Review of the Official Information Act

John Allen
General Manager, Planning and Communications,
New Zealand Post Limited

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

Introduction

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

State enterprise accountability

The transformation of the public sector and the emergence of SOEs, CRIs, and CHEs reflect an effort to improve the performance of government trading activities. The state enterprise model is about accountability. An extensive framework is established under the Act with specific roles identified for Shareholding Ministers, the Boards of Directors, and Parliament. In reviewing this accountability framework Matthew Palmer observed: "It is true then that ministerial responsibility is narrowed in relation to SOEs. Yet the matters for which responsibility is lost concern commercial management; and the distancing of those matters from political control is exactly the point of the SOE exercise!"[2]

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

1 Towards Open Government: Committee on Official Information p 19.
2 Matthew S. R. Palmer: The State-Owned Enterprises Act 1986: Accountability (1988) 18 VUWLR 169.

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

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

Official information in a commercial environment

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

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

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

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

3 A comprehensive analysis of these issues is provided in two articles by Mai Chen in the NZLJ, August 1994, p 296 and in (1994) 24 VUWLR 51.

> feeling of partnership with the seller and the feeling that we are buying for the future. Anonymous, impersonal selling—the old style Kmart—is over ... There will be no forgiveness of huge mega corporations that hide behind huge and complicated corporate structures. Labels will become more important than ever before. We will want to know (like big brother) a biography of the product and the ethics of the maker. We will want to know the company's stand on the environment, how it regards animal testing, human rights, and other issues—rather than just a list of ingredients or a glimpse of an image.[4]

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

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

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

> This raises an important question about the role of freedom of speech: We have a great deal of it. But if it has little practical effect in reality, then it is not really freedom of speech. Without utility, speech is just decorative.
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> The corporatist structures have been remarkably successful in limiting this utility. The actions of the private sector are obscured in a world made increasingly opaque by the unending quantities of information—that is, of rhetoric and propaganda—which shower down on those outside the interest groups. As for the freedom of information or access to information laws, they have simply confirmed that all information is private unless specifically requested. Requests must be clearly defined and often cost money, with the result that information is stored in increasingly narrower and more specific categories. A request produces a fragment of information and only those citizens with the funds can engage in these frustrating fishing expeditions.[5]

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

4 Faith Popcorn: *The Popcorn Report* 1991, pp 76, 77
5 John Ralston Saul: *The Unconscious Civilization* 1995, p 46.

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

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

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