JOSHUA WILLIAMS MEMORIAL ESSAY 1984

Sir Joshua Strange Williams, who was resident Judge of the Supreme Court in Dunedin from 1875 to 1913, left a portion of his estate upon trust for the advancement of legal education. The trustees of his estate, the Council of the Otago District Law Society, have therefrom provided an annual prize for the essay written by a student enrolled in law at the University of Otago which in the opinion of the Council makes the most significant contribution to legal knowledge and meets all requirements of sound legal scholarship.

We publish below the winning entry for 1984.

THE OFFICIAL INFORMATION ACT 1982 THE BEGINNING OF A NEW ERA: MINISTERIAL VETO

S. R. SCOTT*

The Official Information Act 1982 has been the subject of considerable favourable comment; for instance, the Minister of Justice at the time of its enactment, the Hon J. K. McLay, described it as "the most important constitutional measure in two decades",[1] while a former Minister of Justice, the Rt Hon Sir John Marshall, considered it to be "a major advance in democratic government".[2] The reasons for such comments are not hard to discern. The principles embodied within this Act are diametrically opposite to those propounded by the now repealed Official Secrets Act 1951.

In the past official information was considered to be the property of the government; as such it was not to be disclosed unless authorisation to do so had been given. By contrast the Official Information Act 1982 states that official information "shall be made available unless there is good reason for withholding it".[3] The Act goes on to specify what these good reasons are.

The importance of the Official Information Act 1982 is not confined to the alterations it has made to the principles governing the release of official information. Its importance extends to include the Legislature's awareness of changing public attitudes in respect of the accountability of the government.

Section 4 of the Act states

> The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament, –

* LLB (Otago), Teaching Fellow, University of Otago, 1985.

1 *Otago Daily Times* 16 December 1982 p 5.
2 *Otago Daily Times* 21 February 1983 p 16.
3 Official Information Act 1982, s 5.

(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 property.

The day[4] on which the Act came into force marks the beginning of an era in which governmental control over the availability of official information is diminishing.

Already the present Deputy Prime Minister and Minister of Justice, the Hon G W R Palmer, has suggested the abolition of the ministerial power of veto over an Ombudsman's recommendations concerning the release of official information.[5] This suggestion has rekindled the controversy about who should have the ultimate decision-making power concerning the release of official information. Should it be a Minister of the Crown, an Ombudsman, or the Court?

Against this background we shall consider the arguments which have been advanced for a ministerial power of veto. Before we do so, however, we shall briefly examine the current procedure and the place of the ministerial veto in dealing with a request for official information.

The Official Information Act 1982 provides that any New Zealand citizen, permanent resident of New Zealand, or body corporate incorporated in New Zealand, may request a department, Minister of the Crown, or organisation,[6] to make available any specified official information[7] which it holds.[8] Such departments, Ministers of the Crown or organisations are henceforth collectively referred to in this article as 'government body'. These government bodies must make the requested information available unless a reason as specified in the Act applies thereby authorising the non-disclosure of the information.[9]

The 'good reasons' specified in the Act authorising the non-disclosure of requested information can be divided into two categories, according to whether they are conclusive or permissive. By 'conclusive' is meant reasons which are sufficient in themselves for declining the release of the requested information; for example, where the release of the information would "prejudice the security of defence of New Zealand . . .".[10] By contrast, what are referred to as 'permissive' reasons comprise those reasons which although apparently sufficient to warrant the retention of the in-

4 1 July 1983.
5 *"Implementing Open Government: A Progress Report"* [1985] NZLJ 46, 48.
6 The terms 'Permanent resident of New Zealand', 'Department' and 'Organisation' are defined in s 2(1) of the Official Information Act 1982.
7 'Official information' is defined in s 2(1) of the Official Information Act 1982.
8 Official Information Act 1982, s 12(1).
9 Ibid, ss 5 and 18.
10 Ibid, s 6(a); see generally ss 6, 7 and 8.

formation may "in the circumstances of the particular case . . . be outweighed by other considerations which render it desirable, in the public interest, to make that information available".[11] Such reasons include maintaining "the effective conduct of public affairs through . . . the free and frank expression of opinions by or between or to Ministers of the Crown or officers and employees of any department or organisation in the course of their duty".[12]

In addition to these two categories of good reasons there are a number of other reasons, here referred to as 'authorised' reasons, for declining a request for official information. One such example is where "the information requested is or will soon be publicly available".[13] The list of good and authorised reasons appears at the end of this article.

If the government body declines a request for the official information it is obliged to inform the applicant of the right of complaint to the Ombudsman. The government body must also in most cases inform the applicant of the reason for the refusal and, if the applicant so requests, inform him or her of the grounds supporting the reason or reasons for the refusal.[14]

Upon receiving a complaint the Ombudsman initiates an investigation and review of the government body's decision. By this investigation he determines whether the government body correctly interpreted the provisions of the Act as applicable to the request, it being the responsibility of the government body to satisfy him that the decision was appropriate. If the Ombudsman considers that the request was improperly refused, or that the decision was unreasonable or wrong, he is obliged to report his conclusion and reasoning to the government body. The Ombudsman may also make such recommendations as he thinks fit.[15]

Upon receiving such a recommendation the government body is under a duty[16] to observe and implement it within twenty-one days.[17] This statutory requirement is however subject to three exceptions. First, the Attorney-General can sometimes limit the effectiveness of the Ombudsman's investigation by removing his ability to require the production of the relevant information for his consideration.[18] Secondly, the

11 Ibid, s 9(1).
12 Ibid, s 9(2)(g)(i).
13 Ibid, s 18(d).
14 Official Information Act 1982, s 19. See also s 28 regarding the scope of the decisions which the Ombudsman has power to investigate and review.
15 Official Information Act 1982, s 30.
16 This 'duty' is enforceable by a declaration or order of mandamus (which may be sought on judicial review) against the relevant Minister, officer or organisation.
17 Official Information Act 1982, s 32(1)-(3).
18 Section 20(1) of the Ombudsmen Act 1975 provides:
Where the Attorney-General certifies that the giving of any information or the answering of any question or the production of any document or paper or thing –
(a) Might prejudice the security, defence or international relations of New Zealand (including New Zealand's relations with the Government of any other country or with any international organisation), or the investigation or detection of offences; or
(b) Might involve the disclosure of the deliberations of Cabinet; or
(c) Might involve the disclosure of proceedings of Cabinet, or of any committee of Cabinet, relating to matters of a secret or confidential nature, and would be injurious

Prime Minister and Attorney-General can sometimes restrict the ability of the Ombudsman to make recommendations.[19] If this power is exercised the Ombudsman is unable to recommend that the information be released; he is only authorised to suggest that the government body give further consideration to the request. Finally, the Minister responsible for the government body can within the twenty-one day period veto the Ombudsman's recommendations. The Minister's decision to veto a recommendation must be recorded in writing, and he is required to give to the Ombudsman, to publish in the Gazette and to lay before Parliament a copy of his decision together with a statement of the grounds for his action. Except where the veto is made on the grounds of New Zealand's security, the Minister must also supply the source and purport of any advice upon which he acted. Despite the apparent unlimited nature of this power it seems that the Minister may only use it in situations where the Act authorises withholding the information — that is, when one of the good or authorised reasons examined earlier is satisfied.[20] If the Minister acts outside the scope of the Act then his purported veto may be subject to judicial review.

I SHOULD THE POWER OF MINISTERIAL VETO REMAIN?

1 Principal Argument for Ministerial Veto

The principal factor underlying the recommendation of the Committee on Official Information (hereinafter referred to as the 'Danks Committee') that a Minister of the Crown should have the final say on the granting of a request for official information, was the assumption that such a role required the making of decisions having political or policy ramifications.[21] For various reasons it was considered that Ministers, and not a court or an Ombudsman, were best placed to make such decisions. It was thought that the representative[22] nature of the ministerial office gave the Ministers a mandate to weigh the conflicting considerations and to make the decision. The making of political and policy decisions is, indeed, one of the traditional ministerial functions. This representative nature also made them accountable for unpopular decisions, initially through their susceptibility

to the public interest —
an Ombudsman shall not require the information or answer to be given or, as the case may be, the document or paper or thing to be produced.

Despite the wide powers conveyed by this section, research has failed to show that it has been used.

19 The Prime Minister's power is for the most part limited to situations where he considers that providing the information ". . . would be likely to prejudice 'the security or defence' of New Zealand or the international relations of the Government of New Zealand". (It also extends to include situations envisaged by s 7 of the Official Information Act 1982. See Appendix for the text of s 7.) The Attorney-General's use of this power is restricted to those situations where he considers that releasing this information ". . . would be likely to prejudice the prevention, investigation, or detection of offences".

20 See *Padfield* v *Minister of Agriculture, Fisheries and Food* [1968] AC 997; [1968] 1 All ER 694 (HL).

21 *The General Report of the Committee on Official Information,* Government Printer, Wellington, 1981, paragraphs 66, 67 and 93-106 and *The Supplementary Report* paragraphs 2.01-2.26.

22 'Representative' in that Ministers comprise some of the Members of Parliament.

to parliamentary and public debate and ultimately by their need to retain the country's mandate at election time.

The relevance of this argument to the Official Information Act 1982 may be diminished by two factors. First, not all the grounds for declining a request involve political or policy considerations; some are merely administrative. An example of such an administrative ground is that "the information requested is or will soon be publicly available".[23] In respect of such grounds the representative nature of Ministers offers no special advantages in determining whether the ground is satisfied on the facts; both the court and an Ombudsman are just as able to make such decisions. Secondly, this argument is based on the belief that all questions containing political or policy overtones should be decided by the country's elected representatives. Proponents of this argument apparently fail to place sufficient weight on the fact that the political or policy content of so-called political or policy decisions varies greatly. At one extreme the political or policy content is so great that the legislature – and in some cases its delegated agents, for example Ministers of the Crown – are the appropriate bodies to make the decision. For example, the enactment of the presumptions and criteria contained within the Official Information Act 1982 was the legislature's response to the problem of the availability of official information.

By contrast with the above examples there is a range of decisions which, notwithstanding their potential political or policy ramifications, may be, and indeed are, made by non-elected bodies. The Town and Country Planning Act 1977 provides a good example of such decisions – in this context the decisions being made by the Planning Tribunal and the courts. The Town and Country Planning Act 1977 requires the recognition of and provision for the "wise use and management of New Zealand's resources . . . [i]n the preparation, implementation, and administration of regional, district, and maritime schemes".[24] The Planning Tribunal and the courts have recognised[25] that by virtue of this statutory requirement they have a role in determining planning policy; they may be called upon to decide whether a planning proposal will use and manage the country's resources wisely. Although this involves policy decisions with political ramifications, the legislature has considered the Planning Tribunal and the courts are competent to make them, despite the fact that they are neither elected by nor directly accountable to the general public.

Although the implementation of the criteria in the Official Information Act 1982 may in certain situations require the making of political or policy decisions, the considerations outlined in the last paragraph suggest that it does not follow that Ministers of the Crown should make the

23 Official Information Act 1982, s 18(d).

24 Town and Country Planning Act 1966, s 3(1)(b).

25 Compare *Smith* v *Taranaki West County Council* (1980) 7 NZTPA 241 (Planning Tribunal); *Re an Application by Petralgas Chemicals (NZ) Limited* (1981) 8 NZTPA 106 (Planning Tribunal); with *Gilmore* v *National Water and Soil Conservation Authority* (1982) 8 NZTPA 298 (HC), *Keam* v *Minister of Works and Development* (1982) 8 NZTPA 241 (CA) and *Re an Application by Amoco Minerals NZ Limited for a Prospecting Licence* (1982) 8 NZTPA 449 (Planning Tribunal).

decision. The appropriateness of any body for such a role must be determined by balancing a number of factors, including the extent of the political or policy considerations, their importance and the context in which the decision is made.

An examination of the grounds authorised by the Act for declining a request for official information indicates that they may be divided into three distinct categories. We shall refer to these as A, B and C.[26] Category A comprises those grounds which require the making of substantive decisions. A good example of one of these grounds is if the making available of the information would be likely to "prejudice the security or defence of New Zealand".[27] In order to determine whether a release of information would be likely to prejudice New Zealand's security or defence, associated substantive decisions on the nature of the country's defence policy would have to be considered and then a policy decision made as to whether the release of that information would adversely affect them. As the potential political and policy ramifications of such decisions is so great, the Minister's representative and accountable nature is a good reason why his views should be decisive in resolving which body should have the final power of decision.

Although Category B grounds also require the making of policy decisions, the potential ramifications of them are not so great as in Category A. An example of such a ground is avoiding "prejudice to measures protecting the health or safety of members of the public".[28] In such situations neither the nature of the policy decision nor its potential ramifications make the representative and accountable nature of the Minister decisive in the balancing exercise mentioned above. As we shall see, other factors may outweigh these.

Finally, Category C comprises grounds which require minimal (if any) policy decisions; they can be described as 'administrative' decisions. One such ground is that "the information requested cannot be made available without substantial collation or research".[29] With such matters the fact that Ministers are representatives of the people and are accountable to them is not important; these are not essential qualifications for making such a decision.

It must be appreciated that each category covers a range of policy content and importance. Opinions may therefore differ as to the appropriate classification for some of these grounds. Such a process of categorisation is, however, a prerequisite to undertaking this balancing exercise.

2 *Disadvantages of Ministerial Veto*

As will be seen, some of these disadvantages outweigh other arguments advanced by the Danks Committee to support a ministerial veto. One of these arguments was that as the Ministers as heads of the Executive Government have the role of governing the country, and as they take political

26 See Appendix for the breakdown of the grounds into their respective categories.
27 Official Information Act 1982, s 6 (a).
28 Ibid, s 9(2)(c).
29 Ibid, s 18(f).

responsibility for their decisions, they should be able to make the final decision on all matters pertaining to such governing – including determining requests for official information. Another argument was that the Ministers, by reason of their involvement in the generation and utilisation of official information, would be particularly well placed to determine the likely consequences flowing from its release. As neither a court nor an Ombudsman would be directly affected by a release of such information, it appears to have been thought that they might be insufficiently concerned about the result of an inappropriate release.

Until relatively recently it was considered that decisions of the Executive arm of government were beyond independent review; the more appropriate control was thought to be the political process. Although this view has adherents (and was accepted by the Danks Committee), it has been increasingly challenged in the latter half of this century. This change in attitude is clearly reflected in the area of judicial review. The courts are now prepared to examine ministerial decisions and, in appropriate circumstances, come to a contrary conclusion. This evolution is apparent in the field of public interest immunity in litigation. In 1942 in *Duncan* v *Cammell Laird & Co*[30] the House of Lords considered that a valid ministerial objection to the production of documents on the grounds of public interest would be conclusive.[31] This approach is no longer accepted.[32] This is apparent in *Environmental Defense Society Inc* v *South Pacific Aluminium Ltd (No 2),*[33] where the New Zealand Court of Appeal examined judicial developments in this field since *Duncan* v *Cammell Laird* and concluded that a ministerial objection was inconclusive. Despite a ministerial objection a court has jurisdiction to inspect the documents and to order their production for inspection by the litigants. In the area of judicial review, cases such as *Padfield* v *Minister of Agriculture, Fisheries and Food,*[34] *Rowling* v *Takaro Properties Ltd,*[35] *Fiordland Venison Ltd* v *Minister of Agriculture and Fisheries,*[36] and *Daganayasi* v *Minister of Immigration*[37] illustrate the courts' willingness to uphold challenges to a ministerial decision in some circumstances.

30 [1942] AC 624; [1942] 1 All ER 587 (HL).

31 This did not mean that the courts would never overturn a ministerial objection. As Viscount Simon LC said at pp 642-643; 595:

> . . . it is not enough that the minister of the department does not want to have the documents produced. The minister . . . ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.

32 *Conway* v *Rimmer* [1968] AC 910; [1968] 2 All ER 304 (HL).

33 [1981] 1 NZLR 153 (CA).

34 [1968] AC 997; [1968] 1 All ER 694. (The Minister, contrary to the Agriculture Marketing Act 1958 (UK), refused to refer a complaint made to him on to an investigation committee.)

35 [1975] 2 NZLR 62 (CA). (The Minister wrongly denied consent to a proposal by the defendant company to refinance themselves by issuing a large number of new special shares to overseas interests.)

36 [1978] 2 NZLR 341 (CA). (The Minister wrongly refused to grant a venison export killing licence to the appellant company.)

37 [1980] 2 NZLR 130 (CA). (Suggestion that the Minister wrongly declined to order against deportation of the appellant; he had made a mistake of fact.)

As the court's confidence and willingness to examine ministerial decisions have increased there has been a growing belief that disputes between the Executive and others should be determined by an independent body. This is in accord with the 'natural justice' precepts that a person should not be a judge in his own cause and that justice must not only be done but be seen to be done. This is probably the major objection to the ministerial veto. The Danks Committee tried to meet this argument by reiterating its belief that the decision was executive – that is, policy orientated – and not judicial. As has been seen, the Danks Committee's views are, however, open to challenge.

The ministerial power of veto runs counter to one of the primary purposes of the Official Information Act 1982, that of making the Executive more accountable to the people. Mr W D Baragwanath QC aptly summarised this concern when he said:[38]

> The Ombudsman is Parliament's officer and the public watchdog. For him to be overruled by a member of the Executive whose accountability is the major purpose of the Act is a matter of grave public concern . . . . Given the pressures of party politics which are inherent in our system of government, the public are likely to suspect any veto of the independent advice of the Ombudsman to be potentially due to fear of embarrassment.

The ministerial power of veto also jeopardises the general increase in the availability of official information which was another aim of the Act. As public views change, official information which is at present considered to be in the public interest best withheld, may be considered to be better released. Such a course has occurred in the past concerning the candour of argument ground for withholding information. It is now generally accepted that candour between officials requires less protection than was originally thought. There is no reason to believe that such developments will not occur in the future. Unfortunately the vesting of the final power of decision in the Minister may endanger these developments. As the Australian Senate Standing Committee on Constitutional and Legal Affairs has argued:[39]

> The need for change is best perceived by those who stand outside the system, can look at it objectively, and can weigh against the practices which may prevail therein, practices which elsewhere prevail and the contemporary ideas relating to the practices. Public servants are not in this sense separate from the system of disclosure of documents. Only a neutral tribunal is sufficiently separate and in an adequate position to fashion [such] changes . . . .

Although this argument was being employed against public servants, it applies with equal force to Ministers of the Crown and discounts the

38 W D Baragwanath, *"The Official Information Act – A Real Change in Direction?," 1984 New Zealand Law Conference – Principal Papers, p 63 at p 67.*

39 *Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and Aspects of the Archives Bill* 1973, 1979, Australian Government Publishing Service, Canberra, p 221.

argument that as Ministers are directly aware of the possible consequences which may flow from an inappropriate release of official information, they are best qualified to make the final decision concerning such release.

All these arguments against vesting the ultimate decision-making power in the Minister may be viewed as composite parts of the natural justice consideration that a person should not be a judge in his own cause. They illustrate the many undesirable consequences which flow from such a state of affairs. Before we consider the possible alternatives to a ministerial veto we shall examine possible safeguards – public criticism and judicial review – against inappropriate use of the ministerial veto. Upon the basis of this examination we shall determine whether they lessen the natural justice disadvantages.

3 *Safeguards Against Ministerial Misuse of the Veto*

The first safeguard against ministerial misuse of the veto is public criticism. This safeguard is premised upon the belief that, as a result of public confidence in the Ombudsman, any exercise of the veto would herald public comment upon the propriety of the Minister's action. The rigours of such public scrutiny would, it is argued, encourage the Ministers to exercise the veto sparingly. Although this might seem to be an effective sanction against inappropriate use of the veto, in view of the scarcity of public comment upon the exercise of the veto its practical effect is questionable.[40] It is more likely that this silence has resulted from public ignorance or apathy than approval. If this is so then this safeguard may prove to be not so much a check upon the exercise of the veto as a means of conferring legitimacy through perceiving the silence to amount to ratification and approval of the Minister's action, but nevertheless a ratification and approval occurring quite independently from whether it was in fact intended. It has also been considered that public concern over perceived excessive use of the veto could result in an election defeat for the incumbent government. Such an argument must however be discounted at the outset. The prospect of a change of government occurring for such a reason is highly unlikely even with public comment on the exercise of each veto.

The second safeguard is the possibility of judicial review. In exercising this veto a Minister must obey the provisions of the Official Information Act 1982. If, for instance, the Minister could be shown to have taken into account an irrelevant consideration (e.g. the prospect of political embarrassment arising from a release of official information), or failed to take into account a relevant consideration (e.g. the public interest when applying the criteria contained in section 9 of the Act), his decision to use the veto may be overturned by the courts.[41]

40 A search of the Dunedin press clippings held by the Dunedin Public Library indicated that up to 31 December 1984 there had only been one article on the use of a veto; see *Otago Daily Times* 5 November 1983 p 5, "Department 'wrong' ".

41 See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997; [1968] 1 All ER 694. Other 'errors' which may result in the quashing of a ministerial decision include:

There have not yet been any decisions of a substantive nature[42] concerning the judicial review of a ministerial veto. However, in a recent article, Mr W D Baragwanath QC has indicated that judicial review may prove to be an effective control against illegal uses of the veto. He suggested that in such judicial review proceedings:[43]

> The Court will apply as its test of legality either *Khawaja* v *Secretary of State for the Home Office*[44] . . . (the Court will determine for itself whether an objectively expressed condition precedent to withholding is established: ss6, 7 and 9) or *Associated Provincial Picture House Ltd* v *Wednesbury Corporation*[45] . . . (the Court will determine whether such a decision could have been made by a Minister or department acting lawfully: ss 8 and 10).

Mr Baragwanath's examination of one[46] of the purported uses of the veto may be profitably considered at this point. This examination concerned a request by Dr M Cullen MP to the Department of Labour for information on that department's estimates of unregistered unemployed. The Ombudsman's recommendation to release this information was rejected by the then Acting Minister of Labour for the following reasons[47] –

> 2. The grounds for the direction are that pursuant to section 9 of the Official Information Act, and notwithstanding the opinion of the Chief Ombudsman, the release of the information sought would undermine the constitutional conventions as to the neutrality of officials and the confidentiality of their advice. It would also undermine the free and frank expression of opinion between Ministers and officials and the protection of officials from improper pressure or harassment.
>
> 3. More specifically:
>
> (a) Opinions of departmental officials on unregistered unemployment could well be at variance with those of the Government. This would be likely to draw officials into public debate, whereas the distancing of officials from such debate is an important constitutional convention designed to maintain their political neutrality.
>
> (b) By virtue of the fact that the opinion of officials on unregistered unemployment may imply a need for policy initiatives, release of the information would necessarily breach the constitutional convention which protects the confidentiality of advice tendered to Ministers of the Crown by officials.
>
> (c) Occasions are envisaged when, under conditions of particular uncertainty officials may refrain from preparing information which includes estimates of unregistered unemployment if there exists a possibility that they would be misrepresented in the political arena or used for purely political purposes. This would clearly serve

– proof of insufficient evidence supporting the decision: (*Coleen Properties Ltd* v *Minister of Housing and Local Government* [1971] 1 WLR 433; [1971] 1 All ER 1049 (CA)); *Secretary of State for Education and Science* v *Tameside Borough Council* ([1977] AC 1014; [1976] 3 All ER 665 (HL)); and a mistake of fact (*Daganayasi* v *Minister of Immigration* [1980] 2 NZLR 149).

42 There has however been a number of decisions concerning the Official Information Act 1982. See *Thompson* v *Laking* HC, Wellington, 8 May 1984 (A 487/83) Davidson CJ and *Thompson* v *Laking* HC, Wellington, 21 February 1985 (A 487/83) Jeffries J.

43 W D Baragwanath *"The Official Information Act – A Real Change in Direction?"*, 1984 New Zealand Law Conference – Principal Papers, p 63 at p 67.

44 [1983] 2 WLR 321; [1983] 1 All ER 765 (HL).

45 [1948] 1 KB 223; [1947] 2 All ER 680 (CA).

46 In the first eighteen months after the Act came into force there have been at least 9 exercises of the veto – see the *New Zealand Gazette* 1983 pp 3640, 3943, 4173 and 1984 pp 1445, 2190, 2689, 2690 and 3103.

47 *New Zealand Gazette* 1983, pp 3943-4.

to constrain the "free and frank expression of opinions" by officials of the department to its Minister and would thereby undermine the effective conduct of public affairs.

(d) Circumstances are envisaged under which departmental officials may be placed under some pressure during the course of the public debate to modify their opinions as to the labour market outlook and estimates of unregistered unemployment.

4. The question of whether there are other considerations which render it desirable, in the public interest, to make that information available has also been considered. No such considerations have become identifiable.

Mr Baragwanath considered that this purported veto failed to satisfy the requirements of the Official Information Act 1982 in a number of respects. He said that paragraph 4[48]

> altogether disregards the provisions of ss4(a) and 5. The Act itself establishes as a matter of public interest the participation of the people of New Zealand in the making and administration of laws and policies and promotion of the accountability of ministers and officials and thus the principle that the information should be made available unless there is good reason for withholding it. The veto documents entail misdirection. Unless a minister giving due weight to ss4 and 5 was right to find the scales tipped in favour of non-disclosure, the veto would be upset in a court of law.
>
> Paragraph 3 is also open to criticism. Grounds 3(a)-(d) in essence do no more than restate, employing more words, the terms of the Act itself:
>
> Ground 3(a) = s9(2)(f)(iii)
> – Political neutrality of officials.
> Ground 3(b) = s9(2)(f)(iv)
> – Confidentiality of advice.
> Ground 3(c) = s9(2)(g)(i)
> – Free and frank expression of opinion.
> Ground 3(d) = s9(2)(g)(ii)
> – Protection from harassment.
>
> There is some overlapping among the different provisions. "Grounds" is used in s19(a)(ii) as meaning "reasons" and may be taken to bear the same meaning in the context of s32. The grounds given just do not explain why the withholding of the information is necessary in the particular case to protect the interests relied upon. Such necessity is a condition of the application of s9.

If the courts proceed upon the lines suggested by Mr Baragwanath, then the validity of a large number of the purported uses of the veto may be challenged successfully. All the veto documents have utilised a similar approach in the enumeration of the reasons for the ministerial decision and, as has been seen, it is hard to reconcile this approach with the Act.[49]

Although it appears that judicial review may be an effective control against arbitrary uses of the veto, it has a number of disadvantages which lessen its effectiveness as a general safeguard. Most importantly, judicial review does not involve an appeal on the merits of the case. Its scope is restricted to determining whether the Minister properly applied the provisions of the Act. As long as the Minister did not take into account irrelevant considerations, fail to take into account all that he was required

48 W D Baragwanath, *"The Official Information Act – A Real Change in Direction?"*, 1984 New Zealand Law Conference – Principal Papers, p 68.

49 Ibid, p 68.

to take into account, act upon insufficient evidence or make any mistakes of fact,[50] and also made a decision which a reasonable Minister could have come to, the court will not overturn his decision even though it is a decision which it would not have made. Judicial review of the Minister's decision does not meet the natural justice considerations discussed earlier. The Minister is still the judge in his own cause, but as long as his decision is one which a reasonable Minister could have come to, it will be upheld. In this context the problem with judicial review is the range of final decisions which it allows, a range of final decisions which in any given case may extend to encompass both declining and approving requests for official information. This has the consequence that although the Ombudsman's recommendations may have been reasonable, in that a court would not have overturned them on judicial review, the ministerial veto may likewise be reasonable. The Minister is clearly required to apply the Act's criteria in making his decision and judicial review is a means of ensuring that he does. Such review does not, however, stop the Minister from being indirectly influenced through his role in the production and utilisation of official information to favour secrecy and the status quo.

Another difficulty associated with judicial review is the potential financial cost. Unlike the Crown the requestor may not have the resources to enable him to initiate and sustain such review proceedings.

4 *Do the Advantages Associated with the Ministerial Power of Veto Outweigh the Disadvantages?*

For those grounds which essentially require an administrative decision the representative nature of the ministerial office does not make Ministers more suitable to make the decision. Hence, unless there are serious disadvantages associated with either the courts or an Ombudsman exercising this power, one or other of them should have the final power of decision. By contrast, in those situations where the final decision-maker must make decisions having political or policy ramifications, there are advantages in the Minister having the power of veto. Whether they outweigh the disadvantages depends upon the nature, extent and importance of the political or policy ramifications. Although opinions will differ, it can be argued that in respect of Category B grounds, the disadvantages still predominate. This is not so with Category A.[51]

Accordingly, although Ministers should retain the power of final decision over Category A grounds, it is worth investigating whether a court or an Ombudsman should exercise such a power over Categories B and C.[52]

II Should the Courts or an Ombudsman Have the Power of Final Decision in Respect of Categories B and C?[53]

The Danks Committee recommended that neither the courts nor an Ombudsman should have a power of final decision. They considered that

50 Supra n 42.
51 This classification is discussed on pp 143-144 of this article.
52 Supra n 51.
53 Supra n 51.

because these two bodies were neither elected nor directly accountable to the public they were unsuited to making decisions having political or policy ramifications. As has already been pointed out,[54] this is open to question. The fact that neither a court nor an Ombudsman are elected or directly accountable to the public does not of itself make them unsuitable to make political or policy decisions and is irrelevant in determining the appropriateness of a body to make administrative decisions. It is therefore as well to examine the other arguments as to why they were considered to be unsuitable.

The Danks Committee considered that it was neither a normal nor a traditional function of the New Zealand courts to rule on matters with strong political and policy implications. They further pointed out that the judges themselves had shown a reluctance to become involved in such questions. The Committee considered that a court was unsuited to performing any role in the request procedure which required it to make decisions of this nature. The Committee would limit the role of the courts to the traditional judicial areas of public interest immunity and judicial review. Although New Zealand courts have in the past preferred not to make political or policy decisions, they have shown a willingness to do so when required. This is apparent in the field of planning and environmental law. Cases such as *Gilmore* v *National Water and Soil Conservation Authority,*[55] *Keam* v *Minister of works and Development,*[56] *Re an Application by Amoco Minerals NZ Limited for a Prospecting Licence*[57] suggest that the courts will make policy decisions. If the proposed Bill of Rights is enacted these trends will increase.

Contrary to the belief of the Danks Committee, developments in the field of public interest immunity are relevant in determining the ability of the courts to exercise a final decision-making power. As the Danks Committee pointed out, there are grounds for distinguishing public interest immunity from the official information context. In the public interest immunity situation the proceedings are under the control of the court; the issues are defined and specific; the information is usually factual and relates to a specific decision or action affecting an individual as opposed to matters of general policy; the court can itself assess the value of the information to the litigant's case; the court can weigh the significance of the proceedings; and the court can release such parts of the information as are directly relevant, imposing controls on the information's use. By contrast with the Official Information Act 1982, the context in which the balancing of interest occurs is generally much broader; the issues to which it relates are not identified; the specific value of the information cannot be precisely assessed; the information often extends beyond the factual to encompass policy and advisory information; there is no official control over the use of the information once released; and there is a major difference in the potential number of cases. Despite these differences it is arguable that the Danks

54 Refer to pp 142-144 for discussion of this argument.
55 (1982) 8 NZTPA 298.
56 (1982) 8 NZTPA 241.
57 (1982) 8 NZTPA 449.

Committee failed to appreciate the significance of recent developments concerning public interest immunity which show a change in the relationship between government and the courts. In circumstances where the courts used to defer to the views of the Ministers they are now willing to make their own decisions after having examined the ministerial certificate, and in appropriate cases inspected the documents for themselves. More importantly, this increased willingness of the courts to examine ministerial decisions has neither revealed any possible limitations in the courts' ability to undertake such a role nor any harmful repercussions to society at large.

The Danks Committee raised different arguments against an Ombudsman making such decisions. Although the examination of decisions having political or policy ramifications had been an accepted function of the Ombudsman, the results of such examinations had never been binding upon the Executive. The results are at present given in a recommendatory form which the Executive can refuse to implement. The Committee considered that to give a decision-making power to an Ombudsman would alter the essential character of his office. The undoubted success of the Ombudsman in New Zealand is due to a large extent to his ability to resolve disputes through discussion and recourse to common sense, and it is clearly more desirable that the parties to a dispute come to a mutually acceptable solution themselves than have a decision imposed upon them. Decisions must, however, be made, whether as a result of agreement between the parties or by imposition by a third party. Although the Ombudsman's conclusions concerning the release of official information are at present termed recommendations and may be vetoed, in the overwhelming majority of cases they have become the final decision.[58] Despite this decisive nature of the Ombudsman's recommendations, his qualities in resolving disputes amicably have not been impaired. It would therefore be highly unlikely that by removing the power to overturn the Ombudsman's recommendations, public confidence in the Ombudsman would alter.

Both the courts and an Ombudsman are qualified to make the final decisions concerning Category B grounds, and given the natural justice considerations examined earlier, it is more appropriate that one of them and not a Minister should exercise such a power.

We shall now briefly consider which, of the courts or an Ombudsman, is the better suited to make the final decision in respect of Category B policy grounds and Category C administrative grounds.

To resolve this question it is necessary to determine what type of appeal procedure there should be from the decision of the government body. There could, for instance, be a right of appeal direct to the courts, excluding the Ombudsman altogether. The establishment of such a procedure would, however, be unwise. This area of law requires flexible procedures, procedures which are different from those employed by the courts. A desirable trend which has emerged in the first year of operation of the Official Information Act 1982 has been the large number of complaints resolved informally by an Ombudsman. The courts are unable to do this. It is therefore con-

58 In the first six months of the Act's application the Ombudsman received 188 requests for investigation and review. Four of his recommendations were vetoed by a Minister.

sidered that the most desirable appeal alternatives are either to have a right of complaint to an Ombudsman, who would make the final decision, or to replace the present ministerial veto with a right of appeal to the courts. By this latter alternative the present Ombudsman's role would remain the same.

Views as to which of these two alternatives is the most desirable will differ according to the role one wishes to see the courts and Ombudsmen play. Arguably the most appropriate procedure would be to vest the final decision-making power in an Ombudsman, with judicial review providing a safeguard against arbitrary decisions. As a result of the policy nature of some of these decisions, different bodies may come to differing conclusions. A right of appeal to the courts would undoubtedly produce a number of successes. However, this would not indicate inappropriate reasoning by the Ombudsman. If there was a further right of appeal there would doubtless be a number of successful appeals reinstating the Ombudsman's recommendations. With decisions revolving on policy considerations, the existence of successful appeals at a high judicial level indicates differing opinion and not errors or misconceptions in the earlier reasoning. A right of appeal to the courts from an Ombudsman would not achieve any appreciable gains, and by virtue of the financial and legal resources of the Executive, may place requestors for official information at a disadvantage.

III Conclusion

The Official Information Act 1982 marks the beginning of an era in which the government's control over the availability of official information is diminishing. Although there may have been reasons not canvassed here for having a ministerial power of veto when the Act first came into operation, this examination suggests that it is no longer desirable to retain the present procedure. The ministerial power of veto[59] should be limited to those situations involving substantive political and policy decisions (that is, Category A grounds). Where the political or policy ramifications of a given decision are not of such a high magnitude (that is, those grounds in Categories B and C), natural justice considerations require that a body independent of the Executive should have this power.[60]

59 Whether this power should be in the form of a 'veto' or a power to limit the ability of the Ombudsman to make recommendations (i.e. similar to that in s 31 of the Act with appropriate requirements of public and parliamentary notice) is of secondary importance and is not discussed here.

60 Such conclusions have ramifications beyond the exercise of the ministerial veto. It will be recalled that the ministerial veto is only one of three ways by which a final power of decision may be exercised by the Executive through the Prime Minister, Attorney-General or other Ministers of the Crown. There is the power in s 20(1) of the Ombudsmen Act 1975 for the Attorney-General to effectively exclude an Ombudsman's inquiry and s 31 of the Official Information Act 1982 enables the Prime Minister and Attorney-General to limit the ability of an Ombudsman to make recommendations. Modifications to the power of veto logically require alterations to these other powers.

APPENDIX

CATEGORY A CRITERIA FOR WITHHOLDING OFFICIAL INFORMATION — Criteria of the Official Information Act 1982 which, in the writer's opinion, require the making of political and policy decisions of a substantive nature.

s 6 Good reason for withholding official information exists . . . if the making available of that information would be likely —

(a) To prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or

(b) To prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by —
  (i) The government of any other country or any agency of such a government; or
  (ii) Any international organisation; or . . .

(d) To damage seriously the economy of New Zealand by disclosing prematurely Government economic or financial policies, such as those relating to —
  (i) Exchange rates or the control of overseas exchange transactions;
  (ii) The regulation of banking or credit;
  (iii) Taxation;
  (iv) The stability, control, and adjustment of prices of goods and services, rents, and other costs, and rates of wages, salaries, and other incomes;
  (v) The borrowing of money by the Government of New Zealand;
  (vi) The entering into of overseas trade agreements.

s 7 Good reason for withholding information exists . . . if the making available of the information would be likely —

(a) To prejudice the security or defence of —
  (i) The self-governing state of the Cook Islands; or
  (ii) The self-governing state of Niue; or
  (iii) Tokelau; or
  (iv) The Ross Dependency; or

(b) To prejudice relations between any of the Governments of —
  (i) New Zealand;
  (ii) The self-governing state of the Cook Islands;
  (iii) The self-governing state of Niue; or

(c) To prejudice the international relations of the Governments of —
  (i) The self-governing state of the Cook Islands; or
  (ii) The self-governing state of Niue.

CATEBORY B CRITERIA FOR WITHHOLDING OFFICIAL INFORMATION — Criteria of the Official Information Act 1982 which require the making of political and policy decisions of a non-substantive nature.

s 6 Good reason for withholding official information exists . . . if the making available of that information would be likely —

(c) To prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial;

s 9 (1) Where this section applies, good reason for withholding official information exists . . . unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

(2) . . . this section applies if, and only if, the withholding of the information is necessary to —

(a) Protect the privacy of natural persons, including that of deceased natural persons; or

(b) Protect information supplied in confidence to any organisation, or by or on behalf of the Crown or of any Department or organisation to any person outside the service of the Crown or of the Department or organisation, —

  (i) Where the making available of that information would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or

  (ii) Where the protection of that information is otherwise in the public interest; or

(c) Avoid prejudice to measures protecting the health or safety of members of the public; or

(d) Avoid prejudice to the substantial economic interests of New Zealand; or

(e) Avoid prejudice to measures that prevent or mitigate material loss to members of the public; or

(f) Maintain the constitutional conventions for the time being which protect —

  (i) The confidentiality of communications by or with the Sovereign or her representative;

  (ii) Collective and individual ministerial responsibility;

  (iii) The political neutrality of officials;

  (iv) The confidentiality of advice tendered by Ministers of the Crown and officials; or

(g) Maintain the effective conduct of public affairs through —

  (i) The free and frank expression of opinions by or between or to Ministers of the Crown or officers and employees of any Department or organisation in the course of their duty; or

(ii) The protection of such Ministers, officers, and employees from improper pressure or harassment; or

(h) Maintain legal professional privilege; or

(i) Enable the Crown or any Department or organisation or any subsidiary of any organisation to carry out, without prejudice or disadvantage, its commercial activities; or

(j) Enable the Crown or any Department or organisation of any subsidiary of any organisation to carry on negotiations (including commercial and industrial negotiations); or

(k) Prevent the disclosure or use of official information for improper gain or improper advantage.

CATEGORY C CRITERIA FOR WITHHOLDING OFFICIAL INFORMATION — Criteria of the Official Information Act 1982 which require the making of administrative decisions having no or minimal political and policy content.

s 8 Good reason for withholding official information exists . . . if the making available of the information could reasonably be expected —

(a) To prejudice significantly the competitive commercial activities of the Crown or any Department or any organisation or any subsidiary of any organisation; or

(b) To interfere significantly with contractual or other negotiations related to the competitive commercial activities of the Crown or any Department or any organisation or any subsidiary of any organisation; or

(c) To prejudice the supply of similar information, or information from the same source, where —

(i) The information relates to competitive commercial activities;

(ii) The information was supplied in confidence to the Crown or any Department or any organisation or any subsidiary of any organisation; and

(iii) It is in the public interest that similar information or information from the same source should continue to be supplied.

s 18 A request [for official information] . . . may be refused for one or more of the following reasons, namely: . . .

(c) That the making available of the information requested would —

(i) Be contrary to the provisions of a specified enactment; or

(ii) Constitute contempt of Court or of Parliament;

(d) That the information requested is or will soon be publicly available;

(e) That the document alleged to contain the information requested does not exist or cannot be found;

(f) That the information requested cannot be made available without substantial collation or research;

(g) That the information requested is not held by the Department or Minister of the Crown or organisation and the person dealing with the request has no grounds for believing that the information is either —

(i) Held by another Department or Minister of the Crown or organisation; or
(ii) Connected more closely with the functions of another Department or Minister of the Crown or organisation;

(h) That the request is frivolous or vexatious or that the information requested is trivial.