Leigh Alderson

From: Tim Mitchell
Sent: Wednesday, December 22, 2010 9:25 AM
To: Sarah Owen; Paul W. Gregory
Subject: RE: Draft 2 of OIA Submission after discussions with Russell McV and PG's feedback

Hi Sarah,

I probably will not get a chance to review this today as I am in a meeting until 12.30 then out the door for the plane at 1.15. I was happy with the direction you were going in draft 1 so am relaxed about this.

I suggest that you sign it but make Adrian aware of what is going on and give him a chance to read it if he wants before it heads out.

Cheers,

From: Sarah Owen
Sent: Tuesday, 21 December 2010 8:49 p.m.
To: Tim Mitchell; Paul W. Gregory
Subject: Draft 2 of OIA Submission after discussions with Russell McV and PG's feedback

Hi
Second draft (COPY is attached PLUS reference).
Can we please discuss tomorrow.
Who will sign this? PG – will you send a copy to Minister's office and Chair – or just give them a note- don't know if they need to see the submission.
Cheers
Sarah

201321

Leigh Alderson

From: Paul W. Gregory
Sent: Tuesday, November 09, 2010 8:57 AM
To: Sarah Owen; Tim Mitchell
Subject: RE: Review of the Official Information Act - Submissions Close by 10 December

I think we should have a view on this. It is consistent with transparency and with not being a receiver of changes, particularly as they apply to commercial confidence.

Comments in red.

From: Sarah Owen
Sent: Monday, 8 November 2010 12:37 p.m.
To: Paul W. Gregory; Tim Mitchell
Subject: FW: Review of the Official Information Act - Submissions Close by 10 December

K
Do you have any thoughts on whether the Guardians should make a submission on the following. My 'top of mind' thoughts on the questions below are as follows in blue – on balance I think we should but focus only on the questions relevant to us. Will also check what RmcV and CTSY are doing.
Kind regards
Sarah

From: Reuben van Werkum [mailto:Reuben.vanWerkum@russellmcveagh.com]
Sent: Monday, 4 October 2010 12:30 p.m.
To: Sarah Owen; Cristina Billett
Cc: Graeme Quigley; Adele Wilson; Darryl Hong
Subject: Review of the Official Information Act

Hi Sarah/Cristina

As you may already be aware, the Law Commission (**"Commission"**) released an issues paper last week which reviews the Official Information Act 1982 (**"OIA"**) and the official information provisions of the Local Government Official Information and Meetings Act 1987 (**"LGOIMA"**). Overall the amendments drive towards increasing the availability of ir nation held by public agencies.

We draw this to your attention as the proposed changes may affect the Guardians.

The issues paper generally concludes that the underlying principles of the OIA and the LGOIMA are sound and working well. However, the Commission identified areas where the effectiveness of the legislation could be improved, including:

- Introducing a system of precedent that could be collated from all the case notes of the Ombudsmen to develop practice guidelines for decision-making under the withholding grounds; **Possibly helpful Very helpful – the Banking Ombudsman does this (and in fact includes case studies in an annual report, which is helpful and well read), but does so on an anonymous basis and that should also be the basis of OIA precedent reporting – it is the process/issues raised not the identity of the parties which is the useful piece.**

- Changes to withholding grounds:

    - the "good government" withholding grounds should be redrafted to clarify their expression; **Not so relevant to us,**

    - expanding the definition of "commercial" in the commercial withholding grounds. We note that the Commission wishes to retain the current position whereby information subject to IP rights or confidentiality agreements can be required to be released; **Probably should focus on this aspect. Agree – we could**

186023

perhaps make the point that in investment privacy and commercial confidence are often one and the same, particularly in a small market.

- refusals to release information where the information requested "is or will soon be publicly available" should be redrafted to apply only where the information is to be made publicly available within a very short time; **Possibly and if so, I think it should be within 20 working days – the same period within which the information is supposed to be supplied.**

- new withholding grounds should be introduced to protect cultural matters and to protect information supplied in the course of an investigation or inquiry where disclosure is likely to be prejudicial to the conduct or outcome; **Course of investigation or inquiry possible another avenue where that does not amount to pending litigation which would already be excluded.**

- The "public interest" test should be required to be applied in more situations, even if relying on withholding grounds; **Okay as is – not so relevant to our tests.**

- Clarifying the request sections in the Acts to improve the costs of handling and processing requests, including stronger powers against vexatious or overly large requests; **Possibly- consider further Potentially difficult – I think OK (and certainly useful) if the Ombudsman can be the arbiter, and communicate with the requester accordingly, in such instances. This has the additional merits of working in with the case notes suggestion to establish precedent for 'vexatious' and 'overly large'.**

- Introducing an obligation to give prior notice to affected third parties before a decision is made to release information; **Interesting one this- our contracts would usually require us to do this- don't think we need to have an obligation on us to do so.**

- Introducing "complexity of a request" as a ground for extending timeframes; **Agree I imagine the Ombudsman might have to take a view on what constitutes 'complexity' here. Similar to above, may have to be the arbiter so that when advising a requester that we are extending the timeframe, the communication can include some reference to having cleared it with the Ombudsman. Also consistent with precedent setting as per the 'vexatious' section above.**

- Introducing regulations that lay down clear principles for charging for the release of information; **No strong view on this- thoughts? I thought they'd recently done this. No strong view either.**

- Introducing a ground of complaint to the Ombudsmen that an agency has not kept information in accordance with the Public Records Act 2005. The Commission also suggests introducing a new ground of complaint for "improper or untimely" transfers and extending the complaints processes to third parties who have been affected by a release of information; **Compliance with PRA should be dealt with under PRA I would have thought. Need to think about this one more.**

- Removing the "veto" power by Cabinet or local authorities to reverse the Ombudsman's decision to require information to be released; **Constitutional issue – not sure we would give views No.**

- Improving proactive disclosure by introducing an "all reasonable steps" provision to make information publicly available - at the risk/liability of the agency concerned. The Commission also suggests a requirement that agencies publish on their website the types of information that they currently hold; **Would rather that we continue to be transparent rather than we HAVE to be- unnecessary to do this as operational incentives are there to be transparent to minimise time reacting to OIAs. Agree; sounds a bit like straying into SSC territory to me. I think this is something we should spend some time on in our submission.**

- Introducing and clarifying functions under the Acts (i.e. promotion and education), including the possibility of introducing an Information Commission. **Not sure.**

The full paper is available at:
http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_159_473_The%20Public's%20Right%20To%20Know%20(NZLC%20IP18,%202010).pdf

We note that submissions are due by **Friday 10 December 2010**.

If you would like more information on the issues paper, or for us to prepare a submission on your behalf, please let us know.

Kind regards
Reuben

Reuben van Werkum
GRADUATE

Russell McVeagh, Vero Centre, 48 Shortland Street, PO Box 8, Auckland 1140, New Zealand
DIRECT PHONE 64 9 367 8409 | DIRECT FAX 64 9 367 8596

reuben.van.werkum@russellmcveagh.com | **www.russellmcveagh.com**

Russell McVeagh
OFFICIAL LAW FIRM OF RUGBY WORLD CUP 2011

This email contains confidential information and may be legally privileged. If you have received it in error, you may not read, use, copy or disclose this email or its attachments. In that case, please let us know immediately by reply email and then delete this email from your system. While we use standard virus checking software, we accept no responsibility for viruses or anything similar in this email or any attachment after it leaves our information systems. If you are interested in establishing more secure communication between us, please contact our systems administrator by email at mail.admin@russellmcveagh.com

Please think of the environment before printing this email

Law Commission's The Public's Right to Know

+The Guardians and the New Zealand Superannuation Fund

1. The Guardians and the New Zealand Superannuation Fund

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

2. Commercial nature of our business

2.1 The Guardians is under a statutory duty to invest the investment funds under their management on a prudent, commercial basis and to manage and administer those funds in a manner consistent with:

- Best-practice portfolio management.
- Maximising return without undue risk.
- Avoiding prejudice to New Zealand's reputation as a responsible member of the world community.

2.2 The Guardians undertake a range of investment activities that it believes will add value over and above the returns generated by passive investments in the asset classes contained within the reference portfolio. This includes three broad areas of added-value activity.

2.3 Firstly, capturing active returns through investing in private markets and/or selecting and investing through active managers. For instance investment strategies in:

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

2.4 Secondly, strategic tilting or 'swimming against the tide. Thirdly, portfolio completion (closely managing fees and costs).

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

2.6 More information about how we invest the Fund can be found in our annual report (Copy enclosed), Statement of Intent and www.nzsuperfund.co.nz.

3. The Guardians' Approach to Transparency

3.1 We have included in our Annual Report (pages 34/35) a description of our approach to transparency. This includes a description of the material we proactively release as well as our performance in transparency surveys by third parties. The San Fransisco-based Sovereign Wealth Fund Institute publishes the Linaburg-Maudell Transparency Index and the Guardians has rated 10/10 since inception of the index. We also include reference to the survey published by the Washington-based Carnegie Endowment for World Peace where the Guardians were rated a clear first among the 26 sovereign wealth funds which were signatories to the Santiago Principles.

4. The Guardians' History of Official Information Act Requests

4.1 As a relatively young organisation we have had limited experience with the application of the Act. The most focus has been on our decisions in relation to responsible investment issues such as investment in companies involved in the nuclear weapons industries.

[Discuss what data we had had on – how many we have had/how many have gone to the Ombudsman etc.]

4.2 The area where we have had little experience to date but consider will be the most difficult for us is where we are asked for information relating to specific investments or proposed investments, investment managers or the investment activities and terms such as fees of those managers

4.3 We think that such requests are likely to increase as the Fund grows in size and becomes better known through its activities in New Zealand and offshore. Anecdotally (through conversations with peer funds and general searches), we think that freedom of information legislation is used by people who are more interested in gaining insights for commercial reasons then to scrutinize the machinery of government.

5. Response to the Law Commission's Issues Paper

5.1 We have set out the questions in the Issues in the attached appendix and outline our thoughts in respect of those questions where we consider we can provide most perspective.

6. Questions and Contacts

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

Yours faithfully

[Adrian/Tim/Sarah?]

ISSUES PAPER - QUESTIONS

2. Scope of the Acts

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

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

3. Decision-making

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

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

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

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

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

Yes. See above

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

Yes. See above. However, *[To discuss RmcV – what if the Ombudsman has got it wrong – what grounds for change?]*

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

Yes

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

Yes

4. Protecting good government

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

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

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

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

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

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

Our understanding of this provision is that the expression of opinions may be between members/employees of an organization and need not be with the Minister [*Discuss Russell McVeagh].*

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

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

We agree that the grounds should cover both 'opinions' and 'the provision of advice'. We are not clear why the proposed (v) is limited to Ministers.[Discuss lin light of point above- Russell McVeagh.]

5. Protecting commercial interests

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

For ease of reference we record the section:

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

We think that the approach taken by the Ombudsman is more restrictive than what is contemplated by the wording of the Act itself. In particular, a person who is in a "commercial position" may or may not be in the business of making a profit. In addition, in theory a person could be in a commercial position but choose not to utilise that commercial position. However, such a person would wish to preserve that position to ensure it was available for use in the future.

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

---

[1] Law Commission's Issues paper, Paragraph 4.39.

[2] Ibid Paragraph 4.29

We note that the Issues Paper does not focus on the word "unreasonably" and the meaning of that. Is it necessary to have such a high threshold in the test – particularly where there is the overriding public interest assessment?

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

We note that the Issues Paper does not focus on the word "unreasonably" and the meaning of that. Is it necessary to have such a high threshold in the test – particularly where there is the overriding public interest assessment?

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

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

Obligations of confidentiality are expressly provided for in many types of third parties with whom we engage and in a number of transactions. For instance:

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

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

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

We have not undertaken comprehensive legal research on the approach of various jurisdictions to freedom of information legislation and its application in

the context of sovereign wealth funds. However, we have identified some sovereign wealth funds that we have identified as 'peer funds' and set out below their approach to this issue.

Peer Fund	Position under Freedom of Information Laws
Future Fund	Excluded under schedule 2 of the Freedom of Information Act for Future Fund Board documents in respect of acquiring, realising or managing investment of the Future Fund Board. [Russell McVeagh to reference]
Canadian Pension Plan Investment Board	The head of the Canada Pension Plan Investment Board shall refuse to disclose a record requested under this Act that contains advice or information relating to investment that the Board has obtained in confidence from a third party if the Board has consistently treated the advice or information as confidential.[3]
OMERS Ontario Municipal Employees Retirement System	OMERS was subject to the Ontario Freedom of Information and Protection of Privacy Act from 1987 until July 1, 2010. It is no longer subject to the Act as a result of an amendment to the regulations that took effect on July 1.
OTPP Ontario Teachers Pension Plan	[Ontario Freedom of Information and Protection of Privacy Act does not apply] Check
CALPERS	California Public Records Act Check
QIC Queensland Investment Corporation	Investment activities excluded- check

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

No specific comment at this time.

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

No specific comment at this time.

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

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

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

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

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

To date we have had few requests where we have had to consider the application of these grounds, particular in the context of specific investments or investment managers. We think that such requests are likely to increase as the Fund grows in size and becomes better known through its activities in New Zealand and offshore. Anecdotally (through conversations with peer funds and general searches), we think that freedom of information legislation is used by people who are more interested in gaining insights for commercial reasons then to scrutinize the machinery of government. Should that occur and we are unable to withhold this information, we consider this will severely curtail our access to investment opportunities. However, this is yet to be tested.

[Consider improper gain or advantage section 9(2)(k).]

6. Protecting privacy

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?

No specific comment at this time.

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

(a) deceased persons?

(b) children?

No specific comment at this time.

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

No specific comment at this time.

7. Other withholding grounds

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

No specific comment at this time.

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

(a) harassment;

(b) the protection of cultural values;

(c) anything else?

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

8. The Public Interest Test

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

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

Practically, failure to undertake this assessment is likely to become apparent through Ombudsman review or subsequent information requests. Reviews and follow up requests are a significant disincentive for agency as they are time consuming and cause reputation damage.

9. Requests – Some problems

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

Yes. We think your suggested wording: "The request must be clear, and should refer as precisely as possible to the information that is required." is clearer for the requester which will assist the agency. We note also that additional help should be given, particularly to smaller agencies with fewer resources that a discussion with the requester as to what he or she is looking for is allowed and indeed desirable to save time for both the requester and the agency.

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

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

10. Processing requests

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

Yes.

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

Yes.

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

Yes.

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

No.

Q41 Do you agree it should be clarified that the past conduct of a requester can be taken

into account in assessing whether a request is vexatious?

Yes.

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

[Discuss. The inclusion of bad faith seems to be a higher threshold than vexatious. Note also that neither vexatious nor bad faith deals with misuse of the regime for commercial purpose. See however]

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?

[Yes. Discuss see page 109 of issues paper].

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

Yes. {Discuss – to difficult to police]

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

No specific comment at this time.

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

Yes.

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

Yes.

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

No specific comment at this time.

Q50 Do you agree that, as at present, there should be no statutory requirement to

acknowledge receipt of an official information request but this should be encouraged as best practice?

Yes.

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

Yes.

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

Yes.

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

Yes.

Q54 Do you agree that handling urgent requests should continue to be dealt with by Ombudsmen guidelines and there is no need for further statutory provision?

Yes.

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

Yes.

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

No.

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

No/Yes[Discuss]. Most agencies will either be required to do this under the contracts they have with third parties or will recognise that it is prudent to advise third parties of matter. Is it really necessary to legislate this requirement? In addition, the best judge of where it is important to notify third parties is the agency concerned as it is the agency which has the reputation/judicial review, legal and commercial risks if it gets it wrong).

[It is possible that third parties with significant interests may gain some comfort during dealings with us that we would have statutory obligations to notify.]

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

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

A five day working period would seem reasonable.

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

transfers?

Yes.

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

No specific comment at this time.

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

No specific comment at this time.

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

Yes. Discuss

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

It may be better that this is addressed by amending section 18(f) (*that the information requested cannot be made available without substantial collation or research).*

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

No specific comment at this time.

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

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

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

11. Complaints and Remedies

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

Yes.

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

Yes.

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

As discussed above, we consider there is real risk to us reverse freedom of information complaints. Additionally, should third parties form the view that we were unable to withhold information that they regard as commercially sensitive, this would have a significant impact on our ability to discharge our statutory investment obligations. [We do not think that an additional avenue for complaint would make a significant difference[Provide comfort??Discuss.]

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?

[See question on notice of release above- if included then makes sense to include ability to complain]

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

No specific comment at this time.

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

No specific comment at this time.

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

[Discuss Russell McVeagh– still have judicial review – what does this mean for our contracts where we must withhold unless required by law to disclose etc – better to have a determination.

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

[Perhaps- political veto/legal- status - discuss].

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

No specific comment at this time.

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

No specific comment at this time.

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

[Discuss Russell McVeagh- probably yes leave at the O level]

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

Yes.

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

No specific comment at this time.

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

[Yes]

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

[No]

Proactive Disclosure

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

Yes. We do note the sort of information does not seem particularly relevant to an organisation like ours and could be enhanced.]

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

Oversight and other functions

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

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

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

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

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

No specific comment at this time.

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

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

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

Yes.

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

If proactive release is mandated then the agency should be afforded protection for that release (and this would extend to those using the information). If the release is voluntary then the agency should not have protection from court proceedings. [Russell McVeagh discussion – does section 48 give us cross border protection in relation to disclosure in respect of say our overseas in NZ funds.]

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

Yes if NZ Inc can afford it.

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

Yes if NZ Inc can afford it.

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?

Yes if NZ Inc can afford it.

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?

Yes (could just do an OIA request for this tho)

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

Yes.

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?

Yes if NZ Inc can afford it.

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?

[Ombudsman?]

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

No specific comment at this time.

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

No specific comment at this time. No- unnecessary cost.

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

No specific comment at this time.

Local Government Official Information and Meetings Act 1987

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

No specific comment at this time.

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

[Access to information –discuss- possible to have a contractor with information you don't have access to – who is a contractor?].

Other Issues

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

No specific comment at this time.

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

No specific comment at this time.

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

The PRA has brought greater focus on the retention of all records, including emails. The sheer quantity of information that is possibly relevant to a request is huge. [Discuss- consultation with person the answer].

23 December 2010

Official Information Legislation Review
Law Commission
PO Box 2590
WELLINGTON 6140

Email:officialinfo@lawcom.govt.nz

1. The Public's Right to Know

1.1 We refer to the Law Commission's Issues Paper 19, September 2010, 'The Public's Right to Know.

1.2 We provide information about us and the key issues for us in the Issues Paper below. In addition, we have set out the questions in the Issues Paper in the attached appendix and outline our thoughts in respect of those questions where we consider we can provide most perspective.

2. The Guardians and the New Zealand Superannuation Fund

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

3. Commercial nature of our business

3.1 The Guardians is under a statutory duty to invest the investment funds under their management on a prudent, commercial basis and to manage and administer those funds in a manner consistent with:

- Best-practice portfolio management.
- Maximising return without undue risk.
- Avoiding prejudice to New Zealand's reputation as a responsible member of the world community.

3.2 The Guardians undertake a range of investment activities that it believes will add value over and above the returns generated by passive investments in the asset classes contained within the reference portfolio. This includes three broad areas of value-adding activity.

201677

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

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

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

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

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

4. Protection against certain actions potentially unavailable

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

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

5. The Guardians' Approach to Transparency

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

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

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

6. The Guardians' History of Official Information Act Requests

6.1 As a relatively young organisation we have had limited experience with the application of the Act. Requesters have tended to focus on our decisions in relation to responsible investment issues such as investment in companies involved in the nuclear weapons industries. We have also received a number of requests relating to our approach to investing in New Zealand.

6.2 We have received approximately 30 requests. We have provided the information as soon as reasonably practicable and have never exceeded the 20 working-day limit. Our decisions to withhold have been referred to the Ombudsman on several occasions and were queried by the Ombudsman on two occasions. In keeping with what we have said about being a relatively young organisation, the appeals to the Ombudsman were for older requests and, as we have become more familiar with the process, our response times have sharply declined. We believe we have a constructive relationship with the Ombudsman.

6.3 Queries where we have had least experience to date but which we consider will be the most difficult for us, are where we are asked for information relating to specific investments or proposed investments, investment managers or the investment activities and terms such as fees of those managers.

6.4 We think that such requests are likely to increase as the Fund grows in size and becomes better known through its activities in New Zealand and offshore. Anecdotally (through conversations with peer funds and general searches), we understand that freedom of information legislation can be used by people who are more interested in gaining insights for commercial reasons rather than to scrutinise the machinery of government.

7. Questions and Contacts

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

Yours faithfully

Sarah Owen
General Counsel

ISSUES PAPER - QUESTIONS

2. Scope of the Acts

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

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

3. Decision-making

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

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

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

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

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

Yes. See above.

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

Yes. See above.

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

Yes.

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

Yes.

4. Protecting good government

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

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

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

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

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

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

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

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

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

A balance must be struck.

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

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

[1] Law Commission's Issues paper, Paragraph 4.39.
[2] Ibid Paragraph 4.29

5. Protecting commercial interests

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

For ease of reference we record the section:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[3] Access to Information Act 2006, c. 9, s. 148.
[4] Ibid, c. 9, s. 148.
[5] Ibid, c. 9, s. 147.
[6] Government Code Section 6254 - California Public Records Act

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

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

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

No specific comment at this time.

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

No specific comment at this time.

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

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

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

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

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

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

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

6. Protecting privacy

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

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?

No specific comment at this time.

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

(a) deceased persons?

(b) children?

No specific comment at this time.

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

No specific comment at this time.

7. Other withholding grounds

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

No specific comment at this time.

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

(a) harassment;

(b) the protection of cultural values;

(c) anything else?

We note that the Issues Paper does not discuss the withholding ground section 9(2)(k) (information may be withheld if that is necessary to prevent the disclosure or use of official information for improper gain or improper advantage). The Law Commission states[8] that it might be said that one of the withholding grounds in the Act assumes a knowledge of purpose. For the reasons outlined in the Issues Paper under "Purpose of Request", it is likely that there is little value in requiring requesters to provide the purpose of their request and their real name. However, this does give rise to the question as to whether the ground in 9(2)(k) is of any use. Consideration could be given to reformulate the grounds so that the agency can form the reasonable view that the information could be used for improper gain or improper advantage based on the facts and circumstances existing at the time of the request.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

8. The Public Interest Test

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

No specific comment at this time.

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

No specific comment at this time.

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

[8] Ibid. section 9.4

No specific comment at this time.

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

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

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

9. Requests – Some problems

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

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

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

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

10. Processing requests

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

Yes.

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

Yes.

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

Yes.

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

No.

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

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

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

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

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

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

Yes.

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

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

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

Yes.

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

No specific comment at this time.

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

Yes.

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

Yes.

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

No specific comment at this time.

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

Yes.

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

Yes.

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

Yes.

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

Yes.

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

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

Yes.

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

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

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

No.

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

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

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

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

No specific comment at this time.

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

Yes.

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

No specific comment at this time.

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

No specific comment at this time.

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

Yes.

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

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

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

No specific comment at this time.

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

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

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

11. Complaints and Remedies

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

Yes.

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

Yes.

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

Yes. We think that this would:

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

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

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

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

No specific comment at this time.

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

No specific comment at this time.

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

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

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

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

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

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

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

No specific comment at this time.

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

No specific comment at this time.

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

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

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

Yes.

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

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

be aligned with the complaints process under Part 2?

No specific comment at this time.

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

No specific comment at this time.

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

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

Proactive Disclosure

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

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

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

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

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

Oversight and other functions

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

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

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

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

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

No specific comment at this time.

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

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

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

Yes.

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

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

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

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

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

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

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

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

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

See above at 94.

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

See above at 94.

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

See above at 94.

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

Yes.

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

Yes.

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

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

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

No specific comment at this time.

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

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

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

See above at 102.

Local Government Official Information and Meetings Act 1987

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

No specific comment at this time.

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

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

Other Issues

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

No specific comment at this time.

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

No specific comment at this time.

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

legislation? Are any statutory amendments required in your view?

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

Law Commission's The Public's Right to Know

+The Guardians and the New Zealand Superannuation Fund

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

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

2. **Commercial nature of our business**

2.1 The Guardians is under a statutory duty to invest the investment funds under their management on a prudent, commercial basis and to manage and administer those funds in a manner consistent with:

- Best-practice portfolio management.
- Maximising return without undue risk.
- Avoiding prejudice to New Zealand's reputation as a responsible member of the world community.

2.2 The Guardians undertake a range of investment activities that it believes will add value over and above the returns generated by passive investments in the asset classes contained within the reference portfolio. This includes three broad areas of ~~added-value~~ value-adding activity.

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

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

2.4 The second is~~Secondly,~~ strategic tilting or 'swimming against the tide'. The third category is

~~2.4~~ ~~Thirdly,~~ portfolio completion (closely managing fees and costs).

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

~~2.5~~

Formatted: Indent: Left: 0.45", No bullets or numbering

Formatted: Indent: Left: 0.45", No bullets or numbering

Formatted: Indent: Left: 0.45", No bullets or numbering

201270

2.6 More information about how we invest the Fund can be found in our annual report (Copy enclosed), Statement of Intent and www.nzsuperfund.co.nz.

Field Code Changed

3. Protection against certain actions potentially unavailable

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

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

~~3.~~4. The Guardians' Approach to Transparency

4.1 We have included in our Annual Report (pages 34/35) a description of our approach to transparency. *[PG's comment not included as then need to refer to public interest test etc as refers to OIA tests.]*

Formatted: Font: 8 pt, Italic

Formatted: Font: 8 pt, Italic

Formatted: Indent: Left: 0.45", No bullets or numbering

~~3.1~~4.2 ~~This includes a description of~~ The Annual Report section we have referred to also describes the broad range of the material we proactively release as well as our performance in transparency surveys by third parties. The San Fransisco-based Sovereign Wealth Fund Institute publishes the Linaburg-Maudell Transparency Index and the Guardians has rated 10/10 since inception of the index. We also include reference to the survey published by the Washington-based Carnegie Endowment for World Peace where the Guardians were rated a clear first among the 26 sovereign wealth funds which were signatories to the Santiago Principles.

~~4.~~5. The Guardians' History of Official Information Act Requests

5.1 As a relatively young organisation we have had limited experience with the application of the Act. ~~The most focus has~~ Requesters have tended to focus ~~been~~ on our decisions in relation to responsible investment issues such as investment in companies involved in the nuclear weapons industries. We have also received a number of requests relating to our approach to investing in New Zealand.

Formatted: Font: (Default) Times New Roman, 12 pt

Formatted: Indent: Left: 0.45", No bullets or numbering

We have received approximately 30 requests. We have provided the information as soon as reasonably practicable and have never exceeded the 20 working-day limit. Our decisions to withhold have been referred to the Ombudsman on several occasions and were queried by the Ombudsman on two occasions. In keeping with what we have said about being a relatively young organisation, the appeals to the Ombudsman were for older requests and, as we have become more familiar with the process, our response times have sharply declined. We believe we have a constructive relationship with the Ombudsman.

4.15.2

~~*[Discuss what data we had had on – how many we have had/how many have gone to the Ombudsman etc.]*~~

4.25.3 Queries ~~The~~ where we have had ~~area where we have had little~~ least experience to date but which we consider will be the most difficult for us, is where we are asked for information relating to specific investments or proposed investments, investment managers or the investment activities and terms such as fees of those managers

~~4.3~~ We think that such requests are likely to increase as the Fund grows in size and becomes better known through its activities in New Zealand and offshore. Anecdotally (through conversations with peer funds and general searches), we ~~think~~ understand that freedom of information legislation ~~is~~ can be used by people who are more interested in gaining insights for commercial reasons ~~then~~ than to scrutinize the machinery of government.

~~5.~~6. **Response to the Law Commission's Issues Paper**

~~5.1~~6.1 We have set out the questions in the Issues in the attached appendix and outline our thoughts in respect of those questions where we consider we can provide most perspective.

~~6.~~7. **Questions and Contacts**

~~6.1~~7.1 Please contact us should you require any elaboration on any of the responses or comments made in our letter to you.

Yours faithfully

[Adrian/Tim/Sarah?] {Tim pls discuss}

ISSUES PAPER - QUESTIONS

2. Scope of the Acts

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

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

3. Decision-making

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

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

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

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

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

Yes. See above

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

Yes. See above. ~~However, [*To discuss RmcV – what if the Ombudsman has got it wrong – what grounds for change?*~~

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

Yes

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

Yes

4. Protecting good government

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

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

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

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

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

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

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

Formatted: Font: Not Italic

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

Formatted: Font: Not Italic

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

A balance must be struck.

]

Formatted: Font: Not Italic

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

We agree that the grounds should cover both 'opinions' and 'the provision of advice'. ~~We are not clear why the proposed (v) is limited to Ministers.[Discuss lin light of point above- Russell McVeagh.]~~

5. Protecting commercial interests

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

For ease of reference we record the section:

[1] Law Commission's Issues paper, Paragraph 4.39.

[2] Ibid Paragraph 4.29

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

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

Whether a party's commercial position has been prejudiced should be addressed on a case by case basis and the nature or purpose of the organization should merely be a part of that consideration rather than a qualifying hurdle.

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

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

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

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

Whether a party's commercial position is or is likely to be prejudiced should be the intial enquiry. Once this is established one applies the public interest test to determine whether it is reasonable or appropriate to nevertheless disclose the information. ~~We note that the Issues Paper does not focus on the word "unreasonably" and the meaning of that. Is it necessary to have such a high threshold in the test – particularly where there is the overriding public interest assessment?~~

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

~~We note that the Issues Paper does not focus on the word "unreasonably" and the meaning of that. Is it necessary to have such a high threshold in the test – particularly where there is the overriding public interest assessment?~~

Formatted: Indent: Left: 0.3"

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

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

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

Obligations of confidentiality are expressly provided for in many types of third parties ~~with whom we engage~~ engagements and in a number of transactions. For instance:

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

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

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

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

Peer Fund	Position under Freedom of Information Laws
Future Fund	~~Excluded under schedule 2 of the Freedom of Information Act for Future Fund Board documents in respect of acquiring, realising or managing investment of the Future Fund Board. [Russell McVeagh to reference]~~ In Australia, the Finance Minister announced in November 2009 that the Future Fund would be listed in Schedule 2 of the Freedom of Information Act 1982 (Cth), exempting the Fund from the Act in respect of requests related to acquiring, realising or managing its investments (similar to the current exemption in Schedule 2 for the Reserve Bank in respect of its open market operations and dealings in the currency market).
Canadian Pension Plan Investment Board	The head of the Canada Pension Plan Investment Board shall refuse to disclose a record requested under ~~this Act~~the Access to Information Act 1985 that contains advice or information relating to investment that the Board has obtained in confidence from a third party if the Board has consistently ~~treated the advice or information~~ as confidential.[3]
Public Sector Pension ("PSP") Investment Board	Under the Access to Information Act 1985, the PSP Investment Board is subject to the same exemption provision as the Canadian Pension Plan Investment Board in respect of records obtained in confidence from third parties.[4] In addition, the PSP Investment Board is further exempted from disclosure of records containing trade secrets or financial, commercial, scientific or technical information that belongs to, and has consistently been treated as confidential by the PSP Investment Board.[5] Section 20 also provides a general exemption in respect third party information, but which is subjected to a "public interest test".
OMERS Ontario Municipal Employees Retirement System	OMERS was subject to the Ontario Freedom of Information and Protection of Privacy Act from 1987 until July 1, 2010. It is no longer subject to the Act as a result of an amendment to the regulations that took effect on July 1.
OTPP Ontario Teachers Pension Plan	We think that [the Ontario Freedom of Information and Protection of Privacy Act does not apply but have not managed to confirm this] ~~*[Note: Research was not conclusive whether OTPP has been exempted from the Act - was subject to a request in 1991]*~~Check
CALPERS	The California Public Records Act ~~Check~~ exempts certain records held by state agencies from disclosure under the Act, including: preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure, information received in confidence etc. State agencies however are not prohibited from disclosing such categories of information.[6]
~~QIC~~ Queensland Investment Corporation (QIC)	~~Investment activities excluded check~~Under Schedule 2 of the Right to Information Act 2009 (Qld), QIC is exempt from disclosure of information under the Act in respect of its "functions" (except as they relate to community services obligations). This will include its various investment functions
Pension Protection Fund (Note this UK fund is not considered a peer fund by us)	Under section 43 of the Freedom of Information Act 2000 (UK), information is exempt from disclosure if it constitutes a trade secret or would be likely to prejudice the commercial interests of any person (including the public authority holding it). Section 41 provides that any information is exempt if it was obtained from a third party and its disclosure would

Formatted Table

Formatted: Font: Italic

Formatted: Font: Bold, Highlight

Formatted: Font: Bold, Italic, Highlight

Formatted: Font: Bold, Highlight

Formatted: Font: Italic

Formatted: Font: (Default) Arial, 9 pt

Formatted: Font: (Default) Arial, 9 pt

Formatted: Font: (Default) Arial, 8 pt

Formatted: Font: (Default) Arial, 8 pt

Formatted: Font: (Default) Arial, 8 pt, English (U.S.)

Formatted: English (U.S.)

Formatted: Font: (Default) Arial, 8 pt

Formatted: English (U.S.)

[3] Access to Information Act 2006, c. 9, s. 148.
[4] Ibid, c. 9, s. 148.
[5] Ibid, c. 9, s. 147.
[6] Government Code Section 6254 - California Public Records Act

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

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

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

No specific comment at this time.

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

No specific comment at this time.

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

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

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

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

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

Formatted: Font: 9 pt, Not Italic, Font color: Auto, English (New Zealand)

Formatted: Font: 9 pt, Font color: Auto, English (New Zealand)

Formatted: Font: 9 pt, Font color: Auto, English (New Zealand)

Formatted: Font: (Default) Arial, 11 pt, English (U.S.)

Formatted: Indent: Left: 0.3"

Formatted: Font: (Default) Arial, 11 pt, English (U.S.)

Formatted: Font: 8 pt, English (U.K.)

Formatted: Font: 8 pt, English (U.K.)

Formatted: Font: 8 pt, English (U.K.)

Formatted: English (U.S.)

To date we have had few requests where we have had to consider the application of these grounds, particular in the context of specific investments or investment managers. We think that such requests are likely to increase as the Fund grows in size and becomes better known through its activities in New Zealand and offshore. ~~Anecdotally (through conversations with peer funds and general searches), we think that freedom of information legislation is used by people who are more interested in gaining insights for commercial reasons then to scrutinize the machinery of government.~~ Should that occur and we are unable to withhold commercially sensitive ~~this~~ information, we consider this will severely curtail our access to investment opportunities. However, this is yet to be tested.

~~[Consider improper gain or advantage section 9(2)(k).]~~

6. Protecting privacy

[To discuss with PG I think the issue of where say AO goes to dinner with a possible investee company and this in itself could give rise to speculation in the market or undermine our ability to do a deal – this would be under the commercial grounds rather than protecting privacy – if public venue this may be hard to withhold]]

Formatted: Font: 9 pt, Italic

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?

No specific comment at this time.

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

(a) deceased persons?

(b) children?

No specific comment at this time.

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

No specific comment at this time.

7. Other withholding grounds

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

No specific comment at this time.

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

(a) harassment;

(b) the protection of cultural values;

(c) anything else?

~~No specific comment at this time.~~ We note that the Issues Paper does not discuss the withholding ground section 9(2)(k) (information may be withhold if that is necessary to prevent the disclosure or use of official information for improper gain or improper advantage."). The Law Commission states[8] that it might be said that one of the withholding grounds in the Act assumes a knowledge of purpose. For the reasons outlined in the Issues Paper under "Purpose of Request" it is likely that there is little value in requiring requesters to provide the purpose and real name. However, this does give rise to the question as to whether in the ground in 9(2)(k) provides any practical grounds for withholding information. Consideration could be given to reformulate the grounds so that the agency can form the reasonable view that the information could be used for improper gain or improper advantage.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

8. The Public Interest Test

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

No specific comment at this time.

Q32 Can you suggest any statutory amendment which would clarify what "public interest"

[8] Ibid. section 9.4

Formatted: Font: (Default) Arial, 8 pt, English (U.K.)

Formatted: Font: (Default) Arial, 8 pt, English (U.K.)

Formatted: English (U.S.)

means and how it should be applied?

No specific comment at this time.

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

No specific comment at this time.

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

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

Practically, failure to undertake this assessment is likely to become apparent through Ombudsman review or subsequent information requests. ~~Reviews and follow up requests are a significant disincentive for agency as they are time consuming and cause reputation damage.~~

9. Requests – Some problems

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

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

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

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

10. Processing requests

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

Yes.

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

Yes.

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

Yes.

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

No.

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

~~Yes.~~ No. Formerly vexatious persons should have the right for each case to be considered on its merits. As a practical matter a request from a formerly vexatious requester will put agencies on alert to the need to examine the request critically.

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

~~[Discuss.~~ The inclusion of bad faith seems to be a higher threshold than vexatious. "Bad faith" imports elements of dishonesty and fraud whereas "vexatious" is more closely related in meaning to annoyance, harassment or abuse of the request process i.e through continuity of requests.
Note also that neither vexatious nor bad faith deals with misuse of the regime for commercial purpose. See however improper gain or advantage under 9(2)(k). ~~]~~

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

Yes.

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

~~[Yes. Discuss see page 109 of issues paper].~~ No. The cost of such a system is likely to outweigh the cost of assessing individual requests from such a person.

~~[Note: The Australian Freedom of Information Act 1982 contains substantial provisions on vexatious applicants. In particular the Information Commissioner may make a vexatious applicant declaration in relation to a person where satisfied that the person has repeatedly engaged in access actions which involve an abuse of process, a particular access action in which the person engages would be manifestly unreasonable. "Abuse of process for an access action" includes: harassing or intimidating individuals or employees of an agency, unreasonably interfering with the operations of an agency, or seeking to use the Act for the purpose of circumventing restrictions on access to a document imposed by a court. An Information Commissioner cannot declare a person vexatious without giving the person an opportunity to make a submission. Such a declaration is subject to review through a Tribunal.]~~

Formatted: Font: Bold, Italic, Highlight

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

Yes. ~~[Discuss – to difficult to police]~~

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

No specific comment at this time.

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

Yes.

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

Yes.

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

No specific comment at this time.

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

Yes.

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

Yes.

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

limit by agreement?

Yes.

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

Yes.

Q54 Do you agree that handling urgent requests should continue to be dealt with by Ombudsmen guidelines and there is no need for further statutory provision?

Yes.

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

Yes. In particular a minimum time for notification from one agency to another in order to facilitate data gathering and assessment.

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

No.

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

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

~~As a result of experiences with off-shore fund investments the Guardians has developed the following standard clause for negotiation:~~

~~*"The Investor (Guardians or its subsidiary) agrees to:*~~

~~*(a) Use its reasonable best efforts to prevent the disclosure of any information, other than information that solely relates to fund level, aggregate performance information (i.e. aggregate cash flows, overall "IRRS", the name of or other identifying information regarding the Partnership including the year of formation of the Partnership, and the Investor's [Capital Commitment] and [Remaining Commitment]), provided by the Partnership or the General Partner that is marked as confidential; and*~~

~~*(b) if, notwithstanding such efforts, it nevertheless is required to disclose such information, it will, to the extent practicable, notify the General Partner prior to such disclosure. [The General Partner, on behalf of the partnership, accordingly agrees that notwithstanding the provisions contained in clause [] of the Partnership Agreement, neither the Partnership or the General Partner shall make any claim against the investor or its [Representatives], if, despite compliance with this paragraph, the Investor, or its [Representatives], makes available to the public any report, notice or other information the Investor receives from the Partnership or the General Partner which is required (after*~~

Formatted: Font: 10 pt, English (U.K.)
Formatted: Font: 10 pt, Italic, English (U.K.)
Formatted: Font: (Default) Arial, Italic
Formatted: Quote
Formatted: Font: (Default) Arial, Italic
Formatted: Font: 10 pt, Italic, English (U.K.)
Formatted: Font: (Default) Arial, Italic
Formatted: Font: 10 pt, Italic, English( )
Formatted: Font: (Default) Arial, Italic
Formatted: Font: Bold, Italic, English (U.K.)
Formatted: Font: (Default) Arial, Italic
Formatted: Font: Bold, Italic, English (U.K.)
Formatted: Font: (Default) Arial, Italic
Formatted: Font: Bold, Italic, English (U.K.)
Formatted: Font: (Default) Arial, Italic
Formatted: Font: Bold, Italic, English (U.K.)
Formatted: Font: (Default) Arial, Italic
Formatted: Font: Italic, English (U.K.)
Formatted: Font: (Default) Arial, Italic
Formatted: Font: Bold, Italic, English (U.K.)
Formatted: Font: (Default) Arial, Italic

~~*taking into account available exemptions) to be made public pursuant to the [OIA or PRA]....."*~~

Formatted: Font: (Default) Arial

Formatted: Font: (Default) Arial

~~Our experience is that the more comfort that can be provided in terms of the ability of the general partner to challenge disclosure the less negotiation is required.~~

~~[~~

~~It would be beneficial to the Guardians ability to compete for placement in off-shore funds to be able to rely on a statutory right for general partners to be notified of any intended release of fund information. Is possible that third parties with significant interests may gain some comfort during dealings with us that we would have statutory obligations to notify.]~~

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

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

~~A five~~ ten ~~day working period would seem reasonable.~~ No specific comment at this time.

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

Yes.

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

No specific comment at this time.

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

No specific comment at this time.

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

Yes. [Discuss. Paul G]

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

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

Formatted: Font: 11 pt, Not Italic, Font color: Auto, English (U.S.)

Formatted: Font: 11 pt, Not Italic, Font color: Auto, English (U.S.)

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

No specific comment at this time.

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

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

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

11. Complaints and Remedies

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

Yes.

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

Yes.

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

~~As discussed above, we consider there is real risk to us reverse freedom of information complaints.~~
Yes. We think that this would:

- add a whole new level of complexity and costs to the regime.
- have the affect of making agencies more cautious about releasing information;

Formatted: Bulleted + Level: 1 + Aligned at: 0.75" + Indent at: 1"

- do little to 'rectify' the situation as it occurs once the information is made available

Formatted: Indent: Left: 1"

~~Yes. It is preferable that third parties be notified if release and given the opportunity to challenge that release i.e. demonstrate their case for withholding prior to the release of that information. As discussed above we think that this requirement would enhance~~ Additionally, ~~should third parties form the view that we were unable to withhold information that they regard as commercially sensitive, this would have a significant impact on our ability to discharge our statutory investment obligations. [~~

~~However, Wwe do not think that an additional avenue for complaint would make a significant difference. There is little point in seeking retribution once information has been made available. [Provide comfort??Discuss.]~~

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?

~~[See question on notice of release above- if included then makes sense to include ability to complain]~~If notice requirement are introduced then it makes sense to introduce complaint mechanisms.

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

No specific comment at this time.

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

No specific comment at this time.

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

Yes provided that decisions of the Ombudsman remain subject to judicial review where the Ombudsman makes a procedural error, including in circumstances where "the Ombudsman is plainly and demonstrably wrong" *(Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council (1991))*.

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

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

~~[Discuss Russell McVeagh – still have judicial review – what does this mean for our contracts where we must withhold unless required by law to disclose etc – better to have a determination.~~

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

~~[Perhaps- political veto/legal- status – discuss].~~ Yes. To preserve the separation of powers, the Executive should not be left to determine the extent of its own disclosure of official information.

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

No specific comment at this time.

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

No specific comment at this time.

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

~~[Discuss Russell McVeagh- probably yes leave at the O level~~Yes, having a statutory right of appeal will increase uncertainty (as it is more difficult to determine the point at which disclosure is required by law) and compliance costs. ~~]~~

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

Yes.

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

No specific comment at this time.

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

[Yes] No specific comment at this time.

Formatted: Font: (Default) Arial, 11 pt, English (U.S.)

Formatted: Font: (Default) Arial, 11 pt, English (U.S.)

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

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

Formatted: Font: (Default) Arial, 11 pt, English (U.S.)

Formatted: Font: (Default) Arial, 11 pt, English (U.S.)

Proactive Disclosure

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

~~Yes. We do note the sort of information does not seem particularly relevant to an organisation like ours and could be enhanced.~~]No.

Formatted: Font: 11 pt

Information required to be provided by an agency should be considered upon the establishment of the agency and specified in its establishing legislation, as it is for the Guardians.

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

Formatted: Font: 11 pt

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

Formatted: Font: 11 pt

Formatted: Font: 11 pt

Formatted: Font: 11 pt

Formatted: Font: 11 pt

Oversight and other functions

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

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

Formatted: Font: 11 pt

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

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

Formatted: Font: 11 pt

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

No specific comment at this time.

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

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

Formatted: Font: 11 pt

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

Yes.

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

If proactive release is mandated then the agency should be afforded protection for that release (and this would extend to those using the information). If the release is voluntary then the agency should not have protection from court proceedings. ~~[Russell McVeagh discussion – does section 48 give us cross border protection in relation to disclosure in respect of say our overseas in NZ funds.]~~

Formatted: Font: 11 pt

~~We note that for agencies such as the Guardians who are engaging in off-shore investments on a regular basis in accordance with agreements that are subject to foreign laws, any bar on proceedings in the Act will not necessarily effectively protect the Guardians from suit because a New Zealand statute cannot directly speak to the Courts of another jurisdiction. That is, a New Zealand statute cannot direct a foreign court to excuse a breach of that country's own laws. Whilst defences under private international law may be available in certain cases, this highlights the need for the commercial prejudice and subject to confidence grounds to be adequately robust and flexible enough to protect agencies like the Guardians where they are unable to negotiate contractual positions that cover the risk of disclosure under the Act.~~

Formatted: Font: 11 pt

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

Yes ~~if NZ Inc can afford it~~ provided that this is streamlined and provided efficiently i.e. online.

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

Yes ~~if NZ Inc can afford it~~. This is central to the effective operation of the Act and the fulfilment of its purpose.

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

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

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

~~Yes (could just do an OIA request for this tho)~~See above at 94.

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

~~Yes.~~See above at 94.

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

~~Yes if NZ Inc can afford it.~~See above at 94.

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

Yes.

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

Yes.

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

~~[~~Ombudsman would seem best placed to carry out this function.~~?]~~

Formatted: Font: (Default) Arial

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

No specific comment at this time.

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

~~No specific comment at this time.~~ No. See above at 94. If anything the Ombudsman should be provided with more resource. ~~- unnecessary cost.~~

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

~~No specific comment at this time.~~See above at 102.

Local Government Official Information and Meetings Act 1987

Q104 Do you agree that the LGOIMA should be aligned with OIA in terms of who can

make requests and the purpose of the legislation?

No specific comment at this time.

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

[Access to information –discuss- possible to have a contractor with information you don't have access to – who is a contractor? It is difficult to justify any difference between these Acts. The Guardians prefer the LGOIMA formulation for the fact that it acknowledges the practical fact that if an agency does not hold of have access to information it cannot provide it to others.

[Note: Under section 2(5) of the OIA information held by "independent contractors" engaged by that organisation is deemed to be held by that organisation. Under section 2(6) of the LGOIMA, information held by a person that has entered into a contract (other than an employment contract) with the local authority, which the local authority can access, will be deemed to be held by that local authority.]]

Formatted: Font: 11 pt

Formatted: Don't add space between paragraphs of the same style

Formatted: Font: Bold, Italic, Highlight

Formatted: Font: 11 pt, Bold, Italic, Highlight

Formatted: Font: (Default) Arial, 11 pt, Bold, Italic, Highlight

Formatted: Font: 11 pt, Bold, Italic, Highlight

Formatted: Font: (Default) Arial, 11 pt, Bold, Italic, Highlight

Formatted: Font: 11 pt, Bold, Italic, Highlight

Formatted: Font: (Default) Arial, 11 pt, Bold, Italic, Highlight

Formatted: Font: 11 pt, Bold, Italic, Highlight

Formatted: Font: (Default) Arial, 11 pt, Bold, Italic, Highlight

Formatted: Font: 11 pt, Bold, Italic, Highlight

Formatted: Font: (Default) Arial, 11 pt, Bold, Italic, Highlight

Formatted: Font: (Default) Arial, 11 pt

Formatted: Font: 11 pt

Other Issues

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

No specific comment at this time.

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

No specific comment at this time.

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

The PRA has brought greater focus on the retention of all records, including emails. The sheer quantity of information that is possibly relevant to a request is huge. No. We see the Acts as being complementary. The PRA defines the scope of information that must be held by agencies in accordance with normal, prudent business practice and the OIA provides for public access to information held by an agency.

[Discuss- consultation with person the answer].

Formatted: Font: 11 pt

Formatted: Font: 11 pt

Formatted: Font: 11 pt

LAW COMMISSION REVIEW OF THE OFFICIAL INFORMATION ACT 1982

1. In September 2010, the Law Commission released an issues paper titled "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" ("**OIA Paper**").

2. The OIA Paper reviews the operation of the Official Information Act 1982 ("**OIA**") and the Local Government Official Information and Meetings Act 1987 ("**LGOIMA**"). Overall, the Law Commission considers that the principles of the legislation are sound and they are generally working well.

3. However, some requesters feel that agencies do not take sufficient note of the public interest when declining requests for information, and too readily resorted to the protection of "commercial interests" as a ground for withholding information. There are also concerns that agencies have tended to overuse the "free and frank" withholding ground and that some withholding grounds can be difficult to understand or apply.

4. The Law Commission's key recommendation is for the establishment of a firmer system of precedent and guidance - whereby the casenotes of the Ombudsmen will be compiled, analysed, and arranged by patterns of decision. Commentary (and examples) on each case should be provided, drawing on patterns, principles and reasoning.

5. The Law Commission also suggests requiring agencies to notify third parties affected by requests or to whom the information requested belongs to. However, the Law Commission does not believe that this should amount to a duty to consult.

6. Compliance with the OIA can involve considerable resources. The Law Commission received feedback from some government departments that they were sometimes overwhelmed by the sheer volume and scope of requests.

7. One solution to this problem is the proactive approach developed in the UK and Australia, where agencies have voluntarily and routinely released information, rather than waiting for it to be asked for under their respective official information legislation. The Law Commission recommends the adoption of a similar scheme under the OIA and LGOIMA.

8. The Law Commission asks whether the principles of open government that are enshrined in the OIA need to be more actively promoted - whether it is time to charge a body with the role of a watch-dog or responsible for championing open government.

9. The Law Commission has invited submissions or comments to be sent to the Law Commission by **10 December 2010**.

Background

10. The operating environment of official information legislation is very different from the time of their enactment over 20 years ago. First, the legislative and constitutional landscape has changed significantly. Privatisation and corporatisation since the 1980s have seen some organisations leave the public sector, while others have remained within the state sector but have radically changed their form and mandates. New types of entities have been created: state-owned enterprises ("**SOEs**"), district health boards ("**DHBs**") and Crown research institutes ("**CRIs**"). The State Sector Act 1988 and the Local Government Act 2002 have created more autonomous government departments and more clearly delineated separate responsibilities of ministers and heads of government. The adoption of the MMP electoral system has had significant implications.

11. Second, the technological context for official information legislation has changed. At the time the OIA was enacted, official information was mainly in the form of hard-copy documents. Since then, digitalisation and the information revolution have radically changed the nature and use of official information. Official information can now take new forms, including email, tweets, text messages, blogs, and digital video. This has vastly

increased the volume of official information that can be produced, collated, and stored. Technological change has also driven social and cultural change. There is now a much greater expectation of openness and availability of information than the past.

12. There has also been change in the international environment. Notably the UK and Australia have recently reviewed their official information legislation, and there is a clear trend towards more proactive release, and the creation of information commissions (independent authorities that are set up to uphold information rights in the public interest and to promote openness by public agencies).

Scope of the legislation

13. Currently, to find out which agencies are subject to the OIA, one needs to peruse three schedules of two Acts (the OIA and the Ombudsman Act). The Law Commission recommends that all agencies subject to the OIA and the LGOIMA should be clearly and explicitly listed under one schedule in each of those Acts.

14. Further, the lists in the schedules are not entirely logical and contain discrepancies. For example, while all crown entities are subject to the OIA, not all of them are listed by name in the statues. The Law Commission believes that the schedules of both the OIA and the LGOIMA need to be reviewed carefully to eliminate anomalies and bring within coverage organisations that should be included (according to an agency's relationship to the central government).**[Support]** Fine

15. In particular, the Law Commission feels that while there are good reasons for SOEs to be exempt, the fact that they are owned by the public, they have an obligation to exhibit a sense of social responsibility, and are overseen by the government mean they should remain subject to the OIA, which is consistent with previous reviews. The Law Commission comments that the commercial grounds for withholding information are sufficient to protect SOEs (and CCOs) provided that they are applied correctly.**[N/A]** **Unlikely that this wil change but if it does then CFIs (at least the investment part of them) should be treated the same as SOEs?**

Decision-making

16. The method of decision-making under the withholding grounds is currently through the "case-by-case" system. The "case-by-case" system has numerous issues: the lack of firm rules means this process takes time and it is less efficient in terms of resources; there can be more room for what some see as "game-playing" by agencies; and there is greater uncertainty, inconsistency, and the risk that an agency might reach an inconsistent decision. Nevertheless, the Law Commission feels that the case-by-case system should be retained, and considers that amending the OIA through codification of rules or regulations could reduce flexibility, and freeze the present practice in time. **[Support]** Fine

Formatted: Font: Bold

17. The Law Commission believes that for the case-by-case system to work better, firmer precedent and guidance should be adopted. Currently, the Ombudsman's case notes specify that they do not create any legal precedent for the view the Ombudsman may take on any matter in the future. The Law Commission proposes a system of precedent using the casenotes of the Ombudsmen, and for them to be compiled, analysed, and arranged by patterns of decision. Commentary on each case will be provided, drawing not only patterns but also principles and reasoning. It will also provide examples derived from the case notes. The Law Commission believes that this system will provide better guidance but at the same time avoid setting rigid rules.**[Support]** Fine

Formatted: Font: Bold

Protecting good government

18. The Law Commission finds that the "maintenance of constitutional conventions" (s9(2)(f) and "free and frank expression of opinion" (s9(2)(g)(i)) withholding grounds are poorly

understood and difficult for officials to apply. There is a perception that they are overused (particularly the "free and frank" ground).

19. The term "constitutional convention" is problematic. It is difficult to understand what it actually means. Some commentators have described the list of so-called conventions as "conceptually incoherent".

20. In terms of the "free and frank" ground, the essence of the provision is to thwart the chilling effect that openness can have on the expression of blunt or unfettered opinions communicated between ministers and officials. The Law Commission recommends that both "opinions" as well as "advice" should be covered, because they have been used interchangeably. The Law Commission also welcomes submissions on whether bodies outside of core government, eg the SOEs, CRIs and tertiary education, should be able to use this ground to withholding information. **[Discuss applicability to Guardians]**

Formatted: Highlight

21. One suggestion is to combine the two grounds (but not change the substance of the two grounds) by conveying all the nuances of the required protection. The Law Commission invites comments on these suggestions.

Protecting commercial interests

22. The Law Commission also examined the commercial withholding grounds: "disclosure of trade secret" (s9(2)(b)(i)), "prejudice commercial position" (s9(2)(b)(ii)), "protect information subject to an obligation of confidence" (s9(2)(ba)), "prejudice or disadvantage commercial activities" (s9(2)(i)), and "prejudice or disadvantage negotiations" (s9(2)(j)). Agencies sometimes find them difficult to apply, while requesters feel that these grounds are overused. Very often, Crown Entities, SOEs, Councils or CCOs may not wish detailed commercial arrangements or negotiations with other organisations to be made public (as this might prejudice future dealings with the same or other parties, or that it might give an advantage to their competitors in the private sector). **[Provide examples e.g. international funds]**

Formatted: Highlight

23. In terms of third party information held by agencies, the Law Commission supports the practice of consulting with third parties who might be affected before disclosure is made. While not making consultation mandatory, the Law Commission recommends imposing a requirement that third parties be notified in appropriate time before the information is disclosed. Failure to notify should be a ground for complaint to the Ombudsmen.**[Support]** **Why – we do this any usually commercial contracts require it – no need for law?**

24. An issue raised was whether the definition of "commercial" as "for the purpose of making a profit" is too narrow. A number of responses pointed out that this test makes it difficult for non-commercial organisations with significant economic interests to apply the commercial grounds for withholding, or that activities may not have benefits that can always be measured in monetary terms but are nonetheless commercial in nature (eg funding events to stimulate the wider community). The Law Commission has not reached a view on this question and welcomes further views.**[Discuss. Guardians' activities are for profit so perhaps not a key issue]** **Have had example where Ombudsman has said we were not a commercial enterprise but changed their mind.**

25. The Law Commission feels that there should be no exemption for intellectual property, copyright, trademarks, or confidential information, because there can clearly be circumstances where the public interest might require disclosure (for example where the subject matter involved an unjustified expenditure of public money). However, in such cases the public interest in disclosure must be very strong or exceptional. Further, agencies can release information on the condition that it is only to be used in a certain way. The Law Commission believes the solution lies with firmer precedent and guidance.**[Discuss]** **[Discuss re overseas experience – probably unlikely to be accepted]**

Other withholding grounds

Protecting Privacy

26. The Law Commission notes that Steven Price's research shows that the application of the privacy withholding ground has been "extremely inconsistent, and in some cases, alarmingly sloppy". There is a case for the Privacy Act 1993 and the OIA to be more closely aligned. The Law Commission has put forward three options: firmer guidance (the Law Commission's preferred option), minor amendment to prevent unreasonable disclosure, or disclosure based on principle 11 of the Privacy Act. However, the Law Commission warns that OIA requests should not provide a "back-door" to information sharing amongst central government agencies.**[N/A]**

Information soon to be publicly available

27. Of note is the Law Commission's opinion that the administrative ground for withholding under s18 (ie "the information requested is or will soon be publicly available") allows too much scope for manipulation. The term "publicly available" is not always clear in its application. The Law Commission recommends rewording the section to read "that the information is to be made publicly and readily available within a very short time, and its immediate disclosure is unnecessary or administratively impractical".**[N/A]**

Maintenance of law

28. The Law Commission draws attention to the "maintenance of law" conclusive ground in s6(c). Currently, it has been used by agencies beyond the confines of criminal proceedings to cover court processes such as "prejudice to a fair trial". Also, it has been used by a number of agencies much more widely to prevent prejudice to an inquiry or investigation. The IRD for instance, uses it in relation to information acquired in the course of an audit. The Law Commission has serious doubts whether the "maintenance of law" ground is appropriate in such cases. Rather than resorting to the "maintenance of law", the Law Commission believes that there is a case for an explicit new withholding ground to cover material provided in the course of inquiries and investigations. This new ground should not be conclusive, but should allow disclosure if factors of public interest outweigh the desirability of withholding in a particular case.**[N/A]**

New withholding grounds?

29. The Law Commission welcomes submissions as to whether there should be new grounds to cover harassment, protection of cultural values or other grounds.**[Discuss]** Probably no need for further.

The public interest test

30. The Law Commission notes that in deciding whether to withhold information, an agency must under a two-stage approach: is the information such that a withholding ground is made out?, and if so, is it overridden by the public interest in making that information available? The Law Commission notes that currently, the public interest test is applied only in a token fashion, or sometimes ignored. At this stage, the Law Commission recommends rewording the words of s9(1) to make the need for the public interest consideration to be more prominent. Further, it suggests amending s9 to require an agency to expressly state that it has considered the public interest.**[Neutral]. No need for particular statement?**

Requests - some problems ***[Discuss whether Guardians has experienced many requests/wishes to submit]***

31. There are issues relating to the practicalities of handling and processing requests. Most agencies have complained about voluminous requests and vexatious requesters:

(a) Due particularity - The Act requires that requests be made with "due particularity". The Commission recommends redefining that term in plain English to require that request should be made as precisely as possible.

(b) Duty to consult - The Act requires the agency to assist with narrowing down large or broad requests. The Law Commission suggest that a requirement of discussion with the requester where practicable should be included in the Acts. Why?

(c) Substantial collation and research - There is currently power to refuse a request if it involves "substantial collation or research". The Law Commission recommends that review and assessment of the information should be acknowledged in the Acts, as well as making clear that the word "substantial" is relative to the size and resources of the agency involved.

(d) Frivolous or vexatious requests/requesters - The Act allows refusal of a request that is "frivolous or vexatious". The Law Commission recommends that this be defined in modern plain language. It also suggests that past conduct of the requester should be able to be taken into account.

(e) Purpose of request - The Law Commission received suggestions that requesters should state the purpose of the request. This could be useful for determining whether a request is vexatious, whether release would be in the public interest, whether charging would be appropriate, and in helping to refine an overbroad request. However, the Law Commission feels that this is unlikely to be effective and difficult to reconcile with the purpose of the legislation.

Processing requests *[Discuss Guardians' experience]*

32. There are issues relating to the process of how requests are received, including:

(a) Time limits - On receiving a request, an agency is obliged to make a decision as soon as reasonably practicable, with a maximum time limit of 20 working days. The Law Commission received submissions from both the media and government agencies, and believes, on balance, that the 20 working days maximum time limit be retained. Further, there is ambiguity between "decision" and "release". The Law Commission recommends requiring release as soon as possible after decision.

(b) Acknowledgment of receipt - The time limit of 20 working days runs from "the day on which the request is received". However, requesters are often unsure when the time limit is triggered and therefore when they may expect a decision. The Law Commission recommends that there should be a requirement for agencies to acknowledge receipt of requests, with a failure to acknowledge receipt being grounds for a complaint to the Ombudsmen.

(c) Urgent requests - the Law Commission believes that there is no need to change the present law because undue delay in responding is treated in the same way as a refusal and is therefore a ground of complaint.

(d) Release of information - The Act states that the information requested should be released in the form of the requester's preference unless it would "impair efficient administration". Metadata (information about the documents' content, author, publication date and physical location), backup systems, and information inaccessible without specialist expertise are also discussed. The Law Commission is interested in receiving views on this.

(e) Re-use - Release under the OIA to the requester does not automatically mean that he or she can publish it to the world, for example it might be in breach of

confidence or breach of copyright. An agency can release material which it might otherwise have withheld on condition that it is used only in a certain way. Effectively, it operates by way of agreement. The Law Commission does not think there is anything wrong with this practice and therefore the Act does not need to explicitly provide for it.**[Support]**

(f) Charging - there is inconsistency across difficult agencies relating to charging for large requests. The Law Commission recommends a uniform charging practice, with guidelines or regulations laying down clear and uniform rules.**[Support cost recovery as antidote to vexatious claims]** Fine as long as can not charge if don't want to.

Complaints and Remedies *[Neutral]*

33. The current complaint system operated by the Ombudsmen is laid out in both the Ombudsmen Act as well as the OIA. The Law Commission suggests that the whole process should be contained in the OIA or LGOIMA even if that involves replicating the aspects currently in the Ombudsmen Act.

34. The Law Commission was of the view that there should be new grounds for complaint, for example, improper or untimely transfers, failure to promptly deal with urgent requests, or failure to give notice to third parties before releasing their information.

35. Currently, agencies are under a "public duty" to observe the recommendation of the Ombudsmen, unless in the case of the OIA the recommendation is reversed by Order in Council (effectively by the Cabinet), and in the case of the LGOIMA by the local authority itself in a meeting. Such veto powers have rarely been exercised. The Law Commission recommends abolishing the veto, so that judicial review will be the only means of challenging the Ombudsmen's decision. Further, the Ombudsmen's finding should be called a "decision" or "determination", rather than a "recommendation".

Proactive disclosure

36. The UK and Australian governments (amongst other governments) have passed legislation requiring agencies to adopt and maintain a scheme for the publication of information by that authority.

37. The domestic trend has also been towards proactive disclosure. Section 20 of OIA provides that the Ministry of Justice shall regularly release a publication setting out its structure, functions etc. Various other Acts, such as the Public Finance Act 1989, Crown Entities Act 2004, and the State-Owned Enterprises Act 1986 contain requirements to report publicly and the types of information that must be published in annual reports. More and more policy frameworks, such as the *Policy Framework for Government-held Information* released in 1997 and *The Digital Strategy 2.0*, promote proactive publication. It is also standard practice for departments to place discussion documents, submissions, and important policy documents on their websites.

38. The Law Commission recommends requiring agencies to take all reasonable steps to proactively make information publicly available. Agencies subject to the OIA cover a wide range, so in the early stage the Law Commission believes the requirement should be confined to Departments, Crown Entities, and the local authorities in Part 1 of the First Schedule of the LGOIMA.**[To discuss. Likely to be costly. Perhaps support maintenance of status quo]** Don't make this requirement- in agency's interest anyway.

Other issues

Oversight and other functions

39. Currently, the complaints investigation function under the OIA and the LGOIMA is vested in the Ombudsmen. However, the Law Commission suggests that the OIA should specifically require four functions to be carried out: investigation of complaints; provision of guidance; promotion and education; and oversight. It believes that the office of the Ombudsmen should be expanded to cover provision of guidance, as well as promotion and education. It recommends that an independent Information Commission be established to perform the oversight function, i.e. to monitor, report and periodically review the operation of the legislation, and to promote the proactive release of information by agencies.**[Neutral]**

Other miscellaneous issues

40. The Law Commission examines other issues such as the redrafting of the withholding grounds for various reasons, to include clearer wording, as well as better logical order.

41. The Law Commission also examines the relationship between the OIA and the Public Records Act 2005 ("PRA"), forming the view that the two Acts interact appropriately. The Commission considers that the definitions of "record" under the PRA and "information" under the OIA are sufficiently wide to ensure that requesters of information will not be thwarted by the disposal of information that is not caught by the PRA. For now, the Law Commission does not believe that either piece of legislation needs to be amended to fit with the other. **[Support. Any expansion of categories of information that must be retained under the PRA will lead to additional record-keeping and OIA request costs for Guardians]**

Russell McVeagh
16 November 2010

LAW COMMISSION REVIEW OF THE OFFICIAL INFORMATION ACT 1982

1. In September 2010, the Law Commission released an issues paper titled "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" ("**OIA Paper**").

2. The OIA Paper reviews the operation of the Official Information Act 1982 ("**OIA**") and the Local Government Official Information and Meetings Act 1987 ("**LGOIMA**"). Overall, the Law Commission considers that the principles of the legislation are sound and they are generally working well.

3. However, some requesters feel that agencies do not take sufficient note of the public interest when declining requests for information, and too readily resorted to the protection of "commercial interests" as a ground for withholding information. There are also concerns that agencies have tended to overuse the "free and frank" withholding ground and that some withholding grounds can be difficult to understand or apply.

4. The Law Commission's key recommendation is for the establishment of a firmer system of precedent and guidance - whereby the casenotes of the Ombudsmen will be compiled, analysed, and arranged by patterns of decision. Commentary (and examples) on each case should be provided, drawing on patterns, principles and reasoning.

5. The Law Commission also suggests requiring agencies to notify third parties affected by requests or to whom the information requested belongs to. However, the Law Commission does not believe that this should amount to a duty to consult.

6. Compliance with the OIA can involve considerable resources. The Law Commission received feedback from some government departments that they were sometimes overwhelmed by the sheer volume and scope of requests.

7. One solution to this problem is the proactive approach developed in the UK and Australia, where agencies have voluntarily and routinely released information, rather than waiting for it to be asked for under their respective official information legislation. The Law Commission recommends the adoption of a similar scheme under the OIA and LGOIMA.

8. The Law Commission asks whether the principles of open government that are enshrined in the OIA need to be more actively promoted - whether it is time to charge a body with the role of a watch-dog or responsible for championing open government.

9. The Law Commission has invited submissions or comments to be sent to the Law Commission by **10 December 2010**.

Background

10. The operating environment of official information legislation is very different from the time of their enactment over 20 years ago. First, the legislative and constitutional landscape has changed significantly. Privatisation and corporatisation since the 1980s have seen some organisations leave the public sector, while others have remained within the state sector but have radically changed their form and mandates. New types of entities have been created: state-owned enterprises ("**SOEs**"), district health boards ("**DHBs**") and Crown research institutes ("**CRIs**"). The State Sector Act 1988 and the Local Government Act 2002 have created more autonomous government departments and more clearly delineated separate responsibilities of ministers and heads of government. The adoption of the MMP electoral system has had significant implications.

11. Second, the technological context for official information legislation has changed. At the time the OIA was enacted, official information was mainly in the form of hard-copy documents. Since then, digitalisation and the information revolution have radically changed the nature and use of official information. Official information can now take new forms, including email, tweets, text messages, blogs, and digital video. This has vastly

188177

increased the volume of official information that can be produced, collated, and stored. Technological change has also driven social and cultural change. There is now a much greater expectation of openness and availability of information than the past.

12. There has also been change in the international environment. Notably the UK and Australia have recently reviewed their official information legislation, and there is a clear trend towards more proactive release, and the creation of information commissions (independent authorities that are set up to uphold information rights in the public interest and to promote openness by public agencies).

Scope of the legislation

13. Currently, to find out which agencies are subject to the OIA, one needs to peruse three schedules of two Acts (the OIA and the Ombudsman Act). The Law Commission recommends that all agencies subject to the OIA and the LGOIMA should be clearly and explicitly listed under one schedule in each of those Acts.

14. Further, the lists in the schedules are not entirely logical and contain discrepancies. For example, while all crown entities are subject to the OIA, not all of them are listed by name in the statues. The Law Commission believes that the schedules of both the OIA and the LGOIMA need to be reviewed carefully to eliminate anomalies and bring within coverage organisations that should be included (according to an agency's relationship to the central government).**[Support]** Fine

15. In particular, the Law Commission feels that while there are good reasons for SOEs to be exempt, the fact that they are owned by the public, they have an obligation to exhibit a sense of social responsibility, and are overseen by the government mean they should remain subject to the OIA, which is consistent with previous reviews. The Law Commission comments that the commercial grounds for withholding information are sufficient to protect SOEs (and CCOs) provided that they are applied correctly.**[N/A]** **Unlikely that this wil change but if it does then CFIs (at least the investment part of them) should be treated the same as SOEs?**

Decision-making

16. The method of decision-making under the withholding grounds is currently through the "case-by-case" system. The "case-by-case" system has numerous issues: the lack of firm rules means this process takes time and it is less efficient in terms of resources; there can be more room for what some see as "game-playing" by agencies; and there is greater uncertainty, inconsistency, and the risk that an agency might reach an inconsistent decision. Nevertheless, the Law Commission feels that the case-by-case system should be retained, and considers that amending the OIA through codification of rules or regulations could reduce flexibility, and freeze the present practice in time. **[Support]** Fine

Formatted: Font: Bold

17. The Law Commission believes that for the case-by-case system to work better, firmer precedent and guidance should be adopted. Currently, the Ombudsman's case notes specify that they do not create any legal precedent for the view the Ombudsman may take on any matter in the future. The Law Commission proposes a system of precedent using the casenotes of the Ombudsmen, and for them to be compiled, analysed, and arranged by patterns of decision. Commentary on each case will be provided, drawing not only patterns but also principles and reasoning. It will also provide examples derived from the case notes. The Law Commission believes that this system will provide better guidance but at the same time avoid setting rigid rules.**[Support]** Fine

Formatted: Font: Bold

Protecting good government

18. The Law Commission finds that the "maintenance of constitutional conventions" (s9(2)(f) and "free and frank expression of opinion" (s9(2)(g)(i)) withholding grounds are poorly

understood and difficult for officials to apply. There is a perception that they are overused (particularly the "free and frank" ground).

19. The term "constitutional convention" is problematic. It is difficult to understand what it actually means. Some commentators have described the list of so-called conventions as "conceptually incoherent".

20. In terms of the "free and frank" ground, the essence of the provision is to thwart the chilling effect that openness can have on the expression of blunt or unfettered opinions communicated between ministers and officials. The Law Commission recommends that both "opinions" as well as "advice" should be covered, because they have been used interchangeably. The Law Commission also welcomes submissions on whether bodies outside of core government, eg the SOEs, CRIs and tertiary education, should be able to use this ground to withholding information. **[Discuss applicability to Guardians]**

Formatted: Highlight

21. One suggestion is to combine the two grounds (but not change the substance of the two grounds) by conveying all the nuances of the required protection. The Law Commission invites comments on these suggestions.

Protecting commercial interests

22. The Law Commission also examined the commercial withholding grounds: "disclosure of trade secret" (s9(2)(b)(i)), "prejudice commercial position" (s9(2)(b)(ii)), "protect information subject to an obligation of confidence" (s9(2)(ba)), "prejudice or disadvantage commercial activities" (s9(2)(i)), and "prejudice or disadvantage negotiations" (s9(2)(j)). Agencies sometimes find them difficult to apply, while requesters feel that these grounds are overused. Very often, Crown Entities, SOEs, Councils or CCOs may not wish detailed commercial arrangements or negotiations with other organisations to be made public (as this might prejudice future dealings with the same or other parties, or that it might give an advantage to their competitors in the private sector). **[Provide examples e.g. international funds]**

Formatted: Highlight

23. In terms of third party information held by agencies, the Law Commission supports the practice of consulting with third parties who might be affected before disclosure is made. While not making consultation mandatory, the Law Commission recommends imposing a requirement that third parties be notified in appropriate time before the information is disclosed. Failure to notify should be a ground for complaint to the Ombudsmen. **[Support]** **Why – we do this any usually commercial contracts require it – no need for law?**

24. An issue raised was whether the definition of "commercial" as "for the purpose of making a profit" is too narrow. A number of responses pointed out that this test makes it difficult for non-commercial organisations with significant economic interests to apply the commercial grounds for withholding, or that activities may not have benefits that can always be measured in monetary terms but are nonetheless commercial in nature (eg funding events to stimulate the wider community). The Law Commission has not reached a view on this question and welcomes further views. **[Discuss. Guardians' activities are for profit so perhaps not a key issue]** **Have had example where Ombudsman has said we were not a commercial enterprise but changed their mind.**

25. The Law Commission feels that there should be no exemption for intellectual property, copyright, trademarks, or confidential information, because there can clearly be circumstances where the public interest might require disclosure (for example where the subject matter involved an unjustified expenditure of public money). However, in such cases the public interest in disclosure must be very strong or exceptional. Further, agencies can release information on the condition that it is only to be used in a certain way. The Law Commission believes the solution lies with firmer precedent and guidance. **[Discuss]** **[Discuss re overseas experience – probably unlikely to be accepted]**

Other withholding grounds

Protecting Privacy

26. The Law Commission notes that Steven Price's research shows that the application of the privacy withholding ground has been "extremely inconsistent, and in some cases, alarmingly sloppy". There is a case for the Privacy Act 1993 and the OIA to be more closely aligned. The Law Commission has put forward three options: firmer guidance (the Law Commission's preferred option), minor amendment to prevent unreasonable disclosure, or disclosure based on principle 11 of the Privacy Act. However, the Law Commission warns that OIA requests should not provide a "back-door" to information sharing amongst central government agencies.**[N/A]**

Information soon to be publicly available

27. Of note is the Law Commission's opinion that the administrative ground for withholding under s18 (ie "the information requested is or will soon be publicly available") allows too much scope for manipulation. The term "publicly available" is not always clear in its application. The Law Commission recommends rewording the section to read "that the information is to be made publicly and readily available within a very short time, and its immediate disclosure is unnecessary or administratively impractical".**[N/A]**

Maintenance of law

28. The Law Commission draws attention to the "maintenance of law" conclusive ground in s6(c). Currently, it has been used by agencies beyond the confines of criminal proceedings to cover court processes such as "prejudice to a fair trial". Also, it has been used by a number of agencies much more widely to prevent prejudice to an inquiry or investigation. The IRD for instance, uses it in relation to information acquired in the course of an audit. The Law Commission has serious doubts whether the "maintenance of law" ground is appropriate in such cases. Rather than resorting to the "maintenance of law", the Law Commission believes that there is a case for an explicit new withholding ground to cover material provided in the course of inquiries and investigations. This new ground should not be conclusive, but should allow disclosure if factors of public interest outweigh the desirability of withholding in a particular case.**[N/A]**

New withholding grounds?

29. The Law Commission welcomes submissions as to whether there should be new grounds to cover harassment, protection of cultural values or other grounds.**[Discuss]** Probably no need for further.

The public interest test

30. The Law Commission notes that in deciding whether to withhold information, an agency must under a two-stage approach: is the information such that a withholding ground is made out?, and if so, is it overridden by the public interest in making that information available? The Law Commission notes that currently, the public interest test is applied only in a token fashion, or sometimes ignored. At this stage, the Law Commission recommends rewording the words of s9(1) to make the need for the public interest consideration to be more prominent. Further, it suggests amending s9 to require an agency to expressly state that it has considered the public interest.**[Neutral]. No need for particular statement?**

Requests - some problems ***[Discuss whether Guardians has experienced many requests/wishes to submit]***

31. There are issues relating to the practicalities of handling and processing requests. Most agencies have complained about voluminous requests and vexatious requesters:

(a) Due particularity - The Act requires that requests be made with "due particularity". The Commission recommends redefining that term in plain English to require that request should be made as precisely as possible.

(b) Duty to consult - The Act requires the agency to assist with narrowing down large or broad requests. The Law Commission suggest that a requirement of discussion with the requester where practicable should be included in the Acts. Why?

(c) Substantial collation and research - There is currently power to refuse a request if it involves "substantial collation or research". The Law Commission recommends that review and assessment of the information should be acknowledged in the Acts, as well as making clear that the word "substantial" is relative to the size and resources of the agency involved.

(d) Frivolous or vexatious requests/requesters - The Act allows refusal of a request that is "frivolous or vexatious". The Law Commission recommends that this be defined in modern plain language. It also suggests that past conduct of the requester should be able to be taken into account.

(e) Purpose of request - The Law Commission received suggestions that requesters should state the purpose of the request. This could be useful for determining whether a request is vexatious, whether release would be in the public interest, whether charging would be appropriate, and in helping to refine an overbroad request. However, the Law Commission feels that this is unlikely to be effective and difficult to reconcile with the purpose of the legislation.

Processing requests *[Discuss Guardians' experience]*

32. There are issues relating to the process of how requests are received, including:

(a) Time limits - On receiving a request, an agency is obliged to make a decision as soon as reasonably practicable, with a maximum time limit of 20 working days. The Law Commission received submissions from both the media and government agencies, and believes, on balance, that the 20 working days maximum time limit be retained. Further, there is ambiguity between "decision" and "release". The Law Commission recommends requiring release as soon as possible after decision.

(b) Acknowledgment of receipt - The time limit of 20 working days runs from "the day on which the request is received". However, requesters are often unsure when the time limit is triggered and therefore when they may expect a decision. The Law Commission recommends that there should be a requirement for agencies to acknowledge receipt of requests, with a failure to acknowledge receipt being grounds for a complaint to the Ombudsmen.

(c) Urgent requests - the Law Commission believes that there is no need to change the present law because undue delay in responding is treated in the same way as a refusal and is therefore a ground of complaint.

(d) Release of information - The Act states that the information requested should be released in the form of the requester's preference unless it would "impair efficient administration". Metadata (information about the documents' content, author, publication date and physical location), backup systems, and information inaccessible without specialist expertise are also discussed. The Law Commission is interested in receiving views on this.

(e) Re-use - Release under the OIA to the requester does not automatically mean that he or she can publish it to the world, for example it might be in breach of

confidence or breach of copyright. An agency can release material which it might otherwise have withheld on condition that it is used only in a certain way. Effectively, it operates by way of agreement. The Law Commission does not think there is anything wrong with this practice and therefore the Act does not need to explicitly provide for it.**[Support]**

(f) Charging - there is inconsistency across difficult agencies relating to charging for large requests. The Law Commission recommends a uniform charging practice, with guidelines or regulations laying down clear and uniform rules.**[Support cost recovery as antidote to vexatious claims]** **Fine as long as can not charge if don't want to.**

Complaints and Remedies *[Neutral]*

33. The current complaint system operated by the Ombudsmen is laid out in both the Ombudsmen Act as well as the OIA. The Law Commission suggests that the whole process should be contained in the OIA or LGOIMA even if that involves replicating the aspects currently in the Ombudsmen Act.

34. The Law Commission was of the view that there should be new grounds for complaint, for example, improper or untimely transfers, failure to promptly deal with urgent requests, or failure to give notice to third parties before releasing their information.

35. Currently, agencies are under a "public duty" to observe the recommendation of the Ombudsmen, unless in the case of the OIA the recommendation is reversed by Order in Council (effectively by the Cabinet), and in the case of the LGOIMA by the local authority itself in a meeting. Such veto powers have rarely been exercised. The Law Commission recommends abolishing the veto, so that judicial review will be the only means of challenging the Ombudsmen's decision. Further, the Ombudsmen's finding should be called a "decision" or "determination", rather than a "recommendation".

Proactive disclosure

36. The UK and Australian governments (amongst other governments) have passed legislation requiring agencies to adopt and maintain a scheme for the publication of information by that authority.

37. The domestic trend has also been towards proactive disclosure. Section 20 of OIA provides that the Ministry of Justice shall regularly release a publication setting out its structure, functions etc. Various other Acts, such as the Public Finance Act 1989, Crown Entities Act 2004, and the State-Owned Enterprises Act 1986 contain requirements to report publicly and the types of information that must be published in annual reports. More and more policy frameworks, such as the *Policy Framework for Government-held Information* released in 1997 and *The Digital Strategy 2.0*, promote proactive publication. It is also standard practice for departments to place discussion documents, submissions, and important policy documents on their websites.

38. The Law Commission recommends requiring agencies to take all reasonable steps to proactively make information publicly available. Agencies subject to the OIA cover a wide range, so in the early stage the Law Commission believes the requirement should be confined to Departments, Crown Entities, and the local authorities in Part 1 of the First Schedule of the LGOIMA.**[To discuss. Likely to be costly. Perhaps support maintenance of status quo]** **Don't make this requirement- In agency's interest anyway.**

Other Issues

Oversight and other functions

39. Currently, the complaints investigation function under the OIA and the LGOIMA is vested in the Ombudsmen. However, the Law Commission suggests that the OIA should specifically require four functions to be carried out: investigation of complaints; provision of guidance; promotion and education; and oversight. It believes that the office of the Ombudsmen should be expanded to cover provision of guidance, as well as promotion and education. It recommends that an independent Information Commission be established to perform the oversight function, i.e. to monitor, report and periodically review the operation of the legislation, and to promote the proactive release of information by agencies.**[Neutral]**

Other miscellaneous issues

40. The Law Commission examines other issues such as the redrafting of the withholding grounds for various reasons, to include clearer wording, as well as better logical order.

41. The Law Commission also examines the relationship between the OIA and the Public Records Act 2005 ("PRA"), forming the view that the two Acts interact appropriately. The Commission considers that the definitions of "record" under the PRA and "information" under the OIA are sufficiently wide to ensure that requesters of information will not be thwarted by the disposal of information that is not caught by the PRA. For now, the Law Commission does not believe that either piece of legislation needs to be amended to fit with the other. **[Support. Any expansion of categories of information that must be retained under the PRA will lead to additional record-keeping and OIA request costs for Guardians]**

Russell McVeagh
16 November 2010

NEW ZEALAND SUPERANNUATION FUND

23 December 2010

Official Information Legislation Review
Law Commission
PO Box 2590
WELLINGTON 6140

Email:officialinfo@lawcom.govt.nz

1. The Public's Right to Know

1.1 We refer to the Law Commission's Issues Paper 19, September 2010, 'The Public's Right to Know.

1.2 We provide information about us and the key issues for us in the Issues Paper below. In addition, we have set out the questions in the Issues Paper in the attached appendix and outline our thoughts in respect of those questions where we consider we can provide most perspective.

2. The Guardians and the New Zealand Superannuation Fund

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

3. Commercial nature of our business

3.1 The Guardians is under a statutory duty to invest the investment funds under their management on a prudent, commercial basis and to manage and administer those funds in a manner consistent with:

- Best-practice portfolio management.
- Maximising return without undue risk.
- Avoiding prejudice to New Zealand's reputation as a responsible member of the world community.

3.2 The Guardians undertake a range of investment activities that it believes will add value over and above the returns generated by passive investments in the asset classes contained within the reference portfolio. This includes three broad areas of value-adding activity.

201723

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

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

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

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

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

4. Protection against certain actions potentially unavailable

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

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

5. The Guardians' Approach to Transparency

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

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

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

6. The Guardians' History of Official Information Act Requests

6.1 As a relatively young organisation we have had limited experience with the application of the Act. Requesters have tended to focus on our decisions in relation to responsible investment issues such as investment in companies involved in the nuclear weapons industries. We have also received a number of requests relating to our approach to investing in New Zealand.

6.2 We have received approximately 30 requests. We have provided the information as soon as reasonably practicable and have never exceeded the 20 working-day limit. Our decisions to withhold have been referred to the Ombudsman on several occasions and were queried by the Ombudsman on two occasions. In keeping with what we have said about being a relatively young organisation, the appeals to the Ombudsman were for older requests and, as we have become more familiar with the process, our response times have sharply declined. We believe we have a constructive relationship with the Ombudsman.

6.3 Queries where we have had least experience to date but which we consider will be the most difficult for us, are where we are asked for information relating to specific investments or proposed investments, investment managers or the investment activities and terms such as fees of those managers.

6.4 We think that such requests are likely to increase as the Fund grows in size and becomes better known through its activities in New Zealand and offshore. Anecdotally (through conversations with peer funds and general searches), we understand that freedom of information legislation can be used by people who are more interested in gaining insights for commercial reasons rather than to scrutinise the machinery of government.

7. Questions and Contacts

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

Yours faithfully

Sarah Owen
General Counsel

ISSUES PAPER - QUESTIONS

2. Scope of the Acts

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

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

3. Decision-making

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

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

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

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

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

Yes. See above.

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

Yes. See above.

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

Yes.

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

Yes.

4. Protecting good government

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

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

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

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

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

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

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

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

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

A balance must be struck.

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

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

---

[1] Law Commission's Issues paper, Paragraph 4.39.

[2] Ibid Paragraph 4.29

5. Protecting commercial interests

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

For ease of reference we record the section:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[3] Access to Information Act 2006, c. 9, s. 148.
[4] Ibid, c. 9, s. 148.
[5] Ibid, c. 9, s. 147.
[6] Government Code Section 6254 - California Public Records Act

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

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

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

No specific comment at this time.

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

No specific comment at this time.

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

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

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

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

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

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

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

6. Protecting privacy

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

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?

No specific comment at this time.

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

(a) deceased persons?

(b) children?

No specific comment at this time.

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

No specific comment at this time.

7. Other withholding grounds

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

No specific comment at this time.

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

(a) harassment;

(b) the protection of cultural values;

(c) anything else?

We note that the Issues Paper does not discuss the withholding ground section 9(2)(k) (information may be withheld if that is necessary to prevent the disclosure or use of official information for improper gain or improper advantage). The Law Commission states[8] that it might be said that one of the withholding grounds in the Act assumes a knowledge of purpose. For the reasons outlined in the Issues Paper under "Purpose of Request", it is likely that there is little value in requiring requesters to provide the purpose of their request and their real name. However, this does give rise to the question as to whether the ground in 9(2)(k) is of any use. Consideration could be given to reformulate the grounds so that the agency can form the reasonable view that the information could be used for improper gain or improper advantage based on the facts and circumstances existing at the time of the request.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

8. The Public Interest Test

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

No specific comment at this time.

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

No specific comment at this time.

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

[8] Ibid. section 9.4

No specific comment at this time.

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

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

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

9. Requests – Some problems

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

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

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

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

10. Processing requests

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

Yes.

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

Yes.

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

Yes.

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

No.

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

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

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

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

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

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

Yes.

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

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

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

Yes.

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

No specific comment at this time.

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

Yes.

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

Yes.

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

No specific comment at this time.

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

Yes.

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

Yes.

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

Yes.

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

Yes.

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

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

Yes.

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

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

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

No.

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

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

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

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

No specific comment at this time.

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

Yes.

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

No specific comment at this time.

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

No specific comment at this time.

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

Yes.

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

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

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

No specific comment at this time.

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

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

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

11. Complaints and Remedies

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

Yes.

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

Yes.

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

Yes. We think that this would:

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

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

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

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

No specific comment at this time.

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

No specific comment at this time.

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

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

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

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

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

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

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

No specific comment at this time.

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

No specific comment at this time.

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

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

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

Yes.

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

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

be aligned with the complaints process under Part 2?

No specific comment at this time.

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

No specific comment at this time.

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

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

Proactive Disclosure

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

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

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

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

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

Oversight and other functions

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

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

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

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

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

No specific comment at this time.

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

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

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

Yes.

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

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

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

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

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

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

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

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

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

See above at 94.

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

See above at 94.

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

See above at 94.

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

Yes.

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

Yes.

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

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

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

No specific comment at this time.

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

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

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

See above at 102.

Local Government Official Information and Meetings Act 1987

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

No specific comment at this time.

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

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

Other Issues

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

No specific comment at this time.

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

No specific comment at this time.

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

legislation? Are any statutory amendments required in your view?

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

Leigh Alderson

From: Sarah Owen
Sent: Thursday, December 23, 2010 12:43 PM
To: 'Adele Wilson'
Cc: Reuben van Werkum
Subject: FW: Public's Right to Know- Law Commisison Review - Response by Guardians
Attachments: SUPERDOCS-201723-1-Official_Information_Legislation_Review_2010 _Submission_Guardians.pdf

Dear Adele and Reuben
Thanks for your assistance.
Kind regards
Sarah

From: Sarah Owen
Sent: Thursday, 23 December 2010 12:42 p.m.
To: 'Margaret Thompson'; 'OfficialInfo@lawcom.govt.nz'
Cc: Paul W. Gregory; Tim Mitchell
Subject: RE: Public's Right to Know- Law Commisison Review - Response by Guardians

Dear Margaret

As discussed we attach the Submission in response to the Law Commission's Issues Paper 19.

For ease of reference we also attach the link to our website: www.nzsuperfund.co.nz.

Kind regards
Sarah

Sarah Owen
General Counsel

DDI: +64 9 308 2020
Mobile: +64 21 920 811
Email: sowen@nzsuperfund.co.nz

PO Box 106 607, Auckland 1143, New Zealand
Level 17, AMP Centre, 29 Customs Street West, Auckland, New Zealand
Office: +64 9 300 6980 | Fax: +64 9 300 6981 | Web: www.nzsuperfund.co.nz

NEW ZEALAND SUPERANNUATION FUND

CAUTION - This message may contain privileged and confidential information intended only for the use of the addressee named above. If you are not the intended recipient for this message, you are hereby notified that any user dissemination, distribution or reproduction of this message is prohibited. If you have received this message in error, please notify New Zealand Superannuation Fund immediately. Any views expressed in this message are those of the individual sender and may not necessarily reflect the views of the Guardians of New Zealand Superannuation, and of the New Zealand Superannuation Fund.

CONFIDENTIALITY NOTICE

This message may contain privileged, confidential or copyrighted information intended only for the use of the recipient(s) named above. If you are not an intended recipient you may not read, use, copy or disclose this email or its attachments. If you have received this message in error you must delete the email immediately and contact us at enquiries@nzsuperfund.co.nz. Any views expressed in any email from the Guardians, or its attachments, are those of the individual sender and may not necessarily reflect the views of the Guardians of New Zealand Superannuation, and of the New Zealand

201726

Superannuation Fund. Additionally, while we use standard virus checking software, we accept no responsibility for viruses or anything similar in this email or any attachment after it leaves our information systems.

****

This email message and attachments do not necessarily reflect the views of the Law Commission.
It may contain information that is confidential and may be subject to legal privilege.
If you are not the intended recipient, you are hereby notified that you must not use, disseminate, distribute or copy this email message or its attachments.
If you received this message in error please notify the Law Commission and return the original message to the sender. Please destroy any remaining copies.
****

CONFIDENTIALITY NOTICE

This message may contain privileged, confidential or copyrighted information intended only for the use of the recipient(s) named above. If you are not an intended recipient you may not read, use, copy or disclose this email or its attachments. If you have received this message in error you must delete the email immediately and contact us at enquiries@nzsuperfund.co.nz. Any views expressed in any email from the Guardians, or its attachments, are those of the individual sender and may not necessarily reflect the views of the Guardians of New Zealand Superannuation, and of the New Zealand Superannuation Fund. Additionally, while we use standard virus checking software, we accept no responsibility for viruses or anything similar in this email or any attachment after it leaves our information systems.

****

This email message and attachments do not necessarily reflect the views of the Law Commission.
It may contain information that is confidential and may be subject to legal privilege.
If you are not the intended recipient, you are hereby notified that you must not use, disseminate, distribute or copy this email message or its attachments.
If you received this message in error please notify the Law Commission and return the original message to the sender. Please destroy any remaining copies.
****

NEW ZEALAND SUPERANNUATION FUND

23 December 2010

Official Information Legislation Review
Law Commission
PO Box 2590
WELLINGTON 6140

Email:officialinfo@lawcom.govt.nz

1. The Public's Right to Know

1.1 We refer to the Law Commission's Issues Paper 19, September 2010, 'The Public's Right to Know.

1.2 We provide information about us and the key issues for us in the Issues Paper below. In addition, we have set out the questions in the Issues Paper in the attached appendix and outline our thoughts in respect of those questions where we consider we can provide most perspective.

2. The Guardians and the New Zealand Superannuation Fund

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

3. Commercial nature of our business

3.1 The Guardians is under a statutory duty to invest the investment funds under their management on a prudent, commercial basis and to manage and administer those funds in a manner consistent with:

- Best-practice portfolio management.
- Maximising return without undue risk.
- Avoiding prejudice to New Zealand's reputation as a responsible member of the world community.

3.2 The Guardians undertake a range of investment activities that it believes will add value over and above the returns generated by passive investments in the asset classes contained within the reference portfolio. This includes three broad areas of value-adding activity.

GUARDIANS OF NEW ZEALAND SUPERANNUATION
Level 17, Quay Tower, 29 Customs Street West, Auckland
PO Box 106 607, Auckland, New Zealand. Phone: +64 9 300 6980 Fax: +64 9 300 6981
www.nzsuperfund.co.nz

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

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

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

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

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

4. Protection against certain actions potentially unavailable

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

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

5. The Guardians' Approach to Transparency

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

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

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

6. The Guardians' History of Official Information Act Requests

6.1 As a relatively young organisation we have had limited experience with the application of the Act. Requesters have tended to focus on our decisions in relation to responsible investment issues such as investment in companies involved in the nuclear weapons industries. We have also received a number of requests relating to our approach to investing in New Zealand.

6.2 We have received approximately 30 requests. We have provided the information as soon as reasonably practicable and have never exceeded the 20 working-day limit. Our decisions to withhold have been referred to the Ombudsman on several occasions and were queried by the Ombudsman on two occasions. In keeping with what we have said about being a relatively young organisation, the appeals to the Ombudsman were for older requests and, as we have become more familiar with the process, our response times have sharply declined. We believe we have a constructive relationship with the Ombudsman.

6.3 Queries where we have had least experience to date but which we consider will be the most difficult for us, are where we are asked for information relating to specific investments or proposed investments, investment managers or the investment activities and terms such as fees of those managers.

6.4 We think that such requests are likely to increase as the Fund grows in size and becomes better known through its activities in New Zealand and offshore. Anecdotally (through conversations with peer funds and general searches), we understand that freedom of information legislation can be used by people who are more interested in gaining insights for commercial reasons rather than to scrutinise the machinery of government.

7. Questions and Contacts

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

Yours faithfully

Sarah Owen
General Counsel

ISSUES PAPER - QUESTIONS

2. Scope of the Acts

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

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

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

3. Decision-making

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

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

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

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

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

Yes. See above.

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

Yes. See above.

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

Yes.

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

Yes.

4. Protecting good government

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

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

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

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

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

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

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

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

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

A balance must be struck.

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

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

[1] Law Commission's Issues paper, Paragraph 4.39.

[2] Ibid Paragraph 4.29

5. Protecting commercial interests

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

For ease of reference we record the section:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[3] Access to Information Act 2006, c. 9, s. 148.
[4] Ibid, c. 9, s. 148.
[5] Ibid, c. 9, s. 147.
[6] Government Code Section 6254 - California Public Records Act

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

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

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

No specific comment at this time.

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

No specific comment at this time.

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

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

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

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

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

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

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

6. Protecting privacy

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

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?

No specific comment at this time.

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

(a) deceased persons?

(b) children?

No specific comment at this time.

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

No specific comment at this time.

7. Other withholding grounds

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

No specific comment at this time.

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

(a) harassment;

(b) the protection of cultural values;

(c) anything else?

We note that the Issues Paper does not discuss the withholding ground section 9(2)(k) (information may be withheld if that is necessary to prevent the disclosure or use of official information for improper gain or improper advantage). The Law Commission states[8] that it might be said that one of the withholding grounds in the Act assumes a knowledge of purpose. For the reasons outlined in the Issues Paper under "Purpose of Request", it is likely that there is little value in requiring requesters to provide the purpose of their request and their real name. However, this does give rise to the question as to whether the ground in 9(2)(k) is of any use. Consideration could be given to reformulate the grounds so that the agency can form the reasonable view that the information could be used for improper gain or improper advantage based on the facts and circumstances existing at the time of the request.

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

8. The Public Interest Test

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

No specific comment at this time.

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

No specific comment at this time.

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

[8] Ibid. section 9.4

No specific comment at this time.

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

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

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

9. Requests – Some problems

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

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

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

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

10. Processing requests

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

Yes.

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

Yes.

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

Yes.

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

No.

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

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

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

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

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

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

Yes.

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

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

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

Yes.

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

No specific comment at this time.

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

Yes.

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

Yes.

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

No specific comment at this time.

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

Yes.

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

Yes.

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

Yes.

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

Yes.

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

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

Yes.

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

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

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

No.

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

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

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

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

No specific comment at this time.

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

Yes.

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

No specific comment at this time.

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

No specific comment at this time.

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

Yes.

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

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

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

No specific comment at this time.

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

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

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

No specific comment at this time.

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

No specific comment at this time.

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

No specific comment at this time.

11. Complaints and Remedies

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

Yes.

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

Yes.

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

Yes. We think that this would:

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

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

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

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

No specific comment at this time.

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

No specific comment at this time.

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

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

This approach ensures that the decision making process is not drawn out and provides certainty in circumstances where contracts require the Guardians not to disclose information except where required by law.

This approach also contains costs associated with OIA requests and is an effective forum for lay persons to participate which is critical given the very purpose of the Act is aimed at enabling lay persons to have access to information.

Q76 Do you agree that the veto power exercisable by Order in Council through the Cabinet in the OIA should be removed?

Yes. To preserve the separation of powers, the Executive should not be left to determine the extent of its own disclosure of official information.

Q77 Do you agree that the veto power exercisable by a local authority in the LGOIMA should be removed?

No specific comment at this time.

Q78 If you believe the veto power should be retained for the OIA and LGOIMA, do you have any comment or suggestions about its operation?

No specific comment at this time.

Q79 Do you agree that judicial review is an appropriate safeguard in relation to the Ombudsmen's recommendations and there is no need to introduce a statutory right of appeal to the Court?

Yes, having a statutory right of appeal will increase uncertainty (as it is more difficult to determine the point at which disclosure is required by law) and compliance costs.

Q80 Do you agree that the public duty to comply with an Ombudsman's decision should be enforceable by the Solicitor -General?

Yes.

Q81 Do you agree that the complaints process for Part 3 and 4 official information should

[9] *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180.

be aligned with the complaints process under Part 2?

No specific comment at this time.

Q82 Do you agree that, rather than financial or penal sanctions, the Ombudsmen should have express statutory power to publicly draw attention to the conduct of an agency?

No specific comment at this time.

Q83 Should there be any further enforcement powers, such as exist in the United Kingdom?

No. There does not appear to be substantial non-compliance with the Act which would warrant the additional cost and complexity of this. As noted above, there are considerable commercial and reputational imperatives which put pressure on agencies to comply. Incentives through matters such as the KPIs of Chief Executives governed by the State Sector Act may also be a more effective way of addressing this issue.

Proactive Disclosure

Q84 Do you agree that the OIA should require each agency to publish on its website the information currently specified in section 20 of the OIA?

No. Information required to be provided by an agency should be considered upon the establishment of the agency and specified in its establishing legislation, as it is for the Guardians.

Each agency differs in terms of its size and nature and a one size fits all disclosure requirement is neither needed nor likely to add anything of use to those seeking specific information held by an agency.

Q85 Do you think there should be any further mandatory categories of information subject to a proactive disclosure requirement in the OIA or LGOIMA?

We consider that mandatory disclosure of information is better dealt with by the legislation governing the entity. For instance the publishing of an annual report (including reference to investment managers used) and statement of intent as per the Crown Entities Act 2004 and the governing legislation specific to the Guardians and the Fund e.g. the New Zealand Superannuation and Retirement Income Act 2001.

Oversight and other functions

Q86 Do you agree that the OIA and LGOIMA should require agencies to take all reasonably practicable steps to proactively release official information?

No. Agencies should be encouraged to be transparent and those who seek to reduce time spent on reactively communicating through OIA requests will proactively release relevant information without being 'required' to.

Q87 Should such a requirement apply to all central and local agencies covered by the OI legislation?

We think there is a distinction between crown entities which are largely commercial in operation and public decision or policy making bodies. Such mandatory disclosure may be more relevant to the latter.

Q88 What contingent provision should the legislation make in case the "reasonably practicable steps" provision proves inadequate? For example, should there be a statutory review or regulation making powers relating to proactive release of information?

No specific comment at this time.

Q89 Do you think agencies should be required to have explicit publication schemes for the information they hold, as in other jurisdictions?

No. Particularly not in respect of agencies such as the Guardians.

Q90 Do you agree that disclosure logs should not be mandatory?

Yes.

Q91 Do you agree that section 48 of the OIA and section 41 of the LGOIMA which protect agencies from court proceedings should not apply to proactive release?

If proactive release is mandated then the agency should be afforded protection for that release (and this would extend to those using the information). If the release is voluntary then the agency should not have protection from court proceedings.

Q92 Do you agree that the OIA and the LGOIMA should expressly include a function of providing advice and guidance to agencies and requesters?

Yes, provided that this is streamlined and provided efficiently i.e. online.

Q93 Do you agree that the OIA and the LGOIMA should include a function of promoting awareness and understanding and encouraging education and training?

Yes. This is central to the effective operation of the Act and the fulfilment of its purpose.

Q94 Do you agree that an oversight agency should be required to monitor the operation of the OIA and LGOIMA, collect statistics on use, and report findings to Parliament annually?

No. The replication of agencies and reporting and the compliance costs that come with such structures should be avoided unless there is a compelling reason for their implementation. The operation of the Act should be able to be adequately monitored via the sample seen by the Ombudsman each year.

Q95 Do you agree that agencies should be required to submit statistics relating to official information requests to the oversight body so as to facilitate this monitoring function?

See above at 94.

Q96 Do you agree that an explicit audit function does not need to be included in the OIA or the LGOIMA?

See above at 94.

Q97 Do you agree that the OIA and the LGOIMA should expressly enact an oversight function which includes monitoring the operation of the Acts, a policy function, a review function, and a promotion function?

See above at 94.

Q98 Do you agree that the Ombudsmen should continue to receive and investigate complaints under the OIA and the LGOIMA?

Yes.

Q99 Do you agree that the Ombudsmen should be responsible for the provision of guidance and advice?

Yes.

Q100 What agency should be responsible for promoting awareness and understanding of the OIA and LGOIMA and arranging for programmes of education and training for agencies subject to the Acts?

The Ombudsmen would seem best placed to carry out this function.

Q101 What agency should be responsible for administrative oversight of the OIA and the LGOIMA? What should be included in the oversight functions?

No specific comment at this time.

Q102 Do you think an Information Commissioner Office should be established in New Zealand? If so, what should its functions be?

No. See above at 94. If anything the Ombudsman should be provided with more resources.

Q103 If you think an Information Commissioner Office should be established, should it be standalone or be part of another agency?

See above at 102.

Local Government Official Information and Meetings Act 1987

Q104 Do you agree that the LGOIMA should be aligned with OIA in terms of who can make requests and the purpose of the legislation?

No specific comment at this time.

Q105 Is the difference between the OIA and LGOIMA about the status of information held by contractors justified? Which version is to be preferred?

It is difficult to justify any difference between these Acts. The Guardians prefer the LGOIMA formulation for the fact that it acknowledges the practical fact that if an agency does not hold or have access to information it cannot provide it to others.

Other Issues

Q106 Do you agree that the official information legislation should be redrafted and re-enacted.

No specific comment at this time.

Q107 Do you agree that the OIA and the LGOIMA should remain as separate Acts?

No specific comment at this time.

Q108 Do you have any comment on the interaction between the PRA and the OI

legislation? Are any statutory amendments required in your view?

No. We see the Acts as being complementary. The PRA defines the scope of information that must be held by agencies in accordance with normal, prudent business practice and the OIA provides for public access to information held by an agency. Whether the definition of "public record" is sufficient for its purpose under the PRA is a matter that justifies a separate Commission inquiry. The definition of "information" under the OIA does not seem to us to be relevant to such an inquiry.

Leigh Alderson

From: Sarah Owen
Sent: Thursday, December 23, 2010 12:42 PM
To: 'Margaret Thompson'; 'OfficialInfo@lawcom.govt.nz'
Cc: Paul W. Gregory; Tim Mitchell
Subject: RE: Public's Right to Know- Law Commisison Review - Response by Guardians
Attachments: SUPERDOCS-201723-1-Official_Information_Legislation_Review_2010 _Submission_Guardians.pdf

Dear Margaret

As discussed we attach the Submission in response to the Law Commission's Issues Paper 19.

For ease of reference we also attach the link to our website: www.nzsuperfund.co.nz.

Kind regards
Sarah

Sarah Owen
General Counsel

DDI: +64 9 308 2020
Mobile: +64 21 920 811
Email: sowen@nzsuperfund.co.nz

PO Box 106 607, Auckland 1143, New Zealand
Level 17, AMP Centre, 29 Customs Street West, Auckland, New Zealand
Office: +64 9 300 6980 | Fax: +64 9 300 6981 | Web: www.nzsuperfund.co.nz

NEW ZEALAND SUPERANNUATION FUND

CAUTION - This message may contain privileged and confidential information intended only for the use of the addressee named above. If you are not the intended recipient for this message, you are hereby notified that any user dissemination, distribution or reproduction of this message is prohibited. If you have received this message in error, please notify New Zealand Superannuation Fund immediately. Any views expressed in this message are those of the individual sender and may not necessarily reflect the views of the Guardians of New Zealand Superannuation, and of the New Zealand Superannuation Fund.

CONFIDENTIALITY NOTICE

This message may contain privileged, confidential or copyrighted information intended only for the use of the recipient(s) named above. If you are not an intended recipient you may not read, use, copy or disclose this email or its attachments. If you have received this message in error you must delete the email immediately and contact us at enquiries@nzsuperfund.co.nz. Any views expressed in any email from the Guardians, or its attachments, are those of the individual sender and may not necessarily reflect the views of the Guardians of New Zealand Superannuation, and of the New Zealand Superannuation Fund. Additionally, while we use standard virus checking software, we accept no responsibility for viruses or anything similar in this email or any attachment after it leaves our information systems.

****

This email message and attachments do not necessarily reflect the views of the Law Commission.
It may contain information that is confidential and may be subject to legal privilege.
If you are not the intended recipient, you are hereby notified that you must not use, disseminate, distribute or copy this email message or its attachments.
If you received this message in error please notify the Law Commission and return the original message to the sender. Please destroy any remaining copies.
****

CONFIDENTIALITY NOTICE

201727

This message may contain privileged, confidential or copyrighted information intended only for the use of the recipient(s) named above. If you are not an intended recipient you may not read, use, copy or disclose this email or its attachments. If you have received this message in error you must delete the email immediately and contact us at enquiries@nzsuperfund.co.nz. Any views expressed in any email from the Guardians, or its attachments, are those of the individual sender and may not necessarily reflect the views of the Guardians of New Zealand Superannuation, and of the New Zealand Superannuation Fund. Additionally, while we use standard virus checking software, we accept no responsibility for viruses or anything similar in this email or any attachment after it leaves our information systems.

****

This email message and attachments do not necessarily reflect the views of the Law Commission.
It may contain information that is confidential and may be subject to legal privilege.
If you are not the intended recipient, you are hereby notified that you must not use, disseminate, distribute or copy this email message or its attachments.
If you received this message in error please notify the Law Commission and return the original message to the sender. Please destroy any remaining copies.
****

NEW ZEALAND SUPERANNUATION FUND

23 December 2010

Official Information Legislation Review
Law Commission
PO Box 2590
WELLINGTON 6140

Email:officialinfo@lawcom.govt.nz

1. The Public's Right to Know

1.1 We refer to the Law Commission's Issues Paper 19, September 2010, 'The Public's Right to Know.

1.2 We provide information about us and the key issues for us in the Issues Paper below. In addition, we have set out the questions in the Issues Paper in the attached appendix and outline our thoughts in respect of those questions where we consider we can provide most perspective.

2. The Guardians and the New Zealand Superannuation Fund

2.1 This submission is made by the Guardians of New Zealand Superannuation ("**Guardians**"). The Guardians is an autonomous crown entity that was established in 2002 to manage and administer the New Zealand Superannuation Fund (the "**Fund**"). The Fund is not a legal entity but a pool of Crown assets. The Fund size as at 31 October 2010 is NZD17.66 billion.

3. Commercial nature of our business

3.1 The Guardians is under a statutory duty to invest the investment funds under their management on a prudent, commercial basis and to manage and administer those funds in a manner consistent with:

- Best-practice portfolio management.
- Maximising return without undue risk.
- Avoiding prejudice to New Zealand's reputation as a responsible member of the world community.

3.2 The Guardians undertake a range of investment activities that it believes will add value over and above the returns generated by passive investments in the asset classes contained within the reference portfolio. This includes three broad areas of value-adding activity.

GUARDIANS OF NEW ZEALAND SUPERANNUATION
Level 17, Quay Tower, 29 Customs Street West, Auckland
PO Box 106 607, Auckland, New Zealand. Phone: +64 9 300 6980 Fax: +64 9 300 6981
www.nzsuperfund.co.nz

3.3 The first category of value-adding activity is capturing active returns through investing in private markets and/or selecting and investing through active managers. For instance investment strategies in:

- Infrastructure (e.g. purchase with Infratil of Shell downstream assets).
- Timber (e.g. Ownership of Kaingaroa Forest in partnership with Harvard Endowment Fund).
- Private Equity and Property (investment in multiple private equity and private equity real estate partnerships and other collective investment vehicles).
- Rural land.
- New Zealand direct.

3.4 The second is strategic tilting or 'swimming against the tide'. The third category is portfolio completion (closely managing fees and costs).

3.5 Like any other investment business, we have commercial relationships with investment managers, private equity funds, counterparties and suppliers. The agreements governing these relationships include terms that are commercially sensitive for the third party and/or for us. In addition, from time to time we hold market sensitive information (i.e. inside information) and have procedures in place to manage the risk under insider trading laws.

3.6 More information about how we invest the Fund can be found in our annual report, Statement of Intent and additional information on our website (www.nzsuperfund.co.nz.).

4. Protection against certain actions potentially unavailable

4.1 As discussed below (Section 5), we consider there is risk to us of reverse freedom of information complaints in the context of our commercial activities.

4.2 The protections in the Act (section 48) may not be available to us. In particular, we make off-shore investments on a regular basis in accordance with agreements that are subject to foreign laws. Any bar on proceedings in the Act will not necessarily effectively protect the Guardians from suit because a New Zealand statute cannot directly speak to the Courts of another jurisdiction. That is, a New Zealand statute cannot direct a foreign court to excuse a breach of that country's own laws. Whilst defences under private international law may be available in certain cases, this highlights the need for the commercial prejudice and subject to confidence grounds to be adequately robust and flexible enough to protect agencies like the Guardians. In addition, consistent and principled decisions by the Ombudsman assist in providing greater commercial certainty.

5. The Guardians' Approach to Transparency

5.1 We have included in our Annual Report (pages 34-35) a description of our approach to transparency.

5.2 The Annual Report section we have referred to also describes the broad range of the material we proactively release as well as our performance in transparency surveys by third parties. The San Fransisco-based Sovereign Wealth Fund Institute publishes

the Linaburg-Maudell Transparency Index and the Guardians has rated 10/10 since inception of the index. We also include reference to the survey published by the Washington-based Carnegie Endowment for World Peace where the Guardians were rated a clear first among the 26 sovereign wealth funds which were signatories to the Santiago Principles.

6. The Guardians' History of Official Information Act Requests

6.1 As a relatively young organisation we have had limited experience with the application of the Act. Requesters have tended to focus on our decisions in relation to responsible investment issues such as investment in companies involved in the nuclear weapons industries. We have also received a number of requests relating to our approach to investing in New Zealand.

6.2 We have received approximately 30 requests. We have provided the information as soon as reasonably practicable and have never exceeded the 20 working-day limit. Our decisions to withhold have been referred to the Ombudsman on several occasions and were queried by the Ombudsman on two occasions. In keeping with what we have said about being a relatively young organisation, the appeals to the Ombudsman were for older requests and, as we have become more familiar with the process, our response times have sharply declined. We believe we have a constructive relationship with the Ombudsman.

6.3 Queries where we have had least experience to date but which we consider will be the most difficult for us, are where we are asked for information relating to specific investments or proposed investments, investment managers or the investment activities and terms such as fees of those managers.

6.4 We think that such requests are likely to increase as the Fund grows in size and becomes better known through its activities in New Zealand and offshore. Anecdotally (through conversations with peer funds and general searches), we understand that freedom of information legislation can be used by people who are more interested in gaining insights for commercial reasons rather than to scrutinise the machinery of government.

7. Questions and Contacts

7.1 Please contact us should you require any elaboration on any of the responses or comments made in our letter to you.

Yours faithfully

Sarah Owen
General Counsel

ISSUES PAPER - QUESTIONS

2. Scope of the Acts

Q1 Do you agree that the Schedules to each Act (OIA and the LGOIMA) should list every agency that they cover?

No specific comment at this time.

Q2 Do you agree that the schedules to the OIA and LGOIMA should be examined to eliminate anomalies and ensure that all relevant bodies are included?

No specific comment at this time.

Q3 Do you agree that SOEs and other crown entity companies should remain within the scope of the OIA?

No specific comment at this time.

Q4 Do you agree that council controlled organisations should remain within the scope of the LGOIMA?

No specific comment at this time.

Q5 Do you agree that the Parliamentary Counsel Office should be brought within the scope of the OIA?

No specific comment at this time.

Q6 Do you agree that the OIA should specify what information relating to the operation of the Courts is covered by the Act?

No specific comment at this time.

Q7 Should any further categories of information be expressly excluded from the OIA and the LGOIMA?

Please note our comments under the heading "Protecting Commercial Interests" (Chapter 5).

3. Decision-making

Q8 Do you agree that the OIA and the LGOIMA should continue to be based on a case-by-case model?

Yes. We consider that an approach such as exemptions by categories of document is clumsy, likely to continually need to be updated and does not address the key point which is the substance of the information.

Q9 Do you agree that more clarity and more certainty about the official information withholding grounds can be gained through enhanced guidance rather than through prescriptive rules, redrafting the grounds or prescribing what information should be released in regulations?

Yes. We think that any concerns with consistency of approach would be better addressed through a focus on education, guidelines and the publishing of case notes.

Q10 Do you agree there should be a compilation, analysis of, and commentary on, the case notes of the Ombudsmen?

Yes. See above.

Q11 Do you agree there should be greater access to, and reliance on, the casenotes as precedents?

Yes. See above.

Q12 Do you agree there should be a reformulation of the guidelines with greater use of case examples?

Yes.

Q13 Do you agree there should be a dedicated and accessible official information website?

Yes.

4. Protecting good government

Q14 Do you agree that the "good government" withholding grounds should be redrafted?

We have no comment on section 9(2)(f)(Constitutional Conventions).

We consider that a situation where advice is given orally, or simply not given at all and the associated risks to the public record are real. In our view, while the use of the ground in (9)2(g) ("free and frank" expression) is likely to arise infrequently, it is an important protection. For ease of reference we record the section (9)2(g):

> g) maintain the effective conduct of public affairs through—
> - (i) the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty; or
> - (ii) the protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment; or

We do not understand the following statement by the Law Commission:

"However, given that all these bodies have relationships with Ministers we are currently not inclined to make a change, but ..."[1]

Our understanding of this provision is that it applies to the expression of opinions between members/employees of an organisation in the course of their duty and need not be with the Minister. We would be concerned if it was the Law Commission's view that this ground should only apply to communications by or between or to Ministers of the Crown.

We consider that the questions that the Ombudsman poses to assist in the application of this ground are helpful.[2] However, the hurdle for reliance on this ground set out in the commentary by the Ombudsman is too high (especially when coupled with the public interest test).

For example, in order for the Guardians to be successful it is important that a range of investment ideas, including those at the untested or more extreme end of the spectrum, are able to be tabled and debated without fear of individuals who promote those ideas being ridiculed or exposed to undue criticism. If the threshold for this ground is set too high individuals will be incentivised to act in a manner that protects their interests. A situation where more and more advice is provided orally, or not at all, is contrary to good policy and the principles of open access to information that the Act seeks to protect.

A balance must be struck.

Q15 What are your views on the proposed reformulated provisions relating to the "good government" grounds?

We agree that the grounds should cover both 'opinions' and 'the provision of advice'.

---

[1] Law Commission's Issues paper, Paragraph 4.39.

[2] Ibid Paragraph 4.29

5. Protecting commercial interests

Q16 Do you think the commercial withholding ground should continue to be confined to situations where the purpose is to make a profit?

For ease of reference we record the section:

> (b) protect information where the making available of the information—
> - (i) would disclose a trade secret; or
> - (ii) would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; or

We think that the approach taken by the Ombudsman is more restrictive than what is contemplated by the wording of the Act itself and that such a reading down is not justified.

Whether a party's commercial position has been prejudiced should be addressed on a case-by-case basis and the nature or purpose of the organisation should be a factor taken into account in making that judgment, rather than a qualifying hurdle.

In particular, a person who is in a "commercial position" may or may not be in the business of making a profit. In addition, in theory a person could be in a commercial position but choose not to utilise that commercial position. However, such a person would wish to preserve that position to ensure it was available for use in the future. For instance, specific knowledge gained by the Guardians in the course of the development of a strategic tilting framework could have value to a third party. However, the Guardians may not wish to 'sell' that intellectual property and indeed may be prepared to license it at no cost to say, another crown financial institution.

Q17 If you favour a broader interpretation, should there be a statutory amendment to clarify when the commercial withholding ground applies?

The Guardians favour the deletion of the word "unreasonably", which introduces an unnecessary and unhelpful hurdle that is adequately addressed by the application of the "public interest" test.

The Guardians favour the wording used in section 43(2) of the Freedom of Information Act 2000 (UK): "***would, or would be likely to, prejudice the commercial interests of any person*** *(including the public authority holding it)*"

Whether a party's commercial position is or is likely to be prejudiced should be the initial matter for enquiry. Once this is established, the public interest test is applied to determine whether it is reasonable or appropriate to nevertheless disclose the information.

Q18 Do you think the trade secrets and confidentiality withholding grounds should be amended for clarification?

The preliminary work we have done (as briefly outlined below) suggests to us that we may have less ability to preserve commercially sensitive information than other funds and this may negatively impact on our ability to do business. In addition, it increases the risk of reverse freedom of information complaints where we may not be afforded the protection under the Act (this is described in our covering letter). We would welcome consideration by the Law Commission of this issue.

As you will anticipate from the nature of our activities, one of the key grounds for withholding information that we are likely to seek reliance on is the confidentiality obligations as set out below:

> (ba) protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—
> (i) would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or
> (ii) would be likely otherwise to damage the public interest; or

Obligations of confidentiality are expressly provided for in many types of third party engagements and in a number of transactions. For instance:

- Investment management agreements.
- Limited partnership agreements in the context of private equity or real estate funds.
- Negotiations and due diligence in the context of potential acquisitions of businesses or shares.
- The provision of information by managers in the context of our assessment of them including such information as the particularities of investment strategies.
- ISDAs and related documentation with counterparties.
- Custody and collateral management.
- Supply contracts such as advisers, IT services, proxy voting services, leases for office space etc.

It is critical to the discharge of our investment obligations that the pool of potential investment and related third parties continue to be willing to deal with us without fear of disclosure of information that they regard as proprietary and commercially sensitive.

In order to maximise returns to the funds we invest, we seek out firms and opportunities that meet our conviction hurdles and our investment needs. We may be one of a number of investors that seek access to these third parties. While we may invest considerable sums of money by New Zealand standards, the amount we trust to any one firm can often be a small fraction of the total. That amount, too, is often but a small fraction of the total sums invested, or advised upon, by the firm.

We have not undertaken comprehensive legal research on the approach of various jurisdictions to freedom of information legislation and its application in the context of sovereign wealth funds. However, we have identified some sovereign wealth funds that we consider 'peer funds' and have set out below their approach to this issue.

Peer Fund	Position under Freedom of Information Laws
Future Fund	In Australia, the Finance Minister announced in November 2009 that the Future Fund would be listed in Schedule 2 of the Freedom of Information Act 1982 (Cth), exempting the Fund from the Act in respect of requests related to acquiring, realising or managing its investments (similar to the current exemption in Schedule 2 for the Reserve Bank in respect of its open market operations and dealings in the currency market).
Canadian Pension Plan Investment Board	The head of the Canada Pension Plan Investment Board shall refuse to disclose a record requested under the Access to Information Act 1985 that contains advice or information relating to investment that the Board has obtained in confidence from a third party if the Board has consistently treated the advice or information as confidential.[3]
Public Sector Pension ("PSP") Investment Board	Under the Access to Information Act 1985, the PSP Investment Board is subject to the same exemption provision as the Canadian Pension Plan Investment Board in respect of records obtained in confidence from third parties.[4] In addition, the PSP Investment Board is further exempted from disclosure of records containing trade secrets or financial, commercial, scientific or technical information that belongs to, and has consistently been treated as confidential by the PSP Investment Board.[5] Section 20 also provides a general exemption in respect third party information, but which is subjected to a "public interest test".
OMERS Ontario Municipal Employees Retirement System	OMERS was subject to the Ontario Freedom of Information and Protection of Privacy Act ("**FOIPPA**") from 1987 until 1 July 2010. It is no longer subject to the Act as a result of an amendment to Regulation 460 (enacted under the FOIPPA). Regulation 460 sets out which bodies are classified as "institutions" and therefore subject to the requirements of the FOIPPA. OMERs was excluded from Regulation 460 as a result of the amendment that took effect on 1 July 2010.
OTPP Ontario Teachers Pension Plan	OTPP is not listed in Regulation 460 as an "institution" (see above) so it would appear that this organisation is not subject to the requirements of the FOIPPA. We have not managed to confirm whether OTPP are subject to the Act or exempt from the Act through other regulations or through its governing legislation.
CALPERS	The California Public Records Act exempts certain records held by state agencies from disclosure under the Act, including: preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business (provided that the public interest in withholding those records clearly outweighs the public interest in disclosure), information received in confidence etc. State agencies however are not prohibited from disclosing such categories of information.[6]
Queensland Investment Corporation (QIC)	Under Schedule 2 of the Right to Information Act 2009 (Qld), QIC is exempt from disclosure of information under the Act in respect of its "functions" (except as they relate to community services obligations). This will include its various investment functions
Pension Protection Fund (Note this UK fund is not considered a peer fund by us)	Under section 43 of the Freedom of Information Act 2000 (UK), information is exempt from disclosure if it constitutes a trade secret or would be likely to prejudice the commercial interests of any person (including the public authority holding it). Section 41 provides that any information is exempt if it was obtained from a third party and its disclosure would

[3] Access to Information Act 2006, c. 9, s. 148.
[4] Ibid, c. 9, s. 148.
[5] Ibid, c. 9, s. 147.
[6] Government Code Section 6254 - California Public Records Act

Peer Fund	Position under Freedom of Information Laws
	constitute a breach of confidence by any person. Both sections are subject to the section 17(3) "public interest" test.
Pension Reserves Investment Trust (PRIT) Fund. (Note this UK fund is not considered a peer fund by us)	Confidentiality of certain records. Any documentary material or data made or received by a member of the PRIM board which consists of trade secrets or commercial or financial information that relates to the investment of public trust or retirement funds, shall not be disclosed to the public if disclosure is likely to impair the government's ability to obtain such information in the future or is likely to cause substantial harm to the competitive position of the person or entity from whom the information was obtained. The provisions of the open meeting law shall not apply to the PRIM board when it is discussing the information described in this subdivision. This subdivision shall apply to any request for information covered by this subdivision for which no disclosure has been made by the effective date of this subdivision.[7]

The Guardians itself does generate 'trade secrets' and confidential (including inside information) information. Accordingly, we think that an amendment to clarify that the section 9(2) grounds also apply to information generated by the agency would be desirable.

Q19 Do you agree that the official information legislation should continue to apply to information in which intellectual property is held by a third party?

No specific comment at this time.

Q20 Do you have any comment on the application of the OIA to research work, particularly that commissioned by third parties?

No specific comment at this time.

Q21 Do you think the public interest factors relevant to disclosure of commercial information should be included in guidelines or in the legislation?

We consider that the purpose and the activities of the organisation are relevant to the public interest factors. It is difficult to assess the public interest in a vacuum without taking into account the reason Parliament established the organisation at the heart of the request, and the activities associated with that purpose.

We agree that these factors are better left to guidelines, case notes and discussion.

Q22 Do you experience any other problems with the commercial withholding grounds?

To date we have had few requests where we have had to consider the application of these grounds, particularly in the context of specific investments or investment managers. We think that such requests are likely to increase as the

[7] Mass General Law Chapter 32 Section 23 (management of retirement funds).

Fund grows in size and becomes better known through its activities in New Zealand and offshore. Should that occur and we are unable to withhold commercially sensitive information, we consider this will severely curtail our access to investment opportunities. However, this is yet to be tested.

6. Protecting privacy

Q23 Which option do you support for improving the privacy withholding ground:

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?

No specific comment at this time.

Q24 Do you think there should be amendments to the Acts in relation to the privacy interests of:

(a) deceased persons?

(b) children?

No specific comment at this time.

Q25 Do you have any views on public sector agencies using the OIA to gather information about individuals?

No specific comment at this time.

7. Other withholding grounds

Q26 Do you agree that no withholding grounds should be moved between the conclusive and non-conclusive withholding provisions in either the OIA or LGOIMA?

No specific comment at this time.

Q27 Do you think there should be new withholding grounds to cover:

(a) harassment;

(b) the protection of cultural values;

(c) anything else?

We note that the Issues Paper does not discuss the withholding ground section 9(2)(k) (information may be withheld if that is necessary to prevent the disclosure or use of official information for improper gain or improper advantage). The Law Commission states[8] that it might be said that one of the withholding grounds in the Act assumes a knowledge of purpose. For the reasons outlined in the Issues Paper under "Purpose of Request", it is likely that there is little value in requiring requesters to provide the purpose of their request and their real name. However, this does give rise to the question as to whether the ground in 9(2)(k) is of any use. Consideration could be given to reformulate the grounds so that the agency can form the reasonable view that the information could be used for improper gain or improper advantage based on the facts and circumstances existing at the time of the request.

Q28 Do you agree that the "will soon be publicly available" ground should be amended as proposed?

No specific comment at this time.

Q29 Do you agree that there should be a new non-conclusive withholding ground for information supplied in the course of an investigation?

No specific comment at this time.

Q30 Do you have any comments on, or suggestions about, the "maintenance of law" conclusive withholding ground?

No specific comment at this time.

8. The Public Interest Test

Q31 Do you agree that the Acts should not include a codified list of public interest factors? If you disagree, what public interest factors do you suggest should be included?

No specific comment at this time.

Q32 Can you suggest any statutory amendment which would clarify what "public interest" means and how it should be applied?

No specific comment at this time.

Q33 Do you think the public interest test should be contained in a distinct and separate provision?

[8] Ibid. section 9.4

No specific comment at this time.

Q34 Do you think the Acts should include a requirement for agencies to confirm they have considered the public interest when withholding information and also indicate what public interest grounds they considered?

No. We do not think this should be legally required. The legal requirement for agencies to undertake this assessment exists already. This would be better addressed by further information and discussion on the application of the current law.

Practically, failure to undertake this assessment is likely to become apparent through Ombudsman review or subsequent information requests.

9. Requests – Some problems

Q35 Do you agree that the phrase "due particularity" should be redrafted in more detail to make it clearer?

Yes. We think your suggested wording ("The request must be clear, and should refer as precisely as possible to the information that is required.") is clearer for the requester and, as a result, will assist the agency. We note also that additional help should be given, particularly to smaller agencies with fewer resources to facilitate a discussion with the requester with the aim of defining more closely what the requester is looking for. This would save time for both the requester and the agency and likely produce a more satisfactory outcome for the requester in terms of information gained.

Q36 Do you agree that agencies should be required to consult with requesters in the case of requests for large amounts of information?

No. This should not be made a requirement. There is incentive for the agency to do this now as outlined above. We think adding additional requirements on the agency is likely to be less effective than ensuring that agencies understand the benefits of consultation with the requester.

10. Processing requests

Q37 Do you agree the Acts should clarify that the 20 working day limit for requests delayed by lack of particularity should start when the request has been accepted?

Yes.

Q38 Do you agree that substantial time spent in "review" and "assessment" of material should be taken into account in assessing whether material can be released, and that the Acts should be amended to make that clear?

Yes.

Q39 Do you agree that "substantial" should be defined with reference to the size and resources of the agency considering the request?

Yes.

Q40 Do you have any other ideas about reasonable ways to deal with requests that require a substantial amount of time to process?

No.

Q41 Do you agree it should be clarified that the past conduct of a requester can be taken into account in assessing whether a request is vexatious?

No. Formerly vexatious persons should have the right for each case to be considered on its merits. As a practical matter, a request from a formerly vexatious requester will put agencies on alert to the need to examine the request critically. Similarly, we imagine the Ombudsman would utilise a similar approach should the request require the involvement of the Ombudsman and the Ombudsman has previous experience with the requester.

Q42 Do you agree that the term "vexatious" needs to be defined in the Acts to include the element of bad faith?

The inclusion of bad faith seems to be a higher threshold than vexatious. "Bad faith" imports elements of dishonesty and fraud whereas "vexatious" is more closely related in meaning to annoyance, harassment or abuse of the request process i.e. through continuity of requests.

Note also that neither vexatious nor bad faith deals with misuse of the regime for commercial purpose. See however improper gain or advantage under 9(2)(k).

Q43 Do you agree that an agency should be able to decline a request for information if the same or substantially the same information has been provided, or refused, to that requester in the past?

Yes.

Q44 Do you think that provision should be made for an agency to declare a requester "vexatious"? If so, how should such a system operate?

No. The cost of such a system is likely to outweigh the cost of assessing individual requests from such a person.

Q45 Do you agree that, as at present, requesters should not be required to state the purpose for which they are requesting official information nor to provide their real name?

Yes.

Q46 Do you agree the Acts should state that requests can be in oral or in writing, and that the requests do not need to refer to the relevant official information legislation?

No specific comment at this time.

Q47 Do you agree that more accessible guidance should be available for requesters?

Yes.

Q48 Do you agree the 20 working day time limit should be retained for making a decision?

Yes.

Q49 Do you agree that there should be express provision that the information must be released as soon as reasonably practicable after a decision to release is made?

No specific comment at this time.

Q50 Do you agree that, as at present, there should be no statutory requirement to acknowledge receipt of an official information request but this should be encouraged as best practice?

Yes.

Q51 Do you agree that 'complexity of the material being sought' should be a ground for extending the response time limit?

Yes.

Q52 Do you agree there is no need for an express power to extend the response time limit by agreement?

Yes.

Q53 Do you agree the maximum extension time should continue to be flexible without a specific time limit set out in statute?

Yes.

Q54 Do you agree that handling urgent requests should continue to be dealt with by

Ombudsmen guidelines and there is no need for further statutory provision?

Yes.

Q55 Do you agree there should be clearer guidelines about consultation with ministerial offices?

Yes. In particular a minimum time for notification from one agency to another of a request relevant to that agency in order to facilitate data gathering and assessment of what, if any, information should be withheld.

Q56 Do you agree there should not be any mandatory requirement to consult with third parties?

No.

Q57 Do you agree there should be a requirement to give prior notice of release where there are significant third party interests at stake?

No. Most agencies will either be required to do this under the contracts they have with third parties or will recognise that it is prudent to advise third parties of this matter. Including additional obligations (with the attendant consideration of the implications of not providing notice) would seem to overcomplicate the legislation.

However, if it was considered that notice should be legislated, then we consider that the formulation recommended ("notice would be required to third parties where there is good reason for withholding information, but the agency considers this to be outweighed by public interest factors.") is appropriate.

Q58 How long do you think the notice to third parties should be?

No specific comment at this time.

Q59 Do you agree there should be provision in the legislation to allow for partial transfers?

Yes.

Q60 Do you agree there is no need for further statutory provision about transfer to Ministers?

No specific comment at this time.

Q61 Do you have any other comment about the transfer of requests to ministers?

No specific comment at this time.

Q62 Do you think that whether information is released in electronic form should continue to depend on the preference of the requester?

Yes.

Q63 Do you think the Acts should make specific provision for metadata, information in backup systems and information inaccessible without specialist expertise?

It may be better that this is addressed by amending section 18(f) (that the information requested cannot be made available without substantial collation or research). In particular, extending the concept of substantial collation or research to substantial resources expended.

Q64 Should hard copy costs ever be recoverable if requesters select hard copy over electronic supply of the information?

No specific comment at this time.

Q65 Do you think that the official information legislation needs to make any further provision for agencies to place conditions on the re-use of information, or are the current provisions sufficient?

We think that practically it would be difficult and expensive to enforce any condition on use of released material by the recipient. Expressly providing for the ability to impose conditions in the Act would do little to alter this unless this was coupled with enforceability provisions which would seem inconsistent with the thrust of the Act.

Q66 Do you agree there should be regulations laying down a clear charging framework for both the OIA and the LGOIMA?

No specific comment at this time.

Q67 Do you have any comment as to what the framework should be and who should be responsible for recommending it?

No specific comment at this time.

Q68 Do you agree that the charging regime should also apply to political party requests for official information?

No specific comment at this time.

11. Complaints and Remedies

Q69 Do you agree that both the OIA and LGOIMA should set out the full procedures followed by the Ombudsmen in reviewing complaints?

Yes.

Q70 Do you think the Acts provide sufficiently at present for failure by agencies to respond appropriately to urgent requests?

Yes.

Q71 Do you agree with the existing situation where a person affected by the release of their information under the OIA or the LGOIMA cannot complain to the Ombudsman?

Yes. We think that this would:

- add a whole new level of complexity and costs to the regime;
- have the effect of making agencies more cautious about releasing information; and
- do little to 'rectify' the situation as it occurs once the information is made available.

Q72 Do you agree there should be grounds to complain to the Ombudsmen if sufficient notice of release is not given to third parties when their interests are at stake?

If notice requirements are introduced then it makes sense to introduce complaint mechanisms.

Q73 Do you agree that a transfer complaint ground should be added to the OIA and the LGOIMA?

No specific comment at this time.

Q74 Do you think there should be any changes to the processes the Ombudsmen's follows in investigating complaints?

No specific comment at this time.

Q75 Do you agree that the Ombudsmen should be given a final power of decision when determining an official information request?

Yes, provided that decisions of the Ombudsman remain subject to judicial review where the Ombudsman makes a procedural error, including in circumstances where "the Ombudsman is plainly and demonstrably wrong".[9]

This approach ensures that the decision making process is not drawn out and provides certainty in circumstances where contracts require the Guardians not to disclose information except where required by law.

This approach also contains costs associated with OIA requests and is an effective forum for lay persons to participate which is critical given the very purpose of the Act is aimed at enabling lay persons to have access to information.

Q76 Do you agree that the veto power exercisable by Order in Council through the Cabinet in the OIA should be removed?

Yes. To preserve the separation of powers, the Executive should not be left to determine the extent of its own disclosure of official information.

Q77 Do you agree that the veto power exercisable by a local authority in the LGOIMA should be removed?

No specific comment at this time.

Q78 If you believe the veto power should be retained for the OIA and LGOIMA, do you have any comment or suggestions about its operation?

No specific comment at this time.

Q79 Do you agree that judicial review is an appropriate safeguard in relation to the Ombudsmen's recommendations and there is no need to introduce a statutory right of appeal to the Court?

Yes, having a statutory right of appeal will increase uncertainty (as it is more difficult to determine the point at which disclosure is required by law) and compliance costs.

Q80 Do you agree that the public duty to comply with an Ombudsman's decision should be enforceable by the Solicitor -General?

Yes.

Q81 Do you agree that the complaints process for Part 3 and 4 official information should

[9] *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180.

be aligned with the complaints process under Part 2?

No specific comment at this time.

Q82 Do you agree that, rather than financial or penal sanctions, the Ombudsmen should have express statutory power to publicly draw attention to the conduct of an agency?

No specific comment at this time.

Q83 Should there be any further enforcement powers, such as exist in the United Kingdom?

No. There does not appear to be substantial non-compliance with the Act which would warrant the additional cost and complexity of this. As noted above, there are considerable commercial and reputational imperatives which put pressure on agencies to comply. Incentives through matters such as the KPIs of Chief Executives governed by the State Sector Act may also be a more effective way of addressing this issue.

Proactive Disclosure

Q84 Do you agree that the OIA should require each agency to publish on its website the information currently specified in section 20 of the OIA?

No. Information required to be provided by an agency should be considered upon the establishment of the agency and specified in its establishing legislation, as it is for the Guardians.

Each agency differs in terms of its size and nature and a one size fits all disclosure requirement is neither needed nor likely to add anything of use to those seeking specific information held by an agency.

Q85 Do you think there should be any further mandatory categories of information subject to a proactive disclosure requirement in the OIA or LGOIMA?

We consider that mandatory disclosure of information is better dealt with by the legislation governing the entity. For instance the publishing of an annual report (including reference to investment managers used) and statement of intent as per the Crown Entities Act 2004 and the governing legislation specific to the Guardians and the Fund e.g. the New Zealand Superannuation and Retirement Income Act 2001.

Oversight and other functions

Q86 Do you agree that the OIA and LGOIMA should require agencies to take all reasonably practicable steps to proactively release official information?

No. Agencies should be encouraged to be transparent and those who seek to reduce time spent on reactively communicating through OIA requests will proactively release relevant information without being 'required' to.

Q87 Should such a requirement apply to all central and local agencies covered by the OI legislation?

We think there is a distinction between crown entities which are largely commercial in operation and public decision or policy making bodies. Such mandatory disclosure may be more relevant to the latter.

Q88 What contingent provision should the legislation make in case the "reasonably practicable steps" provision proves inadequate? For example, should there be a statutory review or regulation making powers relating to proactive release of information?

No specific comment at this time.

Q89 Do you think agencies should be required to have explicit publication schemes for the information they hold, as in other jurisdictions?

No. Particularly not in respect of agencies such as the Guardians.

Q90 Do you agree that disclosure logs should not be mandatory?

Yes.

Q91 Do you agree that section 48 of the OIA and section 41 of the LGOIMA which protect agencies from court proceedings should not apply to proactive release?

If proactive release is mandated then the agency should be afforded protection for that release (and this would extend to those using the information). If the release is voluntary then the agency should not have protection from court proceedings.

Q92 Do you agree that the OIA and the LGOIMA should expressly include a function of providing advice and guidance to agencies and requesters?

Yes, provided that this is streamlined and provided efficiently i.e. online.

Q93 Do you agree that the OIA and the LGOIMA should include a function of promoting awareness and understanding and encouraging education and training?

Yes. This is central to the effective operation of the Act and the fulfilment of its purpose.

Q94 Do you agree that an oversight agency should be required to monitor the operation of the OIA and LGOIMA, collect statistics on use, and report findings to Parliament annually?

No. The replication of agencies and reporting and the compliance costs that come with such structures should be avoided unless there is a compelling reason for their implementation. The operation of the Act should be able to be adequately monitored via the sample seen by the Ombudsman each year.

Q95 Do you agree that agencies should be required to submit statistics relating to official information requests to the oversight body so as to facilitate this monitoring function?

See above at 94.

Q96 Do you agree that an explicit audit function does not need to be included in the OIA or the LGOIMA?

See above at 94.

Q97 Do you agree that the OIA and the LGOIMA should expressly enact an oversight function which includes monitoring the operation of the Acts, a policy function, a review function, and a promotion function?

See above at 94.

Q98 Do you agree that the Ombudsmen should continue to receive and investigate complaints under the OIA and the LGOIMA?

Yes.

Q99 Do you agree that the Ombudsmen should be responsible for the provision of guidance and advice?

Yes.

Q100 What agency should be responsible for promoting awareness and understanding of the OIA and LGOIMA and arranging for programmes of education and training for agencies subject to the Acts?

The Ombudsmen would seem best placed to carry out this function.

Q101 What agency should be responsible for administrative oversight of the OIA and the LGOIMA? What should be included in the oversight functions?

No specific comment at this time.

Q102 Do you think an Information Commissioner Office should be established in New Zealand? If so, what should its functions be?

No. See above at 94. If anything the Ombudsman should be provided with more resources.

Q103 If you think an Information Commissioner Office should be established, should it be standalone or be part of another agency?

See above at 102.

Local Government Official Information and Meetings Act 1987

Q104 Do you agree that the LGOIMA should be aligned with OIA in terms of who can make requests and the purpose of the legislation?

No specific comment at this time.

Q105 Is the difference between the OIA and LGOIMA about the status of information held by contractors justified? Which version is to be preferred?

It is difficult to justify any difference between these Acts. The Guardians prefer the LGOIMA formulation for the fact that it acknowledges the practical fact that if an agency does not hold or have access to information it cannot provide it to others.

Other Issues

Q106 Do you agree that the official information legislation should be redrafted and re-enacted.

No specific comment at this time.

Q107 Do you agree that the OIA and the LGOIMA should remain as separate Acts?

No specific comment at this time.

Q108 Do you have any comment on the interaction between the PRA and the OI

legislation? Are any statutory amendments required in your view?

No. We see the Acts as being complementary. The PRA defines the scope of information that must be held by agencies in accordance with normal, prudent business practice and the OIA provides for public access to information held by an agency. Whether the definition of "public record" is sufficient for its purpose under the PRA is a matter that justifies a separate Commission inquiry. The definition of "information" under the OIA does not seem to us to be relevant to such an inquiry.

Leigh Alderson

From: Sarah Owen
Sent: Wednesday, December 22, 2010 6:40 PM
To: Paul Gargan; Paul W. Gregory; Cristina Billett
Subject: OIA Submission Final
Attachments: SUPERDOCS-201270-R-Draft_2_of_Submission_to_Law_Commission__OIA_21_December_2010.DRF

Please see attached.
Any final comments please let me know. Have to send off by Christmas.

Head of Comms- thanks very much for your input on this already – it is as you say BBBS.

Kind regards
Sarah

201570

Law Commission's The Public's Right to Know

+The Guardians and the New Zealand Superannuation Fund

1. The Guardians and the New Zealand Superannuation Fund

1.1 This submission is made by Guardians of New Zealand Superannuation (Guardians). The Guardians is an autonomous crown entity that was established in 2002 to manage and administer the New Zealand Superannuation Fund (the Fund). The Fund is not a legal entity but a pool of Crown assets. Fund size as at 31 October 2010 is NZD17.66 billion

2. Commercial nature of our business

2.1 The Guardians is under a statutory duty to invest the investment funds under their management on a prudent, commercial basis and to manage and administer those funds in a manner consistent with:

- Best-practice portfolio management.
- Maximising return without undue risk.
- Avoiding prejudice to New Zealand's reputation as a responsible member of the world community.

2.2 The Guardians undertake a range of investment activities that it believes will add value over and above the returns generated by passive investments in the asset classes contained within the reference portfolio. This includes three broad areas of ~~added-value~~ value-adding activity.

2.3 ~~Firstly,~~ The first category of value-adding activity is capturing active returns through investing in private markets and/or selecting and investing through active managers. For instance investment strategies in:

- Infrastructure (e.g. purchase with Infratil of Shell downstream assets)~~.~~
- Timber (eg. Ownership of Kaingaroa Forest in partnership with Harvard Endowment Fund)
- Private Equity and Property (investment in multiple private equity and private equity real estate partnerships and other collective investment vehicles)
- Rural land
- New Zealand direct

2.4 The second is~~Secondly,~~ strategic tilting or 'swimming against the tide'. The third category is

~~2.4~~ ~~Thirdly,~~ portfolio completion (closely managing fees and costs).

2.5 Like any other investment business, we have commercial relationships with investment managers, private equity funds, counterparties and suppliers. The agreements governing these relationships ~~which~~ includes terms that are commercially sensitive for the third party and/or for us. In addition, from time to time we hold market sensitive information (ie inside information) and have procedures in place to manage the risk under insider trading laws.

~~2.5~~

Formatted: Indent: Left: 0.45", No bullets or numbering

Formatted: Indent: Left: 0.45", No bullets or numbering

Formatted: Indent: Left: 0.45", No bullets or numbering

2.6 More information about how we invest the Fund can be found in our annual report (Copy enclosed), Statement of Intent and www.nzsuperfund.co.nz.

Field Code Changed

3. Protection against certain actions potentially unavailable

3.1 As discussed below (Section 5), we consider there is risk to us of reverse freedom of information complaints in the context of our commercial activities.

3.2 The protections in the Act (section 48) may not be available to us. In particular, we make off-shore investments on a regular basis in accordance with agreements that are subject to foreign laws. Any bar on proceedings in the Act will not necessarily effectively protect the Guardians from suit because a New Zealand statute cannot directly speak to the Courts of another jurisdiction. That is, a New Zealand statute cannot direct a foreign court to excuse a breach of that country's own laws. Whilst defences under private international law may be available in certain cases, this highlights the need for the commercial prejudice and subject to confidence grounds to be adequately robust and flexible enough to protect agencies like the Guardians.

~~3.~~4. The Guardians' Approach to Transparency

4.1 We have included in our Annual Report (pages 34/35) a description of our approach to transparency. *[PG's comment not included as then need to refer to public interest test etc as refers to OIA tests.]*

Formatted: Font: 8 pt, Italic

Formatted: Font: 8 pt, Italic

~~3.1~~4.2 ~~This includes a description of~~ The Annual Report section we have referred to also describes the broad range of the material we proactively release as well as our performance in transparency surveys by third parties. The San Fransisco-based Sovereign Wealth Fund Institute publishes the Linaburg-Maudell Transparency Index and the Guardians has rated 10/10 since inception of the index. We also include reference to the survey published by the Washington-based Carnegie Endowment for World Peace where the Guardians were rated a clear first among the 26 sovereign wealth funds which were signatories to the Santiago Principles.

Formatted: Indent: Left: 0.45", No bullets or numbering

~~4.~~5. The Guardians' History of Official Information Act Requests

5.1 As a relatively young organisation we have had limited experience with the application of the Act. ~~The most focus has~~ Requesters have tended to focus ~~been~~ on our decisions in relation to responsible investment issues such as investment in companies involved in the nuclear weapons industries. We have also received a number of requests relating to our approach to investing in New Zealand.

Formatted: Font: (Default) Times New Roman, 12 pt

We have received approximately 30 requests. We have provided the information as soon as reasonably practicable and have never exceeded the 20 working-day limit. Our decisions to withhold have been referred to the Ombudsman on several occasions and were queried by the Ombudsman on two occasions. In keeping with what we have said about being a relatively young organisation, the appeals to the Ombudsman were for older requests and, as we have become more familiar with the process, our response times have sharply declined. We believe we have a constructive relationship with the Ombudsman.

Formatted: Indent: Left: 0.45", No bullets or numbering

4.15.2

~~[*Discuss what data we had had on – how many we have had/how many have gone to the Ombudsman etc.]*~~

4.25.3 Queries ~~The~~ where we have had ~~area where we have had little~~ least experience to date but which we consider will be the most difficult for us, is where we are asked for information relating to specific investments or proposed investments, investment managers or the investment activities and terms such as fees of those managers

4.3 We think that such requests are likely to increase as the Fund grows in size and becomes better known through its activities in New Zealand and offshore. Anecdotally (through conversations with peer funds and general searches), we ~~think~~ understand that freedom of information legislation ~~is~~ can be used by people who are more interested in gaining insights for commercial reasons ~~then~~ than to scrutinize the machinery of government.

5.6. Response to the Law Commission's Issues Paper

5.16.1 We have set out the questions in the Issues in the attached appendix and outline our thoughts in respect of those questions where we consider we can provide most perspective.

6.7. Questions and Contacts

6.17.1 Please contact us should you require any elaboration on any of the responses or comments made in our letter to you.

Yours faithfully

[Adrian/Tim/Sarah?] {Tim pls discuss]

ISSUES PAPER - QUESTIONS

2. Scope of the Acts

Q1 Do you agree that the Schedules to each Act (OIA and the LGOIMA) should list every agency that they cover?

No specific comment at this time.

Q2 Do you agree that the schedules to the OIA and LGOIMA should be examined to eliminate anomalies and ensure that all relevant bodies are included?

No specific comment at this time.

Q3 Do you agree that SOEs and other crown entity companies should remain within the scope of the OIA?

No specific comment at this time.

Q4 Do you agree that council controlled organisations should remain within the scope of the LGOIMA?

No specific comment at this time.

Q5 Do you agree that the Parliamentary Counsel Office should be brought within the scope of the OIA?

No specific comment at this time.

Q6 Do you agree that the OIA should specify what information relating to the operation of the Courts is covered by the Act?

No specific comment at this time.

Q7 Should any further categories of information be expressly excluded from the OIA and the LGOIMA?

Please note our comments under the heading "Protecting Commercial Interests" reference Chapter 5.

3. Decision-making

Q8 Do you agree that the OIA and the LGOIMA should continue to be based on a case-by-case model?

Yes. We consider that an approach such as exemptions by categories of document is clumsy, likely to continually need to be updated and does not address the key point which is the substance of the information.

Q9 Do you agree that more clarity and more certainty about the official information withholding grounds can be gained through enhanced guidance rather than through prescriptive rules, redrafting the grounds or prescribing what information should be released in regulations?

Yes. We think that any concerns with consistency of approach would be better addressed through a focus on education, guidelines and the publishing of case notes.

Q10 Do you agree there should be a compilation, analysis of, and commentary on, the case notes of the Ombudsmen?

Yes. See above

Q11 Do you agree there should be greater access to, and reliance on, the casenotes as precedents?

Yes. See above. ~~However, *[To discuss RmcV – what if the Ombudsman has got it wrong – what grounds for change?*~~

Q12 Do you agree there should be a reformulation of the guidelines with greater use of case examples?

Yes

Q13 Do you agree there should be a dedicated and accessible official information website?

Yes

4. Protecting good government

Q14 Do you agree that the "good government" withholding grounds should be redrafted?

We have no comment on section 9(2)(f)(Constitutional Conventions).

We consider that a situation where advice is given orally, or simply not given at all and the associated risks to the public record are real. In our view, while the use of the ground in 2(g)(free and frank/protection) is likely to arise infrequently, it is an important protection. For ease of reference we record the section 2(g):

- g) maintain the effective conduct of public affairs through—
  - (i) the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty; or
  - (ii) the protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment, or

We do not understand the following statement by the Law Commission:

"However, given that all these bodies have relationships with Ministers we are currently not ~~included~~ inclined to make a change, but ..."[1]

Our understanding of this provision is that it applies to the expression of opinions ~~may be~~ between members/employees of an organization in the course of their duty and need not be with the Minister. We would be concerned if ~~If it is~~ it was the Law Commission's view that this ground should only apply to communications by or between or to Ministers of the Crown it should be explicit. ~~[Discuss Russell McVeagh].~~

Formatted: Font: Not Italic

We consider that the questions that the Ombudsman poses to assist in the application of this ground are helpful[2]. However, the hurdle for reliance on this ground set out in the commentary by the Ombudsman ~~suggests that the hurdle for reliance on this ground~~ is too high, (especially when coupled with the public interest test) ~~is too high. [*Flesh out*~~

Formatted: Font: Not Italic

For example, in order for the Guardians to be successful it is important that a range of investment ideas, including those at the untested or more extreme end of the spectrum, are able to be tabled and debated without fear of individuals who promote those ideas being ridiculed or exposed to undue criticism. If the threshold for this ground is set too high individuals will be incentivized to act in a manner that protects their interests. A situation where more and more advice is provided orally, or not at all, is contrary to good policy and the principles of open access to information that the Act seeks to protect.

A balance must be struck.

~~]~~

Formatted: Font: Not Italic

Q15 What are your views on the proposed reformulated provisions relating to the "good government" grounds?

We agree that the grounds should cover both 'opinions' and 'the provision of advice'. ~~We are not clear why the proposed (v) is limited to Ministers.[Discuss lin light of point above- Russell McVeagh.]~~

5. Protecting commercial interests

Q16 Do you think the commercial withholding ground should continue to be confined to situations where the purpose is to make a profit?

For ease of reference we record the section:

[1] Law Commission's Issues paper, Paragraph 4.39.
[2] Ibid Paragraph 4.29

(b) protect information where the making available of the information—
- (i) would disclose a trade secret; or
- (ii) would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; or

We think that the approach taken by the Ombudsman is more restrictive than what is contemplated by the wording of the Act itself and that such a reading down is not justified.

Whether a party's commercial position has been prejudiced should be addressed on a case by case basis and the nature or purpose of the organization should merely be a part of that consideration rather than a qualifying hurdle.

In particular, a person who is in a "commercial position" may or may not be in the business of making a profit. In addition, in theory a person could be in a commercial position but choose not to utilise that commercial position. However, such a person would wish to preserve that position to ensure it was available for use in the future. For instance, specific knowledge gained by the Guardians in the course of the development of a strategic tilting framework could have value to a third party. However, the Guardians may not wish to 'sell' that intellectual property and indeed may be prepared to licence it at no cost to say, another crown financial institute.

Q17 If you favour a broader interpretation, should there be a statutory amendment to clarify when the commercial withholding ground applies?

The Guardians favour the deletion of the word "unreasonably" which introduces an unnecessary and unhelpful hurdle that is adequately addressed by the application of the public interest test.

The Guardians favour the wording in section 43(2) of the Freedom of Information Act 2000 (UK): "***would, or would be likely to, prejudice the commercial interests of any person*** *(including the public authority holding it)*"

Whether a party's commercial position is or is likely to be prejudiced should be the intial enquiry. Once this is established one applies the public interest test to determine whether it is reasonable or appropriate to nevertheless disclose the information. ~~We note that the Issues Paper does not focus on the word "unreasonably" and the meaning of that. Is it necessary to have such a high threshold in the test – particularly where there is the overriding public interest assessment?~~

Q18 Do you think the trade secrets and confidentiality withholding grounds should be amended for clarification?

~~We note that the Issues Paper does not focus on the word "unreasonably" and the meaning of that. Is it necessary to have such a high threshold in the test – particularly where there is the overriding public interest assessment?~~

Formatted: Indent: Left: 0.3"

The preliminary work we have done (as briefly outlined below) suggests to us that we may be have less ability to preserve commercially sensitive information than other funds and this may negatively impact on our ability to do business. In addition it increases the risk of reverse freedom of information complaints where we may not be afforded the protection under the Act (this is described in our covering letter). We would welcome consideration by the Law Commission of this issue.

As you will anticipate from the nature of our activities, one of the key grounds for withholding information that we are likely to seek reliance on is the confidentiality obligations as set out below:

> (ba) protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—
> (i) would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or
> (ii) would be likely otherwise to damage the public interest; or

Obligations of confidentiality are expressly provided for in many types of third parties ~~with whom we engage~~ engagements and in a number of transactions. For instance:

- Investment management agreements.
- Limited partnership agreements in the context of private equity or real estate funds.
- Negotiations and due diligence in the context of potential acquisitions of businesses or shares.
- The provision of information by managers in the context of our assessment of them including such information as the particularities of investment strategies.
- ISDAs and related documentation with counterparties.
- Custody and collateral management.
- Supply contracts such as advisers, IT services, proxy voting services, leases for office space etc.

It is critical to the discharge of our investment obligations that the pool of potential investment and related third parties continue to be willing to deal with us without fear of disclosure of information that they regard as proprietary and commercially sensitive.

In order to maximise returns to the funds we invest, we seek out firms and opportunities that meet our conviction hurdles and our investment needs. We may be one of a number of investors that seek access to these third parties. While we may invest invest considerable sums of money by New Zealand standards, the amount we trust to any one firm can often be a small fraction of the total. That amount, too, is often but a small fraction of the total sums invested, or advised upon, by the firm.

We have not undertaken comprehensive legal research on the approach of various jurisdictions to freedom of information legislation and its application in the context of sovereign wealth funds. However, we have identified some sovereign wealth funds that we have ~~identified as~~ consider 'peer funds' and set out below their approach to this issue.