10 December 2010

Margaret Thompson

Law Commission
PO Box 2590
Wellington 6140

Dear Margaret

Official Information Legislation Review

Meridian Energy ("**Meridian**") welcomes the opportunity to make submissions to the Law Commission's ("**Commission**") Official Information Legislation Review ("**Review**").

Meridian has focussed on the following key areas in our submission. Our detailed analysis, in response to particular discussion questions, is set out in Appendix A.

Scope of OIA

Meridian considers that there are strong reasons for excluding State Owned Enterprises (**SOEs**) from the scope of the OIA because:

1. inclusion of SOEs is inconsistent with the OIA's purpose;
2. SOEs are properly scrutinised under other legislation;
3. Meridian competes in the same market as non SOEs and as such is materially unfairly disadvantaged.

If SOEs remain within the scope of the OIA, Meridian submits that it is important to the commercial success of entities like Meridian, who operate in highly competitive environments with direct competitors who are not SOEs, that the matters summarised in points 2 and 3 below are provided for in this Review.

Interpretation of commercial withholding grounds

Meridian supports the extension and clarification of the commercial withholding grounds. On this basis, we also support greater use of case notes as precedent. However, we note that there is potential for SOEs like Meridian to be materially disadvantaged by the operation of the OIA if:

1. the commercial withholding grounds are narrowly interpreted or are given insufficient weight (when balanced against the public interest); and/or
2. a body of precedent case notes is developed which fails to make a distinction between SOEs that operate in a competitive market environment and other agencies that do not.

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Purpose

Meridian is particularly concerned that certain individuals and groups are using the OIA as a means of creating nuisance rather than genuinely seeking access to information. We have made detailed submissions regarding vexatious requests/requesters, purpose of requests and release of information during court processes.

Meridian considers that these changes are necessary in order ensure the OIA operates in furtherance of the public interest and not as a mechanism for hindering the legitimate business activities of agencies.

Please call Vanessa Simons on (04) 3827567 if you wish to discuss this submission further.

Yours sincerely,

Jason Stein

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Attachment: Appendix A: Meridian's response to the discussion questions.

Appendix A: Meridian's response to the discussion questions

	Question	Response
1	Q1 Do you agree that the schedules to each Act (OIA and LGOIMA) should list every agency that they cover?	Yes. Meridian agrees that the schedules in the OIA and LOGOIMA should list each agency they cover.
2	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?	Yes. Meridian supports this recommendation.
3	Do you agree that SOEs and other crown entity companies should remain within the scope of the OIA?	No. Meridian considers that there are strong reasons for excluding SOE's from the scope of the OIA because: • inclusion of SOEs is inconsistent with the OIA's purpose. • information relevant to proper scrutiny of SOsE is available under other legislation. • Meridian competes in the same market as non SOEs and is materially disadvantaged because: o OIA compliance imposes additional costs and requires allocation of resources that non

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		SOEs do not incur; and o limited withholding grounds (or the limited interpretation of them) on a commercial basis undermines Meridian's ability to compete in the market. We consider each of these in more detail below. ***Inclusion of SOEs is inconsistent with the OIA's purpose.*** Meridian notes that the purpose of the OIA is to make official information available in order to enable effective participation in the making and administration of laws and policies and to promote the accountability of Ministers of the Crown and officials. We submit that Meridian's inclusion does not enable effective participation in the making or administration of laws. SOEs have no responsibilities in this regard. ***Information relevant to proper scrutiny of an SOE is available under other legislation.*** Meridian notes that the Commission's view that inclusion of SOEs provides an important accountability mechanism not covered by other reporting obligations. We disagree. For local and central government the public quite rightly ought to be able to gain assurance that public spending decisions are transparent and appropriate. However, like other companies, SOEs are revenue generating entities. As such, the public interest in obtaining information from SOEs can appropriately be limited to disclosures already provided for under various legislation governing reporting and compliance. Specifically, the transparency and accountability of Meridian is met by a number of existing processes, including publishing a SCI and Audited Annual Report, quarterly and half yearly reports, and the requirement to appear at Select Committee. There is also the 'no surprises policy' in place with shareholding Ministers. In addition, Meridian now also falls under the NZX disclosure regime following its launch of listed securities. We submit that this legislative framework is appropriate to Meridian's purpose and provides sufficient disclosure of information in the public interest. We submit that no further public interest purpose is served by inclusion of Meridian under the OIA, and as described below, such inclusion unfairly disadvantages Meridian in comparison to its non SOE competitors.

		Meridian and other SOEs who compete in the same market as non SOEs are materially unfairly disadvantaged. Meridian notes that the issues identified in this category may be addressed by expansion and clarification of the commercial withholding grounds and a more purposive interpretation of the OIA. We have made submissions accordingly, in response to relevant questions below. If SOEs remain within the scope of the OIA, we submit that it is important to the commercial success of entities like Meridian operating in highly competitive environments with direct competitors who are not SOEs, that these matters are provided for in the Review. *OIA compliance imposes additional costs and allocation of resources that non SOEs do not incur.* Meridian notes the Commission's conclusion that SOEs face additional costs under the Act not borne by their private sector competitors, but submits that it has not given sufficient regard to the additional costs that are imposed on SOEs. In our observation, the cost in the administrative overlay from incessant OIA requests can be substantial, and can not only be measured in terms of dollars and hours, but also the business impact resulting from tying up resource which might otherwise be used to more effectively manage Meridian's business activity. If SOEs are to continue to be subject to the OIA, we have made submissions below requesting amendments that will better provide for us to refuse requests that have the purpose or the effect of unfairly disadvantaging Meridian. *Limited withholding grounds (or the limited interpretation of them) on a commercial basis undermines Meridian's ability to compete in the market.* Release of information under the OIA where the withholding grounds do not apply or are applied in a limited fashion (for example the application of precedent appropriate only to accountability of local and central government) result in Meridian being disadvantaged for example by: • discouraging third parties entering agreements with Meridian, providing information to Meridian or giving evidence in support of a Meridian project , due to concerns that such information will become publicly available; • undermining Meridian's negotiation position with third parties by revealing commercially sensitive information;

		• using the OIA as a method of creating nuisance to hinder the RMA process necessary for establishment of Meridian's infrastructure projects. This occurs by tying up internal resources who are involved in the consenting process with detailed and complex requests for information, using Meridian as a collator of information already made public during the RMA process, and causing the release of information declined by the relevant authority.
4	Do you agree that council controlled organisations should remain within the scope of the LGOIMA?	
5	Do you agree that the Parliamentary Counsel Office should be brought within the scope of the OIA?	
6	Do you agree that the OIA should specify what information relating to the operation of the Courts is covered by the Act?	
7	Should any further categories of information be expressly excluded from the OIA and the LGOIMA?	
8	Do you agree that the OIA and the LGOIMA should continue	

	to be based on a case-by-case model?	
9	Do you agree that more clarity and 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?	We agree that enhanced guidance has the potential to improve clarity and certainty, however the extent to which this is successful will depend on the quality of analysis and case notes. This is discussed in more detail at Q11 below.
10	Do you agree there should be a compilation, analysis of, and commentary on the casenotes of the Ombudsmen?	Yes.
11	Do you agree there should be greater access to, and reliance on, the casenotes as precedents?	While we consider that the use of precedents has the potential to provide certainty, we are also concerned that this approach could lead to short cuts in analysis. In our experience there has been a tendency for the Office of the Ombudsmen to apply findings in earlier cases to Meridian, without undertaking sufficient analysis to properly distinguish Meridian's case on the facts. We are particularly concerned that proper account is taken of the commercial nature of Meridian as an SOE enterprise and the extent to which Meridian can be commercially disadvantaged in the market as a result of disclosures in the market, vis a vis its non SOE competitors. Meridian therefore supports the use of precedents only in conjunction with a more robust approach to applying the commercial withholding terms and recognition by the Office of the Ombudsmen that findings made in relation to government departments do not, as a matter of course, apply equally to SOEs.

12	Do you agree there should be a reformulation of the guidelines with greater use of case examples?	Yes.
13	Do you agree there should be a dedicated and accessible official information website?	Yes.
14	Do you agree that the "good government" withholding grounds should be redrafted?	
15	What are your views on the proposed reformulated provisions relating to the "good government" grounds?	
16	Do you think the commercial withholding ground should continue to be confined to situations where the purpose is to make a profit?	No. Consistent with the Law Commission's paper, we consider that commercial activities may encompass situations that do not necessarily relate to profit making. Meridian supports the view that confining to profit making is too narrow.
17	If you favour a broader interpretation, should there be a statutory amendment to	Yes. As discussed above, Meridian submits that if SOEs are to remain within the scope of the OIA, clear guidance must be provided to the Office of the Ombudsmen on taking a broad view when assessing whether commercial withholding grounds apply. In particular the Ombudsmen should have regard to the

	clarify when the commercial withholding ground applies?	impact release of the information would have on all relevant parties (not just the agency) and whether the release would disadvantage the agency (specifically SOEs) in relation to its direct competitors. We submit that any such disadvantage be sufficient grounds to withhold the information, subject to the overriding public interest test. Further we submit that in balancing the commercial disadvantage against the public interest benefits, weight should be given to the commercial issues such that the information is only released where there is a very strong and clear public interest.
18	Do you think the trade secrets and confidentiality withholding grounds should be amended for clarification?	Yes. We are particularly supportive of an amendment to clarify that the obligation of confidence ground includes information created by the agency. In addition, we are aware of instances where the OIA is being used as a method for obtaining data either on its own (ie raw data) or following compilation and collation by the agency in such a way as to attract copyright, which would otherwise only be available via license from the agency or which would be retained as a commercially valuable trade secret. In the electricity industry, the development of smart meter technology will enable Meridian and other electricity retailers to gather and collate data regarding consumers' use of electricity. This data will obviously have commercial benefit to Meridian and will be treated as confidential/trade secret material. We will be significantly disadvantaged if a third party is then able to obtain that data, particularly in its collated form, and reuse it in competition with Meridian. While s.9(2)(k) may go some way to offering grounds to withhold information of this nature, we consider that it is appropriate for trade secrets and confidentiality to be expressly dealt with.
19	Do you agree that the official information legislation should continue to apply to information in which intellectual property is held by a third party?	Yes, provided that, as discussed above, release of that information is clearly for a proper purpose regarding the public interest and is not being used by a third party as a back door mechanism for obtaining valuable IP that would otherwise have to be paid for via a license or developed independently.
20	Do you have any comment on the application of the OIA to research work, particularly that commissioned by third	

	parties?	
21	Do you think the public interest factors relevant to disclosure of commercial information should be included in guidelines or in the legislation?	Yes, we are supportive of the factors listed in 5.42 of the Law Commission's paper. We consider they could usefully be added to both the legislation and the guidelines (in an expanded form).
22	Do you experience any other problems with the commercial withholding grounds?	We have experienced problems regarding release of third party confidential information. We submit that firmer guidance should be provided to the Office of the Ombudsmen to clarify that consideration of the wider commercial implications and potential for commercial disadvantage for all parties involved in the disclosure should take place. For example, Meridian agreed lower than market rates with a third party service provider, which were required to be disclosed under the OIA. The Ombudsman "saw no harm" in the release, yet that third party was subsequently put at a disadvantage in negotiating its rates with other parties who then also wanted to obtain the lower rate offered to Meridian.
23	Which option do you support for improving the privacy withholding ground: Option 1 – 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?	
24	Do you think there should be amendments to the Acts in relation to the privacy interests of: (a) deceased persons? (b) children?	
25	Do you have any views on public sector agencies using the OIA to gather personal information about individuals?	
26	Do you agree that no withholding grounds should be moved between the conclusive and non-conclusive withholding provisions in either the OIA or LGOIMA?	

27	Do you think there should be new withholding grounds to cover: (a) harassment; (b) the protection of cultural values; (c) anything else?	
28	Do you agree that the "will soon be publicly available" ground should be amended as proposed?	Yes.
29	Do you agree that there should be a new non-conclusive withholding ground for information supplied in the course of an investigation?	Yes. As a developer of infrastructure Meridian is a regular participant in the Resource Management Act consenting process. In our experience, opponents of such developments opt to use the OIA as a mechanism for hindering and disadvantaging Meridian during that process. We submit that it is not in the public interest for the OIA to be used in this manner. Specifically, OIA requests that relate to RMA consenting process generally mean: • that there is duplication in the provision of information since the information requested will normally form part of the public record once a resource consent application is lodged (there is also additional expense and time incurred compiling such information); • that Meridian is at a competitive disadvantage with other private developers as the information is released early to the market and not at a time of Meridian's choosing; • that occasionally OIA requests relate to the release of information that has already been declined by another jurisdiction (i.e. Environment Court) and seek to re-litigate the same matter via

		• "fishing expeditions" to bolster a RMA challenge. Accordingly, in addition to supporting this amendment, we also submit that it should be extended so that information withheld during the relevant proceeding can be withheld until that proceeding has been completed. We consider this should include the RMA consenting process and any other court proceedings where the agency is a participant. We note with reference to Q30 that "maintenance of the law" ground is not sufficiently wide to provide for this issue.
30	Do you have any comments on, or suggestions about, the "maintenance of law" conclusive withholding ground?	
31	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?	
32	Can you suggest any statutory amendment which would clarify what "public interest" means and how it should be applied?	

33	Do you think the public interest test should be contained in a distinct and separate provision?	Yes.
34	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 – the need to provide an explanation will naturally arise from explaining to the requester or during an Ombudsman investigation, the reasons for withholding information.
35	Do you agree that the phrase “due particularity” should be redrafted in more detail to make it clearer?	Yes
36	Do you agree that agencies should be required to consult with requesters in the case of requests for large amounts of information?	No
37	Do you agree the Acts should clarify that the 20 working day limit for requests delayed by lack of particularity	Yes

	should start when the request has been accepted?	
38	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?	
39	Do you agree that “substantial” should be defined with reference to the size and resources of the agency considering the request?	
40	Do you have any other ideas about reasonable ways to deal with requests that require a substantial amount of time to process?	
41	Do you agree it should be clarified that the past conduct of a requester can be taken into account in	Yes

	assessing whether a request is vexatious?	
42	Do you agree that the term "vexatious" should be defined in the Acts to include the element of bad faith?	We support a clearer definition of "vexatious" but submit that making reference to "bad faith" is simply adding another legal term of art rather than providing clarity.
43	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
44	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. In our experience individuals or groups of individuals are using the OIA to prevent or hinder Meridian taking a legitimate course of action or business decision. These most often relate to groups or individuals who oppose our generation projects. In general, these groups or individuals seek to hinder the project by inundating Meridian with requests for the same or similar information. As discussed further below, we consider that the agency should be given the opportunity to demonstrate that an individual or group is seeking to use the OIA for an improper purpose by providing relevant evidence and giving the Office of the Ombudsmen broad powers to review that evidence and draw conclusions regarding whether the requests/requesters are seeking information for matters genuinely within the public interest or are using it inappropriately in a way that diverts resource from proper process. In our experience, the true intent of the requests/requesters will be obvious from the volume and nature of the requests.
45	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	No. We consider that the purpose for which information is required is an important consideration. We submit that purpose is relevant to an individual's right to information and consider that purposes that do not support the public interest or the purpose of the Act should warrant refusal of the request, notwithstanding the requester or request may not be "vexatious". For example, where the primary purpose of the request/requester is to obtain information in order to prevent or hinder the agency taking a

	name?	legitimate course of action or business decision or otherwise as a means of protest against the agency. We also consider that the real name of requesters should be provided. This will promote the use of the OIA by individuals acting genuinely out of the public interest and deter those with ulterior motives who would be more likely to hide behind false identities.
46	Do you agree the Acts should state that requests can be oral or in writing, and that the requests do not need to refer to the relevant official information legislation?	
47	Do you agree that more accessible guidance should be available for requesters?	
48	Do you agree the 20 working day time limit should be retained for making a decision?	
49	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?	
50	Do you agree that, as at present, there should be no statutory requirement to	Yes. This will ensure the requester knows their request is being considered. If a requester sends a request via email to a person within Meridian who has left the organisation, there is no mechanism for alerting the requester that their request is not being processed. If a requester expected a prompt

	acknowledge receipt of an official information request but this should be encouraged as best practice?	acknowledgement of receipt, and the acknowledgement was not forthcoming, they would be in a position to more quickly investigate whether their request was being processed.
51	Do you agree that ‘complexity of the material being sought’ should be a ground for extending the response time limit?	
52	Do you agree there is no need for an express power to extend the response time limit by agreement?	
53	Do you agree the maximum extension time should continue to be flexible without a specific time limit set out in statute?	
54	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?	
55	Do you agree there should be clearer guidelines about consultation with ministerial	

	offices?	
56	Do you agree there should not be any mandatory requirement to consult with third parties?	Yes.
57	Do you agree there should be a requirement to give prior notice of release where there are significant third party interests at stake?	No. We consider this is a matter than can be appropriately handled as between the agency and the third party without the need for a statutory requirement.
58	How long do you think the notice to third parties should be?	
59	Do you agree there should be provision in the legislation to allow for partial transfers?	Yes
60	Do you agree there is no need for further statutory provisions about transfer to ministers?	
61	Do you have any other comment about the transfer of requests to ministers?	

62	Do you think that whether information is released in electronic form should continue to depend on the preference of the requester?	
63	Do you think the Acts should make specific provision for metadata, information in backup systems and information inaccessible without specialist expertise?	
64	Should hard copy costs ever be recoverable if requesters select hard copy over electronic supply of the information?	
65	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?	No. We submit this would place an unnecessary and unreasonable burden on agencies to essentially provide legal advice to requesters regarding their legal obligations with respect to information obtained.
66	Do you agree there should be regulations laying down a clear charging framework for	

	both the OIA and the LGOIMA?	
67	Do you have any comment as to what the framework should be and who should be responsible for recommending it?	
68	Do you agree that the charging regime should also apply to political party requests for official information?	Yes. Meridian agrees that the charging regime should apply to political party requests for official information. Meridian submits that charging for information provides incentives to ensure that the information sought is targeted and useful.
69	Do you agree that both the OIA and LGOIMA should set out the full procedures followed by the Ombudsmen in reviewing complaints?	Yes.
70	Do you think the Acts provide sufficiently at present for failure by agencies to respond appropriately to urgent requests?	
71	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?	
72	Do you agree there should be grounds to complain to the Ombudsmen if sufficient notice of release is not given to third parties when their interests are at stake?	No. We submit that a change of this nature would place an unreasonable burden on the agency. The agency would not only be exposed to investigation by the Ombudsmen due to complaint by the requester for refusal to provide information, but also due to complaint by a third party for releasing that information. As discussed above, in our view the better approach is to protect third parties' interests by ensuring the withholding grounds are adequately formulated to ensure that agencies are able to withhold information subject to confidentiality or which would commercially prejudice the third party.
73	Do you agree that a transfer complaint ground should be added to the OIA and the LGOIMA?	
74	Do you think there should be any changes to the processes the Ombudsmen's follows in investigating complaints?	
75	Do you agree that the Ombudsmen should be given a final power of decision when determining an official information request?	
76	Do you agree that the veto power exercisable by Order in	

	Council through the Cabinet in the OIA should be removed?	
77	Do you agree that the veto power exercisable by a local authority in the LGOIMA should be removed?	
78	If you believe the veto power should be retained for the OIA and LGOIMA, do you have any comment or suggestions about its operation?	
79	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?	
80	Do you agree that the public duty to comply with an Ombudsman's decision should be enforceable by the Solicitor-General?	

81	Do you agree that the complaints process for Part 3 and 4 official information should be aligned with the complaints process under Part 2?	
82	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?	
83	Should there be any further enforcement powers, such as exist in the United Kingdom?	
84	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?	
85	Do you think there should be any further mandatory	

	categories of information subject to a proactive disclosure requirement in the OIA or LGOIMA?	
86	Do you agree that the OIA and LGOIMA should require agencies to take all reasonably practicable steps to proactively release official information?	
87	Should such a requirement apply to all central and local agencies covered by the OI legislation?	
88	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?	
89	Do you think agencies should be required to have explicit	

	publication schemes for the information they hold, as in other jurisdictions?	
90	Do you agree that disclosure logs should not be mandatory?	
91	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?	
92	Do you agree that the OIA and the LGOIMA should expressly include a function of providing advice and guidance to agencies and requesters?	
93	Do you agree that the OIA and LGOIMA should include a function of promoting awareness and understanding and encouraging education and training?	
94	Do you agree that an oversight agency should be	

	required to monitor the operation of the OIA and LGO IMA, collect statistics on use, and report findings to Parliament annually?	
95	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?	
96	Do you agree that an explicit audit function does not need to be included in the OIA or the LGOIMA?	
97	Do you agree that the OIA and LGOIMA should enact an oversight function which includes monitoring the operation of the Acts, a policy function, a review function, and a promotion function?	
98	Do you agree that the	

	Ombudsmen should continue to receive and investigate complaints under the OIA and the LGOIMA?	
99	Do you agree that the Ombudsmen should be responsible for the provision of general guidance and advice?	
100	What agency should be responsible for promoting awareness and understanding of the OIA and the LGO IMA and arranging for programmes of education and training for agencies subject to the Acts?	
101	What agency should be responsible for administrative oversight of the OIA and the LGOIMA? What should be included in the oversight functions?	
102	Do you think an Information Commissioner Office should be established in New Zealand? If so, what should its functions be?	

103	If you think an Information Commissioner Office should be established, should it be standalone or part of another agency?	
104	Do you agree that the LGOIMA should be aligned with the OIA in terms of who can make requests and the purpose of the legislation?	
105	Is the difference between the OIA and LGOIMA about the status of information held by contractors justified? Which version is to be preferred?	
106	Do you agree that the official information legislation should be redrafted and re-enacted?	
107	Do you agree that the OIA and the LGOIMA should remain as separate Acts?	No. Meridian considers that there are no strong reasons for the OIA and LGOIMA to remain as separate Acts. Meridian therefore submits that the two Acts should be combined.

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