The Official Information Act and the Policy Process

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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 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.