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

*Grant Liddell*
*Crown Counsel and Senior Lecturer,*
*Faculty of Law, University of Otago**

## 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;[1] 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,[2] 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.[3] 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.[4] 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?[5]; is the body holding the information subject to the Act?[6] 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.[7]

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[8], the rationalisation of provisions relating to commercially sensitive information,[9] the repeal of some secrecy provisions in other statutes, the enactment of companion legislation covering local government,[10] 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.

10 Local Government Official Information and Meetings Act 1987.

been so successful that it has never been used).[11] The climate since 1984 has, of course, been one of public sector reform with major reorganisation of the state sector,[12] the overhaul of public finance legislation,[13] 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,[14] 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;[15] 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.

12 State Sector Act 1988, State-Owned Enterprises Act 1986 and, on a smaller scale, the Crown Research Institutes Act 1991, the Housing Restructuring Act 1992, and the Health and Disability Services Act 1993.

13 Public Finance Act 1989, and its creation of what are now "Crown entities".

14 "Public sector reform and the law: the case of New Zealand", presented to the European Group of Public Administration, 1996.

15 See, eg, the judgments of the Court of Appeal in *Commissioner of Police v Ombudsmen* [1988] 1 NZLR 385, Jeffries J in *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180, Elias J in *Lange v Atkinson* (HC Auckland, CP 484/95, Elias J, 24 February 1997) at p 31, *Cabinet Office Manual* (1996), introductory essay by Sir Kenneth Keith, "On the constitution of New Zealand: an introduction to the foundations of the current form of government" at pp 4 and 7, and ch 6; and see by comparison *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 74–75 per Deane and Toohey JJ.

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).[16] 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?[17] Why are SOEs subject to the Act, but not LATEs subject to the LGOIMA?[18]

Answers to some of these questions, or rather further questions to ask, are found in the Danks Committee's report[19] and the report of the Legislation Advisory Committee on *Legislative Change*, the contents of which have been endorsed by successive Cabinets.[20] The recent *Report of the Controller and Auditor-General on Governance Issues in Crown Entities*[21] 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,[22] established by statute and performing public functions, ought now to be subject to the OIA.[23]

16 See W G Liddell *Applying the Official Information and Ombudsmen Acts*, an unpublished paper prepared for the Law Commission, December 1993.

17 OIA, s 2(2), and see the Ombudsmen's casenotes cited above at note 6.

18 See *Report of the Working Party on the Local Government Official Information and Meetings Act 1987* (Department of Internal Affairs, 1990), p 7.

19 *Towards Open Government*, supplementary report of the Committee on Official Information 1981, pp 104–105.

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 Authority[27] 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.

28 Draft bill, cl 37(1)(b), *Towards Open Government*, supplementary report, p 87, and comment.

*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,[29] and issues relating to information in the hands of the judicial branch of government.[30] 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.[31] 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".[32] 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".[33]

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

29 See, eg, Saxby "The Development of UK Government Policy towards the Commercialization of Official Information" (1996) 4 Int J of Law and Info Tech 199.

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.

32 Danks Committee, *Towards Open Government*, general report, para 22, p 14.

33 Ibid, para 23, pp 14–15.

disputes.[34] 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.[35] "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:[36]

> 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,[37] and it is equally arguable that if the government must account to the House,[38] 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*:[39]

> 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,

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.

35 See, eg, L Schenk "Freedom of information statutes: the unfulfilled legacy" (1996) 48(2) Federal Communications Law Journal [unknown page reference: copy obtained from Internet], James T O'Reilly "Applying federal open government laws to Congress: an explorative analysis and proposal" (1994) 312 Harv J on Legis 415.

36 Hon Justice E W Thomas "Secrecy and open government" in Finn, P D (ed) *Essays on Law and Government, Volume 1, Principles and Values* (Law Book Company, 1995), 182 at pp 191–192.

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*[40] 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 signally 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.[41]

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-

40 [1938] SCR 100, 132–133; [1938] 2 DLR 81, 107.

41 This element of s 14 has not yet been the subject of any detailed exegesis by New Zealand judges.

dinary constitutional novelty"[42] of extending parliamentary privilege to proceedings of the National Party caucus, as Master Thomson has done recently in *Rata v Attorney-General*,[43] 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[44] and that the submissions once heard are publicly accessible,[45] 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,[46] 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.[47] 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.[48]

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.[49] 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.[50] I think it is appropriate

42 Sir Geoffrey Palmer, *Nine to Noon* Public Radio broadcast, 25 March 1997, transcript p 4.
43 (HC Wellington, CP 213/95, 17 March 1997.)
44 Standing Orders of the House of Representatives 1996, S O 217.
45 Standing Orders of the House of Representatives, S O 225(2), unless the committee has previously made it available: SO 225(1).
46 *Report of the Standing Orders Committee on the Operation of the Standing Orders* (1995, AJHR, I.18), pp 45–48.
47 *Report of the Standing Orders Committee on its Review of the Operation of the Standing Orders* (1996, AJHR I.18B), Annex D.
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,[51] the Parliamentary Service Commission,[52] and the Parliamentary Counsel Office.[53] (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.[54]) 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,[55] the Privacy Commissioner,[56] the Commerce Commission[57] and the Commissioner for Children,[58] 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.[59]

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.

59 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.[60]) 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.[61] 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.[62]

*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:[63]

> 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 co-operate 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.[64]

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.

62 See Standing Orders Committee *Report on the Review of the Standing Orders* (1995, AJHR, I.18A), Standing Orders 217–238, *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451, and see also Law Commission Miscellaneous Paper 5 *The Law of Parliamentary Privilege in New Zealand* at p 28, fn 194 and the references therein.

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]

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.

67 Letter from James Madison to W T Barry (Aug 4, 1822), reprinted in *The Complete Madison* 337 (Saul K Padover ed 1953), and cited in many articles including Amy Y Rees "Recent developments regarding the Freedom of Information Act" (1995) 44 Duke LJ 1183.