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10 December 2010

Law Commission
PO Box 2590
Wellington
6011

com@lawcom.govt.nz

Dear Mr Burrows

Bay of Plenty Regional Council's submission to the: Review of information Legislation

Thank you for the opportunity to comment on the Review of Information Legislation. Bay of Plenty Regional Council wishes to reserve the right to present our submission in person.

For matters relating to this submission, please contact Kataraina Maki at kataraina.maki@envbop.govt.nz or 0800 368 288 ext. 9321.

Our Organisation

The Bay of Plenty Regional Council is responsible for the sustainable management of resources within the Bay of Plenty region. Our Council works to manage peoples' effects on freshwater, land, air and coastal water under the Resource Management Act (1991).

We also have a broader responsibility working with district councils in the area, for the economic, social and cultural well-being of communities in the Bay of Plenty region.

Summary

We support the general intent of this document. Please find our detailed comments on specific questions attached. We trust you find them constructive.

Yours sincerely,

A handwritten signature in black ink, appearing to read "M Macleod".

Mary-Anne Macleod
Group Manager Strategic Development

Bay of Plenty Regional Council 5 Quay Street, P O Box 364, Whakatane, New Zealand

BAY OF PLENTY REGIONAL COUNCIL SUBMISSION TO THE: Review of Official Information Legislation

Reference to the document	BAY OF PLENTY REGIONAL COUNCIL - Comments & Recommendations
<p>Question 1</p> <p>Do you agree that the schedules to each Act Trade Secret in Official Information Act 1982 (OIA) and Local Government Official Information and Meetings Act 1987 (LGOIMA) should list every agency that they cover?</p>	<p>The Regional Council agrees that a full schedule would clearly identify what agencies information public have access to under the act.</p>
<p>Question 2</p> <p>Do you agree that the schedules to the OIA and LGOIMA should be examined to eliminate anomalies and ensure all relevant bodies are included?</p>	<p>We agree as this will support consistency and clarity</p>
<p>Question 3 & 4</p> <p>Do you agree that State Owned Enterprises (SOE) and other crown entity companies should remain within the scope of the OIA?</p> <p>Do you agree that council controlled organisations should remain within the scope of the LGOIMA?</p>	<p>We agree that State Owned Enterprises, crown entities, and other state controlled organisations should remain within the scope of the OIA and LGOIMA. There are clear guidelines for all the entities about how to manager OIA and LGOIMA requests.</p>
<p>Question 6</p> <p>Do you agree that the OIA should specify what information relating to the operation of the Courts is covered by the Act?</p>	<p>The Bay of Plenty Regional Council (BOPRC) agree that this will support consistency and clarity</p>

Reference to the document	BAY OF PLENTY REGIONAL COUNCIL - Comments & Recommendations
<p>Question 7</p> <p>Should any further categories of information be expressly excluded from the OIA and the LGOIMA?</p>	<p>We consider there is inadequate protection against the provision of lists of details held in corporate databases where these databases are not “public registers” with specific protection grounds already enacted.</p> <p>For example: Consent applicants are required to provide certain details. The Regional Council is aware the Ombudsmen advocates for provision of such details. This organisation does not seek to over-ride the RMA’s requirement to hold and have available details of consents or provide information relevant to an area or consent type. The purpose is to have a mechanism to improve the balance between the public’s right to know and the protection and privacy of the parties involved.</p>
<p>Question 8</p> <p>Do you agree that the OIA and the LGOIMA should continue to be based on case-by-case model</p>	<p>The Regional Council strongly agrees in part that some clear exceptions and categories would support time saving and minimise risks around commercial sensitivity especially with SOE’s, CCO’s etc. Some exceptions around emails which are essentially notes rather than information would also benefit time efficiencies for the organisation actioning the request and ensure the requestor is not charged for and provided with irrelevant items.</p>
<p>Question 9</p> <p>Do you agree that more clarity and certainty about the official information withholding grounds can be gained through enhanced guidance rather than prescriptive rules? Redrafting the grounds or prescribing what information should be released in regulation.</p>	<p>The Regional Council agrees in part that more guidance would be of significant value in creating consistency and fairness and lessening confusion. These guidelines need to be well indexed and readily accessible as it is currently difficult to find specific help even though it may be available on the Ombudsmen’s website or elsewhere. However guidance is not legislation and there is some security in having requirements clearly available in law. BOPRC has commented on some areas where they recommend that legal specificity may be the safer approach.</p>
<p>Question 10</p> <p>Do you agree there should be a compilation, analysis of and commentary on the case notes of the Ombudsman?</p>	<p>We agree that a user friendly plain English version would be of benefit for consistency and clarity in application. It would need to include summaries as reasoning can be complex.</p>
<p>Question 11</p> <p>Do you agree there should be greater access to and reliance on case notes as precedents?</p>	<p>The Regional Council agrees that it needs to be simple and well indexed and user-friendly to encourage greater reliance by those applying legislation.</p>

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<p>Question 12</p> <p>Do you agree there should be reformulation of the guidelines with greater use of case examples?</p>	<p>The Regional Council supports this as it will improve confidence in the application of guidelines.</p>
<p>Question 13</p> <p>Do you agree there should be a dedicated and accessible official information website</p>	<p>The Regional Council supports this idea. We would also like the opportunity for users to suggest improvements to ensure the website is user-friendly for the authorities entrusted with carrying out OIA and LGOIMA requests.</p>
<p>Question 14 - 15</p> <p>Q14</p> <p>Do you agree that the “good government” withholding grounds should be redrafted?</p> <p>Q15</p> <p>What are your views on the proposed reformulated provisions relating to the “good government” ground</p>	<p>The Regional Council considers the proposed reformulated terms will support good communication. Honest opinion and advice will support better decision making.</p>
<p>Question 18</p> <p>Do you think the trade secrets and confidentiality withholding grounds should be amended for clarification?</p>	<p>The Regional Council would support an amendment that includes interpretation of OIA and LGOIMA and clarifies intellectual property.</p> <p>This organisation submits that explicit mention in OIA section 9(2)(ba)(i) and LGOIMA section 7(2)(c) to include information created internally that should have an obligation of confidence would provide better protection and confidence for public dealing with Government and Council on sensitive issues</p>
<p>Question 19</p> <p>Do you agree that the official information legislation should continue to apply to information in which intellectual property is held by a third party?</p>	<p>In the experience of this organisation there are organisations that have a standard practice of placing confidentiality clauses on their documentation. Outsourcing of activities and research undertaken on behalf of the public should not remove the public's right to the information.</p>

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<p>Question 21</p> <p>Do you think the public interest factors relevant to disclosure of commercial information should be included in guidelines or in the legislation?</p>	<p>BOPRC supports public interest factors relevant to be considered in decision making in the form of guidelines rather than prescriptive legislation. There are factors to be considered in all of information requests not just commercial information. It is likely legislative prescription in this area would compel comprehensive documentation for the organisation actioning the request to provide proof of the decision making process.</p>
<p>Question 22</p> <p>Do you experience any other problems with the commercial withholding grounds?</p>	<p>The Regional Council has some difficulty in accurately assessing whether specific data is of commercial sensitivity in cases where industry specific knowledge is required that is not available in-house. Working in partnership with the information provider can be a juggling act between them wanting to withhold everything and the requirement to assess content and provide all information possible.</p> <p>Lack of confidence in BOPRC's capacity to protect items of commercial sensitivity can affect customers will to provide full information.</p>
<p>Question 23 - 25 Q23</p> <p>Which option do you support for improving the privacy withholding ground:</p> <p>Option 1 – guidance only, or;</p> <p>Option 2 – an “unreasonable disclosure of information” amendment while retaining the public interest balancing test, or;</p> <p>Option 3 – an amendment to align with principle 11 of the Privacy Act 1993 while retaining the public interest test, or;</p> <p>Option 4 – any other solutions?</p> <p>Q24</p> <p>Do you think there should be amendments to the Acts in relation to the privacy interests of:</p> <p>(a) deceased persons?</p> <p>(b) children?</p> <p>Q25</p> <p>Do you have any views on public sector agencies using the OIA to gather personal information about individuals?</p>	<p>With regards to privacy in general BOPRC does not consider it to be in the interests of shared services for Local Authorities to be prevented from sharing information in the form of electronic data that may be obtained from a public register where the sharing of that information will constitute more effective use of existing (public) resources. Although this sharing is protected by clauses in legislation relevant to each register a remedy for limited disclosure to other local authorities under LGOIMA would be useful.</p>

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<p>Question 27</p> <p>Do you think there should be new withholding grounds to cover:</p> <p>(a) harassment;</p> <p>(b) the protection of cultural values;</p> <p>(c) anything else?</p>	<p>The Regional Council supports (a) and (b), a clear mandate to consider the safety of parties providing information to local and central government before its disclosure should be available. It is a responsible position for this legislation to take.</p> <p>Although the Resource Management Act (RMA) and LGOIMA provide protection from disclosure for some aspects of cultural importance (specifically Waahi Tapu) BOPRC does not believe this goes far enough. It is in the community's interest to encourage the sharing of information in order to protect areas of cultural significance.</p> <p>The BOPRC has received legal advice that the RMA and LGOIMA do not provide enough protection to prevent the disclosure of this type of information under LGOIMA. This legal issue has prevented iwi sharing information with Council in some cases. It also reduces the level of trust.</p> <p>Council recommends that an additional criterion as follows:</p> <ul style="list-style-type: none"> ▪ Information that may “threaten the control over and or the integrity of Maori or other traditional knowledge or other culturally sensitive material” this would present opportunities for improved and constructive knowledge sharing between BOPRC and iwi in the region.
<p>Question 28</p> <p>Do you agree that the “will soon be publicly available” ground should be amended as proposed?</p>	<p>We support that an amendment as proposed will provide more clarity to the public and reduce instances of public feeling they are the victims of staff tactics.</p>
<p>Question 36</p> <p>Do you agree that agencies should be required to consult with requesters in the case of requests for large amounts of information?</p>	<p>The Regional Council agrees that requesters may not understand the implications of their request. Consultation with the requestor to clarify their request where it may involve large amounts of information will reduce unnecessary time for the organisation and expense for the requestor. Changing the wording to “should” places a more direct obligation to consult which will benefit all parties.</p>
<p>Question 37</p> <p>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?</p>	<p>BOPRC agrees with the intent of this amendment. However it may be in the public interest to also specify what constitutes acceptance. A timeframe of less than 20 days may be set to prescribe the period within which council may return to the applicant for due particularity.</p>

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<p>Question 38</p> <p>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?</p>	<p>The Regional Council agrees that review and assessment are the most significant time factors in a number of more complex requests. These actions are required by the Act and should be considered in relation to the organisations ability to comply with a request.</p>
<p>Question 42</p> <p>Do you agree that the term “vexatious” should be defined in the Acts to include the element of bad faith?</p>	<p>BOPRC agrees that vexatious could be better defined in plain English to reflect the intent of removing individual’s ability to create nuisance and unnecessary expense. It is unclear whether the terms bad faith or not in good faith would provide this.</p>
<p>Question 43</p> <p>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?</p>	<p>This organisation agrees with question 43. However Council believes the ability to decline a request in situations where substantially the same information has already been provided, should include a requirement to consult with the requestor as to the reasons for the similar request. The initial or subsequent request may not have been interpreted by the organisation in the way the requestor meant.</p>
<p>Question 45</p> <p>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?</p>	<p>The Regional Council does not agree and is of the opinion that rather than require requestors to state their purpose, guidelines should be in place or the Act should state that responding organisations are able to enquire as to the purpose of the request. The requestor may or may not be required to respond. A name should be required regardless of whether it is false. A name is a point of reference and provision of information to unnamed parties reduces the organisations ability to consult with the party on aspects of the request and advice of costs etc.</p>
<p>Question 46</p> <p>Do you agree the Acts should state that requests can be oral or in writing, and that the requests do not need to refer to the relevant official information legislation?</p>	<p>The BOPRC agrees that it may not be necessary to specify, oral vs. written especially in the age of changing technologies where further grey areas may arise. “Any request in any form for information received by a local authority/government department is a LGOIMA/OIA request and subject to the requirements of the act.”</p>
<p>Question 47</p> <p>Do you agree that more accessible guidance should be available for requesters?</p>	<p>The Regional Council supports that having a central place for public to go and providing agencies subject to LGOIMA and OIA with the ability to provide the link from their own website will help requestors and responding agencies.</p>

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<p>Question 48</p> <p>Do you agree the 20 working day time limit should be retained for making a decision?</p>	<p>This organisation agrees that if the research is showing that the current time limit is largely being met an amendment is not necessary. The 20 days timeframe is practical for the purposes of most requests Council receives. Although the majority of requests are processed within 20 days, a reduced timeframe would create additional administrative burden in situations where extensions are required. It is unclear whether there is a tangible benefit in changing the timeframe.</p>
<p>Question 52</p> <p>Do you agree there is no need for an express power to extend the response time limit by agreement?</p>	<p>We agree that entering into a debate with requestors regarding timing of response is not productive or good for relationships. Recourse through the Ombudsmen is adequate if the requestor is unhappy with a time extension.</p>
<p>Question 53</p> <p>Do you agree the maximum extension time should continue to be flexible without a specific time limit set out in statute?</p>	<p>The BOPRC agrees that a maximum extension time may result in more requests for information being refused on the grounds of substantial collation and research as the use of this provision may be a matter of available resourcing within the given timeframe.</p>
<p>Question 57</p> <p>Do you agree there should be a requirement to give prior notice of release where there are significant third party interests at stake?</p>	<p>The BOPRC agrees in part that it is fair to give prior notice to third parties where they have significant interest. This places another burden of assessment on the authority responding to the request and the timeframe of the response can become dependant on the third party while the agency is accountable for meeting the timeframe.</p> <p>Any requirement to give prior notice should only be applicable to situations where good reason exists to with-hold the information but the information may be released due to overriding public interest. The requirement should include consultation with the third party not just "notice" and the ability for the third party to go to the Ombudsman with concerns before the release of information.</p>
<p>Question 58</p> <p>How long do you think the notice to third parties should be?</p>	<p>The Regional Council recommends 5 working days for review and consultation by third parties.</p>

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<p>Question 62</p> <p>Do you think that whether information is released in electronic form should continue to depend on the preference of the requester?</p>	<p>The BOPRC suggests that it is unfair to assume the format that is convenient for the releasing agency is practical for the requestor. Providing information in a format that the requestor is unable to use is essentially refusing their request for information.</p>
<p>Question 63</p> <p>Do you think the Acts should make specific provision for metadata, information in backup systems and information inaccessible without specialist expertise?</p>	<p>The Public Records Act requires agencies to create and maintain accessible records. BOPRC suggests that changes to OIA and LGOIMA should not conflict with this. Any specific exclusion of metadata from official information requests should be carefully defined to ensure the provision does not exclude the use of metadata where it can more easily be used to present information.</p>
<p>Question 64</p> <p>Should hard copy costs ever be recoverable if requesters select hard copy over electronic supply of the information?</p>	<p>The BOPRC agrees with the Ministry of Justice Charging Guidelines allow for recovery of photocopying costs.</p>
<p>Question 66 and 67 Q66</p> <p>Do you agree there should be regulations laying down a clear charging framework for both the OIA and the LGOIMA?</p> <p>Q67</p> <p>Do you have any comment as to what the framework should be and who should be responsible for recommending it?</p>	<p>The Regional Council supports that there should be clear consistent charging guidelines. Charge amounts do not need to be in statute but the authority responsible for prescribing the rate should be referenced in both LGOIMA and OIA and required to set and review the rate.</p> <p>We would support rules based on categories of request but not categories of requestor as this would encourage requestors to mislead agencies about their purpose and identity.</p>
<p>Question 85</p> <p>Do you think there should be any further mandatory categories of information subject to a proactive disclosure requirement in the OIA or LGOIMA?</p>	<p>We do not agree and the BOPRC considers current reporting requirements to be sufficient. Further requirements for pro-active disclosure would place further burden on resources particularly affecting smaller authorities in the Bay of Plenty Region.</p>

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<p>Question 90</p> <p>Do you agree that disclosure logs should not be mandatory?</p>	<p>We agree that pro-active disclosure is a commendable goal but the current environment does not allow for the additional administrative costs disclosure logs would create. The current legislation does not provide protection for pro-active release, Council assumes this would hold true of information disclosed via logs.</p> <p>We suggest that disclosure logs being so readily accessible have more risk to their subjects than specific release to specific requestors. Given the risk and the cost, the decision to publish disclosure logs should be left to each agency.</p>
<p>Question 91</p> <p>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?</p>	<p>The Regional Council agrees that it is appropriate under the current OIA and LGOIMA that these sections do not apply to pro-active release. A very high duty of care and responsibility should be taken in pro-active release of information</p> <p>If there is a desire or legal directive to increase pro-active release by government agencies it is inconsistent and unfair not to provide some protection in law to encourage responsible pro-active disclosure.</p>
<p>Question 92</p> <p>Do you agree that the OIA and the LGOIMA should expressly include a function of providing advice and guidance to agencies and requesters?</p>	<p>The BOPRC supports the addition of this function as it has the potential to support better understanding, consistency in application, improved compliance and better service to requestors. Also this function has potential to reduce time spent on internal and inter-agency discussions on appropriate application of the acts and provide more confidence to agencies in the appropriateness of their information provision.</p>
<p>Question 93</p> <p>Do you agree that the OIA and LGOIMA should include a function of promoting awareness and understanding and encouraging education and training?</p>	<p>Given that LGOIMA applies to all requests for information to a local authority, any staff member from front line support through to the Chief Executive may be answering requests under LGOIMA on any given day. A central agency responsible for training and education will enhance organisations ability to up skill staff and provide organisations with the correct information and confidence to communicate LGOIMA requirements and improve procedures and knowledge internally.</p>

Reference to the document	BAY OF PLENTY REGIONAL COUNCIL - Comments & Recommendations
<p>Question 94 and 95 Q94</p> <p>Do you agree that an oversight agency should be required to monitor the operation of the OIA and LGO IMA, collect statistics on use, and report findings to Parliament annually? Q95</p> <p>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?</p>	<p>Although the BOPRC supports the concept of monitoring and reporting on the application of the act there are concerns around the practicality of obtaining accurate statistics on requests. Given the broad application of the LGOIMA and OIA in regards to what is considered to be an official information request it is unlikely organisations will be in a position to provide true results as to how many requests they have had as many occur informally or briefly over the counter. The administration costs and margin for error in collecting statistics for requests may minimise any benefit.</p>
<p>Question 96</p> <p>Do you agree that an explicit audit function does not need to be included in the OIA or the LGOIMA?</p>	<p>Although a specific audit role is considered unnecessary the BOPRC would appreciate having access to an authority responsible for providing local authorities with review and recommendation services around their internal LGOIMA process and application.</p>
<p>Question 97</p> <p>Do you agree the OIA and LGOIMA should enact an oversight function which includes monitoring the operation of the Acts, a policy function, a review function, and a promotion function?</p>	<p>The BOPRC supports this as good practice, and agree but with the proviso that another layer of bureaucracy is not created for applicants and respondents. Emphasis should be on simplicity.</p>
<p>Question 104</p> <p>Do you agree that the LGOIMA should be aligned with the OIA in terms of whom can make requests and the purpose of the legislation?</p>	<p>Given there is no explicit need for the requestor to identify themselves BOPRC believes this clause may be unenforceable under the OIA and unnecessary under the LGOIMA.</p> <p>BOPRC considers that the OIA assumption in the purpose statement is that a progression was required from the initial state secrecy stance to that of right to access. LGOIMA having been enacted at a later stage assumes that progression has taken place and has an explicit purpose to provide for availability not merely progress towards it. It is considered by this organisation that the latter is the more desirable stance for a local authority.</p>

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<p>Question 105</p> <p>Is the difference between the OIA and LGOIMA about the status of information held by contractors justified? Which version is to be preferred?</p>	<p>BOPRC believes the requirements of the Public Records Act for authorities to apply certain standards of care and access to public records including those created by contracted parties should be reflected in the OIA and LGOIMA and clear to contractors.</p> <p>“Where any local authority enters into any contract (other than a contract of employment) with any person or organisation for any matter, information that is created or received by that person or organisation in relation to conducting activities for or on behalf of the authority is deemed to be the property of the authority and subject to requests under this act”</p>
<p>Question 107</p> <p>Do you agree that the OIA and the LGOIMA should remain as separate Acts?</p>	<p>Although there may be some confusion for the public when making requests quoting OIA rather than LGOIMA has no impact on the request itself. Currently there are clear and relevant areas of official information legislation for Central vs. Local Government. BOPRC considers this separation to represent the more user-friendly option and believes any attempt to combine the two acts may lead to confusion and complexity.</p>