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 oblained 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

[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

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.)

	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 (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: 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, W~~we ~~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.

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.

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.

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?

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.

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?

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

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.]~~

~~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.~~

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?

Formatted: Font: 11 pt

Formatted: Font: 11 pt

Formatted: Font: 11 pt

Formatted: Font: 11 pt

~~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

Leigh Alderson

From: Adele Wilson [adele.wilson@russellmcveagh.com]
Sent: Wednesday, December 22, 2010 3:29 PM
To: Sarah Owen
Cc: Reuben van Werkum
Subject: FW: OIA review
Attachments: 2225644 v1 Guardian's OIA submission - compare.docx; 2224349 v5 Official Information Act - The Public's Right to Know - December 2010.doc

Sarah

The submission reads well.

Our changes are set out in the attached mark-up. The majority are typographical.

We have also attached a clean copy.

If it would be faster for us to insert our changes in your master and have that formatted here feel free to send us the current master and we will get that done.

Apologies for the delay in getting this through to you.

Kind regards

Adele Wilson
ASSOCIATE

Russell McVeagh, Vero Centre, 48 Shortland Street, PO Box 8, Auckland 1010, New Zealand
DIRECT PHONE 64 9 367 8329 | DIRECT FAX 64 9 367 8595

adele.wilson@russellmcveagh.com | **www.russellmcveagh.com**

201571

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 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.

Formatted: Font: Bold

Formatted: Font: Bold

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 -value-adding activity.

2.3 -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 (ege.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.

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

2.4 portfolio completion (closely managing fees and costs).

Formatted: Indent: Hanging: 0.45", Outline numbered + Level: 2 + Numbering Style: 1, 2, 3, ... + Start at: 1 + Alignment: Left + Aligned at: 0.2" + Indent at: 0.45"

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 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 (iei.e. 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 (Copycopy enclosed), Statement of Intent and on our website (www.nzsuperfund.co.nz-.).

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.

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.]*

4.2 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.

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. 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.

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.

~~5.2~~

Formatted: Font: Bold, English (New Zeal

Formatted: Justified, Indent: Left: 0.49", Don't add space between paragraphs of the same style

Formatted: Font: Arial, 11 pt

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

~~5.3~~5.2 Queries -where we have had -least experience to date but which we consider will be the most difficult for us, ~~is~~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

5.3 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 understand that freedom of information legislation -can be used by people who are more interested in gaining insights for commercial reasons rather than to ~~scrutinize~~scrutinise the machinery of government.

6. Response to the Law Commission's Issues Paper

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.

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

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

Formatted: List Paragraph, Indent: Left: 0.45", Don't add space between paragraphs of the same style, Pattern: Clear

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.

Formatted: Font: Arial, 11 pt, English (U.S.)
Formatted: Indent: First line: 0.3"

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.

Formatted: Font: Arial, 11 pt, English (U.S.)
Formatted: Indent: First line: 0.3"

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

No specific comment at this time.

Formatted: Font: Arial, 11 pt

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

No specific comment at this time.

Formatted: Font: Arial, 11 pt, English (U.S.)
Formatted: Normal, Indent: First line: 0.3

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).

Formatted: Font: Arial, 11 pt, English (U.S.)
Formatted: Indent: Left: 0.25"
Formatted: Indent: Left: 0.25", First line: 0"

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/~~protection~~" 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

Formatted: Indent: Left: 1", No bullets or numbering

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 ~~organization~~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 ~~it should be explicit~~.

We consider that the questions that the Ombudsman poses to assist in the application of this ground are helpful[2], [3] 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 ~~incentivized~~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'.

5. Protecting commercial interests

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

Q16Do 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 ~~organization~~organisation should ~~merely~~ be a ~~part of~~factor taken into account in making that ~~consideration~~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 licence it at no cost to say, another crown financial institute.

Formatted: Font: Times New Roman Mäori, 12 pt, English (New Zealand)

Formatted: Indent: Left: 0"

Q17If 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 ~~intial~~initial enquiry. Once this is established ~~one applies~~, the public interest test is applied to determine whether it is reasonable or appropriate to nevertheless disclose the information.

Q18Do you think the trade secrets and confidentiality withholding grounds should be amended for clarification?

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

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~~ 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~~ 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.

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

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~~ consider 'peer funds' and set out below their approach to this issue.

Formatted: Indent: Left: 0"

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.[4]
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.[5] 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.[6] 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 ~~1,~~ 2010. It is no longer subject to the Act as a result of an amendment to ~~the regulations~~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	~~We think that the Ontario Freedom of Information and Protection of Privacy Act does not apply but have not managed to confirm this~~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.[7]
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

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

Formatted: Font: Arial, 9 pt
Formatted: Font: Arial, 9 pt, Not Superscript/ Subscript
Formatted: Font: 9 pt, Not Superscript/ Subscript
Formatted: Font: 9 pt
Formatted: Font: 9 pt, Not Superscript/ Subscript
Formatted: Font: Arial, 9 pt
Formatted: Font: 9 pt, Not Superscript/ Subscript
Formatted: Font: Arial, 9 pt

	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[8]; [9]

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.

Formatted: Indent: Left: 0"

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 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.

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

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

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, 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. -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

[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]]

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?

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

Formatted: Normal, Indent: First line: 0.3", Tab stops: Not at 0.59"

Formatted: Font: Arial, Bold

Formatted: Font: Times New Roman Māori, English (New Zealand)

Formatted: Normal, Indent: Left: 0.3", Hanging: 1.7", Tab stops: Not at 0.59"

No specific comment at this time.

Q27Do 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 ~~withhold~~withheld if that is necessary to prevent the disclosure or use of official information for improper gain or improper advantage~~.")).~~). The Law Commission states[10] 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 ~~in~~ the ground in 9(2)(k) ~~provides~~is of any ~~practical grounds for withholding information.~~ 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.

Formatted: Indent: Left: 0.25", First line: 0"

Q28Do you agree that the "will soon be publicly available" ground should be amended as proposed?

No specific comment at this time.

Q29Do 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.

Q30Do 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

Formatted: Font: Arial, Bold, English (New Zealand)

Q31Do 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?

[10] Ibid. section 9.4

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.

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 ~~he or she~~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.

Formatted: Font: 11 pt

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.

Formatted: Indent: Hanging: 0.05"

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.

Formatted: Indent: Left: 0.25"

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

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

Formatted: List Paragraph, Tab stops: Not at 0.59"

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?

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

Formatted: Normal, Indent: Left: 0.3", Tab stops: Not at 0.59"

Yes.

Formatted: Indent: Left: 0.25"

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.

Formatted: Normal

Formatted: Font: Times New Roman Māori, 12 pt, English (New Zealand)

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.

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

Formatted: Indent: Left: 0.25"

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.

Formatted: Indent: Left: 0.25"

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

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

Yes.

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

Formatted: Indent: Left: 0.25"

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

Yes.

Formatted: Indent: Left: 0.25"

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

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.

Formatted: Indent: Left: 0.25"

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.

Formatted: Indent: Left: 0.25"

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. ~~Yes.~~ 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.

Formatted: Indent: Left: 0.25"

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

Formatted: Font: 11 pt

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

No specific comment at this time.

Formatted: Indent: Left: 0.25"

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

Yes.

Formatted: Indent: Left: 0.25"

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

No specific comment at this time.

Formatted: Indent: Left: 0.25"

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

No specific comment at this time.

Formatted: Indent: Left: 0.25"

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]~~

Formatted: Indent: Left: 0.25"

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

Formatted: List Paragraph, Indent: Left: 0.25", Tab stops: Not at 0.59"

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: Indent: Left: 0.25"

Formatted: Font: 11 pt, Not Italic

Formatted: Font: Not Italic

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.

Formatted: Indent: Left: 0.25"

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

Formatted: Indent: Left: 0.25"

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.

Formatted: Indent: Left: 0.25"

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.

Formatted: Indent: Left: 0.25"

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

No specific comment at this time.

Formatted: Indent: Left: 0.25"

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.

Formatted: Indent: Left: 0.25"

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

Yes.

Formatted: Indent: Left: 0.25"

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:

Formatted: Indent: Left: 0.25"

- add a whole new level of complexity and costs to the regime;

Formatted: Indent: Left: 0.25", First line: 0.25"

- have the ~~affect~~effect of making agencies more cautious about releasing information; and

Formatted: Indent: Left: 0.5", No bullets or numbering

Formatted: Indent: Left: 0.5", First line: 0"

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

Formatted: Indent: Left: 0.5"

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 ~~requirement~~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" ~~(*Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council (1991)*)~~.".[11]

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.

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

Formatted: Indent: Left: 0.25"
Formatted: Indent: Left: 0.25"
Formatted: English (New Zealand)
Formatted: Font: Arial, 11 pt, English (U.S.)
Formatted: List Paragraph
Formatted: Indent: Left: 0.25"
Formatted: Indent: Left: 0.25"
Formatted: Font: Arial, 11 pt, English (U.S.)
Formatted: Indent: Left: 0.25"
Formatted: Indent: Left: 0.25"

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.

Formatted: Indent: Left: 0.25"

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.

Formatted: Indent: Left: 0.25"

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.

Formatted: Indent: Left: 0.25"

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

Yes.

Formatted: Indent: Left: 0.25"

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.

Formatted: Indent: Left: 0.25"

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.

Formatted: Indent: Left: 0.25"

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~~effective way of addressing this issue.

Formatted: Indent: Left: 0.25"

Proactive Disclosure

Formatted: Indent: Left: 0", First line: 0"

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 ~~Official Information Act~~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

Formatted: Indent: Left: 0.25", First line: 0"

Formatted: Indent: Left: 0.25", First line: 0"

Formatted: Indent: Left: 0.25"

Formatted: Font: 12 pt

Formatted: Indent: Left: 0.3", Hanging: 1.7"

Formatted: Indent: Left: 0", First line: 0"

Formatted: Font: Not Bold

Formatted: Indent: Left: 0.25"

Formatted: Indent: Left: 0.25"

Formatted: Font: Arial

information?

No specific comment at this time.

Formatted: Font: 11 pt
Formatted: Indent: Left: 0.25"

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: Indent: Left: 0.25"

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

Yes.

Formatted: Font: 11 pt
Formatted: Indent: Left: 0.25"

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.

Formatted: Indent: Left: 0.25"

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.

Formatted: Font: 11 pt
Formatted: Indent: Left: 0.25"
Formatted: Font: 11 pt
Formatted: Font: Arial, 11 pt

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.

Formatted: Font: 11 pt
Formatted: Indent: Left: 0.25"
Formatted: Font: Arial, 11 pt

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.

Formatted: Font: 11 pt
Formatted: Indent: Left: 0.25"
Formatted: Font: Arial, 11 pt, English (New Zealand)

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.

Formatted: Font: 11 pt
Formatted: Font: Arial
Formatted: Indent: Left: 0.25"

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.

Formatted: Font: 11 pt
Formatted: Indent: Left: 0.25"
Formatted: Font: Arial, 11 pt

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.

Formatted: Font: 11 pt
Formatted: Indent: Left: 0.25"
Formatted: Font: Arial

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

Yes.

Formatted: Font: 11 pt
Formatted: Indent: Left: 0.25"
Formatted: Font: Arial, 11 pt

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

Yes.

Formatted: Indent: Left: 0.25"
Formatted: Font: Arial

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~~

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

Formatted: Font: 11 pt
Formatted: Font: Arial, 11 pt
Formatted: Indent: Left: 0.25"

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.

Formatted: Font: 11 pt
Formatted: Indent: Left: 0.25"

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 ~~resource~~resources.

Formatted: Font: 11 pt
Formatted: Indent: Left: 0.25"
Formatted: Font: 11 pt

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.

Formatted: Font: 11 pt
Formatted: Indent: Left: 0.25"

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.

Formatted: Font: 11 pt
Formatted: Indent: Left: 0.25"
Formatted: English (New Zealand)
Formatted: List Paragraph, Tab stops: Not 0.69"

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 ~~of~~or have access to information it cannot provide it to others.

Formatted: Normal, Indent: Left: 0.25", Add space between paragraphs of the same style

Other Issues

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

No specific comment at this time.

Formatted: Font: 11 pt
Formatted: Font: 11 pt

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

No specific comment at this time.

Formatted: Font: 11 pt
Formatted: Indent: Left: 0.25"
Formatted: Font: Arial

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.

Formatted: Normal, Indent: Left: 0.25", Tab stops: Not at 0.69"
Formatted: Font: 11 pt, English (New Zealand)

Leigh Alderson

From: Paul W. Gregory
Sent: Wednesday, December 22, 2010 9:39 AM
To: Sarah Owen; Tim Mitchell
Subject: RE: Draft 2 of OIA Submission after discussions with Russell McV and PG's feedback
Attachments: PG comments_Draft_2_of_Submission_to_Law_Commission__OIA_21_December_2010.doc

My edits on a separate document Sarah.

I have made comments where they have been sought.

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
econd 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

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~~ organisation 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 only 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 organizsation 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 licenese it at no cost to say, another crown financial instituteion.

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 initial matter for 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 of this issue 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~~ party ~~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.

Formatted: Font: (Default) Arial, 11 pt

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 have 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

[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

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.)

	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 itself 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: (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. Agreed it is fundamentally a commercial rather than a privacy issue. The privacy issue would be more a prospective employee or investment manager etc. I think a situation where a journo spotted AO having dinner with, say, an SOE CEO and wanted to make a story out of it is different. Clearly they could report the fact of the meeting without recourse to the OIA. They might want to know why and would likely speculate. We would simply employ the usual issues management response against speculation. Were they to attempt an OIA request to discover the reason for/matters discussed, then we could certainly apply the OIA commercial sensitivity grounds.]]

Formatted: Font: 9 pt, Italic

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

[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.)

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~~ 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 as we imagine it would should the request require the involvement of the Ombudsman and the Ombudsman has precedent 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?

~~[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 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. ~~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*~~

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

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

~~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 Agree with this. Instinctively, the channel through which a request is received is a clear indication of what channels the requester has access to: if they can email, they will email. In any event, we follow an electronic response with a hard copy one as a matter of practice]

Q63 Do you think the Acts should make specific provision for metadata, information in

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

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 aeffect of making agencies more cautious about releasing information;
- do little to 'rectify' the situation as it occurs once the information is made available

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

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.

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.

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.

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?

~~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.

Oversight and other functions

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

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 or~~f~~ 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.]~~.

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: 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, Bo 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

Formatted: Font: 11 pt

Formatted: Font: 11 pt

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,

Tim

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

Leigh Alderson

From: Paul W. Gregory
Sent: Tuesday, December 21, 2010 9:40 PM
To: Sarah Owen; Tim Mitchell
Subject: Re: Draft 2 of OIA Submission after discussions with Russell McV and PG's feedback

Will ask Alex but doubt it as we're not asking for exclusions etc.

From: Sarah Owen
To: Tim Mitchell; Paul W. Gregory
Sent: Tue Dec 21 20:49:10 2010
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

From: Adele Wilson [mailto:adele.wilson@russellmcveagh.com]
Sent: Tuesday, 21 December 2010 9:03 p.m.
To: Sarah Owen; Reuben van Werkum
Subject: RE: Draft 2 of OIA Submission after discussions with Russell McV and PG's feedback

,nks Sarah. Will read and revert first thing tomorrow.

Adele Wilson
ASSOCIATE

Russell McVeagh, Vero Centre, 48 Shortland Street, PO Box 8, Auckland 1010, New Zealand
DIRECT PHONE 64 9 367 8329 | DIRECT FAX 64 9 367 8595

adele.wilson@russellmcveagh.com | **www.russellmcveagh.com**

From: Sarah Owen [mailto:SOwen@nzsuperfund.co.nz]
Sent: Tuesday, 21 December 2010 8:50 p.m.
To: Adele Wilson; Reuben van Werkum
Subject: FW: Draft 2 of OIA Submission after discussions with Russell McV and PG's feedback

Hopefully you went to bed early tonight. I have circulated this to the relevant folk here. My additional changes are in purple. Please let me know if you have any comments on them.
Thanks for your help
Kind regards
Sarah

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.

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

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 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.

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

[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

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.)

	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.

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.)

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: 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 (U
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.]]***~~

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: 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
Formatted: Font: 11 pt
Formatted: Font: 11 pt
Formatted: Font: 11 pt

Leigh Alderson

From: Sarah Owen
Sent: Tuesday, December 21, 2010 8:49 PM
To: Tim Mitchell; Paul W. Gregory
Subject: Draft 2 of OIA Submission after discussions with Russell McV and PG's feedback
Attachments: SUPERDOCS-201270-R-Draft_2_of_Submission_to_Law_Commission__OIA_21_December_2010.DRF; SUPERDOCS_n201270_v1_Draft_2_of_Submission_to_Law_Commission__OIA_21_December_2010.doc

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

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:

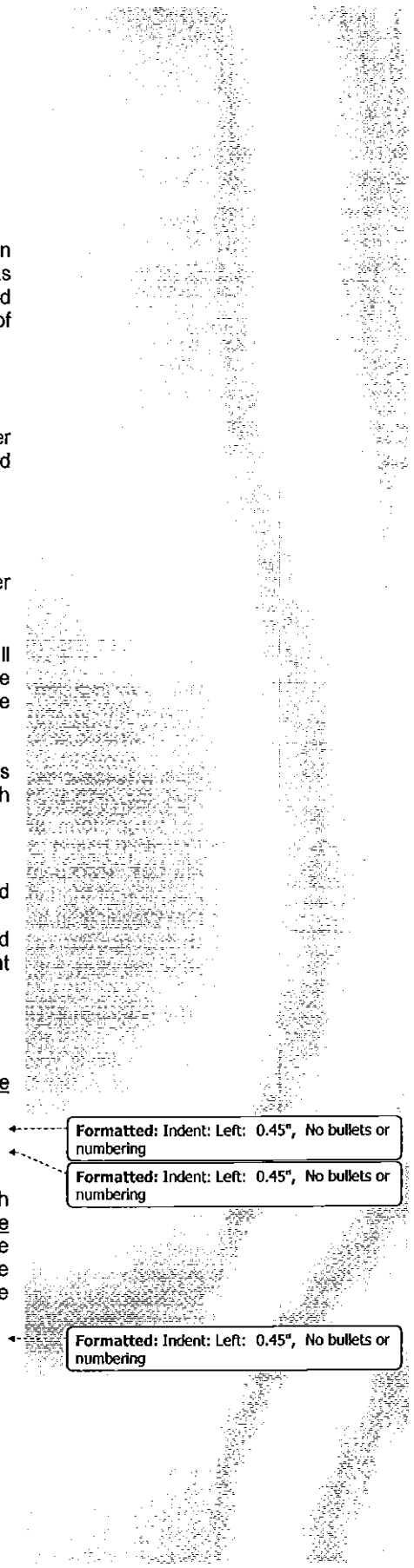
- Infrastructure (e.g. purchase with Infratil of Shell downstream assets)~~.~~
- Timber (eg. Ownership of Kaingaroa Forest in partnership with Harvard Endowment Fund)
- Private Equity and Property (investment in multiple private equity and private equity real estate partnerships and other collective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



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. *JPG'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 in 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.

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

[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

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.)

	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 (U.
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, W~~we ~~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.

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.]~~

~~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.~~

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?

Formatted: Font: 11 pt

Formatted: Font: 11 pt

Formatted: Font: 11 pt

Formatted: Font: 11 pt

~~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.

Formatted: Font: 11 pt

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

[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: 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.

Formatted: Font: 11 pt

Formatted: Font: 11 pt

[Discuss- consultation with person the answer].

Formatted: Font: 11 pt

Leigh Alderson

From: Sarah Owen
Sent: Tuesday, December 21, 2010 6:31 PM
To: 'Adele Wilson'
Cc: Reuben van Werkum; Cristina Billett
Subject: RE: OIA inputs

Hi Adele

You had a very late night - apologies.

The note was very helpful thank you. I note that I spoke to Cristina who considered (in line with my initial thoughts) that to date there have not been any situations where a deal has not gone ahead because of our current OIA requirements and accordingly additional obligations are not required.

This cross border issue is something that is interesting but it appears unlikely we can do much about it except be very vigilant in our OIA requests vis a vis any third parties where they are likely to have concerns about release of information – I guess we could try the 5(b) approach..

The only other point which is not drawn out is the unfair advantage and the difficulty with relying on that so I am working on a bit more on this.
Kind regards
Sarah.

From: Adele Wilson [mailto:adele.wilson@russellmcveagh.com]
Sent: Tuesday, 21 December 2010 3:33 a.m.
To: Sarah Owen
Cc: Reuben van Werkum
Subject: OIA inputs

Sarah

Following our call this afternoon, please find attached our inputs to the OIA submission.

I have set out below an email of advice that James Every-Palmer prepared on the conflict of laws point. You will see that I have crafted a paragraph using this information.

***

"1. A NZ statute cannot directly speak to the Courts of another jurisdiction. That is, a NZ statute cannot direct a foreign court to excuse a breach of that country's own laws.

2. However, a defence may well be available to Guardians if it discloses information pursuant to the OIA and an action (eg for breach of confidence or breach of contract) is brought against it in a foreign jurisdiction. For example, one or more of the following principles of private international law may come into play:
a. it may be the case that the foreign court rules that it is not the appropriate forum (eg because the disclosure took place in New Zealand);
b. the fact that the disclosure is not actionable in New Zealand may prevent the foreign action (for example, if the doctrine of "double actionability" is recognised in the foreign jurisdiction);
c. a defence in the nature of sovereign immunity may be available (although generally not for a state body acting in a commercial capacity); and
d. if the foreign jurisdiction recognises a defence to an action for breach of confidence where a disclosure is required by law, this may include "required by a foreign law"

3. The difficulty is that the extent to which the foreign jurisdiction ends up respecting the policy behind s48 through one of the means above, will depend on the rules in that jurisdiction.

4. If Guardians wants to understand the position more fully:
a. we could do a bit of research to see whether there are any on point cases in the private international law texts (I'm not aware of any, but I would imagine that similar issues will have arisen before); or
b. we could help them instruct local lawyers in the jurisdictions that they are most concerned about to understand the position better.

5. In terms of trying to improve the position under the OIA:
a. I don't think that making it express in s48 that it is intended to apply to actions brought in any country really helps much because of #1 above;
b. You could try and add a s9 principle along the lines of "avoiding breaches of obligations in foreign jurisdictions", but I'd imagine that officials would think that the problem would be covered by commercial prejudice ((2)(b) and (2)(ba)) and they would be worried that entities could avoid OIA obligations by entering into foreign law obligations which prohibit disclosure."

***

Please let us know if we can be of further assistance - happy to get our typists to format etc.

Kind regards

Adele Wilson
ASSOCIATE

Russell McVeagh, Vero Centre, 48 Shortland Street, PO Box 8, Auckland 1010, New Zealand
DIRECT PHONE 64 9 367 8329 | DIRECT FAX 64 9 367 8595

adele.wilson@russellmcveagh.com | **www.russellmcveagh.com**

Leigh Alderson

From: Adele Wilson [adele.wilson@russellmcveagh.com]
Sent: Tuesday, December 21, 2010 3:24 PM
To: Sarah Owen
Cc: Reuben van Werkum
Subject: RE: OIA inputs

Sarah

Just wanted to check that the attached was of use.

Let us know if we can do anything more to help.

Kind regards

Adele Wilson
ASSOCIATE
Russell McVeagh, Vero Centre, 48 Shortland Street, PO Box 8, Auckland 1010, New Zealand
DIRECT PHONE 64 9 367 8329 | DIRECT FAX 64 9 367 8595
adele.wilson@russellmcveagh.com | **www.russellmcveagh.com**

From: Adele Wilson
Sent: Tuesday, 21 December 2010 3:33 a.m.
To: 'Sarah Owen'
Cc: Reuben van Werkum
Subject: OIA inputs

Sarah

Following our call this afternoon, please find attached our inputs to the OIA submission.

I have set out below an email of advice that James Every-Palmer prepared on the conflict of laws point. You will see that I have crafted a paragraph using this information.

***

1. A NZ statute cannot directly speak to the Courts of another jurisdiction. That is, a NZ statute cannot direct a foreign court to excuse a breach of that country's own laws.

2. However, a defence may well be available to Guardians if it discloses information pursuant to the OIA and an action (eg for breach of confidence or breach of contract) is brought against it in a foreign jurisdiction. For example, one or more of the following principles of private international law may come into play:
a. it may be the case that the foreign court rules that it is not the appropriate forum (eg because the disclosure took place in New Zealand);
b. the fact that the disclosure is not actionable in New Zealand may prevent the foreign action (for example, if the doctrine of "double actionability" is recognised in the foreign jurisdiction);
c. a defence in the nature of sovereign immunity may be available (although generally not for a state body acting in a commercial capacity); and
d. if the foreign jurisdiction recognises a defence to an action for breach of confidence where a disclosure is required by law, this may include "required by a foreign law"

3. The difficulty is that the extent to which the foreign jurisdiction ends up respecting the policy behind s48 through one of the means above, will depend on the rules in that jurisdiction.

4. If Guardians wants to understand the position more fully:
a. we could do a bit of research to see whether there are any on point cases in the private international law texts (I'm not aware of any, but I would imagine that similar issues will have arisen before); or

b. we could help them instruct local lawyers in the jurisdictions that they are most concerned about to understand the position better.

5. In terms of trying to improve the position under the OIA:
a. I don't think that making it express in s48 that it is intended to apply to actions brought in any country really helps much because of #1 above;
b. You could try and add a s9 principle along the lines of "avoiding breaches of obligations in foreign jurisdictions", but I'd imagine that officials would think that the problem would be covered by commercial prejudice ((2)(b) and (2)(ba)) and they would be worried that entities could avoid OIA obligations by entering into foreign law obligations which prohibit disclosure."

***

Please let us know if we can be of further assistance - happy to get our typists to format etc.

Kind regards

Adele Wilson
ASSOCIATE

Russell McVeagh, Vero Centre, 48 Shortland Street, PO Box 8, Auckland 1010, New Zealand
DIRECT PHONE 64 9 367 8329 | DIRECT FAX 64 9 367 8595

adele.wilson@russellmcveagh.com | **www.russellmcveagh.com**

Leigh Alderson

From: Adele Wilson <adele.wilson@russellmcveagh.com>
Sent: Tuesday, 21 December 2010 3:33 a.m.
To: Sarah Owen
Cc: Reuben van Werkum
Subject: OIA inputs
Attachments: 2224349.doc

Sarah

Following our call this afternoon, please find attached our inputs to the OIA submission.

I have set out below an email of advice that James Every-Palmer prepared on the conflict of laws point. You will see that I have crafted a paragraph using this information.

***

"1. A NZ statute cannot directly speak to the Courts of another jurisdiction. That is, a NZ statute cannot direct a foreign court to excuse a breach of that country's own laws.

2. However, a defence may well be available to Guardians if it discloses information pursuant to the OIA and an action (eg for breach of confidence or breach of contract) is brought against it in a foreign jurisdiction. For example, one or more of the following principles of private international law may come into play:
a. it may be the case that the foreign court rules that it is not the appropriate forum (eg because the disclosure took place in New Zealand);
b. the fact that the disclosure is not actionable in New Zealand may prevent the foreign action (for example, if the doctrine of "double actionability" is recognised in the foreign jurisdiction);
c. a defence in the nature of sovereign immunity may be available (although generally not for a state body acting in a commercial capacity); and
d. if the foreign jurisdiction recognises a defence to an action for breach of confidence where a disclosure is required by law, this may include "required by a foreign law"

3. The difficulty is that the extent to which the foreign jurisdiction ends up respecting the policy behind s48 through one of the means above, will depend on the rules in that jurisdiction.

4. If Guardians wants to understand the position more fully:
a. we could do a bit of research to see whether there are any on point cases in the private international law texts (I'm not aware of any, but I would imagine that similar issues will have arisen before); or
b. we could help them instruct local lawyers in the jurisdictions that they are most concerned about to understand the position better.

5. In terms of trying to improve the position under the OIA:
a. I don't think that making it express in s48 that it is intended to apply to actions brought in any country really helps much because of #1 above;
b. You could try and add a s9 principle along the lines of "avoiding breaches of obligations in foreign jurisdictions", but I'd imagine that officials would think that the problem would be covered by commercial prejudice ((2)(b) and (2)(ba)) and they would be worried that entities could avoid OIA obligations by entering into foreign law obligations which prohibit disclosure."

***

Please let us know if we can be of further assistance - happy to get our typists to format etc.

Kind regards

Adele Wilson
ASSOCIATE

Russell McVeagh, Vero Centre, 48 Shortland Street, PO Box 8, Auckland 1010, New Zealand
DIRECT PHONE 64 9 367 8329 | DIRECT FAX 64 9 367 8595

adele.wilson@russellmcveagh.com | **www.russellmcveagh.com**

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'.

~~2.4~~2.5 Thirdly, portfolio completion (closely managing fees and costs).

~~2.5~~2.6 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~~2.7 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.

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

Field Code Changed

201581

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~~ 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. If it is 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 in 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.

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"

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]~~ 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	[Ontario Freedom of Information and Protection of Privacy Act does not apply] ***[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	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 constitute a breach of confidence by any person. Both sections are subject to the section 17(3) "public interest" test.

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.

[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

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.)

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?

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~~ 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 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 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.

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.

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

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

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).*

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. 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, ~~W~~we 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~~]~~

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.]~~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.

Formatted: Font: 11 pt

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.?]

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.]]

Other Issues

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

Formatted: Font: (Default) Arial
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

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

Leigh Alderson

From: Darryl Hong [darryl.hong@russellmcveagh.com]
Sent: Friday, December 17, 2010 4:50 PM
To: Sarah Owen; Cristina Billett; Paul Gargan
Cc: Graeme Quigley
Subject: Legislation, regulations etc. (November 2010)

Hi Sarah, Cristina and Paul,

As you know, each month we review any introduced or pending New Zealand legislation/regulations which we consider are, or may become, relevant to the Guardians' activities.

As in previous months we set out below a list of introduced or pending legislation/regulations for November. We also set out comments on some of those items.

1. Employment issues: Both the Employment Relations Act and Holidays Act have recently been amended. There are some minor amendments which may be relevant to the Guardians (for example, the ability to cash out annual leave from 1 April 2011). However, there are no significant amendments which would impact upon the Guardians. We have summarised the changes in an employment update that went out last week that was circulated to Janet Gallagher last week. Do let us know if you require any further information?

2. OIA Law Commission Report: We are currently liaising with you as to a submission on this matter.

Please also let us know if you would like specific details on any of the above matters, or if you have any queries about the below legislation/regulation list.

Thanks

Darryl

Bills Introduced
Alcohol Reform Bill
Aquaculture Legislation Amendment Bill (No 3)
Biosecurity Law Reform Bill
Building Amendment Bill (No 3)
Criminal Procedure (Reform and Modernisation) Bill
Social Security Amendment Bill (No 3)
Iga Wai o Maniapoto (Waipa River) Bill
Māori Purposes Bill
Register of Pecuniary Interests of Judges Bill
Social Assistance (Living Alone Payments) Amendment Bill
Environmental Protection Authority Bill
Electoral (Administration) Amendment Bill (No 2)
Regulatory Reform (Repeals) Bill
Road User Charges Bill
Taxation (Tax Administration and Remedial Matters) Bill
Telecommunications (TSO, Broadband and Other Matters) Amendment Bill
Weathertight Homes Resolution Services (Financial Assistance Package) Amendment Bill
Westpac New Zealand Bill

First Reading not agreed to
Animal Welfare (Treatment of Animals) Amendment Bill

Bills to Select Committee
Alcohol Reform Bill
Aquaculture Legislation Amendment Bill (No 3)
Māori Purposes Bill

Criminal Procedure (Reform and Modernisation) Bill
Commerce Commission (International Co-operation, and Fees) Bill (293-2)
Electoral (Finance Reform and Advance Voting) Amendment Bill (146-2)
Electoral Referendum Bill (128-2)
Electoral (Administration) Amendment Bill (No 2)
Environmental Protection Authority Bill
Parliamentary Service Amendment Bill (186-2)
State Sector Management Bill (193-2)
Taxation (International Investment and Remedial Matters) Bill

Bills Reported Back
Airports (Cost Recovery for Processing of International Travellers) Bill (199-2)
New Zealand Productivity Commission Bill (179-2)
Taxation (GST and Remedial Matters) Bill (182-2)
Subordinate Legislation (Confirmation and Validation) Bill (No 2)
Copyright (Infringing File Sharing) Amendment Bill 119-2
Education Amendment Bill (No.2)
Employment Relations Amendment Bill (No 2) 196-2
Holidays Amendment Bill 195-2
Local Government Act 2002 Amendment Bill 142-2
Military Manoeuvres Act Repeal Bill 173-2
Search and Surveillance Bill (45-2) 169-2
Legislation Bill

Select Committee Reports Delayed
Alcohol Reform Bill: report back date now 18 February
Consumer Guarantees Amendment Bill: now 28 February 2010
Fair Trading (Soliciting on Behalf of Charities) Amendment Bill: now 28 February 2011
Southland District Council (Stewart Island/Rakiura Visitor Levy) Empowering Bill: now 31 March 2011

Bills Passed Second Reading
Courts and Criminal Matters Bill
Education Amendment Bill (No 2)
Education (Freedom of Association) Amendment Bill
Employment Relations (Secret Ballot for Strikes) Amendment Bill
Taxation (GST and Remedial Matters) Bill
New Zealand Productivity Commission Bill

Bills Awaiting Third Reading
Electoral (Disqualification of Sentenced Prisoners) Amendment Bill
Rugby World Cup 2011 (Empowering) Bill
Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill

Bills Passed Third Reading
Employment Relations Amendment Bill (No 2)
Holidays Amendment Bill
Subordinate Legislation (Confirmation and Validation) Bill (No 2)
Local Government Act 2002 Amendment Bill

Acts Assented, 29th October
Employment Relations (Film Production Work) Amendment Act 2010, No 120
Summary Proceedings Amendment Act (No 2) 2010, No 121
Governor-General Act 2010, No 122
Rugby World Cup 2011 (Empowering) Act 2010, No 123

Supplementary Order Papers
SOP173 Governor-General Bill

SOP174 Electoral (Disqualification of Sentenced Prisoners) Amendment Bill
SOP175 Local Government Act 2002 Amendment Bill
SOP176 Education Amendment Bill (No 2)
SOP177 Education Amendment Bill (No 2)
SOP178 Child and Family Protection Bill
SOP179 Child and Family Protection Bill
SOP180 Local Government Act 2002 Amendment Bill
SOP181 Local Government Act 2002 Amendment Bill
SOP182 Local Government Act 2002 Amendment Bill

Regulations

2010/390 New Zealand Public Health and Disability Amendment Act 2010 Commencement Order 2010
2010/391 Commodity Levies (Eggs) Order 2010
2010/392 Court of Appeal (Civil) Amendment Rules 2010
2010/393 Court of Appeal (List Election Petitions) Amendment Rules 2010
2010/394 High Court Amendment Rules (No 2) 2010
2010/395 District Courts (Limitation Act 2010) Amendment Rules 2010
2010/396 Customs Export Prohibition (Livestock for Slaughter) Order 2010
2010/397 Financial Service Providers (Dispute Resolution—Reserve Scheme Fees) Rules 2010
2010/398 Securities Act (APN Media (NZ) Limited) Exemption Notice 2010
2010/399 Fisheries (Maunganui Bay Temporary Closure) Notice 2010
2010/400 Gas Governance (Insolvent Retailers) Regulations 2010
2010/401 Fisheries (Basking Shark—High Seas Protection) Regulations 2010
2010/402 Fisheries (Challenger Area Amateur Fishing) Amendment Regulations 2010
2010/403 Fisheries (Challenger Area Commercial Fishing) Amendment Regulations 2010
2010/404 Fisheries (Infringement Offences) Amendment Regulations (No 2) 2010
2010/405 Fisheries (Registers) Amendment Regulations 2010
2010/406 Fisheries (Reporting) Amendment Regulations (No 2) 2010
2010/407 Fisheries (Satellite Vessel Monitoring) Amendment Regulations 2010
2010/408 Fisheries (Schedule 6) Order 2010
2010/409 Fisheries (Transfer of Functions, Duties, and Powers to The New Zealand Seafood Industry Council Limited) Amendment Order 2010
2010/410 Immigration Act 2009 Commencement Order (No 2) 2010
2010/411 Wildlife (Basking Shark) Order 2010
2010/412 Canterbury Earthquake (Rating Valuations Act) Order 2010
2010/413 Local Government (Infringement Fees for Offences: Auckland Regional Council Navigation and Safety Bylaws) Regulations 2002 Revocation Order 2010
2010/414 Local Government (Infringement Fees for Offences: Bay of Plenty Regional Navigation Safety Bylaw 2010) Regulations 2010
2010/415 Local Government (Infringement Fees for Offences: Central Otago District Council Lake Dunstan Navigation Safety Bylaws 2006) Regulations 2010
2010/416 Local Government (Infringement Fees for Offences—Lake Taupo Navigation Safety Bylaw) Regulations 2010
2010/417 Local Government (Infringement Fees for Offences: Manawatu River and Tributaries Navigation and Safety Bylaw 2010) Regulations 2010
2010/418 Income Tax (Minimum Family Tax Credit) Order 2010
2010/419 Takeovers Code (Delegat's Wine Estate Limited) Exemption Notice 2010
2010/420 Fisheries (Kaikoura–Wakatu Quay Temporary Closure) Notice 2010
2010/421 Health Practitioners (Quality Assurance Activity—Bridgewater Surgical Services Limited) Notice 2010
2010/422 Tariff (New Zealand—Hong Kong, China Closer Economic Partnership Agreement) Amendment Act 2010 Commencement Order 2010
2010/423 Financial Service Providers (Exemptions) Regulations 2010
2010/424 Accident Compensation (Apportioning Entitlements for Hearing Loss) Regulations 2010
2010/425 Accident Insurance (Occupational Hearing Assessment Procedures) Amendment Regulations 2010
2010/426 United Nations Sanctions (Iran) Amendment Regulations 2010
2010/427 Canterbury Earthquake (Road User Charges Act) Order 2010
2010/428 Education (Disestablishment of Telford Rural Polytechnic and Incorporation in Lincoln University) Order 2010
2010/429 Immigration (Visa, Entry Permission, and Related Matters) Amendment Regulations (No 2) 2010
2010/430 Customs and Excise (Rules of Origin for New Zealand—Hong Kong, China Closer Economic Partnership Agreement Goods) Amendment Regulations 2010
2010/431 Building (Exempt Building Work) Order 2010
2010/432 Dog Control (Certifying Organisations for Disability Assist Dogs) Order 2010

2010/433 Taxation (Use of Money Interest Rates) Amendment Regulations 2010
2010/434 Deposit Takers (In Receivership or Liquidation) Exemption Amendment Notice 2010
2010/435 Deposit Takers (Funding Conduits) Exemption Amendment Notice (No 3) 2010
2010/436 Deposit Takers (Moratorium) Exemption Amendment Notice (No 2) 2010
2010/437 Deposit Takers (Payment Facility Providers) Exemption Amendment Notice 2010
2010/438 Deposit Takers (Craigs Investment Partners Cash Management Trust Limited) Exemption Amendment Notice 2010
2010/439 Deposit Takers (Charitable and Religious Organisations) Exemption Amendment Notice 2010
2010/440 Deposit Takers (Client Reserve Limited) Exemption Notice 2010
2010/441 Deposit Takers (Forsyth Barr Cash Management Limited) Exemption Notice 2010
2010/442 Deposit Takers (Fisher & Paykel Finance Limited) Exemption Notice 2010
2010/443 Deposit Takers (Public Trust) Exemption Notice (No 2) 2010
2010/444 Deposit Takers (UDC Finance Limited) Exemption Notice 2010

Leigh Alderson

From: Tim Mitchell
Sent: Friday, December 17, 2010 4:46 PM
To: Paul W. Gregory; Sarah Owen
Subject: RE: OIA Submission

Hi Sarah,

Looking good so far. Good work!

Cheers,

Tim

From: Paul W. Gregory
Sent: Friday, 17 December 2010 10:43 a.m.
To: Sarah Owen; Tim Mitchell
Subject: RE: OIA Submission

Thanks Sarah. Wow, real Xmas fare...!

I have made some mark ups on this

From: Sarah Owen
Sent: Thursday, 16 December 2010 9:58 p.m.
To: Tim Mitchell; Paul W. Gregory
Subject: FW: OIA Submission

Hi (Note this is a COPY not a Reference)

Russell McVeagh were going to send a draft through gratis but unfortunately this did not arrive. I have put together first draft of this submission. I think in general terms this is more about getting the Law Commission to focus on commercial' entities particularly where they are 'competing' with offshore businesses who do not have the same obligations. Hopefully this will prompt them to do more research in the key areas of commercial sensitivity.

I have to provide this by Christmas.

Please let me know thoughts on this first draft.
Kind regards
Sarah

From: Sarah Owen
Sent: Thursday, 16 December 2010 9:54 p.m.
To: Adele Wilson
Cc: 'Henry Clayton'; Tim Clarke
Subject: OIA Submission

Hi Adele

A little later in the day than anticipated and very rough in parts. Please let me know when you have had time to digest and are free to discuss.
Kind regards
Sarah

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 ~~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. 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 (i.e. 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.

Field Code Changed

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 which is, in essence, to be open about what we do unless there are good reasons to withhold information. The primary reason for withholding information is commercial sensitivity, as explained at 2.5

3.13.2 The Annual Report section we have referred to above describes the board range of ~~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~~Requesters have tended to focus ~~has 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 investments in New Zealand.

[~~*Discuss what data we had had on - how many we have had/how many have gone to the Ombudsman etc.*~~]We do not propose to provide exhaustive detail of our experiences with the application of the Act. However in summary we have received approximately 30 requests. We have met the required 20 working-day disclosure deadline on all occasions. Our decisions to withhold have been referred to the Ombudsman on several occasions and 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.

4.2 Queries~~The 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.

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

Formatted: Font: 11 pt

Formatted: Font: (Default) Arial, 11 pt, N Italic

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 (which of course would necessarily have certain details omitted, but the general process of which would have instructive value).

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. As a – rough – example of this, see the use of the Government data website for centralisation of CEO credit card expenditure as per the recent State Services Commission ruling.

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. [an example of this would be good here – perhaps link to those set out at Q18.]

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

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

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 party engagements and ~~ies 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.

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

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, 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~~ understand that freedom of information legislation ~~is~~ can be used by people who are more interested in gaining insights for commercial reasons thaen 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. I wonder if we can make a general comment linking privacy to commerciality particularly in a small market where, say, disclosing the identity of someone with whom Adrian has met effectively suggests a commercial negotiation.

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.