

The scientist and freedom of information

D. K. Clifford*

In this article, the writer examines the problem of freedom of information legislation in relation to the activities of New Zealand scientists. His conclusion is that legislation alone is unlikely to provide the desired degree of freedom and that broader administrative changes may be required.

I. INTRODUCTION

Legislative attempts to achieve greater freedom of information reflect the complexity of the issues involved in what is essentially a very difficult balancing act. In America a Freedom of Information Act, introduced in 1966 to give more weight to the public interest in disclosure, had to be extensively amended in 1974. It had been found that state agencies had devised ways of absorbing the provisions of the Act with the result that a greater degree of openness in government did not occur. Australian¹ and United Kingdom² proposals for freedom of information legislation are very complex. They attempt to balance the competing interests of disclosure and confidentiality by creating a general principle of disclosure while at the same time recognising the need for certain categories of information to be exempt from this principle. The complexity of the proposals reflects the difficulty found in balancing these competing interests in a legislative manner.

In New Zealand, calls for greater openness in government are not new. The report of the *Royal Commission to Inquire into and Report upon State Services in New Zealand* in 1962³ was followed by moves from within the civil service which evidenced a willingness by the civil service to adopt a more open approach to its role.⁴

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1 Report of Interdepartmental Committee *Policy Proposals for Freedom of Information Legislation* (Canberra, 1976).

2 Cf. the unpublished draft bill of the All Party Committee for Freedom of Information, the Freedom of Information and Privacy Bill 1976.

3 Published in Wellington 1962, known as "The McCarthy Report".

4 Cf. K. J. Keith "Secrecy in Government" (1976) 22 Public Service Association Newsletter 303.

Today, some see a need for further guidelines for openness. They see these as being the best way to balance the interests involved.⁵ Others call for legislative reform.

In July 1977 Mr Prebble, Opposition M.P. for Auckland Central, introduced a private member's bill, the Freedom of Information Bill. Its preamble read:

Whereas the people of New Zealand have a political right to be informed by their Government concerning the public business so that the people may participate more fully in the democratic process; and whereas open government is necessary for a strong democracy:

The Bill, criticized by Mr Minogue, Government M.P. for Hamilton West, as being the product of an intellectual virgin,⁶ was defeated at its first reading. Mr Minogue and others however continue their pressure for legislative reform. New Zealand citizens have taken advantage of overseas legislation. Denied access to particular information here, they have been able to acquire that information from agencies of the United States by use of that country's freedom of information legislation. Such experiences strengthen the conviction that real reform can be achieved in New Zealand by a freedom of information statute.

How can reform best be achieved in New Zealand? This question can only be answered in the light of an understanding of what factors or practices any reform would be aimed at. Unless these are known, attempts at reform could simply miss the mark. This would seem to be the United States experience since 1966.

This paper will look at one particular government department, the Department of Scientific and Industrial Research (DSIR). It will endeavour to identify the criteria which govern the freedom of the scientists who work there to engage in open and public discussion of scientific issues, to see in what ways freedom of information legislation might operate in such an area, and to assess the implications that this may have for legislative reforms which are intended to be applied to a broad range of state institutions.

II. THE DSIR — AN "OPEN" DEPARTMENT ?

Section 5 of the Scientific and Industrial Research Act 1974 sets out in paragraphs (a) to (m) the statutory functions of the DSIR. The most relevant of these for our purposes are the first four. They are:

- (a) To initiate, plan, and implement research calculated to promote the national interest of New Zealand:
- (b) To advise the Minister on scientific matters:
- (c) To undertake research and to provide advisory services for Government Departments, authorities, institutions, associations, companies, and other persons:
- (d) To collect and disseminate scientific and technological information, including the publication of scientific reports and journals.

5 Cf. *The Evening Post*, Wellington, New Zealand, 21 March 1977, reporting the views of Hon. Mr V. Young, M.P., Minister for the Environment, and others.

6 N.Z. Parliamentary debates Vol. 410, 1977: 500.

A. *The Responsibility to Publish*

The responsibility to publish, in the words of the Director-General, Mr I. Robertson, "indicates that the results of the work of the Department are required by statute to be freely available within the community".⁷ This statutory duty is clearly reflected in the large flow of information of a scientific nature which comes from the department. Each year a booklet is published to summarise the work of the department and to provide the public with a type of layman's index to the year's activity.⁸ Scientists also publish individual research papers on a broad range of topics, many with application to New Zealand's agricultural industries. It could therefore be argued that for such a department there is no need to press for greater openness:⁹

DSIR is one of the most open departments in the public service because it is administered by scientists who accept the need to report and publish research results. There results within the department a wide delegation of authority to officers to make public statements on departmental activities. An apparent reluctance to release information often reflects nothing more than the scientist's, or scientist administrator's belief that too few, hard facts are available and that the premature release of incomplete information could be misleading and simply confuse the public.

Thus the statutory function of the DSIR demands that it should have a very large degree of openness, that it should already be a department which by its nature is involved in the type of process that freedom of information legislation might seek to impose on a wide range of state functions.

B. *Restraints on Openness*

The statutory functions of the DSIR however also involve exceptions to the open approach just mentioned. In giving advice to the Minister, and in doing research in either a pure or applied sense, the individual scientist may find he is not regarded by the department as being free to publish and comment on the material he is studying. What then is the nature of these restrictions and the justification for them?

In a DSIR newsletter of 1975¹⁰ some indications were given of the issues involved. The public discussion which followed its publication indicated further the attitudes both of the government and of the scientists working for the DSIR.

Entitled "Professional Ethics" the article sought to answer the question "to what extent can a scientist in the DSIR divulge information gained in the course of his employment?" It sought to answer the question with regard to two situations.

1. *The consultant-client relationship*

The DSIR often does research work on request for the groups mentioned in section 5(c) of the Act. It may be research into the suitability of types of new

7 In a letter to the author, 26 July 1977.

8 Science Information Division *DSIR Research 1976* (Wellington, 1976), 200 ff.

9 Mr G. W. Butler, Assistant Director-General of the DSIR, in an address to a forum on "Professional Ethics and Secrecy in Science", Dunedin, 2 April 1977.

10 Anon. "Professional Ethics", DSIR Newsletter, Wellington, July 1975, p. 8.

11 Edsall "Scientific Freedom and Responsibility" (1975) 188 Science 687.

seed, into the safety of electrical goods, into the proposal by another government department concerning the utilisation of certain New Zealand resources. The relationship between the DSIR and its client in this situation is seen as being similar in nature to that between a doctor and his patient, and between a lawyer and his client. The prime responsibility of the DSIR scientist is to consider the interest of the party for whom the work is being done. It is in the employee scientist's interests to further the interest of his client. His duty is to give priority to the client's interests where they clash with his own interests.

The DSIR acts as a professional adviser on scientific matters and its relationship to its clients is therefore governed by a code of ethics which sees the interests of the client as paramount over private interest. These considerations apply equally whether the client is a public body or a private firm. In this type of situation the individual scientist is seen to be very strictly controlled in what information he may release and what views he may put forward in public. He should only act so as to advance the interests of his client. This may involve refraining from publishing the information he has uncovered, or more often refraining from adverse public comment on the client's proposals. This situation of restraint however is open to a number of exceptions, which the scientists themselves have been eager to protect.

Commercial clients often rely on the protection of confidentiality when dealing with the DSIR. They do so to protect the financial interest they have in keeping a certain product or process secret from their competitors. When the DSIR client is another government department this argument is less likely to be relevant. Save where the government department is one such as the New Zealand Forest Service, and has itself a large financial interest in a mixed sector industry, such a client is not looking for protection from competitors. The rationale of protection of commercial gain will only rarely then justify restricting the individual scientist.

Where a government department or other public body is the client the public is also, by implication, a client. The government is, in broad terms, there to act on behalf of the public, and for the public good. Government departments, through the Minister, are ultimately accountable to the public. Thus when considering the interest of a government body client the DSIR scientist also has the responsibility to consider the interest of the general public.

Where the client is a private firm there may also be occasions where the public interest can best be served by disclosure, though this may run contrary to the interest of the client. In the United States, a report of the American Academy for the Advancement of Science revealed a number of such instances.¹¹ One such example should serve to show the serious issues involved. From 1970 to 1973 various scientists became aware of the cancer-causing characteristics of vinyl chloride. By 1973 it was realised that concentrations of this chemical of only 50% of the allowable limit were causing tumours in experimental animals. In that year the National Institute of Occupational Safety and Health (NIOSH) requested information on the dangers associated with exposure to vinyl chloride:¹²

On 7 March, MCA [the Manufacturing Chemists Association] responded by recommending a precautionary label that made no mention of toxic effects on animals or

12 *Ibid.*, 690.

people; in other words, it appears to have deliberately deceived NIOSH regarding the true facts. Apparently MCA has claimed that the withholding of data was due to their agreement with the European manufacturers to keep the data confidential until an agreement for their release could be worked out.

In this situation many people were exposed to a chemical known to be dangerous, because it would seem the interest the manufacturers had in non-disclosure was put before the clear public interest in disclosure.

In New Zealand two less dramatic examples illustrate the possibility of similar conflict.

In May of 1977 manufacturers of solar water heaters successfully prevented the publication of the results of tests on their product by the DSIR. The manufacturers had asked for the tests on the water heaters in the first place and had authorised the conditions under which they were to go ahead. Yet the results did not satisfy them and they argued that the tests were not accurate. Under some pressure the DSIR was persuaded not to make these results public. Mr Collins, the head of the DSIR Physics and Engineering Laboratory was quoted as saying:¹³

One of the difficulties associated in making tests was that, quite naturally, each manufacturer wanted to display his own unit to its best advantage, whereas the DSIR has to be realistic in its approach.

This is an example where the client's interest conflicted with the clear public interest in having access to these results. It is submitted that the interest more worthy of protection was that of the public in having access to the information.

In the year ending 1977 the DSIR investigated the cause of several fatal accidents caused by beer kegs exploding. The results showed the culprit to be a device marketed as a way of preventing keg beer from going flat by releasing carbon dioxide into a keg and thus maintaining the pressure. In this situation the information was made public in the 1977 summary of DSIR activities. If this work had been commissioned by the manufacturers of the device a clear conflict of interest would have arisen between the manufacturers' desire to avoid bad publicity and the responsibility of the DSIR to the public at large. It is submitted that in such a case the public interest in disclosure clearly outweighs the scientist's duty to further the interests of his client. Thus it can be seen that there are exceptions to the responsibility of the scientist to further the interests of his client. These situations involve occasions when the public interest in disclosure outweighs the advantage to be gained by the preservation of confidentiality. Such a balancing of interests is the very operation which freedom of information legislation is aimed at performing. Whether it can really achieve this will be considered later.

2. *The scientist and government policy*

The second situation which the "ethics" article in the DSIR Newsletter saw as an exception to the general openness of the scientific approach was where the scientist had to consider his position in relation to the policy of the government of the day.

13 *The Evening Post*, Wellington, New Zealand, 27 May 1977, p. 20.

The article reads:¹⁴

[E]xtreme care must be taken to ensure that anyone issuing statements does not, without first obtaining the Director-General's approval, issue any statement which contains any criticism, stated or implied, of the Government of the Day.

This statement, which in its own words applies to DSIR scientists twenty-four hours a day, seven days a week, occasioned criticism from scientists who saw it as an unwarranted limitation on individual freedom.¹⁵ The broad terms of this statement, taken at face value, would seem to imply that by virtue of his position, a DSIR scientist gives away all his right to criticise the government of the day, save where he gains official approval.

This would seem to be an extreme view. The Hon. Mr Gandar, M.P., the Minister of Science, despite what some may see as the clear words of the statement, denied that this was a directive or that it could even be interpreted as one.¹⁶ He saw it more as an attempt to point out the issues involved, a way of ensuring a responsible use of the freedom given to scientists.¹⁷ The situation as it exists does not seem to follow the guideline exactly. DSIR scientists can doubtless criticise the government's policy on free kindergartens for example without the approval of the Director-General. But the newsletter went into more detail in its appraisal of the limits on individual "speaking out":¹⁸

The DSIR scientist is not free to offer public criticism on Government policy in areas which are in or close to his own areas of expertise or the areas of expertise covered in his division. For instance, a DSIR ecologist is most constrained as to what he may say publicly on environmental issues . . .

Mr. J. Gregory, the Editor of the New Zealand Science Review, outlined the same approach more succinctly when he said "You are not supposed to say anything about the things you are most expert in".¹⁹ This can be seen as having a number of justifications from the government viewpoint.

It has been said a scientist should not use information he has been paid to produce to further his own view publicly.²⁰ Mr G. Orr, Secretary for Justice, said of the individual scientist "He is not entitled to steal his employer's documents to further a moral crusade".²¹ This attitude would seem to imply that because the government pays to produce information it gains ownership of it to the exclusion of all other claims. In very sensitive areas of science this may be true. In the Second World War, DSIR scientists were involved in working on the development of radar.²² This was in its early stage and was at that time highly secret and of great strategic importance. Disclosure would have been disastrous. In most situations however it can be seen that such an extreme approach is not justified.

14 *Supra* n. 10 at p. 9.

15 Cf. *The Evening Post*, Wellington, New Zealand, 27 July 1976, p. 8.

16 "Science Policy" (1976) 33 *New Zealand Science Review* 122, 127.

17 *The Otago Daily Times*, Dunedin, New Zealand, 31 July 1976, p. 10.

18 *Ibid.*, 9.

19 In an interview with the author, Wellington, 4 July 1977.

20 Cf. *The New Zealand Herald*, Auckland, New Zealand, 28 July 1976, p. 1, reporting the Hon. Mr Gandar, M.P., Minister of Science.

21 *The New Zealand Listener*, 15 May 1976, p. 22.

22 J. D. Atkinson, *DSIR's First Fifty Years* (Wellington, 1976) 46-47.

This restriction on the scientist has also been explored in terms of the general confidentiality required of the public service. As government employees DSIR scientists are required to act as advisers to the Minister on scientific matters. It is in their areas of special expertise that their advice will be required, and it is the same area on which they will probably find occasion to speak out in public.

Mr G. W. Butler, the Assistant Director-General of the DSIR, when speaking on this point, quoted with approval from the Task Force Report. The passage quoted reads:²³

There are particular problems associated with any attempt to reduce the degree of secrecy covering the advice given to a minister by his public servants. There must be mutual trust between a minister and his advisers. This can only be based on the exercise of loyalty and discretion by the advisers. If a public servant wishes to remain effective as a ministerial adviser he must place constraints upon himself when dealing with the press and the public. An adviser who is tempted to publicise his disagreement with the ideas of his government becomes in effect a political opponent and cannot possibly maintain that government's confidence. He will probably become isolated in the decision-making process and the government will turn to other advisers — who may not be as competent.

There are a number of considerations however which suggest that this consideration should not dictate the final judgment on the question.

(a) A scientist may believe that despite the need for him to retain his Minister's confidence, the public interest and his responsibility to this as a scientist and a citizen, require him to voice his view in public. This may not be a frequent occurrence, yet it could happen.

A scientist may for example know that a certain vaccine used by the health authorities contains impurities which are dangerous to human health. The release of this information is clearly potentially damaging to the Minister involved who thus decides against disclosure, at least for a while. Despite the damage his action will cause to his work relationship the individual scientist sees himself as obliged to reveal the information. The public interest in this situation can be seen to be served by disclosure.

(b) The nature of scientific research indicates that scientists may be in a different position from the majority of civil servants. The scientific method demands that information be freely available, that findings be open to criticism, and that individuals be able to express their opinions on scientific matters. This same method requires of scientists an objectivity of approach to their findings, an objectivity which is of the essence of their role as scientific advisers.⁴² The scientific method may on occasions require an individual scientist to publicly criticise government policy. Yet the same method will demand that he has an objective approach to scientific matters, especially within his own area of expertise. This objectivity enables him to act as a competent adviser to the Minister on scientific matters. Thus public criticism of government policy by a scientist need not disqualify him from being an able adviser to that government.

23 *New Zealand at the Turning Point: Report of the Task Force on Economic and Social Planning* (Wellington, 1976) 381.

24 Cf. H. Offenberger "The Scientist's Dilemma — an experimental approach" (1976) 33 *New Zealand Science Review* 117, 118-119.

(c) In New Zealand the state is the largest single employer of scientists. In some areas most, if not all, of the experts in the field could well be employed within the DSIR and other government departments. The cost of requiring all these people to refrain from critical comment on their area of expertise, when their comment may be the only one available, does not seem to be in the public interest. A completely unified official line may not be a desirable thing in such a situation, even if a free approach may cause some ministerial concern.

Thus when considering the general issue of the need for restraint arising from the involvement of the scientist with government policy it can again be seen that a greater public interest can often be served by allowing the scientist to comment in public, and perhaps critically, on areas within his special competence and to release information the Minister might wish withheld. Can freedom of information legislation protect this interest?

3. *Special areas of sensitivity*

In addition to the fairly general outlines of situations where individual scientists ought to feel constrained from speaking out publicly the DSIR has indicated specific areas where a departmental approach is in the department's best interest.

It designated four "special" topics:²⁵ one of these, that of the potato cyst nematode has now been cancelled, due to a resolution of the scientific conflict in the area. The others remain. They are:

1. The Beech Forest Utilisation Scheme;
2. Halo methanes in the atmosphere;
3. Nuclear power.

In regard to these topics comment was only to come from authorised spokesmen. A need was seen for a departmental view to avoid confusing the public, in contrast to an earlier ruling that there was no one departmental view on any scientific question.²⁶

In these three areas it was felt that the public interest would best be served by having only official spokesmen giving their views. This would be less confusing for the public, and perhaps less embarrassing for the government.

These designations however seem to have fallen from favour. The Royal Commission on Nuclear Power, constituted in 1976, received many submissions from individual scientists from within the DSIR, and the beech forest issue also has seen a general opening up of discussion following pressure from environmental groups. Differing scientific points of view are now being heard.

Such public discussion would seem to be in the public interest, even though the public may become a little confused. Public confusion may not even be undesirable. When all sides of a complex issue are considered a degree of confusion may be unavoidable and is to be preferred to the simple view obtained by a one-sided approach to an issue. Thus again with regard to these special topics the public interest can be seen as being served by a greater openness. How can this be achieved?

25 Cf. The Hon. Mr Gandar, M.P., Minister of Science, *supra* n. 16, at p. 128.

26 J. D. Atkinson, *op. cit.*, 199-202.

4. *The Official Secrets Act 1951*

For the scientist in the employment of the government the Official Secrets Act 1951 forms the back-drop to all issues of confidentiality and the release of information. By itself the significance of the Act is limited. It prohibits the unauthorised²⁷ release of information gained while working for the state, and reinforces the prohibition with criminal sanctions. The central question to be answered is what constitutes an unauthorised release of information. In light of the discussion of policy within the DSIR we can see that a wide range of statements by scientists could fall within the category of unauthorised communication. An opinion critical of the government of the day, which relates to the scientist's own area of expertise and therefore likely to contain information gained in the course of his employment, would, following the policy of the DSIR Newsletter, be an unauthorised communication. The DSIR scientist would seem to have a very small area of implied authorisation, and a potentially wide area where the sanctions of the Official Secrets Act 1951 could become relevant.

It is uncertain whether this approach fosters the valid interest the public has in disclosure of information, or whether it tends to favour excessive confidentiality and secrecy. The Report of the Task Force²⁸ commented in general terms on the role of the Act. It said:²⁹

Clearly there is a strong case for lessening the extent of secrecy in government. There is a fine distinction between secrecy and poor co-ordination, and we encountered several examples of the right hand being unaware of what the left hand was doing . . . The Official Secrets Act itself is thus tending to be turned against the democracy it was designed to protect.

This Report then accepts that the public interest may not be being served by an Act which is noted for the broad jurisdiction it has in this area.

The Franks Committee³⁰ in England had a narrower task. Its job was to review the "part which the criminal law should play in the protection of official information".³¹ It found that the interest the state had in protecting such information would be more acceptably protected by provisions much narrower in scope. It noted the lack of confidence in the Official Secrets Act 1911 (U.K.); and the potential abuse the Act could be put to, since it applied to all information and could therefore be used to protect the political interest of the government of the day, rather than the interests of the state and of the public.³² The Committee felt that a change in section 2 of the English Act was essential.

Section 6 of the New Zealand Act is virtually identical to section 2 of the English Act, and the conclusions reached by the English Committee would seem to apply equally well to the New Zealand situation. There is in New Zealand a conflict between the potential use of the Official Secrets Act 1951 and the public interest in openness in government. With the apparent narrowness of implied authorisation in the DSIR the possible scope of the Official Secrets Act 1951 is correspondingly wider.

27 Section 6(1)(a) of the Official Secrets Act 1951.

28 *Supra* n. 23.

30 Franks Committee *Report of the Departmental Committee on Section 2 of the Official Secrets Act 1911* (HMSO 1972; Cmnd 5104).

31 *Ibid.*, para. 14, p. 12.

29 *Ibid.*, 380-381.

32 *Ibid.*, para. 41, pp. 21-22.

III. POSSIBLE RESOLUTIONS OF THE CONFLICT OF INTEREST

Consideration has so far been given to the various situations in the work of the DSIR scientist where it has been decided that there exists a need for restraint on the publication of information and opinion. It has also been shown that in each situation a greater public interest may exist in allowing the individual scientist to publish and comment without restraint. This public interest has been seen to include that of the individual scientist in responding to his responsibility to the community at large.

The question remaining to be answered is whether freedom of information legislation can protect this greater public interest. For the scientist working at the DSIR there are two situations in which he may come into conflict with the departmental policy on confidentiality.

First, he may in the course of his work come across information which the department regards as confidential. The scientist may feel he has a responsibility to the public at large to make this known.

A scientist who discovered that vaccines in everyday use contain harmful impurities may well feel that this information should be made public. The government of the day might feel this is too sensitive an issue, and a potentially damaging one politically, and decline to release the information.

Secondly, a more common occasion of conflict could occur as regards the responsibility of the scientist to make an opinion known in a public debate, even though this may conflict with the view of the government of the day.

A. The Scientists' Approach

Faced with the dilemma in which an individual scientist may find himself when the demands of his employer and his own conscience conflict, various groups of scientists have sought to resolve this conflict by independent arbitration. Both the New Zealand Association of Scientists and the American Academy for the Advancement of Science have advocated the establishment of a tribunal to resolve such disputes. H. Offenberger writes:³³

At present there is no institution to which a dissentient scientist can appeal for a fair, neutral hearing whether he is a public servant or works in private enterprise. Nor, should he prove right, is there an assurance that the information he considers vital can be released to the public.

This is the background to the Association's demand for a tribunal, a neutral, impartial repository for the information of the dissentient scientist with power to adjudicate in cases involving human life, health, and the environment. Should it rule that the public interest is best served by publication, then it should have the power to do so.

The American Academy for the Advancement of Science spoke of the need for some kind of due process for the resolution of such disputes.³⁴

The establishment of such a tribunal presents many difficulties. From where will its power come? How can it compel disclosure? Will it have any sanctions available to it to give force to its findings? Could these difficulties be resolved by freedom of information legislation?

33 "The Case for a Special Tribunal" (1977) 34 New Zealand Science Review 61, 64.

34 Edsall "Scientific Freedom and Responsibility" (1975) 188 Science 687, 691.

B. Legislative Solution

Freedom of information legislation in general terms gives the public the right to information held by the government, subject to the exclusion of certain categories of information from its provisions. Unless the information can be shown to be in the exempt category it becomes available as of right to the citizen. In proposed United Kingdom legislation³⁵ there are exemptions covering such things as Cabinet minutes, military information, police information, external security information. Australian proposals similarly exempt certain classes of information from disclosure.³⁶ Freedom of information legislation in New Zealand is likely to follow similar lines.

1. Non-exempt information

The scientist may find the information he wishes to make public is not within an exempt category. The existence of legislation recognising the public right to such information would, it is suggested, enable the scientist to release this information from within, without the stimulus of an external inquiry.

The existence of a general right to non-classified information as created by freedom of information legislation can therefore be seen to give the scientist the right to release such information when he sees that to be in the public interest.

2. Exempt information

The information however may be classified as exempt from disclosure provisions. What protection can freedom of information provisions give the public interest in disclosure in such a situation?

The exemptions in such legislation are based on a presumption that the release of information in the exempt category is not in the public interest. Thus appeals against classification are to be directed to the question whether the information is properly classified, not whether the public interest may be served by its disclosure. The proposal contained in paragraph 21.3 of the Australian report³⁷ clearly follows this approach. The scientist there, faced with information in an exempt category, but which nevertheless he feels should be disclosed in the public interest, finds no real remedy in such legislation.

It could therefore be submitted that freedom of information legislation should include a special right of appeal. This would be on the grounds that notwithstanding the fact that the information is in an exempt category, it is nevertheless in the public interest to release the information. Such an appeal, it could be argued, should be made to the judges, who have shown an increasing willingness to arbitrate in such cases in recent years. The cases of *Conway v. Rimmer*³⁸ and *Attorney-General v. Jonathan Cape Ltd.*³⁹ evidence this new awareness of the courts. Such an appeal would enable the claim of the scientist to be heard, while at the same time preserving the confidentiality of the documents pending the decision of the court. The court is the most suitable authority to determine questions of the public interest. It has the powers which the suggested tribunal would not have.

35 *Supra* n. 2.

36 Report of Interdepartmental Committee *Policy Proposals for Freedom of Information Legislation* (Canberra, 1976), para. 2.14, pp. 5-7.

37 *Ibid.*, 86.

38 [1968] A.C. 910.

39 [1976] Q.B. 752.

This suggestion however faces a number of obstacles before it may be effectively included in freedom of information legislation.

First, the courts themselves have indicated that in certain very sensitive areas they are not competent to review the decision of politicians. The Australian proposals, when considering the exemptions based on the presumption that disclosure would be contrary to the public interest in that it would prejudice security, defence and international relations, referred to the awareness of the courts of limitations on what they see as proper areas for judicial review. Paragraph 6.14 comments:

The Committee has noted that, in considering the production of documents in judicial proceedings, the courts have expressed the view that these matters are matters of which Ministers have a special knowledge and that they are not matters which the courts are generally competent to review.

This finding would seem to limit greatly the possible availability of an appeal based on the public interest in disclosure.

Secondly, in considering the judgment in *Attorney-General v. Jonathan Cape Ltd*, the *Report of the Committee of Privy Counsellors on Ministerial Memoirs*,⁴⁰ the Radcliffe Report, indicated a certain dissatisfaction with the case. The most relevant view expressed with regard to the possibility of an appeal to the court of the type indicated is found in paragraph 66. The comment on the suitability of a judge to decide on such issues was:

The relevant considerations are political and administrative, and if enforcement is to be looked for at all they must either be applied according to a generally received rule, such as arbitrary time limit, or according to the opinions of persons whose experience has made them more intimately familiar with the field.

It seems likely that a similar attitude would be held by the lawmakers in New Zealand.

The possibilities then for the courts to fill the role of the tribunal suggested by the scientists must be accepted as being limited. If these limitations were accepted, however, freedom of information legislation may well be able to protect the interests of the individual scientist and of the public at large in cases of conflict over the release of information.

3. *The right to criticise*

Some conflicts involve the airing of opinion and not of restricted information. Can freedom of information legislation help the scientist here?

The Australian report suggests that scientific opinion may be of a different nature from more normal policy advice given by civil servants. In speaking of the exemption from disclosure of internal working documents, the report indicates that this should not extend to scientific reports even if these are given in the form of opinions.⁴¹ These reports are to be considered more as factual documents. This recommendation supports the distinction made earlier between scientific advice and policy advice.⁴² Thus it can be seen that such a finding allows scientists to voice their opinions in public even if they go counter to government policy.

40 HMSO 1976, Cmnd. 6386.

41 *Ibid.*, para. 10.13, p. 45.

42 *Ante* p. 455 et. seq.

It is suggested that this is too simplistic a view of the issues involved. A scientist who of his own accord makes statements criticising government policy will still find himself open to the dangers suggested in the Task Force report.⁴³ Such factors as the need for an adviser to be seen as being impartial will remain important within the civil service even when freedom of information legislation is passed. Legislation therefore cannot be expected to have as its role the protection of the public interest in this area of the freedom of scientists to voice their opinions in public, if their action is likely to affect their ability to advise the Minister on scientific questions. In sensitive political areas like environmental issues, such a consideration becomes especially relevant.

C. An Administrative Approach

There remains however a public interest in scientists' giving voice to their opinions in public. The state in New Zealand employs a large number of scientists. They are often the experts in their fields. Their opinions and views are precisely the ones needed by the public to form a balanced view of the question, to be able to intelligently assess government policies. How can this interest be protected? Recent activity of DSIR scientists gives a lead in this area.

Individual scientists from the DSIR have been prominent in giving submissions to the Royal Commission on Nuclear Power. Here the structure adopted by the government for decision-making, the Royal Commission, permits scientists to present their views to the public in this sensitive matter. They may be very forthright in such a situation, indicating clearly what they see as the conclusions to be drawn from scientific evidence.

In regard to the utilisation of the beech forest resource, public controversy delayed a final decision on this matter. Since this postponement, DSIR scientists have undertaken studies which suggest quite different results from those presented by the Forest Service. This difference of findings was made public in a DSIR Newsletter and again in an environmental paper.⁴⁴ Publication of such findings is clearly in the public interest, enabling the public to make an intelligent assessment of the issues involved.

These instances point to the importance of the structure of the decision-making process in the protection of open scientific debate. Where the method adopted to arrive at a policy decision involves public discussion of the issues then the scientist can contribute to this without jeopardising his position in the decision-making structure.

Such a method of arriving at a decision enables the government scientist to comment publicly before government policy is decided on. In this way criteria which earlier indicated the need for him to remain silent can effectively be avoided. These criteria were aimed at enabling the scientist to retain his position in the decision-making structure. Here the scientist may express his opinion without being seen to be criticising government policy since no such policy would yet exist. In this

43 *Supra* n. 23.

44 *Beechleaves* Journal of Native Forests Action Council, Nelson, New Zealand (1977) No. 4-5, p. 8.

situation public comment cannot be seen to prejudice his position as a government adviser.

Such statutory requirements as those in section 6 of the Forests Amendment Act 1976⁴⁵ may provide scientists with the means to fulfil their responsibility to the public just as much as freedom of information legislation would. Creating a structure of decision-making which necessitates public involvement, such legislation enables government scientists to contribute to the public debate while retaining their ability to act as advisers to the government on scientific matters.

IV. CONCLUSION

The statutory role of the DSIR requires it to be a very "open" department. Yet at the same time its role as government adviser places constraints on this openness. In this paper, it has been indicated that the public interest in the freedom of the individual scientist to speak out is not being adequately recognised in the expression of these constraints. We have sought to answer the question — can freedom of information legislation protect this public interest? — and found that legislation cannot completely do this.

The examination of the position of the scientist in the DSIR indicates that freedom of information legislation by itself could not protect the interest the public has in the free interchange of scientific fact and opinion. Based as it must be on the categorisation into exempt and non-exempt, it would not be expected to solve the problem in all the various situations analysed here. However, if complemented by a more open decision-making process and by some special tribunal, freedom of information legislation would be one way of protecting the interests everyone has in the open interchange of scientific fact and opinion.

45 Section 6 adds the following subsection to section 20 of the Forests Act 1949:

(4) Before any proposal that a Proclamation under this section be revoked or that any area included in a forest sanctuary be excluded therefrom is considered, the Minister shall cause a notice to be published in some newspaper circulating in the district and at least once in each of 4 daily newspapers, one of which shall be published in Auckland, one in Wellington, one in Christchurch, and one in Dunedin, and calling on any person or organisation to set forth in writing any objections to the proposal and the grounds for the objections, and to send the written objections to the Minister within 3 months after the date of the first publication of the notice. The Minister shall give full consideration to all such objections that are duly made under this subsection.