ENVIRONMENT WAIKATO SUBMISSION TO THE LAW COMMISSION REVIEW OF THE OFFICIAL INFORMATION ACT 1982 AND PARTS 1 – 6 OF THE LOCAL GOVERNMENT OFFICIAL INFORMATION AND MEETINGS ACT 1987

TO: Official Information Legislation Review
Law Commission
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FROM: Environment Waikato
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INTRODUCTION

Thank you for the opportunity to submit on the Law Commissions Issues Document: *"The Public's Right to Know: A Review of the Official Information Act 1982 and Parts 1-6 of the Local Government Official Information and Meetings Act 1987".*

As a local authority, the Waikato Regional Council (known as Environment Waikato) is subject to the provisions of the Local Government Official Information and Meetings Act 1987 (LGOIMA) rather than the Official Information Act 982 (OIA). We have therefore focused on the matters that are most relevant to us.

Overall, we support the current case by case model and note that if this is to continue then this ethos needs to flow through to the measures in place to administer and enforce and it would be inconsistent to impose overly prescriptive processes for agencies.

CHAPTER TWO – SCOPE OF THE ACTS

The question of accessibility to the official information legislation is crucial in the consideration of the matters raised in this section, in terms of ensuring the scope of what agencies are covered by the legislation is clear to both the public and practitioners, and also in ensuring the appropriate agencies are covered. With this in mind, we support the suggestions made in questions one to six.

To introduce a system of categories of exempt information in terms of informal or third party information would derogate from the case by case approach, and so we would not support this.

However, we do suggest that more clarity regarding the relationship with the provisions of other enactments which concern the release of information could be achieved via an amendment to the definition of official information to expressly exclude information held by the agency subject to information release / withholding requirements of another enactment. This would have the benefit of ensuring practitioners turn their mind to whether the information in consideration is subject to overriding provisions contained in another enactment as this is currently 'hidden' in the s44 savings section.

CHAPTER THREE – DECISION MAKING

Whilst from a practitioner's perspective, it may well be 'easier' to deal with requests if there were prescriptive rules in place, overall we support the continuance of the current case by case model. No request is the same as the last and this approach allows each request to be decided based on its merits and avoids excessive rigidity.

Given that the case by case model is likely to continue, we would welcome enhanced guidance in all the ways suggested. Guidance linked to case notes is key because each set of facts can lead to a different interpretation. As well as assisting practitioners, this would hopefully increase public confidence by engendering more confidence in the consistency of decisions.

CHAPTER FOUR – PROTECTING GOOD GOVERNMENT

We agree that the "free and frank expression of opinion" withholding grounds should be redrafted to explicitly include the provision of advice.

As currently worded this section does not offer the level of protection that is intended to be conferred if applied narrowly to only cover 'opinion' rather than 'advice'.

There needs to be clarity on the application of this provision as there seems to be reluctance in applying this provision due to the public perception of an "easy out" for agencies.

In terms of the proposed wording at 4.46, we suggest that the word "similar" is omitted in (iv) for the following reasons:

- Its inclusion does not appear to add anything in terms of the clarity of meaning, rather its inclusion could lead to ambiguity i.e. is "similar" to be read generically with regard to opinions/advice, or does it relate specifically to opinions/advice on the particular matter?

- One of the pertinent questions to be asked in applying this section is whether the release of the information would inhibit that particular person from being so free and frank in the expression of opinions or advice in the future, regardless of whether it is on the same subject matter. This scenario would not appear to be covered by the proposed wording.

We note that at 7.21 the comment is made that if drafts are to be withheld then the "free and frank expression of opinion" or another good government ground should be applied. More guidance on the application of these grounds in this type of circumstance would be welcomed.

CHAPTER FIVE – PROTECTING COMMERCIAL INTERESTS

The reality of a public body and public sector environment is such that activities can be commercial in nature but not directly attributable to making a profit and there are legitimate situations where there is a business interest but motivation is not profit. We do not therefore believe that the commercial withholding ground should continue to be confined to situations where the purpose is to make a profit.

We support a statutory amendment to clarify when this withholding ground applies and suggest that a more appropriate term may be the word "business". For example the Fair Trading Act 1986 Section 2 contains the following definition:

> ***Business*** *means any undertaking—*
> *(a) That is carried on whether for gain or reward or not; or*
> *(b) In the course of which—*
> *(i) Goods or services are acquired or supplied; or*
> *(ii) Any interest in land is acquired or disposed of—*
> *whether free of charge or not:*

Guidelines and case law can still be used to assist with interpreting this definition as is standard practice with all definitions. The definition will then be the common starting point for all to determine what is covered by this section and what is not.

We agree that the trade secrets and confidentiality withholding ground should be amended for the following reasons:

- The current wording is misleading as trade secrets are only one example of Intellectual Property (IP) which can also include, for example, designs and provisional / unfiled patents. There is a continuum of interests that require differing levels of protection depending on the extent of the IP. For example, if copyright work is disclosed to the public, it is automatically protected and the owner has a far greater chance of protecting his/her work from being copied. However, if provisional patent information is realised prior to it being completed then this can alter priority dates (if the owner extends the initial priority date) and/or may affect filing priorities in various countries. We therefore suggest rewording this section to clarify that it applies to all types of IP, not just trade secrets.

- The confidentiality withholding ground should be extended to cover information generated by the agency rather than solely information supplied to it by a third party. We also note that in some cases, the information may well be subject to an obligation of confidence for reasons other than business / commercial factors. For example, the situation where a complainant requests that their identity remain confidential (this would also be covered by the privacy withholding ground).

We agree that the official information legislation should continue to apply to information in which intellectual property is held by a third party. To do otherwise would introduce an exempt category of information, which goes against the case by case model, plus would allow a form of commercial interest to have automatic precedence over the public interest. The judgment in *Wyatt* is relevant in that that there is some responsibility on the part of the provider of the information to make themselves aware of the official information obligations of the agency prior to providing the information.

We believe that the public interest factors relevant to disclosure of commercial information should be included in guidelines as we agree with the concerns expressed by the Commission.

CHAPTER SIX – PROTECTING PRIVACY

We prefer Option Three – the “seamless code” approach as this will ensure consistency between LGOIMA and the Privacy Act.

In practice, many agencies already use the privacy principle 11 as a starting point to assess whether there is a privacy interest involved, and agencies should already be familiar with the provisions of the Privacy Act. This approach simply codifies and clarifies this. Rather than being confusing, we suggest that this would actually assist agencies by having all the relevant provisions relating to the release of personal information on request to a third party contained in the same piece of legislation.

Many practitioners of the official information legislation are likely to also be Privacy Officers, so there is a real opportunity for collaborative training of this group of people between the Office of the Ombudsmen (or whichever body is given responsibility for education) and the Privacy Commissioner.. Case notes from the Privacy Commissioner can be applied in assessing the Principle 11 tests and then further guidance/case notes can be developed from the official information perspective regarding weighing up the public interest and when this overrides privacy.

The concerns about the public interest not being considered are addressed by the proposal to have a separate section requiring the public interest to be considered, and the requirement to communicate this to the requester.

With regard to the privacy interests of deceased persons and children, we do not believe there needs to be a specific section in relation to children as they are already covered. We favour the NSW approach for deceased persons and would advocate for a rule whereby people have been deceased for a certain number of years i.e. 30 years are excluded from protection under the privacy ground.

We agree that there should be rules around the public sector agencies using the official information legislation for an information sharing initiative, as is already used in s109 of the Privacy Act for data matching purposes. We would welcome further research on options or assistance in clarifying ways in which government departments can work together with the sharing of information.

Again, we support the Australian approach where information held by government is valued and managed as a national strategic asset. A framework is in place which supports the ability to confidentially share and exchange information. If such a framework was in place in this country, practical guidance for achieving the transfer of information across agency boundaries could be established, thus facilitating the collection and management of information through streamlined processing and storing. This would have the benefits of ensuring information is easily accessible, accurate and relevant, with flow on reduction of costs through collaborative working, improved decision making for policy and improved accountability and transparency.

CHAPTER SEVEN – OTHER WITHHOLDING GROUNDS

We agree that there is little to be gained by moving any grounds between the conclusive and non-conclusive withholding provisions in the official information legislation.

With regard to statutory amendments, we submit as follows:

- We do not think that an amendment is required to protect all cases of harassment, however clear guidance on the appropriateness of the use of the privacy withholding ground in the case of protecting a staff member from harassment would be appreciated.

- In recognition of the fact that New Zealand is moving from being a bi-cultural to multi cultural population, we consider some broadening of the scope of the current ground to encompass wording similar to the New Zealand Government Open Access and Licensing (NZGOAL) framework exception wording to be appropriate.

- We agree that the "soon to be publicly available" provision should not be used by agencies to intentionally delay the release of official information, and suggest that's its use will reduce over time given the decreasing 'administrative burden' in releasing information where it is held electronically and can be transmitted without the need to photocopy etc. We support the proposed amendment, but no doubt there will still be debate regarding what constitutes "a very short" timeframe – perhaps again this is something the Ombudsmen could provide guidance on (presumably it will relate the resources of the agency and the nature of the impending release).

- We agree that the interest agencies are seeking to protect in using the "maintenance of the law" ground to withhold information obtained in the course of an investigation is legitimate. We also agree however, that this ground is more properly used for where some form of criminal or civil proceeding is in contemplation. A new ground to cover the information supplied in the course of an investigation would remove the need to 'stretch' the current ground.

The introduction of a codified criminal disclosure regime under the Criminal Disclosure Act 2008 (CDA) has provided more certainty in responding to these types of requests, as the CDA clarified that the appropriate avenue for the defendant or a person acting on their behalf to seek information relevant to a prosecution is via the criminal disclosure regime rather than the official information legislation.

However, there are limitations to the assistance the CDA has provided as;

- It only governs the disclosure of information considered to be 'relevant' to the prosecution. It can therefore be the case that the same requestor has two active information requests at any given time – one for 'relevant' information governed by the disclosure regime and one for historical / peripheral information which may not be 'relevant' in terms of the of the CDA, but which they are nonetheless entitled to request. This information then needs to be assessed under the LGOIMA withholding provisions, which can impact on the judicial process in terms of timeframes.

- There is still a 'grey' area where prosecution is being considered but charges have not yet been laid. In these situations, the maintenance of the law ground will need to continue to be relied upon.

- The situation where a third party requests information relating to a current prosecution is also not covered by the CDA, and so LGOIMA provisions still apply.

Further guidance on the interaction between the two disclosure regimes would be appreciated.

CHAPTER EIGHT – THE PUBLIC INTEREST TEST

We agree that there should not be a codified list of public interest factors in the official information legislation but there needs to be guidelines on this. As noted at 8.3 and 8.12, the phrase "public interest" is widely used in legislation but no statutory definition exists. We acknowledge the Commission's comment that it is doubtful whether it is possible to frame a "simple workable" statutory definition but do feel that assistance is required help practitioners in applying the test and suggest that the most appropriate vehicle for this through enhanced guidelines, and precedent.

We also agree that the public interest test should be contained in a distinct and separate provision as this will provide clarity and highlight the requirement to consider any public interest considerations favouring release where one of the LGOIMA Section 7 withholding grounds has been found to exist.

We support in principle the introduction of a requirement for agencies to confirm they have considered the public interest when withholding information and also indicate what public. This proposal has the benefits of ensuring that agencies actually turn their mind to the public interest and give requesters a greater level of confidence that the act has been appropriately applied.

However, clear guidelines would be required to indicate the level of detail required to be communicated to requester as potentially this will further add to the administrative burden if the requirement is to communicate the withholding ground(s) considered and their application, plus the public interest factors considered and the reasoning for the assessment that they don't override the need to withhold the information.

CHAPTER NINE – REQUESTS-SOME PROBLEMS

Due particularity

We agree that the phrase "due particularity" should be redrafted in more detail to make it clearer. The proposed amendment will assist in dialogue with requesters as it is a more useful starting point for explanation of what level of detail is required from them than the current wording, which itself requires some level of interpretation and explanation.

We do not agree that agencies should be required to consult with requesters in the case of requests for large amounts of information. This should remain a matter of discretion and is adequately covered by the current requirement to consider whether consulting with the requester would be of assistance (s17B) LGOIMA. Sometimes it will be necessary, other times not. We consider that to make it a mandatory requirement would promote procedural inefficiency.

Further, there will be problems in defining what "large" means in this context. Some small requests are still time consuming due to the complexities involved and some large requests are actually straight forward and do not necessitate the need to consult with the requester.

Extensions of Time and Charging

We agree the official information legislation should clarify that the 20 working day limit for requests delayed by lack of particularity should start when the request has been accepted. This is consistent with similar provisions concerning resource consents under the RMA. To do otherwise unreasonably penalises the agency by shortening the effective response time available (through no fault of its own) and burdens the agency's resources.

We also agree that 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 official information legislation should be amended to make that clear. This aspect of responding can often constitute the bulk of the time spent actioning a request and is not a discretionary "extra". This is especially the case given the requirement to consider whether information contained in documents needs be withheld, thus necessitating examination on a "line by line" basis.

It is entirely appropriate that the actual amount of time spent responding to a request is reflected in any decision to refuse the request based on the substantial collation and research ground as well as any charging and/or extension of timeframe calculations.

The wording of the Australian Freedom of Information Act (Cth) s24 is a good model as it gives a realistic picture of what is involved for an agency in processing a request. It includes not only the time spent collating, researching, reviewing and assessing the information, but also the time spent consulting with the requester and communicating a decision to them.

We agree that "substantial" should be defined with reference to the size and resources of the agency considering the request. The key factor here is the extent to which responding to the request would interfere with the operations of that agency, which will depend on the extent of the agency's resources available at that time to deal with the request.

Vexatious Requests

We agree it should be clarified that the past conduct of a requester can be taken into account in assessing whether a request is vexatious as this will often be the only basis on which an agency can make such a judgment. We also agree that the term "vexatious" should be defined in the official information legislation to include the element of bad faith as it addresses the reasonableness of the request.

We believe 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. However, we suggest that, to the extent that the provision concerns previous refusals, it should explicitly require agencies to consider whether the circumstances surrounding the refusal have changed materially in the interim.

If the agency has already refused to provide the material, then it will depend on how long ago the refusal was given and the reasons for the refusal, and so the agency will need to exercise its discretion in each case and consider whether the circumstances which caused the request to be refused have changed in the interim. It may also be the case that the information provided in response to a previous request has been updated or superseded.

We support the proposal for provision to be made for an agency to declare a requester "vexatious and that system should operate as described in 9.37 of the Review document.

In principle, we would support amendments requiring requesters to state the purpose for which they are requesting official information and to provide their real name as it is impossible to assess whether the improper use ground applies without knowing the purpose of the request and the ability to charge and recover costs (if that discretion is exercised) is reliant on having accurate data as to the requester's identity. However, we are not convinced that this would function effectively or improve the current situation, as requesters intending to evade charges or use the information improperly are highly unlikely disclose their true name or reasons.

We strongly agree the official information legislation 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 as these are common misconceptions. However, as suggested the Act should also state "However if an oral request is not clear the agency may ask that it put in writing".

We agree that more accessible guidance should be available for requesters

CHAPTER TEN – PROCESSING REQUESTS

<u>Time limits</u>

There is already lot of pressure to complete a response within the statutory time frame. Reducing the time frame would put immense pressure on agencies and consequently we agree the 20 working day time limit should be retained for making a decision.

We 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 because this will vary from case to case depending on the volume of information required to finalise the request.

We support the retention of the status quo in that there should be no statutory requirement to acknowledge receipt of an official information request, but agree that this should be encouraged as best practice. If this were to become a mandatory requirement it would impose yet another administrative burden on agencies. For many requests, the information can be provided so readily that an acknowledgment is simply not required. Further, any acknowledgement needs to be worded in such a way that it takes into account that the timeframes might be changed if on sourcing the information it was discovered that further information was needed (ie dealing with 'due particularity'). We note that even for applications for resource consent under the RMA, no acknowledgement by the consent authority is required.

One of the key factors that needs to be considered in determining whether a request can be responded to within the statutory timeframe is the complexity of the material being sought and we therefore agree that this should be a ground for extending the response time limit.

We agree there is no need for an express power to extend the response time limit by agreement and that the maximum extension time should continue to be flexible without a specific time limit set out in statute as the agency is best placed to know what a reasonable extension of time is.

Handling urgent requests should continue to be dealt with by Ombudsmen guidelines and there is no need for further statutory provision. It is impracticable to prescribe fixed guidelines defining what is urgent and as noted, this will depend largely on the level of cooperation between the agency and requester. We do however also agree that failure to accord proper urgency to a request where the reasons have been given should be "undue delay" and subject to Ombudsman's review.

Consultation with affected third parties

We strongly agree there should not be any mandatory requirement to consult with third parties. This would impose a huge administrative burden on agencies and there would be need for a statutory definition and / or very clear guidance on of what constitutes a "significant third party interest". We are of the view that where an information provider has concerns about the potential release of the information, it is open to the parties to agree on what level of consultation will take place.

We strongly disagree that there should be a requirement to give prior notice of release where there are significant third party interests at stake for the following reasons:

- This is a solution without a problem as the existing provisions for redress through the Ombudsmen are working satisfactorily.
- As noted above, there will be difficulties in determining what constitutes a significant third party.
- Introducing this requirement risks escalating the administration of information requests to a level of bureaucracy and potential contention that is simply not warranted given the risks and issues involved. Information requests already demand considerable resources to administer.
- The proposed process will delay the response time for requester and place even further burden on agencies as the agency will not only need to make a decision on the request, but also communicate this to the third party, allow time for a response, consider that response and then reply to the requester within the same timeframe as currently applies.
- Were this proposal to be implemented, the proportion of requests where the timeframe is extended will significantly increase.

Transfer Provisions

We agree there should be provision in the legislation to allow for partial transfers. From our experience, this already happens in practice and appears to be working well.

Release of Information in Electronic Form

We agree that whether information is released in electronic form should continue to depend on the preference of the requester. It is important however that the current caveat that their preferred choice should only be mandatory if it doesn't impair efficient administration also be retained.

It can sometimes be extremely onerous for an agency to provide information that is held in hard copy electronically as this will likely involve scanning the documents which may well then be too large to send by email so file sharing needs to be used, all of which is far more time consuming than simply photocopying and posting the information.

We agree that hard copy should be recoverable if requesters select hard copy over electronic supply of the information, particularly if there is a large volume of material.

As noted at 10.72, it is implicit only in the legislation that the agency may place conditions on the re-use of the information provided. We suggest that this would be better framed by an explicit provision to avoid any uncertainty.

Charging

The question of when to charge and the quantum is one of the most troublesome areas of the official information legislation to apply and so we would welcome regulations laying down a clear charging framework for both the OIA and the LGOIMA. This will ensure a transparent public process subject to regulatory review cycles and will ensure a uniform system of rules.

The framework should include the ability the recover the full "actual and reasonable" costs of responding to the request and we believe that the 3 category approach as outlined in paragraph 10.90 seems a good approach.

Serious consideration needs to be given in the drafting of the regulations to section 36 (e) and (f) of the Resource Management Act 1991 (RMA) which allows a local authority to fix charges for *"providing information in respect of policies and plans and resource consents"*, and for the *"supply of documents"* so long as the decision making requirements of the Local Government Act 2002 are complied with. The opportunity needs be taken to clarify which charging regime takes precedence in the case of a request for official information which falls under the scope of charges made under the RMA.

CHAPTER ELEVEN – COMPLAINTS AND REMEDIES

We agree that both the OIA and LGOIMA should set out the full procedures followed by the Ombudsmen in reviewing complaints.

There should be a new ground of compliant for failure by agencies to respond appropriately to urgent requests but this would need to recognise that for a request to be treated as urgent, the reasons must be given to the agency (with onus on the agency to request reasons if not initially proffered by the requester).

We strongly 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. The introduction of such a right of complaint would inhibit the release of official information to the detriment of the openness and transparency of information.

As previously noted there is a responsibility on the part of the information provider to make themselves familiar with the official information provisions, and negotiate some form of consultation arrangement with the agency if they are concerned about the release of the information. The only exception to this may be where the information can be compelled to be provided by statute, as in this case the provider does not have the choice.

Also as previously noted, we do not believe the requirement to give third parties notice of release of information be mandatory. Consequently, we do not agree there should be grounds to complain to the Ombudsmen if sufficient notice of release is not given to third parties.

CHAPTER TWELVE – PROACTIVE DISCLOSURE

Environment Waikato is proactively looking at how it can implement the NZGOAL policy initiatives in collaboration with other Waikato Local Government organisations.

We agree that each agency should have a responsibility to publish the information currently specified in section 20 of the OIA on its website. This would reduce the amount of work required to keep the links from the Directory current and ensure that information is kept up to date. There is a shift in expectation of users about finding information on the internet and using search engines to find the information. There is also a shift in expectation from accepting that information could be up to two years old and still be acceptable, to an expectation of greater currency.

Discretion should be used as to what information is placed on a website in additional to what is legislatively required and so we do not think there should be any further mandatory categories of information subject to a proactive disclosure requirement in the OIA or LGOIMA at this stage.

However, we do agree that the OIA and LGOIMA should require agencies to take all reasonably practicable steps to proactively release official information and that such a requirement apply to all central and local agencies covered by the OI legislation. There is public interest in both local and central agencies / government business.

There should be a statutory review undertaken within a reasonable timeframe (three years as suggested seems appropriate) to assess what has already occurred and whether further changes are needed at that stage. It takes time for agencies to adapt, especially as this is requiring agencies to act in a way that is quite different for some. Whilst this may be a double-edged sword ultimately the information is disclosed to 'everyone' or at least available for everyone to access at the same time. This ensures that the public are on an 'even' platform when it comes to information being released. Furthermore, the information is still subject to the usual withholding grounds and public interest test which allows for commercial/business activities

In principle, explicit publication schemes for the information held by agencies would be useful and may provide the framework for the information to be released under in the future. However, making this mandatory would be a further drain on the agency's resources and may be too rigid and not allow agencies the flexibility required.

Again, disclosure logs are a good idea in principle but we do not believe that these should be mandatory given the extra resources required to maintain such a log, and the fact that this is still an evolving concept internationally.

The question of the application of the section 41 LGOIMA immunity is a difficult question in this context given it is only triggered when information is given to a particular requester. In this instance it should remain but to apply this to proactive disclosure requires further consideration. The key difference if that where an official information request is received, the agency is statutorily obliged to release the information whereas proactive disclosure is voluntary.

Were publication schemes, disclosure logs etc made mandatory, it would go hand in hand that the immunity should be extended to any information released under such a disclosure regime, as the element of choice would have been removed from the agency. However, if as proposed, these are only voluntary then it is recommended that these sections do not apply to proactive disclosure at this stage.

CHAPTER FOURTEEN – LOCAL GOVERNMENT OFFICIAL INFORMATION AND MEETINGS ACT 1987

We agree that where practicable and appropriate, the provisions of LGOIMA and the OIA should align. This will enhance consistency of access to information whether it is held by a central or local government agency and promote uniformity of decision making across the two sectors.

We therefore agree that the LGOIMA should be aligned with the OIA in terms of who can make requests and the purpose of the legislation and the status of information held by contractors. We believe that the question of whether the agency has 'access' to the information held by the person in their capacity as contractor is difficult to assess and unnecessary.

CHAPTER FIFTEEN – OTHER ISSUES

We agree that the official information legislation should be redrafted and re-enacted and that the OIA and the LGOIMA should remain as separate Acts

The Public Records Act 2005 does interact well with the official information legislation. For local government the combination of the PRA and LGOIMA, the Schedule in the Local Government Act 2002 that states what should be kept, along with an organisation setting up Retention and Disposal Schedule and processes for approval before deleting gives both clarity and a robust process.

In the situation mentioned of deliberate deletion of information, if an organisation has a document management system as well as the matters mentioned above, there is likely to be metadata available about the steps that were taken and who undertook them, plus who authorised deletion if it occurred through the records management process. With

these checks and balances in place it should be possible to undertake investigation and potentially make sanctions if warranted.

Signed: ______________________

Bob Laing

Position: **Chief Executive Officer**

Date:

LGC Official Information Review Submission Planning

Link to submission doc: Submission to the LGC Review of the Official Information Legislation

When entering comments, please put your name by any text entered.

Friday 5 November	**Initial comments made**
Wednesday 10 November	Draft Submission to Crystalle for EMT Agenda
Monday 15 November	Draft Submission to EMT
Tuesday 16 November	Mail out day for Policy Committee
Wk beginning 23 November	Submission to Policy and Strategy Committee

Chapter	Who
2) Scope of the Acts	
3) Decision Making	Sarah J
4) Protecting Good Government - Includes discussion of the 'free and frank expression' ground	Mark B, Sarah J
5) Protecting commercial interests - Includes discussion of Confidentiality, Copyright & IP	Mark B, Jim P, Gill L, Toni D
6) Protecting Privacy	Caroline G, Sarah J
7) Other withholding grounds - Includes discussion of "maintenance of the law ground" and "will soon be publicly available" grounds	Mark B, Caroline G
8) The Public Interest Test	Sarah J
9) Requests – Some Problems - Includes discussion of "due particularity", large requests etc	Mark B, Jim P, Sarah J
10) Processing Requests - Includes discussion of timeframes, consultation with third parties, the use to which information can be put once released and charging.	Mark B, Gill L, Sarah J
11) Complaints and Remedies	Caroline G
12) Proactive Disclosure	Gill L, Jim P, Toni D
13) Oversight and Other Functions	
14) Differences between OIA and LGOIMA	
15) Other Issues - Includes discussion of alignment with the Public Records Act 2005 (PRA)	Gill L

Other matters that may be worth commenting on:

- The extent to which new technologies enable information to be manipulated and the implications of this – Jim P
- Relationship with the Criminal Disclosure Act 2008 (CDA) – Caroline G

The Public's Right to Know – A review of the Official Information Act 1982 and Parts 1 to 6 of the Local Government Official Information and Meetings Act 1987

Summary Key Points

Chapter One, Background

Contextual change
- Political
- Technological revolution
- Public expectations
- International reviews of official information legislation

Chapter Two, Scope

Discrepancies in what agencies are covered.

Types of information covered:
- Not planning to introduce 'categories' of exempt information
- Discussion on information held by an agency that has been supplied by / generated for third parties.

Chapter Three, Decision Making

No desire to change 'case by case approach', but this can lead to uncertainly and inconsistency. Therefore propose introducing a system of precedent, to be a function of the Ombudsmen

Chapter Four, Protecting Good Government

Discussion of "free and frank expression of opinion" withholding ground – should this be extended to cover the provision of advice?

Chapter Five, Protecting Commercial Interests

No intention of withdrawing commercial information from coverage of legalisation but is discussion on:
- The definition of "commercial"
- Information held by an agency where the IP belongs to others

Chapter Six, Protecting Privacy

Acknowledge the 'awkward interface' between the official information legalisation and the Privacy Act due to the different presumptions upon which they are based.

Chapter Seven, Other Withholding Grounds

No proposed amendments to the distinction between conclusive withholding grounds and those which are overridable by the public interest.

Discussion on misuse of:
- "is or will soon be publicly available" ground – suggested amendment to clarify only applicable when information will be available within a "very short" time and its immediate release would be "administratively impractical".
- "maintenance of the law ground" – suggested inclusion of new ground where withholding is necessary to protect information supplied in the course of an investigation where

disclosure is likely to prejudice the conduct or out come of that investigation. This would be subject to the public interest test.

Possibility of a broader protection of cultural interests ground.

Chapter Eight, The Public Interest Test

Unlikely to introduce list of factors to be considered as this may be treated as exhaustive.

Suggest
- Separate section in the legislation setting out the requirement to balance public interest in the case of the overridable withholding grounds.
- Provision requiring agencies confirm to the requestor that public interest has been considered and what factors were taken into account.

Chapter Nine, Requests - Some Problems

Practicalities handing and processing requests discussed.

There needs to be balance between relieving agencies of unreasonable burden and not deterring genuine requesters. Suggestions include:
- Redefining "due particularity".
- Introducing requirement to discuss the request with the requester where practicable.
- Clarification that "substantial collation and research" includes the time taken to review information prior to release.
- Express provision that past conduct of the requester and be looked at, and potential for introduction of the concept of a "vexatious requester".
- Clarification that requests can be verbal and do not need to mention the legislation.

However, do not believe that requesters should be required to give purpose

Chapter Ten, Processing Requests

Timeframes:
- Maximum 20 working day time limit to remain but clarification that information should be released as soon as practicable following the decision to release.
- Clarification that complexity of request can be factor in extending timeframe.
- No maximum for timeframe extensions.
- Urgency of request a consideration in deciding whether a delay is unreasonable.

Consultation
- Consultation with third parties is 'highly desirable' and whilst no statutory requirement to consult is proposed, suggested that prior notice should be given of a decision to release in order to give the third party the opportunity challenge.

Suggest express provision for partial transfers

Discussion on the use to which the information can be put once released:
- Agency can release on condition that the information only be used in a certain way – currently operated by agreement between the parties.
- Reuse of information by the agency via eg creative common licences encouraged.

Charging
- Variability across agencies – more certainty needed so propose regulations.
- Balance between public duty and private benefit.

Chapter Eleven, Complaints and Remedies

Whole complaints process should be contained within the official information legislation and Ombudsmen's decisions should be determinations rather than recommendations.

Potential new grounds for compliant:
- Untimely transfers
- Failure to notify third parties of release
- Where information is released that should have been withheld

Chapter Twelve, Proactive Disclosure

Promotion of proactive release of information is a strategic priority for the Ombudsmen, plus the NZ Government Open Access and Licensing Framework (NZGOAL) was released in August 2010.

Not proposing mandatory proactive disclosure above what is already required (eg LGA), but rather that agencies take all reasonable steps to proactively make information available

Chapter Thirteen, Oversight and Other Functions

Recommend four functions, with discussion on what agency best to exercise them
- Investigation of complaints
- Provision of guidance
- Promotion and education
- Oversight

Chapter Fourteen, Local Government Official Information and Meetings Act 1987

Suggest better alignment with the OIA
- Who can request information
- Purpose to include progressive release

Chapter Fifteen, Other Issues

Recommend complete redrafting of the legislation but keeping the two acts separate

Discussion of alignment with the Public Records Act