

The Danks Report

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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-

are we still progressing

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." → "cabinet veto"

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;

- establish a channel for the public to test individual decisions on availability;
- ensure that general progress towards the “larger aim” is appropriately monitored and reviewed.

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.