage conflicts of interest.

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, requests should be in writing and make reference to the OIA, so that they can be referred to the people responsible for OIA requests within the organisation (given they can be received by any person at any level in the organisation), clearly identified as OIA requests, and more easily managed.

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

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

Yes, although extensions of time should be allowed where consultation with a third party is required.

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?

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?

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

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

Yes, the need for third party consultation should be recognised but not mandated (requirement/appropriateness will depend on the relationship between the agency and third party).

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

This happens already for the most part. Wwe would not want to see a change that would add to the complexity of OIA process, additional bureaucracy or costs that are not recoverable from the requester.

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

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?

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

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

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

There should be no obligation to provide this information.

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

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?

Greater clarification is required. It is unclear in what circumstances the agency can require the requester to keep the information confidential. It might be helpful for the commentary provided in 10.72 should be incorporated into the guidelines. However the willingness of the requester to enter into a confidentiality agreement or the like should not operate so as to invalidate good reason for withholding, as enforceability is often difficult and can provide little assurance.

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

Yes.

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

Hourly rates for time spent collating the information should be increased, bearing in mind it is generally senior staff within the agency dealing with OIA requests.

It should be clarified that time spent consulting internally and with third parties in respect of the request should be recoverable (as an exception, we accept

that time spent/expenses incurred (e.g. obtaining legal advice) assessing grounds for withholding should not be recoverable).

There should be a requirement for payment upfront, or at least a deposit.

The agency should be able to insist on agreement being reached around costs before having to spend considerable time responding to a request (the guidelines suggest costs cannot be addressed until the agency is almost in a position to respond to the request, by which time significant costs may have already been incurred.

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

Yes.

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

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

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, as they have other remedies at law in the case of unlawful use or distribution of information by an agency. The Ombudsman should not have jurisdiction over this.

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?

No, existing rights and remedies are sufficient. The Ombudsman should not have jurisdiction over this.

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

Q74 Do you think there should be any changes to the processes the Ombudsmen's

follows in investigating complaints?

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

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

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

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?

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?

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

Q81 Do you agree that the complaints process for Part 3 and 4 official information should be aligned with the complaints process under Part 2?

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.

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

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, not supported.

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

No, not supported.

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

No, not supported. CRIs must engage in commercial activities in order to return a profit, this would prejudice its ability to carry out commercial activities and would put the CRI at a commercial disadvantage.

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

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?

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

No.

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?

No, agencies should be protected from claims in the case of any proactive release.

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

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

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?

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?

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

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?

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?

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

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

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

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?

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

No there should be no distinction. LGOIMA version is preferred.

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

The OIA needs to be amended to at least rectify deficiencies and interpretations issues in section 9(2).

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

Q108 Do you have any comment on the interaction between the PRA and the OI legislation? Are any statutory amendments required in your view?