THE OFFICIAL INFORMATION ACT

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CONTENTS

General Overview of Official Information and the Official Information Act

The Danks Report 1

The Official Information Act 1982 and the Legislature: A Proposal 6

Use of the Official Information Act in the Political Process (including Policy Development in an MMP Environment)

Behind the Official Information Act: Politics, Power and Procedure 19

The Official Information Act and the Policy Process 24

The Games People Play: Journalism and the Official Information Act 30

The Official Information Act in the Corporatised World

Review of the Official Information Act 39

The Official Information Act in Respect of State-Owned Enterprises 43

The Official Information Act in the Corporatised World 52
PREFACE

Since the passage of the Official Information Act in 1982 the legislation has been the subject of determined use and defence by the public, its lawyers, officials, the press, politicians, researchers and those in the corporate world. It has given rise to considerable debate, and a number of cases have gone before the Ombudsmen and the courts. The corporatisation of the government system and the advent of MMP have both played a part in transforming the governmental and political environment in which the Act operates.

After 15 years of initiation and use it seemed a good time to appraise the Official Information Act and its workings, particularly following the first MMP election. The Legal Research Foundation in February 1997 gathered a number of the principal players and commentators to take part in a seminar examining the role and operation of the Act, and is pleased to present here the papers given at the seminar.

The Foundation wishes to record its gratitude to the authors; to Sir Brian Elwood, Chief Ombudsman, the Hon. Justice David Baragwanath, President of the Law Commission, and Jack Hodder of Chapman Tripp Sheffield Young for their invaluable contributions to the seminar; to the New Zealand Institute of Public Law for its assistance in staging the event; and to Judge Anand Satyanand, Ombudsman, without whom the seminar would not have taken place at all.

Kristina Muller
May 1997
The Danks Report

Bryce Harland

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It is now 15 years since the committee chaired by Sir Alan Danks completed its report "Towards Open Government". For most of that time I was out of New Zealand, first at the United Nations in New York and then in London. I represented the Secretary of Foreign Affairs on the Danks Committee for only a year or so, in 1979 and 1980. But in that time the Committee formulated its main conclusions and prepared its General Report. (A Supplementary Report containing a draft Bill was completed in 1981.) The General Report sets out the conclusions, and the reasons for them: it is a good starting point for a discussion of the present situation and the options for the future. There is not much I can add to it, but it may be helpful to recall the context in which the Committee did its work and try to highlight the main features of its recommendations. Others are better qualified to say how the system then proposed has worked in practice.

So many changes have taken place since the early '80s, and they are so pervasive, that it is not easy to recall accurately the political atmosphere of those years. The Government was headed by Sir Robert Muldoon, who had recently been reelected by a small majority. His personality and his style of government polarised opinion and provoked radical reactions. His approach to the economy is now described as "interventionist": he sought to manage it in some detail, and not to open it up to international pressures too rapidly. And he was launching a series of what became known as "Think Big" projects for developing the country's resources. Partly because of his actions, pressure was mounting for more open government. The existing arrangements for the handling of official information were confused, and were increasingly seen as inadequate. Leaks were becoming common, especially on environmental questions, and the sources were seldom identified. The Official Secrets Act was still in force, virtually unchanged since 1911: the penalties it prescribed were so severe that it was not often invoked.

When charges under the Act were brought against Dr W. B. Sutch, the jury found him not guilty and he was acquitted. Sir Guy Powles, the widely respected Chief Ombudsman, was asked to carry out an investigation of the Security Intelligence Service. Among the many questions touched on by Sir Guy in his report was that of security classifications. He made it clear that he had not had time to go into this in depth, and he recommended that classifications should be examined separately. This recommendation was one of the developments that led to the setting up of the Committee on Official Information—the Danks Committee.

The Terms of Reference given to the Committee called upon it to review the criteria for the classification of documents, to examine the working of the Official Secrets Act, and
to make “appropriate recommendations on changes in policies and procedures which would contribute to the aim of freedom of information”. But the Committee was instructed to bear in mind “the need to safeguard national security, the public interest and individual privacy. The basic task of the Committee [was] to contribute to the larger aim of freedom of information by considering the extent to which official information can be made readily available to the public.” The tone was positive—perhaps surprisingly so in the circumstances—but it was cautious. The door was to be opened, but not too wide.

This approach was reflected in the composition of the Committee. Sir Alan Danks, who was appointed Chairman, was a former Chairman of the (now extinct) University Grants Committee. The only other member who was not an official was Professor K. J. Keith—now Sir Kenneth—who was then teaching law at Victoria University. The rest of the members were senior officials in Departments that were directly concerned with the handling of sensitive information—the State Services Commission, Justice, Foreign Affairs, Defence, and the Cabinet Office. The Chief Parliamentary Counsel was co-opted at an early stage. None of the members was a politician, the media were not represented, and neither was any of the departments dealing with social policy, such as Education, Health and Social Welfare. Today such a group might not be regarded as sufficiently representative for the task in hand: even in the ’70s it seemed very much an “In House” body—though arguably one not ill-equipped for the job it had to do. Some at least of the members might have been surprised if they could have foreseen that the outcome of their deliberations would be an Act later described by the President of the Court of Appeal as “constitutional”.

Conscious of its limitations, the Danks Committee canvassed widely for comments and suggestions. Submissions were received from many organisations and individuals: many were interviewed, some more than once. (They are all listed in Appendices 3 and 4 to the General Report.) The interviews were conducted by the Chairman with courtesy and wit: he had a carefully cultivated capacity to mix metaphors. At one meeting, he had us hanging from a monkey-bar while pushing our barrow through a minefield. Some of the interviews turned into discussions—often spirited—with the person being interviewed, or among ourselves. All aspects of the subject were considered, sometimes exhaustively.

The Committee also studied the actions taken, and proposed, in kindred countries—particularly Australia and Canada and their constituent states or provinces, Sweden, the United Kingdom and the United States. The one that received most attention was the United States: its Freedom of Information Act went further than the others, and had been in force long enough to show clear results. Some of these the Committee found worrying—especially the volume of litigation arising from the Act, and its use for purposes presumably not intended by the Congress, including personal gain. By the time I came onto the Committee in 1979 there was already a strong feeling among members that it would not be wise to follow the Americans in creating a legal right of access to official information, even if all appropriate exceptions were made. On the other hand, most members felt that the British device of laying down a Code of Practice for those handling official information, without giving it a legal basis, would not meet the rising demand in New Zealand for more open government. The Committee came quickly to the conclusion,
later expressed in its General Report, that the long-established attitudes of those handling official information would be difficult to change without legislation.

Quite early in its existence the Danks Committee agreed on what should *not* be done in New Zealand. The question that took longer to resolve was what *should* be done. The Committee agreed that it had to find a middle road—a way of overcoming inertial resistance to making information more freely available, without causing a flood of litigation and adding to the burdens on the judiciary. We wrestled with this for some months before coming up with a solution.

The solution the Committee finally agreed on was, in theory at least, simple. It had already been foreshadowed in a circular sent to Permanent Heads by the State Services Commission in 1964, which directed that "information should be withheld only if there is good reason for doing so". The solution was to reverse the presumption on which the handling of official information had hitherto been based. The existing law had established the rule that information should not be disclosed without authorisation. In practice, many Departments proceeded on the assumption that they had implied authority to disclose a great deal, but this assumption could always be challenged, and its viability depended heavily on the attitudes of Ministers and senior officials. To meet the growing demand for information, and to put the actual arrangements on a more regular basis, the Committee proposed that in future "the presumption should be that information is to be made available unless there is good reason to withhold it". The Committee also proposed that "good reason" should be defined in legislation.

The question that then arose was how to define it. The Committee agreed that there should be two categories of reason—those that were "absolute", such as national security and law and order, and those that were "qualified"—reasons that had to be weighed in each case against other considerations. Among the latter the privacy of the individual took first place. Commercial negotiations were also included in this category. So, it may be interesting to note, was advice to Ministers from their officials: the importance of confidentiality in this case was fully recognised, but submissions were not given blanket protection. One point the Committee readily agreed on:

The fact that the release of certain information may give rise to criticism or embarrassment of the government is not an adequate reason for withholding it from the public.

The Danks Committee strove to be realistic: it recognised that the system could not be changed overnight, because long-ingrained attitudes were involved. "An attempt at a sudden and definitive reform could easily fail." It also recognised that times would go on changing: "reasons for protection based on the experience of the '70s might not hold up through the '80s". In retrospect that looks perceptive. While legislation was required without delay, the new system could in practice only be introduced progressively, and provision had to be made for further change in the future. In New Zealand, the Committee felt, it would be more fruitful to set in motion a process of opening up, rather than to try and reach a definitive solution immediately.

Seeking to avoid the disadvantages of creating a legal right of access to official informa-
tion, the Committee did not see the courts as having a central role in making decisions about the release of information.

The criteria to be applied are very broadly stated and the resulting political judgments are, in the end, for ministers who are elected and accountable to Parliament rather than for the courts who are not elected and are not accountable.

The Committee did, however, provide for access to the courts in certain specified cases. Clause 22 of the draft Bill included in its report gave an individual a legal right of access to information about himself, and it recognised that a decision to deny access to such information would be subject to review by the courts.

The Committee felt it desirable to make the fullest possible use of other existing institutions. Thanks to the work of Sir Guy Powles, the Ombudsman was already a well established institution, and one which commanded general respect. He had already had extensive experience in dealing with information questions. In the New Zealand context it made sense to give him the key task of dealing with complaints made when requests for specific information were turned down by officials. But the Committee felt that his decision could not always be final. His recommendations would carry great weight, but room should be left for Ministers to reject them. “The central feature [of the new system] is that the executive will have final power of decision.”

The Danks Committee did, however, see a need for one new body. If the new system was to go on developing, it would have to be modified from time to time. What was required was a means of systematically enlarging the range and scope of information available to the public. In the Committee’s opinion, no existing institution or agency was appropriate to perform this broad policy-making function. “It is foreign to the Ombudsmen’s office, and it would be inconsistent with the spirit of our recommendations for the responsibility to be vested in any department of state.” The Committee therefore proposed the establishment of an independent Information Authority, responsible to Parliament. Its primary task would be to keep the system under review and recommend changes to the Government. The Committee envisaged that “the operation of the Information Authority may be expected to progressively extend” those categories of information to which individuals would have a legal right of access.

This was the main expression of the Committee’s desire to “set in motion a process of opening up which, on the basis of a presumption of openness, would contribute and be responsive to changing attitudes and circumstances”. As it said in its General Report (page 24):

The essential elements of this process would be:

(i) A legislative base that would:
• provide a substantial advance on the present framework of policy and practice;
• commit government and administration to principles;
• remove unjustified barriers;
• set up mechanisms for the ongoing process.

(ii) Mechanisms to:
• enlarge progressively the areas of information declared to be publicly available;
The system proposed by the Danks Committee was specifically designed to meet the requirements of New Zealand. It differed from all those adopted or proposed in other countries, and especially from those worked out in the United States and the United Kingdom. The Danks system was, however, compatible with the Westminster type of democracy, and arguably better adapted to the needs of the United Kingdom than any other then suggested. Some of the people interested in the subject in London feel that, if and when the question is taken up again by the British Government, it may find the Danks Report helpful. I understand that the Constitution Unit set up in association with the University of London, which has done a good deal of work on the subject, sent one of its members to New Zealand.

As I have been out of New Zealand for most of the time since the new system was introduced, I will be interested to hear how it has worked in practice. My impression is that it has become generally accepted, and has developed a momentum of its own. The Information Authority was set up in 1981, and did valuable work in the next five years—work that was summed up by Sir Alan Danks in his final report as Chairman. But the Authority was then disestablished, and it has not so far been replaced. Ten years have elapsed since then: perhaps it is now time to consider whether there is still a need for some body that can take a broad view of the subject, in the light of the original objectives, and advise the Government on the development of the system. The big question, to my mind, is whether it has in practice fulfilled the expectation expressed at the end of the General Report that it would “narrow differences of opinion, increase the effectiveness of policies adopted, and strengthen public confidence in our system of government”. If this expectation has not been completely fulfilled, the Information Authority would be the appropriate body to consider what further action should be taken to achieve those objectives.

For completeness, perhaps I should add that the task of reviewing the classification of official documents was not overlooked, even though this question proved not to be central to the Committee’s work. A new set of classifications was devised, with clearer definitions, and it was suggested that even they should be used as sparingly as possible. The Committee also made plain its view that, in the event of a leak, the classification of a document should not, in itself, be ground for a prosecution. On this, as on many other questions, the Committee took a position which was, for its time, rather advanced. Despite the restriction of its membership—or perhaps because of it—the Committee’s proposals turned out to be quite liberal. And it is not without significance that they were generally acceptable, both to the Government which set up the Committee, and to that which succeeded it.
The Official Information Act 1982 and the Legislature: A Proposal

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Introduction

It is now time to consider the application of the Official Information Act (OIA) to the legislative branch of government. This paper canvasses justifications for and possible objections to such an extension. It also touches on some other reforms which could be the subject of the Law Commission’s recently revived reference on the Act.

The Official Information Act: a successful development of public policy

New Zealand’s OIA suffers from fewer deficiencies than most if not all other freedom of information statutes. It is an Act concerned with information, not documents; it creates rights of process rather than rights of access to official information; its dispute resolution and enforcement mechanisms are relatively inexpensive, accessible and speedy; it requires decisions on access to be made on a time- and information-specific basis; and, most importantly, it states a guiding principle of availability, informed by the purposes of accountability and participation, as the foundation on which the Act is built. Unlike other freedom of information statutes, it does not categorise certain classes or categories of information, eg Cabinet papers, as beyond its reach. Its coverage is defined and, in most

*The views expressed in this paper are my own and not attributable to the Solicitor-General or the Crown Law Office.

1. Norgle “Revising the Freedom of Information Act for the information age: the Electronic Freedom of Information Act” (1996) 14 J of Comp & Info L 817, 827–836, richly illustrates the costs incurred in the US through creating a right of access to paper records cf information *per se*.

2. “If the decision-maker ... is in two minds in the end, he should come down on the side of availability of information”: Cooke P on “equipoise” in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 391.

3. It would have been unthinkable in New Zealand ten years ago (and probably still is in most other Westminster-style jurisdictions) for members of Parliament to have publicly debated the import of a Cabinet minute, as occurred recently in controversy over the funding of Aotearoa Television Ltd, a recipient of government funds: [1997] NZPD 449–451.
instances, easily ascertained. Thus disputes are principally disputes over matters of judgment: is information, properly subject to the Act, properly withheld or not? There are very few disputes about boundary issues, such as what is information? is the body holding the information subject to the Act? And the cases that have progressed to the regular courts have emphasised the role of the decision-maker’s judgment in determining access to information issues, thus emphasising that they have been the genuinely difficult cases.

The credit for this well-designed public policy mechanism belongs in the first place to the Danks Committee. We can now confidently assert that the Danks Report stands as a model for the successful introduction of freedom of information legislation in a parliamentary democracy. Rereading that report emphasises, as it inevitably must, that the Committee’s proposals were a creature of their time. Many of the premises upon which the Committee proceeded still hold good, however, and they are now the central strengths of the legislation, sections 4 and 5.

Changes that have occurred since the enactment of the OIA in 1982 have seen its coverage extended to education and health bodies, the rationalisation of provisions relating to commercially sensitive information, the repeal of some secrecy provisions in other statutes, the enactment of companion legislation covering local government, and the replacement of the individual ministerial veto with a collective Cabinet veto (which has

4 The OIA applies to all Ministers, departments, and organisations as defined. The organisations are listed in schedules to the OIA itself and the Ombudsmen Act. There are, however, three main exceptions to this precision coverage: 1) unincorporated bodies are only subject to the OIA when the body is established “for the purpose of assisting or advising, or performing functions connected with, any Department, Minister of the Crown, or organisation”: s 2(2); 2) information held by independent contractors to Departments, Ministers, or organisations is deemed to be held by the body with which or whom they contract: s 2(5); 3) the related companies rule deems the OIA to apply to any company which any state-owned enterprise, Crown research institute, or Crown health enterprise directly or indirectly owns or controls: s 2(1A).

5 Thomas J in R v Harvey [1991] 1 NZLR 242 held that information not in documentary form was not subject to the Act, but see Eagles, Taggart & Liddell, Freedom of Information in New Zealand (OUP, 1992), 23–25.

6 See, eg, cases W 1735, 10 CCNO 8 (J Robertson), W 1978, 10 CCNO 10 (J Robertson), W 2098, 10 CCNO 13 (J Robertson).

7 The most important are Commissioner of Police v Ombudsman [1988] 1 NZLR 385 (CA) and Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council [1991] 2 NZLR 180: an Ombudsman is required to “exercise his judgment using experience and accumulated knowledge which are his by virtue of the office he holds. Parliament delegated to the ... Ombudsman tasks, which at times are complex and even agonising, with no expectation that the Courts would sit on his shoulder about those judgments which are essentially balancing exercises involving competing interests. The Courts will only intervene when the ... Ombudsman is plainly and demonstrably wrong, and not because he preferred one side against another.”

8 Official Information Amendment Act 1987, s 23 and First Schedule.

9 The repeal of s 8, and the amendments to ss 9(2)(b) and (ba): OIAmA 1987, ss 4 and 5.

been so successful that it has never been used). The climate since 1984 has, of course, been one of public sector reform with major reorganisation of the state sector, the overhaul of public finance legislation, and, importantly in the context of freedom of information, the imposition of statutory disclosure requirements concerning the management of government finance in the Fiscal Responsibility Act 1994. As John Martin argues, the OIA has stood throughout this period of reform as an important “political and constitutional mechanism [providing] appropriate restraints on the exercise of executive powers”. Indeed, the Act’s constitutional significance is well recognised; its purposes restate a fundamental tenet of representative democracy, and one which now has widespread public and élite acceptance.

My argument is that the Act has passed through its infancy into a healthy and mature adolescence, and its proper adult role ought now to be canvassed. It is now appropriate to re-examine some aspects within the Act and, more significantly, whether its principles can now be applied more widely. Although the political and social environment is almost unrecognisable from the time of the Act’s passage, open government legislation has become embedded in our political and constitutional understandings. This acceptance provides a platform for looking ahead.

The ways ahead: reform within the Act

I touch very briefly on questions that I believe we should now ask.

The tests for withholding information

Should all of the s 6 interests/good reasons for withholding continue to have a “would be likely” standard to invoke them? Should any (or all) be subject to a s 9(1) public interest override?

Should the s 18 (“administrative”) reasons be trimmed? Should any (or all) of them be subject to a s 9(1) public interest override?

The Law Commission has some of these questions within its reference to review certain aspects of the Act’s operation. Answers will depend in part on the experience of operat-

11 OIA, ss 32–32C.
13 Public Finance Act 1989, and its creation of what are now “Crown entities”.
ing these provisions, but also on a correct appreciation of the scope of the Act, and its value as a statutory backstop behind which officials cannot retreat. Its standards and tests provide the benchmark against which withholding stands or falls. Experience with the Act suggests that these questions can now be explored without the prospect of cataclysm.

Rationalising the coverage of the Official Information and Ombudsmen Acts

There is a case for rationalising the coverage of the Act and that of the Ombudsmen Act (OA). Many bodies are subject to only one of the two Acts. Are there really any cases where if one of the two Acts properly applies, the other should not? And to what extent should the application of the OIA (and the OA) correspond with Public Finance Act reporting requirements?

How adequate are the “incorporating” rules, by which the OIA applies to bodies through a process of determining whether, for example, the body was established for the purpose of assisting a Minister or department? Why are SOEs subject to the Act, but not LATEs subject to the LGOIMA?

Answers to some of these questions, or rather further questions to ask, are found in the Danks Committee’s report and the report of the Legislation Advisory Committee on Legislative Change, the contents of which have been endorsed by successive Cabinets. The recent Report of the Controller and Auditor-General on Governance Issues in Crown Entities provides further navigation through the sea of public administration in New Zealand. Questions of the wider application of the Act would include whether such professional registration bodies as the Law Society and the Medical Council, established by statute and performing public functions, ought now to be subject to the OIA.

17 OIA, s 2(2), and see the Ombudsmen’s casenotes cited above at note 6.
20 Legislative Change: Guidelines on process and content (1991), para 161, pp 53–54, and see also the Cabinet Office Manual (1996) with its requirements for legislative proposals to consider whether the OIA and OA should apply to new agencies, Appendix 6, standard formats for legislation submissions “CAB 100”, cl 5.
21 November 1996.
22 And see also the judgment of Keith J in Commissioner of Inland Revenue v Medical Council of New Zealand (CA 31/96, 20 December 1996) for a valuable application of criteria determining whether the Medical Council is a “public authority” for the purposes of the Income Tax Act 1976.
23 The Danks Committee thought not: “... the Schedule does not include bodies with essentially local functions (many of them already subject to the Public Bodies Meetings Act 1962) or tribunals, including tribunals concerned with the registration and discipline of members of a professional or occupational group”. Towards Open Government, supplementary report, p 105. But see Freedom of Information and Protection of Privacy Act 1992, s 3(1), Schedules 1 and 3 (British Columbia) which subjects professional registration bodies to FOI. See also D L Stevens Report on Occupational Licensing in New Zealand, Economic Development Commission, 1988.
Disclosure volunteered—not on request

To what extent do the withholding grounds and their application stand as guides to disclosure at the volition of agencies holding official information, as opposed to disclosure on a request under the Act? Recent years have seen progressively greater disclosures from government of significant information. It is now routine for post-election briefing papers to be published.24 The enactment of the Fiscal Responsibility Act 1994 has required the government to conduct economic and fiscal policy in a far more public environment than was the case previously. Moves to provide independent costing of political parties’ election policies signal a further loosening of the notion that the public service is only the government’s service. When the Minister of Treaty Negotiations released the policy papers that had led to the development of the National Government’s policy on Treaty settlements, the documents made plain that the government was releasing them generally and not to particular requesters. Deletions of information were based on the grounds in the OIA. Currently the State Services Commission is developing policy, built on existing principles and conventions underlying the public service and using the OIA as a starting point, for the management of all government-held information.25 This will include aspects relating to the voluntary disclosure of information. The SSC exercise, which is ongoing, aims to introduce some consistency of principle and approach.

However, one difference between disclosure in response to a request and at the initiative of the agency holding the information is that the holding agency can determine in relation to the circumstances of the requester such issues as how the public interest in disclosure might be served, for example, by contributions to public debate.26 Consideration of disclosure issues in a vacuum might not produce the same answer as case-by-case assessment under the OIA.

Regulation-making under s 47

The initiatives I have described are consistent with the Danks Committee’s envisaged “greening” of the OIA. It had recommended the Information Authority27 propose the making of regulations prescribing categories of information to which access is given as a matter of right.28 Section 47 implements that recommendation, but no regulations have ever been made under this provision. Perhaps there is now an opportunity to use it.

24 The announcement of the decision of the new Minister of Maori Affairs, Hon Tau Henare, not to disclose his ministry’s papers thus seemed quite anomalous, and was properly reversed within days.

25 The Ontario government has a similar initiative; its open government legislation has some similarities to New Zealand’s, and it provides a framework against which the policy will develop.

26 See, eg, the comments of the Ombudsman in case nos W1718, 2154 and 2284, 10(2) CCNO 33, which emphasised the value of public discussion in a still incomplete consultation process.

27 Established to oversee the operation of the Act at a “wholesale” level, and responsible for the detail of many of the 1987 amendments, the Authority expired in 1988: OIA, s 41.

What the paper does not cover

It is beyond the scope of this paper to touch on issues that electronic storage and dissemination of information raise, questions relating to economic analyses of the cost of information, both its production and release, and issues relating to information in the hands of the judicial branch of government. And the question of the extension of freedom of information legislation into the non-government sector is also beyond the scope of this paper.

A larger canvas: the legislature

My suggestions are, I believe, consistent with the gradualist approach towards greater openness of government. The Danks Committee was concerned to see the executive government made more accountable. Hence we have the principle of availability in s 5, and the purposes of the Act in s 4. It is worth restating them:

The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—

(a) To increase progressively the availability of official information to the people of New Zealand in order—

(i) To enable their more effective participation in the making and administration of laws and policies; and

(ii) To promote the accountability of Ministers of the Crown and officials, and thereby to enhance respect for the law and to promote the good government of New Zealand:

(b) To provide for proper access by each person to official information relating to that person:

(c) To protect official information to the extent consistent with the public interest and the preservation of personal privacy.

Section 4(a) is a statement of democratic theory. It states a fundamental proposition, that a “better informed public is better able to play the part required of it in the democratic system—and to judge policies and electoral platforms”. Similarly, “secrecy is an impediment to accountability, when Parliament, press, and public cannot properly follow and scrutinise the actions of government or the advice given and options canvassed”.

As many case notes of the Ombudsmen have demonstrated, the formal statements of purpose that s 4 contains have frequently been helpful as “tie breakers” in difficult access


30 See, eg, Baylis “Justice done and justice seen to be done—the public administration of justice” (1991) VUWLR 177.

31 Thus its definitions exclude both legislative and judicial branches of government. The question of a principal application to the judicial branch is a topic in its own right and beyond the scope of this paper.


The sentiments in s 4 stand as reminders of the objects of the Act. Certainly the accountability of the government, both the elected Ministers and officials, whether in departments or organisations, is important—and for the reasons that s 4 articulates. But the same justifications can be used in relation to imposing freedom of information on the legislature itself.

My suggestion is that we ought to consider whether information in the hands of the legislative branch of government ought also to be subject to a statutory principle of availability, and that the grounds for its withholding ought to the extent of their compatibility to mirror those in the OIA. "The legislative branch" means the Parliament, its members, its officers, and its servants.

Democratic theory

Thomas J in a recent essay on “Secrecy and open government” said:

The primary foundation for insisting upon openness in government rests upon the sovereignty of the people. Under a democracy, parliament is “supreme”, in the sense that term is used in the phrase “parliamentary sovereignty”, but the people remain sovereign. They enjoy the ultimate power which their sovereignty confers. But the people cannot undertake the machinery of government. That task is delegated to their elected representatives together with such powers as are necessary to carry it out. But sovereignty remains with the people …

The same appeals to popular sovereignty, enhanced governmental accountability, and increased prospects of participation in democracy can be made in relation to the legislature itself. The government owes its existence to its command of majority support in the legislature, and it is equally arguable that if the government must account to the House, so must the House account to the people. These arguments have, of course, a long pedigree in political theory, and have as long been judicially recognised. The High Court of Australia has articulated these tenets in *Nationwide News Ltd v Wills*:

Inherent in the Constitution's doctrine of representative government is an implication of the freedom of the people of the Commonwealth to communicate information, opinions and ideas about all aspects of the government of the Commonwealth,

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34 See, eg, case no W 2159, 10(2) CCNO 43 (request for access to review by the Police on importation of firearms—assessment of competing public interest considerations—s 9(1) considerations, determined by reference to s 4, outweighed s 9(2)(f)(iv) grounds for withholding.


37 Or at least its not having lost that support; the two are not identical.

38 The first election under MMP has brought to the fore again the previously elided political and constitutional fact that the government is both a choice of and accountable to the House.

39 (1992) 177 CLR 1, 74, per Deane and Toohey JJ.
including the qualifications, conduct and performance of those entrusted (or who seek to be entrusted) with the exercise of any part of the legislative, executive or judicial powers of government which are ultimately derived from the people themselves. The basis of such an implication was identified by Duff CJ and Davis J in Re Alberta Legislation Statutes when speaking of the British North America Act before the adoption of the Canadian Charter of Rights:

The statute contemplates a Parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signal;ly true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.

Those comments are equally applicable to the working of the doctrine of representative government embodied in our Constitution.

And, of course, s 14 of the New Zealand Bill of Rights Act 1990 guarantees, subject to the s 5 justified limitation, such a right to information.

The transition to a different electoral system has not in itself increased the public’s opportunities for participation in the making and administration of laws and policies. While voter initiatives such as the Citizens Initiated Referenda Act 1994 and the focus in Parliament’s new standing orders on protecting individuals from unfair process at the hands of the House or its committees are welcome, there is a case for requiring members and the institutions of Parliament also to be subject either to the OIA itself or some analogue designed to recognise the distinctive features of the legislature compared to those of the government.

The caucus involvement in policy making

Some aspects of this increased coverage are justified in the same terms as the OIA: control of the government. Some, however, are justified in terms of the accountability of the members themselves, and of the institution of Parliament. In the former category would come the government caucus(es) and their committees, which have had for many years and are expected to continue to have an active role particularly in policy development and in political patronage (government appointments to official bodies). It is difficult to see why a legal device such as the OIA should not be available as one measure to force disclosure of these bodies’ involvement in these processes. Of course, if the model of the OIA were employed, the same good reasons for withholding could be expected to be available, so that ss 9(2)(f) and (g), which provide good reason for withholding for reasons associated with government decision-making, might be employed. The “extraor-

41 This element of s 14 has not yet been the subject of any detailed exegesis by New Zealand judges.
ordinary constitutional novelty” of extending parliamentary privilege to proceedings of the National Party caucus, as Master Thomson has done recently in *Rata v Attorney-General*, sits quite uncomfortably with recent developments and my suggestions.

**Select committees**

Similarly in relation to the development of legislation by select committees. While standing orders provide that their hearing of submissions on bills and inquiries is to be in public and that the submissions once heard are publicly accessible, there is equally a case either for the standing orders or for legislation like the OIA to provide for access to the deliberations of the committees on bills. As committees are expected to operate to a far greater degree independent of the government, and will now have more resources available to them with which to pursue their functions, democratic theory suggests that they too should be prepared to expose their workings to the public gaze. The House and its committees may develop, as David McGee suggests, a more formal role in relation to the ratification of international treaties. This similarly justifies OIA-type coverage. At the very least it is appropriate to ask the question why a principle of availability, subject to such good reasons for withholding as the OIA provides, should not apply.

**Members**

Similarly information in the hands of members themselves, so long as it relates to their official functions. I recognise that such a test has a degree of vagueness about it, but it probably provides a workable definition.

The question of information that members themselves hold can be approached also from a privacy dimension as well. The OIA recognises in s 9(2)(a) that official information can be withheld when necessary to protect individual privacy, and of course the Privacy Act amplifies on considerations relevant to the disclosure of personal information, both on request and at the initiative of the agency holding the information. It is worth noting the call of the Privacy Commissioner for members of Parliament to consider the development of appropriate guidelines relating to their collection and use of information they hold concerning their constituents or other private individuals. I think it is appropriate

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43 (HC Wellington, CP 213/95, 17 March 1997.)
45 Standing Orders of the House of Representatives, S O 225(2), unless the committee has previously made it available: SO 225(1).
48 Cf the definition of “Minister” in the OIA: s 2(1), and see also the Privacy Act 1993, s 2(1), exclusion of member of Parliament “in his or her official capacity”.
49 Privacy Act 1993, s 6, particularly Information Privacy Principles 10 and 11.
50 Annual Report of the Privacy Commissioner for 1995, p 32, and compare OIA, s 4(b). See also the Privacy Commissioner’s report concerning the so-called Pugmire case, case note 2049, 10 February 1997, p 8.
to broaden the issue and consider the extent to which the principles of the OIA can and should apply to information in the hands of the members themselves.

Parliamentary bodies and offices of Parliament

It would follow, of course, that if the members were subject to the Act or its essential principles, so also ought to be other bodies currently not subject to the Act on the grounds that they are not part of the executive government but rather part of or responsible to the legislature. This would include the Office of the Clerk of the House of Representatives, the Parliamentary Service Commission, and the Parliamentary Counsel Office. (The practice here is inconsistent: the Ombudsmen can entertain complaints of “matters of administration” concerning the PSC and the PCO, as each is listed in a Part of the First Schedule to the OA, but staff of these bodies had no access to their personal information, whereas the converse applied to the staff of the Office of the Clerk. Similarly the offices of Parliament could expect to be subject to the OIA as well. Practice here is also inconsistent and suggests a lack of clarity. The Parliamentary Commissioner for the Environment is currently subject to the OIA (but not the OA), whereas the Controller and Auditor-General and the Ombudsmen are subject to neither.

Some other “watchdog” bodies are subject to the OIA, such as the Human Rights Commission, the Privacy Commissioner, the Commerce Commission and the Commissioner for Children, and others are not, such as the Health and Disability Commissioner, the Police Complaints Authority and the Inspector-General of Intelligence and Security. There appears to be no consistent practice here either.

51 Clerk of the House of Representatives Act 1988, s 31, provides that for the purposes of Part IV of the OIA, the Office of the Clerk is deemed to be an “organisation”, so that employees could access personal information about themselves.

52 Expressly declared not to be an “instrument of the Executive Government”: Parliamentary Service Act 1985, s 3(2), and not subject to the OIA by exclusion from the definition of “organisation”: OIA, s 2(1). See Keith J in Commissioner of Inland Revenue v Medical Council of New Zealand (CA 31/96, 20 December 1996), p 16. Note also that the other bodies His Honour quotes there as declared by legislation expressly not to be “instruments of the Executive Government” (the New Zealand Government Property Corporation, the New Zealand Railways Corporation and the (former) Area Health Boards) were also all subject to the OIA by listing in the OIA First Schedule in the case of the first, the OA First Schedule Part II in the case of the second, and the OIA First Schedule, OA First Schedule Part III and LGOIMA Second Schedule, Part I in the case of the third.

53 Excluded from the application of the OIA by the definition of “department” in OIA, s 2(1), but subject to the Ombudsmen Act 1975 by inclusion in Part I of its First Schedule.

54 Ombudsmen Act 1975, First Schedule, listing of PCO and PSC in Parts I and II respectively, and see Privacy Act 1993, s 2, exclusions from definition of “agency”, paragraphs (v) and (vi): “(v) The Parliamentary Service Commission; or (vi) The Parliamentary Service, except in relation to personal information about any employee or former employee of that agency in his or her capacity as such an employee.”

55 Ombudsmen Act 1975, First Schedule, Part II.

56 OIA, First Schedule.

57 OIA, First Schedule.

58 OA, First Schedule, Part II.
Some objections

There is no need

Opponents might say:

The OIA is not needed; there are sufficient incentives and controls to encourage openness among members. There are already sufficient mechanisms, from parliamentary questions through opportunities for general and adjournment debates and select committee inquiries, for information in the hands of members to become available.

Indeed, those processes do exist, and all the proceedings of the House itself are broadcast. However, they may suffer as all parliamentary processes can from the control that the majority party or coalition can exert. Against a determined majority, existing protections may count for nothing, because numbers rule the day. The existence of a statutory backdrop against which demands for information can be measured would provide an independent mechanism in law, not reliant upon a favourable configuration of a current parliamentary majority. To those that would say that a member’s unwillingness to provide the information stands sufficiently to condemn him or her, I would respond that surely it is better to judge the member on facts rather than inaction, especially when the majority attempts to wrap its protective cloak around him or her.

It is constitutionally inappropriate

The argument might go:

The disputes process (involving the Ombudsmen and potentially the Cabinet and the courts) is constitutionally inappropriate. If the executive is accountable to the House, and not the other way around, it is improper for both one of the Parliament’s officers (the Ombudsman) and the Executive Council to make decisions about access to information in the hands of the legislative branch.

This contention may require some further consideration, but the practical experience of the operation of the Ombudsmen in relation to information held by Ministers (in their executive capacity, admittedly, although where the border between that and their legislative capacity lies is hard to draw) has been that the system works.

Parliamentary privilege

Those detractors might say:

To subject the legislative branch to this control would breach parliamentary privilege.²⁹

In particular, it would represent an attempt to diminish the legislature’s independence by subjecting the actions of its members to supervision by a body outside the House.

Sections 18(c)(ii) and 52(1) of the OIA already provide a ground for withholding where disclosure would amount to contempt of the House of Representatives. See, generally, Eagles, Taggart & Liddell Freedom of Information in New Zealand (OUP, 1992), ch 15, esp pp 468–477.
Alternatively or in addition, it could constitute an inhibition on members' freedom of debate. There are two answers to these criticisms. Firstly, there are already statutory provisions applying directly to members, even within the House itself. (This is distinct from those statutory provisions relating to the House as an institution.) For example, the Regulations (Disallowance) Act 1989 confers a special privilege on the member who chairs the Regulations Review Committee. And see also the creation by statute of a committee, the Intelligence and Security Committee, comprising only members of Parliament and bound by standing orders. Secondly, and more substantially, it does not follow that a measure requiring disclosure of information in the hands of members amounts to a restriction on their rights to freedom in debate. There is, however, clearly a need to ensure that any such extension of the OIA is consistent with the principles and law of parliamentary privilege.

**Balance of powers issues**

It might similarly be a criticism that the extension of the OIA to the legislature would open its procedures to review by the courts. However, this is neither inevitable, nor, in my view, likely. The OIA was constructed to avoid litigation as much as was possible; that model should carry over. In any event, as a parallel the guarantee of natural justice in s 27(1) of the New Zealand Bill of Rights Act 1990, which applies equally to the legislative branch as to the others, does not necessitate judicial review of the House's processes.

**The coalition agreement**

This is a modest proposal: it invites consideration of the question in principle first, and its workability subsequently. I am heartened in this regard by the statement from the coalition government in its published agreement:

Each party shall:
(a) Diligently attend to and devote as much time and attention as required as shall be necessary for the efficient carrying on of a Coalition Government and will cooperate in all reasonable ways to ensure sound, stable and effective government is maintained in the best interests of the people of New Zealand;
(b) Disclose to each other any associations with interest groups, lobbyists or any other entity or body likely to influence one or other party in the formulation of policy for or administration by the Coalition.

and that

[The Government will] Review the Official Information Act with a view to increasing the availability and transparency of official documents.

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60  Legislature Act 1908, s 242; Constitution Act 1986, ss 11 and 20; New Zealand Bill of Rights Act 1990, ss 3 and 7; Electoral Act 1993, s 268.
61  Intelligence and Security Committee Act 1996, s 5.
63  Coalition Government policy statement, cl 4 "Parties obligations" (sic).
64  Statement of coalition government policy, 9 December 1996, policy area: state services.
However, the coalescing parties also state that:

All records, reports and other documents relating to the Coalition are confidential whether oral, written or embodied in any other physical form except if:
(a) the information was known to the receiving party on the date of its receipt; or
(b) the information was in the public domain on the date of its receipt; or
(c) the information had entered the public domain after the date of its receipt other than by unauthorised disclosure by a party or any other person.\(^65\)

While this agreement itself is not of legal force, and while it probably acknowledges that where coalition information (whatever that is) is held by Ministers or officials it will be subject to the OIA, its tenor does not encourage optimism for those who would seek to broaden the horizons of the OIA. Nonetheless, I perceive a climate receptive to a wider application of the Act.\(^66\) My suggestions are not, at this stage, worked out in any detail, but they are, at base, no more than simply providing further flesh on the bones of Madison’s famous dictum:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.\(^67\)

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\(^{65}\) Coalition agreement, cl 12.1.

\(^{66}\) The non-application of the OIA to the Parliamentary Service Commission provoked comment when Rodney Hide, MP sought details of MPs’ spending on parliamentary perquisites.

Behind the Official Information Act: Politics, Power and Procedure

Marie Shroff
Clerk of the Executive Council and Secretary of the Cabinet

Introduction: the shift from secrecy to information management

When the Official Information Act was passed 15 years ago, its impact was immediate and fundamental. Many politicians and public servants who had long nestled in the security of the Official Secrets Act reeled with shock as the presumption of access to official information was turned on its head. But this revolution was made by leading public servants and politicians themselves, including my own predecessor as Secretary of the Cabinet, Patrick Millen.

Believing that “knowledge is power”, many feared that the increased availability of information would lead to a corresponding loss of power and ability to govern effectively. Since the passing of the Act, however, the meaning of the phrase “knowledge is power” has become rather more sophisticated. There are still occasions where it is appropriate (and, indeed, important) to withhold information, for example, by invoking the free and frank expression of opinion provisions of the Act (s 9(2)(g)). There are times when it is genuinely beneficial to allow Ministers and officials to consider policy options (particularly in the early stages of advice) well away from the glare of publicity and the pressure of interest groups. However, in many circumstances, public servants have grown to appreciate that sharing knowledge means better government, a better decision-making process, and a better informed public. Governments, too, have adapted to the new regime. Indeed, virtually all written work in the government these days is prepared on the assumption that it will be made public in due course. The idea of maintaining secrecy over ordinary official information, especially after decisions have been made, already seems old-fashioned and a little quaint. Instead, the focus in the current open style of government is on managing the dissemination of official information.

I do not mean that information is managed in a sinister way, like propaganda. What I mean is that when politically sensitive information has been requested and should properly be released under the Act, the government will wish to consider carefully how to release it, who releases it and when. For those of you who may find this concept surprising, I hope you will not take it amiss if I quote what I often say to new public servants in the Cabinet Office: “they’re elected and we’re appointed”. In other words politicians are legitimately and properly driven by what is acceptable to the electorate, and must constantly explain and manage their relations with that electorate. This is just as essential an element of good government, as is governing according to the law. The procedures and protocols that have developed from these political concerns, and how they interrelate with existing laws, conventions and administrative practices, are the practical consequences of the Official Information Act.
How official information is released

When the government is obliged to release information under the Act, it may, quite legiti­mately, seek to manage the process for the release of the information. For example, where a document on, say, a health issue has been requested by a reporter, especially one that contains material of general interest, the government may release the information to the whole press gallery. The Act has given a new dimension to the job of government press secretaries! The task of officials, also, is to work with these political constraints and to accept them as proper.

To take another example, just after the election, the media requested some Cabinet Of­fice circulars on the administrative arrangements for the caretaker government. The Prime Minister decided that they should properly be released under the Act and, having made that decision, sent the circulars to the other party leaders just before giving them to the media. This type of courtesy is very important in maintaining political relationships.

One further point to make about how official information is released is the fact that the information is printed onto paper that has the words “Released under the Official Infor­mation Act” stamped right across it. It reminds me of a story, which is possibly apocryphal but is nonetheless amusing, about Russian and Chinese agents in America during the Cold War. Apparently these agents often obtained official information on subjects of interest through perfectly legitimate means, and then stamped each page with “Top Secret” before sending the documents, in triumph, back to home base.

Who releases official information

There are administrative protocols as to who releases what information. Usually the “author” releases, in consultation with others affected by the release. Again, these protocols are essential to maintain effective relationships within governments. For example, when Cabinet papers are requested of the Cabinet Office on, say, an education funding issue, the request would be transferred to the lead portfolio Minister—the Minister of Educa­tion. That Minister handles the release of the information, having consulted fully with other Ministers with related portfolios (in this case probably the Treasury Ministers).

When official information is released

Judging the best time to release information can be crucial politically. Developments in this area, I believe, support my theme that there is a beneficial interaction between the Official Information Act and political processes.

Where the government is developing a politically sensitive policy, it will now try to structure and manage an overall process for developing the issue. Consultation stages, discussions with industry working groups, and in some cases separate task forces are becoming increasingly common. This dissemination of information to interested recip­ients throughout the policy process can contribute significantly both to the quality and to public acceptance of government policy. There are several reasons for this. At a basic level, public interest groups have the opportunity to accustom themselves to proposals over a period of time. But more importantly than that, their inclusion in the
Behind the Official Information Act

process often produces an outcome more acceptable to them, and more shaped to their needs.

Timing the release of information may also be vital from a management perspective when reacting to a difficult political situation that has arisen. The Act has had the desirable effect of encouraging Ministers to consider releasing the relevant documents about a sensitive issue before receiving an Official Information Act request.

The context of central government

So far I have given fairly straightforward examples of how political constraints may influence the way in which official information is released. However, things get a little more complicated in the context of central government, which is a complex mixture of legal obligations, political and practical necessities and established conventions. The addition of the Official Information Act to this brew has had a tremendous effect, and it continues to affect central government processes as they develop. I’ll give you some examples.

Existing parliamentary channels of information

In Parliament there are some established channels of information that are quite separate from the Official Information Act. Select committee questioning and parliamentary questions are a couple of examples of this.

Politicians can therefore choose the most suitable channel of information. For example, they may request a briefing from a Minister on an issue, instead of going through the Official Information Act. This may provide a fuller and more direct level of communication on the subject. Or they may combine the traditional parliamentary channels with the powers of the Official Information Act—a mix of Official Information Act requests, parliamentary questions, and select committee examination of public servants.

The way in which Parliament uses its information powers is, in my view, evolving as a result of the Official Information Act: first because official information is now made available at such a phenomenal rate, and second because the new generation of parties and politicians are more inclined to challenge existing conventions and to demand fuller information.

Releasing documents of previous opposition administrations

Another example of the meeting point between the law and the politics of information which the Cabinet Office administers is the convention on the release of Cabinet papers of a previous opposition administration.

Strictly speaking, the decision whether to release such information rests with the department that receives the request. But convention requires that the Cabinet Office consult with the Leader of the Opposition about the release. While this is unlikely to alter the outcome, it is an important matter of courtesy, and is certainly appreciated by the Opposition.

There has been an interesting side-effect as this convention has developed. My impression is that it has significantly reduced the incidence of politicians removing documents
from the system on leaving office. Now that politicians know on the one hand that they will have access to their documents, and on the other that they will be consulted in the future when they are released, they are more relaxed about leaving them in the system.

Unfortunately, this useful convention may not be workable in the future. For what constitutes a previous opposition administration in the MMP era? The prospect of shifting combinations of parties—possibly mid-term—makes the idea of consulting with previous opposition administrations in the future a bit of a nightmare.

It may be that, as time goes on, politicians will become accustomed to the idea of their Cabinet papers and minutes being released as a matter of routine, and will not value prior consultation to the same extent. However, I think it is true to say that most politicians are not yet that relaxed.

**Providing information to political parties during the coalition negotiations**

A further recent example of the complex balance of legal obligations, political constraints and conventions arose during the government formation period. During this time public service information and analysis was made available to political parties involved in coalition negotiations. This idea obviously made sense. But the process required some careful thought.

Expecting the negotiating parties to rely on the Official Information Act was a possibility but it was rejected at an early stage as being too cumbersome and slow. Also, it would potentially have brought a variety of Ministers into the process when a greater level of confidentiality was desirable. So we devised a new route of information.

Political parties involved in negotiations to form a government who needed access to factual information from government departments were invited by the Prime Minister to approach the State Services Commissioner with their questions. The questions and answers were channelled through the State Services Commissioner, to ensure the impartiality of the advice provided, and protect the neutrality of the public service. This process was worked out well in advance of the election, and agreed to by the government.

We also recognised early on that whatever the public service gave to the political parties during this process in terms of advice or analysis would be subject to the Official Information Act. We made sure that this point was explicitly flagged in the guidelines.

Various conventional relationships also had to go into the equation. How were public servants to provide information in a sufficiently confidential fashion while taking account of their primary duty to serve their Ministers? The answer was a skeleton weekly report to the Prime Minister, and a self-denying ordinance by Ministers, who refrained from enquiring as to their departments' activities in this sphere. We were also concerned about the fact that the context was highly political, and was therefore by definition a risky situation for the public service. We drew on the accepted protocols that apply where public servants are asked to cost political party policies. This led to a fairly constrained process, clear articulation of assumptions throughout, clarifying with requesters when we were uncertain what was being asked, and a strong central quality assurance process before answers were sent off.
Given the difficulties and risks involved in the process, I'm pleased with the outcome. The political parties found the information and analysis provided by the public service during the coalition talks helpful. The neutrality of the public service remained intact. And just last week the information was gathered together in its entirety and provided to the public by the State Services Commission. Only a fraction of the total information was withheld on the basis of the Official Information Act. This is a perfect example of the interplay between the political process and the Act, evolving in the context of MMP.

Post-election briefings

The post-election briefing process provides another interesting example of the mix of law, politics, convention and administrative practice. It is clearly an evolving area. It brings together several strands: the changing relationship between public servants and Ministers under the State Sector Act, the changing nature and status of official information, and the changes to the government formation process under MMP. The question to be considered before the next election is whether there is anything in the traditional practice of preparing post-election briefings for the incoming Minister, and this Minister only, which is worth protecting as we develop new procedures for the new environment. In 1996, post-election briefings were released to the new Ministers after they were appointed in December, and were subsequently (and quite quickly) publicly released. Issues to consider in the new environment include whether the briefing information held by departments for the incoming Minister should be made available earlier, and to a wider political and public audience.

Conclusion

New Zealand has come a very long way since the birth of the Official Information Act. I was reminded of this recently when reading English author Peter Hennessy’s latest book _The Hidden Wiring_. Much of the information that he breathlessly discloses in the book (having learned it from informal conversations and unnamed sources) is the sort of thing that in New Zealand is published and available for purchase at Bennetts Government Bookshop. Indeed, the Cabinet Office Manual is a shining example in this regard.

At the beginning of this address I mentioned that public servants now expect virtually all written work to be released eventually. In my view this has improved the quality of policy work being done in the New Zealand public service. There is nothing like the prospect of outside academic or interest group scrutiny to make you write accurately and neutrally. But I have had some difficulties in persuading my British civil servant colleagues of this!

The main point that I have made and illustrated today, and which I wish to leave you with, is that the Official Information Act must be viewed in its constitutional context. It is part of a larger picture consisting of law, convention, administrative practice and practical politics. Information is basic: its dissemination affects the relationships between the players in our constitution. Even 15 years on, the ripples from the passage of the Official Information Act are still being felt, and providing challenges to administrative practices across all areas of government.
The Official Information Act and the Policy Process

John Belgrave
Secretary for Justice

I think it is impossible to overstate the importance of the Official Information Act for bureaucracy and for government. The Act has been instrumental in remoulding the culture and ethos of officials. The magnitude of the change can only really be appreciated by a public servant like myself whose memory stretches back not only to the days before 1983 but who held reasonably senior positions in the public service, even then.

Back then, the Official Secrets Act underpinned a culture of secrecy. The Official Secrets Act in effect barred all access to official information. In practice, matters were more liberal and enlightened than the law. People outside government and the media were informed about matters that technically fell within the vast scope of the Official Secrets Act, but it was very much on a need-to-know basis and of course wholly within the discretion of those who held the information.

The impact of the Official Information Act was not immediately apparent throughout government when the legislation was passed in 1982. Sir Robert Muldoon referred to it as “a nine day wonder”. On the other hand, the Minister who promoted the legislation, the Hon Jim McLay, thought that the legislation was the most important constitutional measure since the passage of the Parliamentary Commissioner (Ombudsman) Act in 1962. Today, with the benefit of hindsight, Jim McLay got it right and Sir Robert got it wrong. But at the time Sir Robert’s comment was not as outlandish as it may seem today. There were public servants, as well as politicians, who underestimated the impact and bite of the Official Information Act. That view was not wholly irrational. The grounds for withholding information appeared to be very wide. After all, almost everything officials produced was “free and frank”. Officials were not required to action requests within defined timelines. Ministers were at liberty to veto recommendations made by an Ombudsman to release information. And the Act was subject to numerous secrecy provisions liberally sprinkled all over the statute book. So it is quite conceivable that the legislation might have been little more than an ornament.

Fortunately that is not what happened. There are a few individuals who can take credit for that. The first among these is Sir George Laking who, in his investigations and recommendations as Ombudsman, succeeded in minimising the seemingly large grounds for withholding information. Then there was the good work done by the Information Authority in locating and urging the repeal of the numerous statutory provisions which in effect negated the intent of the Official Information Act. These provisions were in fact repealed in 1987 in an amendment promoted by Sir Geoffrey Palmer. That amendment also shifted the power of veto from individual Ministers to Cabinet. This veto provision has not yet been used and I would be surprised if it ever was.
But the credit for making the Act work goes not only to a few outstanding individuals but to whole groups. Official information legislation is not going to work if there is no interest in the wider public in public policy and administration. Fortunately for the well-being of our democracy there has always been intense interest in governmental matters. The media, political parties, interest groups of every kind and description as well as individual members of the public have made effective and legitimate use of the Act. And, on the supply side, the bureaucracy should also be given credit for making the Act work. It has made the profound change from secrecy to openness reasonably smoothly. I don’t think anyone in the public service today would want to put the clock back and revert to the old secrecy. Disclosure under the Official Information Act may at times be less than comfortable but by and large public servants welcome the new disclosure regime because it enables us to engage in meaningful dialogue with the public whom, after all, we are here to serve. Also, criticism based on actual information tends to be fairer and more benign than information based on impression and speculation.

The Act is based on the principle that official information is available unless there is good reason for withholding it. Initially, in the first few years of the Act’s operation, some agencies may have believed that the presumption only made sense if it was reversed. But successive Ombudsmen have put that right. The Act strikes a balance between disclosure and secrecy. Implicit in this balance is the assumption that, even in a setting characterised by openness and transparency, some information should be withheld. One of the most vital questions in any assessment of the Act is whether the balance between openness and secrecy is still right, that is whether it continues to meet changing social needs and expectations.

As you know the Act contains a series of grounds for withholding information. This is consistent with one of the express purposes of the Act, namely the protection of official information to the extent consistent with the public interest and the preservation of personal privacy. We could not function as a nation if all official information had to be disclosed. And if personal privacy was not protected, if all the countless personal records held by public sector agencies were liable to be disclosed, life in New Zealand would be reduced to a nightmare. It is therefore a matter of striking a balance between competing values.

The Act sets out a lucid framework for the task of identifying and assessing the values at stake. The availability of official information is to be increased progressively to enhance two basic principles: the participation principle and the accountability principle. These two principles underpin our democratic values. Citizens can only participate in the development and administration of laws and policies if they have access to relevant information. They can only respond to decisions that affect them if they know about the decisions and the reasons on which they are based. The availability of official information is a necessary condition for the effective exercise of civil rights and for the effective operation of participatory democracy. In enabling greater public participation the availability of official information also enhances the quality of governmental decision-making.

The other basic democratic principle is the accountability principle, which is an aspect of the rule of law. Those in authority, be they Ministers or officials, are subject to the gen-
eral law and subject to numerous special obligations. Officials are accountable to Ministers, who in turn are responsible to Parliament. The skilful use of the Act, notably by Members of Parliament and members of the media, enhances these accountability relationships. If an item of information raises questions as to probity, then that information should in principle be available so that questions can be asked, defects remedied, and, if necessary, sanctions imposed.

The availability purpose will at times have to be balanced against the other stated purpose of protecting official information to the extent consistent with the public interest and the preservation of personal privacy.

These purposes then give rise to the principle of availability. Whether official information is to be made available is decided in accordance with the purposes of the Act and in accordance with the principle that information is to be made available unless there is good reason for withholding it.

What amounts to a good reason has fortunately not been left to the discretion of officials, but has been exhaustively set out in the Act. These divide into conclusive reasons, on the one hand, and conditional reasons, on the other. The conclusive reasons, set out in s 6, are concerned with preventing harm to the nation, to the national economy, to the maintenance of the law or to the safety of any person.

By contrast, the reasons set out in s 9 are concerned with forms of prejudice or harm that are not quite as all pervasive or as irreparable. Because of this they are subject to the overriding public interest. So even where there is good reason for withholding the requested information, as for example personal privacy or commercial sensitivity, the information may still have to be disclosed because the public interest requires disclosure. “Public interest” is of course a wide term but in the context of the Act the term is delineated by the purposes of the Act. If, for example, there is any suggestion of wrongdoing in the public sector the public interest is likely to point against withholding the information.

So much for the basic framework of the Act, which is a model of clarity. The reasons for withholding information are reasonably straightforward, especially in light of rulings given by Ombudsmen over the years. I am bound to say, however, that in my view the reasons that seek to protect effective government, namely the protection of constitutional conventions and the maintenance of the effective conduct of public affairs through free and frank expression of opinions, are not particularly clear. This may be because the subject matter is so complex that simple formulations are not feasible or that there is the risk that more precise formulations might turn out to be overly rigid.

I am not a constitutional lawyer, and so I do not find a reference in a statute to conventions, which by their nature are beyond the law, particularly helpful. Conventions may change over time. They may become moribund. This is recognised by the Act in its reference to “conventions for the time being”. Thus an official seeking to rely on a convention must be sure about the convention concerned and about its current form.

I think it would be easier for all if the Act actually directly addressed the values at stake and the harm that is to be avoided. This “plain language approach” seems to me to be
particularly desirable nowadays in the public sector in which positions are filled by the best talent available regardless of previous public sector experience. Fortunately the matter is under consideration by the Law Commission through a ministerial reference. The Commission expects to be able to report by June this year, but this project is subject to more pressing priorities.

I am particularly interested in the constitutional conventions and free and frank expression of opinion as reasons for withholding official information because they relate directly to policy formulation, an activity into which, as the chief executive of successive policy ministries, I put most of my time and energy.

It seems to me, without in any way wishing to pre-empt the Law Commission, that protection of the convention which protects the confidentiality of advice tendered by officials could be rethought in terms of the policy process. This would be helpful in identifying the values that are currently only alluded to in the Act. Ideally, and generally in practice, policy decisions should be preceded by a period of consultation with interested parties. During this phase information should be freely available to enable genuine consultation to take place. But once the issues have been distilled and Ministers are able to consider the matter, the deliberative process needs protection because it cannot proceed in public. Once decisions have been publicly announced, the surrounding information should in principle be available. Seen against this paradigm, the values at stake are the integrity, manageability and quality of governmental decision-making and the effective and equitable co-ordination and implementation of decisions. To protect these values information needs to be withheld for a limited time only.

Other political values may conceivably require long-term protection of the information. The maintenance of collective ministerial responsibility is an instance. On the other hand, it seems to me that some of the conventions referred to in the Act will generally be best served by disclosure. An example is the political neutrality of officials. If officials are politically neutral, as they are meant to be, they have nothing to fear from disclosure. If they are partisan, disclosure may well promote the convention.

The free and frank expression of opinions exception is also under consideration by the Law Commission. Most of you will be aware that the scope of that exception has been somewhat limited by successive Ombudsmen. And rightly so. I don’t think that I have personally ever wished to rely on this exception as a reason for withholding information. This may be because the policy papers that I am generally associated with are not normally characterised by opinion of any kind; instead they seek to evaluate a range of researched options for Ministers. Where I have found the exception relevant and legitimate is in maintaining effective consultation with private sector interests. Some private sector consultees express real concern that their opinions freely and candidly given might be disclosed. And that concern ought to be respected.

I believe that the statutory purpose of progressively increasing the availability of official information still has some way to go. The expected Law Commission report could help in further freeing up official information. It will provide valuable input into a review of the Official Information Act proposed in the Coalition Agreement with a view to increasing the availability and transparency of official documents.
Among the questions a wider review may raise is one about the boundary between official and political information. As you know, the Act covers information held by Ministers of the Crown, but only if the information is held by Ministers in their official capacity. A good deal of information that is held by a Minister may not be held by him or her in that capacity. For example, correspondence with constituents or party supporters would not be held in a ministerial capacity and would accordingly not be official information. Caucus papers would not be official information. Here the boundary lines are clear.

But what if a Minister engages in a dialogue with other ministerial colleagues about party political matters or about longer term strategic issues? Is that kind of information discoverable under the Official Information Act? One way of looking at this is to ask if the correspondence is limited to ministerial colleagues. If it is, then it is ministerial correspondence, and the information is accordingly official information. But that may be an overly simplistic view because the correspondents may not have been selected because of their ministerial status but because they were the most senior members of their party; in other words their ministerial status may have been incidental or irrelevant. Where one draws the boundary line may well relate to the way one wants the Act to go in future.

On the one hand, one may take the view that the boundaries drawn by the Act in its current form are right and principled. The Act is concerned with the executive government and its manifold manifestations. It is not, and should not be, concerned with the legislative or judicial branches of government because those branches need to be subject to quite different accountability mechanisms. And the Act should not be concerned with private organisations, such as political parties, because that would be an intolerable invasion of privacy. Accordingly, as Ministers are also legislators and party politicians, care needs to be taken that information held in those capacities does not fall under the Official Information net.

On the other hand, there may be a view that if the Act’s objective of effective public participation in the making of laws and policies is taken seriously, then plans and decisions taken by politicians should be available to the public. It should not matter whether politicians wear their party hats or their ministerial hats. Arguably, this second view has gained strength with the advent of MMP, which has strengthened the role of political parties in determining policies, laws, and even the make up of governments themselves.

The Official Information Act was passed more than 14 years ago. At that time it would have been unthinkable that policy advice given by officials about proposals raised in coalition negotiations might be released shortly after the emergence of a coalition government; and it would have been quite inconceivable that the release of advice contrary to decisions taken by the coalition partners would cause scarcely a murmur.

This is a time of great change. The regime under the Official Information Act is also likely to change. I sense that the change will take us towards even greater transparency. I welcome this as long as we remember that proper exceptions will always be necessary to guard against an inhumane transparency or a destabilising transparency. This requires, in our context, particularly the protection of personal privacy and it requires the protection of the deliberative phase of governmental decision-making.
All our aspirations about participatory democracy will come to very little without stable government. I see no reason at all why the MMP environment should not continue to produce stable, durable governments. But it may be that, at least in the current initial phase of MMP, the protection of the deliberative phase of the policy process may require special care. Over time, however, MMP is likely to produce greater transparency. This is because there are now more participants in the policy process. Cabinet Ministers now report to two caucuses, and it is quite conceivable that there could be more than two. Party caucuses, in turn, engage in dialogues with their respective parties.

All of this is likely to result in the examination of matters from more perspectives. It will lead to requests for more information than ever was the case under the previous first-past-the-post system. The withholding of information will be even more closely scrutinised. And the reasons currently available in the Act for withholding information will also come under scrutiny. This is perfectly natural and predictable. What is not predictable is the scope that the Act will have 15 years from now.

My feeling is that the scope will be wider; that transparency will be demanded by the public not only from Ministers and agencies that are part of or linked to the executive, but from all players who wield decisive power in the policy process. As the loci of power change, the Act may change to follow the new power centres. When major policies are effectively determined, not by Cabinet with the assistance of officials, but by political parties, people may want to know more about the actions and roles of political parties. As lobbyists become more influential and powerful in the MMP environment, people may of course want to know more about lobbyists.

So much for the uncertain future. What is clear is that the Act has had a profound and beneficial effect on government. We have come a long way since 1982. Some of you may have read about a survey by a non-governmental organisation called “Transparency International” in which New Zealand emerged as the most transparent country in the world. We can rightly feel proud about this, but not, I hope, so proud as to feel complacent.
In 1989, then Leader of the Opposition Jim Bolger launched an attack on the government's attitude to Official Information Act requests. He criticised the extensive time-wasting and outright refusals by the Labour Government to release information. *The Evening Post* of 9 January reported:

"The Government can, and does, flout the intention of the Act with appalling regularity," Mr Bolger said. "There is a growing, almost sinister, secrecy associated with government departments and especially SOEs."

"For true democracy to flourish the public must have the facts before them before an issue can be debated and settled. That is certainly not happening at present."

The answer, said Mr Bolger, was to introduce penalties for Cabinet Ministers or officials who flouted the Act. Eight years on, six of them with Mr Bolger as Prime Minister, there are still no penalties. And in 1993, then Chief Ombudsman Sir John Robertson noted that the government had failed to make information available in time for proper public debate to influence decisions. In his annual report he said: "It is unarguable and acknowledged that for some time now the public's perception is that successive governments have lost credibility through ineffective consultation on major issues before decisions are taken." He also noted disquiet over delays in accessing information, a criticism repeated by Chief Ombudsman Sir Brian Elwood in 1995.

Mr Bolger's principled stance in opposition and contradictory stance in government is not untypical.

In a 1 July 1993 article in *The Dominion*, Robert Buchanan, then Director of Legal Affairs for the New Zealand Law Society, noted: "It has been interesting, indeed amusing, over the years to see the most savage critic, the most prolific requestor of information while in Opposition, become the most protective and uneasy when in Government, and vice versa!" The high moral ground is easier to claim than to occupy on this issue.

Implicit in the notion of representative democracy is that the elected government stands in for the ordinary citizen so that effective decisions about controversial and complex matters can be made promptly.

The demand on the government is to show leadership, and on the opposition to show that leadership is lacking. To a large extent the outcome of this contest is determined by access to information, and effectiveness in using it.
A competent news medium presents the contest in a way that allows citizens to judge whether the public good is being served, and aids those who think it is not to influence decision-making in an informed manner. In that respect, the objectives of the news media and the intent of the Official Information Act are at one.

Among the stated purposes and criteria of the Act is to increase the amount of official information available to people in order “to enable their more effective participation in the making and administration of laws and policies”. But the Act was not written for the benefit of the news media. Rightly, it bestows no special privileges on the news media. Indeed, it does not even mention them. Notwithstanding that, when the Act was passed in 1982 the public service geared up for an expected deluge of requests from the news media the following July when the legislation came in to force. The deluge never came, a fact noted and commented on at the time.

In his 1985 annual report the Ombudsman reported that 354 applications to review information requests that had been declined. Only 21, or 6%, were from the media. That rose to 12% in 1990 and since then it has stabilised at around that percentage of about 1300 reviews a year.

Reviews by the Office of the Ombudsmen are not an accurate measure of requests under the Official Information Act, but they are the only guide available. And the figures confirm my own impression, that the Official Information Act is a welcome additional tool for journalists, but a limited one.

There is a clue as to why that is in Sir John Robertson’s 1993 annual report in which he reviews the first 10 years of the Act. Sir John concludes that the Act “has forced a change of culture to the release of information”. He notes that more information is available to groups and individuals, citing the return of marked school certificate papers to candidates. And yet he goes on in the report to criticise successive governments for not involving the public in decision-making, and notes disapprovingly a culture of government in which Ministers and the Cabinet insist on the right to make decisions “undisturbed by divisive, critical and ill-informed public debate”.

The apparent contradiction is easily resolved. Individuals and groups requesting information for their own specific interests and ends pose less of a threat to government than the news media, who request information for the purpose of disseminating it widely in a manner that generates debate and controversy.

It is not just the information, but the use to which it is likely to be put, that interests government. Issuing information for private purposes may take resources and be a nuisance, but there is no more at stake than that and time has shifted the culture to accommodate it. That the ideological climate has shifted from a collective to an individual basis and from a government to a private sector outlook has aided that process.

The culture that Sir John criticised was exemplified in comments by Murray McCully in an article in the National Business Review on 22 October 1993. At the time, Mr McCully, an experienced public relations consultant, was Minister of Customs and spin doctor for
the government, a task that involved, among other things, coordinating Official Information Act requests to Ministers.

Mr McCully acknowledged that political gamesmanship determined what information got out and when, and that how the information was likely to appear in the news media influenced those decisions. The 1990 National Government, he said, took a liberal approach to the release of information until Ministers realised they were “not only rather naively handing over political dynamite, but were holding the match for them as well”. It then began coordinating and managing the release of information. “We’re in the business, after all, of getting ourselves re-elected, and would be pretty foolhardy not to be aware of potential hazards being released,” Mr McCully said.

Mr McCully is, of course, absolutely right. There is nothing shocking or alarming in his refreshingly honest appraisal. It is bizarre to expect anyone to issue information knowing it will be used against their interests.

A current example is the refusal of Wyatt Creech, Minister in charge of the National Library, to release documents showing how the library spent almost $9 million on a computer project now terminated. Naturally Mr Creech argues release would breach confidentiality of contract negotiations on a sensitive commercial issue and disadvantage the library in future technology negotiations. That may be the excuse. But one suspects the reason is that the project was a disaster leading to cost blowouts and failure of the software and that the documents contain material that would embarrass the government.

The Official Information Act cannot legislate against the natural instinct to cover up such situations. It would be a remarkable Minister indeed who willingly issued timely information of that sort. Any such Minister would have to explain the waste of taxpayers’ money to the public as well as face the career implications of such a lack of political acumen.

It is naïve to think the law will ever shift that culture. The Act affects it in the sense that it at least gives journalists the opportunity to show that Ministers are trying to hide something. But the public is left to guess what. And the absence of timely and specific information, mixed with the possibility that the reason for refusing the information is valid, means the existing balance of power is hardly shifted.

Which is to emphasise that the Act deals with “official” information, and that, by definition, lies within the control of officials. The people who receive information requests are the ones who produced it, are affected by its release, and sit in judgement over whether it will be released. In the final analysis, even a request from the Ombudsman to release information can be ignored. Mid Central Health, for example, defied an Ombudsman’s ruling in December 1994 and refused to release information on what its public relations people were paid.

Since there are no sanctions for breaching the Act, there is little else than a scolding from an irked Ombudsman to contend with. Treasury, Inland Revenue and the Education Department have all been roundly criticised in despatches to little avail. The overnight embarrassment is far more tolerable than the impact of complying with the spirit of the Act.
What the Act does demand of government is that politicians and officials adapt their behaviour to its existence. Within the provisions of the Act, there is plenty of room for Mr McCully’s gamesmanship. An example from Mr McCully’s own bag of tricks makes the point.

In July 1994 The Evening Post asked Mr McCully as Housing Minister for a number of studies on investigations by his staff into housing shortages. Under the Act he had 20 working days to respond. In fact, he stalled until 23 August, nearly two months later. And then decided to refuse the information.

The Chief Ombudsman investigated and as a result Mr McCully agreed to release the information. It must have been agreement in principle, because he didn’t release it. The Chief Ombudsman approached him again, and received another assurance the information would be released. Finally, nearly six months after the initial request, Mr McCully sent the reports to The Evening Post, on 24 December, a classic Christmas Eve burial for the bad news.

Politicians and officials know that the issue is not the release of information, but the timing and form of its release.

As they adapted to the Act and their gamesmanship became evident, Chief Ombudsman Sir John Robertson was moved to comment in his 1990 annual report: “Generally speaking, information is a perishable commodity. In many instances unless what has been requested is released promptly it is of no value to the person requesting it.”

Nothing has changed. In 1996 Chief Ombudsman Sir Brian Elwood reported that 85% of investigations into complaints were up to six months old, 12% were seven to 12 months old and 4% had been around over 12 months. The average review took 58 days.

It is not a lack of resources that is to blame. As far back as 1988 Sir John Robertson said that it was not resources but increased complexity and “tardiness on the part of organisations in responding to Ombudsmen’s requests for reports and information”. A year later he noted “unreasonable” and “quite unacceptable” delays.

Fifty-eight days is a long time in the news cycle.

That is not to say that persistence always makes the story stale. Evening Post reporter Stephen Stewart persevered for two years to get the salary bands of top public servants and state-owned enterprise executives on the public record. It was a significant story that I have no doubt contributed to tighter requirements in both the public and private sector to declare salaries.

But most information becomes stale over time. Treasury, for example, held out for three years before releasing to TVNZ a recruitment video that it had shown to select people here and in other parts of the world. My understanding is that the video promoted economic reform with a degree of enthusiasm that Treasury thought better not to be made public at the time. Three years on it was little more than a historic document of little consequence and so far as I am aware TVNZ has never shown or used the video’s contents. The news media are interested in creating history rather than reporting it.
Politicians and bureaucrats know that invariably if they hold on long enough the point at issue will have gone off the boil and, if the journalist persists, the story that weeks before would have been a significant front page headline will be confined to an obscure slot and die a quick death rather than generate other media interest.

The 20 working days that officials have to answer requests, intended by the legislators as an absolute maximum, usually sees out the news cycle. Officials use it to good effect, drawing this comment from Sir Brian Elwood in his 1995 report: “There is a common misconception among public sector agencies that 20 working days is the norm within which to respond to a request for official information irrespective of the circumstances of the request and any urgency sought by the requestor.”

If the issue needs more than 20 days to cool the heels of a persistent journalist then a standard refusal prolongs it into an Ombudsman’s review, which is easily drawn out for a year and longer if the imperative is there.

None of this negates the significance of the Official Information Act. It has certainly shifted expectations in the way intended so that the onus is now on the keepers of official information to argue why it should not be made public. And enormous amounts of information have become public as a result.

But if there was an expectation that the Act would mean politicians and officials laying out as a matter of course controversial matters for journalists to exploit then it was naïve.

The relationship between government and journalists ought to be uncomfortable. The most difficult part of journalism is developing trust and confidence on the part of people you need to be able to talk to without compromising your professional independence. The greatest danger is being captured by your sources. Inevitably, the journalist has to make compromises and judgements. It is a balancing act and the principles get watered down to a greater or lesser extent in the process.

Professional tension is a natural part of the journalist–government interface. Journalists ought to treat with suspicion official information easily come by officially, especially when the system offers up controversial information without complaint. Then, making full use of the material should also involve the journalist asking whose interests are advanced by the manner of its release.

This does happen. Politicians and officials have become adept at using the Act to advance their interests. The classic example is the release of briefing papers to incoming governments. Officials know journalists will pick these over, especially if someone quietly points the right journalists to the “juicy bits”. They are a splendid opportunity to define the debates and position new Ministers.

Similarly, officials, agencies or politicians can use release of information under the Act to shift responsibility or redirect debate.

But government has also adapted well to the inevitability of information being released. While making the Act an endurance course is the most effective technique, followed by control over the timing of any release, there are other effective strategies.
One is to swamp the journalist with information, knowing the telling paragraph or two in the one paper they asked for is buried in a mass of material they in all likelihood don’t have time to read. It’s a strategy known in the trade as “generous compliance”.

Such generosity extends to flooding the journalistic market. If one journalist is in pursuit of controversial information that can no longer be withheld, then it can help to release it to all the media. That way the journalist who requested it loses exclusivity over the story. With all the other media running the story at the same time, the journalist who has persisted with the legwork and knows the issue thoroughly loses the edge. That is more so if the material is released outside that journalist’s time, so that they are seen to be following up the others. It tends to take the sting out of the story.

Another technique is to agree to release but at a charge, then put a prohibitive price on the information. That became such an issue that in 1992 that the Justice Department sent out a memo reminding agencies of the government-approved charges.

Perhaps I am being conspiratorial, but documents released under the Act come with a thick stamp that runs the length of each page. It is irritating to the extent that at times sense cannot be made of some paragraphs and I wonder if the stamp has more uses than simply identifying that the document has been officially released, a purpose that could easily be satisfied with a small stamp at the top or bottom of the page. A stamp that blocks enough of a key paragraph to make it unclear forces the journalist to go back and ask for an unexpunged copy. If they don’t know exactly what they’re looking for, they just might miss the significance of the over-stamped piece.

Extending that, blacking out significant portions of information is another trick. In the end, the journalist can go back and ask for deleted material, but it takes persistence and means the whole 20 day cycle is reactivated, at least prolonging any release further from its timeliness.

I have seen recently another technique. The Education Review requested submissions made by a bidder for the teachers’ payroll contract. The unsuccessful bidder had been a major payroll operator and had subsequently made a submission to the Ministry of Education setting out disasters that were likely to occur as a result of shifting the contract. Its predictions, despite the obvious self-interest, proved correct.

The Ministry released the submission, but it came in a public relations package setting out the context the Ministry would expect any reasonable journalist would be morally obliged to report the information in. Furthermore, the Ministry issued new information that cast a bad light on the company that had made the submission.

Another version of this technique that I have experienced is to release information at the same time as a confidential call from the agency’s public relations person giving off-the-record material designed to put the pressure on not to print.

Aside from such standard behavioural adaptation, the culture of government has changed radically in the 13 years the Act has been in force. The advent of the market economy, bringing with it the aping of the private sector commercial world in government affairs, has changed attitudes to information.
Outgoing Ombudsman Nadja Tollemache noted in the 1993 Ombudsmen’s annual report that regardless of any benefits restructuring the government sector may have brought, it had meant less information was available. “In our so-called information age the erosion of the right of the public to access to information of public interest must be a matter of serious concern,” she said.

State-owned enterprises, the new health structures, education and energy sectors, port companies and local authority trading enterprises are all examples where competition and legislative requirements to operate strictly on commercial lines have removed massive amounts of public expenditure from public scrutiny. The demand for greater efficiency and commercial accountability has been at the expense of wider accountability.

Information has a commercial value in this climate and the tendency for such organisations to refuse information requests on the grounds of commercial confidentiality is understandable and defensible given the demands government has placed on them. The notion of the public good is increasingly defined by, and limited to, the commercial imperative.

As public sector organisations continue to develop a private sector commercial culture, and employ people from that background as opposed to career public servants, it can be expected that they will further adapt to offset the nuisance value of the Official Information Act. The media have not stood outside this reform process.

The private sector too has had to sharpen its commercial focus and news media owners are among those demanding greater efficiency and profitability. For journalists it has meant the same redundancies and effective reductions in take-home pay that other state and private sector employees have experienced.

The impact on journalism has been noticeable. There is less time to become absorbed in an area of responsibility, less time to research. Time constraints and work demands make journalists more susceptible to ready-made, packaged news. There is greater accent on the generalist processing spot news rather than the specialist digging and delving.

The Official Information Act is not a very useful tool in this environment. In my experience, few young journalists use it. They don’t know how to ask the right questions and don’t have the time to indulge the tactics of those who would frustrate its intent.

Increasingly, high-calibre young journalists have a short life-span in the industry, dissatisfied with the low wages and lack of opportunity to move into specialist, investigative and feature work. Allied to that is increased emphasis in public and private sector companies on communications and the management of information and news. This has created opportunities for people with journalistic skills to leave the news media for much higher paid jobs. A ministerial press secretary, for example, would be paid 20 to 30 thousand dollars more than a working senior journalist.

The effect may have increased the profitability of news media organisations, but it has done nothing for the quality of journalism. The strength of traditional journalism is based on unofficial information. The art of the journalist is to talk to all parties, to piece to-
gether information in a way that presents a more complete picture than any one party can paint. It can be a grubby business, playing people off against each other and exploiting disputes, talking people into leaking material and resorting to other tricks of the trade to elicit information.

The journalist lives easily with this process when the public good is served. It is a dangerous moral argument that the ends justify the means, but there are ethical judgements to be made that act as controls. But the less the public good is served, the less defensible becomes the process.

Cementing in the benefits of the commercial reforms without eroding the institutions that support democratic decision-making is no easy task. It means restoring a degree of respect for the inherently inefficient processes of an open society. For both government and the news media there are costs involved in doing that.

It is unrealistic to expect the international news media moguls who own most of New Zealand’s commercial media to sacrifice profit in order to perform an unpaid public service. Nor is it necessary. The state still owns public service radio and television, accessible cheaply to all New Zealanders.

In principle there is no good reason why public service television and radio, adequately funded and set up under a charter stipulating standards and service requirements but at arm’s length from party political interference, should not fulfil the function to a high standard.

The continued existence of a core public-funded news media reflects recognition of the need. The political system has not yet shown the maturity to strengthen it. But that is a logical and necessary step in the development of MMP if the new system is to flourish.

The news media, for their part, cannot wait for it to happen. They must force the issue by performing at a new level so that the constraints become an obvious hurdle.

Sir Geoffrey Palmer set out the challenge in 1992 in his book *New Zealand’s Constitution in Crisis*. “The media are subject to the market and subject to the law. Both these pose substantial restraints on media activities, but not in a way which aids the performance of the constitutional function. In important ways, it is the professional standards of the journalists themselves which determine media outcomes. Those standards tend to be somewhat vague and elastic,” he wrote.

The media, Sir Geoffrey argued, are invested with certain functions in a democracy and thus sit somewhere between an agency in the political process and a pure industry. He concludes: “The quality of journalism in New Zealand needs to be improved if we are to improve the quality of government and the public’s ability to participate in it.”

Sir Geoffrey does not make a private–public media distinction. In my view the extent to which the commercial media meet those demands is a bonus not to be relied upon. But the public does have a right to stipulate requirements and standards of the media it funds. It is relevant in my view that in an overall rather dismal analysis Sir Geoffrey acknowledges that “the picture is not one of unremitting gloom” and that public radio in particular at times reaches high standards.
Any public demand for improvements must be in the context of the more commercially aware society that has developed. It is my experience the public already gets more than it pays for from its public media. If the public wants news media that perform the functions that Sir Geoffrey outlines to the standard he desires, it cannot divorce that demand from the issue of funding.

As MMP develops, news media organisations will have to put more resources into political journalism if they are to meet the potential the new system holds for them. In so far as the Official Information Act is a tool of journalism, a serious rethink is needed as to whether it is adequate to meet the MMP environment.

The outcome of the 1993 election was so close that it was unclear for some time who would form a government. The uncertainty was a precursor to the MMP system the public had already opted for. In that environment, then Chief Ombudsman Sir John Robertson put on hold a number of completed requests for information on the grounds that he had an obligation to contribute to political stability.

The media criticised that stance, arguing that it was not the Ombudsman’s job to make such judgements and that it was in the public interest to make the information available irrespective of any effect it might have on the incoming government.

In his 1994 annual report, Sir John addressed that issue, pointing out that the Act “recognises that certain information, in certain circumstances, needs to be withheld in order to protect the public interest in maintaining the orderly process of government”. In that, the Act entrenches the very paternalistic approach that Sir John noted the year before had created a culture where Ministers and Cabinet insisted on making decisions “undisturbed by divisive, critical, and ill-informed public debate”. So long as that version of the open society remains, the Official Information Act will remain largely compliant with that paternalistic political culture.

If the Act is not amended to lead, or meet, a more robust and mature attitude to debate and decision-making, then it will remain of limited use to journalists. It is important that the Act remain a useful tool for making official information available. But in theory, the MMP environment is so rich in opportunities to collect unofficial information that journalism should be enhanced regardless.

The more significant question is whether the journalistic industry is willing and able to meet that challenge. Society should certainly demand it through public news media whose strength is entrenched beyond party politics. Anyone who fears the accountability implications of that will, of course, be comforted by a reminder that the public media are subject to the Official Information Act!
Review of the Official Information Act

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When Government itself engages in business a first few might hold that the conventions of confidentiality which are accepted for private commerce should equally apply to publicly operated activity. Where the activity can be readily related to commercial practice, as in buying and selling, it appears reasonable that Government should “do and suffer”, on behalf of its taxpayer-shareholders, no less confidentiality than does the private sector.1

Introduction

It is almost 20 years since the Danks Committee delivered its report, “Towards Open Government”. In that time New Zealand has changed significantly. The vocabulary of the ’90s—internet, cappuccino, and powhiri—emphasises the extent of this change. Given these changes, the reform of state trading activity under the State-Owned Enterprises Act 1986 and changes in information technology and consumer behaviour it is timely to ask whether the Official Information Act should continue to apply to state enterprises. Does it, to use current corporate jargon, “add value”?2

State enterprise accountability

The transformation of the public sector and the emergence of SOEs, CRIs, and CHEs reflect an effort to improve the performance of government trading activities. The state enterprise model is about accountability. An extensive framework is established under the Act with specific roles identified for Shareholding Ministers, the Boards of Directors, and Parliament. In reviewing this accountability framework Matthew Palmer observed: “It is true then that ministerial responsibility is narrowed in relation to SOEs. Yet the matters for which responsibility is lost concern commercial management; and the distancing of those matters from political control is exactly the point of the SOE exercise!”3

The difference between the state enterprise model and its government department heritage was emphasised in early court decisions such as the judgment of Justice Greig in Wellington Regional Council v Post Office Bank Limited and Others (Unreported, High Court, Wellington, December 1987). In that case a decision to close 432 post offices throughout the country was described as: “Purely a management administrative decision. Whether 1 office, 31 offices or 432 are closed, that is a management decision.”

1 Towards Open Government: Committee on Official Information p 19.
This conclusion represented in a stark way the new independence established under the state enterprise framework. Although the recent decision of the Privy Council in *Mercury Energy Limited v Electricity Corporation of New Zealand* [1994] 2 NZLR 385 recognises that decisions of a state enterprise, as a public body, may be subjected to judicial review, the board specifically held that decisions such as those to enter into or determine a commercial contract to supply goods or services are unlikely ever to be subject to such review.\(^3\)

Should the Official Information Act then continue to apply to state enterprise activities? There are a number of reasons why I believe the answer to that question is no. Legal arguments focused on the accountability structure established under the State-Owned Enterprises Act have been rehearsed by other speakers and are well described in the literature. Put simply, it is argued that applying the Official Information Act to state enterprises is inappropriate given the commercial nature of their activities and the limited involvement of the Crown, as shareholder, in the business. Arguments based on efficiency and fairness have also received much attention. The cost of compliance with the Official Information Act and the practical issues that coverage can raise in a commercial context were recognised by the Danks Committee and have been demonstrated by experience since 1987. It is not proposed in this paper to repeat those arguments. Rather I want to analyse the issue from a customer and market perspective and ask whether in the age of the internet, official information legislation helps or hinders openness.

**Official information in a commercial environment**

State enterprises such as New Zealand Post are only successful if they are able to compete effectively in the markets in which they operate. A limited level of protection is afforded New Zealand Post under the Postal Services Act 1987 in relation to the carriage of standard letters. However, the vast array of electronic substitutes that are available to customers together with the existence of vigorous direct competition through the document exchange network and utilities that deliver their own mail means that in all areas of our business competitive pressure is real. We must constantly look to innovate, and improve our services if we are going to continue to be successful.

The increasing availability of information and its relative ease of access is well recognised. People can through the internet gain access to an enormous range of data while remaining in the privacy of their own homes. There is no longer any need to master the complexities of the Dewey decimal system or risk the disapproval of the stereotypical stern librarian. The public files of the CIA, for example, are available to us all.

The ease of international communication provides consumers with ever increasing choice. One result of this is that customers are becoming more discriminating as predicted by Faith Popcorn in 1991. “We are in the middle of a ‘socioquake’. ” As she said:

> Companies will have to realise that you not only sell only what you make. You sell who you are … What will make us buy any product over another in this decade is a

\(^3\) A comprehensive analysis of these issues is provided in two articles by Mai Chen in the NZLI, August 1994, p 296 and in (1994) 24 VUWLR 51.
feeling of partnership with the seller and the feeling that we are buying for the future. Anonymous, impersonal selling—the old style Kmart—is over ... There will be no forgiveness of huge mega corporations that hide behind huge and complicated corporate structures. Labels will become more important than ever before. We will want to know (like big brother) a biography of the product and the ethics of the maker. We will want to know the company’s stand on the environment, how it regards animal testing, human rights, and other issues—rather than just a list of ingredients or a glimpse of an image.

This thirst for information about businesses is gaining momentum in New Zealand, particularly as investigations such as the Wine Box Commission of Inquiry raised the spectre in the public mind of some form of business-led conspiracy. Organisations willing to share information about their policies and performance are more likely to be successful in this environment.

The push to become more open affects not only the external dealings of companies with their customers but also the way in which they are structured. In fast-changing competitive markets the traditional concept of hierarchical structures with a small central group holding knowledge and power has been displaced in favour of organisational models in which information is distributed, people are empowered, structures are flexible and people are encouraged to think, debate and innovate for the future.

There are therefore significant forces at work in the community which favour openness and a sharing of information. It is in this environment appropriate to ask whether the Official Information Act—which has undoubtedly supported a significant change in government culture towards the sharing of information—continues to be necessary in areas of state trading activity which are subject to these wider economic and social forces. As John Ralston Saul argues in his book *The Unconscious Civilisation*, statutes such as the Official Information Act, which ostensibly promote access to information, can often become an effective barrier to the sharing of that information. He says:

> This raises an important question about the role of freedom of speech: We have a great deal of it. But if it has little practical effect in reality, then it is not really freedom of speech. Without utility, speech is just decorative.

> The corporatist structures have been remarkably successful in limiting this utility. The actions of the private sector are obscured in a world made increasingly opaque by the unending quantities of information—that is, of rhetoric and propaganda—which shower down on those outside the interest groups. As for the freedom of information or access to information laws, they have simply confirmed that all information is private unless specifically requested. Requests must be clearly defined and often cost money, with the result that information is stored in increasingly narrower and more specific categories. A request produces a fragment of information and only those citizens with the funds can engage in these frustrating fishing expeditions.

While John Ralston Saul is speaking specifically about the Canadian and United States experience, there is in the writer’s view some force in the comments that he makes. The


mere fact that requests are made under statute encourages a legalistic approach to access issues. It results in lawyers becoming more involved in these issues than would otherwise be necessary or appropriate. While questions involving the interpretation of s 9(2) are fascinating from a legal perspective and can, on occasion, raise serious issues of wide public importance, the involvement of lawyers in the process may in some circumstances result in an academic approach being taken rather than one which is oriented to the market and customers.

Although there will no doubt be many who question whether “enlightened self-interest” can ever deliver a truly open environment, there are a number of initiatives taken by New Zealand Post which in my view demonstrate the ability of market forces to deliver responsible corporate behaviour. These include the decision to abolish the rural delivery fee and the decision to reduce the price of the standard letter service. Neither of these decisions make sense from a perspective that says the only objective of a business is to maximise short-term profit. If, however, your objective is “to be successful” then building confidence and trust with key constituencies—particularly your current and prospective customers—seems to us to be good business. Developing a more open corporate culture in which information—good and bad—is shared with employees and customers is simply another way of building that trust. This is not corporate philanthropy. Rather it is recognising that the longer-term future of businesses such as New Zealand Post depends on building and maintaining customer confidence. We will not be able to do that if we try to hide behind the walls of secrecy, hierarchy and monopoly.

There is one other element of John Ralston Saul’s comments which must be considered by policy makers reviewing the Official Information Act. That is how we get more people actively involved in public policy debates. This is a real and urgent question if we are to avoid the allegations of “conspiracy” and “élitism” which are so often levelled at the process of public policy formulation. Certainly our experience in encouraging discussion over the reform of postal services or the future of the state enterprise model suggests that the topic is insufficiently “racy” for most of the broadcast media. This in the end is the real challenge for those seeking to develop a more participative democracy. Providing a framework for access to information is at best only half the battle. The real challenge is to then communicate that information in a manner which engages the hearts and minds of the people so that they can become involved in determining the significant issues which face us as a nation.
Accountability provisions under the State-Owned Enterprises Act

The State-Owned Enterprises Act 1986 sets out the accountability provisions for all state-owned enterprises, namely:

- A Statement of Corporate Intent. This is an essential control mechanism for the Shareholding Ministers in which they agree to the broad objectives (financial and other) and strategies of each SOE. It specifies the decisions which Shareholding Ministers must be consulted on and the operational and policy matters agreed to, such as accounting and personnel policies;
- Half-yearly and annual reports. These reports provide the opportunity for public monitoring of the SOE’s success or otherwise in achieving its objectives;
- Section 18 of the Act also provides that Shareholding Ministers can request such information as they require relating to the affairs of the state enterprise. This principally involves the submission of the annual business plan to the Ministers.

The Act also provides the Shareholding Ministers with the ability to determine the level of dividends paid by the enterprise.

The accountability of SOE directors is, therefore, quite explicitly focused on achieving the agreed objectives in the Statement of Corporate Intent and the provision of the appropriate information to Ministers. The Act provides that the Shareholding Ministers of a state enterprise are responsible to the House of Representatives for the performance of the functions given to them by the Act or the rules of the enterprise. The matters for which Shareholding Ministers are accountable to Parliament and therefore to the public are quite explicit. They are not accountable for the operational decisions and policies of the SOEs, which are the responsibility of the directors, unless the Statement of Corporate Intent requires their involvement. ECNZ’s Statement of Corporate Intent, for example, requires consultation with Shareholding Ministers if the Corporation intends to expand into new business activities.

ECNZ believes that the principal responsibility of the Shareholding Ministers is to ensure that the SOE achieves its objectives as set in the Act—to be as profitable and efficient as comparable businesses that are not owned by the Crown, a good employer and an organisation which displays a sense of social responsibility.

In addition to the accountability provisions set out in the SOE Act, parliamentary select committees are authorised to conduct an annual review of the performance and opera-
tions of SOEs. Unless there are exceptional circumstances all hearings are open to the public and members of the media are allowed to report on the evidence presented.

Given the explicit nature of the accountability to our Shareholding Ministers, our owners, it is difficult to see how this additional level of accountability fits in. However, in reality, ECNZ welcomes this particular opportunity to communicate our message more widely.

**Accountability provisions under the Official Information Act**

The two principal purposes of the Official Information Act 1982 are:

- to enable the public’s more effective participation in the making and administration of laws and policies;
- to promote the accountability of Ministers of the Crown and officials.

Following from earlier comments regarding the accountability provisions in the SOE Act, ECNZ considers the accountability that exists between SOEs and the public is different from that which exists between government and the public. The Official Information Act is predicated on the desirability of open government. SOEs are not, however, government; in fact they are required under the SOE Act to be as profitable and efficient as the private sector. The fundamental principle of the SOE policy is the complete separation of all commercial and non-commercial objectives.

For social goals outside of those expected of any private sector equivalent, the Act provides for the government to directly purchase goods or services from an SOE.

As described earlier, the matters for which Shareholding Ministers are accountable to Parliament and therefore to the public are quite explicit. As with the SOE Act, accountability to the public under the Official Information Act should rest with the Shareholding Minister—not the SOE or its directors.

The Official Information Act should, therefore, aim to make freely available (subject, of course, to good reason for withholding) all information held by Shareholding Ministers in the course of carrying out their duties.

Information, such as that of an operational nature, which is the accountability of SOE directors, is not required by Shareholding Ministers for the performance of their duties. It is ECNZ’s view, therefore, that such information should not be covered by the Official Information Act—after all, what privately owned company would ever have to contemplate making public the detailed outcomes of a tender process, for example?

One of the other principal purposes of the Official Information Act is to enable the public “more effective participation in the making and administration of laws and policies”. Public participation in the processes of government can be justified on the grounds that government is accountable to the public and openness therefore enhances the quality of democratic government. Given earlier comments regarding the specific accountability of SOEs to the public it is not considered that this justification holds true for SOEs.
Public participation in the processes of government has also been justified on the grounds of the significant impact government decisions have on individuals and communities. It has been argued that the size and importance of SOEs justify their coverage under the Official Information and Ombudsman Acts. It is no doubt true that building a dam does have a significant impact on the local community. However, it is important to remember that many decisions of large private sector companies also have enormous effects on communities similar in scale to SOE decisions, for example, rationalisation of the meat industry. Other regulatory measures have been developed to deal with such “significant” effects on New Zealand’s society and economy.

It is not therefore the significance of the activities carried out by an organisation that dictates whether public participation through the Official Information Act is desirable but the fact that the activity is undertaken by the government. Given then that the single feature that distinguishes SOEs from other businesses is their state ownership it is contended that any accountability measures should be focused on the accountability between the Shareholding Ministers and the SOE—as outlined earlier, these accountability measures are already in place in the SOE Act.

To illustrate this point further, it is interesting, in terms of the public’s interest in the energy sector, to compare ECNZ with the gas industry (either retailer or wholesaler) which could be seen to be equally as strategic to New Zealand. In order for a gas company’s actions to be in the public domain the company would need to write a letter to a Minister or government officials. This letter could then be requested under the Official Information Act. In contrast, ECNZ, because of its government links, only has to think of an idea for it to be in the public domain!

Taking this idea even further, if there are justifications other than ownership for our inclusion under the Official Information Act, the Corporation would logically continue to remain under the Act even if privatised. In practice, however, as other SOEs have become privatised they have been removed from the Official Information Act as a matter of course.

The Corporation is therefore in the somewhat difficult position of being neither a private sector enterprise nor part of the public service. As a state-owned enterprise we are required by the legislation that established us to act in a commercial manner and make a profit. Our commercial objectives form part of our Statement of Corporate Intent and are therefore one of the principle means of measuring our accountability. At the same time, however, because of our accountability under the Official Information and Ombudsman Acts we have to make the same disclosure as that required by government departments. This requirement is often in conflict with our commercial operations. Because of this conflict the main reasons the Corporation uses for withholding information are based on commercial sensitivity and associated issues. Despite these comments the Corporation receives numerous requests throughout the country from individuals and groups for which we are happy to respond to fully. Only a few of the more tricky requests come to the General Counsel’s attention and the majority of these are about a small range of subjects.

One rather controversial subject on which the Corporation has received numerous requests for information, and one that clearly illustrates the conflict just outlined, is devel-
opment and capital costs, together with current book value of power stations. The Corporation has always maintained that this information should not be released because of the fact that it would prejudice the commercial position of ECNZ and disadvantage its ability to carry out commercial activities. Having this information can assist a competitor in working out ECNZ’s cost of production and margins, hence giving that competitor a distinct advantage. This type of scenario, which is a fairly regular occurrence, illustrates how clearly at loggerheads the application of the Official Information Act is against the objectives required of SOEs under the SOE Act.

It is possible and is appropriate that information about the Corporation is available through mechanisms that apply to all organisations in a market, for example, in the electricity industry the Information Disclosure Regulations. Under the Information Disclosure Regulations (made under the Electricity Act) ECNZ only (not Contact Energy or any other generator) is required to publish the terms of its pricing contracts. ECNZ supports such a regime as long as it is necessary to enhance the working of the market, and/or increase accountability within the market. However, I believe mechanisms such as this should apply to either all or none of the companies within a given market. Industry-related legislation such as this is a more appropriate accountability and monitoring mechanism than the Official Information Act.

Having said the above the Corporation recognises that it makes good commercial sense to take its customers, the public, with it as it makes decisions rather than leaving them in the dark.

Is the Corporation “open” and what public access is there to our decision-making process

Despite earlier comments regarding ECNZ’s difficulties in responding to requests under the Official Information Act for information that is commercially sensitive it is considered that we endeavour to be as “open” as possible. We have, in fact, been accused by some of the organisations we have commercial dealings with of being too open!

ECNZ has published an extensive range of documents on projects and issues such as the recent “Guide to Tender” and associated booklets. Historically this has been one way of educating the public as to how ECNZ’s contracts and pricing methodologies work. However, the recent development of an independent Wholesale Electricity Market means that neither the government nor ECNZ has any direct means of setting a price for electricity. This market, which was developed to ensure robust competition between generators of electricity, has changed the way that ECNZ now has to do business. ECNZ and the other SOE, Contact Energy Ltd, are now having to compete against privately owned electricity generators. This situation highlights the conflict faced by SOEs in fulfilling the profit-maximising objective of the SOE Act and making available information that could be competitively damaging under the Official Information Act.

However, in spite of the new market and subsequent competition, ECNZ continues to publish many booklets about a range of topics. These include guides about the operation of our power stations, energy efficient options, information sheets about topics such as
"Working with Water" and "ECNZ and the Competitive Wholesale Electricity Market" to name a couple.

Other publications include *Market Matters*, a magazine produced quarterly, looking at the electricity industry as a whole, *The Environmental Report*, which will now be published on an annual basis, and *ECNZ News*, which updates the public on happenings within the Corporation. These particular publications are very widely disseminated.

These publications are available either on request or through the information centres situated at some of ECNZ's power stations. Guided tours also form part of the agenda at ECNZ's information centres which continue to attract up to 40,000 visitors per year.

It might be useful to illustrate by way of an example how the Corporation involves the public in our decision-making process.

**Consultative process under the Resource Management Act**

Another example of public involvement in the decision-making process leads onto the relationship ECNZ has with local authorities, in particular regional councils. One of the most significant effects ECNZ has on individuals and communities is as a developer of natural resources. ECNZ has a tricky balancing act to maintain in its Resource Consents Programme. This involves trying to maintain the difficult balance between the needs of other individuals and groups who use or want to protect natural resources and the needs of our customers.

One of the principal functions of the Resource Management Act is to put in place mechanisms to ensure adequate disclosure of information by any developer or user of resources, in order to enable the public to assess the effects on their interests in resource consent applications.

We believe that we have gone several steps beyond what is required under the Resource Management Act in terms of public participation. ECNZ has developed a process for consulting interested parties on the renewal of its consents. This process includes holding a forum of interested parties who are asked to identify and agree on the issues that affect them, relating to particular applications. These forums are widely advertised in the local community and enable individuals who would not usually take part in decision-making done at a national level to have their say.

A working party is set up from the forum (and anyone who wishes to be on the working party may be). The next process involves the working party collating known information, identifying gaps in knowledge, initiating studies to fill those gaps. It also commissions detailed studies to look at options to address adverse effects identified. The briefs for those studies and the experts to be used to undertake them are agreed by consensus of the working party. All studies, research, etc are funded by ECNZ. Participation on the working parties is varied and includes those who might be opposed to ECNZ—with the same information being available to everyone. The studies and research results are shared among the participants in a common database that is acceptable to all the parties. A range of options for avoidance, remediation or mitigation, based on the studies and the likeli-
hood of various outcomes occurring, is identified. A consensus can be reached on solu-
tions to concerns prior to the applications for consents being lodged. In addition to the
working party the Corporation will ensure that it consults government departments rela-
ting to their statutory responsibilities and tangata whenua.

The extensive nature of this consultation obviously assists ECNZ too, in that it means
that when we get to the stage of seeking consents from the regional council they are very
aware (even if they have not been on the working party themselves) of the level of con-
sultation that has been undertaken. The effect of this level of consultation is to ensure
comprehensiveness, and that the community has input into decision-making in a way that
is more likely to address their concerns.

The relationship that ECNZ has with the regional councils is very much a cooperative
one where information is shared. The information thus generated can be used in the
future management of the resources. ECNZ recognises that it has a major impact on local
communities and tries to ensure that the impact is, as much as possible, a positive one.
Our staff have frequent meetings with officers from local authorities to discuss any issues
of concern as they arise.

Our relationship with local government is something that ECNZ is putting considerable
effort into. Traditionally we have been much more successful with our dealings with
central government. This is partly historical, in that we used to be a government depart-
ment and we know how to operate the system. Local and regional authorities have in the
past few years had additional duties imposed on them which have made their job harder.
To a certain extent, therefore, both we and the regional and local authorities we deal with
are feeling our way in terms of developing an effective relationship. The Corporation
recognises that developing this type of relationship is vital and we will continue to put
considerable resources into it.

Public interest in our decision-making process

Having heard about how we involve the public in our decision-making process you might
be wondering how much interest the public actually have in ECNZ. The Corporation
engages a research group to survey the public regularly, over a significant time period,
about their perceptions of the Corporation. One of the issues they question their inter-
viewees about is the importance of information from ECNZ to the public. The most
recent of these surveys was in August 1996. The participants felt that ECNZ should
inform the public about:

- who we are and what our role is;
- how ECNZ intends to manage future demands for electricity with regard to issues
  such as energy efficiency and alternative means of electricity generation (how-
  ever, with the new Wholesale Market these really become industry issues, not
  specifically ECNZ issues);
- the environmental impact of generating electricity and how ECNZ is minimising
  the impact both in the long and short term—maybe another industry-wide issue.

There was a clear message from this survey, consistent with those previously undertaken,
that the participants were reasonably divided. Some wanted to feel this information was
freely available if they wished to access it, although the majority of these were not pre- 
pared to spend the time and energy accessing it. Others honestly admitted they weren’t 
interested as long as electricity continued to flow. It is, however, interesting to note that 
the majority of what the public wanted to know is well catered for in the publications 
previously mentioned.

Summary

In summary, it is considered that the Corporation is an open organisation and as much as 
possible tries to involve the public in its decision-making process. We believe that this 
can in many cases lead to better decisions being made. The main example given to illus-
trate this was the consultative process used under the Resource Management Act. As 
stated, this is of benefit to us as well as it assists us in gaining the consents we need to run 
our system.

Having said this, it is important to remember that the Corporation has been established to 
run as a successful business. It has a tough accountability regime imposed on it by the 
State-Owned Enterprises Act. It also has other disclosure requirements placed on it by 
other legislation, for example, the Information Disclosure Regulations. On top of this the 
Corporation is covered by the Official Information and Ombudsman Acts. This can some-
times be difficult, primarily because of our commercial objectives. Despite this, in the 
majority of cases we are able to help people when they do request information from us.

Appendix

**Accountability Provisions Under the State-Owned Enterprises Act**

- Statement of Corporate Intent
- Half-yearly and Annual Reports
- Information as requested by Shareholding Ministers

**Accountability Provisions under the Official Information Act**

- Must release information requested unless good reason to with-
hold it to enable public participation in the processes of govern-
ment
- Decisions to withhold information can be reviewed by the Omb-
udsman if asked to do so by the requestor
The Official Information Act in the Corporatised World
Commercial Information and the Official Information Act

Leo Donnelly
Assistant Ombudsman, Wellington

Introduction

The nature of commercial activity and how it is conducted in New Zealand, particularly in respect of the commercial activities of the state, has changed markedly since July 1983 when the Official Information Act 1982 first came into force. However, information still remains the "oil" on which the commercial "machine" depends substantially to operate effectively. Rapid advances in technology have resulted in a ready ability to access, collate and analyse information in a manner and to an extent few may have imagined a decade ago. In this context, where the "corporatised world" intersects and interfaces with the activities of departments, Ministers of the Crown, organisations and local authorities subject to the Official Information Act or the Local Government Official Information and Meetings Act 1987, the potential application of official information legislation¹ to commercial information which comes to be held by public sector agencies is a "fact of commercial life" which cannot be ignored.

Despite the privatisation and corporatisation policies pursued by successive governments over the last decade in relation to the commercial activities of the state, much commercial information continues to be gathered by government. In general, this "commercial information" can be seen to come within one of the following two broad categories:

1) information held by publicly owned commercial enterprises subject to the Act (such as state enterprises and Crown Research Institutes) about themselves; and

2) information held by public agencies about private or public sector enterprises whether:

(a) generated by the public sector agencies themselves; or
(b) supplied to them, either compulsorily or voluntarily, by the public or private sector agencies concerned.

While, from time to time, it has been argued that "commercial information" should not be subject to the Official Information Act, Parliament has decided otherwise. The purpose of this paper is to briefly summarise, with reference to the current approach of the Ombudsmen in the exercise of their investigative and review role under the Official Information Act, how the Act operates in practice to balance the right of the public to request

¹ Hereafter, where relevant, all reference to the Official Information Act should be read as including reference to the Local Government Official Information and Meetings Act.
access to commercial information, and the need for confidentiality in terms of generally accepted conditions of commercial negotiation and trade.

Background to the current statutory regime

Before discussing how the Official Information Act currently operates in respect of commercial information, it may be helpful to consider briefly the background to the enactment and continued application of the provisions which provide protection in certain circumstances for commercial information under the Act.

The Danks Committee

In its general report “Towards Open Government”, which led to the enactment of the Official Information Act, the Committee on Official Information (the Danks Committee) carefully considered the issue of “commercial confidences”. Notwithstanding its fundamental recommendation that a presumption of access rather than secrecy should in future underpin the activities of the state, the Danks Committee accepted that there was a need for protection, in appropriate circumstances, for information considered to be commercially sensitive. However, it concluded that “no general rule about protection will fit” and noted that each case would need to be judged on its merits. The Danks Committee recognised that in the context of the commercial activities of the state there is a distinction between:

(a) commercial activities which have “the profit-seeking, competitive colour of private enterprise”; and
(b) commercial activities where “commercial, social and economic objectives become conjoined”.

In respect of the former, the Danks Committee noted as follows at page 19 of its general report:

When government itself engages in business a first view might hold that the conventions of confidentiality which are accepted for private commerce should equally apply to publicly operated activities. Where the activity can be readily related to commercial practice, as in buying and selling, it seems reasonable that government should “do and suffer”, on behalf of its taxpayer-shareholders, no less confidentially than does the private sector.

However, the Danks Committee went on to note that “the matter cannot end there”. As ultimately reflected in the legislation enacted in 1982, while the Official Information Act recognises that in certain circumstances there would be a public interest in withholding commercial information, it does not provide a blanket protection for commercial information as an exempt category or class. Whether such information could properly be withheld needs to be assessed against the statutory reasons for refusal under the Act. If a request is refused, then the requester could ask an Ombudsman to investigate and review that decision.

Official Information Amendment Act 1987

In 1987, following recommendations by the Information Authority based on careful consultation with users of the Act in respect of their experience during its early operation, 70
enactments which had until then provided special protection to commercial information were repealed or amended. Similarly, the provisions of the Act that provided protection for commercial information itself were amended to resolve perceived anomalies and to give a clearer indication of the circumstances in which the legislature expected that such information could be properly withheld. The most significant reform was that, with the repeal of s 8 and the consolidation of all reasons for refusal on grounds of predicted prejudice to commercial activities or commercial position or commercial confidences in s 9 of the Act, any assessment that such prejudice would occur was now subject to the requirement, under s 9(1), to consider whether “in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available”.

Report of the State-Owned Enterprises (Ombudsmen and Official Information Acts) Committee

In respect of SOEs, s 31 of the State-Owned Enterprises Act 1986 required a select committee of the House of Representatives to review the application of the Official Information Act (and the Ombudsmen Act 1975) to state enterprises after two years of their operation, and to report to the House on the matter by 1 April 1990. In its report, tabled in 1990, the select committee recommended that the Official Information Act (and the Ombudsmen Act) should continue to apply and that those Acts be amended to also cover subsidiaries of state enterprises. In effect, the select committee endorsed the earlier view of the Danks Committee and the Information Authority that commercial information did not require any special protection beyond that provided for in the Act itself.

The Ombudsmen’s current approach

The Ombudsmen’s review function

On a general level, the current approach of the Ombudsmen in an investigation and review of a decision to withhold commercial information can be summarised in the following manner.

Departments, Ministers of the Crown, organisations and local authorities can only refuse requests for information under the Act where their concerns about the detrimental effect of its disclosure satisfy the requirements of one of the reasons for refusal set out in the Act. In respect of requests for commercial information, it is not enough under the Act for holders of such information, or third parties to whom the information relates, to simply assert that they consider the information to be commercially sensitive. Good reason for refusal in terms of the Act must be established. In this regard, an Ombudsman’s statutory function on review is not to consider de novo whether there is now good reason to withhold the information at issue, but to investigate and review the decision to refuse the request and form his or her independent opinion as to “whether the request should have been refused” (s 30(1)(a) refers); in other words, whether at the time the decision was made, there was good reason for refusal under the Act.
Given the principle of availability in s 5 of the Act—namely that information should be made available unless there is good reason for withholding it—an Ombudsman’s investigation and review essentially seek to establish:

1) what precisely was the prejudice or “harm” which the holder of the information believed would be likely to result if the information was disclosed; and

2) whether that “harm” was protected by one of the withholding provisions which provide “good reason” for refusal under the Act.

The Ombudsmen’s current approach to interpretation of reasons for refusal relevant to requests for commercial information

The current approach of the Ombudsmen to interpretation of the specific withholding provisions which provide protection for commercial information is set out in the Ombudsmen’s Practice Guidelines No. 3 published in September 1993. A copy of these Practice Guidelines is attached and there is no need to comment further on their detailed content in this paper.

However, it may be more helpful to summarise, by reference to an issue which has arisen in recent months, the general advice provided by the Ombudsmen to two separate public sector agencies in respect of specific concerns they had about the ability of the Act to provide adequate protection in a commercial environment in which they are increasingly becoming more involved.

The general circumstances in which the concerns were raised related to:

1) public sector agencies holding information provided by, or generated for, third party commercial clients during the process of agencies tendering for commercial contracts; and

2) public sector agencies holding research information generated under contract for third party commercial clients.

In each of the above scenarios, it appeared that potential clients were concerned that commercial competitors may be able to use the Official Information Act to obtain access to the information, to the commercial disadvantage of the client. The public sector agencies concerned sought advice from the Office of the Ombudsmen as to how they might provide adequate assurances to their commercial clients that such information, which they believe to be commercially sensitive, will remain confidential.

The Ombudsmen noted that, given their statutory review function, it was not appropriate for them to form an opinion in advance on whether specific information can properly be withheld under the Official Information Act. Each case must be considered on its merits. However, they commented that they did understand and appreciate the concerns expressed. On a general level, based on their experience in investigations and reviews which have raised similar issues under the Act, they offered the following comments.

First, the Ombudsmen noted that although the Official Information Act does not allow for a blanket assurance to be given that all commercial information can be withheld as a
particular class or category of information in all cases, it seemed that the provisions of
the Act would provide adequate protection in the circumstances described. Similar con­
cerns have been expressed in the past by other public sector agencies about the incorrect
perceptions of third parties in the private sector as to how the Official Information Act
would be likely to apply to information which they consider to be “commercially sensi­
tive”, and which has either been provided by them in confidence to a public sector agency,
or generated for them pursuant to a commercial contract for advisory services.

The public sector agencies concerned generally appreciate that the Official Information
Act does provide adequate protection. However, they have found it difficult to express
that view in language which allays the fears, albeit misplaced, of third parties that such
information could easily be accessed by their commercial rivals. In this regard, the Omb­
udsmen were advised that there is a concern that some private sector commercial com­
petitors of public sector agencies have been using the “spectre” of possible release of
“commercially sensitive” information under the Official Information Act as part of their
“sales pitch” to win contracts which public sector agencies might otherwise expect to
obtain. The agencies were concerned to dispel any perception that the Official Informa­
tion Act prevents them from holding in confidence information which the potential client
supplies in confidence, or which it believes will, if disclosed, unreasonably prejudice its
commercial position.

The Ombudsmen referred to the practice of some public sector agencies of including
confidentiality clauses in contracts with third party commercial clients and then arguing
that the existence of such clauses provided a conclusive basis for withholding, under the
Official Information Act, information covered by the clauses. The Ombudsmen com­
mented that, as noted by the High Court, the provisions of the Official Information Act
effectively exclude contracts of confidentiality from automatically preventing release of
information. In the context of the similar provisions of the Local Government Official
Information and Meetings Act 1987, the Ombudsmen referred to the following com­
ments of Mr Justice Jeffries in Hyatt Company (NZ) Ltd v Queenstown-Lakes District
Council [1991] 2 NZLR p 180, at p 191:

There cannot be allowed to develop in this country a kind of commercial Alsatia
beyond the reach of a statute. Confidentiality is not an absolute concept admitting
of no exceptions … It is an implied term of any contract between individuals that
the promises of their contract will be subject to statutory obligations. At all times
the applicant would or should have been aware of the provisions of the Act and in
particular s 7, which effectively excludes contracts on confidentiality preventing
release of information.

In this context, the Ombudsmen commented that the existence of a confidentiality clause
does not, on its own, provide good reason for refusal under the Official Information Act.
However, they observed that the existence of such a clause is an important element in
establishing whether good reason for refusal pursuant to s 9(2)(b)(ii) or s 9(2)(ba) or
s 9(2)(i) is made out in the circumstances of a particular case. The existence of a confi­
dentiality clause provides strong evidence of an understanding between the parties con­
cerned that the information covered by it is “subject to an obligation of confidence” for
the purposes of s 9(2)(ba). It also provides supporting evidence that the party to which
The Official Information Act in the Corporatised World

the information relates considers it “commercially sensitive” and, to that extent, disclosure may be likely to:

1) prejudice unreasonably the commercial position of that party (s 9(2)(b)(ii) refers); and
2) cause the party not to enter into future contracts with the public sector agency concerned to the detriment of that agency’s commercial activities (s 9(2)(i) refers).

In the context of concerns that disclosure would be likely to cause prejudice or disadvantage to the ability of the public sector agencies to obtain commercial revenue, the Ombudsmen commented that s 9(2)(i) is more likely to be relevant.

In short, it seems likely that where any public sector agency has entered into a commercial contractual arrangement to provide goods or services for a client, disclosure of information relating to the client, which has either been supplied by or generated for that client, to another party without the specific consent of the client, would prejudice the agency’s ability to obtain further contracts. In other words, s 9(2)(i) is always likely to apply in such circumstances. However, the Ombudsman noted that before good reason for refusal will exist under the Act, the public sector agency (and an Ombudsman on review) must still consider, pursuant to s 9(1), whether, in the circumstances of a particular case, there are any countervailing public interest considerations which outweigh the need to withhold under s 9(2)(i). Therefore, as a matter of law, one cannot give a blanket assurance that the countervailing public interest will never be strong enough to outweigh the need to avoid prejudice or disadvantage to a public sector agency’s commercial activities.

However, the fact that the ability to withhold information to avoid prejudice or disadvantage to the commercial activities of the Crown is subject to the countervailing public interest test in s 9(1) does not mean that there will always be a countervailing public interest in release in every case. For those public sector agencies engaged in purely commercial activities, the countervailing public interest in disclosure of information relating solely to such commercial activities is likely to be relatively weak. However, s 9 also applies to public sector agencies whose activities include regulatory or social policy functions. For these agencies, the countervailing public interest in disclosure of information it holds may, in particular cases, be high. In these circumstances, the Ombudsman commented that the public sector agencies concerned should feel reasonably confident that in all but the most unusual of circumstances, s 9(2)(i) would be likely to provide good reason to withhold information supplied in confidence by potential clients, or generated by the agencies under contract for commercial clients in a purely commercial environment.
Appendix

Practice Guidelines No.3

Current Approach of Ombudsman to Sections 9(2)(b), (ba), (i) (j) & (k) of the Official Information Act and Sections 7(2)(b), (c), (h) (i) & (j) of the Local Government Official Information & Meetings Act including Information Relating to Tenders

1. Introduction

1.1 These guidelines are designed to help Ministers of the Crown, Departments, organisations and local authorities in considering requests for commercial information. They do not detract from the need for each case to be considered on its own merits, as measured against the relevant statutory criteria, but reflect the approach which the Ombudsmen have developed to the relevant provisions of the legislation based on their experience. The provisions of the Local Government Official Formation & Meetings Act are referred to in square brackets.

1.2 Section 4 [Section 4]—Purposes

Section 4(a) [s. 4(a)] of the Act sets out the purposes which Parliament intended to be achieved in enacting the legislation, namely:

"To increase progressively the availability of official information to the people of New Zealand in order—

(i) to enable their more effective participation in the making and administration of laws and policies; and

(ii) to promote the accountability of Ministers of the Crown and officials,

and thereby enhance respect for the law and to promote the good government of New Zealand."

[(a) To provide for the availability to the public of official information held by local authorities, and to promote the open and public transaction of business at meetings of local authorities, in order:

(i) to enable more effective participation by the public in the actions and decisions of local authorities; and

(ii) to promote the accountability of local authority members and officials,

and thereby to enhance respect for the law and to promote good local government in New Zealand.]"
Section 4(c) [s. 4(c)] provides, however, that a balance must be struck between the interests identified above and the need:

"To protect official information to the extent consistent with the public interest and the preservation of personal privacy."

["To protect official information and the deliberations of local authorities to the extent consistent with the public interest and the preservation of personal privacy."

1.3 Section 5 [section 5]—Principle of availability

Section 5 of both Acts reflects the underlying principle of availability of official information:

"Principle of availability—The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it."

1.4 Section 9 [section 7]

Section 9(2) [s.7(2)] of the Act identifies a series of interests which Parliament recognised might need to be protected by the withholding of official information in certain circumstances. However, it also acknowledges that there is a need to balance those interests against any countervailing public interest considerations. Section 9(1) [s.7(1)] acknowledges that there will be cases where the interest in withholding specific information might be outweighed by other considerations which render it desirable, in the public interest, to make the information available.

2. The role of the decision-maker and an Ombudsman on review

2.1 The role of the decision-maker, and an Ombudsman on review, is to examine the information at issue and form an opinion as to whether or not the interests which the Act seeks to protect would be prejudiced by disclosure of that information. In the course of an Ombudsman's investigation and review of a decision to withhold information, it is for the decision-maker to bring forward sufficient material and advance sufficient argument to support the proposition that good reason exists for withholding the information, in other words, to justify his, her or its decision with sufficient particularity to enable the Ombudsman to form an independent opinion on the complaint.

2.2 In Commissioner of Police v Ombudsman [1988] 1 NZLR 385, Cooke P said at p.391:

"If the decision-maker, be he Minister or departmental head or Ombudsman or Judge adjudicating on a claim of denial of right, is in two minds in the end, he should come down on the side of availability of information. I say this ... because the Act itself provides guidance in the last limb of s.5."
2.3 In the same case, Casey J said at p 411:

"... in conducting a review of the decision, the Ombudsmen are not engaged in an adversarial exercise. The provisions of the Ombudsmen Act apply (section 29 Official Information Act), and under sections 18 and 19 they are given wide powers of inquiry and are not confined to the material put before them by those immediately involved. In the nature of things he who alleges that good reason exists for withholding information would be expected to bring forward material to support that proposition. But the review is to be conducted and the decision and recommendations made without any presumptions other than those specified in the Act."

2.4 Furthermore, even where the decision-maker or an Ombudsman on review forms the view that s.9(2)(a)–(k) [s.7(2)(a)–(j)] applies to the information at issue, s.9(1) [s.7(1)] requires that consideration must still be given to the question of whether, in the circumstances of the particular case, the withholding of the information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

3. Commercial information

3.1 Both in 1982, when the Official Information legislation was first considered by Parliament, and again in 1987, when amendments to the provisions relating to commercial information were addressed in Parliament, the clear intention was not to protect all commercial information held by the central and local government as a special exempt class of information. While Parliament recognised that there is a legitimate interest in citizens, including central and local government departments and organisations, being able to conduct commercial activities without prejudice or disadvantage, it also recognised that not all information relating to commercial activities needed to be protected to avoid prejudice or disadvantage. It also recognised that, on occasion, there would be situations where notwithstanding that disclosure of particular information would result in prejudice or disadvantage to one of the commercial interests identified in the legislation, there could be factors which, in the public interest, outweighed the need to withhold that information (s.9(1)).

3.2 The increasing market orientation of the public sector has focused attention on the need to protect what the holders label "commercially sensitive information". However, that term is misleading because it is used in neither the Official Information Act nor the Local Government Official Information and Meetings Act. Neither Act provides protection for such information per se. Instead, the legislation identifies certain commercial interests which might need to be protected in the circumstances of a particular case. Those interests are:

(i) trade secrets—s.9(2)(b)(i) [s.7(2)(b)(i)];
(ii) the commercial position of the supplier or subject of particular information—s.9(2)(b)(ii) [s.7(2)(b)(ii)];
(iii) information subject to an obligation of confidence or supplied under statutory compulsion—s.9(2)(ba) [s.7(2)(c)];
(iv) the commercial activities of central and local government—s.9(2)(i) [s.7(2)(h)]
(v) negotiations (including commercial and industrial negotiations) of the State—s.9(2)(j) [s.7(2)(i)];
(vi) avoidance of improper gain or improper advantage—s.9(2)(k) [s.7(2)(j)].

3.3 When considering a request for information, disclosure of which might prejudice one of the above interests, it is the decision-maker’s role, and the Ombudsman’s role on review, to:

(a) establish whether one of those interests would be prejudiced by disclosure of the information at issue, and, if so;
(b) to determine to what extent it is necessary to withhold the information at issue to avoid that prejudice.

For example, it may not be necessary to withhold all the information; or it may be possible to provide a summary of the information without disclosing those elements which prejudice the particular interest of concern.

4. Court Cases

4.1 There are two Court cases which provide decision-makers with some judicial guidance as to the protection which the Official Information Act and the Local Government Official Information and Meetings Act afford to some commercial interests. They are Wyatt Co v Queenstown-Lakes District Council [1991] 2 NZLR 180 and Television New Zealand Ltd v Ombudsman [1992] 1 NZLR 106.

4.2 In the Wyatt case, Jeffries J noted at page 190, line 42:

“It cannot be denied that some of the information recommended to be released by the Chief Ombudsman will reveal matters which Wyatt wants to keep entirely secret. The Official Information Act was passed in 1982 following an exhaustive investigation into the subject in New Zealand, which also reflected the same movements elsewhere in the world. Cooke P in Commissioner of Police v Ombudsman at p.391 was prepared to regard that Act as correctly described as a constitutional one. In 1987 the [Local Government Official Information and Meetings] Act under consideration was passed extending the right of the public to know and must similarly be regarded as of constitutional significance. Governments of different political philosophies have endorsed the principle of freedom of information so as to express support for the concept that knowledge and information about the conduct of public affairs, and the application of public money, in a democratically governed country are essential to its right to be so described. The Courts must zealously support those quite sweeping legislative intentions. It is fundamental to the Act that the public are to be given worthwhile
information about how the public's money and affairs are being used and conducted, subject only to the statutory restraints and exceptions. The allegations of errors, unreasonableness and failure to take into account relevant matters are attacks on the several judgments the Chief Ombudsman had to make in the functions ordained for him by the Act. That Act requires him to exercise his judgment using experience and accumulated knowledge which are his by virtue of the office he holds. Parliament delegated to the Chief Ombudsman tasks, which at times are complex and even agonising, with no expectation that the Courts would sit on his shoulder about those judgments which are essentially balancing exercises involving competing interests. The Courts will only intervene when the Chief Ombudsman is plainly and demonstrably wrong, and not because he preferred one side against another... The Chief Ombudsman in his report carefully analyses the legal obligations of [s.7(2)(c)] and compares it to the facts. He finds it applies but in effect the matters not to be disclosed under the subsection are the same as for s.7(2)(b)(ii). The Court now faces the contractual issue. It was accepted that the contract between Wyatt and the council contained a term of confidentiality by the Council... There cannot be allowed to develop in this country a kind of commercial Alsatia beyond the reach of a statute. Confidentiality is not an absolute concept admitting of no exceptions... It is an implied term of any contract between individuals that the promises of their contract will be subject to statutory obligations. At all times the applicant would or should have been aware of the provisions of the Act and in particular s.7, which effectively excludes contracts on confidentiality preventing release of information.”

In the TVNZ case, Heron J noted at page 121, line 12:

“The Court does not sit in judgment on the Ombudsman's decision but can for two reasons express its view. The first is that Judges are regularly called on to examine the probabilities of consequences of disclosure in the commercial environment. The second is that the criticism here is made about the reasonableness of the decision. Referring to it as the nub of the case Mr Mathieson contended that by referring to the case by case approach the Ombudsman shut herself out from considering the likelihood of disclosure in principle carrying the level of prejudice or disadvantage necessary to involve s. 9(2)(i). It is true that the final letter of the Ombudsman to TVNZ does not in its terms address that issue but it was a letter in response to arguments copied by TVNZ from their earlier letter to which the Ombudsman had replied and there addressed the point. She said, in summary, that based on information she received, a complete prohibition on disclosure was not necessary and she considered that in (sic) case the actual information should be examined.

My view is that looked at overall the Ombudsman on this critical issue has addressed and answered the argument raised. Any doubt as to this is removed when one looks at her advice to the Tobacco Institute at the conclusion of her inquiry...

‘Having considered the many points raised I concluded that although the prospect of having to disclose unpublished material placed TVNZ
(iii) information subject to an obligation of confidence or supplied under statutory compulsion—s.9(2)(ba) [s.7(2)(c)];

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My view is that looked at overall the Ombudsman on this critical issue has addressed and answered the argument raised. Any doubt as to this is removed when one looks at her advice to the Tobacco Institute at the conclusion of her inquiry ...

‘Having considered the many points raised I concluded that although the prospect of having to disclose unpublished material placed TVNZ
at a potential disadvantage in its commercial activities, for the ‘neces-
ssity’ test under s.9(2)(i) to be met in a particular case there had to be a
particular reason for nondisclosure of the unpublished material, which
related either to the content of the information or to the form in which
it was held.

This was a stated rejection of the no disclosure on principle argument. No unre-
asonableness is demonstrated by the decision the Ombudsman took on this point.”

THE WITHHOLDING PROVISIONS

5. Section 9(2)(b) [s.7(2)(b)]

5.1 This provision states:

“(2) ... this section applies if, and only if, the withholding of the information is
necessary to—

...  

(b) Protect information where the making available of the information—

(i) Would disclose a trade secret; or

(ii) Would be likely unreasonably to prejudice the commercial posi-
tion of the person who supplied or who is the subject of the infor-
mation.”

5.2 A general approach to the circumstances in which s.9(2)(b)(i) [s.7(2)(b)(i)] might
apply has not been developed. It has been raised in very few cases, and where it has
been raised, there have been difficulties in defining the term “a trade secret”. As s.
9(2)(b)(ii) [s.7(2)(b)(ii)] was found to protect the information at issue in those cases,
it was not necessary to form a final view on the definition of “a trade secret”.

5.3 Section 9(2)(b)(ii) [s.7(2)(b)(ii)] is one of the provisions relied on most often to
protect commercial interests. This section is aimed primarily at information held
by central and local government which is about the commercial interests of third
parties. (Section 9(2)(i) [s.7(2)(h)] deals with the commercial activities of the
holder of the information.) Before accepting that s.9(2)(b)(ii) [s.7(2)(b)(ii)] pro-
tects information in a particular case, the Ombudsman must be satisfied that:

(a) the information relates to the commercial position of the person who sup-
plied or who is the subject of the information; and

(b) disclosure would be likely unreasonably to prejudice that commercial position.

5.4 The Court of Appeal has interpreted the phrase “would be likely” to mean “a
serious or real and substantial risk to a protected interest, a risk that might well
eventuate” (Commissioner of Police v Ombudsman [1988] 1 NZLR 385.)
5.5 For example, on a general level the Ombudsmen have accepted that where disclosure of pricing information would be likely to reveal a tenderer’s pricing/market strategy in a competitive market, then such information is protected by s.9(2)(b)(ii) [s.7(2)(b)(ii)]. However, in respect of requests for total tender prices (as opposed to details of how the total price is made up) and identities of successful and unsuccessful tenderers, the Ombudsman would have to be persuaded in a particular case that such information requires protection under the official information legislation. To date the Ombudsmen have very rarely been persuaded that such information is protected.

5.6 In respect of s.9(2)(b)(ii) [s.7(2)(b)(ii)] an issue which often arises is how one assesses the likelihood and nature of prejudice to a third party’s commercial position. In the Ombudsman’s view, a simple assertion by the holder of the information that such prejudice would be likely is insufficient. Each Ombudsman considers that direct consultation with the third party or parties either by the department or organisation or local authority or by the Ombudsman is necessary. Such consultation can be either by letter or orally.

5.7 Where consultation with a third party about its interests in the information is undertaken, it is not enough for the third party simply to object to disclosure. (See Wyatt.) The Ombudsman needs to know how the commercial position of the third party would be prejudiced and why that prejudice would be unreasonable.

6. Section 9(2)(ba) [s.7(2)(c)]

6.1 This section states:

“(2) ... this section applies if, and only if, the withholding of the information is necessary to—

(ba) Protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—

(i) Would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or

(ii) Would be likely otherwise to damage the public interest.”

6.2 Section 9(2)(ba) [s.7(2)(c)] involves the decision-maker, and the Ombudsman on review, in a two-stage test.

6.3 Stage One

The first stage involves determining whether the information is subject to an obligation of confidence or whether it is information which any person has been or could be compelled to provide under statutory authority.
6.4 Information supplied subject to an obligation of confidence

Where the decision-maker maintains that the information at issue should be withheld because it was supplied subject to an obligation of confidence, the first step in an Ombudsman’s investigation and review of that decision is to establish that the information at issue is subject to an obligation of confidence. In making the assessment, an Ombudsman has regard to the nature of the information and the full circumstances of its supply.

6.5 Information supplied under statutory compulsion

Where information is supplied under statutory compulsion, the authority under which the information was supplied must be established. If there is a statutory power to compel the supply of similar information from the same source, future supply can be assured. However, there are circumstances where, notwithstanding the power to compel the supply of information, a department or organisation has to rely on the supplier to provide the quality of information to enable it to discharge its functions. In particular cases, therefore, a department or organisation may only be able to ensure the future supply of information of the quality it requires if the information is supplied on the basis of an understanding that it will be held in confidence.

6.6 Stage Two

Where it is determined that the information at issue was either supplied subject to an obligation of confidence or under statutory compulsion, an assessment must then be made as to whether, in the circumstances of the particular case, disclosure of that information would be likely to either:

(a) prejudice the supply of similar information or information from the same source, and

(b) it is in the public interest that such information should continue to be supplied; (s.9(2)(ba)(i) [s.7(2)(c)(i)]) or

(c) otherwise damage the public interest (s.9(2)(ba)(ii) [s.7(2)(c)(ii)]).

6.7 An example of the situation in which the Ombudsman has accepted that s.9(2)(ba) [s.7(2)(c)] applies is where the holder of the information requires the information to discharge a statutory function. Even where the department or organisation concerned may have the statutory power to compel the provision of information, it may have to rely on the timely supply of reliable information in order for it to be able to discharge its statutory responsibility effectively. In this context, the information is supplied and accepted under an obligation of confidence in order to ensure that reliable information is supplied in a timely manner. Where the Ombudsman has been satisfied that disclosure of the information would be likely to prejudice the continued supply of such timely and reliable information and therefore the department’s or organisation’s ability to discharge its public function, it has been accepted that s.9(2)(ba)(i) [s.7(2)(c)(i)] applies.
6.8 Section 9(2)(ba)(ii) has been considered a relevant withholding provision, in some circumstances, in respect of information generated by the Audit Office or information generated within a department or organisation which discloses Audit Office information, on the basis that there is a strong public interest in ensuring that the integrity of the Audit Office's statutory functions. While the Audit Office is not subject to the Official Information Act, reports of the Audit Office and/or the Controller and Auditor General, when in the hands of organisations subject to either that Act or the LGOIMA, become subject to those Acts. Audits are conducted in an environment where information exchanged between auditor and auditee is subject to an obligation of confidence and disclosure of that information would be likely to prejudice the integrity and effectiveness of the audit process. Clearly it is in the public interest to maintain the integrity and effectiveness of that process.

6.9 The interpretation of s.7(2)(b)(ii) and s.7(2)(c)(i) of the Local Government Official Information and Meetings Act were the subject of consideration by the High Court in Hyatt (see paras 4.1 and 4.2 above). The Court supported the approach which the Chief Ombudsman had taken, namely, that the Act did not protect commercial information supplied by a third party simply on the basis of an understanding of confidentiality, but that a realistic assessment needed to be made of the nature of the particular information and the likely consequences of its disclosure.

7. Section 9(2)(i) [s.7(2)(h)]

7.1 This section concerns the commercial activities of the holder of the information. It states:

"(2) ... this section applies if, and only if, the withholding of the information is necessary to—

(i) Enable a Minister of the Crown or any Department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities."

7.2 This section allows information to be withheld where necessary to enable the department, Minister, organisation or local authority to carry out, without prejudice or disadvantage, commercial activities. The approach involves:

(a) identifying the commercial activity in question;

(b) identifying the prejudice or disadvantage which might result to that activity if information were made available;

(c) establishing precisely how that prejudice or disadvantage would occur; and

(d) assessing whether disclosure of the information would be so likely to cause the prejudice or disadvantage predicted that it is necessary to withhold it.
7.3 In applying the abovementioned general tests in the tendering situation, a starting point is to establish:

(a) the particular market activity to which the information relates;

(b) the characteristics of that market activity, eg, the number of competitors and degree of competition;

(c) the criteria on which the tender contracts are awarded and how the information at issue relates to those criteria; and

(d) the degree to which the information could be said to reveal a tenderer’s marketing/pricing strategy which a competitor would be able to use to obtain a competitive advantage.

7.4 This information then assists the assessment of:

(1) the precise nature of the prejudice or disadvantage which the department, organisation or local authority predicts would result from disclosure; and

(2) the likelihood of such a prejudice or disadvantage occurring.

8. Section 9(2)(j) [s.7(2)(i)]

8.1 This section states:

“(2) ... this section applies if, and only if, the withholding of the information is necessary to—

(j) Enable a Minister of the Crown or any Department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations).”

8.2 Section 9(2)(j) [s.7(2)(i)] recognises that it is in the public interest for those subject to the Act to be able to carry on commercial or industrial negotiations without prejudice or disadvantage. It allows information to be withheld where necessary to protect that interest.

8.3 However, the section does not provide good reason to withhold all information relating to particular negotiations. It only protects information, disclosure of which would be so likely to prejudice or disadvantage the department, Minister, organisation or local authority in the negotiations that it is necessary to withhold that information. Whether such prejudice or disadvantage will occur will depend very much on the precise nature of the information and its relevance to the actual issues under negotiation or contemplated negotiation. Information relating to negotiating strategy might well be protected, but it is not sufficient simply to assert that release of the information would be unhelpful to the holder’s position.
9. **Section 9(2)(k) [s.7(2)(j)]**

9.1 In commenting on this provision in its Supplementary Report, the Danks Committee said:

"... Not all disclosure of use of official information for advantage or gain is objectionable; much information of this character is designed to assist individuals and businesses to their advantage. It seems impossible in a succinct statement to spell out precisely the circumstances in which the exception should apply: the word 'improper' in general appears adequate."

9.2 The application of s.9(2)(k) was discussed in the *TVNZ* case as follows (p.113 line 27):

"The Ombudsman dealt with s.9(2)(k) indicating that it was not an easy test to meet, the test being whether withholding is 'necessary to prevent the disclosure or use of official information for improper gain or improper advantage'. She referred to the difficulty that people seeking information did not have to specify or justify the purpose for which the information was sought. In this case the Ombudsman dealt with the argument that the background material was not relevant to the advancement of complaint under s.4 (1)(d) of the Broadcasting Act. That argument seems to me to have been correctly rejected. After reviewing Mr Thompson's argument on this point the Ombudsman said:

'Mr Thomson says he fails to see how the background material requested by the Institute can advance the issue under this provision (s.4(1)(d)). He states, with emphasis, that it is not the balance of the background material which is relevant; rather it is the balance of the programme as presented. If that is so, however, then there can be no advantage to the Institute in obtaining the information and s.9(2)(k) cannot apply. Conversely if background material is, after all, relevant, then it is hard to see how any advantage derived from obtaining information could be described as improper.'"

9.3 This section was accepted by the Ombudsman as applicable in a case where a requester sought a copy of the Seventh Form Calculus notes used by the Correspondence School. The Ombudsman concluded that given the statutory restrictions on enrolment at the school; the school's enrolment policy which stated, among other things, "The correspondence school is not an alternative school for those who have the option of attending a local secondary school, nor is it normally a source of alternative curriculum for those students enrolled at a secondary school"; and under s.7A(2) of the Education Amendment Act 1989 relating to fees, disclosure of the calculus notes would constitute an improper gain or advantage for the requester. This was on the grounds that the material had been compiled using the skill and judgment of the school staff and, because the requester was not enrolled at or receiving tuition from the school, provision of the information would give the requester an advantage or gain to which he was not entitled, and it would also circumvent the restrictions on enrolment and tuition.
9.4 Section 9(2)(k) was also accepted in a case where disclosure of the information at issue would have enabled beneficiaries and recipients of the Rest Home Subsidy to obtain a benefit to which they were not legally entitled. The Ombudsman formed the view that if something was illegal, it was also improper.

10. Section 9(1) [s.7(1)]—Countervailing public interest

10.1 This section states:

“(1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5 of this Act, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.”

10.2 Accordingly, even where one of the reasons for withholding information under s.9(2) [s.7(2)] can be made out, the decision-maker, and the Ombudsman on review, still needs to consider in each case whether there is any countervailing public interest in disclosure. In balancing the competing interests for and against disclosure of information, the Ombudsman has regard to the purposes of the Act as defined in s.4 and also the principle of availability enunciated in s.5. As observed at page 190, line 55, in Wyatt:

“it is fundamental to the Act that the public are to be given worthwhile information about how the public’s money and affairs are being used and conducted, subject only to the statutory restraints and exceptions.”

10.3 In the tendering situation, for example, the public interest considerations which the Ombudsmen have identified as favouring disclosure are:

(a) the public interest in public sector procedures for purchasing of goods and services to be seen to be beyond reproach, and
(b) the public interest in the New Zealand public having access to information on how government departments and organisations and local authorities spend public funds.

10.4 These considerations flow naturally from the stated purposes of the official information legislation in s.4 of the respective Acts, namely, “to promote the accountability of ... officials”.

10.5 There have, in the past, been incidents where public sector employees have been charged and convicted of offences connected with the corruption of tendering procedures. These incidents, though rare, serve to highlight the importance of integrity in the tendering process so that such integrity is beyond doubt in the eyes of the public (including unsuccessful and prospective tenderers).

11. Conclusion

11.1 The Official Information Act and the Local Government Official Information and Meetings Act provide adequate protection for information which is held by Ministers...
of the Crown, Departments, organisations and local authorities and disclosure of which would prejudice or disadvantage unreasonably their commercial position or activities or those of third parties about whom they hold information. Since 1 July 1983 when the Official Information Act came into force, no evidence has been produced to an Ombudsman that information which has been disclosed either under that Act or under the Local Government Official Information and Meetings Act as a result of an investigation and review by an Ombudsman has prejudiced any of the commercial interests which the Act seeks to protect. All the legislation requires is that, when considering a request for commercial information, the holder of the information must, in each case, identify the prejudice or disadvantage, and show how that prejudice or disadvantage would occur, and why that prejudice or disadvantage would be unreasonable. The holder must then consider whether there are any countervailing public interest factors favouring disclosure. Only then can a decision be made as to whether or not good reason exists in terms of the legislation to withhold the information.

Wellington, September 1993

Other Practice Guidelines


Practice Guidelines No.2—“Current Approach of the Ombudsman to s.9(2)(f)(iv) and s.9(2)(g)(i) of the Official Information Act 1982”—February 1993

Practice Guidelines No.4—“Local Government Official Information & Meetings Act 1987—Requests for information on Local Authority Trading Enterprises”—April 1994

Practice Guidelines No.5—“General guidelines for Departments and organisations subject to the Ombudsmen Act 1975, the Official Information Act 1982 and the Local Government Official Information & Meetings Act 1987 on the role and investigation procedures of the Ombudsmen”—July 1994

Practice Guidelines No.6—“Current approach of the Ombudsmen to the interface between sections 9(2)(a) and 27(1)(b) of the Official Information Act/sections 7(2)(a) and 26(1)(b) of the Local Government Official Information and Meetings Act and the Privacy Act”—July 1994

Practice Guidelines No.7—“Current Approach of the Ombudsmen to requests for information relating to the reasons for decisions or recommendations made by public sector agencies about a requester which affect that person in his, her or its personal capacity. Section 23 of the Official Information Act and section 22 of the Local Government Official Information and Meetings Act”—July 1994