ISSUES PAPER - QUESTIONS

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

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?*

Q1 & Q2: No – it would be better to use generic descriptions then every time a new agency appears or is renamed or reformed there is no need for legislative amendment.

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

Q3: N/A – References in this response relate to local government (Local Government Official Information and Meetings Act 1987)

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

Q4: If the purpose of the CCO is purely commercial (ie no public utility or service involvement relating to local authorities) then commercial law should apply. Otherwise the public interest would support retention.

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

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

Q5/Q6 – No comment

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

Q7: We support the view that informal information should be excluded. Of particular concern are recollections of conversations, phone calls, or file notes and e-mails which have not formed part of advice or factual information.

Third party information is another area which should be expressly excluded. A common example in local government may be information supplied by another government agency or commercial entity regarding their own development proposals where the release of such information could be detrimental to that organisation's commercial position. For example intended land purchases for public utility use (roading). Current grounds for refusal are challenged often and occasionally upheld by the Ombudsman which would suggest that either this needs to be specifically excluded or the grounds for refusal extended or more clearly defined.

Another area of concern for local government is the number of neighbourhood disputes conducted by way of regulatory complaint and the potential for the release of such information to inflame difficult situations. There is no real ability to withhold such information despite it being (even in ordinary circumstances) supplied with a view from complainants that it will remain confidential. Should such matters end up in court disclosure through those processes would naturally follow. However often these issues are resolved without court process and release of the information would not seem to be either necessary or appropriate. Also the knowledge that such information may be released may inhibit reporting. The Police are able to receive anonymous reporting and not release their information sources – why not local government enforcement and compliance officers.

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

Q8: Absolutely not as this approach has led to inconsistent application across the country and confusion as numbers of differently skilled people attempt to interpret the Act. Clear specification is what is needed. For small councils that do not have legal officers on the staff this is an increasingly costly burden on their ratepayers. From a public perspective it is also confusing since applications to a number of authorities on the same topic can result in huge variance of response. People on both sides of this equation would benefit from more clarity. Time taken over responding to requests is already onerous in many circumstances and adding to this the requirement to seek guidance through even more research only adds to the cost and consequential loss of productive time for ratepayer services.

A key area for clarification is application of the withholding grounds and an improvement the clarity of intent of the withholding grounds would greatly assist from the perspective of local government officers. From a public perspective the ability to understand the rationale of the reason used would also reduce concern and mistrust of public institutions.

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?

Q9: No – see above.

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

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

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

Q10 – Q12: see response to Q8

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

Q13: All assistance is valuable when working with such uncertain legislation.

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

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

Q14 - Q15: We would support a redraft of this for local government and an inclusion for local government of an opportunity to withhold information on the basis of allowing advice to be properly considered prior to a decision being made.

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

Q16: This is too confining and sometimes the interest to be protected is third party information. Other parties' intellectual property would be protected in a commercial environment so forcing a different standard on public institutions is clearly inequitable. This could discourage some parties from dealing with government entities and reduce good public outcome opportunity. It is not always obvious to local authority officers whether information is or is not a trade secret. The other major point is that the range of information collected and held by local authorities is much greater than that held by (on the whole) purpose specific government departments and in particular issues have arisen over building matters (house designs etc), tender details from or about tenders to show just two examples.

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

Q17: Yes

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

Q18: See above

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?

Q19: See above

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

Q20: See above

Q21 Do you think the public interest factors relevant to disclosure of commercial

information should be included in guidelines or in the legislation?

Q21: A definition of when and how public interest would override commercial protection would be extremely helpful.

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

Q22: Their generality does not assist in knowing when they can be properly applied.

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?

Q23: Refer comments under Q7 –When information held about an individual supplied by a third party (eg a complaint) will quite clearly identify the third party then the privacy issues relating to that third party cannot be protected. This is the quandary the two acts create.

Referring to the ombudsman case notes and practice guidelines is insufficient as referral would also have to be made through the Privacy Commissioner. Clarity on which act to give weight to is important, and consideration of the privacy of all parties is important and would support option three without the public interest addition. Currently the individual's right to privacy is protected under one act but can be overridden by the other. These should be consistent.

Q24 Do you think there should be amendments to the Acts in relation to the privacy interests of:
(a) deceased persons?
(b) children?

Q24: No comment.

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

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?

Q27 Do you think there should be new withholding grounds to cover:
(a) harassment;
(b) the protection of cultural values;
(c) anything else?

Q26: If the withholding grounds were clearly defined with no confusion over meaning or application this would not be an issue.

Q28 Do you agree that the "will soon be publicly available" ground should be

amended as proposed?

Q28: The contention that some agencies may be misusing this clause is not a good ground to amend it. Different local authorities operate different meeting cycles and therefore the definition of a very short time may cut across a decision making cycle. For example some operate on a monthly cycle, some on a six weekly cycle. The words "will soon be publicly available" if aligned somehow to the authority's decision making cycle may be an acceptable amendment – but "very short time" is neither clear nor helpful in efficient and effective administration. Also this has the potential to release into the public environment information which the decision makers have not had the opportunity to duly consider.

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

Q29: Yes – see response to Q 7 and Q 23 above.

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

Q30: This ground should remain as a conclusive reason for withholding.

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?

Q31: As with other questions raised in regard to clarity of understanding from both agency and public perspective a list is more useful than reference to "guidelines". The list could carry a rider that it was not exhaustive but would at least give some grounds for certainty.

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

Q32: Guidance on appropriate statutory amendment is best provided through bodies such as the Law Commission or Parliamentary Counsel.

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

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?

Q34 – Any improvements to the legislation should result in a less and not more onerous process, so therefore such a requirement would not result in a positive improvement. In addition the public interest is not the only consideration and the question would have to be should this have more weight than other equally relevant considerations such as privacy, trade secrets, and protecting the maintenance of law.

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

Q35: More emphasis on plain English can only improve all legislation.

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

Q36: Due to the cost and research involved with such requests this is normal process in any case and it is probably unnecessary as a requirement.

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?

Q37: The twenty working day requirement should come into force once all ambiguity has been clarified, and once payment for extensive research has been received. Time taken in clarifying a requesters needs should not start the clock. This should be clear and separate from the "day" the request is received.

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?

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

Q38 and Q39: We support the suggestions in the discussion paper.

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

Q40: Provide opportunity to agree with the requester a much longer period for response to reduce pressure on resources.

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?

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

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?

Q41, Q42, and Q43: These are all frequently experienced in our agency, often with such individuals also approaching the Ombudsman. The Agency should have the ability to take into account past conduct, bad faith and repeat requests for the same information.

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?

Q44: We support the proposal to declare some forms of request vexatious however it may be difficult to maintain the label vexatious on an individual. If this was turned around so that certain requests could be treated as vexatious then should the requester want other information on something completely different (and possibly not vexatious) then response could be made.

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?*

Q45: There should be some provision for the question of purpose to be raised as this can assist in refining research, and requests should not be able to be made anonymously because of the possibility of breaching privacy issues as discussed earlier.

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?*

Q46: The onus on the agency to decide whether or not a request is made under the legislation is another very grey area for local authorities given that "all" information we hold is deemed official information however some requests for information are part of normal day to day business transactions within the local authority eg building consent information, land information etc. Hence the lack of clarity about what is and is not an official information request again leads to a mixed and confused response across the industry. Definition by the requestor (provided as in Q47 there is clearer public understanding of the legislation) would assist all parties in satisfactory outcomes.

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

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

Q48: 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?*

Q49: Yes

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?*

Q50: Yes

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

Q51: Yes – see above

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

Q52: No – see above

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

Q53: 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?*

Q54: As for previous comments – clarity in the legislation is preferable to guidelines.

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

Q55: Not applicable.

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

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

Q56 and Q57: The proposal for prior notice to release would address the need for consulting.

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

Q58: Five working days should be sufficient for most business purposes.

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

Q59: Yes as with the amount of inter-agency interaction there are often instances where a request needs response from more than one source.

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

Q60: N/A

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

Q61: N/A

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

Q62: It needs to be explicit in the Act that electronic form is acceptable, and preferable in terms of cost efficiency for agencies. The preference of the requester should only be taken into account if access to electronic media is restricted.

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

Q63: Yes – as this comes back to cost and resourcing.

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

Q64: As with all other resources the costs of hard copies and delivery to the agencies become costs on tax payers and ratepayers and should be born by end users.

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?

Q65: The Act should be explicit that conditions can be set to ensure public understanding and to provide agencies with the ability to defend their release of information (particularly third party information).

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

Q66: A clear framework would as in all other cases, assist provided that it was regularly reviewed to recognise rising costs.

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

Q67: The Ministry of Justice guidelines could be used and are currently used as a basis for charging.

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

Q68: Yes

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

Q69: Yes

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

Q70: 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?

Q71: No but this would cease to be a problem if the issue of releasing information involving third parties (as referred to elsewhere in this discussion document) was properly addressed.

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?*

Q72: Yes

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

Q73: No comment

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

Q74: No – the process followed by the Ombudsman's offices has by experience been very fair and consultative. The office encourages proactive questions rather than reactive response in complaints situations and should be retained.

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

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

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

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?*

Q75 – Q78: The question of veto should be addressed politically.

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?*

Q79: Judicial review is a very expensive and inaccessible process for public purposes and there should be a more accessible option.

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

Q80: Refer above – Q75-Q78.

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?*

Q81: Yes

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?*

Q82: Support this proposal

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

Q83: The response to Q82 should be sufficient, no further powers necessary.

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?*

Q84: N/A

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

Q85: Clearer definition of what is official information and what is information which is part of the normal business of the organisation would resolve this matter.

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

Q86: As for Q85 – until such definition exists the information held by local authorities is so vast that such requirements could become unwieldy and impractical.

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

Q87: as for Q86 above

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?*

Q88: As above – Q85, 86, 87

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

Q89: There are other references in other legislation such as the Local Government Act requiring publication of certain information – this is therefore unnecessary in Local Government Official Information and Meetings Act 1987.

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

Q90: Not necessary nor should this be mandatory.

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?*

Q91: Disagree – protection of the agency's legal position and rights is important, and such protection should apply to proactive release.

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

Q92: Clarity in the act should remove the need for such a function.

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

Q93: This is not a usual requirement in legislation and as for Q92 improvement in the language and clarity of intent should remove any residual need.

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?*

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?*

Q94 and Q95: From a local government perspective monitoring would only be required within the organisation and should not be an external agency role. Government departments may be different as their reporting structures through to ministers are different.

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

Q96: The Office of the Auditor General already has the power to audit any particular aspect of compliance so this is not really necessary as another legal avenue is available.

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?*

Q97: No – unless this is applied across all the relevant legislation relating to Local and Central Government. Promotion, training , application and education issues are equally applicable across all legislation.

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

Q98: Yes

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

Q99: Yes – this would always be a valuable function of that office but may be less necessary if the legislation was improved as to clarity and applicability.

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?

Q100: See response to Q97

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

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

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

Q101-103: See response to Q 97

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?

Q104: The differences reflect the different natures of the agencies – one being the creator of statute and one being a creature of statute. Therefore differences should be retained.

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

Q105: The provision in Local Government Official Information and Meetings Act 1987 to a degree recognises a third party interest which is missing from the OIA – perhaps the alignment should be in the reverse.

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

Q106: Provided that it takes into account the proposals from this submission in terms of clarity, plain English and various other suggested improvements it would be excellent to have it redrafted and re-enacted.

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

Q107: See response to Q104 above.

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

Q108: Because the PRA is new and retroactive record collation in some cases is not possible no statutory amendments are required.