

## **The Games People Play: Journalism and the Official Information Act**

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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 naïvely 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!