LEGAL RESEARCH FOUNDATION INC.

OFFICIAL INFORMATION BILL

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If the Official Information Bill has done nothing else it has at least elevated the principle of open government to the Pantheon of those civic virtues to which all politicians, whatever their party, must be seen to subscribe. Although we are all now public believers in frankness and openness one suspects there remain not a few quiet apostates among Ministers and civil servants who, while happy enough to mouth these new pieties, will slip off after the service to worship the older gods of secrecy, offering up sacrifices of the occiasional hapless reporter or whistleblowing bureaucrat. The Bill as drafted offers far too many opportunities for such backsliding (indeed in clause 52 it even presents Ministers with a new class of sacrificial victims as we shall see.[1])

The New Zealand Bill differs from most its overseas counterparts in two important respects: It leaves the final decision on the release of almost all[2] official information, however trivial, in the hands of the relevant Minister and it bases the decision to refuse access on a loose balancing of competing policy factors rather than a series of clearly drawn exemptions. The first is fatal to the Bill's aspirations. The second could turn out to be a virtue provided it were coupled with a direct appeal to the courts.

A. THE MINISTERIAL VETO

It is true that the Bill does allow a seeker after information who has been refused access to complain to an Ombudsman, who, after using the wide powers of investigation under his own statute, may in the end recommend disclosure. It is true too, that the Bill augments these powers by providing that the Ombudsman's ruling is not merely advisory but imposes a public duty to disclose on Departments, a public duty which is intended to be enforceable at law. All this may sound as though it is calculated to send a frisson of fear rippling down the corridors of power but a government has three ways of blocking the Ombudsman (i) the Attorney General can in some cases refuse to let him see the very papers to which access is

being sought, (ii) The Attorney General can direct him not to recommend the release of such papers under Clause 30, (iii) Any Minister to whom such a recommendation is made may set it aside under Clause 31 provided that he does so in writing within 21 days of its being given. The Bill's only expressed sanction against a whimsical or arbitary use by Ministers of this general veto is a political one. The Minister must lay before Parliament (and publish in the Gazette) his decision, the reasons for it, and the source and purport of the advice on which he acted. The risk that these will prove paper sanctions only must be rated very high.

Since the Ministerial Veto is so clearly the Bill's Achilles heel it seems necessary to inquire just why the Danks Committee was so set on retaining it?

1. Ministers Judges in their own cause

The first argument that Danks offers us is the oddly circular one that:

> "... to talk of a government being 'judge in its own cause...' is to confuse judicial and executive concepts".(3)

I do not find this rather muddled exposition of the doctrine of the separation of powers very helpful (and rather at odds with their insistence elsewhere on the need to maintain the purity of the Westminster system against American intrusions). Still less helpful is the accompanying tautology that "... a government must be able to make decisions in matters it judges of sufficient importance and take responsibility for those deciisons".(4) At best this is question begging and at worst a reassertion prerogative powers one had rather naively imagined had vanished in 1688 with the flight of the last of the Stuarts. To expect Ministers will always exercise their vetoes without any thought

of party or political advantage presupposes a degree of saintliness not usually to be found on the front benches of any governing party. There are in fact two very good reasons why Ministers should not be given the final say!

(a) Ministerial Misconduct

The exigencies of political life must occasionally tempt a Minister into a course of action which is in breach of the conventions of the constitution as commonly understood or (more rarely still one hopes) plainly illegal. It is expecting too much of human nature of ask Ministers to be objective judges of their own improprietry. No Minister will blithely release information which could lead to his own political downfall or that of his party. Still less likely is the obliging release of information which would place the person releasing it in the dock. As the High Court of Australia pointed out in Sankey v Whitlam[5] it is curiously inappropriate to give as a reason for maintaining secrecy "the need to safeguard the proper functioning of the executive arm of government" when "what is charged is itself the grossly improper functioning of that very arm of government and the public service which assists it". Corruption or the perversion of the security apparatus of the state for private political ends cannot be assumed to be simply American diseases from which we are somehow magically immune. However unlikely such things may seem in New Zealand, political machinery must exist which will detect or expose them. Serious misconduct by Ministers may occur only once in a political lifetime but the damage which it does to the governmental system bears no relation to its frequency.

(b) Perceived Unfairness

Ministers may be quite innocent of any intention to conceal their own mistakes or those of their subordinates but the harm done will be just as great if they are commonly believed to have done so. No applicant who sees his request for disclosure denied by a politician is likely to accept that politician's objectivity. Groups or organisations locked in protracted combat with a department are unlikely to accept the rulings of that department's political head about the need to maintain secrecy. This cynicism must eventually percolate through to a wider public. Ministerial refusuals need not occur often in order to have this effect. One unfortunate Ministerial veto could destroy years of patient work by the Ombudsman and the Information Authority. The Bill's carefully nutured scheme of open government by gradualism would then collapse overnight amid a welter of political recriminations and public mistrust.

3. Jucicial Competence and Neutrality

The Danks Committee in Part 2 of their Report doubt the ability of the courts to weigh broad policy considerations in the way in which the Official Information Bill requires that they be weighed (6) This is far from self evident, Judges are often required to rule on matters in which they have no direct training or experience and they do it very well. It is not though judges are unaware of the difficulties which are likely to arise when they are called upon to decide between secrecy and disclosure. As one member of the House of Lords observed in The Admiralty v Aberdeen Steam Trading and Fishing Co.

> "... judges sitting without assistance might think that something was innocuous which the better informed officials of the public department might think was noxious". (7)

The answer is not to refuse to allow judges to decide these issues but to provide them with the explanations and assistance they require to do their job properly. As was said by one judge in rejecting an inflated Ministerial claim of crown privilege:

> "The imperfections of judges who are not exempt from human limitations does not justify them in refusing to make... relevant inquiry into the facts necessary for the exercise of their jurisdiction".(8)

As one Canadian study points out, it falls to those who doubt judicial competence in this area to explain the nature of these doubts. Only two explanations are possible,

> "... either the evidence or arguments that a Minister can advance to support non-disclosure are so insubstantial or ephemeral that he could never hope to persuade an independent person of their worth or alternatively that a judge lacks the intelligence or capacity to understand the evidence or the arguments and to give them the appropriate wight".(9)

The first explanation is unacceptable and the second a denial of the whole thrust of legal and judicial training (and insulting to boot.) Even if judges were as incompetent to decide on matters of secrecy as the proponents of the Ministerial veto suggest, the difficulty could easily be surmounted by making the Ombudsman the final arbiter. Ombudsmen are chosen on the basis that they either have or will soon acquire a knowledge of the internal workings of government an assumption which has proved fully justified as regards both past and present holders of that office. Danks also expresses the fear that by giving the courts the general power to determine when access should be given to official information the courts would have to rule on matters with strong political overtones and would inevitably be dragged into the political arena. To this observer at least the sort of issues to be decided under the Bill are far less fraught with political implications than in many recent cases of judicial review. In any event, as the aftermath to Lesa and the Clyde Water Rights Cases demonstrates, politicians do not restrain themselves from criticising the judiciary even when the latter are exercising their traditional functions, a state of affairs which the courts seem quite able to endure quite robustly.

4. The Crown Privilege Analogy

The Danks Report (in paras 2.05, 2.06) goes to some length to reject any analogy between the courts current role in deciding whether litigants should have access to official information and any wider role as ultimate arbiters under open government legislation. In fact, the analogy is both valid and illuminating.

(a) Ministers did once have the final way in crown privilege (or as it is now fashionable to say public interest immunity) cases and while they had it they abused it. Prior to the decisions in Corbett v Social Security Commission[10] in this country and Conway v Rimmer[11] in England, Ministers commonly made completely unworthy crown privilege claims and no amount of judicial chiding on the subject was able to embarrass them out of the practice. Parliamentary criticism (which is after all the Official Information Bill's only real sanction) would be even easier to shrug off, coming as it does from a source easily stigmatised as partisan.

(b) Crown privilege cases over the last decade have shown the courts perfectly competent to balance the competing social interests in secrecy and disclosure. Indeed their task under open government legislation would be an easier one.

The range of policy factors to be considered would often be narrower. There would be no need to ask, as the courts commonly do have to ask "Why does this person want this information, are his purposes sufficiently meritorious to outweigh the need for secrecy and will disclosure help him to further those purposes?"

(c) Nor is it true that crown privilege claims usually involve only factual information relating to individual cases (Danks para 2.05). This was not the case in either Burmah Oil v Bank of England (12) or Environmental Defence Society v South Pacific Aluminium (13). The documents sought in both these cases were very much concerned with general policy, indeed this was the chief ground for objecting to their disclosure.

(d) While it is true that the courts do possess a power to limit the use to which disclosed documents may be put (Danks para 2.05) there seems little evidence that the existence of this power leads the courts to reject claims of privilege which they would otherwise accept. The ommission of such a power from the Official Information Bill (and it would be wholly inappropriate to hobble applicants under the Bill by restricting what they may do with the information they receive) would simply serve to make the courts more cautious about ordering release. It is not an argument why they should not have this power at all.

(e) There will be, as Danks states (para 2.05) a considerable difference in scale between the handful of public interest immunity claims which now reach the courts (although it is worth noting that the numbers of such claims is increasing) and the veritable flood of requests to be expected under open government legislation. The implication is that this will hopelessly overtax the courts resources. This is not so. The vast majority of requests will be dealt with by the Ombudsman and only the most difficult cases will be passed to the courts.

Indeed, the very existence of judicial review may prevent the need to resort to it by encouraging officials to comply with requests for information at the outset.

(f) While the courts have said in crown privilege cases that they would seldom question a Ministerial objection in matters of national security, or international relations, they have carefully refrained from saying that they would never do so. In any case, the existence of this self denying ordinance on the courts part in this very limited class of case is no warrant for arguing (as Danks does argue in para 2.07) that a blanket Ministerial veto is justifiable in all cases. Indeed the courts restraint in such matters is an added demonstration of their fitness to be trusted with such decisions.

5. Political Control

Danks (para s.10, 2.11) stresses that a Minister's veto will (and should only) be subject to political rather than judicial controls. Ministers, they say, must account in the first instance to Parliament and ultimately to the electorate. I do not find these arguments convincing. So far as Parliamentary control is concerned if Question Time were a wholly effective means of extracting information from the Executive there would be no need for this Bill. In a small House where party loyalties are tight and the expectation of executive office widely spread, detailed control by backbenchers over Ministers is largely illusory. The notion of backbenchers regularly braving Prime Ministerial wrath by insouciantly strolling across the floor of the House so that information may be extracted from recaltricant Ministers may be dismissed as a political fairy-tale. Punishment by the electorate for non-disclosure is even more unlikely. A government seeking re-election submits the whole of its record to the voters and it is unreal to imagine that an isolated instance of non-disclosure will lead to its being ejected from office especially as the electorate will be unaware of the contents of the information withheld. The injustice to the applicant will be no less however. The electoral risks are too well worth running to be an effective sanction.

6. Existing Administrative Law Remedies

The Official Information Bill does nothing to disturb the existing administrative law remedies for abuse of discretion and it is suggested in Danks that they will be available to curb overenthusiastic wielding of the veto by Ministers. (The proviso in clause 33 of the Bill that applicants for judicial review must first take their cases to the Ombudsman is perfectly sensible.[14]) Indeed the Bill even strengthens the courts' hand on such review by providing in Clause 9 that no claim of public interest immunity shall be made in these cases.[15]

Even with this boost to the courts powers however, information seekers are unlikely to find this cramped and back handed form of review an adequate substitute for a de novo appeal to the courts. Frustrated applicants who wish to contest a Ministers veto by way of the Judicature Amendment Act 1972 will find it of very little assistance in the great majority of cases as Danks itself concedes (para 2.24). While the grounds for judicial review of administrative discretion are many and various only a few will be of use in the context of the Official Information Bill. For all practical purposes judicial review will be confined to the following situations:

(a) Where the Minister expresses himself to be holding back information on some ground not specified in the Bill e.g. to avoid political embarrassment or to avoid Parliamentary criticism or because he finds the applicant politically or personally unacceptable.

(b) Where no reasonable Minister would have refused to disclose. (While this has a lot of potential the courts have historically been timid in the use of this ground).

(c) Failure under Clause 17 to give reasons and grounds. This requirement will usually be able to be met by reciting the appropriate statutory language (with opaque and meaningless glosses where necessary).

(d) Where the Minister overtly ignores the presumption of access in Clause 5 e.g. by requiring an applicant to prove that access is justified.

(e) Treating a "balancing" reason for non-disclosure under Clause 7 as if it were a conclusive reason under Clause 6. (of which more later).

(f) Justifying non-access solely by reference to a prior agreement with some outside body or person that there would be no disclosure. (Clause 7 (b) could make this ground for review hard to sustain).

(g) Differential charging as between similar applicants for similar information.

Even the most garrulous Minister can be trained by his advisers to avoid these elementary mistakes. Provided the grounds for refusing access are carefully drafted Ministers have little to fear from the traditional

administrative law remedies.

7. The Attorney-General as an Obstacle to Access

There is in theory no reason why, if one is seeking independent final arbiters one should not find them in the Ombudsmen rather than the courts. This could be done quite simply by deleting all references to the Minister's veto in Clause 31. Two further limitations on the Ombudsman's powers would then require to be lifted to make him truly independent.

(a) The power of the Attorney-General to cripple the Ombudsmans investigation at the outset under section 20 of the Ombudsmen Act 1975 should not be applied to requests under the Official Information Bill (Section 20 is applied to the Bill by Clause 28).

(b) Clause 30 of the Bill allows the Attorney-General to certify conclusively that disclosure would be likely to prejudice the security, defence or international relations of New Zealand or the investigation or detection of offences. Once such a certificate is issued the Ombudsman cannot recommend disclosure even if, on any objective assessment, disclosure would be harmless. Whether he can in such cases publicly take the Attorney-General to task is an interesting question. It is unlikely he would wish to do so however. True, Clause 30 does allow the Ombudsman, to ask, after having his investigation decapitated by the Attorney-General, the department concerned to think again about disclosure but this is not a course which he is likely to find very fruitful.

B. GROUNDS FOR REFUSING ACCESS

No country's freedom of information laws allow completely open access. All limit disclosure in some way. The question is: What form should these exemptions take? Both the Australian Act (16) and the proposed Canadian Bill (17) attempt to deal with the problem by legislating for a general right of access subject to very detailed and tightly drawn exemptions, exemptions which Danks quite rightly stigmatises as defensively drafted and unduly favourable to the Executive. The United States Freedom of Information Act, by contrast, states its exemptions very shortly, allowing the courts to fill in the detail by the ordinary processes of statutory interpretation. The New Zealand Bill takes American flexibility one step further (or back depending on one's point of view) by providing that the decision on access is to be arrived at by asking first whether the information sought falls within the nine extremly loosely worded categories set out in Clause 7 and then and only then seeing whether there is some other overriding public interest not stated in the Bill which requires disclosure. It is important to note that the admittedly wooly concept of an undifferentiated public interest can only be used to contract the statutory exemptions not expand them. Then too, some of the exemtpions contain within themselves a concealed balancing in the form of such phrases as "information properly entrusted in confidence" (Clause 7 b) or "the improper use of official information for gain or advantage" (Clause 7 i). The balance thus clearly intended to be tilted infavour of disclosure. Whether public servants will abandon the habits of a lifetime by so tilting it is another matter.

The framers of the Official Information Bill were not so enamoured of the balancing approach, however, that they thought all questions of access should be decided by it. The Bill does contain conclusive exemptions which need not be set aside in the public interest.

1. The Conclusive Exemptions

Where there are absolute exemptions the loose drafting which is acceptable where there are conflicting public interests to be balanced has no place. Regrettably, this is not a drafting precept which the Danks Committee has chosen to follow. Their conclusive exemptions are just as fuzzy as those subject to balancing with much more serious consequences.

(a) Withholding material under Clause 6

Clause 6 of the Bill provides that good reason:

"for withholding official information exists, for the purpose of this Act, if the making available of that information would be likely to prejudice -

(a) The security, defence, or international relations of New Zealand; or
(b) The entrusting of information to the Government of New Zealand on a basis of confidence by -
    (i) The government of any other country or any agency of such a government; or
    (ii) Any international organisation or agency of an international organisation; or
(c) The maintenance of law and order, including the investigation and detection of offences; or
(d) The substantial eocnomic interests of New Zealand."

There is no attempt to weigh competing social interests here. The clause proceeds on the false assumption that there can never be a public interest in disclosing certain kinds of information. Without the gift of prophecy such confident certainty is hard to justify. No governmental activity is so sacrosanct that it is entitled to be conducted in absolute secrecy. Disclosure may be rare, but it should always be possible. Clause 6 should be re-drafted so that:

(a) It is only the lawful activities of law enforcement and security intelligence agencies which are protected from disclosure. Where the legality of those activities is itself in issue there should be no exemption from the obligation to disclose.(18)
(b) "International Organisation" is re-defined so as to exclude purely private bodies. A definition similar to that set out in section 9 of the Diplomatic Privileges and Immunities Act 1968 would seem to be appropriate here viz.

"Organisations of which two or more States or the Governments

are members".

(c) "Substantial economic interests of New Zealand" is too slippery a phrase to be given absolute exemption. Protection should only be directed to preventing premature disclosure of tax, currency or bank rate changes or the release of information concerning the regulation or supervision of financial institutions

(d) The law enforcement exemption belongs more properly in Clause 7. If it were subsumed into that clause it might then be possible to obtain disclosure of: (i) disciplinary and efficiency reports on individuals or sections within the police force. (ii) Information about individuals held by law enforcement agencies which does not relate to the actual or apprehended commission of an offence. (iii) matters concerning offences which are no longer being investigated (iv) the results of investigations into strict liability health and safety offences.

(b) Refusing requests under Clause 16

Clause 16 deals largely with denials of access on administrative grounds e.g. where the information is or soon will be publicy available or cannot be made available without substantial collation or research. Such grounds were so obvious that the Danks Committee thought that they need not be counterbalanced by any public interest requirement. Clause 16 does however, contain two rather alarming provisions:

(i) other secrecy enactments - 16 (c) There are over 200 Acts and regulations containing some form of secrecy requirement. Many (but not all) of them are listed in Appendix 4 of the Supplementary Danks Report. The range of information covered by them is vast and much of it is totally innocuous. Either the Official Information Bill must override these Acts and regulations or they must be effectively amended to conform with the Bill in practice and spirit. If this is not done the Bill's operation will be greatly impeded since these enactments cover those very areas where access is most likely to be sought.

(ii) applicants need and motive - 16(g) This sub-clause allows departments to ignore requests which are "frivolous, vexatious, made in bad faith or concern trivial information". While there is no doubt that many silly and annoying requests will be received by departments it is probably unwise to allow them to traverse applicants needs and motives. Open government assumes equality of access and departments should not be encouraged to treat some applicants as more worthy than others.

2. Exemptions subject to balancing under Clause 7

The Danks Committee's insistence on a shapeless balancing of conflicting criteria rather than a tightly worded list of permissable departures from the general rule of openness means that it will be some years before it is clear whether the exemptions are reinforcing or undermining the principle of availability under Clause 5. Even accepting that this approach requires a degree of imprecision, some criticisms can be made:

Clause 7 (b) Confidentiality

This should not be a ground for refusing disclosure. Those who supply the government with information should not be given a veto over its release, particularly where it is supplied in expectation of pecuniary gain or advantage. Nor should the state be permitted to contract out of the Bill by stipulating to outsiders that the its dealing with them be kept from public view. Access should only be denied where:

(a) Disclosure would adversely affect the privacy of the individual (already protected elsewhere in Clause 7).

(b) The information was acquired by statutory compulsion (and even here disclosure should be considered if the information concerns product or environmental testing.[18A]

(c) Disclosure would deprive the supplier of some competitive advantage (e.g. trade secrets).[18B]

Clauses 7(d) and 7(e) The Constitutional Conventions and Candour

There is a contradiction here. If, as the Danks Committee suggests 7(d) is stated in general language so as to allow the disclosure rules to change as the constitution evolves there would seem no need for 7(e) which has precisely the opposite effect. Clause 7(e) is an attempt to "freeze" in statutory form an outdated version of the conventions of collective and individual ministerial responsibility. I do not think that public servants are so lacking in spirit that they will tailor the advice they give to the likelihood of its disclosure. In any event it is possible to release advice given to Ministers while still preserving the anonymity of those who render it.

Ministers who themselves abandon the convention by publicly blaming their subordinates should not later be permitted to take refuge behind that same convention when resisting disclosure. A proper "balancing" would also acknowledge that a government which deliberately speaks with two voices on a given matter thereby undermines its case for resisting the disclosure of the cabinet papers relating to it.

Clause 7 (g) State Commerical Activities

The definition of official information in Clause 2 of the Bill excludes informtion solely related to the competitive commercial activities of the various Quangos listed in the First Schedule to the Bill. Such information is unobtainable however great the public interest in its disclosure. The protection offered to departments under 7(g) is both wider and narrower. Wider, in that it is not necessary that the department actually has competitors. (Presumably a sine qua non for protection under Clause 2). Narrower in that it must be shown that the department would in some way be prejudiced or disadvantaged by disclosure.

Clause 7 (h) Negotiations

To say that business should be able to negotiate with government away from the distracting glare of publicity would be well enough if policy formulation always preceded negotiation. This is not the way things tend to happen in New Zealand. Governments often find themselves locked into a thoroughly unsatisfactory policy by prior contractual commitments. This is why disclosure during the negotiation stage is vital. After all, multinationals are not forced to do business with the state and businessmen can surely be relied upon to weigh the pains of disclosure against the expected profits before embarking on negotiations. Some of the information passing between government and business will of course be protected on other grounds. See comment on Clause 7 (b) supra.

Clause 7 (i) Gain or Advantage to the Applicant

This clause is designed to prevent government departments from becoming unpaid research agencies for the private sector. American companies do tend to use the American FOIA in this way, it is true, but it would be dangerous to invite speculation or queries by public servants as to the likely use to which an applicant wishes to put his information. This could easily become oppressive. Since a department is protected against expensive and substantial collation and research under Clause 16 (f), there is no need for this exemption.

3. Mandatory or Permissive Disclosure?

Nothing in Clauses 6, 7 or 16 prevents a department from disclosing if it wants to. These clauses merely set up the parameters within which disclosure may be compelled (assuming that those parameters are not arbitrarily contracted by Ministerial fiat). If a public servant wishes to disclose personal information about individuals or material obtained in confidence the only real constraints upon him are the criminal law and the prospect of civil liability for defamation, breach of confidence or infringement of copyright. (There is no such liability where information is made available in accordance with the Bill - Clause 46). There is thus no means whereby a person or body outside the public sector can directly resist disclosure even though that disclosure may fall squarely within one of the exemptions. The concept of "reverse freedom of information" which flowered briefly in the American courts[19] and is now partially embodied in the Australian Act[20] has no counterpart in the Bill. A company which fears that its trade secrets will be blithely betrayed by a department to whom they have been entrusted cannot prevent the department from disclosing. Normally of course, the departments self interest would dictate concealment (lest the flow of commercial information to it dry up) but if the supplier and the department were locked in dispute there might be few inhibitions on disclosure. Again, the discloser may not be aware of the significance or sensitivity of what he is disclosing. (The same arguments would apply to personal information.) The Ombudsman could and no doubt would consult such outside parties but this would be of no assistance where the information had already been released.

4. Invisible Information

Clause 8 of the Bill allows a Minister or Department to conceal the very existence of information to which Clause 6 applies if he is satisfied that confessing its existence would be likely to prejudice the interests protected by Clause 6. This is done by giving the applicant notice in writing that the existence of the information is neither confirmed or denied (Clause 26 contains an identical power in relation to requests for subject access. See infra). While the use of the formula "is satisfied" is not the insurmountable obstacle to judicial review it once was the courts still tend to be intimidated by it when used in a security context.[20B] Its inclusion in Clause 8 therefore to be regretted since if there were a prize for the provision of the Bill most likely to be abused Clause 8. would win it, Danks pious hopes to the contrary notwithstanding. To say, as they do, that Clause 8 "theoretically puts a strong weapon in the hands of government" errs on the side of understatement. One suspects that theory will quickly become practice once Clause 8's potential for burying inconvenient matters becomes fully appreciated by Ministers and their subordinates.

C. JUSTICIABLE RIGHTS OF ACCESS

Danks concedes that there are some categories of official information where the need for access is so clear or concealment is so demonstrably unfair that the inquirer should have a legal right of access to them unimpeded by Ministerial veto and directly enforceable in the courts (subject only to certain stated exceptions.[20A]. The Bill provides for four such categories:

(1) Right to personal information about oneself. This is dealt with below.

(2) Aids to finding information. There would be no point in providing an elaborate access machinery unless people knew what to look for, who to ask and where to start looking. Clause 18 of the Bill requires each department (within twelve months of that Clause's commencement) to issue a publication setting out: (i) its function, structure and responsiblities (ii) a description of all classes of records under its control (iii) a statement of what an outsider needs to know in order to find information held by the department (iv) a description of all "secret internal law" used in the department (see infra.). Should the department neglect or be unable to comply with this duty to publish it still has a directly enforceable obligation to allow access to these indices under Clause 19.

(3) Information made available by regulation. As part of its penchant for gradualism the Danks Committee envisaged that the categories of information to which access was to be given as of right could gradually be extended by regulation as it became apparent from individual requests that disclosure in such cases was harmless and as departments evolved procedures for making such information readily available.

The Official Information Bill sets up a complicated consultative process for making these regulations. It provides for an Information Authority (of which more later) with extensive evidence gathering powers which is to monitor departments compliance with the purposes of the Bill and recommend to Cabinet regulations widening the classes of legally accessible information (these are not the Authority's only functions to be sure). The Authority's powers are entirely advisory and the regulations promulgated by Order-in-Council, may bear no resemblance to its recommendations, nor is their validity affected by any lack of consultation with the Authority (even if total). Once promulgated however, the regulations create a right of access under Clause 18. There are also, it should be remembered a few existing statutes which provide for the publication of certain information[21] and these will prevail over access regulations made under the Official Information Bill (Clause 49). This unfortunate since many of these extant provisions are either permissive in form[22] or contain a Ministerial power of veto[23] or restrict the class of person to whom disclosure can be made.[24]

(4) Secret Internal "Law". Although statutes under which administrative decisions are taken contrive to give the impression that administrators operate in a world of wide and unfettered discretions most are hedged in by a thicket of informal policies, principles, rules and guidelines contained in well thumbed manuals inaccessible (and sometimes invisible) to the public. Few of these internal rules have the force of Law [25] but their impact on individuals is often as great as if they were contained in a statute (Greater perhaps, since public servants actually read the manuals while the Acts which they purport to explain languish unread on the shelves of departmental libraries). Clause 20 of the Bill gives a right of access to any such rule if decisions are made in accordance with it affecting persons or groups of persons in their personal capacity. (This last proviso is intended to exclude decisions affecting the public or sections of the public at large and indirectly.)

Clause 20 falls short of its Australian counterpart in two important respects: (i) There is under Cl. 20 no obligation to publish merely a duty to allow access [26] (ii) Under the Australian Act decisions taken on the basis of unpublished rules do not bind those affected by them if they might lawfully ordered their affairs differently had they been aware of the rule. [27] Under Clause 20 the seeker after internal rules must know they exist, which is unlikely unless they are included in the departmental record indices required to be kept under Clause 18. If Clause 20 contained prohibition against the use of secret law to the detriment of individuals it would concentrate public servants minds wonderfully on their obligations to disclose.

Clause 20 does not apply to the policy reasons underlying the rules just the rules themselves. Since internal manuals are replete with explanations and examples this seems unduly restrictive especially as such explanations are examples tend to offer more illuminating insights into the way in which a discretion is intended to operate than a bald statement of the rule itself. Again, clause 18 would not appear to apply to decisions in individual cases even when such decisions are consciously followed in subsequent cases [28]. This is a pity since public servants are much more faithful believers in stare decisis than are judges and it is sometimes useful to beat them over the head with their own prior decisions. (Just when a yellowing bundle of precedents floating around a department crystallises sufficiently into a "policy or a guideline" will not be an easy question to resolve.)

D PERSONAL INFORMATION

Part IV of the draft Official Information Bill seeks to regulate access by individuals to personal information about themselves while Clause 38 gives the Information Authority purely advisory powers in connection with the collection, use and dissemination of such information. Danks took the view that only the former was susceptable to direct statutory control and that the latter could safely be left to informal administrative guidelines or directives.

1. Collection The question should be asked whether government departments and public agencies have simply acquired over the years far too much information about the private lives of New Zealanders. In order that such collection be kept to the barest minimum:

(a) The Information Authority should be empowered to examine of its own motion the need for, and fairness of, the various statutory powers which compel individuals to supply information about themselves. The Authority should not have to wait for Ministers to initiate such examinations.

(b) Before individuals are asked to give information about themselves they should be told what the information is to be used for, whether or not they are obliged to supply it and to whom it will be passed.

(c) Officials should not imply that their statutory powers to compel the supply of information are greater than they actually are. Conversely, if failure to provide the information is likely to result in a decision adverse to the person asked to give it, then the subject should be informed of this fact even though there is no formal power to compel the supply of such information.

(d) Agencies should only collect personal information where this is necessary for carrying out their statutory functions.

2. Access

The Official Information Bill seeks to straddle what are often said to be the contradictory objectives of trying to allow individuals to find out what is held about them while ensuring that the self-same information does not fall into the hands of unauthorised third parties. The conflict is more apparent than real and is easily resolvable provided appropriate procedures are devised for identifying the subject before the information is handed over to him. (Such procedures can be both secure and simple as the American practice shows [29]).

(a) Subject Access. Although the Bill does deal in some detail with the problem of subject access there are some significant omissions:

(i) Charges - There is a difference of principle between asking for information about others and asking for it about oneself. One should not have to pay for retrieving something which one did not ask to be collected in the first place. It is worth noting that no charges are made for subject access under the United States Privacy Act 1974 although they are when inquiries are made under the Freedom of Information Act.

(ii) Medical and psychiatric records - Clause 25(d) allows details of a person's physical or mental health to be kept from them if disclosure would be likely to prejudice their physical or mental health. This seems a little paternalistic. People have a right to know the worst. Information should not be kept back just because disclosure might make treatment more difficult. Clause 25(d) would benefit from the following changes:

(i) Access should be denied only where a patient's physical or mental health is likely to be seriously affected thereby. In Sweden disclosure can only be refused in those cases where life is at risk.

(ii) Even in such cases disclosure should be allowed to an intermediary selected by the patient (relatives or his own medical practitioner for example).

(iii) Access should not be denied when the quality or competence of public health care is in issue.

(iii) References and evaluations - Clause 25(c) is designed to ensure that references and reports prepared for the purposes of assessing a person's fitness for an office or award are not made known to that person. This is unexceptionable provided:

(i) Subjects are informed in advance that they will not be entitled to see references

(ii) The identity of referees is not concealed

(iii) Subjects are able to stipulate that an unseen reference not be used in making decisions concerning them.

(iv) Joint subjects - Records commonly relate to more than one person. Unless the portions referring to third parties can be segregated access would presumably be refused under Clause 25(b). Provision should be made for obtaining the consent of that other person.

(v) Blanket waiver - The purpose of Part IV would be entirely subverted if subjects were induced to sign forms waiving their right of access. The Official Information Bill does not expressly recognise waiver as a ground for refusing access, it is true, but there is a danger that a request from a person who had earlier waived their rights might be regarded as vexatious or made in bad faith under Clause 25(b). It would be safer if the practice of blanket waiver were forbidden outright.

(b) Third Party Access - Clause 7(a) allows a request for official information to be refused "if this is necessary to protect the privacy of the individual". It might have been better had the term privacy not been used since there are such multiplicity of interests capable of being protected under this head (30) that officials may cast the net of this particular exemption too widely out of a combination of caution and confusion. Jurisprudential quibbles as to the meaning of privacy are unlikely to be of much assistance to those required to administer the Bill on a day to day basis. The Canadian Bill seeks to avoid this problem by forbidding the unauthorised disclosure of unpublished personal

information.[31] Part IV of the Official Information Bill makes no reference to "privacy" and its presence in Clause 7(a) is hard to explain.

Only natural persons are protected under Clause 7(a) not corporations. Statistical data which is not visibly linked to individuals would not be protected.[31a] Personal information about public employees is probably as Danks suggests, within 7(a), although the line between personal and official will not always be an easy one to draw (work evaluation records for example[32]). Nor is it clear to what extent the dead are entitled to privacy if at all.

3. Correction The provisions of the Bill for requesting corrections and having that request noted are generally adequate. Weaknesses would appear to be:

(i) Clause 24 envisages a written document which can be manually and visibly correct or noted. Computer systems can be so designed that corrections are by-passed when the information is called up.

(ii) A corrected record should note that it has been corrected and when (but not what the inaccuracy was). A subject might need to prove that his record once was incorrect.

(iii) Clause 24 makes no reference to the timeliness of the record. It is questionable for example whether a conviction for stealing paper clips should follow one through life forever.

4. Use and Dissemination A personal record should not be used for a purpose other than that for which it was originally compiled. (Unless perhaps it is required for use in legal proceedings and sometimes not even then.) Subjects should be able to trace the movements of their files so as to keep a check on improper use. While it would be unreasonable to expect subjects to be told the name of every person who had seen their file it should be possible:

(i) To ensure that movement between sections within a department or agency is logged

(ii) The passing of information to other departments and the purpose for which it is passed should be noted

(iii) Access by Ministers to an individual's file should be recorded. This would enable individuals to dispel (or verify) the suspicion that their personal files were being used for political ends

(iv) Where information is passed to persons outside the State Service proper the name of the recipient should be recorded and the purpose for which it is passed noted.

It is to be hoped that the Information Authority will direct departments accordingly.

E. PROCEDURE AND ADMINISTRATION

Unlike most other freedom of information legislation the New Zealand Bill gives access to information not documents. This would include facts known to an agency although not opinions in the minds of officials. Opinions probably become information once recorded in a permanent form although the Bill does not say this[33]. (Many of the exemptions would make no sense unless "information" extended to non-factual material). While the wider ambit of the New Zealand Bill might be thought to favour persons seeking access this is not invariably so and even when it is they may find their way blocked by the Bill's seemingly harmless procedural provisions

1. Forms of Access: Clause 14.

Where information is contained in a document the Bill exhorts officials to be guided by preferences of the access-seeker as to the form in which access should be given. Normally, one imagines, access seekers would prefer to sight the original and take a copy. The Bill however, also enjoins officials to be guided by "the need for efficient administration" when settling the form of access allows them to substitute a oral or written precis of the document provided they say why they have chosen this form of access) for the original. (An access seeker who objects to such bowdlerised access may have this decision reviewed by the Ombudsman).

2. Segregation and Severability - Where exempt information can be excised from a document Clause 15 allows (but does not require) such excision to be done. Clause 15 also allows the document to be altered to this end, a power which could lead to misleading editing of information unless closely watched by the Information Authority and the Ombudsman. The fact that a document has been altered or truncated in this way should be made to appear on its face lest the document be made to seem what it is not.

3. Particularising the Request: Clause 10.

In many cases applicants will be unable to describe precisely what they are looking for. As suggested in para. 4.33 of the Danks Report it will be sufficient if the request for access describes it in such a way as to enable an employee of the department, who is familiar with the subject area of the request, to locate the record with reasonable amount of effort.
It might be better if this limitation were expressly written into the Bill.

4. Time Limits: Clause 10.

The Bill does not provide a specific time limit. It should. If this is thought to be unduly restrictive then the department could apply to the Ombudsman to extend it. If the Bill is to be of any use a time limit is essential.

5. Charges and Costs: Clause 13.

Applicants should only be required to meet the costs of making available the material sought. Applicants should not be charged for the time spent in searches or deciding whether the material is to be released. Departments should bear the costs due to their own indecisiveness or the

inadequacies of their record keeping. Nor should applicants have to bear the cost of issuing a commentary on documents which the Department thinks are misleading or tendentious. (Danks para 4.46).

The Department should bear all costs other than those directly attributable to retrieval and reproduction.

6. Unprocurable and Non-Existent Documents: Clause 16.

Information which has only recently ceased to exist is in rather a different category. Departments should not be encouraged to cull files in anticipation of requests. Where a record has ceased to exist in some permanent form in the twelve months immediately preceding the request for access the Bill ought to provide that the date of and reasons for its destruction should be made known to the applicant.

7. The Role of the Information Authority.

Part VI of the Bill is entirely given over to the establishment and functions of the Information Authority, a body of which the Danks Committee clearly had high hopes[33A]. Given the purely advisory and monitoring role bestowed on it it is difficult to see how the Authority can live up to this promise. No doubt it will do little harm but it is unlikely to do much good either. If, therefore, there is to be any competition for funds and resources between the Ombudsmans Office and the Information Authority it would be preferable to see those funds and resources go to the former. Two aspects of the Authority's functions which do cause concern, however, are:

(1) At whose request should the Authority Act?

The role of Olympian detachment from current controversial issues outlined for the Authority in para 3.09 of Danks is too remote to gain for the Authority the public acceptance it will need if it is to do its job properly. The Authority will lose all credibility if it does not investigate matters of current public concern whether these be drawn to its attention by interest groups or otherwise. If it acts only on, or mainly in response to, Departmental initiatives it runs the risk of being seen as the prisoner of those Departments.

(2) Restricting Access by Regulation

Clause 37, as we have seen, envisages the gradual extension by regulation of the categories of information to which access is to be given as of legal right. It should be made explicit in Clause 37 that there is no power to restrict access by this means. (Danks (in Part 2

para 3.15) suggests a role for such Regulations which is disquieting. Regulations should not be used to refine or explain the exemptions contained in Clause 7. Regulations should be confined to authorising the release of named classes of documents only. Nor should (as Danks suggests) Regulations attempt to lay down classes of more or less worthy applicants.

F. CRIMINAL SANCTIONS FOR DISCLOSURE

Although one can only endorse the Danks Committee's recommendation that the Official Secrets Act 1951 be repealed one finds that some of the suggested replacements for that Act have extremely ominous implications, implications which are no less ominous for being unintended.

1. New Section 21A in the Police Offences Act.

The disclosure of information likely to prejudice the "substantial economic interests of New Zealand" is too vague a concept to constitute an element of a criminal offence. The section should confine itself to protecting information in the hands of the police and the prison service.

2. The proposed replacement for Section 78 of the Crimes Act.

The Select Committee is by now no doubt aware the Clause 52 of the Bill has given rise to widespread public concern. Such concern is scarcely surprising. Clause 52, as it now stands, would allow a degree of control over the free expression of thoughts and ideas by New Zealanders which has not hitherto been attempted by any democracy, not even in war-time.

The Danks Committee depicts the new section 78(1) as being directed solely towards espionage, a modest tidying up of the present law and nothing more. This grossly underestimates the scope of the new section which makes every person -

> "liable to imprisonment for a term not exceeding 14 years who being a person who owes allegiance to the Queen in right of New Zealand, within or outside New Zealand, for a purpose prejudicial to the security, defence, or international relations of New Zealand, -
>
> "(a) Communicates information or delivers any object to a country or organisation outside New Zealand or to a person acting on behalf of any such country or organisation; or
>
> "(b) With the intention of communicating information or delivering any object to a country or organisation outside New Zealand or to a person acting on behalf of any such country or organisation:
>
> " (i) Collects or records any information; or
> " (ii) Copies any document; or
> " (iii) Obtains any object; or
> " (iv) Makes any sketch, plan, model, or note; or
> " (v) Takes any photograph; or
> " (vi) Records any sound or image; or
> " (vii) Delivers any object to any person, -
>
> if the communication or delivery or intended communication or intended delivery under paragraph (a) or paragraph (b) of this subsection is likely to prejudice the security, defence, or international relations of New Zealand."

It will be apparent that the framers of the new Section 78(1) have spread their grasp far wider than espionage as that term is commonly understood. Without dilating at length on the vagaries of interpretation to which it is possible to subject the new section (the subject was most efficiently covered by Philip Joseph in his article in last year's law journal[34]) if it were given the same executive minded treatment as its English predecessor in Chandler v D.P.P.[35] it would mean that the sending overseas of perfectly innocuous material to perfectly innocent recipients may in some circumstances amount to a criminal offence punishable by fourteen years imprisonment.

The new Section 78(1) is so wide that:

(i) The information communicated need not be a diplomatic secret. It would be sufficient if the communication overseas lowers New Zealand's international standing

(ii) It matters not that the information is already publicly available in New Zealand. By what must surely be the Bill's ultimate irony, information obtained by using the Bill's own access machinery will render the obtainer liable to criminal penalties if he sends it overseas. Even repeating a Minister's off the cuff idiocies abroad would be dangerous.

(iii) Unlike the new Section 78(2) (which carries only three years imprisonment) the proposed Section 78(1) is not confined to the communication of "official" information. It is not necessary that the document emanate from a government source. Purely private information is within the purview of the section.

(iv) The communication of opinions as well as facts is punishable. This is wrongheaded and smacks of "thought control". New Zealanders are as fully entitled to criticise their government abroad as they are at home, however mistaken or intemperate their view may be.

(v) The overseas recipient need not be a foreign government or its agent. Any "organisation" public or private will do. Writing letters to overseas newspapers or communicating with sports bodies overseas could attract criminal sanctions. Employees of overseas firms, journalists writing for the foreign press, churchmen communicating with their brethren abroad, voluntary aid organisations, trade unionists, all could find themselves facing prosecution for a careless word or infelicitous phrase.

Nor should the side-effects of Clause 52 be overlooked. By absorbing the new offence into the definition of espionage in the New Zealand Security Intelligence Service Act 1969 the legal

scope of surveillance by the S.I.S. is dramatically increased. The proposed offence is accompanied by expanded powers of entry and search which are barely tolerable when applied to true espionage and totally outrageous when exercised in relation to the relatively harmless behaviour caught by the new Section 78(1).

Drafting lapses of this magnitude cannot be repaired by Ministerial assurances that the section will only be used against true espionage. The history of Official Secrets legislation throughout the Commonwealth is littered with well-meant but ultimately broken promises of this kind. Nor should we be reassured by the need to obtain the Attorney-General's consent before instituting a prosecution. Silly and misguided Official Secrets prosecutions have slipped past many an Attorney-General before this. The simplest cure for these drafting ills would be to retain Section 78 in its present form. If a new section is thought to be absolutely necessary it should:

(a) Make no reference to international relations at all.

(b) Be confined to official information.

(c) Require that the person charged knows that communication is likely to prejudice New Zealand's defence or security.

(d) Ensure that prior disclosure inside or outside New Zealand is a complete defence.

(e) Provide that only communication to foreign governments (or their agents) attracts the fourteen year penalty.

Footnotes

(1) See infra.

(2) The four classes of information for which there is a right of access directly enforceable in the courts are discussed infra.

(3) General Report or the Committee on Official Information para. 104.

(4) Ibid.

(5) (1979) 21 A.L.R. 505 at 540.

(6) Supplementary Report of the Committee on Official Information para 2.04.

(7) 1909 S.C., 334 at 334.

(8) Marconi Wireless Telegraph Co. v Commonwealth (1913) 16 C.L.R. 175 at 178 per Griffith C.J.

(9) Rankin "Report on a Proposed Freedom of Information Act", Ottawa 1976.

(10) [1962] N.Z.L.R. 878.

(11) [1968] A.C. 910.

(12) [1980] A.C. 1090.

(13) [1981] N.Z.L.R. 146 and 153.

(14) Prior complaint to the Ombudsman is not a pre-condition for judicial review in those few cases where there is a statutory right of access.

(15) This involves a considerable change in the courts role. It seems to be envisaged that the courts will be able view the material in private with a view to acting on it as evidence even though it will be kept from the parties. (In crown privilege cases the court sights the documents only for the purpose of deciding on their admissibility and they do not become evidence unless the privilege claim is rejected in which case the parties must see them). Whether the rather clumsy drafting of Clause 9 actually achieves this result is open to question.

(16) Freedom of Information Act 1980 (Cwth).

(17) Access to Information Bill 1980 (Bill C-43 of 1980).

(18) Cf. U.S. Freedom of Information Act 5 U.S.C. Sec. 552 (b) (7).

(18A) Cf. Canadian Access to Information Bill 1980, Clause 20 (2).

(18B) Cf. Australian Freedom of Information Act, Section 43.

(19) In Chrysler Corporation v Brown (1979) 441 U.S. 281, the Supreme Court demolished an elaborate edifice of third party participation in F.O.I.A. suits which had been built up by lower federal courts.

(20) Australian Freedom of Information Act 1982, ss 27, 59. These sections deal only with information concerning business affairs. The suppliers of personal information are not per se entitled to participate in the decision to disclose.

(20A) Aids to finding information need not be published where to do so would disclose matters within any of the Clause 6 exemptions. The "Secret Law" provisions are made subject to Clauses 6 (a) to (c). (omitting the "substantial economic interests of New Zealand) and Clauses 7(a) and (b) (privacy and confidentiality).

(20B) Ross-Clunie v Papadopoullos [1958] 1 W.L.R. 546; Reade v Smith [1959] N.Z.L.R. 996 at 1000; R v Home Secretary, ex parte Hosenball [1977] 1 W.L.R. 766.

(21) See s.4(3) National Housing Commission Act 1972 which allows the Housing Commission to publish the results of inquiries or research carried out by it or on its behalf provided this information has first been made known to the Minister.

(22) Fertilizers Act 1960, s.31 (1) (a), Commerce Act 1975, s.130 (2).

(23) Trade and Industry Act, s.15.

(24) Hospitals Act 1957, s.67 (2).

(25) R. v Home Secretary ex p. Hosenball [1977] 1 W.L.R. 766, R v Customs and Excise ex p. Cook [1970] 1 W.L.R. 450. Cf. R. v Criminal Injuries Compensation Board ex p. Schofield [1971] 1 W.L.R. 926.

(26) Cf. Australian Freedom of Information Act 1982, s.9.

(27) Ibid, s.10.

(28) The Australian Act refers to "practices or precedents". Ibid s.9. Cf. Grumman Aircraft craft Engineering Corporation v Re-negotiation Board 482 F 2nd at 720 (1973).

(29) The complex and rather intimidating practice of the Wanganui Computer Centre Privacy Commissioner with its multiplicity of registered letters and interrogation by post-masters is perhaps not the best model to follow.

(30) Wacks The Poverty of Privacy (1980) 98 L.Q. R.73.

(31) Access to Information Bill 1980, Cl. 9. Not that "personal information" is without its problems of definition. It may not include information about a persons financial position or business activities whereas American judges have held both to be within the preview of "privacy" under their F.O.I.A. Metropolitan Life Insurance Co. v Usery 425 U.S. 353 (1976) Sonderegger v Department of the Interior 424 F. Supp 847 (1976). But see National Parks Conservation Association v Klepper 547 F. 2nd 673 at 685 (1976).

(31A) See the definition of "personal information" in Cl. 2 (Cf. Gamini Bus Co. v C.I.T. [1952] A.C. 571 at 579; Foster v Mountford (1977) 14 A.L.R. 71).

(32) See Committee on Masonic Homes v N.L.R.B. 556 F. 2nd 214 (1977).

(33) But see Hiroa Maria v Hutt Timber Co. [1950] N.Z.L.R. 458 at 460.

(33A) An enthusiasm which it would be uncharitable to attribute to the large number of highly paid civil service jobs it is likely to provide.

(34) [1981] N.Z.L.J. 534.

(35) [1964] A.C. 763.