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**A HARD LOOK AT THE NEW ZEALAND  
EXPERIENCE WITH THE OFFICIAL  
INFORMATION ACT AFTER 25 YEARS**

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## I. INTRODUCTION

- 1 New Zealand's Official Information Act 1982 ("OIA") has now been in force for 25 years.<sup>1</sup> In some respects, the writer was present at its creation, serving on the Select Committee in Parliament that dealt with the Bill and as Opposition Spokesman, and later, when in government, as Minister of Justice. As Minister of Justice, I oversaw a number of amendments to the Act. The most significant change was to the ministerial veto. Changes were made to ensure that the veto was a Cabinet decision, not an individual ministerial decision. That change effectively put a stop to the use of veto. The political cost was too high. Furthermore, the Act and its principles were adapted to Local Government and a separate Act under the stewardship of the Hon Dr Michael Bassett, the Local Government Official Information and Meetings Act 1987 was passed.
- 2 Much of the credit for the OIA should go to then Minister of Justice and Attorney-General, the Honourable Jim McLay. He managed to achieve passage of the bill in face of opposition from both his Prime Minister and the Treasury. The Treasury opposed the Bill at the Select Committee, no doubt with the permission of and on the instruction of the Minister of Finance who was also the Prime Minister, the Rt Hon Sir Robert Muldoon. The Prime Minister said the Act would be a "nine day wonder".<sup>2</sup>
- 3 The Danks Committee that devised the policy comprised a mixed membership of public servants and outsiders. Sir Alan Danks, the Chairperson, had had experience primarily as an academic economist. The other outsider from Government was Professor KJ Keith, then an outstanding academic lawyer from the Faculty of Law at Victoria University of Wellington.
- 4 The Deputy Secretary of Justice and law reformer par excellence, Jim Cameron, was one of the Committee members. So was Bryce Harland, an Assistant

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<sup>1</sup> I am most grateful to Zoë Prebble from the Law Commission who provided valuable research assistance on this paper.

<sup>2</sup> See KJ Keith "Institute of Policy Studies: Seminar on the Official Information Act 1982" (Institute of Policy Studies, Victoria University of Wellington, 1989) 7.

Secretary of Foreign Affairs and one of New Zealand's most distinguished diplomats. The Chief Parliamentary Counsel, Walter Iles, was a member of the Committee, as was the Secretary of Defence, Dennis McLean. Also members were the Secretary of Cabinet, Mr PG Millen and Dr RM Williams, the Chair of the State Services Commission. This was a highly accomplished group of people who understood well the system of New Zealand government. The Committee was able to tailor a set of recommendations that would work.

- 5 There were other public servants of distinction involved in the Committee's work. These included Mr GS Orr, a former Secretary of Justice, Mr JF Robertson, Secretary of Justice, Frank Corner from Foreign Affairs and Bruce Brown from the same department. New Zealand should look back at this accomplishment with pride. It is not often matters of such importance and difficulty are accomplished so elegantly.
- 6 Looking back it is hard to resist the conclusion that the development of the OIA was the biggest policy game in town at the time. It was a significant constitutional change. Resources were devoted through the Information Authority to get the Act going, conduct a programme of education for public servants and to generally see that the Act was properly supported from an administrative point of view. The Information Authority was very successful in this early work under the Act.
- 7 Perhaps the most signal lack in recent years has been a failure of institutional support, education and commitment. The OIA is a sophisticated open-textured Act that is difficult to operate because it is not rules-based. But much of its success flows from the very fact that it is not rules-based. It does require a lot of government commitment, support and effort to ensure that it can work.
- 8 In this paper, I first describe the features of the Act. Then follows an account of the most prominent analyses of the Act that had been done in recent years. This body of research taken as a whole is very useful. And I have set out to summarise it because of its value. The Law Commission in 1997, Steven Price and Nicola White have all done serious work that provides a base from which to carry out some preliminary evaluation of the Act. It is also important to look at the New

Zealand Act from some other eyes, particularly those of Rick Snell from the University of Tasmania whose views are summarised in the paper.

- 9 It turns out that an evaluation of the OIA's performance is very difficult. Such an evaluation goes to the quality of governance, which is a particularly difficult concept to measure. Yet, even if exact empirical measurements of the Act's successes and failures are not possible, some evaluative footholds are available. Evaluation of the OIA, or indeed any Act that has been in force for some time, is very important. It is a mistake not to check periodically that an Act is working well in practice. An Act like the OIA should not be allowed to go stale or run out of steam. It may require attention, some changes around the edges, and importantly, better administrative support, education and training.

## II. FEATURES OF THE ACT

- 10 It is useful to begin here with an outline of the OIA and how it operates. The OIA is designed to ensure that official information is made available to those who request it unless there is good reason to withhold it.<sup>3</sup> The presumption is in favour of disclosure.<sup>4</sup> The Act has a wide reach. It applies to all government departments and ministers and most government entities. However, it does not apply to MPs, the courts, tribunals, Royal Commissions, and other inquiries, or to the Parliamentary Service Commission.<sup>5</sup> The purposes of the Act are set out in section 4. They are:
- (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:

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<sup>3</sup> Official Information Act 1982, s 5.

<sup>4</sup> See generally, Ian Eagles, Michael Taggart and Grant Liddell *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992).

<sup>5</sup> Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming our Political System* (John McIndoe, Dunedin, 1992) 132.

- (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.

11 Section 5 of the Act enshrines the principle that “information shall be made available unless there is good reason for withholding it”. Sections 6 and 7 provide a number of reasons that are regarded as being conclusive for the withholding of information. The section 6 reasons are 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.]

12 Where those reasons are applicable, the information will not be given unless the government wants to release it.

13 Section 9 contains a further list of more common reasons for withholding information. These are not conclusive reasons, but are subject to a balancing test. They will justify withholding information 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 information available” in order 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.

14 There is not a great deal of precision in most of these tests and the categories are broad.<sup>6</sup> This means that the decision-making process is a crucial element of the legislation. It is the Ombudsmen who police the release of information under the Act. In marginal cases, it can be difficult to predict whether information sought will be released. The guidance given and decisions by the Ombudsmen are critical here.

15 Requests for information are to be made with “due particularity”,<sup>7</sup> but there is no formal requirement that requests should be in writing. The Ministry of Justice is required to publish a directory of information,<sup>8</sup> which includes details of all departments and organisations covered by the Act, what they do, what sorts of documents they hold, a list of all manuals and similar documents containing policies, principles, rules or guidelines that the department applies, and a statement of how to gain access to information, including details of which officers to contact. All information that is held is subject to the Act, not just information acquired after the Act came into force.

16 In the Act as it first operated, decisions on requests had to be made “as soon as reasonably practicable”. However, it soon became evident that this led to delays. Amendments in 1987 required decisions to be made within 20 working days of the request. There is provision to extend the time limits in some circumstances, for instance, if there is a large quantity of information that requires a lot of time to

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<sup>6</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4 ed, Oxford University Press, Auckland, 2004) 232.

<sup>7</sup> Official Information Act 1982, s 12.

<sup>8</sup> Ministry of Justice *Directory of Official Information 2005* (Wellington, December 2005) <http://justice.org.nz/pubs/reports/2006/directory-of-official-information/index.html> (accessed 20 November 2007).

search through, or if consultation may be needed. If an extension is granted, notice must be given to the requester specifying the reason for the extension and its length.

- 17 When information is supplied, section 15 of the Act provides that charges “shall be reasonable and regard may be had to the cost of the labour and materials involved in making the information available.” Charges can be required to be paid in advance.
- 18 Section 16 of the Act specifies a number of ways in which the information may be made available:
  - by providing a reasonable opportunity to inspect the document;
  - by providing a copy of the document;
  - as a written transcript, where it is a recording or similar matter;
  - by giving a summary of its contents.
- 19 Documents can have material deleted from them if there is reason to withhold some of the information. The information must be made available in the way that the requester prefers unless that would impair efficient administration or there is a good reason under the Act.
- 20 Requests for information can be refused on the grounds specified in section 18. These are:
  - that good reason exists for withholding the information in terms of the tests discussed earlier;
  - that, for some sensitive categories, the existence of the information can be neither confirmed nor denied;
  - where making the information available would be contrary to a specific Act or would be a contempt of court or of the house of Parliament;
  - where information is or will soon be publically available;
  - where the information or document does not exist or cannot be found;



- where the information cannot be made available without substantial collation and research;
- where the information is not held by the department, minister, or organisation dealing with the request;
- where the information is frivolous or vexation or the information requested is trivial.

21 If a request is refused, the department, minister, or organisation must, if the requester asks, give reasons for the refusal. The requester must also be informed that he or she has the right to ask the Ombudsmen to review the decision. Where such a request is made, the Ombudsman investigates the matter. The Ombudsman has no power of decision but can recommend as he or she thinks fit. The Ombudsman can make recommendations if he or she thinks the request should not have been refused, or that the decision complained of is unreasonable or wrong. These recommendations and reasons are then reported to the appropriate department, minister, or organisation as well as to the complainant. Where such a recommendation is made, the information must be made available within 21 days, unless the Governor-General, by Order in Council, directs otherwise. This collective power of Cabinet to veto the Ombudsmen's recommendations was inserted in 1987 to replace the individual ministers' power of veto, which had been the most controversial feature of the Act. In addition, a requester whose request is declined can seek a judicial review of the making of an Order in Council.

### III. ANALYSES OF THE ACT

22 There have been a number of interesting analyses of the OIA in recent years. In this part of the paper, I have selected four significant analyses of the Act for detailed attention. Three of these are New Zealand perspectives of the Act and a fourth analysis offers an Australian perspective.

## Law Commission Report

23 The first analysis of the Act that will be discussed in this paper is the Law Commission's review of the Act and eventual report in 1997.<sup>9</sup> As its preface indicates, the report was some time in the making:<sup>10</sup>

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.

24 The Law Commission report began by discussing the changing context of the OIA. It said that while the Act itself had undergone relatively little change since it was passed, a number of other developments had significantly impacted on requesters and agencies subject to the Act. Changes in the social and political context identified by the Commission related to:<sup>11</sup>

- 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.

25 The Commission said that the Act had largely weathered these changes well. It put much of this down to the Act's open textured standards, as opposed to precise rules, which had allowed the Act to "change with the times" and had given the Ombudsmen flexibility in interpreting it.<sup>12</sup>

26 The Law Commission was satisfied that the Act was generally achieving its stated purposes. The Act had made the principle of open government central to the ethos of public administration. In the core public sector, it was increasingly recognised

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<sup>9</sup> Law Commission *Review of the Official Information Act 1982* (NZLC R40, Wellington, 1997).

<sup>10</sup> *Ibid*, xi.

<sup>11</sup> *Ibid*, 13.

<sup>12</sup> *Ibid*, 13.

that, in most cases, official information can and will be released.<sup>13</sup> The Commission considered that the quality and transparency of policy advice had improved as officials knew that their advice could eventually be released under the Act.<sup>14</sup> knowledge that policy advice will eventually be released under the Act

27 However, the Commission also identified a number of problems with the Act and its operation. The major problems identified were:<sup>15</sup>

- 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.

28 The Commission considered that neither the problems nor the terms of reference brought into question the underlying principles of the Act.

29 The Commission's report contained two groups of conclusions and recommendations. The first group responded to the major problems identified in the report. In the Commission's view, these warranted immediate consideration. The second group involved fine-tuning of the Act. These were thought to be less urgent given the Commission's overall conclusion that the Act generally achieves its stated purposes. The conclusions and recommendations emphasised the importance of administrative as well as legislative response to the problems identified in the report. However, many of the Commission's recommendations were not acted upon.

30 As indicated above, the Commission made recommendations in respect of particular problems associated with large and broadly defined requests. These recommendations were intended to encourage dialogue between the agency holding information and the requester.<sup>16</sup> Not all of these recommendations were acted upon however. For instance, the Commission recommended that sections 12 and 13 of the Act be amended, but this did not occur. More successful was the

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<sup>13</sup> Ibid, 3.

<sup>14</sup> Ibid, 5.

<sup>15</sup> Ibid, 1.

Commission's recommendation to repeal section 18(f), which related to agencies' ability to refuse requests where the information requested cannot be made available without substantial collation and research, and replace it with a broader, more flexible section 18A. Subsection 18(f) was not repealed, but it was supplemented by a new section 18A in 2003.<sup>17</sup>

- 31 In respect of problems with tardiness responding to requests, the Commission recommended that the government should shorten the time limit for processing official information requests from 20 working days to 15 working days. It considered that developments in electronic technology and information management in the years since the Act was passed meant a shorter time limit was realistic. It suggested that the time limit set out in section 15(1) should be reviewed within three years, with a view to reducing it to 15 working days. This did not occur however. The Commission also endorsed the Ombudsmen's emphasis on agencies obligation to respond to requests as "soon as reasonably practicable" rather than the 20 day time limit.
- 32 The Commission made several recommendations about how to foster a co-ordinated approach to the administration of the Act. It said that the Ministry of Justice should be given responsibility for developing this more co-ordinated and systematic approach to the functions of oversight, compliance, policy review and education in respect of the Act. It also recommended that adequate resourcing should be given to existing institutions, such as the Office of the Ombudsmen and Ministry of Justice, to improve the administration and understanding of the Act. It noted that the Ombudsmen's work in publishing guidelines and case notes and holding seminars and training sessions is very valuable in improving the operation of the Act, and stressed the importance of adequate funding being made available for these activities.
- 33 The Commission's report also contained other conclusions and recommendations as to how the Act and its administration might be fine-tuned.

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<sup>16</sup> Ibid, ch 2.

<sup>17</sup> The new sections 18A and 18B were inserted from 22 October 2003 by section 3 of the Official Information Amendment Act 2003.

## Steven Price's Analysis of the Act

34 The second analysis of the Act discussed in this paper is the research of Steven Price, of Victoria University of Wellington, into the Act in practice. His research was conducted over several years,<sup>18</sup> and culminated in a speech and research paper.<sup>19</sup>

### *Methodology*

35 The main data for Price's research was obtained by making OIA requests of all the national-level agencies subject to the OIA as listed in the Directory of Official Information seeking copies of OIA requests they had received, their responses and any related documentation. Specifically, he requested:

- the 10 most recent OIA requests and responses;
- the 10 most recent requests and responses where information was withheld;
- the last 5 requests and responses where a time limit extension was sought; and
- the last 5 requests and responses in which the minister or minister's office was consulted before the response was prepared.<sup>20</sup>

36 The results of these hundreds of OIA requests were themselves mixed:<sup>21</sup>

Although I mentioned in my request letter that my research was being overseen by a supervisory committee that included an Ombudsman and a former Secretary for Justice, 13 agencies did not respond, even after a follow-up letter. The average response time to my letter was 21.7 working days. Almost a third arrived late, with no extension. Thirteen organisations lawfully granted themselves extensions and five then missed the new deadlines. One unlawfully gave itself two extensions, and still failed to supply the information within the third deadline. Some deleted the names of all the requesters on grounds of privacy; some even deleted the names of the officials responding to the requests. One agency even deleted its own name from some of the responses it supplied.

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<sup>18</sup> Steven Price "The Official Information Act: Does it Work?" (2006) NZLJ 276.

<sup>19</sup> Steven Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?* (New Zealand Centre for Public Law, Victoria University of Wellington, Occasional Paper 17, November 2005).

<sup>20</sup> *Ibid*, 7.

<sup>21</sup> Price "The Official Information Act: Does it Work?" above, n 18, 276.

37 Price's other data comprised information gained through interviews he conducted with frequent requesters and officials.

38 Price then analyses the data this data in his research paper. His aim was "to provide a picture of the OIA in operation, focusing in particular on responses whose legality seems questionable."<sup>22</sup>

*Not one OIA, but two*

39 Price concluded from his research that, in practice, we have not one OIA, but two. The first OIA is the set of rules that apply to straightforward requests that are unlikely to embarrass anyone. These comprise the bulk of OIA traffic. They are usually processed well within the 20-day limit, with little or no information withheld, and no charge. There is much to be happy about in respect of how this first OIA operates.

40 The second OIA, on the other hand, is the set of rules that apply to difficult or politically sensitive requests – often from journalists or opposition MPs. These kinds of requests are often processed quite differently to straightforward, uncontroversial requests. They have different time limits – they are often overdue without an extension, some take more than a year. They are more likely to be transferred to the minister's office, often with questionable or no justification. Many are refused outright. Information is withheld, either wholesale, or in larger than necessary chunks. Price noted, with more than a little sense of irony, that his own OIA requests for the purpose of this research apparently fell under this second, much less user-friendly OIA. It is this second class of requests about which Price considers there is cause for real concern.

*Requesters' views of OIA*

41 As mentioned above, in addition to his OIA requests, Price also conducted a series of interviews with requesters and officials. Frequent requesters that Price spoke to were generally ambivalent about the OIA. On the one hand, they acknowledged

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<sup>22</sup> Ibid.

that it was a powerful tool, and meant that a lot of information was accessible to them. No one wanted to go back to the way things were before the Act.<sup>23</sup> On the other hand, they thought the Act and the way it operates in practice had some major limitations, and were sceptical of Ministers' and officials' motives and knowledge of the Act.<sup>24</sup> They said many officials wrongly believed that OIA requests must be in writing. They also suspected that officials interpret requests as narrowly as possible. This led requesters to word their requests in broad, sweeping terms so as to minimise risk of missing something.<sup>25</sup> Information was sometime refused for illegitimate reasons not set out in the Act.<sup>26</sup> They also thought officials often used the withholding clauses that are set out in the Act improperly, deciding not to release information and then fishing through the Act for justification.<sup>27</sup>

42 Requesters reported frustrating delays, particularly with regards to more controversial or sensitive material. They listed what they saw as a number of common stalling tactics.<sup>28</sup> They thought the aim of such delays was to wait out the newsworthiness of a story, that is, let the possible scoop go stale. Sometimes large charges were imposed, in a way that seemed designed to deter them from pursuing requests.<sup>29</sup> They also thought that sometimes too much information is withheld, when parts of it could be released.<sup>30</sup> They told Price of more serious suspicions, such as that information sometimes gets shredded or is given back to sources in order to avoid disclosing it. They often suspected the information they received might be incomplete.<sup>31</sup>

43 Of course, the data Price gained through these interviews was necessarily anecdotal. It was also quite subjective – some of the most serious suggestions were suspicions rather than provable claims. Notwithstanding this subjectivity, and indeed even supposing such suspicious are not in fact correct, the mere existence of such doubts and suspicious is a serious matter. The aim of the Act is

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<sup>23</sup> Price *The Official Information Act 1982* above, n 19, 14.

<sup>24</sup> *Ibid*, 11.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid*, 12.

<sup>27</sup> *Ibid*, 12.

<sup>28</sup> *Ibid*, 11 – 12.

<sup>29</sup> *Ibid*, 13.

<sup>30</sup> *Ibid*, 12 – 13.

not just open government, but surely also that it should be clearly and observably open. Both openness and the appearance of openness are necessary for requesters and the wider public to be confident that the principle of open government is actually operating.

*Officials' views of OIA*

- 44 Price's interviews with officials revealed that they were also ambivalent about the Act, although for different reasons.<sup>32</sup>

They supported the concept of open government and the principles behind the OIA.... Many said that the possibility of their advice becoming public strengthened its quality.... However, officials also said the OIA is an enormous burden to administer. They criticised many requesters for not thinking hard enough about the precise information they wanted or for simply trying to get officials to do their research for them.... Requests, they said, were increasingly taking the form: "all documents relating to Y including emails (and deleted emails), minutes, briefings, memos, drafts, correspondence, reports, aides memoire, file notes, Cabinet and Cabinet committee papers." This could create days of work – sometimes weeks or months".

- 45 The task of responding to requests can be complex and time-consuming. Officials said it is also often thankless, as some requesters are demanding, abusive and suspicious.<sup>33</sup> Processing OIA requests is not always well resourced within departments and it is not high-status.
- 46 Officials also reported feeling cautious in some instances about releasing information. They are aware that the media does not always present information in its fullest context. Information gained by politicians through the OIA is seen as even more likely to be presented sensationally or used for "political grandstanding".<sup>34</sup> Furthermore, the standards in the Act are open-textured and nebulous and decisions made by officials under the Act are subject to review.

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<sup>31</sup> Ibid, 14.

<sup>32</sup> Ibid, 15.

<sup>33</sup> Ibid, 16.

<sup>34</sup> Ibid, 17.



### *Tension between requesters and officials*

- 47 Price's paper identifies a tension between requesters' and officials' views of and approaches to the Act. Each group was to a certain extent suspicious of the other.
- 48 Officials felt that requesters often framed their requests much too broadly, and suspected that many were "fishing expeditions" or were a lazy attempts by requesters to get officials to do their research for them. Regardless of requesters' motives for framing requests broadly, such requests are more resource-intensive for officials than more narrowly-defined requests would be.
- 49 However, requesters reported a pragmatic pressure to frame requests more widely. They said they often felt that officials would read requests as narrowly as possible. Broadly-framed requests therefore face less of a risk of missing information because of narrow interpretation by officials.
- 50 The way that these suspicious play out in practice is not good for the efficient administration of the Act. Nor is it good for either officials or requesters. In fact, it is a vicious circle – officials and requesters each distrust the other, and as a result begin to give each other reasons for this distrust, whether or not those reasons existed in the beginning. The groups become locked into competitive tactics.

### *Good uses of OIA*

- 51 Price identifies deficiencies with the way the OIA operates in practice. Analysing the data he gathered through his own OIA requests, he explores in detail a number of problematic grounds on which requests are refused.<sup>35</sup> However, his research paper also has an optimistic note. He lists situations in which the OIA has led to some very good outcomes.<sup>36</sup> He acknowledges that "earth-shaking OIA revelations are rare", although he lists a few examples that might fall into this category.<sup>37</sup> But he highlights the significance of "ordinary" OIA requests, which have a real impact on freedom of information in New Zealand. He says that "a

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<sup>35</sup> Ibid, 33 – 48.

<sup>36</sup> Ibid, 30 – 31.

<sup>37</sup> Ibid, 29.

good proportion of [these] are about holding decision-makers accountable, seeking a window on the processes of government and marshalling resources for research, political opposition or public critique.”<sup>38</sup>

### **Nicola White**

- 52 The third analysis of the Act discussed in this paper is the major research project undertaken by Nicola White while she was a Research Fellow at the Institute of Policy Studies at the Victoria University School of Government. Her research culminated in a book published in 2007.<sup>39</sup>

#### *Motivation for undertaking research*

- 53 In her book, White explains that she felt the concept of open government had gained real traction and acceptance both with officials and requesters.<sup>40</sup> Like Price, she acknowledged that this had resulted in some significant changes in behaviour across government. However, she was concerned that in practice, there was too much unnecessary conflict surrounding the Act’s processes and operation. These arguments ranged in scope from apparently petty procedural matters to high constitutional questions. While officials and requesters alike believed in the Act and its principles, officials hated processing OIA requests and requesters did not like the treatment their requests received. The aim of her research project was to understand what was going on with the Act, and why, and to see if it was possible to improve the situation.

#### *Context of the OIA today*

- 54 White notes that the OIA cannot be analysed in a vacuum. It is one part of a wider picture of today’s information climate. White refers to other factors, such as the key role that information plays in today’s society, or the “information age”. She also refers to changes in the relationship between citizens and the state. She

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<sup>38</sup> Ibid.

<sup>39</sup> I am very grateful to Nicola White for allowing me access to a pre-publication copy of her book. Nicola White *Free and Frank: Making the Official Information Act Work Better* (Institute of Policy Studies, Wellington, 2007).

stresses that this relationship is government by consent, and citizens have the tools, literacy and energy to pursue information if they wish. White also refers to the value that is placed on accountability – the executive is held accountable through the democratic process and mechanisms such as judicial review. Information is crucial to this. Finally, she also refers to the changes brought about by the MMP electoral system during the past 20 years, which has, among other things, strengthened Parliament.

- 55 According to White, the overall information context in New Zealand today is that the Executive is, on the whole, more constrained, accountable, open and participatory than before. There is greater dissemination of government information to citizens, and consultation with citizens by government.<sup>41</sup>

#### *Literature review and interviews*

- 56 White's research comprised a comprehensive literature review and interviews with requesters and officials. She notes ten themes that she observed in her research:<sup>42</sup> government is now much more open under the OIA; many OIA requests are processed easily; in many areas, there is still significant uncertainty; the role of the ombudsmen regarding the OIA is settled; delay is and always has been a problem; large requests are hard to manage; there needs to be more training for officials regarding OIA requests; protecting government decision-making remains contentious; electronic information will provide a major challenge; and it may be time to consider pre-emptive release systems.

#### *What works well*

- 57 White makes a number of positive observations about the OIA. First, she notes that it has played a key role in developing a culture of more open government. It has spawned a number of related Acts, such as the Public Finance Act 1989; Fiscal Responsibility Act 1994; Criminal Procedure Bill; and consultation

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<sup>40</sup> Ibid, 6.

<sup>41</sup> Ibid, 13.

<sup>42</sup> Ibid, 90 – 92.

provisions in statutes such as the Local Government Act 2002.<sup>43</sup> It has also effected other significant changes. For instance, examination scripts are now routinely returned; most departmental manuals and procedures are now easy available; many departments regularly publish reports and research papers, sometimes also including internal and external think-pieces; and it is now a regular occurrence to publish all background reports, including Cabinet papers,<sup>44</sup> that accompany any major government announcement.

- 58 Secondly, White notes that the basic system for processing OIA requests generally works well.<sup>45</sup> She refers to Price's research, agreeing that straight forward requests are generally processed efficiently. Thirdly, the quality of decision-making and advice has improved as a result of the scrutiny to which officials know their advice will be subject.<sup>46</sup> Fourthly, she observes that the Office of the Ombudsmen has been very effective in its role as the review authority.<sup>47</sup>

*What does not work well*

- 59 White also lists a number of respects in which the OIA is less successful. First, she notes that there is often a political dimension to OIA requests. Sometimes information is inherently of political consequence. In other cases, if the requester is an opposition politician or a journalist, he or she may make an issue into one of political consequence. White says this is a simple reality. The important question is how well the OIA and associated regime manages this political-administrative interface. Her view is that this interface is difficult. She considers that this is at least in part due to uncertainty about the relevant principles or rules that should guide behaviour – judgments are often highly subjective, and it is uncertain to what extent political considerations can impinge on behaviour regarding OIA

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<sup>43</sup> Ibid, 214 – 215.

<sup>44</sup> See Phillip A Joseph *Constitutional & Administrative Law in New Zealand* (3 Ed, Brookers, 2007) 8.5.1(7)(c) and 19.7.6.

<sup>45</sup> White, above n 39, 217.

<sup>46</sup> Ibid, 218.

<sup>47</sup> Ibid, 218.

matters. She contends that this uncertainty is “a breeding ground for suspicion and distrust” between officials and requesters.<sup>48</sup>

60 Secondly, White notes the problem of large OIA requests.<sup>49</sup> When a request is large or poorly specified, officials may extend the timeframe for responding, charge for part of the work involved in responding, or if neither of these approaches would render the request manageable, refuse the request altogether. White considers that the grounds in the Act for imposing a charge are too broadly worded. As a result, charging can appear inconsistent, arbitrary and illegitimate. She cautions that this can raise suspicions and distrust in requesters who are made to pay a charge. They often feel that the real reason for the charge is to discourage them from pursuing a request.

61 Thirdly, White says that timeframes under the Act are problematic. Those responding to requests often granted themselves extensions to the 20-day upper time limit and many simply returned information late without extension. White notes that requesters, particularly media and opposition politicians, often suspected that delays were used deliberately and tactically. Again, this was a source of mistrust and suspicion.

62 White’s fourth point is that official modes of information management and storage have not yet caught up with the advances in information technology of recent years.<sup>50</sup> A great deal of this information is generated, and is subject to the Act, but officials cannot effectively comply with the Act unless such electronic information is readily accessible by them.

63 Fifthly, White questions the Act’s effectiveness in practice with regards to protecting government advice and decision making processes.<sup>51</sup> This is an important aim of the Act, but there is some way to go on this. For instance, she says that many officials will avoid writing things down so that they can avoid the

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<sup>48</sup> Ibid, 221.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid, 224.

<sup>51</sup> Ibid, 225.

Act, even when this is an inefficient way to work.<sup>52</sup> The Act itself might protect such information, were it to be written down, on various withholding grounds. However, White argues that officials are simply too uncertain about how these open textured grounds operate, that they will not chance it. She argues that the Act fails to achieve one of its aims of protecting government advice and decision-making processes because it is too open-ended and uncertain.

64 White’s sixth criticism of the Act is that its administrative impact is simply too big of a burden. While it is difficult to measure this burden, she says that anecdotal evidence suggests it is too big.<sup>53</sup> Seventh, the public sector’s systemic expertise with regard to the OIA is not nearly as good as one might expect or hope given that it has been in effect for 25 years.<sup>54</sup> Officials are much less clear than they should be about what they should be doing under the Act, and what its basic “rules” are. One of the reasons White gives for this is that the case-by-case approach taken to decision-making under the Act and by the Ombudsmen. Decisions are made within separate departments, and by the Ombudsmen, one at a time on the facts of each case. Specific more concrete “rules” have not built up.

65 White’s eighth point is that there is insufficient “balance” in the system.<sup>55</sup> The Danks Committee called for balance on all sides – requesters should be reasonable in their requests and officials should be reasonable in processing them. White thinks this balance is lacking in the current systems. Requesters sometimes use requests to annoy, punish or slow down government. Those responding to requests also use tactics from time to time, such as delaying, imposing charges, or reading requests as narrowly as possible. The final point is that the OIA has not operated well to build trust between requesters and responders:<sup>56</sup>

The system as it works now is eroding trust in the state sector rather than building it.... [I]n essence, the ambiguity of the rules leaves people free to judge behaviour against different standards, or to infer motives and conduct from their own perspective. Often that means that people see political manipulation and game-playing where in reality there may be careful administrative process and ordinary

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<sup>52</sup> Ibid, 226.

<sup>53</sup> Ibid, 227.

<sup>54</sup> Ibid, 228.

<sup>55</sup> Ibid, 230.

<sup>56</sup> Ibid, 231–232.

interplay with the political level of government. But because the rules are unclear, suspicion breeds.

As suspicion and distrust grow, people engage in ever more behaviour based on low trust, like specifying OIA request in more and more detail. That in turn creates “black letter responses” that may miss the point or appear overly formalistic and/or obstructive, which then fuels more distrust. And so the spiral goes. Overall, behaviour moves further away from the ideal of reasonable and balanced discussion and cooperation that the Danks Committee hoped for, and that the ombudsmen exhort people to adopt.

### *Developing rules and categories*

- 66 White’s conclusion is that the problems with the Act in practice are strongly related to the broadness and openness of its principles. She says it is time to go back to legislative design basics, and consider firmer rules and categories again<sup>57</sup> These further developed categories of information and administrative rules regarding release of official information could be developed over time, in light of experience with OIA requests. The rules would sit underneath the existing OIA framework and provide more detailed guidance for its administration.<sup>58</sup>

### **Rick Snell, University of Tasmania**

- 67 The fourth analysis of the OIA discussed here is an Australian perspective, offered by Rick Snell of the University of Tasmania. Snell has a long background in freedom of information law, and was the editor of the Freedom of Information Review for many years.

### *Comparative perspective*

- 68 Snell advocates a comparative and/or multi disciplinary approach to freedom of information and information management. Official information is an area that has had and is having a very rapid uptake across various jurisdictions. He thinks it is important to move beyond descriptive overviews of FOI legislation to

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<sup>57</sup> Ibid, 242.

<sup>58</sup> Ibid, 92.

comparative studies. Yet, to date there has been relatively limited research of this kind.<sup>59</sup>

Freedom of information has only received limited study as [a] marginal subject in a marginal field – administrative law –. Indeed freedom of information is rarely covered in administrative law courses (or at best receives a fleeting mention in the rush of other topics like the ombudsman that are given a few minutes at the end of the course for completeness sake) sometimes in media law units and increasingly in some journalism courses or occasionally in information management courses....

A comparative perspective may allow a better understanding of what design choices, legislative architecture, administrative reforms and other steps that may be necessary to bed down a successful adoption of open government in the long term.

- 69 From this point of view, Snell’s comparisons of New Zealand’s OIA with Australian FOI laws are of considerable interest.

*Administrative (non)compliance*

- 70 Snell proposes administrative compliance as a useful measure of the efficacy and well being of any FOI regime. There should be administrative compliance with both the spirit and letter of FOI laws. Requests should be processed in a timely fashion by a bureaucracy committed to achieving the maximum disclosure possible in the particular circumstances at the time of the request. Decisions on release should be made on the merits of the request, and should be free of political and other considerations that are not set out in the legislation. The public interest should be a key determinative question.<sup>60</sup>
- 71 Snell refers to a model of compliance according to which administrative responses to requests can be broken into five categories:<sup>61</sup>

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<sup>59</sup> Rick Snell “Using Comparative Studies to Improve Freedom of Information Analysis: Insights from Australia, Canada and New Zealand” (Conference Paper, 6th National and 2nd International Congress on the Right to Information, Mexico, 8-11 November 2005) 19 - 22.

<sup>60</sup> Ibid, 26.

<sup>61</sup> Ibid, 27–29. Snell refers to categories proposed in Alasdair Roberts “Freedom of Information Project: Limited Access: Assessing the Health of Canada’s Freedom of Information Laws” School of Policy Studies, Queen’s University, 1998) and adds extra categories himself.



1. Malicious non-compliance (where the intention is to avoid complying with the Act, for instance, the destruction of records subject to a FOI request; avoiding responding to a request; or removing compromising information from files);
2. Adversarialism (the practice of testing the limits of FOI laws, without engaging in obvious illegalities, in an effort to ensure that the interests of governments or departments are adequately protected. New Zealand is not immune to this kind of non-compliance);
3. Administrative non-compliance (in which public bodies undermine rights of access due to inadequate resourcing, deficient record keeping, or other weaknesses in administration);
4. Administrative compliance (in which public bodies comply with Act's requirements);<sup>62</sup> and
5. Administrative activism (according to which officials not only comply with the Act, but are proactive, for instance by providing additional assistance or guidance to requesters. This category highlights the difference between technical compliance and an active pursuit of the objectives and spirit of the legislation.

72 Administrative compliance and non-compliance are part of a spectrum of possible behaviour. Clearly, as successful FOI regime is one in which administrative compliance is largely achieved. The mark of a very healthy regime may well be that there is also at least some administrative activism as well.

73 Snell notes that the Australian FOI Acts were greeted with more enthusiasm at their inception than the OIA was in New Zealand. While there were initially concerns in New Zealand that the broad principles of the OIA would not work well in practice, the rules-based Australian Acts were expected to work better. Yet, Snell argues that today, the OIA is much more effective than the Australian provisions:<sup>63</sup>

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<sup>62</sup> The Ombudsmen in New Zealand have detected a "compliance culture" within some organisations, that is a culture of minimum compliance with the statutory regime. *Report of the Ombudsmen for the Year Ended 30 June 2004* [2004] AJHR A.3, 25.

<sup>63</sup> Rick Snell "The Truth is out there: In Wellington not Canberra" (news blog, Sydney Morning Herald, 11 January 2007).

In Canberra, where we were promised a new democratic right, we now have public officials who will fight all the way to the High Court to deny access to old policy documents.

We have a Canberra public service that appears, by actions and words, nervous about any level of transparency, and a cabinet that insists it needs to keep every bit of advice and discussion completely under wraps in order to function....

But look at New Zealand where the Official Information Act was [initially] treated as a joke. Their Act grants access to so much cabinet information that there are guidelines published on the internet on releasing it.

74 According to the administrative compliance criterion, Snell is fairly disparaging of Australian FOI laws: “The picture in Australia has been described as one of ‘frustration, delay and the haphazard provision of information’”.<sup>64</sup> He argues that they are enduring a “death by a thousand cuts”.<sup>65</sup> Material that in Australia receives automatic exemption, such as Cabinet papers, in New Zealand is routinely available.<sup>66</sup>

75 Snell is aware of some problems with the OIA that emerge in practice: “Unfortunately there is mounting evidence that even in New Zealand the art of managing and sustaining the tensions between open government and other policies is a continual one rather than a reform that can be achieved by the simple stroke of a pen.”<sup>67</sup> He notes that instances of administrative non-compliance are likely to occur in almost any FOI regime. This is as true of New Zealand as of any other jurisdiction. However, he thinks that New Zealand does better than other jurisdictions like Canada and Australia. He puts the success of the OIA in this regard down to several factors: legislative architecture; history; and the nature of the FOI constituency in NZ, that is, the officials that have “bought into” the ethos of the Act.

#### IV. EVALUATION

76 The ultimate issue about the OIA is whether it has contributed to good governance in New Zealand. It is important to know how the OIA has affected New Zealand’s

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<sup>64</sup> Ibid, 25.

<sup>65</sup> Rick Snell and Peter Sebrina “Information Flows: The Real Art of Information Management and Freedom of Information” (2007) 35 Archives and Manuscripts 55.

<sup>66</sup> Rick Snell “The Kiwi Paradox – A Comparison of Freedom of Information in Australia and New Zealand” (2000) 28 Federal Law Review 575.

system of government and the decision-making processes within government. When the concept of good governance is unpacked a number of ideas lie beneath it. The idea of openness and transparency is certainly one element of good governance, and it is an objective that the OIA aims directly at. The idea that there should be accountability for public decisions is frequently said to be an element of good governance.<sup>68</sup> Another element is the notion that public participation in government decisions is to be encouraged – democracy is often said to be an exercise in self-government by the people.<sup>69</sup> Openness in official information contributes to the public’s ability to participate in this way.

- 77 Government decisions must be seen to be legitimate by those to whom they apply. The Government has also to be seen as trustworthy and reliable. Availability of official information can be said to contribute those aims as well. When information is available, it demonstrates that there is nothing to hide and nothing being hidden. All these points were explicit in the Danks Committee analysis. Surprisingly, one element that appears to have been absent was the need for government to be free of corruption. It seems clear that the OIA contributes considerably to meeting that value. Most decisions cannot be hidden and neither can the reasons behind them.
- 78 These ideas concerning good governance exist at such high level of abstraction that it is difficult to measure whether they have been achieved in any empirical or quantitative sense. It is difficult to prove what the Act has or may have done for the quality of governance in New Zealand. The United Kingdom did without freedom of information legislation until 2000. I suspect that it would not be easy to demonstrate whether that fact impeded the good governance of Britain.
- 79 In the New Zealand context, it would also be a mistake to assume the OIA is the only possible factor impacting on the availability of official information. For

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<sup>67</sup> Snell “Using Comparative Studies to Improve Freedom of Information Analysis” above, n 59, 51.

<sup>68</sup> Dawn Oliver *Constitutional Reform in the United Kingdom* (Oxford University Press, Oxford, 2003).

<sup>69</sup> See Grant Liddell “The Official Information Act 1982 and the Legislature: A Proposal” in *The Official Information Act* (Official Information Act Seminar, Legal Research Foundation, Wellington & Auckland, 1997) 6, 12.

instance, it is also possible to build a human rights analysis for freedom of information. Section 114 of the New Zealand Bill of Rights Act 1990 that guarantees the right to seek and receive information.

80 In matters of governance and constitutions it is hard to tell what is a cause of what – we do not always know what we do not know.<sup>70</sup>

81 Assessing the performance of the OIA in New Zealand after 25 years is not simple. The first issue is what criteria should be applied to such assessment. The most obvious methodology is to compare the aspirations expressed in the Danks Committee recommendations in 1980 with what has actually happened. But there are considerable methodological difficulties in trying to work out the answer. Assessing standards like accountability and public participation in public affairs is an open-ended and indeterminate inquiry, especially given New Zealand's constitutional arrangements. Let me set the scene by quoting from a recent article I wrote about New Zealand's constitutional arrangements of which the OIA now must be regarded as part.<sup>71</sup>

Despite the apparent simplicity of New Zealand Constitution, or perhaps because of it, many complexities lurk not far beneath the surface. Even the core is indefinable, and writing this article brought to mind Lewis Carroll's delightful nonsense poem, "The Hunting of the Snark," in which the Snark is both imaginary and elusive. The New Zealand Constitution in 2006 is neither readily accessible nor easily understood. The New Zealand Constitution is flexible and, to a large extent, uncodified and fluid. The Constitution is both malleable and mysterious. It is an iterative Constitution in a state of constant and often silent evolution. The cumulative effect of decisions by the Executive government, the Parliament, and the courts alter its features, if not its fundamental configuration, every year. In a constitution like New Zealand's, law and politics tend to merge into each other – political battles are more influential in determining what the rules are than court decisions. It should be observed that almost every constitution inevitably appears as a work in progress.

82 It is important when evaluating the OIA to recognise that the biggest constitutional change in New Zealand in the 20<sup>th</sup> century was the adoption of the mixed member proportional representation system for electing members of Parliament ("MMP"). This has caused the current situation where we have eight

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<sup>70</sup> Zoë Prebble "The Epistemology of the Constitution: Do We Know our Constitution when we See it?" (LLB(Hons) research paper, Victoria University of Wellington, 2005) s IV.B.

political parties represented in the Parliament. There is a strong tendency under this type of electoral system for there to be a minority government. The diversity of points of view that are now represented in the New Zealand Parliament is substantial.

83 The first MMP election occurred in 1996. As such, the experience with the OIA falls into two phases: from 1982 until 1996 the OIA operated in the context of a first-past-the-post electoral system (“FFP”); and from 1996 to 2007 it has operated in the context of a proportional system. It might be postulated that operation of the OIA has been under greater pressure, and pressure from more points of view, under MMP than it was before. But it is difficult to see how to make much of this distinction, except to say that it may be important.

84 The Danks Committee report titled “Towards Open Government” was a document of high quality and considerable liberality.<sup>72</sup> Some of the most able public servants of their generation served on this committee. In a sense, the policy objectives the Committee sought from the project can be summarised as follows:

- A better informed public that can better participate in the democratic process.<sup>73</sup>
- The minimisation or elimination of secrecy in government. Secrecy is an important impediment to accountability when Parliament, the press and the public cannot properly follow and scrutinise the actions of Government.<sup>74</sup>
- Public servants should also be held accountable through greater flows of information about what they are doing. They make many important decisions that affect people and the permanent administration.<sup>75</sup>

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<sup>71</sup> Geoffrey Palmer “The New Zealand Constitution and the Power of Courts” (2006) 15 *Transnational Law and Contemporary Problems* 551.

<sup>72</sup> Committee on Official Information (“Danks Committee”) “Towards Open Government: General Report” (Wellington, 1980); “Towards Open Government: Supplementary Report” (Wellington, 1981).

<sup>73</sup> *Ibid*, para 22.

<sup>74</sup> *Ibid*, para 23.

<sup>75</sup> *Ibid*, paras 24–25.

- Ensure better information flows, as these will produce more effective government and help towards a more flexible development of policy; with more information available, it is easier to prepare for change.<sup>76</sup>
- Ensure that more public information is available as this will enhance public co-operation with Government.<sup>77</sup>

85 Hard headed analysis of the sort that auditors insist on would probably have to conclude that it would be impossible to measure whether the Danks Committee objectives have been met. Take the last one. How do we decide whether public co-operation with Government has been enhanced? How many variables must be analysed in order to answer such a question? Even if it has been enhanced, what causal role did the OIA may play in this? The question of whether more flexible development of policy has occurred as a result of the Act, or due to some combination of other factors, is similarly imponderable.

86 The policy-making process in New Zealand has changed and developed considerably since the time the Act came into force. In the New Zealand context it is incontestable that MMP has placed more checks and balances around executive policy development machinery than previously existed. The process of winnowing out and testing proposals is more rigorous than it was under FPP. But the policy may not be better nor the process by which it is generated. It is harder under MMP to pursue consistent policy objectives over time. There tends to be a loss of coherence in pursuing a broad policy framework because MMP generally works on the basis of concurrent majorities. The group of political parties in Parliament that form a majority to support one measure that passes will not necessarily be the same as the group that supported the previous one that passed.

87 MMP also opens up the policy-making process to greater contestability. Pressure groups and lobbying can be more effective than they were under FPP. Public service policy analysts have to aware of these tendencies and factor them into the process of developing policy. It is also clear that the OIA does put public servants

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<sup>76</sup> Ibid, para 26.

<sup>77</sup> Ibid, para 27.

under notice that their advice is likely to become public at some point and will be scrutinised, particularly by those interests who are affected by it. That is likely to cause better analytical approaches that proactively attempt to identify and address or combat arguments against proposed policy. Both the OIA and MMP have put public servants under greater pressure than they were previously under.

- 88 The place of the Public Service in providing policy advice has become plainer as a result of the OIA. The fact that a government has not followed official advice in a particular instance becomes known in a way that it previously did not. This places pressures on the Cabinet system, especially in relation to collective responsibility. The constitutional conventions in this regard have had to be altered in New Zealand to reflect the political needs of coalitions. The “agree to disagree” provisions in the Cabinet Manual are used from time to time.<sup>78</sup>
- 89 The other development over the period has been that public servants no longer have a monopoly over policy advice. There are many more contestable sources of policy now than there used to be – for instance, think tanks, consultancies, governments abroad, special advisers and lobbyists. There is a lot more consultation in the Government than there used to be. The Government does not appear to be a Leviathan,<sup>79</sup> that is to say an omniscient and omnipotent creature from which dictates are delivered on high.
- 90 One of the Danks Committee’s objectives was that, since public servants make many important decisions, they should be held accountable through greater flows of information regarding what they are doing. This has probably been achieved to some degree. Under the Act, an individual can secure information of interest to their affairs. Individuals and can, more effectively than before, find out if they have been fairly treated. In routine cases at least, it is probably quite simple to get the sort of information that individuals require in many instances. Of course the operation of the Ombudsmen in New Zealand preceded the OIA.

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<sup>78</sup> Cabinet Office, Department of Prime Minister and Cabinet *Cabinet Manual 2001* (Wellington, 2001) 3.2–3.24.

<sup>79</sup> Thomas Hobbes *Leviathan* (reprint of 1651 edition, Penguin Books, Baltimore, 1968).

- 91 The Act has reduced the anonymity of the Public Service. The removal of the cloak of secrecy has allowed critics of policies to get down to what the real issues are and not be put off by prevarication or flimflam. It is possible to find out why decisions were made – or at least the basis upon which they were articulated, which may not be quite the same thing. Thus, the accountability of the public service seems pretty clearly to have increased as a result of this Act. The accountability of ministers has been increased as well because it can be discovered when they did not follow advice.
- 92 It can hardly be contested that secrecy is an important impediment to Executive accountability to Parliament, the media and the public. There is no doubt that much more information now comes out than was previously the case. Yet, in some ways the plethora of information may actually impede accountability rather than increase it. There is such a mass of material around all the time that many important issues are not analysed effectively simply because there is so much to choose from. Important information may be swamped, possibly even deliberately, by large volumes of less important or irrelevant information.<sup>80</sup>
- 93 There is a certain ambiguity about the term “accountability” within Westminster systems of government. There is the political accountability of public servants to elected politicians. There is accountability of ministers to Parliament. There is accountability to the law. There is accountability to the general public in the sense that decisions have to be explained and defended. But whatever form of accountability is being discussed, it cannot be effective without information. In its classical form, the doctrine of ministerial responsibility protected civil servants and held ministers accountable. The OIA has made it clear what public servants recommend and what Ministers decide. To some extent, that fractures the appearance of unity between the two. Whether there is any great harm in this is not easy to say.

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<sup>80</sup> Alastair Morrison “The Games People Play: Journalism and the Official Information Act” in *The Official Information Act* (Official Information Act Seminar, Legal Research Foundation, Wellington & Auckland, 1997) 30, 35.



- 94 A heavily analytical approach to the OIA in terms of the constitutional principles upon which it is based turns out to be virtually impossible. I am inclined to the view that the Act has improved things so far as the objectives to which it was aimed are concerned. But how can we be sure? One way to test the issue is to consider the counterfactual. What would be the reaction if there was a serious proposal to repeal the Act and go back to the Official Secrets Act? Put in that way, the case in favour of the OIA is clearly unanswerable. There would be no political or public support a move to return to the way things were before the Act. It would be seen as undemocratic. I doubt that any political party that would be prepared even to propose it. So, based on the ordinary democratic principles about how policy gets accepted, it would seem to be impossible that New Zealand could go back. It is not in the nature of the political culture.<sup>81</sup>
- 95 The question thus becomes whether we can go forward, and how. The recent studies of the OIA in practice demonstrate in my view that there is a need to reassess it. Both the studies of Nicola White and Steven Price are based in part on interviews with users, some of whom are unhappy. After 25 years, all legislation should be reviewed. A recent United Kingdom Law Commission report was strongly in favour of a systematic approach to post-legislative scrutiny.<sup>82</sup> We should not pass laws and never look at them again. It is important to revisit them after they have been in effect for a while and evaluate how well they are fulfilling their purposes in practice, and whether they are having any unforeseen or undesired consequences. The OIA can be no exception to this.
- 96 After 25 years, the Act is not at the top of people's minds in the way it was when it first came into force. When you have been in the business of government and legislation for a while, you realise that legislation/legislative regimes can wax and wane over time. After 25 years, no Act should be free from systematic review. There are some problems with its operation. We should analyse what these are.

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<sup>81</sup> For a discussion of the Official Secrets Act 1951, see Geoffrey Palmer *Unbridled Power? An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, Wellington, 1979) 158–162.

<sup>82</sup> UK Law Commission *Post-Legislative Scrutiny* (UKLC, R 302, London, 2006).

- 97 I have little doubt that more resources were devoted to training public servants about their obligations under the Act when it was first in force than are now. The failure to provide adequate support for officials who have to administer the Act has undoubtedly impaired its operation. This point has been noted by the Ombudsmen.<sup>83</sup> Any legislation requires proper administration and training if it is to work effectively. A statute like the OIA that operates across the whole of Government should, in my view, have support from the State Services Commission. The enterprise is a whole of Government operation and needs to be administered in a consistent and fair manner across the whole of the public service and the crown entities to which it applies.
- 98 I should say that the view I take is that the basic principles of the Act are appropriate. I do not favour a rules-based approach. I think the open-textured manner of the New Zealand Act has served us well. It has the great virtue of avoiding judicialisation of the issues. This is an Act that is overseen by the Ombudsmen. They perform this role very well. However, it is not a role that would be appropriate for the Ombudsmen to perform if the Act were remodelled according to a rules-based template. The principles-based structure of the Act allows the Ombudsmen flexibility to ensure that sometimes competing aims of the Act are kept in balance. For instance, there is an Ombudsmen's ruling to the effect that the OIA can in some instances be applied less rigorously to advice from the Department of Prime Minister and Cabinet ("DPMC") to the Prime Minister because the nature of its work is to give instant advice.<sup>84</sup>

In our 2002 annual report, we commented on the issues raised concerning the confidentiality of advice from the Department of ... DPMC to the Prime Minister. We noted that there was no basis for blanket withholding of such advice as an exempt "*class*" of information. However, ... the characteristics of the relationship between DPMC and the Prime Minister will mean that sections 9(2)(ba)(i) ("*...information subject to an obligation of confidence...*") and 9(2)(g)(i) ("*...free and frank expression of opinions...*") are often relevant. Subject to the circumstances of the particular case and any countervailing public interest considerations, those provisions are likely to provide good reason for refusal in many cases.

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<sup>83</sup> Office of the Ombudsmen *Report of the Ombudsmen for the Year Ended 30 June 2002* [2002] AJHR A.3 10.

<sup>84</sup> Office of the Ombudsmen *Report of the Ombudsmen for the Year Ended 30 June 2005* [2005] AJHR A.3 22.

- 99 I also do not believe that the burdens the Act places on public servants can be a valid reason for altering its principles. This may indeed be a real concern and challenge to public servants trying to do their work from day to day. However, if the Act imposes a heavy administrative burden on officials, that is relevant to issues of resourcing and support. It should not be used as an argument to undermine the principles of the Act, although it may justify some tweaking.
- 100 All four of the analyses of the Act discussed in Part III of this paper identify a certain number of practical difficulties with the Act's operation. In some instances, there may even be problems with administrative non-compliance, adversarialism or possibly even in rare instances malicious non-compliance.<sup>85</sup> But I believe it is a mistake to attribute such shortcomings to the open-textured, principle-based structure of the Act. Rigid, defined rules do not guarantee that non-compliance of the kinds discussed above will not occur. Legislation comprising rigid or defined rules generally also comprises space to slip through the odd loophole. There has been a significant culture change during the time the Act has been in force.<sup>86</sup> No one would like to return to the days before the Act was passed. This culture change may not have reached its final point – we might well wish it to continue a little further. But imposing rules is not the way to achieve this end. Instead, we should stick with our principles-based approach, continue to use the Ombudsmen as overseers of the Act, and provide additional resourcing, support and education so that the Act can work more effectively in practice.

## V. CONCLUSION

- 101 After 25 years, New Zealand's OIA needs some systematic reconsideration. My firm view is that the first principles of the Act do not need change. While this view may appear at first to be somewhat path-dependent, that impression is

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<sup>85</sup> See discussion of these categories in para 71.

<sup>86</sup> See Marie Shroff "Behind the Official Information Act: Politics, Power and Procedure" in *The Official Information Act* (Official Information Act Seminar, Legal Research Foundation, Wellington & Auckland, 1997) 19; and John Belgrave "The Official Information Act and the Policy Process" in *The Official Information Act* (Official Information Act Seminar, Legal Research Foundation, Wellington & Auckland, 1997) 24.

misleading. I do not propose that we should retain the Act's principles and open-textured approach merely because that is the way the Act is currently organised. We should retain the basic framework of the Act because it is sound. However, the Act needs some adjustment at the edges.

102 In order to make these necessary adjustments, an open and transparent process needs to be undertaken. The research reviewed in this paper suggests such a process would be of value.

103 One way of doing this would be for the government to refer the Act to the Law Commission. That would mean that a discussion paper of the issues would be prepared following consultation. Public submissions would be taken on it. Policy proposals would be fashioned and then recommended to the Government. Such a process could result in a desirable refurbishment of an important constitutional statute 25 years after its creation. I shall recommend it for the consideration of the Government for the Law Commission's work programme next year.