

E 31AC

Report 40

Review of the
Official Information Act 1982

October 1997
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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7 October 1997

Dear Minister

I am pleased to submit to you Report 40 of the Law Commission, *Review of the Official Information Act 1982*, in response to your reference to report on certain aspects of the Act. The Commission has taken the opportunity to comment on certain issues affecting the operation of the Act which fall outside the terms of reference, but which are of major importance.

We are satisfied that, in general, the Act works relatively effectively to further its stated purposes. Since 1982 there has been a substantial increase in the availability of official information. Public participation in the making of laws and policies, and the accountability of Ministers and officials, has been enhanced.

This report identifies a number of factors which inhibit the effective operation of the Act, and as a result the wider availability of official information.

The Commission recommends the enactment of a number of specified amendments to the Official Information Act 1982, the Local Government Official Information and Meetings Act 1987, and the Ombudsmen Act 1975. Also of importance are administrative steps to ensure that the legislation operates more smoothly. We are confident that these measures will ensure that the Official Information Act continues to serve as a model for freedom of information legislation.

Yours sincerely

The Hon Justice Baragwanath
President

The Hon Douglas Graham
Minister of Justice
Parliament House
Wellington

Preface

THIS REPORT RESPONDS TO A REFERENCE from the Minister of Justice to report on certain aspects of the Official Information Act 1982. It also addresses other issues not directly within the terms of reference but which affect the operation of the Act.

The Law Commission received the reference in 1992, and in December 1993 circulated a draft report to a wide range of public sector organisations and bodies who use the Act to request official information. In 1994, with the approval of the Minister of Justice, the Commission decided to delay publication of its final report. The decision was motivated in part by the Commission's competing work commitments; but also by a recognition that publication in the period before New Zealand's first MMP election might cause the report to date prematurely in light of subsequent political and administrative developments. In the executive summary, and more fully in chapter 1, we comment on how changes in government over the past 5 years have affected the use of the Act, and enhanced its importance as a major instrument in laying the affairs of government open to public scrutiny.

The major problems with the Act and its operation are:

- the burden caused by large and broadly defined requests,
- tardiness in responding to requests,
- resistance by agencies outside the core state sector, and
- the absence of a co-ordinated approach to supervision, compliance, policy advice and education regarding the Act and other information issues.

Neither these problems, nor the terms of reference, bring into question the underlying principles of the Act.

The executive summary to this report contains the Commission's conclusions and recommendations. We have divided these into two groups: first, those which respond to the major problems we have identified and therefore, in the Commission's view, warrant immediate consideration. The second group of conclusions and recommendations involve fine-tuning of the Act and are less urgent given our overall conclusion that the Act generally achieves its stated purposes. Our conclusions and recommendations emphasise the importance of administrative as well as legislative responses to the problems we have identified.

Structure of the report

In chapter 1 of the report, we comment on aspects of the changing context in which the Official Information Act operates. We also discuss the present administration of the Act, and suggest how this might be improved.

The terms of reference from the Minister of Justice to the Law Commission are set out in appendix A. Four of the terms of reference, discussed in chapters 2–5 respectively, relate to the *initial processes* agencies use in responding to requests for official information:

- Are the provisions of ss 12(2) and 18(f)¹ adequate to deal with broadly defined requests and requests for large amounts of information?
- Should an agency be able to charge for the time spent and expenses incurred in deciding whether to release information pursuant to a request?
- Are the time limits in ss 15, 15A and 29A for the making of decisions by agencies, and for their responding to the Ombudsmen's requirements, appropriate? The time limits require response as soon as reasonably practicable, with a maximum of 20 working days (subject to extension in certain cases).
- Are the rules set out in s 15(4) and (5), relating to decisions by officials and Ministers on requests for information, appropriate? Those provisions require the chief executive of a department, or an authorised officer, to make the decision (if the request is not transferred), and state that the decision-maker may consult over the proposed decision.

Three of the terms of reference, discussed in chapters 6–8, concern some of the *good reasons* stated in the Act for withholding official information:

- How are the interests of effective government and good administration, as reflected in s 9(2)(f) and (g), to be appropriately protected in the context of the principle and purposes supporting availability? Sections 9(2)(f)(iv) and

¹ These provisions require that a request specify the information with due particularity, and allow refusal of a request if the information cannot be made available without substantial collation or research.

9(2)(g)(i) relate to the confidentiality of advice and the free and frank expression of opinion between Ministers and officials. Is it possible to define more precisely the interests that these provisions seek to protect?

- Should the special rules in ss 6(a)–(b), 7, 10 and 31 governing the treatment of some or all classes of diplomatic documents be retained?
- Should the administrative reasons for refusing to disclose official information in s 18(d)–(f)² apply equally to the disclosure of personal information?

The final two terms of reference, discussed in chapters 9 and 10, concern the *review process*:

- What obligations should a decision-maker have with respect to a request for information, particularly in relation to a requirement by an Ombudsman for information during the course of an investigation?
- How appropriate is the Order in Council procedure for the veto of an Ombudsman's recommendation for the release of information?

Chapter 10 also discusses enforcement of the public duty to comply with an Ombudsman's recommendation, where the veto procedure has not been followed.

Most of the issues arising from the terms of reference relate equally to the parallel provisions of the Local Government Official Information and Meetings Act 1987, and this has been taken into consideration. To simplify the discussion this report generally mentions only the provisions of the Official Information Act. We have also commented, with the agreement of the Privacy Commissioner, on provisions in the Privacy Act 1993 which parallel provisions of the Official Information Act, particularly the procedural provisions which deal with requests. The Commission is aware, however, that the Commissioner may wish to make his own recommendations concerning these provisions in his current review of the Privacy Act. The table in appendix J sets out the corresponding provisions of the three Acts.

² Those grounds concern availability or imminent availability of the information to the public, the non-existence of the document in question, and substantial collusion or research.

For convenience we have generally used the word *agency* throughout the report to refer to the Minister, department, organisation or local authority involved.

The Commission hopes that its report will be of use as a reference work for those who use the Act either as requesters or as the holders of official information.

The Commission acknowledges the help of many people, in both the public and the private sectors, who assisted or participated in the review. The co-operation and help of the Office of the Ombudsman is especially noted. We are grateful to the Hon David Caygill, a former Minister of the Crown, and Nadja Tollemache OBE, a former Ombudsman, for their invaluable comments on the final draft of this report. We also acknowledge the work of the Hon Sir Kenneth Keith, who was responsible for the review during his time as President of the Law Commission, and who prepared the first draft of the report.

Executive summary

The right to information has become one of the fundamental rights of the twentieth century citizen. . . . All citizens must be in a position where they can understand and assess the policies followed by governments.³

E1 **W**E ARE OFTEN SAID TO LIVE in an information age. Access to information about government, in the late twentieth century, is a prerequisite to effective democracy and participation in it. In New Zealand, the Official Information Act 1982 has for 15 years been the principal means by which the public has secured access to this information.

E2 This report responds to a reference from the Minister of Justice to report on certain aspects of the Act, and comments on other important issues outside the terms of reference.

E3 We are satisfied that the Act generally achieves its stated purposes. This report identifies, however, a number of factors which inhibit the effective operation of the Act and as a result the wider availability of official information.

E4 The major problems with the Act and its operation are:

- the burden caused by large and broadly defined requests,
- tardiness in responding to requests,
- resistance by agencies outside the core state sector, and
- the absence of a co-ordinated approach to supervision, compliance, policy advice and education regarding the Act and other information issues.

Neither these problems, nor the terms of reference, bring into question the underlying principles of the Act.

THE PRINCIPLE: OPEN GOVERNMENT

E5 There have been continuing calls both in New Zealand and elsewhere for government to be more accountable to citizens. In our recent report, *Crown Liability and Judicial Immunity: A response to Baigent's case and Harvey v Derrick* (NZLC R37, 1997), we con-

³ Jospin, opening address to International Statistical Institute conference, Paris, 1989, supplied by Len Cook, Government Statistician.

firmed the principle that the state is under the law. But amenability to suit is only one way in which the state may be held accountable to the citizen. Another is to require the activities of government to be open to public scrutiny. The widespread acceptance of the principle of open government in New Zealand is largely attributable to the Official Information Act.

- E6 The Act recognises open government through the principle that official information is to be made available unless there is good reason for withholding it (s 5). That principle is supported by s 4 of the Act:

4 Purposes

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

- (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 privacy.

- E7 The principle of open government is further supported, in a practical sense, by explicit statutory processes both for making the original decisions about the availability of official information and for reviewing those decisions.⁴

- E8 The Act applies to a very wide range of public bodies including Ministers, government departments, and other listed bodies established to carry out public functions (see s 2(2)). Any "official information" held by these bodies is open to request.⁵

⁴ Sections 12–19, 24–27, and 28–34.

⁵ The definition in s 2 is extensive: to summarise, "official information" means any information "held" by departments, Ministers in their official capacity, or organisations. Thus information supplied directly by one Minister to another without the involvement of officials, is official information if held in the latter Minister's official capacity, although there may of course be reasons for withholding the information under the Act. For convenience we have generally used the word *agency* throughout the report to refer to the Minister, department, organisation or local authority involved.

THE CHANGING ENVIRONMENT

- E9 The Act has made the open government principle central to the ethos of public administration. In the core public sector there is substantial and increasing recognition that, in most cases, official information will be released. In many cases the only issue is the timing of release. It is recognised that the Crown has no monopoly over official information – it belongs instead to the public.
- E10 The Act now operates in a wider context of statutory and administrative provisions which have further enhanced the principle of openness. In 1987 the Local Government Official Information and Meetings Act extended the official information regime to local government. In 1993 the rights of access to personal information originally contained in Part IV of the Official Information Act were carried across to the Privacy Act, and were made available in respect of information held by any agency, whether in the public or the private sector. The Public Finance Act 1989 and the Fiscal Responsibility Act 1994 now ensure that significant information about public administration and the economy is made public as a matter of course, without recourse to the Official Information Act. The Cabinet's recent acceptance of a policy framework developed by the State Services Commission in respect of government-held information generally, will ensure a continuation of this trend by administrative means.⁶
- E11 Other changes have cast a different perspective on the Official Information Act, while also reinforcing its importance. Underlying the reshaping (and reduction) of the state from the mid-1980s was the belief that the range of state activity was too wide,⁷ and more particularly that the state was performing certain functions to which it was not suited. The commercialisation and privatisation of these functions have resulted in a sharp distinction between core Crown functions (including taxation, foreign affairs, defence, and policing) and others which are less clearly "public" functions and are carried out by the Crown, another public body, or the private sector.

⁶ We explore this further in chapters 1 and 3 (paras 52–55 and 121–123).

⁷ There was until the mid-1980s a tradition of governmental involvement in many aspects of life including commercial operations, transport, and utilities such as electricity and telecommunications: Taylor, "The Laws of New Zealand and Australia" in Bell and Bradley (eds) *Governmental Liability: A Comparative Study* (UK National Committee of Comparative Law, London, 1991).

COMPETING INTERESTS

- E12 The Official Information Act continues to apply to state-owned enterprises and other Crown entities established as a result of these reforms,⁸ and also, by virtue of s 2(5), to those in the private sector performing functions contracted out by the Crown and public bodies.⁹ The principle of open government necessarily operates somewhat differently in those contexts, as opposed to the core state sector. The incorporating statutes of the new bodies impose obligations to act in a commercial manner, and some of them have perceived this as inconsistent with, and ultimately overriding, their obligations with regard to official information (see chapter 1, paras 5–11). Many public servants have now left those bodies and have been replaced by managers from the private sector often selected to introduce business practices and a commercial culture. This has resulted in a decline in knowledge within these bodies about the Official Information Act and understanding of its practical application.
- E13 Throughout the changes to the public sector one thing has remained constant: reduction in the size of the state has not reduced calls for the state to continue to be accountable to the citizen, either in respect of those services which the Crown still provides, or in those areas in which it has only regulatory or supervisory responsibility. If anything, the call for accountability is louder than ever.
- E14 In the core state sector, the wide acceptance of the Act has placed a burden on Ministers and departments. The Minister's reference to the Law Commission was prompted, in part, by a burgeoning use of the Act to obtain large amounts of information concerning significant and difficult matters of policy development. Some Ministers were concerned about the impact of the Act on the quality of advice received from officials. More recently the proliferation of political parties and the advent of proportional representation have increased

⁸ The State-Owned Enterprises Act 1986, Crown Research Institutes Act 1992, and Health and Disability Services Act 1993 established separate bodies, substantially distinct from the Crown, with greater autonomy in the performance of their functions than their predecessors.

⁹ It no longer applies where the function has been privatised; but note the exception in s 41C of the Penal Institutions Act 1954 which provides that for the purposes of the Ombudsmen Act 1975 and the Official Information Act, every contract penal institution "shall be deemed to be part of the Department of Justice".

the use of the Act by members of Parliament and parliamentary research units as a means of securing information.¹⁰

- E15 Increased use of the Act has resulted in friction between those requesters who complain that official information is disclosed reluctantly, belatedly, or not at all, and the holders of information concerned about the time and cost incurred in dealing with requests. This friction may be exacerbated by agencies failing to use the Act as flexibly as was intended, for example, by imposing conditions on the use of information instead of refusing a request altogether.
- E16 The work of the Ombudsmen under the Official Information Act attracts general support. But there is uncertainty about how the public duty¹¹ to comply with their recommendations is to be enforced when an agency simply ignores them, as has occurred recently.

THE COALITION AGREEMENT

- E17 This report takes account of the statement in Schedule A of the Coalition agreement of the present government, that the Official Information Act should be reviewed to increase the availability and transparency of official documents.¹² The Law Commission's conclusions and recommendations are consistent with the sentiment expressed in that statement.

IMPACT ON EXECUTIVE GOVERNMENT

- E18 Since 1982 there has been a fundamental change in attitudes to the availability of official information. Ministers and officials have learned to live with much greater openness. The assumption that policy advice will eventually be released under the Act has in our view improved the quality and transparency of that advice.¹³
- E19 The report acknowledges the impact which the Act can have on the policy process and the workloads of some officials and

¹⁰ This has coincided with a substantial increase in the use of parliamentary questions, the administrative impact of which is similar to the use of the Official Information Act.

¹¹ Under s 32 of the Act – see chapter 10.

¹² Statement of Coalition Government Policy, 11 December 1996, Policy Area: State Services.

¹³ See further, chapter 6.

ministerial staff. The Commission considers that while changes in the administration of the Act and to some of its procedural provisions are capable of easing the administrative burden, the withholding provisions of the Act currently strike the correct balance between the principle of openness and the interests of effective government (see further chapter 6). Most criticisms of the Act are relatively specific and turn upon the tensions arising from competing – sometimes incompatible – interests.

MAJOR CONCLUSIONS AND RECOMMENDATIONS

- E20 We have divided our recommendations and conclusions into two groups: those which respond to the major problems we have identified, and therefore warrant immediate consideration to improve the operation of the Act; and those whose implementation is less urgent. We now summarise our conclusions and recommendations; these are restated in each chapter along with our proposed amendments to provisions in the Act.

Large and broadly defined requests

- E21 In relation to large and broadly defined requests, the Law Commission recommends that ss 12 and 13 of the Act be amended to encourage dialogue between an agency holding information and the requester. This could include discussion of the terms of the request, any problems the request poses for the agency, and the form in which, or conditions on which, the agency intends to release the information. The Act should expressly allow a requester to specify, and an agency to have regard to, the purpose for which the information is sought; but also prevent an agency from relying on a failure to specify a purpose as a ground for refusing the request (chapter 2, paras 65–83).
- E22 Section 18(f) of the Act permits an agency to refuse a request where the information requested “cannot be made available without substantial collation or research”. This provision should be repealed and replaced by a wider provision (s 18A) which would incorporate the current s 18(f), but also:
- require an agency to consider, before refusing a request under this provision, whether fixing a charge for the information requested, or extending the time limit for responding to the request, might enable the request to be granted;
 - allow an agency to treat numerous requests about similar subject matter, received simultaneously or in short succession

from the same person, as a single request for the purposes of refusing a request under this provision.
(See chapter 2, paras 84–108)

- E23 The Ombudsmen’s guidelines should be updated to expressly state that the new s 18A covers the process of determining what information falls within the scope of the request. Finally, a new paragraph should be inserted into s 18 to allow an agency to refuse a repeat request for information to which the requester has already been refused access, provided no reasonable grounds exist for that person to request the information again (chapter 2, paras 92, 104–108).

Charging provisions

- E24 The Law Commission does not propose any change to the charging provisions in s 15 of the Act. In particular, the Act should not allow agencies to charge for time and expenses incurred in deciding whether or not to release official information. Each decision under the Act ought to add to agencies’ institutional capacity to deal more efficiently with future requests, as the body of relevant jurisprudence increases: as no equivalent benefit is received by the requester, on principle the agency and not the requester should bear that cost (chapter 3, paras 129–137).
- E25 The Act does not require amendment to enable agencies undertaking commercial activities for profit to charge in any different way from other agencies. The test should remain one of reasonableness, as qualified by s 15(2). Useful guidance is provided by the Department of Justice’s 1992 guidelines, which should be updated to conform with the more recent policy framework on government-held information. The Law Commission does not support any change to the practice of not charging for requests by members of Parliament and parliamentary research units. Problems in this area are best addressed through administrative measures and the provisions relating to large and broadly defined requests (chapter 3, paras 138–149).

Time limits

- E26 The Law Commission recommends that the government should review the 20 working-day time limit in s 15(1) in 3 years, with a view to reducing it to 15 working days. This would recognise that much information is now, or should become, more

readily retrievable than when the 20 working-day limit was set,¹⁴ because of developments in information technology and information management. In the meantime, the government should adopt a 3-year strategy aimed at improving the ability of all agencies to respond to requests under the Act through better information technology and management (chapter 4, paras 163–173).

- E27 The Law Commission endorses the Ombudsmen’s emphasis on agencies’ obligation to respond to requests “as soon as reasonably practicable”. This, and not the 20 working-day time limit, is their principal obligation as regards timeliness (chapter 4, paras 155–158).
- E28 In relation to other provisions, the Law Commission recommends that:
- the complexity of issues raised by the request should be a ground for extending the time limit under s 15A(1);
 - a decision to transfer a request under s 14, and failure to comply with the time limit in that section, should be grounds for complaint to the Ombudsmen under s 28(2) of the Act; and
 - section 30(1)(a) should be amended to allow the Ombudsmen to make recommendations following a complaint concerning transfer of a request.
- (See chapter 4, paras 177–189)

Enforcement

- E29 The Law Commission does not recommend any change to the “Cabinet veto” – the power of the Governor-General in Council under s 32 to direct non-compliance with an Ombudsman’s recommendation (chapter 10, paras 345–359).
- E30 Section 32 should, however, stipulate that an agency seeking judicial review of an Ombudsman’s recommendation to release information must commence proceedings within 20 working days of the recommendation being made. Where an agency ignores the recommendation without having obtained a Cabinet veto, the Solicitor-General should, as a matter of constitutional practice, enforce the public duty upon the agency to comply with the recommendation (chapter 10, paras 364–382).

¹⁴ Under the Official Information Amendment Act 1987.

Co-ordinated administration of the Act

- E31 The Law Commission recommends that, consistent with the Coalition agreement:
- The Ministry of Justice should be given responsibility for ensuring a more co-ordinated and systematic approach to the functions of oversight, compliance, policy review, and education in relation to the Act.
 - Adequate resources should be provided to existing institutions (including the Office of the Ombudsmen and Ministry of Justice) to improve the administration and understanding of the Act.
 - The Ombudsmen's work in publishing guidelines and case notes, and holding seminars and training sessions, is essential to improving the operation of the Act, and adequate funds should be available for these activities.

(See chapter 1, paras 37–50)

OTHER CONCLUSIONS AND RECOMMENDATIONS

Consultation

- E32 Section 15(4) – relating to the making of decisions on requests by chief executives or their delegates – is redundant and should be repealed. Section 15(5) should be broadened beyond departments to cover consultation by all agencies which are subject to the Act. With the suggested repeal of s 15(4), the reference to that subsection in the opening words of s 15(5) should be deleted (chapter 5, paras 195–205).
- E33 The Act and current practice under it adequately protect the rights and interests of third parties (chapter 5, paras 206–212).

Good reasons for withholding

- E34 Section 9(2)(f) and (g) adequately protect internal processes of government and do not require amendment. The interests recognised in these provisions (including the protection of opinions to Ministers or agencies under s 9(2)(g)(i), which was raised in the course of our consultations) should continue to be the subject of an explicitly stated good reason for withholding official information. Administrative measures are preferable to legislative change in attempting to resolve difficulties with s 9(2)(f) and (g) (chapter 6, paras 245–254).

- E35 Single person bodies such as the Commissioner for Children and the Māori Trustee, which are subject to the Act, currently fall outside the scope of s 9(2)(g)(i). The definition of “member” in s 2 of the Act should therefore be amended to include single person bodies, so that they may be covered by the existing wording of s 9(2)(g)(i) (chapter 6, paras 258–259).
- E36 In relation to the provisions protecting diplomatic documents, the Law Commission recommends no change to ss 6(a) and (b), 7 and 10 of the Act. However, the government should review the need for s 31(a),¹⁵ which concerns the Prime Minister’s power to issue a certificate preventing the Ombudsmen from recommending the release of information. The government should consider in particular whether subparas (i) and (ii) might be deleted, and para (a) confined to information “likely to prejudice the security of New Zealand”. Section 31(b) should be deleted in any event (chapter 7, paras 272–286).
- E37 The three administrative reasons for refusing requests in s 18(d), (e) and (f) should not be applied to personal information (chapter 8, paras 299–309).

The review process

- E38 Section 28(3) of the Official Information Act, which requires complaints to the Ombudsmen to be in writing, should be repealed to cater for circumstances where this is not immediately possible, and for consistency with other complaints to the Ombudsmen.¹⁶ Oral complaints, to be put in writing as soon as practicable, should be allowed (chapter 9, paras 311–312).

¹⁵ Section 31 states:

Where—

(a) The Prime Minister certifies that the making available of any information would be likely to prejudice—

(i) The security or defence of New Zealand or the international relations of the Government of New Zealand; or

(ii) any interest protected by section 7 of this Act; or

(b) The Attorney-General certifies that the making available of any information would be likely to prejudice the prevention, investigation, or detection of offences—

an Ombudsman shall not recommend that the information be made available, but may recommend that the making available of the information be given further consideration by the appropriate Department or Minister of the Crown or organisation.

¹⁶ See ss 16(1) and (1A) of Ombudsmen Act 1975, which specify that an oral complaint should be put in writing as soon as practicable.

- E39 Section 20 of the Ombudsmen Act, which allows the Attorney-General to certify that disclosure of information might have certain adverse consequences,¹⁷ should be amended to specify that this power may only be exercised by the Attorney-General personally (chapter 9, paras 316–320).
- E40 The Law Commission supports the general approach of s 19(5A)–(5B) of the Ombudsmen Act and s 94(1A)–(1B) of the Privacy Act, both of which came into force in September 1997. These provisions allow the Ombudsmen and Privacy Commissioner to require the supply of information to assess the validity of a claim that the information is privileged. The new provisions should be amended, however, to preserve the privilege against self-incrimination, and legal professional privilege so far as it relates to advice concerning the particular complaint (chapter 9, paras 321–327).
- E41 There is no ‘burden of proof’ on agencies to show good reason for withholding information under s 9 and the Law Commission does not recommend any change in this respect. Nor does it recommend any change to the time limits for complying with requirements of the Ombudsmen during investigation of a complaint. Finally, the Commission does not favour the imposition of a time limit upon the Ombudsmen in investigating official information complaints (chapter 9, paras 328–344).
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¹⁷ These are that disclosure might prejudice the security, defence, or international relations of New Zealand, or the investigation or detection of offences; involve the disclosure of the deliberations of Cabinet; or involve the disclosure of proceedings of Cabinet, or of any committee of Cabinet, relating to matters of a secret or confidential nature, and which would be injurious to the public interest.

1

The changing context of the Official Information Act

OVERVIEW

- 1 **T**HIS CHAPTER COMMENTS on the changing context in which the Act has operated since 1982.¹⁸ Four aspects of that context deserve particular comment:
 - changes in the role and structure of the state;
 - increased consultation in lawmaking and policy making;
 - the introduction of a mixed-member proportional electoral system (MMP); and
 - growing international influences on the making of public policy and law.
- 2 These developments have had a real impact upon requesters and agencies subject to the Act. While the Act itself has undergone relatively little change, its use of general standards, rather than precise rules, has given the Ombudsmen flexibility in making their decisions. The provisions in the Act requiring a judgment of the consequences of releasing information, and sometimes of countervailing public interests, have also allowed the operation of the Act to change with the times.

CHANGES IN THE ROLE AND STRUCTURE OF THE STATE

- 3 The Committee on Official Information (the Danks Committee), charged with reviewing the Official Secrets Act, stated in 1980:

The case for more openness in government is compelling. It rests on the democratic principles of encouraging participation in public affairs and ensuring the accountability of those in office; it also derives from concern for the interests of individuals. A no less important consideration is that the Government requires public understanding and

¹⁸ The movement towards greater openness, which culminated in the enactment of the Official Information Act in 1982, is described in appendix C.

support to get its policies carried out. This can come only from an informed public. These are recognised arguments and are well represented in the literature on the subject. There is in addition a special feature of the New Zealand setting for these arguments to which we wish to draw attention.

New Zealand is a small country. The Government has a pervasive involvement in our everyday national life. This involvement is not only felt, but is also sought, by New Zealanders, who have tended to view successive governments as their agents, and have expected them to act as such. . . . History and circumstances give New Zealanders special reason for wanting to know what their Government is doing and why.¹⁹

- 4 The pervasiveness of government in daily life, noted by the Danks Committee, has lessened in the last 10 years with changes in the role and structure of the state. While privatised bodies are not subject to the Act,²⁰ state-owned enterprises (SOEs), Crown health enterprises (CHEs), and other public bodies set apart from central government, are still subject to public supervision through the Ombudsmen and Official Information Acts.
- 5 In 1990 and 1992 those means of control were confirmed for SOEs by a select committee, executive government, and Parliament: *Report of the State-Owned Enterprises (Ombudsmen and Official Information Acts) Committee*.²¹ The select committee heard arguments for and against the continued application of the Official Information Act to SOEs. Submissions supporting the removal of SOEs from the official information regime emphasised, first, the principal objective of SOEs under s 4 of the State-Owned Enterprises Act 1986: to operate as a successful business. To this end, s 4(a) requires SOEs to be as “profitable and efficient as comparable businesses that are not owned by the Crown”. The submissions argued that the requirement to release information about their activities placed SOEs at a disadvantage compared to their private sector competitors, which are not under similar obligations. Responding to official information requests also imposes transaction costs on SOEs to which, again, private sector competitors are not subject.

¹⁹ Committee on Official Information (hereafter the Danks Committee), *Towards Open Government: General Report* (1980), paras 20–21.

²⁰ But note s 2(5) of the Act which provides that information held by an independent contractor engaged by an agency in its capacity as contractor, is deemed to be held by that agency for the purposes of the Act.

²¹ 1990 AJHR I.22A.

- 6 The second argument against SOEs' being subject to the Official Information Act was that these organisations are already subject to an adequate accountability regime under the State-Owned Enterprises Act 1986. That Act requires SOEs to prepare statements of corporate intent, table financial statements in Parliament, and produce half-yearly and annual reports. Moreover, these requirements are in addition to those on SOEs under the Companies Act. The arguments in this and the preceding paragraph are still voiced by SOEs today.²²
- 7 The select committee, however, reached the following conclusions:
 - 4.2 It is the nature and functions of the SOEs, their role in the community and their ownership, that are the deciding factors in whether they should be covered by the Ombudsmen Act and Official Information Act. SOEs are still owned by the public, and the hybrid nature of their functions continues, together with issues of scale or monopoly.
 - 4.3 The Ombudsmen Act and Official Information Act provide a measure of accountability for the public, particularly on matters that affect individuals and which the other SOE accountability processes do not address, and to remove the jurisdiction of the two Acts would result in a significant loss in public confidence in the Government's oversight of the SOEs.
- 8 The Commission endorses these conclusions. The decision whether certain activities traditionally conducted by central government should remain with central government, be devolved to state-owned enterprises, or privatised, is a political one upon which the Commission expresses no opinion in this report. If the SOE model is chosen for a particular organisation, then public ownership and the performance of certain public functions by that organisation weigh in favour of retaining controls such as the Official Information Act and Ombudsmen Act.²³ Taxpayers have invested in publicly owned entities, and are entitled (subject to the exceptions in the Official Information Act) to know what happens to their investment. Moreover, individual taxpayers (unlike shareholders of a private company) cannot relinquish their investment in the public bodies. All these factors make the analogy with private sector organisations at least incomplete.

²² Baumann, "The Official Information Act in Respect of State-Owned Enterprises", in *The Official Information Act* (Legal Research Foundation, Auckland, 1997), 43.

²³ It may be presumed that Parliament views such controls as desirable, given its power to privatise SOEs and thereby free them from such controls as it sees fit (as indeed it has done, for example, with Telecom and Air New Zealand).

- 9 The arguments of commercial disadvantage submitted by SOEs can be overstated. There are provisions in the Act protecting information concerning the commercial activities of agencies subject to the Act – in particular s 9(2)(b) and (ba), and s 9(2)(i)–(k) – subject to the countervailing public interest. The Ombudsmen have issued guidelines concerning these provisions, and their equivalents in the Local Government Official Information and Meetings Act 1987.²⁴
- 10 Recently, two public sector agencies asked the Ombudsmen whether these provisions would protect information provided by or generated for third party commercial clients during the process of agencies tendering for commercial contracts, and research information generated for third party commercial clients. The Ombudsmen replied that, while unable to give a blanket assurance that all information could be withheld, it seemed likely that the provisions of the Act would provide adequate protection in these circumstances.²⁵
- 11 The Ombudsmen Amendment Act 1992 and the Official Information Amendment Act 1992 extended the application of both principal Acts to subsidiaries of SOEs. By contrast, when local authority trading enterprises (LATEs) were set up (largely on the model of SOEs), the Local Government Official Information and Meetings Act was not made applicable to them. The 1990 select committee recommended that LATEs should also be subject to the Ombudsmen Act and the Local Government Official Information and Meetings Act²⁶ – but this recommendation has not been effected. The Commission considers that the select committee recommendation remains valid.

INCREASED CONSULTATION IN LAWMAKING AND POLICY MAKING

- 12 Public agencies, Parliament through select committees, and the courts, all increasingly emphasise open and consultative processes of policy and decision making. Over 1200 statutory provisions use the word “consult” or its variations. An analysis of a large number of submissions made to the the Royal Commission on Social Policy found that New Zealanders wanted three things: voice, choice,

²⁴ Office of the Ombudsman, Practice Guidelines, No 3 (1993) (see appendix F).

²⁵ Donnelly, “The Official Information Act in the Corporatised World”, in *The Official Information Act* (Legal Research Foundation, Auckland, 1997), 55–56.

²⁶ See paras 4.11 and 5 of the report cited at fn 21.

and safe prospect. Within *voice* they included their opportunity to participate in important decisions affecting their lives and well-being.²⁷

- 13 At best, open consultative processes mean that relevant principles are developed and refined through careful attention to the facts, and details of proposals are tested against experience. Such processes should recognise both the dangers of the tyranny of the majority and the need for broad support for basic social policies.
- 14 The Law Commission has stressed the importance of open consultative processes as a precondition for democratic lawmaking.²⁸ The Legislation Advisory Committee (LAC) has highlighted practical reasons for consultation:

In some cases the group or organisation will have knowledge and experience about the issues without which it will not be possible to develop the proposal adequately. In other cases early understanding and support for the proposal by the organisation concerned will be essential to its political acceptability.²⁹
- 15 The practical importance of consultation also appears in the *Cabinet Office Manual*.³⁰ It requires all Cabinet committee submissions to be accompanied by a form on which the department and Minister have certified what consultation has been undertaken. The *Manual* also requires Ministers and departments to report if they have not complied with the LAC guidelines. Similar requirements in the *Manual* apply to the making of regulations.
- 16 The Official Information Act has become a central part of the culture of governmental consultation with the public and special interest groups. We note in the executive summary that one of the purposes of the Act is to enable the people of New Zealand to participate more effectively in the making and administration of laws and policies. Section 4 of the Act states the goal of progressively increasing the availability of official information. Implicitly, official information is to be made available not only in response to requests made under the Act, but also on the initiative

²⁷ Dyllal and Keith, "Let the People Speak" in *The April Report: Report of the Royal Commission on Social Policy*, Vol III, Part I, Future Directions (Royal Commission on Social Policy, Wellington, 1988), 365, 369–379.

²⁸ Law Commission, *Annual Report* (NZLC R32, 1994), 4–7.

²⁹ *Legislative Change: Guidelines on Process and Content* (LAC, Report 6, rev ed, Wellington, 1991), 7.

³⁰ (Cabinet Office, Department of the Prime Minister and Cabinet, Wellington, August 1996), paras 4.13–4.21, 4.41–4.43, and 5.18–5.22.

of agencies covered by the Act. As emphasised by one speaker at a recent seminar on the Act, the Act has encouraged the unsolicited release of official information by those subject to it, on the assumption that the information will eventually form the subject of a request.³¹

- 17 In this environment, the form in which information is released, and above all the timing of the release, have assumed particular importance.³² The availability of official information can only contribute to public participation in the making and administration of laws and policies (s 4) if relevant government decisions have not already been made. Issues concerning the timing of release of information are discussed further in chapters 4 and 6.
- 18 Public advisory bodies provide one means of facilitating consultation with the public. An LAC discussion paper lists over 110 public advisory bodies with some degree of permanence: *Public Advisory Bodies: a discussion paper* (LAC, Wellington, 1990); see also the *Directory of Official Information 1995–1997* published by the Ministry of Justice which helps to update that list. About one quarter of those bodies were established by legislation; as a matter of principle all such bodies are, and should be, subject to the Official Information Act.³³ In addition to the more permanent bodies are temporary, ad hoc bodies established for a particular purpose. These bodies are, in general, subject to the Act by means of s 2(2)–(4).
- 19 Consultation, by increasing public participation in the making of law and policy, reduces both the secrecy of these processes and the need to resort to the Official Information Act. Information about whom the government has consulted and, more importantly, what advice has been provided by consultees, may itself form the subject of a request under the Act, which in some cases might be refused under s 9.³⁴

A PROPORTIONALLY ELECTED PARLIAMENT

- 20 With the introduction of MMP, the Official Information Act is now operating in a context which could not have been anticipated

³¹ Shroff, "Behind the Official Information Act: Politics, Power and Procedure", in *The Official Information Act* (Legal Research Foundation, Auckland, 1997), 19–20.

³² Shroff.

³³ See Legislation Advisory Committee, *Legislative Change: Guidelines on Process and Content* (LAC, Report 6, rev ed, Wellington, 1991), para 43.

³⁴ Especially s 9 (2)(g)(i) of the Act – see chapter 6.

by those responsible for the Act. Identifying the consequences of the new electoral system for the Act and its operation still involves speculation, but some comments can be made based on experiences of coalition governments overseas, and in New Zealand up until now.

- 21 First, the number of members of Parliament in New Zealand has increased. The 1995 report of the Standing Orders Committee, *Review of Standing Orders*, expected that in a Parliament of 120 members, approximately 96 members would be available to serve on select committees. This would allow for twelve eight-member subject select committees, the Regulations Review Committee, Privileges Committee, and ad hoc committees on electoral reform and standing orders. The report stated that ideally each MP would only be on one select committee.³⁵
- 22 In practice some of the subject committees in the current Parliament have 10 or 12 members: some MPs serve on two or even three committees. Nevertheless, the general trend of limiting each MP's committee memberships requires MPs to specialise in particular areas of policy and administration, and intensify their scrutiny of the activities of departments, Crown entities and SOEs. The State Services Commission speculated in 1995 that members "may seek to obtain information through select committees, rather than through previously used channels such as oral and written channels and official information requests".³⁶ But, in the Law Commission's view, the developing subject specialisation of MPs is also likely to increase both their use of the Official Information Act and of parliamentary questions to obtain information on government activities – not as part of select committee work, but as part of the policy formulation process for their own political parties.
- 23 Secondly, MMP has increased the number of political parties in the House of Representatives (from four in the 1990 Parliament to seven immediately before the October 1996 election,³⁷ and six in September 1997). Moreover, the strength of parties other than the two traditional "major parties" has increased. This has led to a broader debate than was the case at the height of two-party politics, and more requests for information about the activities of government from a number of political parties rather than from a solitary or

³⁵ 1995 AJHR I.18A, 33, 36.

³⁶ *Working under Proportional Representation: A Reference for the Public Service* (State Services Commission, Wellington, 1995), 45.

³⁷ This increased number of smaller parties could itself be attributed, at least partially, to the imminence of the MMP election.

major opposition party. The Official Information Act provides an important vehicle for making such requests – as noted in our executive summary, the evidence already points to its increased use.

- 24 A third, related point concerns the likelihood of coalition governments under MMP and the effect this may have on conventions governing the relationship between MPs, Ministers and officials. It was widely recognised before October 1996 that coalition or minority (including coalition minority) governments were more likely under MMP than under the “first past the post” (FPP) system it replaced. The period leading up to the October 1996 election saw New Zealand’s first coalition government since World War II. With the party receiving the greatest share of the party vote in the first MMP election falling well short of an absolute majority, coalition or minority governments seem likely to become the norm in future New Zealand politics.
- 25 Coalition government may focus attention on the convention that officials serve the government of the day. Under a coalition government officials will have increased contact with Ministers from more than one party. Officials may face an apparent conflict of responsibilities arising from the different attitudes of their Minister, possibly from a minority party, and the remainder of Cabinet. The State Services Commission speculated that
- a situation could arise where a chief executive was instructed by the responsible Minister from one of the coalition parties to undertake some action which the chief executive considered contrary to the expressed policy of the Government or to the requirements of collective interest. This might be particularly problematic if a chief executive reported to several Ministers, or if a pattern emerged of Ministers from a particular party dominating certain portfolios – as is the case with the Free Democratic Party (FDP) in Germany.³⁸
- 26 Similar difficulties could of course have arisen under FPP if Ministers differed sharply among themselves within a single party government. Under a coalition, such disputes may be capable of resolution by reference to the coalition agreement, or the dispute resolution procedures established under it. The coalition agreement may also serve as a source of guidance for officials seeking to avoid any suggestion of political advocacy.
- 27 This ties in with another convention which some have suggested may be strained by MMP – the political neutrality of officials. This convention is referred to in s 9(2)(f)(iii) of the Official Information

³⁸ *Working under Proportional Representation*, 29.

Act – protecting the “political neutrality of officials” may constitute a good reason for withholding official information. But, as the then Secretary for Justice pointed out:

On the other hand, some of the conventions referred to in the Act will generally be best served by disclosure. An example is the political neutrality of officials. If officials are politically neutral, as they are meant to be, they have nothing to fear from disclosure. If they are partisan, disclosure may well promote the convention.³⁹

- 28 If there are indeed difficulties for officials in maintaining, or being seen to maintain, political neutrality under a coalition government, it may be that other sources of advice will be increasingly used by government.⁴⁰
- 29 Fourthly, another source of potential difficulty arises from the greater general contact between officials and minority parties. That possible difficulty also has precedents in the briefing of caucus committees, opposition members and opposition caucus committees, and indeed groups outside Parliament. Rules for dealing with these contacts would no doubt be desirable, and some do already exist, including the need for ministerial approval. The role of the Official Information Act as the means by which opposition parties obtain information from officials before an election is still to be worked through in New Zealand,⁴¹ but may be compared with the practice in Australia, Ireland and the United Kingdom where opposition parties are briefed by officials.
- 30 Fifthly and finally, questions as to the scope of the Act have also arisen as a result of a new aspect of public affairs under MMP – the process of coalition forming itself. The advice given by senior officials to the parties engaged in coalition negotiations is official information within the Act, although there may of course be good reasons for withholding that information. But advice given to those parties by private bodies (eg, costings of particular policies by external consultants), will not fall within the scope of the Act unless commissioned by officials or Ministers acting in their official capacities, or otherwise incorporated into departmental advice.

³⁹ Belgrave, “The Official Information Act and the Policy Process”, in *The Official Information Act* (Legal Research Foundation, Auckland, 1997), 27.

⁴⁰ See also Voyce, “Providing Free and Frank Advice to Government: Fact or Fiction?”, in (1997) 20 *Public Sector*, 9, 14, who notes suggestions that free and frank advice was conveyed informally and not recorded, or “destroyed on the instructions of Ministers not wanting it to be known that they were acting contrary to the advice they had received . . .”.

⁴¹ Voyce, 31.

- 31 Under clause 12.1 of the Coalition agreement signed on 11 December 1996, between the National and New Zealand First parties, all "records, reports or other documents relating to the Coalition are confidential", except in limited circumstances where the information was already public or known to the receiving party. To the extent that the Official Information Act applies to such information, that agreement is subject to the Act's request and withholding provisions.⁴²
- 32 Party caucuses are likely to have a significant role at some stage in the coalition-building process. The Ombudsmen have more than once determined that information held by Ministers in their capacity as a member of caucus, is not official information.⁴³ Furthermore, the High Court held in March 1997 that minutes of a caucus meeting were not discoverable. The grounds on which discovery was resisted were parliamentary privilege, public interest immunity, and that discovery was not reasonably necessary: *Rata v Attorney-General*.⁴⁴ That decision, by treating caucus documents as a class of evidence entitled to public interest immunity, takes a different approach to that of the Official Information Act.

GROWING INTERNATIONAL INFLUENCES ON THE MAKING OF PUBLIC POLICY AND LAW

- 33 As trade, finance, information, the environment, human rights and many other matters increasingly become the subject of international law, international processes of advice and lawmaking grow in importance. Approximately 200 out of the 700 or so public Acts of the New Zealand Parliament appear to raise issues concerning New Zealand's international rights and obligations.⁴⁵ The statutes may give direct effect to treaty provisions, or they may empower the government to give effect to them.⁴⁶

⁴² For example, s 9(2)(ba).

⁴³ See Sixth Compendium of Case Notes of the Ombudsmen (1985), 124. (Case Notes of the Ombudsmen are hereafter referred to as OCN and are preceded by the year and number of the compendium.) See also (1989) 9 OCN 87, and Report of the Ombudsmen for the year ended 30 June 1994, 26, 1994 AJHR A.3.

⁴⁴ (1997) 10 PRNZ 304. The decision contains a discussion of caucuses in general and their absence of any special legal status.

⁴⁵ See appendix C of *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996) .

⁴⁶ See LAC, *Legislative Change: Guidelines on Process and Content* (LAC, Report 6, rev ed, Wellington, 1991), appendix E; and *A New Zealand Guide to International Law and its Sources*.

34 In these cases the basic material for making policy and law in New Zealand is provided not by New Zealand advisers but by international ones. If public participation is to be effective, then the open process which the Official Information Act emphasises will have to extend to information held by the New Zealand government about the international processes in which it is involved. Once the international processes are complete, there may be no real role for New Zealand interests to play. The Clerk of the House has recently observed:

One problem with globalisation is that people can lose control over decisions on the rules that affect how their society is governed. Moving rule-making to an international plane exacerbates the danger of remoteness which is already present at a national level.⁴⁷

35 The domestic consultation process followed in the GATT Uruguay Round has been outlined in a speech by the Secretary of Foreign Affairs and Trade.⁴⁸ Groups consulted included business organisations, academic and research organisations, media, and community groups including Māori and environmental interests. This does, however, contrast with the views expressed in one submission received by the Law Commission on the draft of this report. The submission commented on a refusal by the Minister for Overseas Trade Negotiations to release copies of the draft GATT Bill and New Zealand's offer on GATT. The Minister cited s 9(2)(d) and the conclusive provisions of s 6(e)(vi).⁴⁹

36 As the submission acknowledged, s 6(e)(vi) provides a conclusive reason to withhold information, rather than merely a reason to be balanced against the public interest in releasing the information – a reflection of the executive's traditional autonomy to conclude international trade agreements. We discuss s 6 in more detail in chapter 7.

⁴⁷ McGee, "Parliament should have final say over treaties"; *Herald*, 4 June 1997, A15. See also McGee, "Treaties – A Role for Parliament?" in (1997) 20 *Public Sector*, 2, and McKay, "Treaties – A Greater Role for Parliament?" in (1997) 20 *Public Sector*, 6.

⁴⁸ Nottage, "The GATT Uruguay Round 1984–1994: 10 years of Consultation and Co-operation" in (1994) 3 *Ministry of Foreign Affairs and Trade Record*, 16.

⁴⁹ Section 9(2)(d): Prejudice to the substantial economic interests of New Zealand; and s 6(e)(vi): Serious damage to the New Zealand economy by prematurely disclosing economic or fiscal policy decisions relating to the entering of overseas trade agreements.

THE WAY AHEAD

- 37 As the executive summary records, the Official Information Act works reasonably well to further its stated purposes. But as is to be expected, there is room for improvement. We explore specific improvements in the following chapters. In the rest of this chapter, we discuss ways of ensuring that the ethos of open government is fostered and maintained. In particular, we identify the need for the administration of the Act to be enhanced, and propose an increased responsibility on the Ministry of Justice to provide leadership on what is a constitutional function.

Administration of the Act

- 38 While there does not appear to be any widespread call for substantial change to the Act, there have been a number of comments calling for an improvement in the way the Act is administered. Among these there has been a revival of interest in the idea of a separate agency responsible for administering the Act. This was the task of the Information Authority which was established under the Act but ceased to exist in 1988.
- 39 Some of the Information Authority's functions were transferred to the Legislation Advisory Committee, whose terms of reference accordingly include "monitor[ing] the content of new legislation specifically from an 'official information' standpoint". But the LAC meets only periodically, has no full-time staff, and cannot carry out the day-to-day role, formerly undertaken by the Authority, of keeping the Act under review.
- 40 Two of the Authority's functions under the expired s 38(2) of the Act merit particular comment:
- (b) To recommend to any Department or Minister of the Crown or organisation that that Department or Minister of the Crown or organisation make changes in the manner in which it or he gives access to, or supplies, official information or any category of official information:
...
 - (d) To inquire into and report on the question whether this Act should be extended to cover information held by bodies other than Departments, Ministers of the Crown, and organisations.
- 41 To some extent the Ombudsmen, either in relation to specific requests or in their published case notes, are able to comment upon the manner in which a Minister or agency gives access to or supplies official information. But they may find it difficult to ascertain, for example, whether information supplied by an agency in accordance

with requests is indeed *all* the relevant information held within the scope of the request, rather than simply enough to satisfy the requester on each occasion. Essentially, there is no overall audit of agency and Ministerial compliance with the Act, although the Ombudsmen do have authority, under s 16 of the Ombudsmen Act, to inquire into the way in which departments or organisations (but not Ministers) respond to requests generally.⁵⁰

- 42 An audit role is characteristic of freedom of information and privacy legislation in the provinces of Canada. In New Zealand, the Privacy Commissioner has an audit function under s 13 of the Privacy Act 1993.⁵¹ The Law Commission believes that more active monitoring of agencies' performance could also benefit compliance with the Official Information Act.
- 43 There are also current issues as to whether the scope of the Act should be broadened, for example to include the Parliamentary Services Commission.⁵² We consider that keeping the Act's coverage under review is consistent with its purpose in s 4 to increase progressively the availability of official information. The Ministry of Justice (which is responsible for providing guidance to the government in this area) currently has limited resources to devote to this function.
- 44 A further role of some importance is to provide education and publicity about the Act to government and the public alike. The Privacy Commissioner has, and is active in exercising, such a function under s 13(1)(g) of the Privacy Act 1993. But educational activity in the official information area has been spasmodic and uneven in its coverage.

⁵⁰ Section 16 enables investigation of "matters of administration" either on complaint or on the Ombudsmen's own motion. The annual reports of the Ombudsmen also provide an opportunity to comment more generally on agencies' compliance with the Act.

⁵¹ See in particular s 13(1)(e) which provides for monitoring compliance with the public register privacy principles, and s 13(1)(m) which provides for inquiring into any governmental practice or procedure which might infringe on individual privacy.

⁵² Alexander, "System 'wastes money'", *Sunday Star Times*, 11 May 1997, A9. See also Liddell, "The Official Information Act 1982 and the Legislature: A Proposal", in *The Official Information Act* (Legal Research Foundation, Auckland, 1997), 6, for a proposal to extend the Act's coverage to the legislature. As to the application of the Local Government Official Information and Meetings Act to local authority trading activities, see para 11.

- 45 The Ombudsmen have published useful guidelines on the application of the Act, and have regularly commented on issues of note in their annual reports and published case notes. They and their staff have taken on a limited educational role and more recently have published a newsletter, *Ombudsmen Quarterly Review*. This publication contains guidance as to the interpretation of provisions in the Act and provides examples of best practice. The Ombudsmen's activities of this nature have been limited, however, by lack of funds, and the publication of case notes has ceased in recent years. The Ombudsmen have also commented that an educational role does not always fit comfortably with their role as independent reviewers of decisions under the Act.
- 46 In our view, the publication of case notes and guidelines, and the holding of seminars to improve understanding of the Act and encourage best practice, are essential to improving the effectiveness of the Act, and should be properly funded (see para 135). We note that the internet provides an opportunity for the guidelines and case notes to be disseminated widely and at little cost.
- 47 The State Services Commission is responsible for government departments' compliance with the Official Information Act. It periodically issues guidelines on how to handle requests, although these have not been updated for some time. The public, however, has no comparable source of education and advice, and nor does the State Services Commission have authority in respect of organisations outside the core state sector where, as noted in the executive summary, there may be a greater need for education. Similar observations about the limits of the State Services Commission's jurisdiction have been made, outside the official information context, in the recent report of the Government Administration Committee.⁵³

The need for systematic review and oversight

- 48 There is a strong case for systematic review and oversight of the Official Information Act. The preceding paragraphs show how these functions, and educational functions, are currently divided between the Ombudsmen, Ministry of Justice and the State Services Commission. The Law Commission considers that the Ministry of Justice is the appropriate body to assume overall responsibility for these functions. It has the advantage both of links throughout the public sector and of the constitutional role of the

⁵³ *Financial review of the 1995/1996 performance and current operations of the State Services Commission*, 1997 AJHR I.20A 295, 301–302.

Justice portfolio which permits a principled and systematic approach to the issues. In some cases the Ministry's role would be to ensure that certain functions are performed either itself or by others – for example, publishing guidelines and case notes might be the task of the Ombudsmen. In addition, the broader roles of policy advice on the Act, and ensuring compliance with the Act, should be provided directly by the Ministry. The State Services Commission would retain an overview of policy and practice regarding government-held information, including the performance by the Ministry of Justice of its responsibilities regarding the Official Information Act.

A new information authority?

- 49 The notion of a stand-alone body has its attraction, and was recently proposed in Australia.⁵⁴ A separate body would have both the advantage and the disadvantage of being removed from the day-to-day operation of the Act. It would also have the disadvantage of its separate funding costs, and could experience difficulty in maintaining close links with the relevant agencies. The success or failure of its work, in terms of open government outcomes, would be difficult to quantify. We consider that the enhanced, co-ordinating role we propose for the Ministry of Justice should work satisfactorily, and at this stage do not recommend the establishment of a new information authority. The matter is so important, however, as to warrant review by the government in 3 years.

- 50 The Law Commission recommends that, as part of the Coalition Government's review of the Act:
- The Ministry of Justice should be given responsibility for ensuring a more co-ordinated and systematic approach to the functions of oversight, compliance, policy review, and education in relation to the Act.
 - To improve the administration and understanding of the Act adequate resources should be provided to existing institutions (including the Office of the Ombudsmen and Ministry of Justice).

⁵⁴ *Open government: a review of the federal Freedom of Information Act 1982* (Australian Law Reform Commission, ALRC 77, and Administrative Review Council Report 40, 1995), para 6.4.

- In particular, the Ombudsmen’s work in publishing guidelines and case notes, and holding seminars and training sessions, is essential to improving the operation of the Act, and adequate funds should be available for these activities .

Positive disclosure

- 51 The Act encourages release of information without recourse to the request procedures only implicitly. But one of its effects undoubtedly has been to increase steadily the volume of official information which is supplied to the public without request. Promoting that as a trend is another important way of implementing the purposes of the Act.
- 52 Early in 1997 the State Services Commission finalised a policy framework for the management of government-held information in the collective interest of the government and the public of New Zealand.⁵⁵ The Treasury has also produced a paper concerning government information supply activities which was adopted by the government in July this year.⁵⁶ These initiatives broadly reinforce the values expressed in the Official Information Act, in particular progressively increasing the availability of official information (s 4(a)), the principle of availability (s 5), and that any charge for information should be reasonable (s 15(2)). They followed a review which found departmental practices and pricing policies on information disclosure were ad hoc, inconsistent, and too dependent on individual commitment and philosophy. The policy framework, which was adopted by the government in April 1997, lays down 10 integrated principles for good management of government information. Each is intended to contribute to the following outcomes:
- the effective participation of the people of New Zealand in the making and administration of laws and policies,
 - clear accountability of Ministers and officials for good government,
 - confidence in the integrity of government and public decision making,

⁵⁵ *Policy Framework for Government Held Information* (State Services Commission, Wellington, 1997). The scope of government-held information is defined as that held by the executive government, both published and unpublished, which has been collected or created at taxpayers’ expense.

⁵⁶ We refer to this paper in more detail in chapter 3.

- reduced cost of government processes, and
- efficient and effective management of government operations to support policy development and service delivery.

- 53 The principles are set out in appendix I. The first of them, described as the availability principle,⁵⁷ states that government departments should make information available “easily, widely and equitably to the people of New Zealand”. It carries the implication that government-held information will increasingly be made available proactively and in electronic form. While fully consistent with the objective of the Official Information Act to make official information “progressively” more available to the public, this approach promises at the same time to reduce need for the Act as a means of accessing information. It will also achieve a greater level of consistency in the type and frequency of information disclosure, and consequently reduce the compliance costs involved in processing specific requests.
- 54 The Law Commission fully endorses this approach. It preserves the existing limits on release of information set by the Official Information Act, Privacy Act, and other statutes such as the Statistics Act 1975, while broadening considerably the range of government-held information (as defined) which reaches the public arena through the internet and by other means. Although the policy framework binds only departments, its philosophy ought also to be attractive to the wider public sector.
- 55 We return to other principles in the policy framework, such as those relating to the pricing of information, in chapter 3.

⁵⁷ Although consistent with s 5 of the Official Information Act, this is not to be confused with the “principle of availability” set out in that section.

2 Large and broadly defined requests

OVERVIEW

- 56 **T**HE LAW COMMISSION was asked to examine the adequacy of ss 12(2) and 18(f) of the Official Information Act, with particular reference to broadly defined requests and requests for large amounts of information.
- 57 Under s 12(2) a person seeking official information is to specify it “with due particularity”. In the words of the Danks Committee, any documents being sought should be “described in detail sufficient to enable experienced employees in departments or agencies familiar with the subject matter of the request to identify the record” in question (*Supplementary Report*, para 4.34). That obligation upon the requester is complemented by the duty on an agency under s 13(b) to give the requester reasonable assistance to help ensure compliance with s 12.⁵⁸ As the Danks Committee said, the relevant officer might help in reformulating the request; the actual identification of the information sought might require further communication between the applicant and the officer (*Supplementary Report*, para 4.34).
- 58 Even if a request does comply with the requirement of due particularity, s 18(f) permits the agency to refuse the request if the information requested cannot be made available without “substantial collation or research”. The Danks Committee explained this ground for refusing a request as being:

⁵⁸ One practical question in the application of that duty to assist, is whether the circumstances of the applicant should be relevant – consider the position of a requester for instance in the Opposition research unit in Parliament who is very knowledgeable about the operation of government. The assistance might be of particular importance at the time of a general election: see the “Guidelines for release of official information prior to an election” (State Services Commission, Wellington, 1993), para 15.

that a person requesting information is not entitled to ask a department to assemble or analyse data for him. As the Ontario Commission says: (Vol 2, p 234) "the right to information does not embrace a right to require the Government to conduct research on matters of interest to citizens in order to provide answers to their questions". (*Supplementary Report*, para 4.38)

- 59 It is implicit in s 18(f) that *some* collation and research may be required of an agency. Nevertheless, Ministers, departments and organisations continue to express concern about the number of broadly defined and time consuming requests, and in particular about these requests taking priority over urgent responsibilities.⁵⁹ This chapter contains recommendations which provide a mechanism for refining broad requests. It recommends the enactment of a new provision requiring agencies to consider imposing a charge, or extending the time limit for responding to a request, as alternatives to refusing a request which involves substantial collation and research.⁶⁰ Finally, it recommends express statutory provisions to deal with successive and repeat requests.

"DUE PARTICULARITY"

- 60 The Ombudsmen have said that the requirement of due particularity does not preclude a person asking whether an agency holds any information on a specified topic nor from requesting access to all information held in relation to that topic. Their 1995 Annual Report states that "a request meets the test of 'due particularity' if the information covered by the request can be identified by the recipient".⁶¹ It follows that:

Lack of particularity cannot, therefore, be used as a means for refusing a request which is for a large amount of specified information. Where such a request is made, the legislation provides appropriate procedures for dealing with it, including provision for a charge to be made, extensions of the time limit, and refusal in an appropriate case where the information requested cannot be made available without substantial collation or research.⁶²

⁵⁹ These requests are sometimes referred to as "fishing expeditions", although the Ombudsmen regard this expression as inappropriate for official information requests. Unlike court processes, requests need not have a defined purpose.

⁶⁰ See also chapter 3, which concerns charging, and chapter 4 which considers time limits including the power to extend those limits.

⁶¹ Report of the Ombudsmen for the year ended 30 June 1995, AJHR A.3, 34.

⁶² Report of the Ombudsmen for the year ended 30 June 1989, AJHR A.3, 32.

- 61 Against that view are to be balanced the limits which are implied by the words “due” and “particularity”. The Danks Committee did not envisage individuals having the right to make vague or sweeping requests (*Supplementary Report*, 69).
- 62 The Ombudsmen have issued guidelines dealing with the administrative provisions of the Act (see appendix D). Those guidelines give advice to requesters as well as to agencies. They aim at having both parties consider not just the substantive prejudice that might result from the release of the information, but also administrative issues: what specifically has been requested; whether the agency holds the information; and whether it can be retrieved without the administrative difficulties which the Act takes into account. The guidelines suggest ways in which requesters can also facilitate the process, with an eye of course to their own advantage. The government guidelines on charging (considered in paras 119–120 and set out in appendix G) contain parallel advice:
- the requester, like the department, might be very well advised to consider a narrower statement of the request and a more appropriate form of release;
 - if that course is not followed, the request might be rejected under s 18(f) (see paras 84–89);
 - a broad request might lead an agency to extend the time limit for responding under s 15A (see paras 174–183); or
 - the charge for the information released might be prohibitive.
- 63 The final three unfortunate consequences of defining a request too broadly emphasise the value of requesters also familiarising themselves with guides to the availability of information.⁶³
- 64 It is important to stress that the failure to frame a request with due particularity is not a ground for refusing the request. The Ombudsmen’s view as to the obligations upon an agency faced with such a request was expressed in a case concerning a request to the Minister for State-Owned Enterprises. The request was for all documents prepared for the Minister since October 1990 regarding Treaty of Waitangi claims in general, and in particular those in relation to Railways Corporation land.⁶⁴ The Minister’s office had

⁶³ For instance, the Directory of Official Information published bi-annually by the Ministry of Justice. We also note that some agencies have taken specification of information they hold to a higher level of detail, eg, “What’s where: a stocktake of justice sector information” which details information held on databases in the justice sector.

⁶⁴ (1993) 10(2) OCN 17.

advised that the major difficulty with the request was identifying with sufficient particularity the documents requested, due to the large volume of material relating to Treaty claims, although certain information was also likely to be protected under s 9(2). The Ombudsmen noted that where a requester was unable to identify the information at issue, “the appropriate course is to give reasonable assistance to the requester to identify the information sought”. This had not been done, and it was wrong to refuse the request before the required information had been identified. Later discussions with the requester and officials clarified the information sought; a fresh request was made, and the Ombudsmen’s involvement ceased.

- 65 The Law Commission considers that the difficulties arising under the due particularity requirement of s 12(2) can usually be handled through the administrative measures mentioned in the preceding two paragraphs and the Ombudsmen’s Practice Guidelines which appear in appendix D. Section 12(2) itself should not be amended. However, our emphasis on administrative measures does lead us to propose:
- an additional subsection to s 12 relating to the purpose of the request; and
 - a reformulation of the duty upon agencies under s 13 to give reasonable assistance to requesters.
- 66 In its present form the Act imposes no obligation on the requester to specify the purpose of the request. Neither does it expressly allow a requester to do so. The Act makes no express reference whatsoever to the “purpose” of the request. An agency may implicitly take the purpose of a request into account, however, in refusing a request under s 18(a) because there is good reason for withholding the information by virtue of ss 6, 7 or 9. For example, s 9(2)(a) allows withholding to “protect the privacy of natural persons”, and s 9(2)(ba) allows protection of information so as not to disclose a trade secret or unreasonably prejudice the commercial position of the supplier or subject of the information: either provision may apply (or not) according to the apparent purpose of the request.
- 67 Although a requester may currently specify the purpose of the request, the Act does nothing to encourage this practice so that information that might otherwise properly be withheld is released.
- 68 A potential risk of *expressly allowing* a requester to specify a purpose for seeking official information is that where a requester does not disclose a purpose, the agency may try to use that as a ground for refusing the request – either expressly or tacitly – or for imposing

unjustifiable conditions on the use of information. The virtue of the present system is that this reaction is generally not open to the agency.

- 69 Accordingly, if the Act is amended to expressly allow a requester to specify the purpose, the legislation must make clear that a requester who chooses not to do so is not in a worse position than before the amendment. The language we have used in our proposed s 12(4) (see para 73) would send a message to agencies that they may not require a requester to specify a purpose for which he or she seeks the information, or refuse a request because no purpose is specified. In short, the amendment is intended to have a one way operation only – to facilitate the flow of additional information, but not to reduce the present flow.
- 70 We also emphasise that a specified purpose is irrelevant to the grounds for refusing requests in s 18(b)–(h). These grounds are not based on there being good reason for withholding the information. In particular, a specified purpose cannot be relevant to whether any of the “administrative reasons” in s 18(d)–(f), or our proposed s 18A,⁶⁵ apply. Section 24(1) of Australia’s Freedom of Information Act 1982 (Cth) takes the same approach (see paras 90–91).
- 71 A stated purpose for seeking the information might anticipate an obvious question the agency may have of the requester, and facilitate the processing of the request. It would make it easier for agencies to impose conditions on the use and publication of information which may otherwise be properly withheld. In turn, it could help agencies overcome criticisms that information is too often withheld on a mistaken assumption, for example, that the requester will make released information publicly available. For example, the family of a deceased officer in the armed forces might request information from the officer’s file to find out how he or she died. An agency in these circumstances might be willing to release certain information to family members but not to the general public, and so might impose conditions on the use and publication of the information. We would anticipate requesters choosing to specify the purpose of the request if they thought it to their advantage, as in the example just mentioned.
- 72 Finally, we note that the Ombudsmen’s jurisdiction under the Act includes the power to investigate not only refusals, but also the form in which information is released and conditions imposed on its use: s 28(1)(b) and (c). This would help to prevent agencies

⁶⁵ See para 108.

from imposing, in reliance upon a purpose specified by the requester, unjustified conditions on the use of information.

73 **We recommend that s 12(2) remain unchanged, but that a further subsection be added to section 12 as follows:**

- (4) The person making the request may, but is under no circumstances obliged to, specify the purpose for which the information is sought, and a department, Minister of the Crown or organisation shall have regard to this purpose in determining whether to make the information available, in what form and on what conditions, but may not rely on the failure to specify a purpose as a ground for refusing the request.

A wider duty to assist?

- 74 Section 13 is not drafted particularly clearly. It imposes a duty to give reasonable assistance “to make a request in a manner that is in accordance with” s 12 or to direct the request to the appropriate agency. But in practice, compliance with s 12 is likely to mean only that the request is stated with due particularity (s 12(2)) and specifies any reasons for urgent treatment (s 12(3)). Why is the duty to assist no wider? A request may still comply with s 12 and yet, for example, be refused because it involves substantial collation and research. The relevant officer may know that the information requested is not held in the particular manner specified in the request – but is recorded in another manner. Section 13 imposes no obligation to consult, or consider consulting, with the requester in these circumstances.
- 75 Section 16(1) of the Act indicates that information comprised in a document may be made available in a number of specified ways, including by:
- allowing inspection of the document,
 - providing copies,
 - providing an excerpt or summary of the contents, or
 - furnishing oral information about its contents.
- Any one of these methods may be acceptable to the requester, even though the information was requested in a different form. Usually, communication between the agency and the requester can reveal this.
- 76 A scenario which has been raised is where a requester is given a printout of the information requested, but then requests a copy of the information on computer disk. Is the agency under an

obligation to provide the information in this form? Information on disk falls within the definition of "document" in s 2, as "any information . . . stored by means of any . . . computer", and is therefore within the scope of s 16(1). Section 16(2) requires the agency to make the information available in the way preferred by the requester unless to do so would impair efficient administration, be contrary to a legal duty in respect of the document, or prejudice the interests protected by ss 6 or 7, or s 9 where there is no counter-vailing public interest.

- 77 But in this scenario the information has already been made available to the requester, so does s 16(2) still apply? On a strict construction of the Act, no, because the agency has already responded to the request in its original terms. Nevertheless, acting within the spirit of the Act suggests the agency could provide the information on disk.⁶⁶
- 78 The outcome of an Ombudsman's investigation may often be that the information is released in a form other than that requested, but which is acceptable to both parties. The Act ought expressly to encourage and facilitate such an outcome in the first instance.
- 79 Moreover, the Act implicitly allows the release of information subject to conditions, although there is no express power to impose conditions.⁶⁷ The Ombudsmen generally regard conditions as justified only where the information might otherwise properly be withheld under the Act. Communication with the requester again allows an agency to determine whether the release of information on certain conditions is likely to be acceptable to the requester.
- 80 In practice many or even most agencies seek to clarify difficult requests through dialogue with the requester. But some do not, or seek to shelter behind the technical withholding grounds in s 18(e) and (f), when a dialogue would allow the request to be refined to specify information which the agency would have no objection, on substantive grounds, to releasing.

⁶⁶ An agency may prefer to download the information onto a new disk rather than supply the original disk, which might contain additional information. It would in our view be entitled to charge for the cost of the new disk and time spent downloading the information.

⁶⁷ Section 15(1) of the Act refers to decisions as to the manner in which a request is to be granted, while s 28(1)(c) makes it a function of the Ombudsmen to review "conditions on the use, communication, or publication of information made available".

- 81 One way of prompting all agencies to adopt the dialogue with requesters which we encourage, and which was suggested by one respondent to a draft of this report, would be to impose an obligation upon agencies to assist in reformulating requests which are likely to be refused under s 18(e) or (f) or to be the subject of extensive charges. In Australia s 24 of the Freedom of Information Act 1982 (Cth) allows agencies to refuse requests on the grounds that the work involved would substantially and unreasonably divert the agency's resources from its other operations. The Australian Law Reform Commission (ALRC) recently recommended that s 24 should be reformulated to emphasise the importance of agencies' consulting with applicants about their requests. There is currently an obligation to consult with the applicant in s 24(6) before refusing a request under s 24(1) – see para 91. The ALRC considered that reformulation of the provision to place greater stress on the consultation requirement, while “relatively minor . . . would have a symbolic and educative effect”.⁶⁸
- 82 We favour an express obligation upon agencies to consider consulting with a requester before relying on s 18(e) or s 18A which we propose replace s 18(f) (see para 108). As a matter of practice agencies should also consult the requester if they will release the information requested at a substantial charge. We accept that it would be impracticable, however, to impose a requirement to this effect in the Act.

83 **Accordingly, the Law Commission recommends that section 13 be redrafted as follows:**

13 Assistance

Every Department, Minister of the Crown and organisation shall owe the following duties to a person who has made or wishes to make a request under this Act:

- (a) To assist that person to specify the requested official information with due particularity;
- (b) To assist that person by directing his or her request to the appropriate Department, Minister of the Crown, organisation or local authority;
- (c) Where that person asks for his or her request to be treated as urgent, to assist him or her to specify the reasons for seeking the information urgently, if those reasons are not already specified in the request;

⁶⁸ *Open government: A review of the federal Freedom of Information Act* (ALRC 77, 1995), para 7.14.

- (d) Where a request for information is likely to be refused under section 18(e) or section 18A of this Act, to consider consulting with that person and, if asked by that person, assist him or her in reformulating the request;
- (e) Where the Department, Minister of the Crown, organisation or local authority wishes to release information which is the subject of a request in a form other than that specified in the request, or on conditions, to consult with that person before releasing the information.

“SUBSTANTIAL COLLATION OR RESEARCH”

- 84 Section 18(f) permits (but does not require) agencies to withhold information if it “cannot be made available without substantial collation or research”. The Ombudsmen’s guidelines (see appendix D) mention five relevant factors:
- the difficulty of the work involved in locating, researching or collating the information;
 - the amount of documentation to be looked at;
 - the work time involved;
 - the nature of the resources available in money, facilities and numbers and quality of personnel; and
 - the effect on other operations of the diversion of resources to meet the request.
- 85 Once again the Ombudsmen stress the other administrative provisions of the Act, especially those in s 16 which enable the information to be made available in another form, if the form requested would impair efficient administration.
- 86 Several agencies take the view that s 18(f) covers both an initial process of determining what to release, if anything, and a later process of physically locating the information and releasing it once the initial determination has been made. The Ombudsmen take a different view on the premise (with which we agree) that those two processes in fact occur in reverse order. They consider that on receipt of a request, agencies should ask themselves whether they can identify what information is being sought (s 12(2)), whether they hold it (s 18(e) or (g)) and, if so, whether they can extract and compile the information (s 18(f)). Once agencies have established that there are no administrative problems in processing a request, the next step is to consider whether there is any reason to refuse the request in part or in whole because of the likely result of disclosure of the information. The Ombudsmen consider that

s 18(f) relates logically only to the first stage of assembling the information; if s 18(f) does not apply, then the question of whether the information needs to be withheld can properly be considered.

- 87 The principle of availability is fundamental. Closely connected to it is the obligation upon an agency to respond to requests in accordance with the Act. But that is not the agency's only function. As the Danks Committee indicated, staff resources, especially at the senior level where the essential decisions will have to be made, and financial considerations have to be weighed (*Supplementary Report*, para 4.40). The significance of financial and resource issues has been heightened by the disciplines of the Public Finance Act 1989: there is now a much greater emphasis on the precise identification of how public money is spent. The Danks Committee added that balancing the need for making information available with the cost of doing so does not amount to "an argument of 'administrative convenience'; still less ought it to be used as an excuse for withholding information that is awkward or embarrassing".
- 88 An early case illustrates the balance. The request was for information about several aspects of applications by public servants for leave without pay to take up paid employment in the private sector: the general criteria, the numbers considered, and the success rate and the duration of the leave granted. The State Services Commission responded to the first aspect of the request, essentially by stating that each case was decided on its merits, approval was rare, and was subject to stringent conditions, but referring to s 18(f) it refused to supply the information about actual cases. The Chief Ombudsman accepted that the refusal was justified. The State Services Commission had argued that the search would be a very extensive one, would probably not be complete, and would probably not produce a firmer answer to the question concerning general criteria than that already given. Moreover, on the matter of the substantive grounds for refusal, to provide the details of the one successful case discovered would identify the person concerned and would involve unwarranted disclosure of that person's affairs.⁶⁹
- 89 This case illustrates how the power conferred by s 18(f) can be and is used. It also suggests that, in some cases, it is difficult or even artificial to try to distinguish a process of identifying what information falls within the scope of the request, from one of locating or collating the relevant information.

⁶⁹ (1984) 5 OCN 137: see also (1993) 10(2) OCN 54.

Australia's Freedom of Information Act

- 90 Provisions like s 18(f) are to be found in other freedom of information legislation. As noted above, in Australia, s 24(1) of the Freedom of Information Act⁷⁰ (FOI Act) allows a Minister or agency to refuse a request without processing it if satisfied that processing it would substantially and unreasonably interfere with the performance of the Minister's functions or "substantially and unreasonably divert the resources of the agency from its other operations".⁷¹ The Act makes it explicit that the Minister and agency can have regard to the resources that would have to be used in:
- identifying, locating and collating the documents;
 - deciding whether to grant, refuse or defer access, or grant edited access (including the resources used in examining the documents and in consultation);
 - making the copy; and
 - notifying the decision (s 24(2)).
- 91 No regard is to be had to any charge for processing the request or to any reasons the requester may have for making the request. Section 24(6) contains the important control that s 24(1) cannot be used to refuse access to documents unless the Minister or agency gives notice of that intention; it gives the applicant a reasonable opportunity to consult with an appropriate officer with a view to making the request in a form which would remove the ground for refusal. The Law Commission supports a similar approach, as is apparent from our previous recommendation in para 83.⁷² It would be one control on any temptation to abuse such a ground. Appropriate guidelines to ensure fair application of such a power would provide another control.

⁷⁰ As enacted by s 15 of the 1991 Amendment Act. See also Australian Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information Act 1982: Report on the Operation and Administration of the Freedom of Information Legislation* (AGPS, Canberra, 1987), 104–119.

⁷¹ The Australian Law Reform Commission in ALRC 77, para 7.15, decided against legislative definition of this phrase. It noted however decisions of the Administrative Appeals Tribunal indicating that the resources to be taken into account were those of the relevant line area of an agency, rather than those of the entire agency.

⁷² Our proposed s 13(d) imposes only a requirement to *consider* consulting with the requester where refusal is likely under ss 18(e) or 18A.

The scope and wording of s 18(f)

- 92 In considering s 18(f) the first issue is whether it covers the process of determining what information falls within the scope of the request. The Ombudsmen's guidelines (see appendix D) do not expressly address the point. The expression "collation and research"⁷³ is to be interpreted in accordance with its purpose: Acts Interpretation Act 1924, s 5(j).⁷⁴ We consider that the actual process of identifying what information comes within the scope of the request is necessarily covered by the word "research"; "collation" must bear its standard dictionary definition of bringing together material, especially for comparison. In other cases only collation of the relevant material itself will allow the information falling within the scope of the request to be identified. The Ombudsmen's guidelines should be updated to state expressly that s 18(f) (or the new s 18A we propose in its place – see para 108) covers the process of determining what information falls within the scope of the request.
- 93 The second issue is whether the wording of s 18(f) requires amendment. The process of identifying the relevant information can be a large and difficult one affecting an agency's other operations. It can involve extensive consultation with those who provided relevant information. Section 9(1) of the Official Information Amendment Act 1987 inserted a new s 15A, which expressly recognises that those features of the process might justify an *extension* of time for handling the request:
- (1) Where a request in accordance with section 12 of this Act is made or transferred to a Department or Minister of the Crown or organisation, the chief executive of that Department or an officer or employee of that Department authorised by that chief executive or that Minister of the Crown or that organisation may extend the time limit set out in section 13 or section 15(1) of this Act in respect of the request if
 - (a) the request is for a large quantity of official information or necessitates a search through a large quantity of information and meeting the original time limit would unreasonably interfere with the operations of the Department or the Minister of the Crown or the organisation; or
 - (b) consultations necessary to make a decision on the request are such that a proper response to the request cannot reasonably be made within the original time limit.

⁷³ We note that the provision would be better expressed sequentially – research usually precedes collation of material.

⁷⁴ See also *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA).

- 94 When that power of extension and the grounds were introduced along with the 20 working-day time limit, no change was made to the wording of the power of refusal in s 18(f). The two provisions are, however, closely linked: if other operations of the agency might require postponing the process of considering and responding to a voluminous request, they could logically, in extreme cases at least, require that that process not be undertaken at all or at least not be completed. In practice, an agency which has received a large or broadly defined request will face a choice between responding to it on time, extending the time limit for responding under s 15A(1), or refusing the request under s 18(f). Or the agency may extend the time limit and then refuse the request under s 18(f).
- 95 While the processes described in s 15A(1)(a) are accommodated within the reference in s 18(f) to “substantial collation and research”, the process of consultation described in s 15A(1)(b) is not. Should s 18(f) mention (substantial) “consultations necessary to make a decision on the request” as a further ground for refusing a request? We do not think so.
- 96 Any widening of the Act’s grounds for refusing requests must be approached cautiously in light of the purpose in s 4(a) to increase progressively the availability of official information. Section 15A(1)(b) is wide enough to include consultation concerning the withholding grounds which might apply to a request, for example, discussions with persons whose privacy might be affected under s 9(2)(a), or with a legal adviser about whether any of the withholding provisions might apply. Section 18(f), by contrast, is an administrative reason for refusing a request in that it relates to the accessibility of information itself, rather than its contents. We do not consider it appropriate to allow an agency to refuse a request because of the time or difficulty in making a substantive decision about whether it can withhold information. As we note in the following chapter, an agency is not allowed to charge for the time spent in deciding whether or not to release information, although it may charge for the process of identifying or locating that information. The same distinction should be made in the context of refusing requests.
- 97 There are two further points concerning the wording of s 18(f). First, it does not refer to an “unreasonable interference with the operations” of an agency, as does s 15A(1)(a). We do not think this point is crucial: as the Ombudsmen’s guidelines suggest, the underlying purpose of s 18(f) must allow these factors to be taken into account. The Ombudsmen themselves have developed a consistent approach to the interpretation of s 18(f), and the meaning of “substantial” in particular. Secondly, s 18(f) is silent about its relation-

ship to s 15A(1), and vice versa, leaving open to argument when an agency should extend the time limit and whether it can simply rely on s 18(f) without considering the need for an extension.

- 98 While the second point also could be dealt with by considering the overall scheme of the Act (and no doubt would be if tested in court), the Law Commission considers it is best resolved through a new provision, s 18A, in place of s 18(f). A draft provision appears at the end of this chapter. That provision retains the phrase “cannot be made available without substantial collation and research”, except it reverses the order of “collation” and “research” in recognition of the order in which these processes usually occur. The Ombudsmen’s existing guidelines will continue to provide useful guidance as to the meaning of these words.
- 99 A new provision in place of s 18(f) is desirable for two further reasons. First, it would be easier under a new provision than as part of s 18(f) to impose on agencies an express requirement to consider fixing a charge for the information or extending the time limit for responding, before refusing a request under the “substantial collation and research” ground.
- 100 Agencies familiar with the scheme of the Act should already regard s 18(f) as a provision of last resort, which must be considered in light of the obligation in s 13 to help requesters with the “due particularity” requirement, and the Act’s charging and extension provisions. We considered the option of simply emphasising, in this report, the relationship between these provisions without any amendment to the Act. But that may not be sufficient to change the approach of certain agencies which resort too readily to s 18(f) to refuse requests. Our proposed s 18A requires agencies to consider the ways the Act provides for dealing with large and broadly defined requests other than refusing them. We earlier recommended (at para 83) that agencies be required to consider consulting with a requester and, if asked, assist in reformulating the request, before refusing a request under s 18(f) or our proposed s 18A. As a matter of practice, agencies should also consult before releasing information at a substantial charge. The exercise of a redefined power of refusal under s 18A would remain subject to complaint to the Ombudsmen.
- 101 If our proposed s 18A is not enacted, we consider that agencies, having regard to the scheme of the Act and the true construction of ss 12, 13, 15A and 18(f), should as a matter of practice only refuse a request under s 18(f) after considering whether charging for the information or extending the time limit might allow the request to be granted.

- 102 The second reason for a new provision in place of s 18(f) is to deal with the cumulative effect of a series of requests, to which we now turn.

Cumulative requests

- 103 A survey of legislation in other jurisdictions raises the possibility of a separate provision dealing directly with numerous or repeated requests.⁷⁵ Section 18(f) currently assumes a single request of an onerous nature. The Act does not expressly allow refusal of a large number of requests from the same requester, none of which on its own would warrant refusal under section 18(f), but which taken together involve “substantial collation or research”. We consider there should be a discretion allowing agencies to treat numerous requests about similar subject matter, received simultaneously or in short succession from the same person, as a single request for the purposes of refusing a request under the new s 18A which we propose.
- 104 The government’s charging guidelines (see appendix G, para 2.2) allow repeated requests from the same source in respect of a common subject made over intervals of up to 8 weeks, to be aggregated for charging purposes. We are not aware of widespread abuse of this provision: our proposed s 18A(3) would allow agencies to adopt a similar approach to refusing requests involving substantial research and collation. We do not see the proposed provision as allowing agencies to impose a “quota” on requests from regular requesters. The requirements that the requests concern similar subject matter and be received simultaneously or in short succession, focus the provision on the practice of dividing large requests into smaller parts, and prevent the number of requests, of itself, being a ground for refusal.
- 105 We note that there is already the power to refuse frivolous and vexatious requests under s 18(h) of the Act. The ALRC proposed for discussion an equivalent provision in Commonwealth legislation, observing that the power to refuse requests causing an “unreasonable diversion of resources” would not, for example, tackle repeated requests for information which the requester already knew was available for sale.⁷⁶ It later rejected the idea, however,

⁷⁵ See, for example, *Re Shewcroft and the Australian Broadcasting Corporation* (1985) 7 ALN 307, 308.

⁷⁶ *Freedom of information* (ALRC DP 59, 1995), para 4.19.

in favour of a narrower provision dealing with repeated requests (see para 107).⁷⁷

- 106 In some Canadian provinces there are more far reaching provisions which enable the head of a public body to request authorisation from the Information and Privacy Commissioner to disregard requests which, “because of their repetitious or systematic nature, would unreasonably interfere with the operations of a public body”.⁷⁸
- 107 We consider that the Act should deal with repeated or numerous requests directly rather than through s 18(h) which, while a necessary backstop provision in cases of last resort, can often aggravate a dispute between a requester and an agency if used to refuse a request. We propose that an agency be able to refuse a repeat request for information to which the applicant has already been refused access, providing there are no reasonable grounds for making it again. A withholding ground in these terms was recommended by the ALRC in its recent report.⁷⁹ We have not had the benefit of others’ views regarding such a provision as it was not raised in our draft report. Nevertheless, a provision in these terms would in our view be unlikely to be opposed by those we have consulted.

- 108 **Accordingly the Law Commission recommends:**
- **The Ombudsmen’s guidelines should be updated to expressly state that s 18(f) (or the new s 18A which we propose in its place) covers the process of determining what information falls within the scope of the request.**
 - **That a new s 18(i) be inserted as follows:**
 - (i) That the person making the request has already been refused access to the information requested, provided that no reasonable grounds exist for that person to request the information again.

⁷⁷ ALRC 77, ARC 40, para 7.18.

⁷⁸ Freedom of Information and Protection of Privacy Act 1993 (British Columbia) s 62. See also s 53 of the Freedom of Information and Protection of Privacy Act 1994 (Alberta) which provides:

If the head of a public body asks, the Commission might authorise the public body to disregard requests under section 7(1) that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body or amounted to abuse of the right to access.

⁷⁹ ALRC 77, ARC 40, para 7.18.

- That the current s 18(f) be repealed and the following provision be enacted as s 18A:

18A Requests involving substantial research or collation

- (1) A request made in accordance with section 12 of this Act may be refused if the information requested cannot be made available without substantial research or collation.
 - (2) In deciding whether to refuse a request under subsection (1) of this section, the Department, Minister of the Crown, or organisation shall consider whether fixing a charge under section 15 of this Act, or extending the time limit under section 15A of this Act, would enable the request to be granted.
 - (3) For the purposes of refusing a request under subsection (1) of this section, a Department, Minister of the Crown, or organisation may treat numerous requests about similar subject matter, received simultaneously or in short succession from the same person, as a single request.
- The words “Subject to section 18A of this Act” should be added to the start of s 18 if the new s 18A we propose is enacted.
 - Equivalent amendments should be made to the Local Government Official Information and Meetings Act 1987.
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3 Charging

OVERVIEW

- 109 **T**HE LAW COMMISSION was asked whether agencies should be able to charge for time spent and expenses incurred in deciding whether or not to release information under the Official Information Act. The issue is another aspect of the administrative burden which agencies may encounter in meeting their responsibilities under the Act. We also consider two further issues:
- whether commercial organisations subject to the Act require a special charging regime;
 - whether the current practice relating to requests by MPs and parliamentary research units is appropriate.
- 110 In considering these issues we emphasise the principle of availability and the purposes of the Official Information Act.⁸⁰ They should not be nullified by an unreasonable charging regime.
- 111 Section 15(1) requires an agency to decide “in what manner and for what charge (if any)” a request is to be granted. Section 15(2) requires any charge to be reasonable; regard may be had to the cost of the labour and materials involved in making the information available and to any costs incurred in responding to an urgent request.
- 112 Section 15(3) provides that the agency may require the whole or part of a charge to be paid in advance; but the requester has the option, on being told of the charge, not to proceed with the matter. As well, the Ombudsmen can consider complaints about charges: s 28(1)(b).
- 113 Section 47(d) authorises the making of regulations prescribing reasonable charges or scales of reasonable charges. No such regulations have in fact ever been made, and at one time doubts were raised whether charges could be imposed, at least by some of the organisations subject to the Act. Accordingly in 1989 both

⁸⁰ See ss 4 and 5.

the Official Information Act and the Local Government Official Information and Meetings Act 1987 were amended. Section 15(1A) of the 1982 Act now provides that Ministers, departments and organisations may charge for the supply of official information under the Act (with the exception of personal information provided to natural persons under s 24, now dealt with by s 35 of the Privacy Act 1993).

PRINCIPLES OF CHARGING

- 114 Section 15(1A) and (2) of the Official Information Act makes it clear that any charge under the Act is for making information available. Other costs associated with the collection, production and transformation of information from one form to another fall outside the Act's charging provisions. It is therefore implicit in the Act that agencies must distinguish between collection, production, transformation and dissemination costs.
- 115 The dissemination of public information itself takes place in many ways, including by publication, in the course of consultation, and in making information available upon request. There are inherent costs, but also well recognised benefits, in such activity.
- 116 Two of the benefits – improved quality of policy and lawmaking by means of increased participation, and the meeting of accountability expectations (whether legal or otherwise) – mirror the purposes of the Official Information Act.
- 117 Whatever the form in which information is disseminated, the pricing practice should not act as a disincentive to the public in obtaining access to, and using, information with consequent public policy benefits. Accordingly, in the Act the emphasis is on a reasonable charge for access, subject to external review, taking into account the costs of actually making the information available. Costs not subject to recovery must be carried by the agency both in infrastructural terms and in its administrative and budgeting arrangements.⁸¹

⁸¹ In the Report of the Ombudsmen for the year ended 30 June 1990, AJHR A.3, 21, the Ombudsmen observed:

Departments and Ministers often see the Official Information Act as being legislation externally applied to their operations. In fact the Act prescribes a departmental or Ministerial function and must rank within the department or Ministry alongside other legislation which prescribes functions for the organisation to perform.

- 118 The power to charge is also only one of a number of procedural devices which the Act provides. The Act's procedures were designed to maximise disclosure, enable efficient handling and disposition of the request, and minimise the cost barrier for the requester. Thus, instead of, or in addition to, a charge:
- the requester might be invited to specify (using ss 12(2) and 13) the request with greater particularity;
 - information might be provided in an alternative form (eg, giving a written or oral summary of a document) to avoid impairing efficient administration (s 16);
 - the request might be transferred to another agency under s 14(b)(ii), to enable it to be handled more efficiently; or
 - a request which requires substantial collation and research might be refused (s 18(f)).

What is a reasonable charge?

- 119 Instead of regulations, the government has from time to time issued guidelines on charging for requests under the Act. The existing guidelines date from February 1992.⁸² The guidelines "represent what the government regards as reasonable charges . . . and should be followed in all cases unless good reason exists for not doing so". Agencies, including departments, are free to adopt their own approach but, as the guidelines remind them, charges are subject to review by the Ombudsmen. Some agencies (including some local authorities under the Local Government Official Information and Meetings Act) apply the guidelines as a matter of administrative practice; the Ombudsmen have upheld charges fixed by reference to the guidelines.
- 120 The guidelines distinguish three situations in a way which appears to conform with the principle and purposes stated in ss 4 and 5. First, in "the circumstances" and as a matter of discretion, the regular charge may be waived or reduced (para 7 of the guidelines). Among the possible reasons are financial hardship to the applicant, facilitating relations with the public and helping the department in its work, and enhancing the public interest. Secondly, the guidelines state that the first hour of time spent on a request, and photocopying of less than 20 pages, ought not to be charged for (paras 3 and 4: see also para 5). Finally, actual costs may be charged for producing and supplying information of commercial value (para 6.1).

⁸² Department of Justice, Memorandum on charging for requests under the Official Information Act 1982 (Department of Justice, Wellington, 1992) (see appendix G).

- 121 The guidelines are broadly consistent with two initiatives adopted by government in 1997, the *Policy Framework for Government Held Information* developed by the State Services Commission,⁸³ and guidelines concerning government information supply activities developed by the Treasury. The policy framework addresses the pricing issue by noting the benefits of dissemination and two peculiar characteristics of information:
- The amount consumed by one person does not reduce the amount available for consumption by another; hence prices do not fulfil their normal role in balancing supply and demand.
 - Production costs of information are relatively fixed, in the sense that (dissemination costs aside)⁸⁴ it costs the same to serve one customer as any number; hence to charge prices greater than the dissemination costs can be inefficient and contrary to public welfare.
- 122 With the objective of encouraging efficient production and dissemination of information, whether by government or the private sector, and the efficient usage of government-held or produced information, the policy framework incorporates the following principles:
- Free dissemination of government-held information is appropriate where:
 - dissemination to a target audience is desirable for a public policy purpose; or
 - a charge to recover the cost of dissemination or transformation of the information is not feasible or not cost-effective.
 - Pricing to recover the cost of dissemination is appropriate where:
 - there is no particular public policy reason to disseminate the information; and
 - a charge to recover the cost of dissemination is both feasible and cost-effective.
 - Pricing to recover the cost of transformation is appropriate where:
 - pricing to recover the cost of dissemination is appropriate; and
 - there is an avoidable cost involved in transforming the information from the form in which it is held into a form preferred by the recipient, where it is feasible and cost-effective to recover in addition to the costs of dissemination.

⁸³ State Services Commission, Wellington, 1997; see paras 52–54.

⁸⁴ Note that some forms of dissemination may not see distribution costs increase with the number of customers served – for example, the internet.

Pricing to recover the full costs of information production and dissemination is appropriate where:

- the information is created for the commercial purpose of sale at a profit; and
- to do so would not breach the other pricing principles.

- 123 The pricing principles link charges for information to particular types of costs incurred by agencies. It is therefore critical that costs associated with each stage of the information “life-cycle”, from creation or collection through transformation to dissemination, be transparent and calculated according to a consistent methodology. The principles also distinguish between information whose dissemination is desirable for a public policy purpose, and information created for a commercial purpose. Sometimes the nature of information sought under the Act or disseminated by an agency will be a hybrid of these two types, in which case fair apportionment will be required. Transparency of transformation and distribution costs is especially important in these circumstances.
- 124 The Treasury’s recent paper concerning government information supply activities noted that some departments were currently unable to break down costs into the categories of information production, transformation and dissemination. It therefore invited Ministers responsible for the purchase of government information outputs to:
- compare current prices for information outputs supplied to external parties with the pricing principles for government-held information;
 - establish whether current costing systems are adequate to set prices in accordance with the pricing principles and, where current systems are inadequate, set in place a timetable for improvements; and
 - where current prices are not in accord with the pricing principles, establish a timetable for amending prices including a strategy for handling the fiscal impact of the changes.
- 125 These recommendations (and those in para 127) were accepted by the government in July 1997. The Treasury, in consultation with the State Services Commission, is now reviewing the implementation and impact of the pricing principles and the guidelines for government information supply (see para 127).
- 126 The Treasury paper’s broader concern was to ensure efficiency in the supply of government information products and services. It distinguished between core information outputs which must be supplied to achieve a desired policy outcome, and non-core outputs. It stated that there is currently little guidance to departments as

to the scope of non-core information activities they should conduct. There are also inadequate mechanisms to ensure that the costs of core and non-core information outputs can be distinguished and separated to avoid the risk of cross-subsidisation.

- 127 The paper noted that budgetary pressures on departments and revenue generating targets set by government create incentives for departments to focus on non-core information outputs to sell to third parties, at the expense of core information outputs. Budgetary pressures and revenue targets may also encourage departments to engage in anti-competitive behaviour to discourage the provision of worthwhile information activities by private sector suppliers, who may be at least as efficient as government suppliers. The paper therefore recommended the adoption of guidelines concerning four matters:
- the definition of core government information outputs,
 - controls on non-core government information outputs,
 - anti-competitive behaviour,⁸⁵ and
 - third party revenue targets.

The overall aim of the guidelines is to enhance the collection, compilation, transformation and dissemination of government information outputs.

- 128 In summary, the principles developed by the State Services Commission and the Treasury affect the production, collection, transformation and dissemination of government-held information, and the even more fundamental issue of what information the government *should* hold. They will therefore broadly define, on a continuing basis, the boundaries within which the official information regime operates.

THE ISSUES

Charging for time spent deciding whether to release

- 129 The pricing principles are useful in considering the specific question which arises under the Law Commission's terms of reference in

⁸⁵ The guideline concerning anti-competitive behaviour states that the Minister responsible for an agency "should ensure that it does not cross-subsidise any contested non-core activity from its core output budget, and does not unduly withhold information, or charge more than its cost of dissemination, to protect that activity from actual or potential competition". These goals are consistent with the Official Information Act, but it should also be noted if non-core information outputs are produced by the private sector in place of government agencies, the amount of information which falls within the definition of "official information" within s 2 of the Act could be reduced.

relation to charging: whether agencies ought to be able to charge for time spent in deciding whether or not to grant a request.

- 130 The government's charging guidelines specify that a charge is not to include "any allowance for . . . time spent deciding whether or not access should be allowed and in what form". The charge can, however, include time spent "in reading or reviewing the information", as well as establishing its location, actually locating and extracting it, and supervising access to it.⁸⁶ The cut-off point, from which an agency can no longer charge, is when it starts to consider whether the withholding grounds apply to the information requested.
- 131 These passages in the guidelines reflect the opinion of the Ombudsmen that s 15(2) does not allow agencies to charge for time spent, or expenses incurred (including legal expenses), in deciding whether or not to release information.⁸⁷ But whatever the legal position, *should* an agency be able to recover some or all of that expense?
- 132 This question is central to the cost of administering the Act, a cost which has grown steadily since the early 1980s as the Act has come to be used for specialised research purposes. It has been of concern to the prime ministers of successive governments.⁸⁸
- 133 It has always been clear that agencies cannot charge for the work involved in deciding *not* to release information: that is the position in law and no-one appears to question it as a matter of policy.⁸⁹ Similarly, the work involved in deciding not to release *part* of the information cannot and should not be charged for. The Commission's view is that in principle the situation is no different if the decision is to release all the information requested. There should be no ability to charge for that phase of an agency's work.
- 134 This approach is consistent both with the principle of availability and the pricing principles we set out in para 122. Particularly relevant is the principle that free dissemination of government-held information is appropriate where the dissemination to a target audience is desirable for a public policy purpose.

⁸⁶ Para 2.3.

⁸⁷ See Office of the Ombudsman, Practice Guidelines No 1, para 2.9.8 (see appendix D).

⁸⁸ See, for example, Report of the Ombudsmen for the year ended 30 June 1990, AJHR A.3, 20.

⁸⁹ Section 15(1) authorises a charge only in the context of a decision *to release*, while s 15(1A) allows a charge only for *the supply* of official information under the Act.

- 135 It is the function of the state to express its rules in a way that is “clear . . . [and] sufficiently stable to allow people to be guided by their knowledge of the content of the rules”.⁹⁰ Each reasoned decision upon the principles whether to disclose ought to add to the government’s institutional capacity to deal more efficiently with future cases, as the body of relevant jurisprudence increases.⁹¹ That cost goes to the progressive improvement of the overall system of dealing with requests and is to that extent a public good; no equivalent benefit is received by the requester. On principle therefore the agency and not the requester should bear that cost.⁹²
- 136 To the extent that the cost of the decision-making process is a problem for some agencies, the Commission thinks that the solution lies in the improved rules and procedures which are proposed for handling voluminous requests (see chapter 2). These measures will promote efficient administration of the Act and help keep under control the extent of the work (and any related expenses) in making decisions about the release of information and the form of release.
- 137 Accordingly, the Law Commission recommends no change to s 15 to allow agencies to charge for time spent in deciding whether or not to grant a request.

Charges by bodies engaged in competitive activities

- 138 A second question about charging has been brought to our attention by the Ombudsmen and Ministers: how are charges to be fixed by organisations which are no longer funded or principally funded by the state, which must compete for funds with other public and private sector bodies, and which may generally be acting on a “user pays” basis?
- 139 An example gives this issue concrete content. Crown research institutes are principally funded by grants from the Foundation for Research, Science and Technology and by contracts for commercial activities. The institutes may compete with the private sector for those grants and contracts. If a scientist spends time

⁹⁰ Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980), 270.

⁹¹ Also vital in this respect are the Ombudsmen’s case notes.

⁹² The alternative would impose an excessive charge on the first requester, of which the agency and later requesters would be able to take advantage.

answering an official information request and that time is costed at the guideline rate (which may be less than half the time-costing of the scientist involved), the official information work is being subsidised by the competitive work. Is that consistent with the emphasis on financial transparency in the Public Finance Act 1989, or with the equal position of the public body in relation to its competitors?⁹³

- 140 Much of the work done by public sector agencies (including many departments) is of commercial value to others, whether competitors or not. The issue here is whether the results of developing information from one form (eg, raw statistical data) into a more valuable form, using taxpayer resources, should be available to the taxpayer without charge except in relation to the cost of dissemination.
- 141 The pricing principles in relation to government-held information draw the distinction in terms of whether the information is “created for the commercial purpose of sale at a profit” (para 122). Where it is, full cost-recovery can be justified, but only where the other pricing principles (including those which promote dissemination to a target audience in the public interest) are not prejudiced.
- 142 The answer to many questions about charging in this area will often depend on the facts. It is a matter of judgment first whether one of the withholding provisions applies, and if not, what charge is appropriate. How many requests do use up valuable time of qualified personnel? To what extent is the official information work being “subsidised” by other activities of the agency? The government’s charging guidelines will assist in setting an appropriate charge if information is to be released under the Act.
- 143 But the guidelines are not decisive. For instance, if a Crown research institute undertakes research on a commercial basis for a client, and charges that client for the creation of that information or the transformation of raw data into another form, a subsequent

⁹³ Moreover, a private competitor of an agency which is subject to the Act can request official information held by that agency. The Act may allow the information requested to be withheld, however, especially under the provisions concerning the protection of trade secrets, commercial positions, confidences and commercial activities, and the prevention of disclosure or use of information for improper gain or improper advantage: s 9(2)(b), (ba), (i) and (k). Parliament has confirmed that SOEs are to remain subject to the Act and to the Ombudsmen Act. With the later concurrence of the government, Parliament rejected the arguments of commercial disadvantage (see paras 5–7). The same arguments as were adopted by the select committee can be made in respect of those Crown entities (eg, Crown research institutes and Crown health enterprises) which are subject to the Act while their competitors are not.

request for the created information could be charged for at a higher rate than the guidelines provide, because the Official Information Act should not be used as a means to avoid paying for government research.⁹⁴ In some cases the ability to recover costs will arise through the commercial production and sale of the information (or the prospect of it) completely outside the ambit of the Act. In that event the request may be refused: s 18(d). Alternatively the request could be refused on one of the withholding grounds in s 9, in which case any charge could include the costs of creating or transforming that information in accordance with the State Services Commission's pricing principles.

144 Assessing the scope of the issue is important. We consider that the broader issue of access to, and protection of, scientific research carried out by Crown bodies should not be addressed simply by way of the charging regime under the Act. The State Services Commission's policy framework on government-held information is a useful starting point in considering the broader issue.

145 The Law Commission does not propose any change to the legislation to enable agencies undertaking commercial activities for profit to charge in any way different from other agencies. The test should remain one of reasonableness, as qualified by s 15(2). The government's 1992 guidelines on charging should be revised, to conform with the more recent work of the State Services Commission.

Charges for members of Parliament

146 Another issue which has come to our attention is what principles should govern the imposition of charges for requests by members of Parliament and parliamentary research units. Charges are ordinarily not imposed on MPs or staff of parliamentary research units.⁹⁵ This practice has been observed by successive governments. We support the practice and consider it important that it remain unchanged.

147 The Act has been used extensively by parliamentary research units since the late 1980s. As noted in chapter 1 of this report, MMP

⁹⁴ This point was highlighted to us by the Ombudsmen in their submissions.

⁹⁵ See Memorandum on charging for requests under the Official Information Act 1982 (Department of Justice, Wellington, 1992), paras 7.2 to 7.4 (see appendix G).

has seen the number of research units grow. The government has reported a substantial increase in the volume and complexity of official information requests from those sources, and from MPs themselves, since the 1996 election. Such is the growth in requests that the Prime Minister has recently considered the use of charges to recover some of the costs of responding to them.⁹⁶

- 148 There are important reasons for not charging MPs and parliamentary research units for requests, including the Opposition's limited resources, and the constitutional importance of the Act (and the parliamentary question procedure) as means of keeping the executive accountable to the legislature. Scrutiny and control over the activities of the government have long been recognised as amongst Parliament's most important functions. Indeed, s 4 of the Act expressly refers to "the principle of the Executive Government's responsibility to Parliament". Because of the whip system and other forms of party discipline, the scrutiny and control functions in practice fall largely on the Opposition; to exercise them effectively it must have access to information. Replies to Opposition requests for official information and parliamentary questions, published or broadcast in the media, in turn form an important source of information to the public about the activities of government.
- 149 This issue has come to prominence only recently; as it was not included in our draft report we have not had the benefit of a full range of opinion on this matter.⁹⁷ We have already stated our support for the practice of not charging MPs and research units, and consider that some of the current pressures may be addressed in two ways. First, the resourcing arrangements for opposition members of Parliament, and for those co-ordinating the government's response to these requests, must be adequate to allow each side to meet their responsibilities under the Act.⁹⁸ This leads into the second point: as the Prime Minister points out it is the generalised requests which are the most problematic. Our

⁹⁶ Hansard advances, 12 June 1997, 2323.

⁹⁷ We have, however, spoken to, amongst others, the Office of the Prime Minister and the Cabinet Office regarding this issue.

⁹⁸ The resources of Opposition research units should be sufficient to enable requests for information to be made with the care and attention required to meet the requirement of due particularity in s 12(2), and to not fall foul of s 18(f). On the government side, the practice of departments referring large numbers of "political" requests to Ministers' offices should be acknowledged by adequate staffing and resourcing of those offices to allow processing of requests within the time-frames set out in the Act.

recommendations in relation to large and broadly defined requests would give the government greater scope to refuse requests which involve a substantial diversion of resources. On the other hand, our reformulation of the obligation to help refine broad requests at the earlier stage is designed to reduce the instances in which this ground for withholding becomes relevant (see chapter 2).

4 Time limits

OVERVIEW

- 150 **T**HE LAW COMMISSION was asked to report on the appropriateness of the time limits in ss 15, 15A and 29A of the Act. Sections 15 and 15A regulate the time within which agencies are to answer requests for official information: we noted in the executive summary that non-compliance with the time limits is an issue of major importance. Section 29A governs the later stage of agencies' responses to requirements for information by an Ombudsman considering a complaint. It is more convenient to consider s 29A in chapter 9, which examines the responsibilities of decision-makers towards the Ombudsmen.
- 151 The Act deals with the following matters relating to timing, each of which we consider:
- the handling of urgent requests (s 12(3));
 - the general rule – agencies must make and notify a decision on a request as soon as reasonably practicable, with an outside limit of 20 working days (s 15(1));⁹⁹
 - the extension of the 20 working-day period by reference to certain criteria (s 15A);
 - the decision to transfer a request, which should be made “promptly” and in any event not later than 10 days after the request is made (s 14).
- 152 The actions (or inaction) of agencies in relation to time limits can be the subject of a complaint to the Ombudsmen. Section 28(4) of the Official Information Act deems failure to comply with the 20 working-day time limit, or an extended time limit, to be a refusal of the request; s 28(5) treats undue delay in making information available in response to a request in the same way. Section 28(2) allows the Ombudsmen to investigate an agency's extension of the time limit under s 15A of the Act. Section 28

⁹⁹ See also the Local Government Official Information and Meetings Act 1987 s 13(1).

does not, however, expressly include complaints about transfer of requests within the Ombudsmen's jurisdiction. We return to this issue in paras 186–189.

- 153 Complaints to the Ombudsmen about non-compliance with the time limits are numerous. The annual reports of the Ombudsmen over the last 3 years show that “delays/deemed refusals” are easily the second largest category of complaints after refusals.¹⁰⁰
- 154 As originally enacted, the Act contained no specific time limits. It simply required actions to be taken “promptly” and “as soon as reasonably practicable”.¹⁰¹ From the outset the Ombudsmen commented that delay could undermine the effect of the Act. Growing concern about delays, both at the initial stage and at the stage of complaint to the Ombudsmen, led in 1987 to the introduction of the time limit and extension provisions in ss 15, 15A and 29A.

“AS SOON AS REASONABLY PRACTICABLE”

- 155 The basic obligation upon agencies to make decisions on requests as soon as reasonably practicable reflects the concern of the Danks Committee, the Ombudsmen, Parliamentarians and others that a specific time limit might come to be seen as the norm.¹⁰² For many public sector agencies this seems to have become so, as the Ombudsmen pointed out in 1995:

There is a common misconception among public sector agencies that 20 working days is the norm within which to respond to a request for official information irrespective of the circumstances of the request and any urgency sought by the requester. That view is wrong under the Act. **The essential obligation is to respond “as soon as reasonably practicable”.** The 20 working-day time limit (subject to extension in certain defined circumstances under s 15A [s.14]) sets a statutory **maximum** on the period of time that can reasonably be said to be “as soon as reasonably practicable” in each case.¹⁰³ (original emphasis)

¹⁰⁰ In the year ending 30 June 1996, 211 of the total 1165 Official Information Act complaints related to “delays/deemed refusals”; 823 complaints related to refusals: Report of the Ombudsmen for the year ended 30 June 1996, AJHR A.3, 75.

¹⁰¹ For the Danks Committee's reasons for standards rather than rules regarding time for responding to requests, see *Towards Open Government: Supplementary Report*, paras 4.43 to 4.48.

¹⁰² *Towards Open Government: Supplementary Report*, para 4.43, and Report of the Ombudsmen for the year ended 30 June 1995, AJHR A.3, 35 (quoting the Hon Paul East MP, 478 NZPD 7075).

¹⁰³ Report of the Ombudsmen for the year ended 30 June 1995, AJHR A.3, 35.

- 156 Earlier, the Ombudsmen recorded that in the related area of agency responses to their own requests for information for review purposes, 32% were answered on the 19th working day or later.¹⁰⁴ This year the Chief Ombudsman again expressed concern about the time agencies take to respond to requests in the course of an Ombudsman's investigation.¹⁰⁵
- 157 The Law Commission adds its voice to those statements of concern. Agencies have a basic obligation to make a decision on a request, and provide information to the Ombudsmen in the course of an investigation, as soon as reasonably practicable. That should be emphasised in all material concerning the Act including in-house information and information prepared by, among others, the State Services Commission and the Ministry of Justice. The 20 working-day period is an *outside* limit, not the rule, subject to the confined possibility of extension considered later in this chapter.
- 158 **We consider that the basic obligation upon agencies should remain to deal with requests as soon as reasonably practicable. This requirement remains paramount notwithstanding the existence of a 20 working-day time limit.**

URGENT REQUESTS

- 159 The use of standard time limits can draw attention away from the appropriate response to urgent cases. Section 12(3) enables a requester to specify urgency in a request and the reasons for the urgency. The complaint provisions confirm that the intervention of the Ombudsmen might be sought well before 20 working days have expired: s 28(5). The Act gives agencies no express guidance, however, on how to take urgency into account.
- 160 In one case, which reflects a common scenario for an urgent request, the Chief Ombudsman was asked on 30 January 1985 for a report being prepared by a department for a meeting of a statutory board on 12 February. Part of the argument was that the report would be publicly available after its consideration by the board (s 18(d)). Since the board was planning to make a decision on the report on 12 February, later release would not support the purpose of effective public participation in the elaboration of policy (set out in

¹⁰⁴ Report of the Ombudsmen for the year ended 30 June 1988, AJHR A.3, 21.

¹⁰⁵ Oral statement by Sir Brian Elwood at the Legal Research Foundation seminar on the Official Information Act, 25–26 February 1997.

s 4(a)(i)). Moreover the s 18(d) reason was administrative and practical, not substantive. Accordingly the Chief Ombudsman recommended that the paper be released on 11 February and that was effected by the department: (1986) 7 OCN 230.

- 161 But the Ombudsmen have also emphasised that in respect of urgent requests the relevant obligation upon agencies is to respond as soon as reasonably practicable even if this takes longer than requested:

Similarly, some users of the Act have wrongly assumed that a person making an urgent request can require a public sector agency to respond within a time frame fixed by that requester. While it will often assist a public sector agency to know at the outset the urgent time frame within which a requester prefers to receive the information requested, the sole obligation remains to respond "*as soon as reasonably practicable*". Whether responding "*as soon as reasonably practicable*" will meet a requester's specific time frame will depend on the circumstances of the particular case.¹⁰⁶ (original emphasis)

- 162 The Ombudsmen have also issued guidelines for responding to urgent requests. While these emphasise that each case must be assessed on its merits, relevant factors in determining what is reasonably practicable in the context of urgent requests are:
- the volume of information which must be considered;
 - the nature of the information requested and how it is held;
 - what consultations are necessary before making a decision on the request;
 - the specified reasons for urgency; and
 - whether according priority to an urgent request would unreasonably interfere with the agency's operations.¹⁰⁷

THE 20 WORKING-DAY LIMIT

- 163 There is some suggestion that the 20 working-day time limit for responding to requests is now generally too short, in the light of the increased workloads experienced by many agencies. The time limits are alleged to distort work flows by requiring agencies to give priority to requests over other work which they see as having greater priority. Should the limits be relaxed, and the statutory criteria changed to take better account of work flows?

¹⁰⁶ Report of the Ombudsmen for the year ended 30 June 1995, AJHR A.3, 35.

¹⁰⁷ Office of the Ombudsman, Practice Guidelines No 8 (Wellington, May 1995), para 5.1: Current approach of the Ombudsmen to the provisions of the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987 which are relevant where the person making a request for official information asks that the request be treated as urgent.

- 164 The Commission is also mindful, on the other hand, of frustration among requesters over the time taken by agencies to process requests. It acknowledges criticisms that some agencies cynically use the 20 working-day rule, extension and transfer provisions, and finally recourse to the Ombudsmen, to delay the release of information until it is of no or little use to the requester.¹⁰⁸ As much as ever, information is “a perishable commodity”:¹⁰⁹ stale information is often useless to the requester. Submissions to the Law Commission from user groups framed the issue in terms of reducing time limits.
- 165 The opinion of the Minister in charge of the 1987 measures which introduced the time limits was that in all normal circumstances 20 working days would be sufficient time and was a reasonable period.¹¹⁰ Foremost in the debate over time limits must be the principle of availability and the emphasis on the utility of timely information for participation and accountability.¹¹¹ Time limits in other jurisdictions are also relevant:
- In Canada and Ontario, 30 days from receipt of the request, with extensions of time for a reasonable period for reasons specified in the Acts.¹¹²
 - In New South Wales under the Freedom of Information Act 1989 (NSW) ss 24(2) and 59B, 21 days, with an extension of a further 14 days.
 - In Australia under the Freedom of Information Act 1982 (Cth) s 15(5)(b), 30 days with an extension of up to a further 30 days in certain circumstances (s 15(6)(a)).
- 166 The Ombudsmen's practice in handling complaints about delay has been, in the first instance, to make informal inquiries about the reasons for the delay. If a response to a request is forthcoming the complainant is notified of that fact. No further steps are taken by

¹⁰⁸ For example, the Act has been described as being of limited use to the daily newspaper or radio journalist, if departments and others under the Act use time limits in s 15 to delay replying to a request until 20 days later, rather than respond “as soon as reasonably practicable” as required under that section – or simply ignore the time limits: see Morrison, “The Games People Play: Journalism and the Official Information Act”, in *The Official Information Act* (Legal Research Foundation, Auckland, 1997), 31–34.

¹⁰⁹ Report of the Ombudsmen for the year ended 30 June 1990, AJHR A.3, 30.

¹¹⁰ (1987) 477 NZPD 6905.

¹¹¹ Sections 4 and 5 of the Act: see paras E5–E6.

¹¹² Access to Information Act 1985 (Canada), ss 7 and 9(1); Freedom of Information and Protection of Privacy Act 1987 (Ontario), ss 26 and 27(1).

the Ombudsmen unless further complaint of delay is received. If the matter becomes the subject of review and further information is requested by the Ombudsmen's Office, an investigating officer contacts the agency to remind it of the time limit for responding to requests (s 29A) and its power to request an extension if necessary. A bring-up procedure is in place to effect this (see para 337).

- 167 While there are significant delays in responding to official information requests, there are competing arguments whether reducing time limits will improve matters. Underlying non-compliance with time limits are both the ability and willingness of agencies to handle requests more quickly. There are numerous factors which affect the ability to respond to a request quickly, including an agency's staff and other resources; familiarity with the matters which form the subject of the request; information technology and document management systems; competing work priorities; and, in the case of some agencies, the large number of other official information requests to be processed. Willingness to process requests promptly, on the other hand, relates more to the organisational culture of the relevant agency, knowledge and understanding of the Act, and whether the purposes of the Act are endorsed, particularly by senior management. Reducing time limits will not necessarily change these factors.
- 168 It may also be argued that shorter time limits will simply increase the incidence of non-compliance, and the number of complaints to the Ombudsmen about delay. Or they may prompt agencies to use the extension power in s 15A more often.
- 169 Nevertheless, the Law Commission considers that shortening the time limits would prompt some agencies to reconsider their approach to handling official information requests and, in particular, to take more seriously the obligation to respond as soon as reasonably practicable. Some of the arguments against reducing time limits appear to us to reject change because it will be unable to *eliminate* the problem of delay in responding to requests. This is of course correct – but we consider shortened time limits would help lessen the problem. Some causes of delay might be addressed through the practices and legislative amendments we recommend in relation to voluminous requests (see chapter 2).
- 170 Shorter time limits are justified for another reason. Since the 20 working-day limit was set, advances in information technology and records management, and in particular the storage of documents on-line rather than in manual filing systems, have reduced the time which is needed to make some forms of official information available. There is force in this argument, even if some

agencies have yet to complete the technological advances which would allow documents to be retrieved more readily. Effective information management policies, allowing new technology to be used to best effect, are vital if technology is to reduce time spent in processing requests.

- 171 The Australian Law Reform Commission concluded, in relation to the time limit for processing requests under the Freedom of Information Act 1982 (Cth):

The Review agrees that it is reasonable to expect agencies to take advantage of technological developments to improve their FOI administration. However, it considers that it would be premature to reduce the 30 day period immediately because some agencies do not yet have the facilities to store all documents electronically. Instead, it recommends that in three years the time limit should be reduced to 14 days.¹¹³

- 172 For the same reasons, we consider that inconsistent implementation of information technology across the public sector, with attendant improvements in the ability to process official information requests, should only delay, rather than rule out, a reduction of the time limits. We consider that the State Services Commission could usefully monitor the progress of public sector agencies in implementing information technology and information management policies, with a view to reconsidering whether this might allow the time limits to be reduced in the future. However, as noted in chapter 1, there is a need for similar supervision to be exercised over the wider state sector including Crown entities and SOEs.¹¹⁴

- 173 Accordingly, the Law Commission recommends that the government review the 20 working-day time limit under s 15(1) in 3 years, with a view to reducing it to 15 working days. This would recognise that much information is now, or should be, more readily retrievable than when the 20 working-day limit was set, because of developments in information technology and information management. In the meantime, the government should adopt a 3-year strategy aimed at improving the ability of all agencies, through information technology and better information management, to respond to requests under the Act.

¹¹³ ALRC 77, ARC 40, para 7.10.

¹¹⁴ See also the report of the Government Administration Committee: *Financial review of the 1995/96 performance and current operations of the State Services Commission*, 1997 AJHR I.20A, para 47.

EXTENSION OF THE TIME LIMIT

- 174 Not all requests can be answered in the prescribed period. A power of extension will be required for some large or difficult requests. How legislation expresses such a power presents several questions:
- Who should exercise it in the first instance?
 - On what grounds should it be exercisable?
 - Should the power be capable of being exercised more than once?
 - Should there be an outer time limit on it?
 - What provision should there be for review?
- 175 The Commission considers that the answers to the first and last questions should be as at present. That is to say, the agency which is handling the request should make the decision and give notice to the requester of the extension, the reasons for it, and the right to complain to an Ombudsman: s 15A(4). The Ombudsmen should also continue to handle complaints about extensions under s 28(2).

Multiple extensions

- 176 The generally, but not unanimously, accepted interpretation of s 15A is that the time for response can be extended only once – that action must be taken within 20 working days of receipt of the request: s 15A(3). The Commission agrees that the power should be limited in that way. The point has been made that something unforeseen might arise in the course of the extension requiring a further extension. But there is no evidence of this being a problem in practice. The Commission does not therefore propose any change to allow multiple extensions of the time limit for responding to requests.

Grounds for extension

- 177 The statutory grounds for extension under s 15A(1) are that:
- the request is for a large quantity of information, or necessitates a search through a large quantity of information, and meeting the original time limit would unreasonably interfere with the operations of the agency; or
 - consultations necessary to make a decision on the request are such that a proper response cannot reasonably be made within the original time limit.
- 178 The extension is to be for a “reasonable period of time having regard to the circumstances”: s 15A(2). The importance of the reference to consultation is emphasised by the discussion of that process in the *Release of Official Information: Guidelines for Co-*

ordination issued by the State Services Commission (set out in appendix H). The guidelines stress the importance of a consistent and considered government response where requests relate to more than one department. One element in the guidelines relevant to the timing of a response is the suggested minimum of one week's notice of the department's intention to release notwithstanding the contrary opinion of those affected (para B1).

- 179 In their comments on consultation, the Ombudsmen have also emphasised the need for regard to be had to first, the real need for consultation, secondly, how quickly that need is established following receipt of the request, and thirdly, how quickly consultation can be completed. They consider that if the request is attended to promptly, it should be possible to undertake any necessary consultation within the 20 working-day limit. They also reinforce in this context the importance of clarifying at the outset exactly what information is requested through ss 12(2) and 13 of the Act.
- 180 Where the information relates to a third party, particularly where that third party has a vested interest in the information being withheld, there is no express statutory duty to consult the affected third party prior to release, as there is for instance in Canada and Australia. In fact, according to the Minister of Justice, the select committee when addressing this issue in 1986–1987 rejected that approach as both time-consuming and expensive. The Minister considered the system of informal consultation appeared to be working well, and that the case for change had not been made out.¹¹⁵ We return to that issue at paras 206–212.
- 181 The only change to s 15A which we propose is an additional ground for extension. Section 29A, regulating the extension of time for responses to the Ombudsmen's requirements for information, sets out the two grounds from s 15A(1), and an additional ground:
- (c) The complexity of the issues raised by the requirement are such that the requirement cannot reasonably be complied with within the original time limit.
- 182 The initial request for information may also of course present complex issues, quite distinct from the present statutory grounds relating to large amounts of information or the need for consultations. Consider for instance some of the issues arising from the requirements of effective government (chapter 6). Such complex matters might sometimes involve consultation, and that ground

¹¹⁵ (1987) 477 NZPD 6903.

might accordingly be properly available for extension. But the Commission suggests that complexity should also be available as a distinct ground for extending the time limit. This should help encourage the proper consideration of requests at the outset.

183 **Accordingly we recommend that complexity of the issues raised by the request should be added to the grounds for an extension of time under s 15A(1).**

TRANSFER OF REQUESTS

184 The provisions dealing with transfer of requests in s 14 of the Act fall outside the terms of reference we were given by the Minister of Justice. Accordingly we have not consulted widely in relation to s 14. One aspect of the section which is worthy of note, however, is that the time limit for transferring a request, 10 working days, is half the time limit for making a final decision on the request under s 15. Thus, if an agency delays considering an official information request until late in the 20 working-day period, it will automatically breach s 14 if it finds that the request should in fact be transferred to another agency.

185 This point has been used to argue in favour of a reduction of the time limit in s 15 to 10 working days. Equally though, it could be argued that the time limit under s 14 should be revised upwards to meet the s 15 time limit. From the requester's point of view this would be unsatisfactory: delays caused by transferring requests are already a considerable source of frustration. Accordingly we do not propose any change to the time limit in s 14, but we do emphasise once again the importance of promptly considering all requests, not least so as to ensure that any transfer of the request can be made within time.

186 We mentioned in para 152 that s 28 does not expressly include complaints about transfers within the Ombudsmen's jurisdiction, in contrast to other aspects of an agency's handling of a request. There is no apparent reason for that exception. If the agency is subject to the Ombudsmen Act, the complaint could be handled under s 13 of that Act as a complaint relating to a matter of administration, but there is no reason to introduce that complication. Moreover, not all bodies which are subject to the Official Information Act are also subject to the Ombudsmen Act.

187 We think it desirable that complaints may be made about transfers, so that unreasonable conduct may be considered by the

Ombudsmen who should be able, if necessary, to direct that the matter be resolved by a particular agency or by the Ombudsmen themselves.

188 It is noteworthy that s 35 of the Official Information Act provides for a general complaint jurisdiction for decisions taken under the Act in respect of *personal* information.¹¹⁶ We consider that s 28 should be amended to allow the Ombudsmen to review a decision to transfer a request under s 14, or a failure to comply with the time limits in that section. An amendment to s 30(1)(a) is also required so that the Ombudsmen can make an appropriate recommendation.

189 The Law Commission recommends that:

- a decision to transfer a request under s 14, and failure to comply with the time limit in that section, should become grounds for complaint to the Ombudsmen under s 28(2) of the Act; and
- the words “or transferred” should be added after the word “refused” in s 30(1)(a) of the Act .

¹¹⁶ Requests by individuals (as opposed to corporate personalities) relating to personal information are now dealt with under the Privacy Act 1993.

5 Decision-making rules for Ministers and officials

OVERVIEW

- 190 **T**HE DECISION ON A REQUEST for information is made by the Minister, department or organisation which received the request unless the request is transferred: s 15(1). The Act lays down almost no procedure for making that decision. In respect of departments, however, s 15(4) requires the decision to be made by the chief executive, or by an officer or employee of the department authorised by the chief executive. Section 15(5) goes on to make it clear that s 15(4) does not prevent the chief executive, officer or employee from consulting a Minister or any other person on the decision that they propose to make.
- 191 The Law Commission was asked to report on the appropriateness of these rules. One concern expressed to us about the provisions is that if the officer with responsibility to decide the request consults with a Minister and disagrees with the Minister's views, the departmental position is to prevail. This, it is said, is in conflict with the usual power of Ministers to give directions to the departments for which they are responsible. As we discuss in paras 200–203, the power of the person to transfer the request (under s 14(b)(ii)) on the basis that it is more closely connected with the functions of another department or Minister or organisation is relevant in this context.

ORIGINS OF SECTION 15(4) AND (5)

- 192 Section 15(4) and (5) were inserted in the Act in the 1987 amendment. They have their origins in concerns expressed in the early years of the Act's operation by the Chief Ombudsman and by those who considered reforming of the original provision for veto by an individual Minister of an Ombudsman's recommendation under s 30(1). In an early case about Reserve Bank financial information, the Chief Ombudsman agreed that it was not inappropriate for

the body which was asked for the information to consult with the relevant Minister. He also, however, called attention to the fact that it was the Minister (under the law as it was then) who was the final arbiter of the release of the information subject to the possibility of judicial review. The Chief Ombudsman considered that the veto procedure seemed to him

to preclude reliance at an earlier stage on a Minister's view as a ground for withholding information. The organisation concerned is obliged, in my opinion, to justify its decision by reference to specific provisions of the Act. Any other course would be an abrogation of the organisation's responsibilities under the Act.

If consultation with a Minister were carried to the point where he was asked to say whether he would direct that any recommendation by an Ombudsman should not be implemented, that in my opinion would be improper. If, on the other hand, the organisation was influenced in its decision primarily by a Minister's wish to have the information withheld, that would also, for the reasons set out above, be unacceptable. It would mean that the organisation was taking on itself the responsibility of prejudging the Minister's reaction to a recommendation by the Ombudsman that the information be released and would necessarily assume that the Minister did not propose to consider, at the appropriate time, the arguments advanced by the Ombudsman in support of his opinion and recommendation. ((1984) 5 OCN 52, 57)

- 193 A paper prepared by Professor Keith for the Information Authority in 1984 addressed the relationship of the Minister and the department in this way:

Should the Minister take any part in the initial decision on the request for information? The answer is *yes* if the request is made to the Minister. But what if the request is made to the department or organisation? No doubt it can consult with its Minister about its proposed action when it thinks that appropriate. But can the Minister actually make the decision at that point? The legal position is not clear. The Act itself indicates that it is the recipient of the request that is to respond, but the general law relating to the relationship between Ministers and officials and some of the provisions of departmental statutes relating to that relationship require the permanent head and department to act under the direction and control of the Minister. It is not clear whether the latter provisions affect the Official Information Act. What *should* the answer be? In principle the department or organisation should make the decision: the system of the Act looks to a later voice for the Minister which should, if possible, not be compromised by an early decision. But what of the case of a request to a department for a Cabinet paper or a paper actually prepared by the Minister and held by the department? Should not the Minister (in the former case in consultation with members of Cabinet) make the decision? I suggest

that the answer is yes: the Minister should. That situation is already adequately dealt with by section 14 of the Act which provides for the prompt transfer of requests by a recipient to the Minister, department or organisation more closely connected with the function in issue. I accordingly recommend that the Act make it clear that only the body or person dealing with the request make the decision on it.¹¹⁷ (original emphasis)

- 194 The nature of the concern expressed in those statements is now to be seen in the somewhat different context brought about by the change in the veto process. In place of the responsible Minister, that power may now only be exercised by the Governor-General in Council – in effect the whole Cabinet: see s 32 and our discussion in chapter 10. The Minister who is being consulted no longer has the final power of decision over the request, although it is likely that that Minister's advice would be important.

THE PROVISIONS IN PRACTICE

- 195 As noted earlier, the Act does not lay down detailed decision-making rules in relation to requests, so that in practice, agencies determine their own processes for handling requests. The Public Service Code of Conduct (1990) envisages delegation by chief executives of responsibility for responding to official information requests.¹¹⁸ It emphasises that information should only be released by officers authorised to do so, and that care should be taken in dealing with requests:

In cases of doubt, employees should seek the guidance of their superior. Should the release of politically sensitive material be required, such employees should ensure (through their chief executive) that the Minister is fully informed. (16)

- 196 The State Services Commission, in *Release of Official Information: Guidelines for Co-ordination*, issued in March 1992 (see appendix H), also stresses the importance of adequate consultation by chief executives with other departments and Ministers. The guidelines are a reminder that the interests protected by the good reasons for withholding information are often interests of the government as a whole, and not simply of the particular department. Other parts of the government will have a real or even a greater interest in

¹¹⁷ Keith, *Resolution of Disputes under the Official Information Act 1982*, Information Authority Occasional Paper 1 (Information Authority, Wellington, 1984), para 3.2(1).

¹¹⁸ See generally Eagles, Taggart and Liddell, *Freedom of Information in New Zealand*, (OUP, Auckland, 1992), 612.

their protection in particular cases. Other legislation also emphasises that collective character and function. For instance, one of the principal responsibilities of a chief executive is to tender advice to the responsible Minister and to *other Ministers*: State Sector Act 1988, s 32(b). That responsibility is directly relevant to the good reasons, in s 9(2)(f) and (g), relating to the internal processes of government (these are discussed in chapter 6).

- 197 Our consultations have highlighted a particular need for consultation within government where requests for the same information, or a single request, are made to a number of different agencies: eg, to departments and to Ministers holding different portfolios. The importance of a co-ordinated government response to the request remains the same as if the request were made to the Minister and department for which he or she is responsible. Yet the lines of communication across departments and portfolios may not be well established. Moreover, as noted in chapter 1, the Act is now being used by political parties to a greater extent than was originally anticipated in an attempt to obtain information which is politically damaging to the government.¹¹⁹ In these circumstances the provisions in s 14 regarding transfer of requests (to the Minister's office, which may in turn consult the Office of the Prime Minister to co-ordinate the government's response to the requests), become particularly important.
- 198 The proper role of the process of consultation with other agencies is also expressly recognised in the provisions of the Act regulating the extension of the time for responding to requests (considered in paras 175–183).
- 199 Some concern has been expressed that the State Services Commission guidelines in effect tell chief executives to consult. We do not read the guidelines in that way. They say that it "remains, of course, a matter for the judgment of the chief executive whether it is necessary in the particular instance to consult" (see appendix H). That discretion might be given added emphasis in any further version of the guidelines.
- 200 The Ombudsmen suggested, in their submission on our draft report, that when the department and Minister disagree about release the proper course is for the request to be transferred, under s 14, to the

¹¹⁹ The State Services Commission guidelines identify requests from the Opposition and Opposition research units, recognised interest groups, or the news media, as warranting consultation with the Minister, especially where the information is particularly sensitive: *Release of Official Information: Guidelines for Co-ordination* (State Services Commission, Wellington, 1992).

Minister who would then make the decision. That is also the position adopted in the *Cabinet Office Manual*:

A department can consult with its Minister over the decision it proposes to make on a request for information but it must then either make the decision itself, or transfer the request to the Minister concerned. If, after consultation, the Minister takes the view that the information should not be released but the department believes it should be, then transfer of the request to the Minister is the only way in which the department can meet its constitutional duty to follow Ministerial direction and the obligation to comply with the Official Information Act 1982. The propriety of such a transfer is not subject to review by an Ombudsman under the Act. Each case of this kind needs to be carefully handled at a senior level within the department, including reference back to the Minister for further consideration if necessary.¹²⁰

- 201 The only qualification to that statement which the Commission can envisage would be where the request relates to the exercise of an independent statutory power of decision. But such powers are usually associated with particular information requirements involving the disclosure that occurs in a fair hearing; they may be more generous than the Official Information Act and they are likely to apply in place of it (see s 52(3)).
- 202 The question has been raised whether the transfer provision in s 14(b) is wide enough to allow transfer in such a case. Is the request *more* closely connected with the functions of the Minister when the department had been principally concerned? In principle the Minister *should* be seen as having the greater role and responsibility. If there is any doubt the legislation should be clarified.
- 203 Section 15(4) repeats the provisions in s 15(1) that the department is to make the decision on the request, and in s 14 that it can transfer the request. While its emphasis on the department's

¹²⁰ *Cabinet Office Manual* (Cabinet Office, Department of Prime Minister and Cabinet, Wellington, 1996), para 6.22. But contrast with the option suggested by the State Services Commission in *The Public Service and Official Information* (State Services Commission, Wellington, 1995):

Where the views of departments and Ministers after consultation are contrary (that is, one thinks the information should be released and the other does not), then it is competent for the chief executive to advise the Minister that the chief executive intends to consult with the State Services Commissioner, or seek an opinion from, say, the Crown Law Office, before responding to the request. In other words, in some special circumstances, it may be appropriate to seek an impartial opinion from a third party. Such a referral should be made by agreement without breaching the constitutional duty to follow a Minister's direction. (10–11)

decision-making role may clarify the position, the provision appears to us to be unnecessary (especially with the change in the veto provision: see paras 347–348). It also redundantly gives the power of the department to the chief executive or an authorised official: redundantly, because of the position and powers of chief executives – including their powers of delegation – under the State Sector Act 1988.¹²¹ The procedure appropriate to the relationship between the Minister and chief executive is in our view satisfactorily stated in the *Cabinet Office Manual* at paragraphs 6.22. It is based on clearly accepted principle, law and practice.

204 Moreover, both ss 15(4) and (5) are incomplete. They relate only to departments, and so do not regulate decision-making or consultation by other agencies which receive requests. Nor should they, in our view. Yet issues of co-ordination and the appropriate identification of matters to be dealt with by the Minister's office are just as acute for Crown entities, SOEs and other bodies subject to the Act.

205 Accordingly the Law Commission recommends that s 15(4) should be repealed. Repealing s 15(5), however, could lead to an unfortunate adverse inference that consultation was no longer appropriate. Section 15(5) should, in our view, be broadened to cover consultation by all agencies which are subject to the Act. With the suggested repeal of s 15(4), the reference to that subsection in the opening words of s 15(5) should be deleted.

“REVERSE” FREEDOM OF INFORMATION

206 An issue which has been raised with us is the protection of rights or interests of those who have provided information to an agency, when a request has been made to release that information. Should they have specific *rights* to be consulted before that information is released, both by the agency and by the Ombudsmen in considering a complaint relating to the request? At present the Act places no binding obligation upon an agency to consult with a third party before releasing information pertaining to that party.

207 There is a further issue whether the substantive reasons for withholding third party information, for instance in ss 9(2)(b) and (ba),

¹²¹ Sections 32(a) and 41; and see some statutes relating to particular departments: eg, the Forests Act 1949 s 4A which confers powers of delegation upon the Secretary of Forestry.

are appropriately worded.¹²² That issue is not within our terms of reference and we do not discuss it in this report. It was extensively considered by the Information Authority, the government and Parliament in the process which led to the 1987 amendments to the Act, and later in the more specific context of the continued application of the Act to SOEs (see paras 5–7).

- 208 The Danks Committee considered the inclusion of express statutory protections of third-party interests. The federal legislation then pending (and now enacted) in Australia and Canada provides such protection. The Committee noted that the provisions were limited in their scope, applying to the area of trade secrets, commercially valuable material and the like. They did not extend, for instance, to personal references (*Supplementary Report*, 71).
- 209 The Danks Committee also thought that the adoption of good practices by agencies and the Ombudsmen should ensure that relevant third-party interests were taken into account (71). Both s 30(3) of the Official Information Act and s 18(3) of the Ombudsmen Act 1975 require an Ombudsman, before making any report or recommendation that may adversely affect any person, to give that person an opportunity to be heard. The High Court, in the one reported official information case in which a third party has challenged the fairness of the procedure followed by an Ombudsman, held that the Ombudsman had complied with that obligation under s 18. The third party was kept informed and had the opportunity to comment on the Ombudsman's draft report which recommended release: *Wyatt Co (NZ) Ltd v Queenstown–Lakes District Council* [1991] 2 NZLR 180 (HC).
- 210 The Danks Committee was concerned as well about the complexity and rigidity of a statutory scheme protecting third-party information. The Committee also noted that such a third party might seek judicial review of an agency's decision or an Ombudsman's recommendation to release official information (12), as has since happened in the *Wyatt* case. A third party might also be able to invoke the general jurisdiction of the Ombudsmen under the Ombudsmen Act 1975.
- 211 As anticipated by the Danks Committee, agencies do in appropriate cases consult the providers of information before making decisions whether to release it. They will very often see such consultation as being in their interest, to ensure the continued flow of information. The inclusion of consultation as grounds for extension

¹²² See Office of the Ombudsman, Practice Guidelines No 3 (appendix F).

of response times under ss 15A and 29A reflect that practice and its appropriateness. Some agencies seeking confidential material from third parties suggest that it be provided on an expressly confidential basis: the providers of sensitive information might seek related contractual rights. Such contracts cannot of course override the Act's regime of access¹²³ but they might enhance the practice of consultation.¹²⁴ Agencies may also seek waivers of access from individuals who might otherwise seek to request the information.

212 The Law Commission sees no reason to move away from the position relating to the protection of the rights and interests of third parties taken by the Danks Committee, and reflected in the Act and in current practice under it.

¹²³ *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council*. That case concerned the provisions of the Local Government Official Information and Meetings Act 1987. Jeffries J stated that the applicant should have been aware that the confidentiality clause in the contract between the applicant and the council was subject to s 7 of that Act which "effectively excludes contracts on confidentiality preventing release of information" (191).

¹²⁴ See, for example, Hon JK McLay, *The Official Information Act 1982: A User's Viewpoint*, NZIPA Seminar 8 October 1990.

6

Protecting effective government and administration

OVERVIEW

- 213 **T**HE FOCUS OF THIS CHAPTER is the provisions protecting effective government and administration. Under s 9(2), information can be withheld if this is necessary to
- (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 members of an organisation or officers and employees of any Department or organisation in the course of their duty; or
 - (ii) The protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment.
- 214 We have considered two specific questions. The first, raised directly in our terms of reference, is in two parts: how are the interests of effective government and good administration reflected in s 9(2)(f) and (g) to be appropriately protected in light of the principle of availability; and can the interests protected by these provisions be more precisely defined? The second question is whether, in addition to or instead of legislative change, administrative measures (such as training, fuller public discussion, and guidelines explaining the relevant interests) might help address particular difficulties with the operation of the Act.

- 215 Official information regimes universally recognise that some parts of the process of government will be conducted in private. As the Danks Committee put it:

To run the country effectively the government of the day needs . . . to be able to take advice and to deliberate on it, in private, and without fear of premature disclosure. If the attempt to open processes of government inhibits the offering of blunt advice or effective consultation and arguments, the net result will be that the quality of decisions will suffer, as will the quality of the record. The processes of government could become less open and, perhaps, more arbitrary. (*General Report*, para 47)

- 216 The fact that some confidences must be kept by doctors, lawyers, and spouses remind us that law and practice in the private sector, as well as in the public, recognise that privacy or confidentiality will sometimes be preferred to openness. The values reflected in that law and practice may provide good reason for withholding official information, as is clear from the protective purpose set out in s 4(c) of the Act.¹²⁵ But the protection must also have its limits.

Essential features

- 217 Four features of s 9(2)(f) and (g) can be stressed at the outset.
- The first is that even if one of the good reasons is established, it might, in terms of s 9(1), be outweighed by other considerations which make it desirable, in the public interest, to make the information available.
 - Second, the protection afforded is not a categorical one. It is not enough, for instance, to show that the relevant information is set out in a Cabinet document. Rather a judgment, involving an element of damage, is required: the person wishing to withhold must show that the withholding is *necessary to maintain* the particular interest. That phrase has been interpreted by the Ombudsmen as requiring that release would go “to the heart” of the relevant interest.¹²⁶ Factors such as the age of the information, or the timing of the request, may be relevant.
 - The third point about the provisions is linked: a judgment is required on the facts of the particular case, measured against the statutory standards. Although general trends and practices may emerge, they cannot produce automatic answers, especially in marginal cases.

¹²⁵ See para E6.

¹²⁶ Such as the convention under s 9(2)(f)(iv): (1984) 5 OCN 52, 59.

- Fourth, the trends and practices might vary over time. The Danks Committee in its *General Report* recognised that dangers possibly resulting from openness

are not such as to deter us from supporting greater openness. But they should be taken carefully into account in mapping out the critical path for change. A new and sharper definition of areas of responsibility at senior levels, and the development of new and perhaps more explicit codes governing the relationship between Ministers and officials might be required. The importance of careful adjustments in this area does point yet again to an evolutionary approach to openness. (para 49)

- 218 The emphasis in that passage is reflected in s 9(2)(f) by the phrase “for the time being”, and by the essential character of some of the listed constitutional conventions. In paragraph (g) it is reflected by changing perceptions of what “the effective conduct of public affairs” requires, for instance in terms of the advice given to Ministers by officials.

The concerns

- 219 The terms of reference and the views considered by the Law Commission in its review imply two concerns.
- 220 The first is that the provisions are uncertain – perhaps unnecessarily so – and that the uncertainty could be removed (or at least reduced) by defining more precisely the interests which are to be protected. One recent suggestion is that s 9 should directly address the harm that is to be avoided by referring to the need to maintain the values of integrity, manageability and quality of governmental decision-making, and the effective co-ordination and implementation of decisions.¹²⁷ Thus, in general terms, information should be withheld for a limited time only to protect those values; although other values (for example, the maintenance of collective ministerial responsibility) may require long-term protection of information.
- 221 The second concern relates to the effect which the Act may have had on the range and quality of advice given to Ministers. Here opinion is divided between those who consider the Act to have inhibited officials in the frankness of their advice (or at least to have resulted in the most sensitive advice being given orally in an attempt to evade the possibility of disclosure),¹²⁸ and those who

¹²⁷ Belgrave, “The Official Information Act and the Policy Process”, in *The Official Information Act* (Legal Research Foundation, Auckland, 1997), 26–27.

¹²⁸ The better view is that oral information is still covered by the Act, however: the definition of “official information” in s 2 refers to “any information”, and is not confined to documents. See discussion in fn164

see the anticipation of possible release under the Act as a useful discipline which ultimately improves the quality of advice.¹²⁹

- 222 Some Ministers, for their part, have been surprised at “liberal” interpretations of the Act, which have seen Cabinet committee papers and advice to Ministers made routinely available, and sensitive information such as exchanges of opinions between Ministers made subject to the possibility of release.¹³⁰

The need for balance

- 223 The Danks Committee in developing its overall approach stressed a number of important general considerations:

One which poses great difficulties is the need for balance – balance between the presumption that greater openness should be sought, and the need for protection in certain sensitive areas. The elements in balance would undoubtedly change over a period of time: reasons for protection based on the experience of the 1970s might not hold up through the 1980s. A second major consideration is the great difficulty of simultaneously applying a single regime all at once to all areas of government activity. (*General Report*, para 63)

- 224 Greater certainty would exist if general protection were given to categories of information relating to the processes of government, for instance advice to Ministers, or draft legislation, or Cabinet papers. This would also, however, reduce the availability of information. The Law Commission does not detect any call or need for such a fundamental change in the scheme of the statute. If anything, the call is for greater availability and transparency¹³¹ and more systematic disclosure of a wider range of information.¹³² The interests of participation and accountability make it critically important to allow for judgment and balance, especially in cases where the public interest in disclosure is particularly strong or where (as is often the case) the need to withhold information may be expected to diminish over time.

¹²⁹ Voyce, “Providing Free and Frank Advice to Government: Fact or Fiction?”, in (1997) 20 *Public Sector*, 9; Shroff, “Behind the Official Information Act: Politics, Power and Procedure”, in *The Official Information Act* (Legal Research Foundation, Auckland, 1997), 19–20.

¹³⁰ Voyce, 14–15.

¹³¹ Statement of Coalition Government Policy, 11 December 1996, Policy Area: State Services: see para E17.

¹³² As proposed in particular by the State Services Commission: see paras 51–54.

RELEVANT FACTORS IN DECISIONS

- 225 The Law Commission identifies four important features of s 9(2)(f) and (g) which are important to any decision on a request for information about the making of law or policy. The features are:
- the governing purposes and principles,
 - the types of information in question,
 - the individuals involved (eg, Cabinet, Ministers, officials, and consultants), and
 - the timing and means of release.

Purposes and principles

- 226 Sections 4 and 5 provide important reminders of the democratic imperative underlying the Act. An informed citizenry is essential to an effective, working democracy whose decisions are broadly accepted. The people must be able to participate in public processes and call the government to account.
- 227 Also critical is that the government, elected by the people, is able to govern effectively. To do that it needs to be able to receive some advice in private and to debate its options and policy in private – at least some of the time. Thus, s 9(2)(f)(iv) protects the process of tendering advice to or by Ministers, while s 9(2)(g)(i) refers to the free and frank expression of opinion, such as is necessary to maintain the effective conduct of public affairs. But both are subject to the public interest balancing test in s 9(1).
- 228 The Law Commission cannot accurately assess the extent to which the giving of free and frank advice to Ministers may have been undermined by the Official Information Act and the interpretations given to it. Suffice to say that officials (and more particularly chief executives of departments) have a duty to give such advice and in doing so not to be constrained by the fear of public disclosure. As one senior chief executive recently observed, the convention of political neutrality of officials in itself promotes the exercise of that duty.¹³³
- 229 The general point is that the Official Information Act places important emphasis on democratic participation in government; a point which has been respected by successive governments.

¹³³ Belgrave, "The Official Information Act and the Policy Process", in *The Official Information Act* (Legal Research Foundation, Auckland, 1997), 27.

Types of information

- 230 In any request it is the information – rather than the form in which it exists – which is of primary importance. Conceivably, as many as 11 distinct types of information may be sought:
- the very fact that a matter is being discussed or that certain information is held,
 - the range of issues or questions being considered,
 - the relevant facts, some of which might be disputed or be more in the nature of an opinion (particularly an expert opinion),
 - the relevant principles to be applied,
 - the application of the principles to the facts,
 - the statement of possible courses of action,
 - evaluations of the options,
 - competing views about the options,
 - an account of consultations or deliberations about the options,
 - advice to adopt a particular option,
 - the decision taken and the reasons for it.
- 231 These categories will often overlap. In many instances a policy paper will be in four broad parts:
- the background, the facts, and the principles involved;
 - the range of options;
 - evaluation of the options, and advice upon them (whether from one or a multitude of sources); and
 - the advice or recommendation.
- 232 The protective provisions of s 9(2)(f) and (g) are essentially about the internal process and working of government. They are not directly about either the substantive interest at stake or the product of the process. Accordingly the fact that a matter is being discussed or that information is held, and the range of issues or questions being discussed, generally will not be able to be protected under their terms. It may be that substantive reasons (for instance relating to the economy, in ss 6(e) and 9(2)(d)) would protect such information, especially for a time. The result of the process – the decision taken and the reasons for it – will also usually be made available, although ordinarily at a time of the government's choosing (see s 18(d)); and sometimes in a formal manifestation such as a regulation, Order in Council, or international agreement.¹³⁴

¹³⁴ Sometimes with associated public processes: eg Acts and Regulations Publication Act 1989; article 102 of the United Nations Charter. See also *Legislation and its Interpretation: Statutory Publications Bill* (NZLC R11, 1989).

- 233 The deliberative process most directly relates to the evaluation of options and the advice upon them. It may on occasions require the range of options to be protected as well. Paragraphs 9(2)(f) and (g) themselves point to the deliberative process: Ministers and officials *tender* advice, and Ministers, members of organisations, and officers and employees engage in *free and frank expression of opinions*.
- 234 The Ombudsmen's Practice Guidelines imply that the provisions are not in chronological order: subparagraph (g)(i) concerns the earlier matter, "the *generation* of opinions, those opinions frequently becoming the basis upon which advice is given"; while subparagraph (f)(iv) is about the later matter, "the *consideration* of [that] advice".¹³⁵ Obviously those steps will often overlap; in other cases only one might be present, as when an official reports his or her opinion to the department about some problem and does not give any advice about the course of action to be followed.¹³⁶
- 235 This approach also supports the particular meaning of the word *advice* indicated in the lists set out above: a recommendation as to the course of action to be adopted, which is a primary dictionary meaning. It is true that the Ombudsmen go on to suggest that *advice* can "also mean 'information given' and then can encompass purely factual information".¹³⁷ While that is an accepted secondary dictionary definition ("we received advice that the goods were shipped"), the primary meaning appears to be given even greater force in the present confined, formal context of subparagraph (f)(iv). The provision parallels the statement of one of the principal responsibilities of chief executives set out in the State Sector Act 1988: "*tendering of advice* to the appropriate Minister and other Ministers". The omission of the provision from the Local Government Official Information and Meetings Act 1987 also gives the word and phrase a special and narrow emphasis. As well, the Official Information Act consistently uses the word *information* to refer to the full range of factual information, opinion and advice.

¹³⁵ Office of the Ombudsman, Practice Guidelines No 2, Current Approach of Ombudsmen to section 9(2)(f)(iv) and section 9(2)(g)(i) of the Official Information Act 1982, paras 3.4, 3.5; original emphasis (see appendix E).

¹³⁶ See, for example, (1993) 10(2) OCN 42.

¹³⁷ Office of the Ombudsman, Practice Guidelines No 2, para 3.6 (see appendix E).

- 236 That distinction between *information* and *advice* led an earlier Chief Ombudsman to the conclusion that “to advise in this context means to offer opinions as to action”.¹³⁸
- 237 Equivalent provisions in other jurisdictions also protect the deliberative process.¹³⁹ But usually they do not cover factual material, or reports by scientific or technical experts. In general, they also expressly exclude statistical, valuation, environmental, and related reports, as well as reasons for certain decisions.

The people concerned

- 238 The political importance of a matter might also be evident from the bodies or persons who are dealing with it: the Sovereign or Governor-General, the Executive Council, the Cabinet, Ministers, officials, officers and employees (collectively or individually), departments and organisations (and their members and employees), and outside advisers and consultants. The Act acknowledges the significance of the particular office held, by referring to some (but not all) of those bodies and persons in s 9(2)(f) and (g), and also by the absence of any equivalent to s 9(2)(f) in the Local Government Official Information and Meetings Act 1987.
- 239 The convention referred to in s 9(2)(f)(iv) of the Official Information Act protects only Ministers and officials in respect of the advice they tender. Section 9(2)(g)(i) and its parallel provisions under the Local Government Official Information and Meetings Act are wider: they protect Ministers, members of an

¹³⁸ (1984) 5 OCN 52, 60. A computer search of the statute book also suggests that the phrase *tendering advice* is used very rarely and very specifically; the only other reference we have found is in the statement of the duties of the Chief of Defence Staff and of the Secretary for Defence in relation to Ministers. Many more provisions refer to giving advice, informing and recommending, with a much wider range of participants in the processes – wider, that is, than *officials and Ministers*.

¹³⁹ The Australian and Canadian statutes (Freedom of Information Act 1982 (Cth), Access to Information Act 1982 (Canada)) use terms such as: accounts of *consultation* or *deliberations*; memoranda presenting *proposals*; records reflecting *communications* or *discussions* between Ministers or on matters relating to the *making of government decisions* or the formulation of government *policy*; background *explanations*, analyses of *problems* or *policy opinions* submitted by a Minister for *consideration by the Executive Council*; and matters in the nature of or relating to *opinion, advice or recommendation*, obtained, prepared or recorded, or *consultation or deliberation* that has taken place in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the government.

organisation, and officers and employees of any department or organisation, in respect of opinions freely and frankly expressed "by or between or to" them.¹⁴⁰ Thus, in relation to departments, the relevant exchanges might be between officers and employees within a department, or between them and officers or employees of another department, members or employees of organisations, or Ministers.

The timing and means of release

- 240 The timing of a request, or the decision in respect of it, will often be critical to whether (or to what extent) it is granted. It may be made before the government has begun to establish a position, during the time when it is settling the policy, or after the policy is settled. In the last case the request might be made shortly after the event or many years later.
- 241 The Act indicates in various ways that information might more appropriately be made available later in the governmental process. For example, s 4(a)(ii) refers to the interest of accountability (which may be best served after the event), and s 18(d) allows a request to be refused if the information is or will soon be publicly available. Historical and archival practice and law also give significant weight to the passage of time.
- 242 Again, practice under the Act and as revealed by the Ombudsmen's case notes give weight to these factors.¹⁴¹ In some cases, however, the character of the information will require early disclosure to facilitate public participation in terms of the purpose in s 4(a)(i). The accountability interest may also on occasions require disclosure during the deliberative process. In other situations early disclosure may prevent reliance on the withholding provisions themselves. For example, disclosure of differing views of Ministers might be inconsistent with collective responsibility if at the relevant time no decision has been taken and collective responsibility has not yet arisen.¹⁴²

¹⁴⁰ The references to members of organisations (added in 1987) and to their employees relate to the organisations listed in the schedules to the Ombudsmen and Official Information Acts. These are public bodies – most are Crown entities – which have a separate legal identity and are to be compared with the departments of state (listed in the schedule to the Ombudsmen Act).

¹⁴¹ See, for example, (1985) 6 OCN 123, (1986) 7 OCN 246, (1987) 8 OCN 82 (statutory procedure), (1989) 9 OCN 147, (1993) 10(2) OCN 33; see also State Services Commission, *Guidelines for release of information prior to an election* (State Services Commission, Wellington, 1993), para 17.

¹⁴² Report of the Ombudsmen for the year ended 30 June 1988, AJHR A.3, 22.

- 243 The purposes of public participation and accountability are frequently taken into account by the Ombudsmen in applying the test of countervailing public interest under s 9(1) of the Act.
- 244 It is also important to mention ss 16 and 17. These heighten the emphasis on availability by providing for information to be made available in a suitable form (eg, by giving a written summary of the contents of a document), and for documents to be released with deletions, where some but not all of the information has to be protected.

CONCLUSIONS

- 245 Returning to the questions raised in para 214, our principal conclusions are that:
- aspects of the internal processes of government should continue to be the subject of an explicitly stated good reason for the withholding of official information;
 - the wording of s 9(2)(f) and (g) should not be changed; and
 - administrative measures are preferable to legislative change in attempting to resolve difficulties with s 9(2)(f) and (g).

- 246 The Commission does not consider that the Act should contain categorical exclusions (eg, of advice tendered to Cabinet or draft legislation). Nor, for the same reasons, should the Act expressly exclude certain material, such as factual material and scientific reports, from the existing good reasons for withholding.
- 247 The developing position under the Act has shown s 9(2)(f) and (g) to be less than perfect in terms of clarity and logic of presentation. Nevertheless the practice they have produced is, in general, well understood. We have considered whether there would be value in rewriting them, either to state the existing propositions with more clarity and logic, or to identify more precisely the types of interest they are intended to protect. A draft was widely circulated and discussed in an earlier version of this report. We have concluded that a change to the legislative formulation would be counter-productive. The jurisprudence and practice under the existing provisions has taken some time to develop – it will, and ought to, continue to evolve. Change would require new adjustments in thinking, and may well generate new contentions of no real merit and of a legalistic type, giving rise to cost and delay both to agencies and to individual requesters of information.

248 We consider the answer to problems with the provisions lies in a renewed effort to make them work through the issue of guidelines, case notes and other explanatory material. Good practice may include, for example, structuring of advice¹⁴³ with the possibility of requests in mind so that, when they are received, information in the nature of advice, and opinions of a free and frank kind, can be distinguished from other information and considered accordingly. The process of disclosure (especially partial disclosure) is thereby made more straightforward.

Opinions by consultants

249 A particular question which was raised with the Law Commission in the course of its review is whether s 9(2)(g)(i) ought to protect opinions expressed by persons such as consultants, who are outside the system of government but involved as independent contractors in the process of developing policy options. Their advice does not (either as a matter of law or policy) merit protection under s 9(2)(f)(iv) even when adopted into an official paper. But such advice may be open to protection under s 9(2)(g)(i), because of the possibility that opinions expressed freely and frankly by or between “or to” Ministers, officials and others may be protected.

250 Section 9(2)(g) was designed to protect the internal processes of government,¹⁴⁴ rather than protect consultants’ opinions as it may now also do. It might be argued that consultants’ advice should not be protected under this provision because it may already be protected under the general confidentiality provisions in s 9.¹⁴⁵

251 But the Danks Committee could not have anticipated the changes to the state in the 16 years following its reports, in particular the shrinking of the public sector and the increased use of private sector consultants to provide advice on matters of economic and social policy. Consultants are used far more often and for a much greater range of advice today than was the case in the early 1980s, for various reasons including their particular expertise, limits on departmental resources or time, and the desire for contestability

¹⁴³ For example, along the lines set out in para 231.

¹⁴⁴ See Danks Committee, *Towards Open Government: General Report* paras 47–51; *Towards Open Government: Supplementary Report*, 67.

¹⁴⁵ Section 9(2)(ba): note that an obligation of confidence is not in itself sufficient to ensure protection; prejudice to future supply of information must also be demonstrated, and the continued supply must be in the public interest. See also *Wyatt Co (NZ) Ltd v Queenstown–Lakes District Council* [1991] 2 NZLR 180.

of advice. Sometimes advice concerning a particular service which was formerly performed by government, such as telecommunications, may now only be available from the private sector provider of that service. In other circumstances, advice about an earlier government decision or policy may be required from former government officials now working in the private sector.

- 252 Removing the protection afforded to consultants' opinions might discourage the government from seeking their advice in circumstances where it has already decided, for various reasons, that the public sector cannot or should not provide that advice. It could thus act as a disincentive to government seeking advice from whatever source it regards as most desirable. Notwithstanding s 9(2)(ba), it could also act as a disincentive to consultants providing the honest advice which would be expected of them.
- 253 Furthermore, removing the words "or to" from s 9(2)(g)(i) would have consequences beyond the policy-making process. Opinions are expressed to Ministers and public sector agencies all the time, on a range of matters. The channel may be important for either the communication or the recipient or both.

254 Accordingly, the Law Commission does not recommend any change to the protection of opinions to Ministers or officers or employees of an agency under s 9(2)(g)(i).

Other terminology

- 255 One further technical point about s 9(2)(g) concerns the description of people included in the provision: official, officer, employee and members of organisations. The State Sector Act 1988 has been enacted since the Official Information Act. Should the list be altered in the light of that and other subsequent developments? The State Sector Act uses the expressions *chief executive*, *employee*,¹⁴⁶ *staff* and *member of the staff* of a department. The State Services Commissioner¹⁴⁷ is referred to in s 3 as an *officer*. Those in the senior executive service are referred to as *members* of that service.

¹⁴⁶ Defined as an employee in any part of the state services, but not including any chief executive or member of the senior executive service. Although compare State Sector Act s 56(4).

¹⁴⁷ Who is the chief executive of the department of state known as the State Services Commission: s 4.

- 256 The enactment of the Employment Contracts Act 1991 has also resulted in a wider use in the statute book of the term *employee* alone. It still, however, appears coupled with *officer* in a very large number of statutes. By contrast *official* (as a noun) appears very rarely with *employee*. And there appear to be no explicit statutory powers to appoint officials, by contrast to the great numbers of powers to appoint officers and employ employees (or increasingly to just employ employees).¹⁴⁸
- 257 The Law Commission does not see any technical reason to depart from the current words: *officials*, in the context of a narrower provision about the constitutional relationship between Ministers and officials; and *officers* and *employees*, in the broader context which covers a wide range of bodies and people.
- 258 The Commission does however call attention to a difficulty with the expression *members of an organisation*. That expression does not appear to be appropriate to deal with those Crown entities and other bodies which consist of a single person, such as the Commissioner for Children, the Māori Trustee, the Parliamentary Commissioner for the Environment, and the Privacy Commissioner. The expression appears only once in the Act – in s 9(2)(g)(i). Rather than amend this subparagraph by adding a reference to “an organisation”,¹⁴⁹ it is preferable to amend the definition of “member” in s 2 of the Act to include single person bodies, so that they may be covered by the existing wording of s 9(2)(g)(i).

259 **The Law Commission therefore recommends adding to the definition of “member” in s 2(1) of the Act the following paragraph:**

“(d) Where the organisation comprises a single person, that person:”.

¹⁴⁸ We might note here that the usage of the words across the statute book provides confirmation for a completely orthodox and narrow reading to be given to *official* in this report.

¹⁴⁹ This would extend the protection of express free and frank opinions to all organisations as well as individuals.

7

Protecting diplomatic documents

OVERVIEW

260 **O**UR TERMS OF REFERENCE ask “whether there should be special rules governing the treatment of some or all classes of diplomatic documents”. Five provisions of the Official Information Act deal in a direct way with information relating to New Zealand’s international relations:

- Section 6(a) authorises the withholding of official information “if the making available of [it] would be likely to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand”.
- Section 6(b) authorises the withholding of information “if the making available of [it] would be likely 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”.
- Section 7 sets out the reasons for withholding official information relating to the Cook Islands, Niue, Tokelau, or the Ross Dependency. They are similar to those in s 6(a) and include as well prejudice to the relations between any of the Governments of New Zealand, the Cook Islands, and Niue, and prejudice to the international relations of the Cook Islands and of Niue.
- Section 10 provides that, if a request relates to information to which s 6 or s 7 applies or if the information existed would apply, the agency may give notice to the applicant that it neither confirms nor denies the existence or non-existence of that information. The agency must be satisfied that the interest protected by the section would be likely to be prejudiced by the disclosure of the existence or non-existence of the information.

- Section 31 provides that if the Prime Minister certifies that making information available would be likely to prejudice the interests set out in ss 6(a) or 7, an Ombudsman is not to recommend that the information be made available. In such a case the Ombudsman does, however, have the power to recommend that the agency further consider making the information available.
- 261 Diplomatic correspondence might also be protected by other provisions of a more general application, such as those protecting personal privacy, trade secrets, or the free and frank expression of opinion: s 9 (2)(a), (b) and (g)(i).
- 262 The judgments to be made under ss 6 and 7 require that the release “would be likely to prejudice” the various interests that are referred to. The Court of Appeal has held that the applicable standard is that there is a serious or real and substantial risk of the effect occurring; a risk that might well eventuate.¹⁵⁰ Furthermore, national security, international relations and the sharing of confidential information between governments are interests in respect of which it will be difficult to override the executive’s assessment that release would likely be prejudicial. That is especially so in the case of information which is provided by a foreign government or an international organisation.¹⁵¹ Moreover, the judgments are not subject to the countervailing public interest elements which argue in favour of making the information available.¹⁵²
- 263 We note two aspects of the main provisions in this group – s 6(a) and (b). First, the provisions are designed to protect very basic interests of the country as a whole. Those interests will sometimes override the otherwise legitimate interest of individual members of the public in having sensitive information relating to the foreign and defence policies of New Zealand. The second point is the emphasis, especially in s 6(b), on the process of providing information. The Danks Committee, in its *General Report*, explained the point this way:

It is . . . widely recognised that much of the information under these headings [of the interests of the country as a whole] can be sensitive not so much for what it reveals as for the *need to protect its sources*.

¹⁵⁰ *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 391, and 411 (CA).

¹⁵¹ Some states for instance adopt the position that information which they provide to other governments should retain the protection which they would themselves provide.

¹⁵² See s 9(1) of the Act.

The then Chief Ombudsman, in his report on the Security Intelligence Service (1976, p20), reached the conclusion that information received by New Zealand from its friends is of major importance in the political, economic, and strategic policy-making fields. It is in the national interest to continue to get as much of this information as possible. While a good deal of it is in the public domain, some is not. Much of the latter is provided on the clear understanding that it will be afforded in New Zealand substantially the same degree of security as it is afforded in the country of origin. (*General Report*, para 38, original emphasis).

THE PROVISIONS IN PRACTICE

- 264 While we are aware of occasional problems, the limited number of cases appearing in the Ombudsmen's case notes, or mentioned to us by the Ombudsmen, concerning ss 6(a), 6(b), 7, 10 and 31 suggest that these provisions in general operate without too much difficulty. One well-placed commentator says that s 6(a) and (b) seldom give rise to Ombudsmen cases, possibly because they are easily recognised as proper grounds for a substantial degree of withholding.¹⁵³ The Ombudsmen advise that no cases have ever arisen by way of complaint to them under s 7. So far as we are aware, s 10 has been applied to diplomatic documents in only one case, which we discuss in paras 268–269. Lastly, we understand s 31(a) has been applied only once, although there is no public record (such as an Ombudsman's case note) of this occasion.
- 265 We now turn to some relevant cases in which ss 6 and 10 have been used, in part to emphasise the importance of the administrative provisions in the Act. One early complainant, shortly before the proposed 1985 All Blacks tour to South Africa, sought access to documents held by the Ministry of Foreign Affairs relating to diplomatic measures taken to offset the damaging international effects of the All Black tour of 1976. The Chief Ombudsman ruled that the actual report could be withheld, as its release would be likely to prejudice the international relations of the Government of New Zealand within s 6(a) of the Act. The Chief Ombudsman indicated that the likelihood of prejudice was related to the fact that sporting contacts with South Africa were of "some significance in the conduct of the Government's international relations". However, the Ministry accepted the Chief Ombudsman's recommendation that a summary be released ((1985) 6 OCN 123).

¹⁵³ Taylor, *Judicial Review: A New Zealand Perspective* (Butterworths, Wellington, 1991), para 9.05.

- 266 In 1987, the Prime Minister withheld documents relating to the medical condition of one of the French agents convicted in the *Rainbow Warrior* affair. The Prime Minister later told the Chief Ombudsman that one of the few issues on which there was satisfactory co-operation between the two governments in that affair was the access the New Zealand doctor had been given to the agent and his medical condition. Disclosure of any part of the medical report prepared by a doctor appointed by the New Zealand government would, in the Prime Minister's estimation, have aggravated the dispute and almost certainly have led to the withdrawal of this existing area of co-operation.
- 267 The Chief Ombudsman satisfied himself that release of the documents would have involved the disclosure of personal medical information and would accordingly have breached the undertaking given to the French government not to make such information available. On that basis he reached the opinion that disclosure of the information would be likely to prejudice the international relations of the government of New Zealand. The requirements of s 6(a) were therefore met. He also thought that good reason may have existed under s 9(2)(a) for withholding the report to protect the personal privacy of the agent ((1989) 9 OCN 100).
- 268 A third case concerned both s 6 and the power in s 10 to neither confirm nor deny the existence of information ((1989) 9 OCN 102). The requester sought information about certain intelligence conferences known as CAZAB. Peter Wright in his book *Spycatcher* had said that New Zealand intelligence agency representatives had attended the conferences along with representatives of other western intelligence agencies.¹⁵⁴ The Director of the New Zealand Security Intelligence Service neither confirmed nor denied the existence or non-existence of the information requested.
- 269 The Chief Ombudsman's case note refers not only to s 10 of the Official Information Act but also to s 4 of the New Zealand Security Intelligence Service Act 1969. That section states that one of the functions of the Service is to communicate intelligence to such persons and in such manner as the Director considers to be in the interests of security. The Chief Ombudsman felt obliged by the statutory language to accept, to a great extent, the judgment of the Director in carrying out a review in such a case. He recalled that Sir Guy Powles as Chief Ombudsman in his 1976 report on the Service had stated that in general "it would not be proper to make any public comment" on the relationship between the Service

¹⁵⁴ Wright and Greengrass, *Spycatcher, the candid autobiography of a senior intelligence officer* (Melbourne, Heinemann, 1987).

and its overseas counterparts. He noted that the test in ss 6 and 10 that prejudice “would be likely” was not high. Furthermore, the reasons for withholding information were conclusive; there was no element of countervailing argument as under s 9. The Chief Ombudsman therefore accepted the Director’s reliance on s 10.

- 270 The Ombudsmen have mentioned to us two further complaints which demonstrate that more difficult international relations cases can arise. One related to the inquiry of the Special Committee on Nuclear Propulsion in 1992. In that case more than one ground for withholding the information requested was available – protecting the process of giving free and frank advice as well as protecting international relations. More than one withholding ground was also relevant in the second case, which concerned access to consular files. The Ombudsmen ascertained that the Ministry’s objection was principally to the release of documents from consular files rather than information itself. Accordingly while the Ombudsmen found that there was good reason to decline to release some information under ss 6(a), 6(b), 9(2)(a), 9(2)(ba)(i) and 9(2)(g)(i), those provisions did not prevent the Ministry from releasing the information in another form. Eventually it released a summary of certain information which was accepted by the requester ((1993) 10(2) OCN 24).
- 271 Similarly, a foreign government may not like copies of its cables being handed over by the Ministry of Foreign Affairs and Trade, but it may have no problem with the release of the content of the information. Consideration of other forms of release may often allay concerns related to the release of certain documents rather than the information in them.

CONCLUSIONS

The general approach

- 272 The cases mentioned here tend to confirm that in the area of international relations the basic approach of requiring an argument and judgment (including, if appropriate, an Ombudsman’s independent judgment) that the release of the particular piece of information involves a real risk of harm is both appropriate and correct. A class approach (excluding, say, diplomatic correspondence between New Zealand and other states) or one that allowed the executive to determine harm (eg, through a certification procedure), would defeat that basic approach. It would also remove – or at least greatly limit – the judgment of an independent officer reviewing the departmental judgment, and inappropriately restrict

the availability of information. No one suggests that *all* diplomatic correspondence must be protected: New Zealand and other states accept that the treaties and international agreements they sign must (and not simply *may*) be published.¹⁵⁵ An Ombudsman's independent review of the executive opinion on issues of consequential damage in international relations can be carried out, even if it will often involve greater deference to that opinion than is to be found in other areas of operation of the Act.

- 273 We mentioned in chapter 1 the increasing internationalisation of national law and policy-making. Once the relevant international process is completed, the choices open to New Zealand policy makers and lawmakers (and those who attempt to influence them) may well be very limited: the text is likely to be determined, with no prospect of amendment, and the government may have no real choice but to accept it. There will properly be increasing pressure on the government to ensure appropriate consultation in the international processes, and the national processes which inform them.
- 274 In both New Zealand and Australia there have recently been calls for greater openness in treaty-making process. In particular, there have been calls for Parliament to play a role in decisions to enter into treaties, and not be confined to legislating to incorporate treaties into domestic law.¹⁵⁶ A formal role for Parliament in the making of treaties could lead to far wider dissemination of information about treaty making than is currently the case (eg, if a proposed treaty went before a select committee with the opportunity for public submissions).
- 275 The developments just mentioned raise the question whether the line between the conclusive reasons for withholding information about international relations in s 6(a) and (b) and the other reasons in s 9 remains as compelling as it was in 1982. Should not information falling within the international relations provisions be subject to release if the public interest in disclosure in the particular case is of greater weight?
- 276 The Law Commission thinks not. The provisions protect the international relations of New Zealand, and the flow of information from other governments or international organisations. They are

¹⁵⁵ Charter of the United Nations, article 102. See generally *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996), for the publication of treaties to which New Zealand is a party; and also *New Zealand Consolidated Treaty List as at 31 December 1996; Part 1 (Multilateral treaties)*, (Ministry of Foreign Affairs and Trade, Wellington, 1997).

¹⁵⁶ See, for example, McGee, McKay, above fn 47. The Law Commission is currently drafting a report on this topic.

about *continuing* relationships with others, some of which are of major importance to New Zealand's vital interests. Judging the likely prejudice to those relationships as a result of releasing official information is a difficult task, and will frequently involve intangible considerations. The further question which would need to be asked under s 9 – whether any prejudice is outweighed by public interest considerations which make it desirable to release the information – would be even more difficult. In any event, sometimes the government will decide that the public interest in disclosure must prevail: it is not *bound* to apply s 6(a)–(b) in the absence of international obligations of secrecy.

277 Accordingly the Law Commission recommends no change to the protective provisions of ss 6(a)–(b), 7 and 10.

Section 31 certificates

- 278 A further point concerns the continued justification for the Prime Minister's certificate power under s 31(a) of the Official Information Act.¹⁵⁷ We consider the time is now right for the government to consider whether matters of defence and foreign affairs might be excluded from this power, and its scope confined to matters of security. We have not had the benefit of others' views on narrowing s 31, as it was not raised in our draft report. We therefore stop short of recommending, in this report, that s 31 be amended immediately.
- 279 In 1981, the Danks Committee justified including s 31 by reference to s 20(1) of the Ombudsmen Act 1975,¹⁵⁸ which to the committee's knowledge had not been criticised. Although s 20 was not

¹⁵⁷ For the text of s 31, see fn 15.

¹⁵⁸ Section 20(1) states:

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 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.

known to have been used between 1962 and 1981, the committee felt that it might be used more often if there was no power, such as that now contained in s 31(a), to intervene at a later stage. The committee noted that the proposed s 31, by contrast with s 20 of the Ombudsmen Act, would allow the Ombudsman to complete the investigation and if appropriate request reconsideration (*Supplementary Report*, para 83).

- 280 As noted earlier, s 31(a) has been used only once to our knowledge. The prospect which the Danks Committee envisaged in 1981 has not been fully realised. The interests which the provision protects are directly addressed by ss 6(a)–(b), 7 and 10. They have been given a broad reading by the Ombudsmen who have not in general shown an inclination to closely review the executive judgment.
- 281 On one view, the number of times s 31(a) has been used should not count against it. It is a useful “fallback” provision which may in fact have had some influence even though it has not been invoked. Section 31(a) recognises the fundamental nature of defence, security and international relations, and that occasions will arise when safeguarding those interests is paramount. Sometimes only the government itself can assess whether these interests would be prejudiced. While we accept the fundamental nature of these interests, this is not the end of the matter.
- 282 Conclusive certificate provisions along the lines of s 31(a) are in principle difficult to justify and do not relate well to the scheme of the Official Information Act. Moreover, the use of the provision only once in 15 years indicates that it is not an essential part of the Act, and that ss 6, 7 and 10 may be adequate by themselves. The repeal of s 31(a) would not permit the Ombudsmen to supplant the judgment of the executive concerning matters of defence, security or foreign relations. The government could still exercise the power of Cabinet veto under s 32 of the Act, in the same way as it would if the information it sought to protect concerned domestic affairs. It would simply place information concerning defence, security or foreign relations under the same regime as other types of information in the event that the Ombudsmen’s recommendations were to be overridden, and shift the key decision-making power from the Prime Minister to the Cabinet.
- 283 Underlying s 31(a), and s 20(1)(a) of the Ombudsmen Act 1975 which we consider at para 316 below, is the convention that the Prime Minister is the Minister in charge of the Security Intelligence Service (SIS) and security matters in general. The functions of the SIS under s 4 of the New Zealand Security Intelligence Service Act 1969 are expressly “subject to the control of the Minister”.

“Minister” is defined in s 2 as the Minister in charge of the SIS, rather than the Prime Minister specifically. Under s 4(1)(b) of the Act it is a function of the SIS to “advise Ministers of the Crown . . . in respect of matters relevant to security, so far as those matters relate to Departments or branches of the State Services of which they are in charge”. Therefore, Ministers receive only limited information from the SIS and even then, subject to the control of the Prime Minister. Section 6(2)(b) of the Intelligence and Security Committee Act 1996 specifically states that it is not a function of the Intelligence and Security Committee, which consists of the Prime Minister, Leader of the Opposition and three other members of Parliament, to inquire into any matter that is operationally sensitive, including any matter that relates to intelligence collection and production methods, and sources of information.

284 But if responsibility for matters of security is concentrated in the Prime Minister rather than Cabinet, the same cannot be said for matters of foreign affairs or defence. There is no convention that the Prime Minister holds these portfolios. Foreign affairs and defence are matters which the Cabinet discusses collegially in Cabinet committees. It is therefore unclear why information concerning these matters should be protected by a Prime Minister’s certificate under s 31(a) of the Official Information Act.

285 Although not directly relevant to our terms of reference, we consider a similar argument can be made in respect of the Attorney-General’s certificate power in the Official Information Act s 31(b). We consider this provision should be deleted.

286 Accordingly the Law Commission recommends that the government consider further whether s 31(a) of the Act might be amended by deleting subparas (i) and (ii) and confining para (a) to information “likely to prejudice the security of New Zealand”. The Commission recommends that paragraph (b) be deleted.

8

Administrative reasons for withholding personal information

OVERVIEW

- 287 **T**HE LAW COMMISSION was asked in its terms of reference to consider whether three reasons for withholding official information in s 18(d)–(f) of the Official Information Act should apply to requests for personal information under s 24.
- 288 Since 1993, requests for personal information by *natural persons about themselves* have been considered under the Privacy Act 1993.¹⁵⁹ Part IV of the Official Information Act, and the equivalent provisions of the Local Government Official Information and Meetings Act, now apply only in respect of requests by *bodies corporate for personal information about themselves*, where those bodies are incorporated in New Zealand or have a place of business here. These bodies still have a right of access to personal information about themselves which is readily retrievable: Official Information Act s 24(1). Requests for *personal information about persons other than the requester* are covered by Part II of the Official Information Act.

Official information and personal information

- 289 Within the broader class of official information, the Official Information Act creates a category of “personal information”, defined in s 2 as “any official information held about an identifiable person”. Under Part IV of the Act as it was originally drafted, a “person” had a right of access to personal information about that person: ss 2(1) and 24. This reflected the purpose stated in s 4(b) of providing for “proper access by each person to official information relating to that person”. The right of access to personal

¹⁵⁹ See principle 6 and Part IV of the Privacy Act.

information contrasted with the procedures for seeking general official information¹⁶⁰ under ss 12 to 19 in three ways:

- it was an express right of access to personal information,
- natural persons seeking personal information could not be charged fees, and
- the person had a right to seek correction of the information (s 26).

290 The reasons for withholding in s 27 were also different, generally to the advantage of the individual requesting personal information.

Limits on access to personal information about the requester

291 Requesters' rights of access to personal information about themselves under the Privacy Act and Part IV of the Official Information Act are subject to limits.

292 The first limit is that the information must be held in such a way that it can readily be retrieved.¹⁶¹ It is here that a distinction arises between the two regimes. Natural persons can now request information about themselves only under the Privacy Act. Other persons, by contrast, can continue to seek it under the Official Information Act. If personal information is not held in a readily retrievable way, and therefore is not available under the right of access in the Privacy Act, it can still be sought as general official information under the Official Information Act.¹⁶² In such cases the apparently narrower ground in the Official Information Act s 18(e) (that the document alleged to contain the information requested does not exist or cannot be found) could become relevant.¹⁶³ The test in s 18(e) is narrower than the "readily retrievable"

¹⁶⁰ Which include requests for access to information about a person other than the requester.

¹⁶¹ Official Information Act s 24(1)(b); Privacy Act, principle 6(1) and s 29(2)(a).

¹⁶² That is, under Part II rather than Part IV of the Act.

¹⁶³ Section 18(e) of the Official Information Act is about "documents" while s 24(1)(b) of the Privacy Act refers to "information" – an apparently wider term which is not limited to recorded, tangible information. The Danks Committee intended the word to have that wider meaning (*Towards Open Government: Supplementary Report*, 61–62, quoting the *Shorter Oxford English Dictionary*: "that of which one is apprised or told"). The Ombudsmen have acted on that wider view (eg, by asking those involved in the action to provide a written account; see, for example, (1984) 5 OCN 106). But judicial opinion on the matter is divided: for the broader view, see: *Commissioner of Police*

test in the Privacy Act, since information which is not readily retrievable may nevertheless exist and may be able to be found ((1984) 5 OCN 124, 126, and (1987) 8 OCN 71).

- 293 The second relevant limit on the right of access is provided by the savings provisions of the two Acts. The Official Information Act is not to derogate from:
- enactments (defined by s 2(1) as provisions of Acts and regulations) authorising or requiring official information to be made available; or
 - other Acts, or regulations if made by Order in Council and in force before 1 July 1983, which
 - impose prohibitions or restrictions in relation to the availability of official information, or
 - regulate the manner in which official information may be obtained or made available.¹⁶⁴
- 294 The Privacy Act differs in its wording. Section 7 provides that nothing in principle 6 (which deals with access to personal information about the requester) or principle 11 (which limits disclosure of personal information) derogates from any provision contained in any other enactment authorising or requiring personal information about the requester to be made available.
- 295 These provisions are complex in their detail and possible operation. That is even more the case for official information in general when they are read with s 18(c)(i) of the Official Information Act, which enables information to be withheld if making it available would be contrary to the provisions of an enactment. The point to note in the present context is that some of the many enactments saved by s 52(3)(a)–(b) of the Official Information Act and s 7 of the Privacy Act will provide for public access, including access by the particular person, to personal information about that person. Thus, for example, if a particular enactment regulates access to personal

v Ombudsman [1985] 1 NZLR 578, 586, [1988] 1 NZLR 385, 402; for the narrower view, see: *R (a police officer) v Harvey* [1991] 1 NZLR 242. The narrower view, if applied generally to the Act would considerably constrain what we understand to be its purpose and scope. See Eagles, Taggart and Liddell *Freedom of Information in New Zealand* (OUP, Auckland, 1992), 20–28. Consider also the obviously broad scope of the word “information” as used in the criminal offences proposed by the Danks Committee (*Towards Open Government: Supplementary Report*, 93, 96, 98, 99), and later enacted in amendments to the Crimes Act 1961 and Summary Offences Act 1981.

¹⁶⁴ Section 52(3) of the Official Information Act; s 44(2) of the Local Government Official Information and Meetings Act.

information by individuals, and an individual seeks access under the Privacy Act or the Official Information Act, then the issue of access will be determined in accordance with the particular enactment.

- 296 The Law Commission is aware that s 7 of the Privacy Act is likely to be considered by the Privacy Commissioner in the forthcoming review of that Act. We make no further comment on this aspect here, but note its general relevance to the ensuing discussion.
- 297 The third limit on requesters' rights of access to information about themselves is the withholding provisions: s 27 of the Official Information Act and ss 27–29 and 32 of the Privacy Act. They repeat, in some respects, the reasons for withholding general official information under ss 6–9 and 18(h) of the Official Information Act. There are, however, some differences between the sets of reasons, which reflect the differences between personal information and the full range of official information.¹⁶⁵
- 298 In particular, the reasons for not releasing personal information do not include three reasons for refusing requests set out in s 18(d)–(f) of the Official Information Act:
- (d) That the document 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.

THE ISSUE

- 299 The issue raised in our terms of reference is whether s 18(d)–(f) listed above should apply to requests for personal information. The Privacy Act already contains an equivalent to s 18(e),¹⁶⁶ but all three questions arise under the Official Information Act in respect of requests by bodies corporate for personal information about themselves.

¹⁶⁵ Note also that there are differences between the reasons for withholding personal information under the Official Information Act (and the Local Government Official Information and Meetings Act) and those under the Privacy Act. Compare also s 29(1)(g) of the Privacy Act with para (e) of the definition of "official information" in s 2 of the Official Information Act.

¹⁶⁶ See Privacy Act s 29(2)(b) which, interestingly, applies more broadly in the sense that it refers to "the information" being non-existent or unable to be found.

Section 18(d)

300 Section 18(d) appears to have been designed specifically with official information of the broader type in mind, and not personal information. The provision acts as

a protection against requests for the content of a speech not yet delivered or a press release not yet made. It is not the intention to impair the practice of imposing a "time embargo" on material. (*Towards Open Government: Supplementary Report*, 73)

301 One reason for not applying s 18(d) to requests for personal information is that persons would effectively lose the right to propose corrections to the information at the critical time – before the information is made public.¹⁶⁷ The appropriate exercise of the right to seek correction can also help the agency holding the information, for instance in improving the quality of its information and preventing it being embarrassed by releasing inaccurate information about a person.

302 The Law Commission has not been made aware of any practical problems in this area.

Section 18(e)

303 We have already noted (para 292) that:

- the rights of access under Part IV of the Official Information Act and Part IV of the Privacy Act apply only to information that is held in such a way that it can readily be retrieved;
- an equivalent to s 18(e) already exists in s 29(2)(a) of the Privacy Act; and
- the "readily retrieved" requirement in s 24 of the Official Information Act appears to place a more difficult hurdle in front of the requester than does s 18(e).

304 Accordingly, the added application of s 18(e) to personal information requests would make no difference. The real question may be whether the extra requirement in respect of such requests can be justified. We consider this a question better addressed following the review of the Privacy Act.

¹⁶⁷ That right to seek correction does not of course apply to general official information. See Official Information Act s 26; Privacy Act principle 7.

Section 18(f)

- 305 It appears to the Law Commission that s 18(f) would not create an additional hurdle for requests for personal information. If the information cannot be made available “without substantial collation or research”, as s 18(f) allows, it cannot be “readily retrieved”. The point has also been made to us that the “readily retrieved” requirement could be used by an agency to limit its obligations under the Act.

CONCLUSIONS

- 306 The Law Commission considers that extending s 18(e) and (f) to personal information would make no practical difference to requests under Part IV of the Official Information Act. Adding the substantial collation reason to s 29(2) of the Privacy Act would be similarly pointless. The statutory requirement that personal information can be “readily retrieved” – already contained in the Official Information Act and the Privacy Act – provides more of a hurdle than either s 18(e) or (f).
- 307 Applying s 18(d) to requests for personal information may make an occasional difference, but that would risk undermining the benefits of the right to correction and so would be inappropriate.
- 308 Moreover, in general individuals seeking information about themselves under the Privacy Act rightly have greater access to information than those making general requests under the Official Information Act. A strong reason would be needed to move the treatment of personal information closer to that of official information in general.
- 309 The Law Commission recommends that the three reasons in s 18(d)–(f) should not be applied to personal information.

9

The Ombudsmen's review: responsibilities of decision-makers

OVERVIEW

310 **A** PERSON WHOSE REQUEST for information has been refused, or who is aggrieved in some other way¹⁶⁸ may complain against the decision to the Ombudsmen. In general, the provisions of the Ombudsmen Act 1975 relating to investigations apply to the complaint: s 29(1). In this chapter, we consider what obligations a decision-maker should have with respect to an Ombudsman's request for information during the course of such an investigation.

THE OMBUDSMEN'S PROCEDURE

311 Section 28(3) of the Official Information Act requires that a complaint to the Ombudsmen in respect of official information (but not personal information)¹⁶⁹ be in writing. Before 1991, the Ombudsmen Act required all complaints under that Act to be in writing; this requirement was relaxed to allow oral complaints which are then to be put in writing as soon as practicable: s 16(1) and (1A).¹⁷⁰

¹⁶⁸ For instance, by the manner of release of the information, the charge made for it, or the time taken to reply to a request.

¹⁶⁹ The provisions considered in this chapter do not distinguish between official information and personal information except in minor detail; whereas the provisions relating to the force of the Ombudsmen's recommendations and the Cabinet veto power, which we discuss in chapter 10, do make this distinction.

¹⁷⁰ Privacy Act s 68, relating to complaints to the Privacy Commissioner, is to the same effect.

312 In our view all official information complaints, not just those relating to personal information, should be able to be made orally, to cater for exceptional circumstances where it is not immediately possible to put a complaint in writing. This could be achieved by repealing s 28(3), allowing s 16 of the Ombudsmen Act to apply instead.

313 Sections 17 to 21 of the Ombudsmen Act create the framework for the investigation of complaints. The Ombudsmen are bound by obligations of procedural fairness:

- to advise the relevant agency of the intention to undertake the investigation;
- to give the agency or other person affected an opportunity to be heard, before making any adverse comment; and
- to consult with the relevant Minister (or Mayor or chairperson of a local organisation) in certain circumstances.¹⁷¹

314 The Ombudsmen are to undertake the investigation in private and to maintain secrecy: Ombudsmen Act ss 18(2) and 21. Those obligations are matched by important powers and corresponding duties upon agencies. The Ombudsmen may hear or obtain information from such persons, and undertake such inquiries, as they think fit: ss 18(3), 19(1)–(2). They can require any person to provide information relevant to the investigation, even in the face of a statutory obligation of secrecy or non-disclosure: s 19(3), (4) and (7).¹⁷²

315 In addition, the Ombudsmen are not, in general, subject to the law of public interest immunity: s 20(2). This proposition is reinforced in the official information context by s 11(1) of the Official Information Act, which states that the law of public interest immunity shall not apply in respect of any investigation by an Ombudsman or any proceedings for judicial review of a decision under the Act. Freedom of access by the Ombudsmen to government files was a central feature of the original scheme when it was set up in 1962.¹⁷³

¹⁷¹ Section 18(1), and 18(3)–(5): see also *Wyatt Co (NZ) Ltd v Queenstown–Lakes District Council* [1991] 2 NZLR 180.

¹⁷² The original ss 19(3)–(4) were replaced by the current provisions under s 24(1) of the Official Information Amendment Act 1987.

¹⁷³ See, for example, Aikman, “The New Zealand Ombudsman” (1964) 42 Can Bar Rev 399, 407.

LIMITS ON THE OMBUDSMEN'S ACCESS TO INFORMATION

- 316 The powers of investigation in the Ombudsmen Act are, however, subject to limits in s 20 of that Act. The provision excluding the application to the Ombudsmen of the law of public interest immunity (s 20(2)) is subject to the Attorney-General's power under s 20(1) to certify that the disclosure of information to the Ombudsmen might:
- prejudice the security, defence, or international relations of New Zealand, or the investigation or detection of offences;
 - involve the disclosure of the deliberations of Cabinet; or
 - 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 to the public interest.¹⁷⁴
- 317 The wording of s 20 dates from the original Ombudsman legislation of 1962. The Official Information Act, passed 20 years later, does not give special protection to Cabinet, or more particularly to Cabinet papers as a class of documents. Section 9(2)(f)–(g) of that Act instead protects, in more general terms, critical parts of the internal *processes* of government (see chapter 6). Moreover, under the Official Information Act it is for an independent officer outside government – the Ombudsman – to judge prejudice to the protected interests, at least in the first instance. The courts now also make judgments on public interest immunity matters in the areas set out in s 20. The original Ombudsman legislation was enacted only a few weeks after the Court of Appeal had first pronounced that the courts would review a Ministerial claim to withhold evidence on public interest grounds,¹⁷⁵ and many years before a court was to review the decisions of Cabinet.¹⁷⁶
- 318 Notwithstanding these considerations, we do not, on balance, favour repeal of s 20(1). This provision must be considered alongside ss 31 and 32 of the Official Information Act, both of which

¹⁷⁴ Furthermore, s 11(2) of the Official Information Act makes it clear that s 11(1) does not affect either s 31 of that Act or s 20(1) of the Ombudsmen Act.

¹⁷⁵ *Corbett v Social Security Commission* [1962] NZLR 878.

¹⁷⁶ See *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA). See also *M v Home Office* [1994] 1 AC 377 (HL) and the "Scott Report" (*Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*) 1995–1996, H.C. 115. See also [1996] Public Law, Autumn, which is devoted to the "Scott Report".

allow the executive to prevail over the Ombudsmen to prevent the release of official information. Section 20(1) allows the executive to intervene *before* the Ombudsmen have had the opportunity to consider the information in question. Although the power in s 20(1) has not been used in 35 years, it could in exceptional circumstances be appropriate to exercise that power rather than rely on ss 31 and 32 of the Official Information Act.

- 319 But in the event of its use, it should be clear where responsibility (and political accountability) lies for the decision to prevent access to information by an independent officer of Parliament. Under ss 31(a) and 32 of the Official Information Act, responsibility and accountability are clearly with the Prime Minister and Cabinet respectively. New Zealand's constitutional structure is strengthened by the presence of two Law Officers: the Attorney-General, who by convention is a Cabinet Minister, and a non-political Solicitor-General. While the Solicitor-General may exercise any power or function conferred on the Attorney-General,¹⁷⁷ we consider that the issue of a certificate under s 20 is properly a political act for which the Attorney-General should be accountable to Parliament. Accordingly, s 20(1) should be amended to specify that only the Attorney-General may exercise the power.

- 320 The Law Commission recommends that s 20 of the Ombudsmen Act should be amended to specify that the Attorney-General personally may exercise the power to prevent disclosure of information to the Ombudsmen.

Ombudsmen Act s 19(5)

- 321 The other provision which has placed an important limit on the Ombudsmen's access to relevant information is s 19(5) of the Ombudsmen Act. Those required to provide information under s 19

have the same privileges in relation to the giving of information, the answering of questions, and the production of documents and papers and things as witnesses have in any Court.

- 322 In addition to public interest immunity, those privileges include legal professional privilege, marital privilege, religious privilege, medical privilege, the privilege against self-incrimination, the

¹⁷⁷ Section 4 of the Acts Interpretation Act 1924.

general protection of confidentiality conferred by s 35 of the Evidence Amendment Act 1980 (No 2), and “without prejudice” communications. The interests protected by the general law of privilege are given appropriate protection from disclosure to the requester (and therefore potentially to anyone at all) by the good reasons in the Act.¹⁷⁸

- 323 The Law Commission is fully considering these privileges in its project on evidence. Legal professional privilege is the privilege most likely to be invoked by agencies in responding to the requirements of the Ombudsmen. The “newspaper rule” has also been specifically mentioned to us: it may protect journalists’ sources of information in limited contexts.¹⁷⁹ Section 9(2)(h) – subject to countervailing public interest – and s 27(1)(g) of the Official Information Act allow requests to be refused on grounds of legal professional privilege. The general confidentiality reason for withholding in s 9(2)(ba) of the Act might also protect journalists’ sources (see, for example, (1985) 6 OCN 89–95).
- 324 But what is the justification for those grounds being used to prevent the Ombudsmen having access to the information in the course of their handling of complaints? How are they to assess a claim about access to a document which has been withheld from the requester on the grounds of, for example, legal professional privilege, if they cannot see the document themselves? How are they to balance the public interest in disclosure under s 9(1)? What in any event is the logic of an Ombudsman being able to override an individual’s

¹⁷⁸ See especially ss 6(b), 9(2)(a)–(ba), (f)–(h), 10, 27(1)(a)–(c) and (g).

¹⁷⁹ The rule protecting the sources of newspaper information in defamation cases does not appear to present a problem for access *by the Ombudsman* in terms of s 19(5). The protection provided by the rule exists only as a limit on interrogatories and discovery and not at the trial, and it is not a matter of privilege. Such information might be protected from disclosure *to the requester* on the ground of confidence (s 9(2)(ba)). Section 2(1) of the Privacy Act in fact excludes news activities of a news medium from its scope. That exclusion might reflect the opinion of the select committee which considered the continued application to SOEs of the Ombudsmen Act and the Official Information Act. It recommended that the good reasons for withholding personal information from the requester should be extended to include withholding where

- the disclosure would be likely to identify an accredited journalist’s source; and
- the information was subject to an obligation of confidence; or
- release would prejudice further supply of information. (Report of the State-Owned Enterprises (Ombudsmen and Official Information Acts) Committee 1990 AJHR I.22A, para 12.7).

statutory *duty* not to disclose,¹⁸⁰ while not being able to override a *privilege* which by its very nature can be waived by the body or individual in question? Given that public interest immunity (the evidentiary privilege of most significance to the government) is substantially limited by the Ombudsmen Act, should not the other evidential privileges also be limited?

- 325 The Ombudsmen commented as follows in their submission to the Law Commission:

In particular, the privilege could be invoked not merely with respect to legal advice given to a department or organisation in connection with a current investigation, which in itself would not be unreasonable, but also to all other legal advice and communications. This could, in fact, be used to frustrate the purpose of an investigation which is to form an opinion on matters after having considered all relevant factors. Clearly, if an Ombudsman can be refused access to material on the grounds of legal professional privilege, this would inhibit the ability to discharge the functions of the Office.

Their approach is to ask agencies to provide the information in question and, if the privilege is raised, to ask that it be waived. In making that request they refer both to their need to see the material if they are to make the assessment required by the Official Information Act, and to their secrecy obligations under s 21 of the Ombudsmen Act, by which appropriate protection can be given to sensitive information. In practice it appears the privilege is generally waived – although in one case it was maintained, properly the Ombudsman agreed, in respect of legal advice on how to respond to the Ombudsman ((1993) 10(2) OCN 128).

- 326 The Law Commission therefore supports, in general, the insertion of s 19(5A) by s 2 of the Ombudsmen Amendment Act 1997, which came into force the day before this report went to press. Section 19(5A) allows an Ombudsman – in the course of an investigation – to require the supply of, and to consider, information in respect of which privilege is claimed, in order to assess the validity of the claim. The Ombudsmen may not use that information in any way that is not permitted by subs (5A); a new s 19(5B) specifies limits on the Ombudsmen's disclosure of the information. Similarly, s 94(1A) of the Privacy Act, inserted by s 2 of the Privacy Amendment Act 1997, allows the Privacy Commissioner to require the supply of, and to consider, information in respect of which privilege is claimed, in order to assess the validity of the claim. But in our view both s 19(5A) and s 94(1A) now go too far and should be narrowed. Documents in respect of

¹⁸⁰ Under s 19(3)–(4) of the Ombudsmen Act.

which legal professional privilege relating to the agency's response to the particular complaint is claimed, should not be inspected by the Ombudsmen or the Privacy Commissioner unless the agency waives that privilege. Moreover, the privilege against self-incrimination should be preserved.¹⁸¹

- 327 The Law Commission supports the general approach of the new s 19(5A)–(5B) of the Ombudsmen Act and s 94(1A)–(1B) of the Privacy Act. These new provisions should, however, be amended to preserve the privilege against self-incrimination, and legal professional privilege so far as it relates to advice concerning the particular complaint.

A BURDEN OF PROOF?

- 328 A further issue which has arisen in the handling of complaints is an aspect of the time and resources agencies spend in justifying decisions to the Ombudsmen. Is an agency under an obligation to justify its refusal of a request? What of the countervailing public interest considerations which, in terms of s 9(1) of the Official Information Act, might override a good reason for withholding? The Court of Appeal in *Commissioner of Police v Ombudsman* made it clear that it is not helpful to refer in any broad way to concepts such as the burden of proof.¹⁸² Rather, the terms of the Act and the character of the Ombudsmen's process should govern.
- 329 Section 5 of the Act states the principle that information is to be released unless there is good reason for withholding it. In the event of a dispute about whether there is or is not good reason, the Ombudsmen will have to make the relevant judgment on the basis of their private, inquisitorial, non-adversarial processes. The Ombudsmen have wide powers of inquiry which are not confined to the material put before them by those immediately involved. In the words of Casey J in the *Commissioner of Police* case:

In the nature of things he who alleges that good reason exists for withholding information would be expected to bring forward material to support that proposition. But the review is to be conducted and the decision and recommendations made without any presumptions other than those specified in the Act.(411)

¹⁸¹ See the New Zealand Bill of Rights Act 1990 s 25(d), and *The Privilege Against Self-Incrimination* (NZLC PP25, 1996).

¹⁸² [1988] 1 NZLR 385, 391, 404–405, 411. We would add that usually the facts are not in dispute, the emphasis being on the inferences to be drawn from them.

- 330 The proposition in the first sentence would apply equally to the requester arguing under s 9(1) that the public interest in disclosure overrides the good reason for withholding. That might also be the case when other decisions (for example, the imposition of a charge, especially one fixed in accordance with the guidelines) are challenged as unreasonable.
- 331 Should a formal burden of proof be imposed on agencies to show good reason for withholding information under s 9? The Law Commission does not think so. It is central to the scheme of the legislation, and to the basic change of principle introduced by it, that the agency must show good reason for withholding. The agency will have addressed those reasons when making its original decision to refuse release. It will have advised the requester of the reason for withholding and, if requested, the grounds in support of those reasons. Some of our proposals are designed to enhance that original decision-making process. If there is a complaint against the agency's decision, the reasons and grounds given by the agency will then be tested by an independent officer of Parliament.

332 Accordingly the Law Commission does not consider that a formal burden of proof should be imposed on agencies to show good reason for withholding information.

TIME LIMITS ON RESPONSES TO THE OMBUDSMEN'S REQUIREMENTS

- 333 In its original form, the Act did not place any time limit on the provision by agencies of information required by an Ombudsman under s 19 of the Ombudsmen Act. There was not even the general principle, governing responses to the initial request, that the information be provided "as soon as reasonably practicable". In the early years of the Act the Chief Ombudsman found that

a major impediment to the success of the [official information] review process has been its slowness. In order to be of any use to the requester, information often needs to be obtained promptly. . . . At times the review process has been undermined entirely, as in cases where important decisions have in the meantime been made concerning the subject matter of the information which is at issue, thereby reducing the usefulness of the information to the requester. As a result, I have had on a number of occasions to emphasise that extensive delays in responding to requests for reports or further comments (in some cases up to a year but more commonly in the order of three months) can hardly be seen to be within the spirit and intent of the Act and the

review functions which Parliament entrusted to my office. The delays adversely affect the efficiency of the office and its standing in the eyes of complainants and the public.¹⁸³

- 334 In 1987, a provision was added to the Official Information Amendment Act which obliges agencies to respond to a requirement of the Ombudsmen as soon as reasonably practicable, and in no case later than 20 working days after receiving it: s 29A(1). The agency may extend the time limit “for a reasonable period of time having regard to the circumstances” if:
- the requirement relates to, or necessitates a search through, a large quantity of information or a large number of documents or papers or things, and meeting the original time limit would unreasonably interfere with the agency's operations;
 - consultations necessary before the requirement can be complied with are such that the requirement cannot reasonably be complied with within the original time limit; or
 - the complexity of the issues raised by the requirement are such that the requirement cannot reasonably be complied with within the original time limit.
- 335 The first and second reasons for extension run parallel to the reasons for the extension of time in responding to the initial request under s 15A(1). We have recommended that the third reason should also be available at that stage (see para 183).
- 336 The importance attached by Parliament to the initial and extended time limits in s 29A is emphasised by the express sanction included in the section. The Ombudsmen, having given the agency an opportunity to be heard, are given particular powers to report breaches of the limits to the Prime Minister and thereafter to Parliament: s 29A(6)–(7). While those powers are already conferred in a general way by the Official Information Act and Ombudsmen Act, Parliament thought it worthwhile to emphasise them.
- 337 The Ombudsmen have also given careful attention to compliance with the time limits since they were enacted. Thus they have a bring-up system to ensure that the agency is reminded of the initial time limit and the possible need for extension. They give particular attention to the time limits in their annual reports, so that Parliament is in a position to make a judgment about compliance with the 1987 requirements. They have also emphasised the perishable nature of information as a commodity.

¹⁸³ Report of the Ombudsmen for the year ended 30 June 1986, AJHR A.3, 12.

- 338 We have already noted (in para 156) the Ombudsmen's expressions of concerns about the time taken by departments to respond to their requirements. Response times to their requirements have also moved closer to the maximum of 20 working days than is desirable. That might reflect resource pressures upon agencies, and a failure to monitor time limits closely enough.
- 339 As discussed in chapter 4, the emphasis should not be solely on the 20 working-day limit. The prime obligation is to respond "as soon as reasonably practicable". The Chief Ombudsman reported in 1991 on a spectacular, if very unusual, instance which arose shortly before the 1990 general election. The Leader of the Opposition sought a copy of a Treasury briefing paper which had been prepared for the new Prime Minister. The request was made on 10 September and was rejected on 9 October. Within 13 days of the complaint being made on 11 October the Chief Ombudsman proposed immediate release of some of the papers. The Prime Minister released them within 24 hours, two days before the election.¹⁸⁴ This was well within the 10 working days.

340 The Law Commission does not recommend any change to the relevant provisions of s 29A of the Official Information Act. It does, however, support the emphasis in the Act, reinforced by its statements of purpose and principle and the Ombudsmen's statements, on the critical importance of the timely availability of information.

- 341 The Law Commission calls attention to the value of the early determination of the scope of the request, consultation on that and related matters with the requester, and the use of other administrative aspects of the Act (see chapter 2). The Ombudsmen's Guidelines in appendix F are important in this respect.

A TIME LIMIT ON THE OMBUDSMEN'S REPORTING?

- 342 The issue has been raised whether the Ombudsmen should themselves be subject to a time limit in investigating and reporting on complaints. The Ombudsmen's 1996 report records that official information investigations completed during the 1995–1996 reporting year took on average 57 working days to complete,

¹⁸⁴ Report of the Chief Ombudsman on case W.2733, 1991 AJHR A.3A.

compared to 84 working days in the 1994–1995 year, and to 85 days in the 1993–1994 year. The Ombudsmen have also improved the speed in processing complaints under the Local Government Official Information and Meetings Act: complaints reported during the 1995–1996 year took on average 48 working days to complete compared to 64 working days in the previous year. This represents a significant achievement, given that the total number of Official Information Act complaints completed by the Ombudsmen over that period increased from 898 to 1165, although completed complaints under the Local Government Official Information and Meetings Act dropped from 134 to 128.¹⁸⁵

- 343 The Law Commission does not think complainants' interests in timely information would be better served by an express statutory requirement that the Ombudsmen report within a prescribed period. Bodies set up to independently resolve disputes are very rarely subject to such obligations. There would also be difficulties in finding an appropriate sanction. The Ombudsmen are clearly aware of the need for timeliness, as appears from their 1996 annual report:

The primary objective of the 1995/96 Ombudsplan was to maintain and if possible improve the timeliness and throughput of our response to complaints made to our office. (1996 AJHR A.3)

- 344 Accordingly the Law Commission suggests no change be made to subject the Ombudsmen themselves to time limits in investigating official information complaints.

¹⁸⁵ Reports of the Ombudsmen for the year ended 30 June 1996, AJHR A.3, 9, 14; and 30 June 1995, AJHR A.3, 10.

10

Non-compliance with the Ombudsmen's recommendations

OVERVIEW

- 345 **A** RECOMMENDATION made by an Ombudsman relating to the release of general official information¹⁸⁶ becomes binding on the agency on the 21st working day after it is made, unless the Governor-General by Order in Council otherwise directs: Official Information Act s 32(1)(a).¹⁸⁷ The Law Commission's terms of reference ask us to consider the appropriateness of the Order in Council procedure. Compliance with this procedure allows the recommendations of the Ombudsmen to be lawfully overridden.
- 346 There have in recent years been occasional instances in which agencies have ignored an Ombudsman's recommendations without obtaining a veto under s 32(1)(a). The absence of a clear statutory regime for enforcement of the public duty upon an agency to comply with an Ombudsman's recommendation, once the time for exercising the veto power has expired, is a matter we also address in this chapter.

¹⁸⁶ But not personal information – see para 352.

¹⁸⁷ A local authority may override the recommendation of an Ombudsman within 20 working days of the recommendation being made, by passing a resolution at a meeting of the local authority: Local Government Official Information and Meetings Act s 32. Sections 32–37 of that Act contain equivalent provisions to ss 32–34 of the Official Information Act, expressly requiring the local authority to publish its decision in the *Gazette* and set out reasons for the decision (s 33); providing the requester with a right of review of the decision with the benefit of a special regime as to costs (s 34); and specifying that a requester who has been refused information cannot seek judicial review of that decision without first lodging a complaint with the Ombudsmen.

THE VETO PROVISIONS

- 347 The method of resolving disputes about access to official information was one of the principal areas of controversy when the Official Information Bill was being prepared in 1978–1982, and again in the review undertaken between 1984 and 1987. Until 1987, when the Official Information Amendment Act replaced the former s 32 with the current ss 32 and 32A–32C, the power of veto was conferred on the responsible Minister, who may actually have made the earlier decision on the request or been otherwise involved in it. The Minister's reasons for the veto were not limited to those used to decline the request at the earlier stage.
- 348 The veto power is now exercisable by the whole Cabinet. Under s 32A(2) the Order in Council is to set out the reasons for which it is made and the grounds in support of the reasons. The reasons must be those advanced by the agency and reviewed by the Ombudsman: s 32A(3).
- 349 Section 32B(1) expressly provides for review of an Order in Council in the High Court. Section 32B(2) sets out the grounds for review in a broad way (that the Order in Council was beyond the power conferred by ss 32 and 32A, or was otherwise wrong in law). The court may make an order in those terms: s 32B(3)(b). It is also given an express power to make an order confirming that the Order in Council was validly made.¹⁸⁸ The applicant's costs are to be paid by the Crown on a solicitor and client basis, even if the application for review was unsuccessful, unless the court finds that the review was not reasonably or properly brought: s 32B(4).
- 350 The questions which have been raised with the Law Commission in respect of the veto provisions are:
- whether the 1987 amendments should be reversed, and the relevant Minister (rather than Cabinet) be given the power to veto an Ombudsman's recommendation; and
 - whether the rules about costs in proceedings challenging the veto should be changed.
- 351 These questions do not challenge the basic system of resolving complaints established in 1982 and confirmed (with important modifications) in 1987. The system involves a balance between the careful process of independent, reasoned scrutiny of the original

¹⁸⁸ Section 32B(3)(a). That power is unnecessary: an administrative decision stands unless it is upset. The court needs no power to confirm it.

decisions by an officer of Parliament, and a (rarely exercised) power conferred on the highest level of government to protect the executive's perceptions of an important national interest.

- 352 A government veto has no role in respect of the Ombudsman's opinion about the legal obligation to release personal information. In this respect, the Act treats personal information differently from general official information.¹⁸⁹ Under s 24(1) there is a right of access to personal information, which can be enforced in the courts (see chapter 8). The Ombudsmen can indicate their opinion on whether, in a particular case, an agency is legally bound to release personal information: s 35(1). A court might or might not agree with that opinion in proceedings, but the proceedings are, in essence, between the requester and the agency.

THE VETO IN PRACTICE

- 353 In the period from 1 July 1983 to 1 April 1987 (when the 1987 amendments came into force) the Ombudsmen made 92 recommendations and individual Ministers exercised 14 vetoes.¹⁹⁰ Since 1 April 1987 the Ombudsmen have made over 100 recommendations under the Official Information Act, but the veto has never been used.¹⁹¹ No doubt a principal reason for that difference is changing attitudes to the legislation as the experience of its operation develops. Another factor may be the possible public reaction against a Cabinet veto. The likelihood of an order against the Crown for the costs of any resulting litigation, and the short time period within which to prepare the Order in Council, have also been mentioned to us as weighing against the use of the veto.
- 354 None of the vetoes have in fact been the subject of judicial proceedings although decisions made and issues arising under the Official Information Act and Local Government Official Information and Meetings Act have come before the courts in a

¹⁸⁹ It follows that this section of the paper relates essentially to access to official information in general and not to personal information.

¹⁹⁰ These figures do not give the full picture since a greater number of complaints are resolved in favour of the applicant without a formal recommendation being required.

¹⁹¹ The Ombudsmen advise that there has been one instance of a local authority overriding the recommendation of an Ombudsman under s 32 of the Local Government Official Information and Meetings Act 1987.

variety of other ways. Official information issues have been raised by:

- defendants in criminal cases (successfully) seeking access as of right to personal information;¹⁹²
- an organisation unsuccessfully seeking to set aside an Ombudsman's recommendation to release official information;¹⁹³ and
- a third party (unsuccessfully) challenging the proposed release of information by a local authority in accordance with a recommendation made by the Ombudsman.¹⁹⁴

355 One consequence of the limited amount of litigation is a comparative lack of judicial interpretation of the Act and a consequent lack of guidance from the courts.

RESPONSIBLE MINISTER OR CABINET?

356 We now turn to the two questions raised in para 350. The reasons for the 1987 change from an individual Ministerial veto to a collective Cabinet veto included the following:

Any decision not to comply with the Ombudsman's recommendation is a substantial and serious one. The reasons for the action, in terms, for example, of the legal issues and the judgments of possible damage to national security interests or to the deliberative processes of government require careful assessment. That assessment and an element of detachment and neutrality would be enhanced by the involvement of Ministers other than the Minister immediately involved. The responsibility of the whole Ministry for the operation of the Act would be increased.¹⁹⁵

357 A further element, no doubt, was the basic decision to maintain the Ombudsmen as the principal agency of review. The arguments for a Cabinet decision are now, if anything, even stronger than in 1987. The dramatic change in the use of the veto power is one factor: the removal of the power from the hands of the particular responsible Minister has obviously been salutary. A Cabinet veto power is consistent with the growing emphasis, in developments

¹⁹² For example, *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA); *Police v Tyson* [1989] 3 NZLR 507; and *R (a police officer) v Harvey* [1991] 1 NZLR 242.

¹⁹³ *Television New Zealand Ltd v Ombudsman* [1992] 1 NZLR 106.

¹⁹⁴ *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180.

¹⁹⁵ Keith, *Resolution of Disputes under the Official Information Act 1982*, Information Authority Occasional Paper 1 (Information Authority, Wellington, 1984), para 3.2(3).

since the enactment of the State Sector Act 1988, on the government's collective interest.¹⁹⁶ In the MMP era, in which mixed-party Cabinets are likely to be the norm, it may be particularly appropriate that a decision to override the recommendation of an independent officer of Parliament be taken collectively, rather than by an individual Minister whose approach to the veto may lack the support of his or her Cabinet colleagues.

358 The tightness of the timeframe in which to make an Order in Council (as compared with a Ministerial direction) is not significant. An Ombudsman's recommendation does not appear suddenly, without warning. It will have been preceded by discussions between the Ombudsman and the relevant Minister and officials. If the timing is a problem, it would be better addressed by extending the period in which the Order in Council may be made, than by removing that procedure altogether.

359 Accordingly, the Law Commission does not recommend any substantive change to the provisions of ss 32 and 32A relating to the power of the Governor-General in Council to direct non-compliance with an Ombudsman's recommendation.

COSTS IN PROCEEDINGS CHALLENGING THE VETO

360 As mentioned at para 353, the special regime by which the Crown bears the costs of a challenge to the veto in the courts, may be a deterrent to a government contemplating a veto.

361 The justification for the special costs regime was that, but for the veto, the information would have been released in accordance with the independent opinion of the Ombudsmen reached following a fair procedure, in which the agency had a full opportunity to present its case. Moreover, there was an awareness of the limits on the role that the Ombudsmen, as officers of Parliament, could play in review or enforcement proceedings brought in respect of the conclusion they had reached and the processes followed. Accordingly, the Act aimed to make a challenge to the veto power accessible to the party most affected – the requester.

¹⁹⁶ See, for instance, the *Cabinet Office Manual* (Cabinet Office, Department of the Prime Minister and Cabinet, Wellington, 1996), paras 2.16 and 6.21; and see appendix H.

362 The Law Commission does not recommend any change to the cost provisions in s 32B(4) of the Act.

363 The reasons for the special costs regime (set out in para 361) are still valid today. But the provision of funding where the veto has been exercised may be contrasted with the absence of any specific provision in the Act for enforcement of the public duty to comply with an Ombudsman's recommendation when the veto has not been used. We now turn to this matter.

ENFORCEMENT OF BINDING RECOMMENDATIONS

364 Failure to comply with the public duty under s 32(1) to observe an Ombudsman's recommendation, where the power of veto has not been used, is as a rule unjustifiable. The practice of virtually complete compliance with the Ombudsmen's recommendations supports that. Such a failure could be justified only if the agency promptly commenced judicial review proceedings in respect of the recommendation. Proceedings of this nature would be highly unlikely in the case of a Minister or department: their proper remedy in almost all cases would be by way of veto.¹⁹⁷ A treble failure by an agency (first, to obtain a veto; secondly, to get the Ombudsman's recommendation set aside by the court; and finally, to comply with the public duty to observe the recommendation) has occurred only very rarely.

365 The Ombudsmen's 1994 report notes the first instance in which a recommendation to release information was ignored. In every previous case the agency concerned had sought judicial review of the decision or obtained the necessary veto.¹⁹⁸ The case concerned a failure by a school principal to release information requested by a group of parents. The Ombudsmen invited the Solicitor-General to enforce the public duty imposed on the principal by s 32 of the Act: the proceedings were eventually settled after the principal agreed to release the information.¹⁹⁹

¹⁹⁷ Two possible justified exceptions might be if the information in issue is said not to be official information, or the body is argued not to be subject to the Act – but such issues, if not resolved by legislation, could and should be brought to court at a much earlier stage.

¹⁹⁸ Report of the Ombudsmen for the year ended 30 June 1994, AJHR A.3, 29–30

¹⁹⁹ Report of the Ombudsmen for the year ended 30 June 1995, AJHR A.3, 40.

- 366 In 1995 the Ombudsmen also reported that three Crown Health Enterprises (CHEs) had ignored recommendations to release certain salary information. The Solicitor-General issued proceedings to enforce the public duty: all three CHEs later released the information. At the time of writing, however, a further proceeding was being pursued by the Solicitor-General on behalf of the Ombudsmen against a CHE. The Ombudsmen's annual reports indicate that the rare instances of non-compliance with recommendations are increasing.

JUDICIAL REVIEW OF THE OMBUDSMEN'S RECOMMENDATION TO RELEASE

- 367 There have been two reported cases in which agencies have sought judicial review of an Ombudsman's recommendation to release information. In *Commissioner of Police v Ombudsman* [1985] 1 NZLR 578 (HC) the police sought judicial review of the Chief Ombudsman's recommendation that briefs of evidence police proposed to call in a prosecution be disclosed to the defendant's solicitors. The police were successful in the High Court but that decision was overturned on appeal: [1988] 1 NZLR 385 (CA).
- 368 In the second case, Television New Zealand (TVNZ) sought judicial review of an Ombudsman's recommendation to release official information connected with the making of a television documentary on smoking to the Tobacco Institute of New Zealand Ltd: *Television New Zealand Ltd v Ombudsman* [1992] 1 NZLR 106. The Institute simultaneously sought an order for release of the documents which the Ombudsmen found were protected from disclosure. TVNZ's application for review was dismissed by Heron J who noted:
- An applicant for information may seek this Court's assistance in having that public duty enforced, clearly an entitlement of a successful applicant, but may then be met by way of defensive application for review. Each case will depend on its own facts and no doubt the Ombudsman will be disturbed if the recommendations are not acted upon and are delayed by subsequent proceedings in this Court. (122–123)
- 369 *Amicus curiæ* in that case pointed out that an organisation unhappy with an Ombudsman's recommendation might either ignore the recommendation on the assumption the requester will not consider the information worth the expense of a High Court review, or seek judicial review of the recommendation itself. Heron J said these approaches amounted to "a considerable impediment to the proper implementation of a most important piece of legislation" (122–123).

- 370 One issue is whether the Act should make it clear that any judicial review proceedings by an agency against a decision of the Ombudsman must be brought within 20 working days, as the Ombudsmen argued in the *Television New Zealand* case in an application to strike out part of the claim before trial. McGechan J dismissed the application, stating that the Act did not prescribe a time limit for commencing review proceedings, and that wording “a great deal more specific [than in s 32] would be necessary before such a draconian regime could be assumed” (unreported, HC, Wellington, 19 February 1991, CP 966/60).
- 371 The right to challenge the validity of public decisions in judicial review proceedings is an important one. The New Zealand Bill of Rights Act 1990 s 27(2) recognises that.²⁰⁰ But notwithstanding general judicial disapproval of privative clauses, the courts have held that statutory provisions which only limit the time within which review must be sought (rather than prevent review altogether), are effective.²⁰¹ But the courts, as McGechan J indicated, will require a clear legislative statement of this intention.
- 372 We recommend that a further subsection be added to s 32 to provide that any application by a Minister, department or organisation under s 4(1) of the Judicature Amendment Act 1972 for review of an Ombudsman’s recommendation, or to otherwise challenge, quash or call into question that recommendation in any court, must be made within 20 working days of the recommendation being made.
- 373 This requirement would focus an agency’s attention on whether to seek a veto under s 32²⁰² or to challenge the decision in the courts, for example, if the recommendation raises an important matter of principle for the agency. Suggestions that 20 working days is a short period in which to consider legal proceedings ignores

²⁰⁰ See also LAC, *Legislative Change: Guidelines on Process and Content* (LAC, Report 6, rev ed, Wellington, 1991), para 154.

²⁰¹ See *R v Secretary of State for the Environment, ex p Ostler* [1977] QB 122 (CA); *Cheyne Developments Ltd v Sandstad* (1986) 6 NZAR 65; and Taylor, *Judicial Review: A New Zealand Perspective* (Butterworths, Wellington, 1991), 3.13.

²⁰² Which would still allow information to be withheld, contrary to the Ombudsman’s recommendations, in exceptional cases.

the protracted process of the Ombudsmen's investigations in which the option of proceedings should at least have been envisaged.

WHO SHOULD ENFORCE THE PUBLIC DUTY?

- 374 A requester is entitled to commence judicial review proceedings to compel an agency to perform its public duty under s 32 of observing an Ombudsman's recommendation.²⁰³ As indicated by Heron J in the *Television New Zealand* case, the court can, where appropriate, accord urgency to a requester's application for review, and arrange an immediate hearing. But the court can do no more (122–123): the 20 working-day period must expire before the agency is under an enforceable public duty to comply with the recommendation.
- 375 Why should the cost of securing the information fall on the requester, who would usually have recovered the costs of bringing judicial review proceedings if the agency had managed to secure a Cabinet veto of the Ombudsman's recommendations? The Law Commission sees no justification for this discrepancy. Consistency with s 32B suggests that a requester who seeks to enforce the public duty should be reimbursed in the same way as if the proceedings were to review the Order in Council. The reimbursement would perhaps more appropriately come from the agency in breach of the public duty, an option supported by the Ombudsmen in their correspondence with us. But the Law Commission sees the more important question as "who should enforce the public duty".
- 376 Heron J in the *Television New Zealand* case did not express an opinion on "the degree to which the organisation or tribunal whose decision is in question should participate in the subsequent proceedings": [1992] 1 NZLR 106. The Ombudsmen have consistently taken the view that it is inappropriate for them to defend the merits of individual recommendations. This, they have argued, might detract from their ability to be perceived as impartial by both requesters of information and agencies subject to the Act. Impartiality in turn is essential to the credibility of the office, and has contributed to the widespread acceptance of the Ombudsmen's recommendations.

²⁰³ There have been no reported cases in which this has occurred: but note Heron J's approval of a requester's right of enforcement in the *Television New Zealand* case: [1992] 1 NZLR 106, 122–123.

377 In *Goodman Fielder Ltd v Commerce Commission* [1987] 2 NZLR 10 (CA) Cooke P noted that

observations . . . about the well-established principle that judicial bodies should not strive to enter the fray in a way which might appear to favour the interests of one of the parties [do not apply] . . . to a case where considerations of public interest and the effective administration of an Act arise, especially if there is no other party to put those considerations adequately before the appellate Court. In such a case it is right that the Commission should help the appellate Court to whatever extent the Commission and that Court find consistent with the Commission's public responsibility." (20)

378 The same argument could be asserted in favour of the Ombudsmen enforcing the public duty. But the argument does not fully address the Ombudsmen's concerns as expressed in para 376. Unlike the Ombudsmen, the Commerce Commission, which was the body whose role was at issue in the *Goodman Fielder* case, does not rely principally on the goodwill of parties as the basis for its recommendations being accepted.

379 Moreover, can it really be said that there is, in Cooke P's words, "no other party to put those considerations adequately before the appellate court"? We have already mentioned the requester as a possible party. Traditionally, it has been the exclusive role of the Attorney-General to enforce a public duty. Thus, in *Gouriet v Union of Post Office Workers* [1978] AC 435, 481 Lord Wilberforce stated that it was constitutional principle, rather than procedure, which gave the Attorney-General "the exclusive right . . . to represent the public interest – even where individuals might be interested in a larger view of the matter . . .".²⁰⁴

380 The Attorney-General performs the constitutional role of overseeing the administration of justice in New Zealand, including supervision of all Crown legal business (criminal and civil), the authorisation of relator proceedings in civil litigation, and the exercise of the Crown's role as *parens patriæ* in securing the enforcement of charitable trusts.

381 The rule of law requires that no public duty should go unenforced, otherwise those subject to the duty may be and be seen to be above the law. Failure to secure enforcement will be seen as inconsistent or even hypocritical. The public duty having been established, it should, in the Law Commission's view, be enforced by a public

²⁰⁴ This passage was approved by Prichard J in the High Court in *Hauraki Catchment Board v Rutherford* [1982] 2 NZLR 578, 583.

officer. In practice, the Solicitor-General has been invited by the Ombudsmen to enforce the public duty, as noted in para 365.

382 We consider the Solicitor-General should enforce the public duty to comply with an Ombudsman's recommendations on his or her own initiative, in accordance with constitutional practice. We recognise, however, that this will still usually require the Ombudsmen to draw a breach of the public duty to the attention of the Solicitor-General.

APPENDIX A

Terms of reference

- A1 **E**XAMINE SECTIONS 9(2)(f) and 9(2)(g) of the Official Information Act 1982, in particular the provisions relating to the confidentiality of advice (section 9(2)(f)(iv)) and the free and frank expression of opinion (section 9(2)(g)(i)), with a view to ascertaining whether it is possible to define more precisely the interests that are intended to be protected;
- A2 Examine the adequacy of sections 12(2) and 18(f) of the Act with particular reference to broadly defined requests and requests for large amounts of information;
- A3 Consider the appropriateness of the time limits set in sections 15(1) and 29A(1) of the Act;
- A4 Consider whether there should be an ability under section 15 of the Act to charge for time spent and expenses incurred in deciding whether or not to release information;
- A5 Consider the appropriateness of the rules set out in sections 15(4) and (5) of the Act;
- A6 Consider whether some or all of the grounds for refusal set out in section 18(d)–(f) of the Act should apply in relation to requests for personal information;
- A7 Consider, with particular reference to section 29A of the Act, what the responsibilities of decision makers should be vis a vis the Ombudsmen, where the decision maker's actions are subject to a review by the Ombudsmen;
- A8 Consider the appropriateness of the Order in Council procedure prescribed by sections 32–34 of the Act and whether there should be any change to those provisions;
- A9 Consider whether there should be special rules governing the treatment of some or all classes of diplomatic documents.

APPENDIX B
Sections of the
Official Information Act 1982
discussed in the report

PART I
PURPOSES AND CRITERIA

4 Purposes

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

- (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 privacy.

5 Principle of availability

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

6 Conclusive reasons for withholding official information

Good reason for withholding official information exists, for the purpose of section 5 of this Act, 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
- (c) To prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or
- (d) To endanger the safety of any person; or
- (e) To damage seriously the economy of New Zealand by disclosing prematurely decisions to change or continue Government economic or financial policies 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.

7 Special reasons for withholding official information related to the Cook Islands, Tokelau, or Niue, or the Ross Dependency

Good reason for withholding information exists, for the purpose of section 5 of this Act, 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.

9 Other reasons for withholding official information

- (1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5 of this Act, 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.

Section 9 continued

- (2) Subject to sections 6, 7, . . . 10, and 18 of this Act, 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 where the making available of the information
 - (i) Would disclose a trade secret; or
 - (ii) Would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; or
 - (ba) Protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information
 - (i) 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) Would be likely otherwise to damage 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 members of an organisation or officers and employees of any Department or organisation in the course of their duty; or
 - (ii) The protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment; or

- (h) Maintain legal professional privilege; or
- (i) Enable a Minister of the Crown or any Department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities; or
- (j) Enable a Minister of the Crown or any Department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations); or
- (k) Prevent the disclosure or use of official information for improper gain or improper advantage.

10 Information concerning existence of certain information

Where a request under this Act relates to information to which section 6 or section 7 or section 9(2)(b) of this Act applies, or would, if it existed, apply, the Department or Minister of the Crown or organisation dealing with the request may, if it or he is satisfied that the interest protected by section 6 or section 7 or section 9(2)(b) of this Act would be likely to be prejudiced by the disclosure of the existence or non-existence of such information, give notice in writing to the applicant that it or he neither confirms nor denies the existence or non-existence of that information.

12 Requests

- (1) Any person, being
 - (a) A New Zealand citizen; or
 - (b) A permanent resident of New Zealand; or
 - (c) A person who is in New Zealand; or
 - (d) A body corporate which is incorporated in New Zealand; or
 - (e) A body corporate which is incorporated outside New Zealand but which has a place of business in New Zealand,
 may request a Department or Minister of the Crown or organisation to make available to him or it any specified official information.
- (1A) Notwithstanding subsection (1) of this section, a request made, on or after the date of commencement of this subsection, by or on behalf of a natural person for access to any personal information which is about that person shall be deemed to be a request made pursuant to subclause (1)(b) of principle 6 of the Privacy Act 1993, and shall be dealt with accordingly, and nothing in this Part or in Part V of this Act shall apply in relation to any such request.
- (2) The official information requested shall be specified with due particularity in the request.
- (3) If the person making the request asks that his request be treated as urgent, he shall give his reasons for seeking the information urgently.

13 Assistance

It is the duty of every Department, Minister of the Crown, and organisation to give reasonable assistance to a person, who

- (a) Wishes to make a request in accordance with section 12 of this Act; or
- (b) In making a request under section 12 of this Act, has not made that request in accordance with that section; or
- (c) Has not made his request to the appropriate Department or Minister of the Crown or organisation or local authority, to make a request in a manner that is in accordance with that section or to direct his request to the appropriate Department or Minister of the Crown or organisation or local authority.

14 Transfer of requests

Where

- (a) A request in accordance with section 12 of this Act is made to a Department or Minister of the Crown or organisation; and
- (b) The information to which the request relates
 - (i) Is not held by the Department or Minister of the Crown or organisation but is believed by the person dealing with the request to be held by another Department or Minister of the Crown or organisation, or by a local authority; or
 - (ii) Is believed by the person dealing with the request to be more closely connected with the functions of another Department or Minister of the Crown or organisation, or of a local authority,the Department or Minister of the Crown or organisation to which the request is made shall promptly, and in any case not later than 10 working days after the day on which the request is received, transfer the request to the other Department or Minister of the Crown or organisation, or to that local authority, and inform the person making the request accordingly.

15 Decisions on requests

- (1) Subject to this Act, the Department or Minister of the Crown or organisation to whom a request is made in accordance with section 12 or is transferred in accordance with section 14 of this Act or section 12 of the Local Government Official Information and Meetings Act 1987 shall, as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received by that Department or Minister of the Crown or organisation,
 - (a) Decide whether the request is to be granted and, if it is to be granted, in what manner and for what charge (if any); and
 - (b) Give or post to the person who made the request notice of the decision on the request.

- (1A) Subject to section 24 of this Act, every Department or Minister of the Crown or organisation (including an organisation whose activities are funded in whole or in part by another person) may charge for the supply of official information under this Act.
- (2) Any charge fixed shall be reasonable and regard may be had to the cost of the labour and materials involved in making the information available to and to any costs incurred pursuant to a request of the applicant to make the information available urgently.
- (3) The Department or Minister of the Crown or organisation may require that the whole or part of any charge be paid in advance.
- (4) Where a request in accordance with section 12 of this Act is made or transferred to a Department, the decision on that request shall be made by the chief executive of that Department or an officer or employee of that Department authorised by that chief executive unless that request is transferred in accordance with section 14 of this Act to another Department or to a Minister of the Crown or to an organisation or to a local authority.
- (5) Nothing in subsection (4) of this section prevents the chief executive of a Department or any officer or employee of a Department from consulting a Minister of the Crown or any other person in relation to the decision that the chief executive or officer or employee proposes to make on any request made to the Department in accordance with section 12 of this Act or transferred to the Department in accordance with section 14 of this Act or section 12 of the Local Government Official Information and Meetings Act 1987.

15A Extension of time limits

- (1) Where a request in accordance with section 12 of this Act is made or transferred to a Department or Minister of the Crown or organisation, the chief executive of that Department or an officer or employee of that Department authorised by that chief executive or that Minister of the Crown or that organisation may extend the time limit set out in section 14 or section 15(1) of this Act in respect of the request if
 - (a) The request is for a large quantity of official information or necessitates a search through a large quantity of information and meeting the original time limit would unreasonably interfere with the operations of the Department or the Minister of the Crown or the organisation; or
 - (b) Consultations necessary to make a decision on the request are such that a proper response to the request cannot reasonably be made within the original time limit.

Section 15A continued

- (2) Any extension under subsection (1) of this section shall be for a reasonable period of time having regard to the circumstances.
- (3) The extension shall be effected by giving or posting notice of the extension to the person who made the request within 20 working days after the day on which the request is received.
- (4) The notice effecting the extension shall
 - (a) Specify the period of the extension; and
 - (b) Give the reasons for the extension; and
 - (c) State that the person who made the request for the official information has the right, under section 28(3) of this Act, to make a complaint to an Ombudsman about the extension; and
 - (d) Contain such other information as is necessary.

16 Documents

- (1) Where the information requested by any person is comprised in a document, that information may be made available in one or more of the following ways:
 - (a) By giving the person a reasonable opportunity to inspect the document; or
 - (b) By providing the person with a copy of the document; or
 - (c) In the case of a document that is an article or thing from which sounds or visual images are capable of being reproduced, by making arrangements for the person to hear or view those sounds or visual images; or
 - (d) In the case of a document by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form, by providing the person with a written transcript of the words recorded or contained in the document; or
 - (e) By giving an excerpt or summary of the contents; or
 - (f) By furnishing oral information about its contents.
- (2) Subject to section 17 of this Act, the Department or Minister of the Crown or organisation shall make the information available in the way preferred by the person requesting it unless to do so would
 - (a) Impair efficient administration; or
 - (b) Be contrary to any legal duty of the Department or Minister of the Crown or organisation in respect of the document; or
 - (c) Prejudice the interests protected by section 6 or section 7 . . . or section 9 of this Act and (in the case of the interests protected by section 9 of this Act) there is no countervailing public interest.

- (3) Where the information is not provided in the way preferred by the person requesting it, the Department or Minister of the Crown or organisation shall, subject to section 10 of this Act, give to that person
 - (a) The reason for not providing the information in that way; and
 - (b) If that person so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the interests protected by section 6 or section 7 . . . or section 9 of this Act and (in the case of the interests protected by section 9 of this Act) there is no countervailing public interest.

18 Refusal of requests

A request made in accordance with section 12 of this Act may be refused only for one or more of the following reasons, namely:

- (a) That, by virtue of section 6 or section 7 . . . or section 9 of this Act, there is good reason for withholding the information:
- (b) That, by virtue of section 10 of this Act, the Department or Minister of the Crown or organisation does not confirm or deny the existence or non-existence of the information requested:
- (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 the House of Representatives:
- (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 a local authority; or
 - (ii) Connected more closely with the functions of another Department or Minister of the Crown or organisation or of a local authority:
- (h) That the request is frivolous or vexatious or that the information requested is trivial.

24 Right of access to personal information

- (1) Subject to this Part of this Act, to sections 10 and 52 of this Act, and to subsections (2) and (5) of this section, every person has a right to and shall, on request, be given . . . access to any personal information which
 - (a) Is about that person; and
 - (b) Is held in such a way that it can readily be retrieved.
- (2) The right conferred by subsection (1) of this section may be exercised only by a person who is
 - (a) A body corporate which is incorporated in New Zealand; or
 - (b) A body corporate which is incorporated outside New Zealand but which has a place of business in New Zealand.
- (3) Sections 12(3), 13 to 17, and 19 of this Act shall apply, with all necessary modifications, to a request made under subsection (1) of this section.
- (3A) Where any person is given access to personal information under this section, that person shall be advised of that person's right, under section 26 of this Act, to request the correction of that information.
- (4) Nothing in this section requires, or imposes any responsibility on, any Department or Minister of the Crown or organisation to compile files or data banks of personal information.
- (5) Nothing in this section gives any person the right to be given access to any personal information about him which is held by the Public Trustee or the Maori Trustee
 - (a) In his capacity as a trustee within the meaning of the Trustee Act 1956; or
 - (b) In any other fiduciary capacity.

27 Reasons for refusal of requests for personal information

- (1) A Department or Minister of the Crown or organisation may refuse to disclose any personal information requested under section 24(1) of this Act if, and only if,
 - (a) The disclosure of the information would be likely to prejudice any of the interests protected by section 6 (a) to (d) or section 7 or section 9(2)(b) of this Act and (in the case of the interests protected by section 9(2)(b) of this Act) there is no countervailing public interest; or
 - (b) The disclosure of the information would involve the unwarranted disclosure of the affairs of another person or of a deceased person; or

- (c) The disclosure of the information or of information identifying the person who supplied it, being evaluative material, would breach an express or implied promise
 - (i) Which was made to the person who supplied the information; and
 - (ii) Which was to the effect that the information or the identity of the person who supplied it or both would be held in confidence; or
 - (d)–(f) *Repealed by s 7(1) of the Official Information Amendment Act 1993.*
 - (g) The disclosure of the information would breach legal professional privilege; or
 - (h) The request is frivolous or vexatious, or the information requested is trivial.
- (1A) No reasons other than one or more of the reasons set out in subsection (1) of this section justifies a refusal to disclose any personal information requested under section 24(1) of this Act.
- (2) For the purposes of subsection (1)(c) of this section, the term “evaluative material” means evaluative or opinion material compiled solely
- (a) For the purpose of determining the suitability, eligibility, or qualifications of the person to whom the material relates for the awarding of contracts, awards, or other benefits; or
 - (b) For the purpose of determining whether any contract, award, or benefit should be continued, modified, or cancelled; or
 - (c) For the purpose of deciding whether to insure any person or property or to continue or renew the insurance of any person or property.

28 Functions of Ombudsmen

- (1) It shall be a function of the Ombudsmen to investigate and review any decision by which a Department or Minister of the Crown or organisation
- (a) Refuses to make official information available to any person in response to a request made by that person in accordance with section 12 of this Act; or
 - (b) Decides, in accordance with section 16 or section 17 of this Act, in what manner or, in accordance with section 15 of this Act, for what charge a request made in accordance with section 12 of this Act is to be granted; or
 - (c) Imposes conditions on the use, communication, or publication of information made available pursuant to a request made in accordance with section 12 of this Act; or
 - (d) Gives a notice under section 10 of this Act.

Section 28 continued

- (2) It shall be a function of the Ombudsmen to investigate and review any decision by which the chief executive of a Department or an officer or an employee of a Department authorised by its chief executive or a Minister of the Crown or an organisation extends any time limit under section 15A of this Act.
- (3) An investigation and review under subsection (1) or subsection (2) of this section may be made by an Ombudsman only on complaint made to an Ombudsman in writing.
- (4) If, in relation to any request made in accordance with section 12 of this Act, any Department or Minister of the Crown or organisation fails within the time limit fixed by section 15(1) of this Act (or, where that time limit has been extended under this Act, within that time limit as so extended) to comply with paragraph (a) or paragraph (b) of section 15(1) of this Act, that failure shall be deemed, for the purposes of subsection (1) of this section, to be a refusal to make available the official information to which the request relates.
- (5) Undue delay in making official information available in response to a request for that information, shall be deemed, for the purposes of subsection (1) of this section, to be a refusal to make that information available.

31 Disclosure of certain information not to be recommended

Where

- (a) The Prime Minister certifies that the making available of any information would be likely to prejudice
 - (i) The security or defence of New Zealand or the international relations of the Government of New Zealand; or
 - (ii) Any interest protected by section 7 of this Act; or
- (b) The Attorney-General certifies that the making available of any information would be likely to prejudice the prevention, investigation, or detection of offences

an Ombudsman shall not recommend that the information be made available, but may recommend that the making available of the information be given further consideration by the appropriate Department or Minister of the Crown or organisation.

32 Recommendations made to Department or Minister of the Crown or organisation

- (1) Where a recommendation is made under section 30(1) of this Act to a Department or to an organisation named in Part I or Part II of the First Schedule to the Ombudsmen Act 1975,
 - (a) A public duty to observe that recommendation shall be imposed on that Department or organisation from the commencement of the twenty-first working day after the day on which that

- recommendation is made to the Department or organisation unless, before that day, the Governor-General, by Order in Council, otherwise directs; and
- (b) The public duty imposed by paragraph (a) of this subsection shall be imposed not only on the Department or organisation itself but also on
- (i) The members of the organisation; and
 - (ii) Every officer and employee of that Department or organisation to whom that recommendation is applicable; and
 - (iii) Every body within that Department or organisation to whom that recommendation is applicable; and
 - (iv) Every statutory officer to whom that recommendation is applicable.
- (2) Where a recommendation is made under section 30(1) of this Act to a Minister of the Crown, a public duty to observe that recommendation shall be imposed on that Minister from the commencement of the twenty-first working day after the day on which that recommendation is made to that Minister unless, before that day, the Governor-General, by Order in Council, otherwise directs.
- (3) Where a recommendation is made under section 30(1) of this Act to an organisation named in the First Schedule to this Act,
- (a) A public duty to observe that recommendation shall be imposed on that organisation from the commencement of the twenty-first working day after the day on which that recommendation is made to that organisation unless, before that day, the Governor-General, by Order in Council, otherwise directs; and
 - (b) The public duty imposed by paragraph (a) of this subsection shall be imposed not only on the organisation itself but also on
 - (i) Its governing body (if any); and
 - (ii) Its members; and
 - (iii) Every officer, employee, and body within that organisation to whom that recommendation is applicable; and
 - (iv) Every statutory officer to whom that recommendation is applicable.
- (4) As soon as practicable after an Order in Council is made under this section, the Minister who recommended the making of that Order in Council shall give a copy of that Order in Council to the Ombudsman who made the recommendation.
- (5) Nothing in this section
- (a) Limits section 8 of the Judicature Amendment Act 1972; or
 - (b) Prevents effect being given to any interim order made under section 8 of the Judicature Amendment Act 1972 or to any declaration contained in any such interim order.

32A Requirements in relation to Order in Council

- (1) Every Order in Council made under section 32 of this Act shall be published in the *Gazette* and laid before the House of Representatives as soon as practicable after it is made.
- (2) Every Order in Council made under section 32 of this Act shall set out the reasons for which it is made and the grounds in support of those reasons.
- (3) An Order in Council made under section 32 of this Act in relation to a recommendation made under section 30(1) of this Act may be made for all or any of the reasons for the decision reviewed by the Ombudsman (being reasons that were before the Ombudsman when the recommendation was made) but for no other reasons.

32B Right of review

- (1) Where
 - (a) A recommendation is made under section 30(1) of this Act in respect of a request made under section 12 of this Act; and
 - (b) An Order in Council is made under section 32 of this Act in respect of that recommendation,the person who made that request may apply to the High Court for a review of the making of that Order in Council.
- (2) An application under subsection (1) of this section may be made on the ground that the Order in Council was beyond the powers conferred by sections 32 and 32A of this Act or was otherwise wrong in law.
- (3) On an application under subsection (1) of this section, the High Court may
 - (a) Make an order confirming that the Order in Council was validly made; or
 - (b) Make an order declaring that the making of the Order in Council was beyond the powers conferred by sections 32 and 32A of this Act or was otherwise wrong in law.
- (4) Unless the High Court is satisfied that an application brought under subsection (1) of this section has not been reasonably or properly brought, it shall, in determining the application and irrespective of the result of the application, order that the costs of the applicant on a solicitor and client basis shall be paid by the Crown, and such costs shall be paid out of money appropriated by Parliament for the purpose.

32C Appeals

Any party to an application under section 32B of this Act who is dissatisfied with any final or interlocutory order in respect of the application may appeal to the Court of Appeal; and section 66 of the Judicature Act 1908 shall apply to any such appeal.

33 Complainant to be informed of result of investigation

The Ombudsman who investigates a complaint made for the purposes of section 28(3) of this Act shall inform the complainant, in such manner and at such time as he thinks proper, of the result of the investigation.

34 Restriction on application for review

Where any person makes a request under this Act that official information be made available to him and a decision to which section 28(1) or section 28(2) of this Act applies is made in relation to that request, that person

- (a) Shall not make an application under section 4(1) of the Judicature Amendment Act 1972 for the review of that decision; and
- (b) Shall not commence any proceedings in which that decision is sought to be challenged, quashed, or called in question in any Court,

unless a complaint made by that person in respect of that decision has first been determined under this Part of this Act.



APPENDIX C
The movement towards
open government

- C1 **U**NDER THE OFFICIAL SECRETS ACT 1951 and its predecessors, official information was to be kept secret unless a decision was made to release it. This rule was of course subject to many exceptions, both in the Act itself and as a result of administrative practice.
- C2 Pressure had been building up for some time before 1982, however, for the basic proposition of secrecy to be modified or even reversed. The year 1962 was a watershed: Parliament, a Royal Commission and the Court of Appeal all took important steps towards making official information more readily available.

The events of 1962

- C3 The provisions and the operation in practice of the Parliamentary Commissioner (Ombudsman) Act 1962 contributed in important ways to the openness of government. The Act, like subsequent Ombudsmen Acts, gave the Ombudsmen wide rights of access to departmental files and expressly provided that any rule of law which authorised or required the withholding of any information on the ground that disclosure would be injurious to the public interest did not apply to the Ombudsmen's proceedings: s 17(2), now Ombudsmen Act 1975 s 20(2). The 1962 Act established failure of a public agency to give reasons for a decision as one of the grounds on which an Ombudsman could intervene: s 19(3)(f), now Ombudsmen Act 1975 s 22(3)(f). In practice, many complaints since 1962 have been resolved by the Ombudsmen's explanations to those affected by the decision in question. If the Ombudsman considered that a complaint was established and that no satisfactory remedy was provided, it could issue a public report to the House of Representatives as the final sanction. The 1962 Act (s 25) and Ombudsmen Act 1975 (s 29) also provided for the Ombudsmen to report annually to the House.

- C4 The Royal Commission of Inquiry on the State Services in New Zealand declared in its 1962 report, *The State Services in New Zealand*:
- Government administration is the public's business, and that the people are entitled to know more than they do of what is being done, and why. (ch 5, para 37).
- C5 The State Services Commission, constituted under the legislation proposed by the Royal Commission's report, directed in 1964 that the rule be that information should be withheld only if there is good reason for doing so. Administrative directives or understandings, without any change in legislation, can sometimes bring about major changes in the real constitutional position.²⁰⁵
- C6 The third major event of 1962 was the landmark case, *Corbett v Social Security Commission* [1962] NZLR 878, relating to Crown privilege, now referred to as public interest immunity. In this case the Court of Appeal stated that it was for the courts, and not the executive, to decide whether a claim by the Crown for immunity from the release of information relevant to litigation should be upheld. Two of the reasons which the court gave for that view have frequently arisen in the debates about official information legislation. The first was that because of the commercial operations of the state in fields of enterprise such as railways, coal mines, forestry, works, and electricity, a decision made by the state could result in undue curtailment of a subject's rights. The second was that withholding information to ensure candour of communication within government departments could be abused with far reaching consequences.

Administrative Law

- C7 These actions are to be seen in much wider context. In the 1950s in New Zealand, as elsewhere in the common law world, attitudes to public power and, in particular, those favouring the introduction of greater controls over its exercise, were developing. Ideas were on the move – and there were those who were giving them practical content. For example, in the 1960 election the National Party proposed, in addition to measures which led to the creation of the

²⁰⁵ The Supreme Court of Canada put that point in a neat formula: "constitutional conventions plus constitutional law equal the total constitution of the country": *Reference re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1.

Ombudsmen's office, a Bill of Rights on the model of that just enacted in Canada, and greater control over the making of regulations. Parliament was also beginning to exert some influence over administration, particularly through the then recently established and strengthened Public Expenditure Committee.

- C8 Similar developments were occurring overseas. Thus, the United Kingdom Parliament, responding to the report of the Franks Committee, brought some control and order to tribunals and inquiries, in part by reference to the principle of openness.²⁰⁶ In addition, the International Commission of Jurists at major meetings in the 1950s and 1960s was developing the application of the principle of the rule of law to the exercise of administrative power.²⁰⁷
- C9 The courts started calling for greater controls over the exercise of such power. So in the 1960s the House of Lords followed other Commonwealth courts and asserted its power to decide on the government's claims of privilege in respect of the disclosure of information.²⁰⁸ It also indicated a strong reluctance to recognise that a statutory discretion was unfettered,²⁰⁹ with one immediate consequence being a greater incentive for those challenging government decisions to seek evidence of the reasons for them; and it gave a very narrow reading to a provision which purported to prevent court proceedings challenging administrative decisions.²¹⁰ The most significant court decision, both generally and for open government, was *Ridge v Baldwin* [1964] AC 40, in which the House of Lords firmly reinstated the principle of natural justice in the law: those exercising public power which might affect the rights and legal interests of particular individuals are in general to give those individuals a fair hearing.

The openness debates and the Danks Committee

- C10 These pressures towards greater openness did not relate just to government decision-making affecting particular individuals. In the second half of the 1960s debates about the environment (for

²⁰⁶ Tribunals and Inquiries Act 1958 (UK) (now 1992), Report of the Committee on Tribunals and Inquiries, Cmnd 218 (1958).

²⁰⁷ See especially the 1959 Declaration of Delhi and the other documents included in the International Commission of Jurists' publication, *The Rule of Law and Human Rights – Principles and Definitions* (1966).

²⁰⁸ *Conway v Rimmer* [1968] AC 910.

²⁰⁹ *Padfield v Minister of Agriculture and Fisheries* [1966] AC 997.

²¹⁰ *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

example the Manapouri campaign and the related Commission of Inquiry), the economy (the National Development Conference), and foreign affairs led to the development of new processes which generally involved a greater disclosure of information and enhanced exchange of opinion. In the foreign affairs area, for instance, the disputes about New Zealand's policy towards South East Asia and its military involvement in Vietnam increased contact between specialists inside and outside the government, and provoked public debate in a way unknown before.

- C11 Sections 4 and 5 of the Official Information Act reflect the reasons given by the Danks Committee for greater access to official information: that it enables democratic participation, promotes accountability of office holders, and provides proper access by individuals to information about themselves.
- C12 In a general sense (if not in strict legal terms) the change made by the Act can be put as an answer to the question: to whom does official information belong? Before 1982 the answer was "the Queen and her advisers", with the consequence that information was secret unless in the particular case Parliament provided otherwise or the government made a decision to release it. Since 1982 the answer has been "the people", at least in the sense that official information is to be made available to members of the public seeking it unless there is good reason for withholding it. This shift was reflected in the replacement of the Official *Secrets* Act with the Official *Information* Act.

Protecting official information

- C13 One important aspect of the "good reasons" for withholding information, which stems directly from the Danks Committee's recommendations, is that they cover much the same areas of official information as the "exemptions" from the principle of availability (as they are generally referred to elsewhere). For instance, the list of grounds for withholding information in the New Zealand Act follows rather closely those to be found elsewhere.²¹¹
- C14 But the way the interests are to be protected may be expressed in different ways. It is possible to draft rules protecting documents which fall within a particular class, for example, certain documents prepared for Cabinet. By contrast the protection might require a judgment of the consequences in the particular case, for example

²¹¹ See a comparison of the 14 interests listed as protected in New Zealand in *Towards Open Government; Supplementary Report*, appendix 3, 115–118.

that disclosure of the particular Cabinet paper would impede the free and frank exchange of opinion between Ministers or between officials and Ministers.

- C15 The way the Official Information Act states this protection is significant in two respects. First, it generally adopts the latter of the two stated approaches, an approach which allows access to information subject to a judgment of the consequences of release and not simply a categorisation of the information. Secondly, the New Zealand Act provides that, in important areas, such a judgment of harmful consequences can be outweighed by the public interest in making the particular information available. The character of those judgments of the consequences of release and countervailing considerations led to a particular view being taken about the principal method of resolving disputes about the release of official information. The power of resolution was essentially to stay within the executive branch but subject to critical investigation, review and report by Parliament's independent officer, the Ombudsman. The executive retain a final power of decision in most cases, by way of a veto of the Ombudsman's recommendation.
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APPENDIX D
Office of the Ombudsman
Practice Guidelines No 1

Practice Guidelines No. 1 (Revised edition No. 2 – July
1994 – These guidelines replace the revised edition
issued in May 1993)

OFFICIAL INFORMATION ACT 1982 and
LOCAL GOVERNMENT OFFICIAL INFORMATION
& MEETINGS ACT 1987

APPLICATION OF ADMINISTRATIVE
PROVISIONS

1. Introduction

- 1.1 The following guidelines are designed to assist both holders of official information and requesters of such information. They are based on the experience of the Office in conducting investigations and reviews under both Acts over the past few years, and are designed to highlight the administrative provisions in both Acts for dealing with requests, and the interrelationship between those provisions and the substantive reasons for withholding official information. Whilst the tendency has been to concentrate on the prejudice which might result from the release of information, the first requirement is to clearly identify what specifically has been requested, whether the information at issue is held, and, if so, whether it can be retrieved without the administrative difficulties which the Act takes into account. These guidelines should not detract from the need to consider each case on its merits, but are designed to help the consideration process.
- 1.2 The sections referred to are those in the Official Information Act, with the equivalent provisions in the Local Government Official Information and Meetings Act in square brackets.

2. Requests

- 2.1 *Section 12 – [s. 10]*

“12. Requests

- (1) *Any person, being—*
- (a) *A New Zealand citizen; or*
 - (b) *A permanent resident of New Zealand; or*
 - (c) *A person who is in New Zealand; or*
 - (d) *A body corporate which is incorporated in New Zealand; or*
 - (e) *A body corporate which is incorporated outside New Zealand but which has a place of business in New Zealand,—*
- may request a Department or Minister of the Crown or organisation to make available to him or it any specific official information.*
- (1A) *Notwithstanding subsection (1) of this section, a request made, on or after the date of commencement of this subsection, by or on behalf of a natural person for access to any personal information which is about that person shall be deemed to be a request made pursuant to subclause (1)(b) of principle 6 of the Privacy Act 1993, and shall be dealt with accordingly, and nothing in this Part or in Part V of this Act shall apply in relation to any such request.¹*
- (2) *The official information requested shall be specified with due particularity in the request.*
- (3) *If the person making the request asks that his request be treated as urgent, he shall give his reasons for seeking the information urgently.”*

2.2 Under s.12 [s.10] **“any person”**, as defined in subs.(1) of that section, **“may request a department or Minister of the Crown or organisation to make available to him or it any specified official information.”**

2.3 Subsection (1A) was inserted into s.12 as a consequence of the enactment of the Privacy Act 1993. It clarifies that requests by or on behalf of a natural person for personal information about that person have to be considered under the Privacy Act not the Official Information Act. However, where a person requests in his or her own right personal information about another person, the request falls for consideration under the Official Information Act.²

2.4 Section 12(2) [s.10(2)] requires that **“official information requested shall be specified with due particularity in the request.”** Thus the recipient of a request must first be able to identify the information requested. For example:

¹ This amendment was inserted following the enactment of the Privacy Act 1993 and came into force on 1 April 1993

² See Practice Guidelines No. 6 – “Current Approach of the Ombudsmen to the Interface between sections 9(2)(a) and 27(1)(b) of the Official Information Act/sections 7(2)(a) and 26(1)(b) of the Local Government Official Information and Meetings Act and the Privacy Act” – July 1994

If the request is for all information held relating to the Treaty of Waitangi, does this mean all the information which specifically addresses Treaty issues, or does it mean all information in which Treaty issues are mentioned?

2.5 *Section 13 – [s. 11]*

“13. Assistance—It is the duty of every Department, Minister of the Crown, and organisation to give reasonable assistance to a person, who—
(a) Wishes to make a request in accordance with Section 12 of this Act; or
(b) In making a request under section 12 of this Act, has not made that request in accordance with that section; or
(c) Has not made his request to the appropriate Department or Minister of the Crown or organisation [or local authority], —
to make a request in a manner that is in accordance with the section or to direct his request to the appropriate Department or Minister of the Crown or organisation [or local authority].”

2.6 If the information requested cannot be identified, s.13 [s.11] of the Act imposes a duty on the recipient of the request to give reasonable assistance to the requester to make the request in a manner that is in accordance with s.12 [s.10] of the Act. Reasonable assistance requires more than stating that the request is not specific enough. In many cases requesters simply do not have sufficient knowledge of the precise nature of the information they are seeking, or the form in which it is or may be held, to be more specific. The fact that a request is for a large amount of information does not of itself mean that the request lacks due particularity.

2.7 The term *“fishing expedition”* now seems to have received general recognition in the vocabulary of those concerned with making decisions on requests for official information. It should be clearly understood that if a request is to be adjudged as a *“fishing expedition”* in its common parlance, this term is not recognised in the Act as a withholding reason and that the only defence is to process the request on the basis of not meeting the test of due particularity which is commented on in the paragraphs above.

2.8 If the requester is unable to clarify what information is wanted in such a way as to enable the recipient of the request to identify the information being sought, the request has not been made in accordance with s.12 [s.10] and the Act does not apply.

2.9 Once the request has been clarified and the recipient has identified the information sought, the administrative issues which need to be considered are:

2.9.1 **Transfer of requests**

Section 14 – [s. 12]

“14. Transfer of requests—Where—

- (a) *A request in accordance with section 12 of this Act is made to a Department or Minister of the Crown or organisation; and*
- (b) *The information to which the request relates—*
 - (i) *Is not held by the Department or Minister of the Crown or organisation but is believed by the person dealing with the request to be held by another Department or Minister of the Crown or organisation, or by a local authority; or*
 - (ii) *It is believed by the person dealing with the request to be more closely connected with the functions of another Department or Minister of the Crown or organisation, or of a local authority,—*

the Department or Minister of the Crown or organisation to which the request is made shall promptly, and in any case not later than 10 working days after the day on which the request is received, transfer the request to the other Department or Minister of the Crown or organisation, or to that local authority, and inform the person making the request accordingly.”

- * Where the recipient receives a request made in accordance with s.12 [s.10] of the Act, and the information requested is not held by the recipient and is believed to be held by some other Department, Minister or organisation, the request should be transferred within 10 working days to that Department, Minister or organisation (s.14(b)(i))[s.12(b)(i)]. Where, the information is held by the recipient, and the request is believed to be more closely connected with the functions of another Department, Minister or organisation, consideration should be given to whether the request should be transferred. Again, it should be transferred within 10 working days of receipt (s.14(b)(ii))[s.12(b)(ii)].

2.9.2 Refusal of requests

“18. [17.]

Refusal of requests—A request made in accordance with section 12 of this Act may be refused only for one or more of the following reasons, namely:

Section 18(d) – [s.17(d)]

“(d) That the information requested is or will soon be publicly available.”

- * This provision is not stated to be a “good reason for withholding information”, but it is simply authority for refusing a request made under s.12. Given that the principle of availability set out in s.5 requires that “*information shall be made available unless there is good reason for withholding it*”, and s.18(d) is not a “good reason”, its use as a ground for refusal of a request should not undermine any of the purposes of the Act which are set out in s.4. The provision is seen as one which may be used, for

example, to refuse to make available the text of a Ministerial speech before it has been delivered or to refuse a request for information contained in a readily available publication. However, it should not be used, eg, to delay release of information intended to be incorporated in other material which, although to be made public at a later date, may still require the making of other policy decisions. If such a refusal has the effect of preventing effective participation in the making or administration of laws or policies where the Act provides no good reason for withholding the information, it could be seen as inconsistent with the stated purposes of the Act. Grounds not in accordance with the perceived purpose of the provision do not provide a basis for refusal of a request in terms of s.18(d). Thus the incorporation of existing documentary information in some future publication is not considered to bring s.18(d) into play because s.16(2) requires such information to be made available in the way preferred by the person requesting it unless a specified exception applies. If the requested information is held, but the text of the future publication does not yet exist, the request for the held information is to be considered on its own merits and not on the basis of s.18(d). As to what is meant by "soon" in the context of s.18(d), this is a question of fact to be determined in the circumstances of the case.

Section 18(e) – [s.17(e)]

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

- * Where the request is for a document(s) which, after taking all reasonable steps, cannot be located, s.18(e) [s.17(e)] might apply.

Section 18(f) – [s.17(f)]

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

- * Where meeting the request would involve substantial collation and research, in assessing whether s.18(f) [s.17(f)] might apply the following factors have been identified as being relevant:
 1. The difficulty of the work involved in locating, researching or collating the information.
 2. The amount of documentation to be looked at.
 3. The work time involved.
 4. The nature of the resources available in money, facilities and numbers and skills of personnel.

5. The effect on other operations of the diversion of resources to meet the request.

Section 18(g) – [s.17(g)]

“(g) That the information requested is not held by the Department or Minister of the Crown or organisation [by the local authority] 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 local authority]; or*
- (ii) Connected more closely with the functions of another Department or Minister of the Crown or organisation [or local authority].”*

- * If the information is not held by the recipient of the request and the recipient does not believe that the information is or may be held by some other Department, Minister or organisation, s.18(g) [s.17(g)] might apply.

2.9.3 Documents

Section 16 – [s. 15]

“16. Documents—

- (1) Where the information requested by any person is comprised in a document, that information may be made available in one or more of the following ways.*
 - (a) By giving the person a reasonable opportunity to inspect the document; or*
 - (b) By providing the person with a copy of the document; or*
 - (c) In the case of a document that is an article or thing from which sounds or visual images are capable of being reproduced, by making arrangements for the person to hear or view those sounds or visual images; or*
 - (d) In the case of a document by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form, by providing the person with a written transcript of the words recorded or contained in the document; or*
 - (e) By giving an excerpt or summary of the contents; or*
 - (f) By furnishing oral information about its contents.*
- (2) Subsection to section 17 of this Act, the Department or Minister of the Crown or organisation shall make the information available in the way preferred by the person requesting it unless to do so would—*
 - (a) Impair efficient administration; or*
 - (b) Be contrary to any legal duty of the Department or Minister of the Crown or organisation in respect of the document; or*
 - (c) Prejudice the interests protected by section 6 or section 7 . . . or section 9 of this Act and (in the case of the interests protected by*

section 9 of this Act) there is no countervailing public interest.

- (3) *Where the information is not provided in the way preferred by the person requesting it, the Department or Minister of the Crown or organisation shall, subject to section 10 of this Act, give to that person—*
- (a) The reason for not providing the information in that way; and*
 - (b) If that person so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the interests protected by section 6 or section 7 . . . or section 9 of the Act and (in the case of the interests protected by section 9 of this Act) there is no countervailing public interest. ”*
- * When considering a request of this type, before deciding whether or not s.18(f) [s.17(f)] might provide good reason for refusing it, consideration should be given to whether the information requested could be made available in a different form from that requested. If the information could be so made available, s.16 [s.15] might apply on the grounds that the actual process of making the information available in the form requested “*would impair efficient administration*”. If the information could not be made available in a different form, s. 18(f) [s.17(f)] might apply.

2.9.4 Time limits

Section 15(1) – [s.13(1)]

“15. Decisions on requests—

- (1) *Subject to this Act, the Department or Minister of the Crown or organisation to whom a request is made in accordance with section 12 or is transferred in accordance with section 14 of this Act shall, as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received by that Department or Minister of the Crown or organisation, -*
- (a) Decide whether the request is to be granted and, if it is to be granted, in what manner and for what charge (if any); and*
 - (b) Give or post to the person who made the request notice of the decision on the request. ”*

- * Decisions on requests must therefore be made and conveyed to the requester **as soon as reasonably practicable**, and in any event no later than 20 working days after the day on which the request is received. The 20 working days is the maximum time limit within which to respond to a request (subject to extensions in certain circumstances – see para 2.9.5 below). In this regard it should be noted that when the time limit was inserted in the Act in 1987 Parliament made it clear that the 20 working days should not be treated as the normal period within which to respond to a request, but should be the absolute maximum.

2.9.5 Extension of time limits

Section 15A – [s.14]

“15A. Extension of time limits

- (1) *Where a request in accordance with section 12 of this Act is made or transferred to a Department or Minister of the Crown or organisation, the permanent head of that Department or an officer or employee of that Department authorised by that permanent head or that Minister of the Crown or that organisation may extend the time limit set out in section 14 or section 15(1) of this Act in respect of the request if—*
- (a) *The request is for a large quantity of official information or necessitates a search through a large quantity of information and meeting the original time limit would unreasonably interfere with the operations of the Department or Minister of the Crown or the organisation; or*
 - (b) *Consultations necessary to make a decision on the request are such that a proper response to the request cannot reasonably be made within the original time limit.*
- (2) *Any extension under subsection (1) of this section shall be for a reasonable period of time having regard to the circumstances.*
- (3) *The extension shall be effected by giving or posting notice of the extension to the person who made the request within 20 working days after the day on which the request is received.*
- (4) *The notice effecting the extension shall—*
- (a) *Specify the period of the extension; and*
 - (b) *Give the reasons for the extension; and*
 - (c) *State that the person who made the request for the official information has the right, under section 28(3) of this Act, to make a complaint to an Ombudsman about the extension; and*
 - (d) *Contain such other information as is necessary.”*

- * If the request is for a large quantity of information or necessitates a search through a large quantity of information, or where consultations are necessary before a decision can be made, consideration should be given to whether it would be reasonable to extend the time limit to enable a decision to be made on release. The Act does not contemplate multiple extensions. Only one extension may be effected. Thus in extending the time limit, Departments, Ministers and organisations should set a realistic and “*reasonable period of time having regard to the circumstances*” within which they expect to be able to meet the request (s.15A) [s.14]. The requester must be notified within 20 working days after receipt of the request of the period of any extension, of the reason for the extension together with any other relevant information,

and of the right to make a complaint to an Ombudsman about the extension.

(NB Separate procedures are provided in s.29A [s.29] for the extension of time requirements imposed by the Ombudsman).

2.9.7 Breach of time requirements

Section 28(4) & (5) [s.27(4) & (5)]

“(4) If, in relation to any request made in accordance with section 12 of this Act, any Department or Minister of the Crown or organisation fails within the time limit fixed by section 15(1) of this Act (or, where that time limit has been extended under this Act, within that time limit as so extended) to comply with paragraph (a) or paragraph (b) of section 15(1) of this Act, that failure shall be deemed, for the purposes of subsection (1) of this section, to be a refusal to make available the official information to which the request relates.”

* If a decision on a request is not made within 20 working days, or within the extended timeframe notified, the request is deemed to have been refused and the requester has the right to ask an Ombudsman to investigate that deemed refusal.

“(5) Undue delay in making official information available in response to a request for that information, shall be deemed, for the purposes of subsection (1) of this section, to be a refusal to make that information available.”

* If a decision is made and the requester notified within the statutory time limit that the information will be made available, but there is then an unreasonable delay in actually supplying the information to the requester, the request is deemed to have been refused and the requester has the right to ask an Ombudsman to investigate that deemed refusal. For example, if the requester is advised within the statutory time limit that the information will be made available upon payment of a charge, once the charge has been paid, the information should be released as soon as reasonably practicable thereafter. There is not a further timeframe of 20 working days from the time the requester pays the charge.

2.9.8 Charges

Section 15(1A) & (2) – [s.13(1A) & (2)]

“(1A) Subject of section 24 of this Act, every Department or Minister of the Crown or organisation (including an organisation whose activities are funded in whole or in part by another person) may charge for the supply of official information under this Act.

(2) *Any charge fixed shall be reasonable and regard may be had to the cost of the labour and materials involved in making the information available to and to any costs incurred pursuant to a request of the applicant to make the information available urgently.* ”

* Section 13(2) of the Local Government Official Information and Meetings Act is the equivalent provision but is worded differently. It provides :

“(2) Any charge for the supply of official information under this Act shall not exceed the prescribed amount.”

“Prescribed amount” is defined in s.2(1) of the Act as follows :

“in relation to any document or copy of any document provided pursuant to this Act, means the amount determined in accordance with regulations made under this Act.”

No regulations have been made determining the *“prescribed amount.”*

Subsection 3 of s.13 provides :

“(3) Where no such amount is prescribed, any charge fixed shall be reasonable, and regard may be had to the cost of the labour and materials involved in making the information available and to any costs incurred pursuant to a request of the applicant to make the information available urgently.”

* The Ombudsmen have consistently taken the view that charges cannot be fixed for time spent deciding on whether or not or to what extent information can be made available. The charging guidelines issued by Cabinet provide a reasonable basis for assessing charges, not only by departments and organisations subject to the Official Information Act, but also by local authorities subject to the Local Government Official Information and Meetings Act. At a general level, the Ombudsmen have taken the view that charges assessed in accordance with the guidelines are reasonable. However, there may be factors in a particular case which warrant waiver of the charges or some other departure from the guidelines. The role of an Ombudsman when reviewing charges is to form a view as to whether the charge was reasonable in all the circumstances of the request.

* Where a Department, Minister or organisation decides that information requested can be made available, but that charges assessed in accordance with the Cabinet guidelines are likely to be substantial, the standard practice which an Ombudsman would expect to be followed is for the requester to be advised of the likely charges before the request is processed and invited

to decide whether he or she wishes the request to proceed on this basis, or whether he or she wishes to modify the request.

3. Assistance to requesters

3.1 Having regard to the purposes of the Act and to the principle of availability of information and to the fact that there is no obligation to refuse a request, it is incumbent on the recipients of requests to take all reasonable steps to assist requesters, eg:

- * By helping them to specify their requests with due particularity, for example, by clarifying the types of documents held in the area of interest to the requester, or providing file lists, indexes, etc.
- * By advising requesters in advance where charges are to be levied, together with an estimate of the likely amount so that the requester can consider whether to proceed with the request or to modify it.
- * Where the information is held in a different form from that requested, by advising the requester of that fact and explaining what would be involved in providing the information in the form requested so the requester can decide whether to proceed with the request or ask for the information in the form in which it is held.
- * By responding promptly where a request is unclear. In this regard, the Act contemplates that a preliminary assessment of a request will be completed within 10 days (s.14 [s.12] refers). Thus, where a holder requires clarification of a request, it is reasonable to expect that to occur within a similar time frame.
- * In cases where information requested cannot be located after reasonable efforts have been made to find it, although the request might be refused in terms of s.18(e) [s.17(e)], the department or organisation concerned might wish to offer to continue searching for the document, but to charge the requester for the further research. Such a charge would not be a charge in terms of s.15 [s.13] of the Act, but an administrative arrangement, if accepted by the requester, on a cost recovery basis. Such a charge would not be reviewable under the Official Information Act, but might be the subject of a complaint under the Ombudsmen Act.

4. Requesters

4.1 Requesters should endeavour to specify the scope of the information they are seeking as clearly as possible. Requests for large amounts

of information are likely to result in processing delays, charges or possibly refusals on the grounds specified in s.18(f) [s.17(f)], "*that the information cannot be made available without substantial collation and research.*"

- 4.2 Requesters might find it useful as a preliminary to a request to take advantage of the provisions of Part III of the Act to find out what information a particular Department or organisation holds. The Official Information Directory, which is available through public libraries, is a useful starting point. Requests for departmental file lists may also provide a starting point to assist requesters in identifying where the information they are seeking is likely to be found.
- 4.3 Frequently requesters request a large amount of information because they have insufficient knowledge of the precise nature of the information they are seeking or of the form in which it may be held. In such cases, requesters may be able to clarify the issues more promptly if they provide the Department, Minister or organisation to which they have addressed their request with a contact telephone number and invite the recipient of the request to telephone them if clarification is required.

Wellington, February 1993

APPENDIX E
Office of the Ombudsman
Practice Guidelines No 2

**Current Approach of the Ombudsman to Section 9(2)(f)(iv)
& Section 9(2)(g)(i) of the Official Information Act 1982
(hereafter referred to as “the Act”)**

1. Introduction

1.1 These guidelines are designed to help holders of official information in their consideration of requests for information. They should not detract from the need for each case to be considered on its own merits, as measured against the relevant statutory criteria.

1.2 Section 4

Section 4(a) of the Act sets out the purposes which Parliament intended to be achieved in enacting the legislation, namely:

“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 enhance respect for the law and to promote the good government of New Zealand.”

Section 4(c) provides, however, that a balance must be struck between the interests identified above and the need:

“To protect official information to the extent consistent with the public interest and the preservation of personal privacy.”

1.3 Section 5

Section 5 of the Act reflects the underlying principle of availability of official information:

“Principle of availability—The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.”

1.4 *Section 9*

Section 9(2) of the Act identifies a series of interests which Parliament recognised might need to be protected by the withholding of official information in certain circumstances. However, it also acknowledges that there is a need to balance those interests against any countervailing public interest considerations. Section 9(1) acknowledges that there will be cases where the interest in withholding specific information might be outweighed by other considerations which render it desirable, in the public interest, to make the information available.

2. **The Role of the decision-maker and an Ombudsman on review**

2.1 The role of the decision-maker, and an Ombudsman on review, is to examine the information at issue and form an opinion as to whether or not the interests which the Act seeks to protect would be prejudiced by disclosure of that information. In the course of an Ombudsman's investigation and review of a decision to withhold information, it is for the decision-maker to bring forward sufficient material to support the proposition that good reason exists for withholding the information, in other words, to justify his, her or its decision with sufficient particularity to enable the Ombudsman to form an independent opinion on the complaint.

2.2 In *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, Cooke P said at p 391:

"If the decision-maker, be he Minister or departmental head or Ombudsman or Judge adjudicating on a claim of denial of right, is in two minds in the end, he should come down on the side of availability of information. I say this . . . because the Act itself provides guidance in the last limb of s 5."

2.3 In the same case, Casey J said at p 411:

". . . in conducting a review of the decision, the Ombudsmen are not engaged in an adversarial exercise. The provisions of the Ombudsmen Act apply (section 29 Official Information Act), and under sections 18 and 19 they are given wide powers of inquiry and are not confined to the material put before them by those immediately involved. In the nature of things he who alleges that good reason exists for withholding information would be expected to bring forward material to support that proposition. But the review is to be conducted and the decision and recommendations made without any presumptions other than those specified in the Act."

2.4 Furthermore, even where the decision-maker or an Ombudsman on review forms the view that s 9(2)(a)–(k) applies to the

information at issue, s 9(1) requires that consideration must still be given to the question of whether, in the circumstances of the particular case, the withholding of the information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

- 2.5 One of the most difficult areas which Departments, Ministers of the Crown and other organisations are called upon to address, and which an Ombudsman has to assess upon review, is the precise nature of the interests which s 9(2)(f)(iv) and (g)(i) seek to protect. The "*constitutional conventions*" referred to in s 9(2)(f) are not defined for the very reason that they evolve over time. As the subsection states, it is "*the constitutional conventions for the time being*" to which the Act applies. Accordingly, the interest which the Act seeks to protect can be difficult to define and may change over time.
- 2.6 The approach to s 9(2)(f)(iv) and (g)(i) over the past few years has been developed on the basis of each Ombudsman's experience in investigating and reviewing decisions to withhold information in reliance upon those statutory provisions.
- 2.7 Although the subsections provide two separate reasons for refusal they are closely related. On a general level, the provisions of the subsections provide protection, where necessary in the public interest, for the internal workings of government. However, their purpose is not so much to protect information as to protect the particular process of government to which the information relates.
- 2.8 While there is undoubtedly a public interest in disclosure of information relating to the workings of government to promote accountability and participation, the overall public interest is not served by disclosure of information which undermines the ability of government to function effectively and in an orderly manner. On the one hand, s 5 of the Act establishes the principle that all information requested under the Act should be made available unless there is good reason for withholding it and s 4(a) of the Act states one of the purposes of the Act to be to increase progressively the availability of official information to enable New Zealanders to participate more effectively in the making and administration of laws and policies and to promote the accountability of Ministers and officials. On the other hand, while the Act does not specify the extent to which withholding should take place to protect constitutional conventions and the effective conduct of public affairs, the Danks Committee in putting forward the draft legislation said:

“that there should be continuing protection as needs be for the free and frank exchange of views between Ministers and their colleagues, between Ministers and officials, or between other officers of the Government in the course of their duty.”

However, the Committee also said such protection would not always be necessary or may only be needed for a short period.

3. Section 9(2)(f)(iv) & Section 9(2)(g)(i)

3.1 The Act does not identify classes of information which may be withheld. Instead it identifies interests which need to be protected, and where disclosure of information would, in the circumstances of a particular case, prejudice those interests, it provides for the withholding of the information, unless the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

3.2 The relevant provisions state:

“(2) Subject to sections 6, 7, 10 and 18 of this Act, this section applies, if, and only if, the withholding of the information is necessary to—

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

... .

(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 members of an organisation or officers and employees of any Department or organisation in the course of their duty;”

3.3 Although the interests which s 9(2)(f)(iv) and (g)(i) seek to protect overlap to an extent, on the basis of their experience in investigating and reviewing decisions to withhold information in reliance upon those subsections, each Ombudsman has been able to identify, in general terms, a distinction between the interests which the two subsections seek to protect.

3.4 Section 9(2)(f)(iv)

In general, this subsection is relied upon where the holder’s concerns are about the *consideration* of advice.

3.5 Section 9(2)(g)(i)

In general, this subsection is relied upon where the holder’s concerns are about the *generation* of opinions, those opinions frequently becoming the basis upon which advice is given.

- 3.6 The terms “*advice*” and “*opinion*” overlap in meaning, “*advice*” being frequently understood to mean “*opinion given or offered as to action*”. However, it is not necessarily limited to that definition. It does also mean “*information given*” and thus can encompass purely factual information. The issue in considering whether either s 9(2)(f)(iv) or s 9(2)(g)(i) might apply to specific information is therefore not so much one of determining whether the information is “*advice*” or “*opinion*” (although that is obviously a relevant starting point), but what has to be addressed is whether disclosure of the specific information would prejudice the interests which those provisions seek to protect.
- 3.7 Neither advice tendered by Ministers and officials, nor the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation always have to be withheld to maintain either the “*constitutional convention*” or the “*effective conduct of public affairs*” requiring protection. In commenting on s (9)(2)(f) in its Supplementary Report, the Danks Committee said:

“It should be noted that Cabinet papers are not as a class automatically protected from disclosure.”

In relation to s (9)(2)(g)(i), the Committee said:

“Essentially the subparagraph covers internal and interdepartmental minutes, reports and recommendations, and advice by public servants to Ministers and by Ministers to Cabinet and the Governor-General. Again, such documents are not automatically protected from disclosure. Only if disclosure is likely to inhibit the free and frank expression of opinion and thereby adversely affect the conduct of public affairs may a reason for withholding them under this head exist. Even in that case, it must be weighed against other public interests.”

- 3.8 There are no absolute rules for assessing when it is necessary to withhold information under s 9(2)(f)(iv) and (g)(i), or when information can be released without undermining the interests which those subsections seek to protect. However, there are a number of questions which an Ombudsman must seek to answer when assessing whether or not disclosure of specific information would prejudice the interests concerned. These include:
- (i) What are the concerns which the holder of the information has expressed about disclosure of the information?
 - (ii) Are those concerns reflected in the interest which the subsection at issue seeks to protect?
 - (iii) Would disclosure of the information at issue prejudice that interest?
 - (iv) If so, in what way would that prejudice arise?

- (v) What is the evidence to support that conclusion?
- 3.9 On the basis of experience in investigating and reviewing decisions to withhold information in reliance upon s 9(2)(f)(iv) and (g)(i), some factors which an Ombudsman may consider as relevant include:
- (i) The policy and/or decision-making process to which the information relates;
 - (ii) Whether the process is completed and, if not, what stage it has reached;
 - (iii) Whether the information in question is still under consideration and, if not, what decisions have been made in relation to it;
 - (iv) Whether the concern expressed by the holder of the information relates to the content of the information or to the context in which it was generated or supplied;
 - (v) The effect which disclosure of the information would have had at the time of the decision on that or any other policy and/or decision-making process;
 - (vi) The extent to which, if any, the topic in question is already in the public domain.
- 3.10 There are occasions where s 9(2)(f)(iv) or s 9(2)(g)(i) is relied on to withhold information, when the concerns of the holder relate to interests other than those which the subsections seek to protect. These concerns generally have to do with considerations of a political nature. As the Danks Committee noted in its General Report when discussing *“Interests of Effective Government and Administration”*:

“The fact that the release of certain information may give rise to criticism or embarrassment of the government is not an adequate reason for withholding it from the public.”

4. Section 9(1)

- 4.1 Where the requirements of either s 9(2)(f)(iv) or s 9(2)(g)(i) are made out, that is, where it is concluded that the interest which those provisions seek to protect would be prejudiced by the release of the information at issue, consideration must be given by both the decision-maker, and the Ombudsman on review, to whether, in the particular circumstances of the case, there are any countervailing public interest considerations favouring disclosure of the information which outweigh the interest in withholding.
- 4.2 In cases where there are valid considerations both for and against disclosure of the information at issue, striking a balance between these competing considerations can often be difficult. As noted

above, this is reflected in the purposes set out in s 4(a) and (c). On the one hand the purpose of the Act is to promote participation and accountability through the disclosure of official information, and on the other hand its purpose is to protect official information consistent with the public interest and the preservation of personal privacy.

- 4.3 At the end of the day the Ombudsman's statutory function is to form an independent opinion on whether or not, in a particular case, the request ought to have been refused. To use the words of Jeffries J in Wyatt Co Ltd v Queenstown Lakes District Council [1991] 2 NZLR 180 at page 191, an Ombudsman is required to:

"exercise his judgment using experience and accumulated knowledge which are his by virtue of the office he holds. Parliament delegated to the . . . Ombudsman tasks, which at times are complex and even agonising, with no expectation that the Courts would sit on his shoulder about those judgments which are essentially balancing exercises involving competing interests. The Courts will only intervene when the . . . Ombudsman is plainly and demonstrably wrong, and not because he preferred one side against another."

5. Conclusion

- 5.1 The Act does not protect classes of information. It provides for the protection of information where disclosure would prejudice one of the interests which the Act identifies as requiring protection, unless there is an overriding public interest in disclosure.
- 5.2 When considering whether or not either s 9(2)(f)(iv) or s 9(2)(g)(i) of the Act might apply to the information at issue, the decision-maker, and the Ombudsman on review, must be satisfied:
- (a) that the interests which those provisions seek to protect are clearly established;
 - (b) that it is necessary to withhold the information to avoid prejudicing those interests;
 - (c) that there are no overriding public interest considerations which outweigh the need to withhold the information.
- 5.3 Examples of how the foregoing guidelines have been applied in practice to specific cases can be found in the most recent Compendium of Case Notes of the Ombudsmen.

Wellington, February 1993

APPENDIX F
Office of the Ombudsman
Practice Guidelines No 3

Current Approach of Ombudsman to Sections 9(2)(b), (ba),
(i), (j) & (k) of the Official Information Act
and
Sections 7(2)(b), (c), (h), (i) & (j) of the
Local Government Official Information & Meetings Act
Including Information Relating To Tenders

1. Introduction

1.1 These guidelines are designed to help Ministers of the Crown, Departments, organisations and local authorities in considering requests for commercial information. They do not detract from the need for each case to be considered on its own merits, as measured against the relevant statutory criteria, but reflect the approach which the Ombudsmen have developed to the relevant provisions of the legislation based on their experience. The provisions of the Local Government Official Information & Meetings Act are referred to in square brackets.

1.2 *Section 4 [section 4] – Purposes*

Section 4(a) [s 4(a)] of the Act sets out the purposes which Parliament intended to be achieved in enacting the legislation, namely:

“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 enhance respect for the law and to promote the good government of New Zealand.”

[(a) To provide for the availability to the public of official information held by local authorities, and to promote the open and public transaction of business at meetings of local authorities, in order—

- (i) to enable more effective participation by the public in the actions and decisions of local authorities; and*

(ii) *To promote the accountability of local authority members and officials,—
and thereby to enhance respect for the law and to promote good local government in New Zealand.*”]

Section 4(c) [s 4(c)] provides, however, that a balance must be struck between the interests identified above and the need:

“To protect official information to the extent consistent with the public interest and the preservation of personal privacy.”

[“To protect official information and the deliberations of local authorities to the extent consistent with the public interest and the preservation of personal privacy.”]

1.3 **Section 5 [section 5] – Principle of availability**

Section 5 of both Acts reflects the underlying principle of availability of official information:

“Principle of availability—The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.”

1.4 **Section 9 [section 7]**

Section 9(2) [s 7(2)] of the Act identifies a series of interests which Parliament recognised might need to be protected by the withholding of official information in certain circumstances. However, it also acknowledges that there is a need to balance those interests against any countervailing public interest considerations. Section 9(1) [s 7(1)] acknowledges that there will be cases where the interest in withholding specific information might be outweighed by other considerations which render it desirable, in the public interest, to make the information available.

2. **The role of the decision-maker and an Ombudsman on review**

2.1 The role of the decision-maker, and an Ombudsman on review, is to examine the information at issue and form an opinion as to whether or not the interests which the Act seeks to protect would be prejudiced by disclosure of that information. In the course of an Ombudsman’s investigation and review of a decision to withhold information, it is for the decision-maker to bring forward sufficient material and advance sufficient argument to support the proposition that good reason exists for withholding the information, in other words, to justify his, her or its decision with sufficient particularity to enable the Ombudsman to form an independent opinion on the complaint.

- 2.2 In *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, Cooke P said at p.391:

"If the decision-maker, be he Minister or departmental head or Ombudsman or Judge adjudicating on a claim of denial of right, is in two minds in the end, he should come down on the side of availability of information. I say this . . . because the Act itself provides guidance in the last limb of s 5."

- 2.3 In the same case, Casey J said at p.411:

". . . in conducting a review of the decision, the Ombudsmen are not engaged in an adversarial exercise. The provisions of the Ombudsmen Act apply (section 29 Official Information Act), and under sections 18 and 19 they are given wide powers of inquiry and are not confined to the material put before them by those immediately involved. In the nature of things he who alleges that good reason exists for withholding information would be expected to bring forward material to support that proposition. But the review is to be conducted and the decision and recommendations made without any presumptions other than those specified in the Act."

- 2.4 Furthermore, even where the decision-maker or an Ombudsman on review forms the view that s 9(2)(a)–(k) [s 7(2)(a)–(j)] applies to the information at issue, s 9(1) [s 7(1)] requires that consideration must still be given to the question of whether, in the circumstances of the particular case, the withholding of the information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

3. Commercial Information

- 3.1 Both in 1982, when the Official Information legislation was first considered by Parliament, and again in 1987, when amendments to the provisions relating to commercial information were addressed in Parliament, the clear intention was not to protect all commercial information held by the central and local government as a special exempt class of information. While Parliament recognised that there is a legitimate interest in citizens, including central and local government departments and organisations, being able to conduct commercial activities without prejudice or disadvantage, it also recognised that not all information relating to commercial activities needed to be protected to avoid prejudice or disadvantage. It also recognised that, on occasion, there would be situations where notwithstanding that disclosure of particular information would result in prejudice or disadvantage to one of the commercial interests identified in the legislation, there could be factors which, in the public interest, outweighed the need to withhold that information (s 9(1)).

- 3.2 The increasing market orientation of the public sector has focused attention on the need to protect what the holders label “*commercially sensitive information*”. However, that term is misleading because it is used in neither the Official Information Act nor the Local Government Official Information Act. Neither Act provides protection for such information per se. Instead, the legislation identifies certain commercial interests which might need to be protected in the circumstances of a particular case. Those interests are:
- (i) trade secrets – s9(2)(b)(i) [s7(2)(b)(i)]
 - (ii) the commercial position of the supplier or subject of particular information – s 9(2)(b)(ii) [s7(2)(b)(ii)]
 - (iii) information subject to an obligation of confidence or supplied under statutory compulsion – s 9(2)(ba) [s 7(2)(c)]
 - (iv) the commercial activities of central and local government – s 9(2)(i) [s 7(2)(h)]
 - (v) negotiations (including commercial and industrial negotiations) of the State – s 9(2)(j) [s 7(2)(i)]
 - (vi) avoidance of improper gain or improper advantage – s9(2)(k) [s 7(2)(j)]
- 3.3 When considering a request for information, disclosure of which might prejudice one of the above interests, it is the decision-maker’s role, and the Ombudsman’s role on review, to:
- (a) establish whether one of those interests would be prejudiced by disclosure of the information at issue, and, if so,
 - (b) to determine to what extent it is necessary to withhold the information at issue to avoid that prejudice.
- For example, it may not be necessary to withhold all the information; or it may be possible to provide a summary of the information without disclosing those elements which prejudice the particular interest of concern.

4. Court Cases

- 4.1 There are two Court cases which provide decision-makers with some judicial guidance as to the protection which the Official Information Act and the Local Government Official Information and Meetings Act afford to some commercial interests. They are *Wyatt Co v Queensland Lakes District Council* [1991] 2 NZLR 180 and *Television New Zealand v Ombudsman* [1992] 1 NZLR 106.
- 4.2 In the *Wyatt* case, Jeffries J noted at page 190, line 42:

“It cannot be denied that some of the information recommended to be released by the Chief Ombudsman will reveal matters which Wyatt wants to keep entirely secret. The Official Information Act was passed in 1982 following

an exhaustive investigation into the subject in New Zealand, which also reflected the same movements elsewhere in the world. Cooke P in Commissioner of Police v Ombudsman at p 391 was prepared to regard the Act as correctly described as a constitutional one. In 1987 the [Local Government Official Information and Meetings] Act under consideration was passed extending the right of the public to know and must similarly be regarded as of constitutional significance. Governments of different political philosophies have endorsed the principle of freedom of information so as to express support for the concept that knowledge and information about the conduct of public affairs, and the application of public money, in a democratically governed country are essential to its right to be so described. The Courts must zealously support those quite sweeping legislative intentions. It is fundamental to the Act that the public are to be given worthwhile information about how the public's money and affairs are being used and conducted, subject only to the statutory restraints and exceptions. The allegations of errors, unreasonableness and failure to take into account relevant matters are attacks on the several judgments the Chief Ombudsman had to make in the functions ordained for him by the Act. That Act requires him to exercise his judgment using experience and accumulated knowledge which are his by virtue of the office he holds. Parliament delegated to the Chief Ombudsman tasks, which at times are complex and even agonising, with no expectation that the Courts would sit on his shoulder about those judgments which are essentially balancing exercises involving competing interests. The Courts will only intervene when the Chief Ombudsman is plainly and demonstrably wrong, and not because he preferred one side against another. . . . The Chief Ombudsman in his report carefully analyses the legal obligations of [s 7(2)(c)] and compares it to the facts. He finds it applies but in effect the matters not to be disclosed under the subsection are the same as for s 7(2)(b)(ii). The Court now faces the contractual issue. It was accepted that the contract between Wyatt and the Council contained a term of confidentiality by the Council. . . . There cannot be allowed to develop in this country a kind of commercial Alsatia beyond the reach of a statute. Confidentiality is not an absolute concept admitting of no exceptions. . . . It is an implied term of any contract between individuals that the promises of their contract will be subject to statutory obligations. At all times the applicant would or should have been aware of the provisions of the Act and in particular s 7, which effectively excludes contracts on confidentiality preventing release of information.

4.3 In the TVNZ case, Heron J noted at page 121, line 12:

"The Court does not sit in judgment on the Ombudsman's decision but can for two reasons express its view. The first is that Judges are regularly called on to examine the probabilities of consequences of disclosure in the commercial environment. The second is that the criticism here is made about the reasonableness of the decision. Referring to it as the nub of the case Mr Mathieson contended that by referring to the case by case approach the Ombudsman shut herself out from considering the likelihood of disclosure

*in principle carrying the level of prejudice or disadvantage necessary to involve s 9(2)(i). It is true that the final letter of the Ombudsman to TVNZ does not in its terms address that issue but it was a letter in response to arguments copied by TVNZ from their earlier letter to which the Ombudsman had replied and there addressed the point. She said, in summary, that based on information she received, a complete prohibition on disclosure was not necessary and she considered that in (sic) case the **actual** information should be examined.*

My view is that looked at overall the Ombudsman on this critical issue has addressed and answered the argument raised. Any doubt as to this is removed when one looks at her advice to the Tobacco Institute at the conclusion of her inquiry. . . .

‘Having considered the many points raised I concluded that although the prospect of having to disclose unpublished material placed TVNZ at a potential disadvantage in its commercial activities, for the “necessity” test under s 9(2)(i) to be met in a particular case there had to be a particular reason for non-disclosure of the unpublished material, which related either to the content of the information or to the form in which it was held.’

There was a stated rejection of the non disclosure on principle argument. No unreasonableness is demonstrated by the decision the Ombudsman took on this point.”

THE WITHHOLDING PROVISIONS

5. Section 9(2)(b) [s 7(2)(b)]

5.1 This provision states:

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

. . .

- (b) Protect information where the making available of the information—*
 - (i) Would disclose a trade secret; or*
 - (ii) Would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information.”*

5.2 A general approach to the circumstances in which s 9(2)(b)(i) [s 7(2)(b)(i)] might apply has not been developed. It has been raised in very few cases, and where it has been raised, there have been difficulties in defining the term “a trade secret”. As s 9(2)(b)(ii) [s 7(2)(b)(ii)] was found to protect the information at issue in those cases, it was not necessary to form a final view on the definition of “a trade secret”.

- 5.3 Section 9(2)(b)(ii) [s 7 (2)(b)(ii)] is one of the provisions relied on most often to protect commercial interests. This section is aimed primarily at information held by central and local government which is about the commercial interests of third parties. (Section 9(2)(i) [7(2)(h)] deals with the commercial activities of the holder of the information.) Before accepting that s 9(2)(b)(ii) [s 7(2)(b)(ii)] protects information in a particular case, the Ombudsman must be satisfied that:
- (a) the information relates to the commercial position of the person who supplied or who is the subject of the information; and
 - (b) disclosure **would be likely unreasonably** to prejudice that commercial position.
- 5.4 The Court of Appeal has interpreted the phrase "*would be likely*" to mean "*a serious or real and substantial risk to a protected interest, a risk that might well eventuate*" (Commissioner of Police v Ombudsman [1988] 1 NZLR 385.)
- 5.5 For example, on a general level the Ombudsmen have accepted that where disclosure of pricing information would be likely to reveal a tenderer's pricing/market strategy in a competitive market, then such information is protected by s 9(2)(b)(ii) [s 7(2)(b)(ii)]. However, in respect of requests for total tender prices (as opposed to details of how the total price is made up) and identities of successful and unsuccessful tenderers, the Ombudsman would have to be persuaded in a particular case that such information requires protection under the official information legislation. To date the Ombudsmen have very rarely been persuaded that such information is protected.
- 5.6 In respect of s 9(2)(b)(ii) [s 7(2)(b)(ii)] an issue which often arises is how one assesses the likelihood and nature of prejudice to a third party's commercial position. In the Ombudsman's view, a simple assertion by the holder of the information that such prejudice would be likely is insufficient. Each Ombudsman considers that direct consultation with the third party or parties either by the department or organisation or local authority or by the Ombudsman is necessary. Such consultation can be either by letter or orally.
- 5.7 Where consultation with a third party about its interests in the information is undertaken, it is not enough for the third party simply to object to disclosure. (See *Wyatt*) The Ombudsman needs to know how the commercial position of the third party would be prejudiced and why that prejudice would be unreasonable.

6. Section 9(2)(ba) [s 7(2)(c)]

6.1 This section states:

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

(ba) Protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information-

(i) 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) Would be likely otherwise to damage the public interest.”

6.2 Section 9(2)(ba) [s 7(2)(c)] involves the decision-maker, and the Ombudsman on review, in a two-stage test.

6.3 *Stage One*

The first stage involves determining whether the information is subject to an obligation of confidence or whether it is information which any person has been or could be compelled to provide under statutory authority.

6.4 **Information supplied subject to an obligation of confidence**

Where the decision-maker maintains that the information at issue should be withheld because it was supplied subject to an obligation of confidence, the first step in an Ombudsman's investigation and review of that decision is to establish that the information at issue is subject to an obligation of confidence. In making the assessment, an Ombudsman has regard to the nature of the information and the full circumstances of its supply.

6.5 **Information supplied under statutory compulsion**

Where information is supplied under statutory compulsion, the authority under which the information was supplied must be established. If there is a statutory power to compel the supply of similar information from the same source, future supply can be assured. However, there are circumstances where, notwithstanding the power to compel the supply of information, a department or organisation has to rely on the supplier to provide the quality of information to enable it to discharge its functions. In particular cases, therefore, a department or organisation may only be able to ensure the future supply of information of the quality it requires if the information is supplied on the basis of an understanding that it will be held in confidence.

6.6 *Stage Two*

Where it is determined that the information at issue was either supplied subject to an obligation of confidence or under statutory compulsion, an assessment must then be made as to whether, in the circumstances of the particular case, disclosure of that information **would be likely** to either:

- (a) prejudice the supply of similar information or information from the same source, **and**
- (b) it is in the public interest that such information should continue to be supplied; (s 9(2)(ba)(i) [s 7(2)(c)(i)])

or

- (c) otherwise damage the public interest. (s 9(2)(ba)(ii) [s 7(2)(c)(ii)])

- 6.7 An example of the situation in which the Ombudsman has accepted that s 9(2)(ba) [s 7(2)(c)] applies is where the holder of the information requires the information to discharge a statutory function. Even where the department or organisation concerned may have the statutory power to compel the provision of information, it may have to rely on the timely supply of reliable information in order for it to be able to discharge its statutory responsibility effectively. In this context, the information is supplied and accepted under an obligation of confidence in order to ensure that reliable information is supplied in a timely manner. Where the Ombudsman has been satisfied that disclosure of the information **would be likely** to prejudice the continued supply of such timely and reliable information and therefore the department's or organisation's ability to discharge its public function, it has been accepted that s 9(2)(ba)(i) [s 7(2)(c)(i)] applies.
- 6.8 Section 9(2)(ba)(ii) has been considered a relevant withholding provision, in some circumstances, in respect of information generated by the Audit Office or information generated within a department or organisation which discloses Audit Office information, on the basis that there is a strong public interest in ensuring that the integrity of the Audit Office's statutory functions. While the Audit Office is not subject to the Official Information Act, reports of the Audit Office and/or the Controller and Auditor-General, when in the hands of organisations subject to either that Act or the LGOIMA, become subject to those Acts. Audits are conducted in an environment where information exchanged between auditor and auditee is subject to an obligation of confidence and disclosure of that information would be likely to prejudice the integrity and effectiveness of the audit process. Clearly it is in the public interest to maintain the integrity and effectiveness of that process.

6.9 The interpretation of s 7(2)(b)(ii) and s 7(2)(c)(i) of the Local Government Official Information and Meetings Act were the subject of consideration by the High Court in *Wyatt* (see paras 4.1 And 4.2 above). The Court supported the approach which the Chief Ombudsman had taken, namely, that the Act did not protect commercial information supplied by a third party simply on the basis of an understanding of confidentiality, but that a realistic assessment needed to be made of the nature of the particular information and the likely consequences of its disclosure.

7. Section 9(2)(i) [s 7(2)(h)]

7.1 This section concerns the commercial activities of the holder of the information. It states:

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

(i) Enable a Minister of the Crown or any Department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities. "

7.2 This section allows information to be withheld where necessary to enable the department, Minister, organisation or local authority to carry out, without prejudice or disadvantage, commercial activities. The approach involves -

- (a) identifying the commercial activity in question;
- (b) identifying the prejudice or disadvantage which might result to that activity if information were made available;
- (c) establishing precisely how that prejudice or disadvantage would occur; and
- (d) assessing whether disclosure of the information would be so likely to cause the **prejudice or disadvantage** predicted that it is **necessary** to withhold it.

7.3 In applying the above-mentioned general tests in the tendering situation, a starting point is to establish:

- (a) the particular market activity to which the information relates,
- (b) the characteristics of that market activity, eg, the number of competitors and degree of competition,
- (c) the criteria on which the tender contracts are awarded and how the information at issue relates to those criteria, and
- (d) the degree to which the information could be said to reveal a tenderer's marketing/pricing strategy which a competitor would be able to use to obtain a competitive advantage.

7.4 This information then assists the assessment of:

- (1) the precise nature of the prejudice or disadvantage which

the department, organisation or local authority predicts would result from disclosure, and
(2) the likelihood of such a prejudice or disadvantage occurring.

8. Section 9(2)(j) [s 7(2)(i)]

8.1 This section states"

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

(j) Enable a Minister of the Crown or any Department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations)".

8.2 Section 9(2)(j) [s 7(2)(i)] recognises that it is in the public interest for those subject to the Act to be able to carry on commercial or industrial negotiations without prejudice or disadvantage. It allows information to be withheld where necessary to protect that interest.

8.3 However, the section does not provide good reason to withhold all information relating to particular negotiations. It only protects information, disclosure of which would be so likely to **prejudice or disadvantage** the department; Minister, organisation or local authority in the negotiations that it is **necessary** to withhold that information. Whether such **prejudice or disadvantage** will occur will depend very much on the precise nature of the information and its relevance to the actual issues under negotiation or contemplated negotiation. Information relating to negotiating strategy might well be protected, but it is not sufficient simply to assert that release of the information would be unhelpful to the holder's position.

9. Section 9(2)(k) [s 7(2)(j)]

9.1 In commenting on this provision in its Supplementary Report, the Danks Committee said:

". . . Not all disclosure of use of official information for advantage or gain is objectionable; much information of this character is designed to assist individuals and businesses to their advantage. It seems impossible in a succinct statement to spell out precisely the circumstances in which the exception should apply: the word 'improper' in general appears adequate."

9.2 The application of s 9(2)(k) was discussed in the TVNZ case as follows (p 113 line 27):

"The Ombudsman dealt with s 9(2)(k) indicating that it was not an easy test to meet, the test being whether withholding is 'necessary to prevent the disclosure or use of official information for improper gain or improper advantage'. She referred to the difficulty that people seeking information

did not have to specify or justify the purpose for which the information was sought. In this case, the Ombudsman dealt with the argument that the background material was not relevant to the advancement of complaint under s 4(1)(d) of the Broadcasting Act. That argument seems to me to have been correctly rejected. After reviewing Mr Thompson's argument on this point the Ombudsman said:

'Mr Thompson says he fails to see how the background material requested by the Institute can advance the issue under this provision (s 4(1)(d)). He states, with emphasis, that it is not the balance of the background material which is relevant; rather it is the balance of the programme as presented. If that is so, however, then there can be no advantage to the Institute in obtaining the information and s 9(2)(k) cannot apply. Conversely if background material is, after all, relevant, then it is hard to see how any advantage derived from obtaining information could be described as improper'."

- 9.3 This section was accepted by the Ombudsman as applicable in a case where a requester sought a copy of the Seventh Form Calculus notes used by the Correspondence School. The Ombudsman concluded that given the statutory restrictions on enrolment at the school; the school's enrolment policy which stated, among other things, *"The correspondence school is not an alternative school for those who have the option of attending a local secondary school, nor is it normally a source of alternative curriculum for those students enrolled at a secondary school"*; and under s 7A(2) of the Education Amendment Act 1989 relating to fees, disclosure of the calculus notes would constitute an improper gain or advantage for the requester. This was on the grounds that the material had been compiled using the skill and judgment of the school staff and, because the requester was not enrolled at or receiving tuition from the school, provision of the information would give the requester an advantage or gain to which he was not entitled, and it would also circumvent the restrictions on enrolment and tuition.
- 9.4 Section 9(2)(k) was also accepted in a case where disclosure of the information at issue would have enabled beneficiaries and recipients of the Rest Home Subsidy to obtain a benefit to which they were not legally entitled. The Ombudsman formed the view that if something was illegal, it was also improper.

10. Section 9(I) [s 7(I)] – Countervailing public interest

- 10.1 This section states:

"(1) Where this section applies, good reasons for withholding official information exists, for the purpose of section 5 of this Act, 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."

10.2 Accordingly, even where one of the reasons for withholding information under s 9(2) [s 7(2)] can be made out, the decision maker, and the Ombudsman on review, still needs to consider in each case whether there is any countervailing public interest in disclosure. In balancing the competing interests for and against disclosure of information, the Ombudsman has regard to the purposes of the Act as defined in s 4 and also the principle of availability enunciated in s 5. As observed at page 190, line 55 in *Wyatt*:

"it is fundamental to the Act that the public are to be given worthwhile information about how the public's money and affairs are being used and conducted, subject only to the statutory restraints and exceptions."

10.3 In the tendering situation, for example, the public interest considerations which the Ombudsmen have identified as favouring disclosure are:

- (a) the public interest in public sector procedures for purchasing of goods and services to be seen to be beyond reproach, and
- (b) the public interest in the New Zealand public having access to information on how government departments and organisations and local authorities spend public funds.

10.4 These considerations flow naturally from the stated purposes of the official information legislation in s 4 of the respective Acts, namely, *"to promote the accountability of . . . officials"*.

10.5 There have, in the past, been incidents where public sector employees have been charged and convicted of offences connected with the corruption of tendering procedures. These incidents, though rare, serve to highlight the importance of integrity in the tendering process so that such integrity is beyond doubt in the eyes of the public (including unsuccessful and prospective tenderers).

11. Conclusion

11.1 The Official Information Act and the Local Government Official Information and Meetings Act provide adequate protection for information which is held by Ministers of the Crown, Departments, organisations and local authorities and disclosure of which would prejudice or disadvantage unreasonably their commercial position or activities or those of third parties about whom they hold information. Since 1 July 1983 when the Official Information Act came into force, no evidence has been produced to an Ombudsman that information which has been disclosed either under that Act or under the Local Government Official Information and Meetings Act as a result of an investigation and review by an Ombudsman

has prejudiced any of the commercial interests which the Act seeks to protect. All the legislation requires is that, when considering a request for commercial information, the holder of the information must, in each case, identify the prejudice or disadvantage, and show how that prejudice or disadvantage would occur, and why that prejudice or disadvantage would be unreasonable. The holder must then consider whether there are any countervailing public interest factors favouring disclosure. Only then can a decision be made as to whether or not good reason exists in terms of the legislation to withhold the information

Wellington, September 1993

APPENDIX G
Department of Justice,
Memorandum on Charging
for requests under the
Official Information Act 1982

26 February 1992

Official Information Act: Charging for Services

On 29 January 1992, the Government approved the following revised guidelines for charging for official information. These guidelines replace those approved by Cabinet Committee in March 1989 (POL 89 M 8/2) and set out in the Department of Justice memorandum of 21 April 1989.

They are provided for all organisations covered by the Act including Public Service Departments, State-owned Enterprises and Education and Health Boards. They represent what the Government regards as reasonable charges for the purposes of the Official Information Act *and should be followed in all cases unless good reason exists for not doing so*. Organisations covered by the Act who wish to develop their own charging regimes should be aware that charges are liable to review by the Ombudsman.

1. EXISTING CHARGES TO REMAIN
 - 1.1 There are currently areas where access to official information is given free of charge or pursuant to an existing charging arrangement set out in an enactment or regulations. The Official Information Act 1982 does not derogate from such access (Section 52 refers); those arrangements are not changed by these guidelines.
2. FIXING THE AMOUNT OF CHARGE
 - 2.1 The amount of charge should be determined by:
 - (a) establishing whether or not the request is made by an identifiable natural person seeking access to any *personal information* about that person (Section 24).

Such requests are NOT subject to any charge.

- (b) the aggregate amount of staff time *exceeding one hour* spent in actioning the request.

This will include search and retrieval of information, the provision of transcripts and the supervision of access.

- (c) the number of pages of A4 sized or foolscap photocopy to be provided *exceeding 20*.

Non standard sized photocopy paper such as that used for reproducing maps and plans will be charged on an actual and reasonable basis.

- (d) for *any other cost*, the amount actually incurred in responding to the request.

This will cover the provision of copies of video, audio and film tapes, computer time or other situations where a direct charge is incurred.

- 2.2 Where repeated requests from the same source are made in respect of a common subject over intervals of up to eight weeks, requests after the first should be aggregated for charging purposes.

- 2.3 The charge should represent a reasonable fee for access given. It may include time spent:

- in searching an index to establish the location of the information;
- in locating (physically) and extracting the information from the place where it is held;
- in reading or reviewing the information; and
- in supervising the access to the information.

The charge should *not* include any allowance for:

- extra time spent locating and retrieving information when it is not where it ought to be; or
- time spent deciding whether or not access should be allowed and in what form.

- 2.4 Where the free threshold is only exceeded by a small margin it is a matter of discretion whether any fee should be paid and if so, how much.

3. STAFF TIME

- 3.1 Time spent by staff searching for relevant material, abstracting and collating, copying, transcribing and supervising access where the total time involved is *in excess of one hour* should be charged out as follows:

- an initial charge of \$28 for the first chargeable half hour or part thereof; and
 - then \$28 for each additional half hour or part thereof.
- 3.2 The rate of charge applies irrespective of the seniority or grading of the officer who deals with the request, *except* where staff with specialist expertise who are not on salary are *required* to process the request, in which case a high rate not above their actual rate of pay may be charged.
- 3.3 Time spent by staff in deciding whether or not to approve access and in what form to provide information should *not* be charged.
4. PHOTOCOPYING
- 4.1 Photocopying on standard A4 or foolscap paper where the total number of pages is *in excess of 20 pages* should be charged out as follows:
- 20c for each page after the first 20 pages
5. OTHER COSTS
- 5.1 All other charges incurred should be fixed at an amount which recovers the full costs involved. This would include:
- producing a document by the use of a computer or other like equipment;
 - reproducing a film, video or audio recording;
 - arranging for the applicant to hear or view an audio or visual recording; and
 - providing a copy of any map, plan or other document larger than foolscap size.
6. COST RECOVERY FOR COMMERCIALLY VALUABLE INFORMATION
- 6.1 It is reasonable to recover actual costs involved in producing and supplying information of commercial value. However, the full cost of producing it in the first instance should not be charged to subsequent requesters.
7. REMISSION OF CHARGES
- 7.1 The liability to pay any charge may be modified or waived at the discretion of the department or organisation receiving the request. Such decisions should have regard to the circumstances of each request. However, it would be appropriate to consider *inter alia*:
- whether payment might cause the applicant financial hardship;

- whether remission or reduction of the charge would facilitate good relations with the public or assist the department or organisation in its work; and
 - whether remission or reduction of the charge would be in the public interest because it is likely to contribute significantly to public understanding of, or effective participation in, the operations or activities of the government, and the disclosure of the information is not primarily in the commercial interest of the requester.
- 7.2 Questions which could be asked by decision makers in order to establish the level of public interest are, inter alia:
- Is the use of the information by the requester likely to make a significant contribution to operations and activities of government?
 - Has the government requested submissions from the public on a particular subject and is the information necessary to enable informed comment?
 - Is the use of information likely to contribute significantly to the understanding of the subject by the public at large as opposed to the individual understanding of the requester or a narrow segment of interested people?
 - Is the information already in the public domain in either the same or similar form which the requester could acquire without substantial cost?
 - Is the public at large the primary beneficiary of the expenditure of public funds necessary to release the information or is it for the requester or a narrow segment of interested people?
 - Is the information primarily in the commercial interest of the requester rather than the public interest?
- 7.3 While it might appear on initial consideration that requests for information for, say, research purposes or to write a book or to have available in a library, might be considered in the “public interest” and so answer some of the criteria, this may not necessarily be so. There should still be reasonable evidence to show that wider public benefit will accrue as a result of that research, or book or library depository. In the case of the media, however, it can be reasonably assumed that they do have access to means of public dissemination. Each request should be considered on a case-by-case basis in light of all relevant information.

- 7.4 Members of Parliament may be exempted from charges for official information provided for their own use. In exercising this discretion it would be appropriate to consider whether remission of charges would be consistent with the need to provide more open access to official information for Members of Parliament in terms of the *reasonable* exercise of their democratic responsibilities.
8. DEPOSITS
- 8.1 A deposit may be required where the charge is likely to exceed \$56 or where some assurance of payment is required to avoid waste of resources. A deposit may only be requested after a decision has been made to make the information available.
- 8.2 The applicant should be notified of the amount of deposit required, the method of calculating the charge and the likely final amount to be paid. Work on the request may be suspended pending receipt of the deposit.
- 8.3 The unused portion of any deposit should be refunded forthwith to the applicant together with a statement detailing how the balance was expended.
9. COST CONTROL
- 9.1 It is useful to keep in mind certain provisions in the Official Information Act which may reduce the amount of staff time and resources incurred in dealing with requests. These provisions, which should be considered when a request is first received, are namely:
- (a) Sections 12(2) and 13 which enable the holder of the information to ask the requester to specify the request with due particularity in order to narrow down the scope of the request and thereby reduce staff time and effort in responding;
 - (b) Section 14(b)(ii) which enables the holder to transfer the request where the request relates more closely to the functions of another department, Minister or organisation and where that other department, Minister or organisation is therefore able to deal with the request more efficiently;
 - (c) Section 18(f) which enables the holder to refuse requests which require substantial collation or research; and
 - (d) Section 16 which enables the holder to provide information in a manner other than that requested where compliance with the requester's preferred method of disclosure would "impair efficient administration".

10. REVIEW OF DECISIONS ON CHARGES

- 10.1 Section 28(1)(b) of the Official Information Act 1982 provides that the Ombudsman may investigate and review any decision on the charge to be paid in respect of a request for access to official information. When informing applicants of charges to be paid, organisations should point out this right of appeal to the Ombudsman.
- 10.2 A record should be kept of all costs incurred. Wherever a liability to pay is incurred the applicant should be notified of the method of calculating the charge and this fact noted on the record.

11. OMBUDSMAN INVESTIGATIONS

- 11.1 Any Ombudsman discharging statutory functions of investigation under the Ombudsman Act, whether for the purposes of that Act, or for reviews under the Official Information Act or the Local Government Official Information and Meetings Act, is not subject to any charging regime. A statutory duty is imposed under that legislation on the person or organisation to comply with any request made pursuant to such an investigation and charging regimes under Government policy are not applicable.

12. GST

- 12.1 The charges given in these guidelines are inclusive of GST.
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APPENDIX H
State Services Commission,
*Release of Official Information:
Guidelines for Co-ordination
(1992)*

Recent discussions on the Official Information Act have highlighted the chief executives to be conscious of the value of adequate consultation in deciding whether to release information under the Official Information Act 1982. The following guidelines have therefore been prepared to provide assistance to chief executives in making decisions on whether and when it is appropriate to consult other departments or Ministers of the Crown.

A number of recent requests have related to matters involving controversial government policy decisions and often a single request has involved material which had input from a number of departments. In those cases therefore, consultation with Ministers and other departments was desirable in order to provide a consistent and considered response. Unfortunately this did not always occur and there were occasions when different departments gave different responses to a request for the same information. You will appreciate that this does not reflect well on the Public Service.

The Act recognises departments as entities separate from the Minister in relation to Official Information requests. Section 15(4) requires that the chief executive or his or her delegate must make the decisions on any request to the department. Subsection (5) of that section provides, however, that subsection (4) does not prevent consultation with a Minister or with any other person in reaching a decision on any request. These guidelines are not intended to undermine the legal requirements on the chief executive but rather to suggest the approach that a chief executive should adopt when fulfilling the legal obligation. It remains, of course, a matter for the judgment of the chief executive whether it is necessary in the particular instance to consult.

Nor is it the intention of these guidelines to suggest that proper disclosure of information under the Official Information Act should

in any way be avoided. On the contrary it is intended that by following the guidelines information will be released in a manner consistent with one of the purposes of the Official Information Act namely to "promote good government" in New Zealand by providing information to the public:

- (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. (Section 4).

Consultation is necessary for the following reasons:

- (a) At the most basic level as a matter of courtesy to the department which provided input.
- (b) To make the other department aware of the request and of your proposed decision on that report because in some cases another department may be in a better position to assess whether or how certain information should be released.
- (c) To check whether similar requests have been made of other departments so that consultation and co-ordination can occur to ensure that a proper stance taken by one department is not undermined due to the actions of another department of whom a similar request has been made.

A When should Departments consult?

- 1 Consultation with other departments should normally occur:
 - (a) When a joint working party has produced some or all of the information which is the subject of the request.
 - (b) When another department than the one receiving the request has provided substantial or critical input into the information requested, for example, Cabinet papers often contain advice specifically proffered by another department.
 - (c) When the information sought contains material that relates to the activities of another department or that may result in publicity for another department.

(Where the situation in either para (b) or para (c) occurs there may well be good grounds for transferring the request to that other department - refer part C).
- 2 The Official Information Act has not removed the duty on a public servant to keep the Minister fully informed on all relevant matters. It is important to consult with Ministers where release is likely to

lead to public comment on a political issue. (Such a step should be second nature to senior public servants.) Consultation over an Official Information request gives a Minister an opportunity to comment on any political issues or matters relating to government management. Examples of situations where it would be appropriate to consult with a Minister are:

- (a) requests from the Opposition, the Opposition Research Unit, recognised interest groups or the news media especially where the information is particularly sensitive;
- (b) where the subject matter is controversial and likely to lead to questions of Ministers;
- (c) where facts, opinions or recommendations in the information are especially quotable or unexpected;
- (d) where the information reveals important differences of opinion among Ministers or agencies.

There is no special procedure for consulting with a Minister or another department regarding an official information request. Departments may wish to develop their own procedures for such consultation.

Attention is drawn to the statutory time limit requirements:

- (a) Section 14, which requires transfers of requests to be made “promptly, and in any case not later than 10 working days after the day on which the request is received” and to inform the requester accordingly;
- (b) Section 15, which requires that decisions on requests be made “as soon as reasonably practicable and in any case not later than 20 working days after the day on which the request is received”;
- (c) Section 15A, which provides for the extension of the above time limits, and that any such extension must be notified to the requester within 20 working days after the day on which the request is received.

B *After Consultation*

- 1 Once due consideration has been given to the advice of another department or Minister that there is good reason to withhold information the department must decide whether to release the information, to decline the request, or to transfer the request under s 14. Different decisions can be made in respect of the particular pieces of information that have been requested.

If it is decided nevertheless to release the information the department or Minister whose advice is being overridden should be given reasonable notice prior to the release. [A week is suggested as the minimum.]

- 2 It should be noted that in some cases a Minister's advice that there is good reason to withhold information could indicate that the request should be transferred to Minister for response, in terms of s 14(b)(ii). The basis for the transfer would be that the information is more closely connected to the functions of the Minister. Such a step would reflect the constitutional relationship between the chief executive to the Minister and would also meet the requirements of the Official Information Act.

In general it will be clear when it is appropriate to transfer a request for official information under s 14. There will however be some situations when a judgment will be called for.

(NB Only 10 working days from the date of receipt of the request are given for such transfers.)

Some examples are:

- (a) Where a document held by the department was prepared by another department. The request as it refers to that document could be transferred to the department that prepared the document.
- (b) Where the department holds a document produced for an official's committee which was chaired by another department. The request as it relates to the document could be transferred to that other department.
- (c) Where during consultations another department or a Minister considers there is good reason to withhold information which the department receiving the request is not as well placed to judge.
- (d) Requests from the Opposition, Opposition Research Unit or recognised interest groups might be transferred to the appropriate Minister after consultation with the Official Information Act representative in that Minister's office.

D *Release*

Some departments have found that information properly released under the Official Information Act has subsequently been publicised as a "leak". To minimise this happening it is suggested that the information can be photocopied on special paper, marked

"RELEASED UNDER THE OFFICIAL INFORMATION ACT".
This paper is available from the Government Printer.

E *Ministers' Rules*

Ministers have put into place a procedure for co-ordinating Official Information requests addressed to Ministers. A copy is attached.

If you have any queries about the guidelines please contact Ann Aspey of the Commission's Legal Division.

D K Hunn
State Services Commissioner

APPENDIX I
State Services Commission
Extract from *Policy Framework
for Government Held
Information (1997)*

Availability

- i Government departments should make information available easily, widely and equitably to the people of New Zealand;

Coverage

- ii Government departments should make the following information available on an increasingly electronic basis:
 - all published material;
 - all policies that could be released publicly;
 - all information created or collected on a statutory basis (subject to commercial sensitivity and privacy considerations);
 - indexes that departments have created to improve their processes;
 - all forms that the public may be required to complete;
 - corporate documentation in which the public would be interested.

Pricing

- iii For pricing purposes:
Free dissemination of Government-held information is appropriate where:
 - dissemination to a target audience is desirable for a public policy purpose; or
 - a charge to recover the cost of dissemination is not feasible or not cost-effective.

Pricing to recover the cost of dissemination is appropriate where:

- there is no particular public policy reason to disseminate the information; and
- a charge to recover the cost of dissemination is both feasible and cost-effective.

Pricing to recover the cost of transformation is appropriate where:

- pricing to recover the cost of dissemination is appropriate; and
- there is an avoidable cost involved in transforming the information from the form in which it is held into a form preferred by the recipient, where it is feasible and cost-effective to recover in addition to the cost of dissemination.

Pricing to recover the full costs of information production and dissemination are appropriate where:

- the information is created for the commercial purpose of sale at a profit; and
- to do so would not breach the other pricing principles.

Ownership

- iv Government held information, created or collected by any person employed or engaged by the Crown is a strategic resource available to the Government for public purposes, ie on behalf of the public;

Stewardship

- v Government departments are stewards of Government held information, whose responsibility is to exercise and implement good information management;

Collection

- vi Government departments should only collect information for specified public business or legislative purposes;

Copyright

- vii Information created by departments is subject to Crown copyright but where wide dissemination is desirable, the Crown should permit use of its copyright subject to acknowledgement of source;

Preservation

- viii Government held information should be preserved only where a public business need, legislative or policy requirement, or a historical or archival reason exists;

Quality

- ix Government held information should be accurate, relevant, timely, consistent and collected without bias so that it is fit for the purposes to which it is put;

Integrity

- x The integrity of Government held information will be achieved when:
 - all guarantees and conditions are met;
 - the principles are clear and communicated;
 - any situation dealing with Government held information is handled openly and consistently;
 - those affected are consulted on any changes;
 - those charged as independent guardians of the public interest have confidence in the ability of departments to manage the information well;
 - there are minimum exceptions to the principles.
-

APPENDIX J

Table of equivalent provisions

Sections of the Official Information Act 1982 (OIA) are listed below with their equivalent provisions of the Local Government Official Information and Meetings Act 1987 (LGOIMA), and the Privacy Act 1993 (Priv). Where no equivalent provision exists a dash (–) is used.

OIA	LGOIMA	Priv
s 2	cf s 2	cf s 2
s 3	s 3	s 5
s 4	s 4	–
s 5	s 5	–
s 6 (a)	–	s 27(1)(a)
s 6 (b)	–	s 27(1)(b)
s 6(c)	s 6(a)	s 27(1)(c)
s 6(d)	s6(b)	s 27(1)(d)
s 6(e)	–	–
s 7(a)	–	s 27(2)(a)
s 7(b)	–	s 27(2)(b)
s 7(c)	–	s 27(2)(c)
s 9(1)	s 7(1)	cf s 28(2)
s 9(2)(a)	s 7(2)(a)	s 29(1)(a)
s 9(2)(b)	s 7(2)(b)	cf s 28(1)
s 9(2)(ba)	s 7(2)(c)	–
s 9(2)(c)	s 7(2)(d)	–
s 9(2)(d)	–	–
s 9(2)(e)	s 7(2)(e)	–
s 9(2)(f)	–	–
s 9(2)(g)	s 7(2)(f)	–
s 9(2)(h)	s 7(2)(g)	cf s 29(1)(f)
s 9(2)(i)	s 7(2)(h)	–
s 9(2)(j)	s 7(2)(i)	–
s 9(2)(k)	s 7(2)(j)	–
s 10	s 8	s 32
s 11	s 9	–
s 12(1)	cf s 10(1)	s 34
s 12(1A)	s 10(1A)	–
s 12(2)	s 10(2)	–
s 12(3)	s 10(3)	s 37
s 13	s 11	s 38

OIA	LGOIMA	Priv
s 14	s 12	s 39
s 15(1)	s 13(1)	s 40(1)
s 15(1A)	s 13(1A)	cf s 35(3)
s 15(2)	cf s 13(2)	cf s 35(5)
s 15(3)	s 13(4)	s 40(2)
s 15(4)	s 13(5)	s 40(3)
s 15(5)	s 13(6)	s 40(4)
s 15A	s 14	s 41
s 16	s 15	s 42
s 17	s 16	s 43
s18(a)	s 17(a)	–
s18(b)	s 17(b)	–
s18(c)	s 17(c)	cf s 29(1)(i)
s18(d)	s 17(d)	Principle 2(a)
		Principle 10(a)
		Principle 11(b)
s 18(e)	s 17(e)	s 29(2)(b)
s 18(f)	s 17(f)	–
s 18(g)	s 17(g)	s 29(2)(c)
s 18(h)	s 17(h)	s 29(1)(j)
s 19	s 18	s 44
s 20(1)(a)	cf s 19(1)(f)	–
s 20(1)(b)	s 19(1)(g)	–
s 20(1)(c)	s 19(1)(h)	–
s 20(1)(d)	s 19(1)(i)	–
s 20(2)	cf s 19(2)	–
s 20(3)	–	–
s 20(4)	s 19(3)	–
s 20(5)	–	–
s 21(1)	s 20(2)	–
s 21(2)	–	–
s 21(3)	–	–
s 22(1)	s 21(1)	–
s 22(2)	–	–
s 22(3)	s 21(2)	–
s 22(4)	s 21(3)	–
s 22(5)	s 21(4)	–
s 22(6)	–	–
s 23(1)	cf s 22(1)	Principle 6(1)
s 23(2)	–	–
s 23(2A)	s 22(1A)	–
s 23(2B)	cf s 22(1B)	–

OIA Official Information Act 1982
LGOIMA Local Government Official Information and Meetings Act 1987
Priv Privacy Act 1993
– no equivalent provision exists

OIA	LGOIMA	Priv
§ 23(3)	cf § 22(2)	–
§ 23(4)	–	–
§ 23(5)	–	–
§ 24(1)	§ 23(1)	–
§ 24(2)	cf § 23(1A)	–
§ 24(3)	cf § 23(2)	–
§ 24(3A)	cf § 23(3)	Principle 6(2)
§ 24(4)	cf § 23(4)	–
§ 24(5)	–	–
§ 25	§ 24	§ 45
§ 26	§ 25	cf Principle 7
§ 27(1)	§ 26(1)	cf ss 27, 28, 29(1)
§ 27(1A)	§ 26(2)	§ 30
§ 27(2)	cf § 27(3)	§ 29(3)
§ 28	§ 27	–
§ 29	§ 28	–
§ 29A(1)	§ 29(1)	–
§ 29A(2)	§ 29(2)	–
§ 29A(3)	§ 29(3)	–
§ 29A(4)	§ 29(4)	–
§ 29A(5)	§ 29(5)	–
§ 29A(6)	–	–
§ 29A(7)	–	–
§ 29B	§ 29A	–
§ 30	§ 30	–
§ 31	cf § 31	–
§ 32	§ 32	–
§ 32A	§ 33	–
§ 32B	§ 34	–
§ 32C	§ 35	–
§ 33	§ 36	–
§ 34	§ 37	–
§ 35	§ 38	–
§ 36	§ 40	–
§ 46	–	–
§ 47	§ 55	cf § 128
§ 48	§ 41	–
§ 49	§ 56	–
§ 50	§ 57	–
§ 51	–	–
§ 52	§ 44	–
§ 53	–	–

OIA Official Information Act 1982
LGOIMA Local Government Official Information and Meetings Act 1987
Priv Privacy Act 1993
– no equivalent provision exists

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