

THE OFFICIAL INFORMATION ACT AND PRIVACY: NEW ZEALAND'S STORY

**PRESENTATION BY MARIE SHROFF, PRIVACY COMMISSIONER, TO THE FOI LIVE
2005 CONFERENCE IN LONDON**

16 June 2005, London

I am delighted and honoured to be asked to be the international speaker at the FOI Live Conference.

This will not be an academic address – rather a practising civil servant's account of how FOI works. As Cabinet Secretary for 16 years and now Privacy Commissioner, I am certainly a veteran sailor on FOI seas. I will not give a learned dissertation on comparative law; rather I will take you on a personal voyage a quarter of a century into the future of FOI.

I am conscious this is a critical moment for freedom of information and for government, in one of the oldest and most consistently democratic countries in the world – one from which New Zealand took the beginnings of its model of government. But we have taken that model and developed it; and FOI legislation is an important influence on that. So I speak to you not only from across the globe but also from across time. For FOI we are the future – and it works.

New Zealand passed its freedom of information law – the Official Information Act or OIA – in 1982. The OIA is one of the freest FOI regimes in the world. To summarise: we reversed the old official secrets presumption, and declared that all government information is open – unless it should be protected. Absolute exemptions or exclusions are minimal, and mostly related to national security – and even there a case has to be made. Cabinet papers are not excluded. But, and it is an important but, the OIA includes a balancing goal to protect official information consistent with the public interest and personal privacy. Unless a conclusive withholding ground has been relied upon, decisions to withhold information must be able to pass the public interest balancing test. Contested decisions to withhold are reviewed by the Ombudsmen. The OIA now contains a Cabinet veto provision – which has never been used, and is probably hard to invoke because it has become embedded into convention.

How did we come to take this radical step? Perhaps I can do no better than quote a European commentator on New Zealand in 1914. New Zealanders have “mingled strength and simplicity. Their strength makes them unconscious of obstacles, and they attack the most delicate questions much as one opens a path through virgin forest with an axe ... they do not seem to see difficulties, and they propose simple solutions for the most complex problems with astonishing audacity.” They believe that “politics are not as complicated as they have been made out to be, and a little courage

and decision are all that is required to accomplish the reforms of which Europe is so afraid". (André Siegfried "Democracy in New Zealand", 1914).

I won't traverse the origins of our OIA in detail, but my personal view is that it was a combination of widely divergent forces. The Prime Minister of the day, Sir Robert Muldoon, was a strong believer in the battler, the little man, the ordinary citizen and his or her rights. Yet the committee he chose to drive the reform included some of the leading legal and government thinkers of the day. The product was a measure which turned the presumption on its head, decreed progressive availability of most official information; and was greeted with incredulity, and some alarm by a large number of public servants, I confess including myself.

The goals of the OIA were lofty. The purposes of the OIA are:

- "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
 - (a) 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."

(Official Information Act, section 4).

To a more limited extent, the OIA also dealt with personal privacy rights. Natural persons and bodies corporate could make requests for personal information. This access regime did not extend to the private sector.

In 1993 New Zealand passed a Privacy Act to enhance protections for personal information¹. This wide ranging law covers personal information in both the public and private sectors; it regulates government data matching; it authorises the making of codes of practice to modify the privacy principles by making them stricter or more lenient to fit cases; and it mandates the Commissioner to monitor and comment publicly on government policies and laws which affect personal information. It is a modern and light handed piece of law; it sets 12 principles to guide behaviour rather than micro-regulating.

The 12 privacy principles are not prescriptive: agencies have a wide ranging discretion to develop the scope and characteristics of their own information handling policies. Within reason, an agency can use and disclose information if it has been clear about the purpose for having the information and then ensures that purpose is communicated to the individuals concerned. In other words, information handling policies need to be open and transparent.

¹ The personal access right for natural person was removed from the OIA and expanded personal access rights were given in the Privacy Act 1993.

What are the common themes of these Acts regulating official and personal information? Both emphasise openness and transparency – leading to accountability; and proper democratic pressure to be fair and reasonable in information handling.

In preparing this speech I decided to consult other senior public officials in New Zealand. Let me quote Mark Prebble, currently State Services Commissioner (in our terms head of the Civil Service; he was formerly Head of the Prime Minister’s Department and Deputy Secretary of the Treasury). Here are his views on the OIA:

“As a public administrator, requests for information can be a pain. But as a policy adviser and a citizen, I think the OIA is the best and most significant reform of a government system that has been made in recent decades.”

Those of you who know a little about the fundamental state sector reforms in New Zealand in the 1990s may be a little surprised at his ranking the OIA higher. His views were echoed by the other public servants I spoke to.

Perhaps this is a good point at which to step back for a moment and consider the broader context of freedom of information and privacy reforms. I believe it is no coincidence that the right to privacy was added to the roll call of human rights in the last half century. The assertion of access to government information as a general right of citizens is also recent. There is a growing and well founded belief that information is vital to a healthy democracy. Public sector reforms in the Western world have been driven by, and delivered, greater accountability to citizens. This has also been a theme of legislation across a number of areas. In New Zealand recent reforms to Standing Orders, the Companies Act, the Public Finance Act, the Fiscal Responsibility Act, and the Consumer Guarantees Act, have also delivered greater accountability, open government, consumer and citizen empowerment and rights to information. Some thinkers on the subject believe that the 1982 OIA was the key reform which in the 1990s made these later developments possible.

So let’s get freedom of information into proportion. It is part of a wider reform and development of democracy and society; it is a very important way for individual citizens to access information. But as I look back from 23 years into your future, FOI reform, although major, is one of a set of tools. Other increasingly powerful tools for open government include Parliamentary questions, select committees, commissions of inquiry, determined lobby groups, highly motivated individuals, independent agencies, the internet, the universities and academics, and of course the media.

Much of this “information society” is delivered through, and in turn influenced by, the astonishing development of information technology and communications – and the equally amazing enthusiasm with which people have embraced these changes and opportunities.

When the FOI voyage started in 1982, what were we saying in New Zealand? My recollection is that the media were keen but sceptical; the public in so far as they were interested at all were mildly positive; Ministers were nervous but publicly accepting (under the ‘guidance’ of the redoubtable Sir Robert Muldoon); and the civil service –

trained and prepared to within an inch of its life – was largely resigned to the inevitable. Yet there were a significant number of senior public servants, and, off the record, Ministers, who were totally unconvinced and became prophets of doom. Among their predictions were that quality advice to Ministers would be damaged or destroyed; individual civil servants would be afraid to offer free and frank advice; written advice would be replaced by decisions made in smoke filled rooms; outside sources of advice would become unwilling to contribute because of the fear of public exposure; and that the civil service would be politicised. Some elements of these views persist in New Zealand even to this day.

For the first five years or so after the Act passed, things progressed reasonably calmly, perhaps because of well planned and comprehensive initial training. But soon requesters became more adept at penetrating through to the matters that really impinged on Ministers. So there was a rocky patch 10 years after the passage of the Act, in 1992. The government asked the Law Commission to report on the OIA. Its conclusions nicely summarise the concerns of the time.

“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 coordinated approach to supervision, compliance, policy advice and education regarding the Act and other information issues.”

But the Law Commission went on to say:

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

“The wide spread acceptance of the principle of open government in New Zealand is largely attributable to the Official Information Act.”

“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.”

I hope the Law Commissioners of the time will not be offended if I describe their recommendations as, ultimately, relatively minor. Large and broadly defined requests were acknowledged as a problem – and some changes were recommended to strengthen the arm of departments in defining, refining and charging for such requests. The Commission also recommended that the government should review the 20 working day time limit with a view to reducing it to 15 working days. This is yet to take place. No change was recommended to the Cabinet veto. But the Commission recommended more systematic oversight and training and more resources to the Ombudsmen, to improve administration and understanding of the Act. In other words if Ministers hoped for a resounding endorsement of their concerns, they were sadly disappointed. By the time the Law Commission reported

in 1997², I believe that not even Ministers were particularly surprised, nor upset, by the Commission's implicit and explicit endorsement of the OIA. While the Law Commissioners pondered for five years, acceptance of open government was growing.

In 2002 the Law Commission was also asked to review the operation of the Privacy Act. A discussion document was produced and submissions sought. In this case many submissions, again perhaps to the surprise of those seeking the review, were largely positive towards the Privacy Act. My understanding is that the Law Commission does not wish to report further on any major reform of the Privacy Act.

The strength of these reforms is that they have stood the test of time. But lest you think I have been brainwashed by the Law Commission and others, I will expand on some of the consistently contentious areas for FOI over the years.

First, there is what the Law Commission calls "the burgeoning use of the Act to obtain large amounts of information concerning significant and difficult matters of policy development". The Commission also acknowledged "increased use of the Act by Members of Parliament and Parliamentary research units". They described friction between requesters and officials, where the disclosure is made "reluctantly or not at all". An examination of recent Ombudsmen reports on their administration of appeals under the OIA reveals some interesting issues. These include:

- whether unsolicited correspondence to Ministers of the Crown should be considered confidential;
- the extent to which advice from officials of the Prime Minister's Department to the Prime Minister can be withheld;
- how to strike the balance between privacy and public interest;
- timeliness - departments failure to respond quickly to requests, and their apparent belief that there is a minimum rather than a maximum time limit; and
- the need to ensure that all staff are adequately trained in the requirements of the OIA.

In 2005, nearly a quarter of a century along the road, what is my take on the situation? It is true that a few Ministers and officials have consistently expressed some concerns about the quality of advice and pressure on the decision making machinery. The Law Commission was sympathetic and acknowledged some problems with the Act, but was more inclined to suggest the patient take a couple of aspirin and lie down, rather than recommend radical surgery. The Ombudsmen (the review authority) continues to be stern in upholding the public interest, in reprimanding departments for excessive delay, and incomplete or badly managed requests. Of course senior public servants will complain about the OIA if you give them a chance and all have "war stories" to tell; but those complaints will now be more about the administrative burden especially on policy officers than that the actual information release was harmful. I believe most would endorse Mark Prebble's statement that the OIA can be "a pain", but it's a good reform.

² Report 40.

Let's have a look at the other side of the equation. What do those persistent requesters, the media and the lobby groups think? Again, I took a sampling of significant opinion. Gavin Ellis, the long serving and very recently retired editor in chief of New Zealand's largest daily newspaper the *New Zealand Herald* said:

“The OIA is laudable in principle but imperfect in practice. In order to work as intended the Act needs its own advocate, not an Ombudsman whose function is essentially remedial. Our bureaucrats and politicians need to be constantly reminded that transparency is expected to be the norm, not an imposition.”

Another senior journalist, Karl du Fresne, recently said [we need to look] “at ways of stopping ... blocking by government and public servants ... by putting off releasing the information for weeks or by forcing the requester to head off to the Ombudsman and wait for months and months for a review”.

Many in the media believe that officials and Ministers shift the ground, dodge and delay – and that getting the information you want is like a blindfolded man trying to pin the tail on the donkey.

I should say at this point that the Ombudsmen are now getting more involved in explaining the principles and rationale of the Act – being coaches as well as referees. More recently they have undertaken a major enquiry into the Immigration Service's handling of OIA responses, resulting in major improvements. This could well be a forerunner of how they expect to operate in the future.

I also asked Nicky Hager for his opinion. Nicky is a one man guerrilla force, constantly needling and land-mining successive governments on a variety of defence, environmental, intelligence and foreign affairs issues. But I think most of us have come to respect him for his consistency and determination. Here's what he has to say:

“Secrecy seems as if it makes life easier for governments and officials. But countries with FOI laws have learned that presumption of availability and orderly release of information actually causes few problems. Interestingly, when governments are secretive the important information still gets out, but in the form of embarrassing leaks.”

“There will always be a conflict between short-term government political expediency and long-term good governance – with public servants often stuck in the middle. It is in the interests of professional apolitical public servants to put information release on to a more consistent, non-political basis.”

“The possibility of information release is a good reason to make defensible decisions, not to cut corners and generally to stay away from doing things that would look bad released by an Opposition MP or the media.”

A predictable picture isn't it – a few Ministers and senior officials are still occasionally discontented with the public exposure; some journalists and lobby groups are dissatisfied and want more. The voyage continues; and we have learned to prepare the ship for the weather and to forecast the storms.

We have learned some simple lessons and made some practical responses. Communication is all important. Best practice occurs where agencies who receive requests, such as departments and Ministers' offices, talk to each other and with the requester. For example, if the Cabinet Office received a request for all Cabinet papers between certain dates, I would ask one of my staff to phone the requester. Mostly people have only one bee in their bonnet and can usually quickly identify what it is. Another typical situation is when one government document contains information provided by a variety of people and agencies. A simple convention has grown up that you consult with other bodies concerned before releasing a paper. If the requester has asked the wrong agency, we flick it across to the right one. If other people or agencies involved are likely to be surprised or dismayed by necessary release of information – we inform them beforehand so they can prepare.

More complex measures have also been developed. Ministers themselves (as well as requesters), get rather unhappy if their department develops a reputation for incompetent handling of requests. Most larger agencies will centralise the recording and handling of official information requests, especially because of the time limit for responding. Central recording and monitoring avoids the risk of being caned by the Ombudsman for delays. Incoming OIA requests were all seen by senior staff in the Cabinet Office. High risk requests were thus easily identified and decisions taken. I, or one of my deputies, signed out every single piece of significant correspondence about requests.

Painful experiences will undoubtedly ensue if FOI requests are regarded as routine and irritating work to be left to junior staff.

Another important procedure we have developed is the referral to the Minister's office. Cabinet papers, minutes or correspondence from or addressed directly to Ministers may often be better handled by the Minister's office. Departments can provide advice, but the importance of the material can often only be determined with political input. You may think this sounds disingenuous or devious – on the contrary I believe it is entirely proper. I will give you an example.

Some years ago as Cabinet Secretary I received a request for the disclosure of the government's three-year forward legislation programme. This document contained a mixture of both relatively harmless bureaucratic information about long term legislative reform intentions, as well as highly sensitive information about the government's tactics and political intentions. We refused to disclose, and the final outcome of an Ombudsman appeal from the requester was that the Ombudsman of the time accepted the arguments of the Prime Minister and the Cabinet Office that the forward legislation programme should not be released. The views of senior Ministers were a significant part of the information sought by the Ombudsmen in deciding to recommend against release.

This example also illustrates a typical practical effect of an FOI regime on the civil service. Cabinet Office tightened its procedures in relation to the supply, classification, distribution and handling of copies of the legislation programme. Cabinet minutes about the programme were given a higher classification and a narrower distribution list. Perceptions of the ownership, nature and intent of a document were clarified as largely political, rather than administrative. These were useful developments; as well as a strengthening of our position in withholding the document in any future request.

Central control and monitoring at the political level has been a variable feast over the years. Some governments have been content to leave it to the bureaucrats; others have developed tighter controls especially on round robin requests or those involving Ministers. Our procedure of referring requests for documents to Ministers has possibly avoided the need for the civil service clearing house structure which I understand has been put in place in the UK.

I have reserved to the last in this list of practical measures the technique of proactive release. Look at any New Zealand government or state sector website and you will find the full text of Cabinet papers and Cabinet decisions and sometimes endless lists of discussion documents on highly sensitive matters of government policy, usually seeking public submissions. Treasury and the Ministry of Transport, for example, have recent Cabinet papers on their websites: Transport about a major roading decision; and Treasury about a savings package which was an important part of last month's 2005 budget.

I now turn to the subject which may well be most interesting to you – an assessment of the impacts of FOI on government decision-making. The research on this topic is limited and in any case will by its nature be somewhat unscientific. I stress that these are my personal views, backed up, however, by reference to research where it exists, and long experience and many discussions over the years with my senior civil service colleagues.

Has FOI impacted on the way the civil service operates? Open government is now deeply ingrained. Normal policy development processes continue but most, and certainly the best, policy advisers now start thinking at any early stage how to consult interest groups and the public. A classic feature of policy development in New Zealand is a discussion document or public consultation round sometimes involving nationwide meetings and hearings. Departments and state agencies almost universally cultivate strong stakeholder relationships, for example with voluntary, business, arts, academic and other groups. Advisory boards, consultation groups and ethnic councils are common place. Very few major policies now come as a surprise to the public as they will have been signalled well in advance through these various means. Ministers expect to be told as a matter of course about the views of interest groups on major new policies. Wherever possible conflicting views will be exposed, opponents on both sides brought together so that they understand each other's point of view, and bureaucrats will diagnose and report on potentially unpleasant reactions to government policy. Operational risks and failures are quickly reported to Ministers before they break publicly.

You may be thinking this is not new, but I can assure you that a strong FOI regime brings about a significant change in culture towards open government. Let me give you a quick outline of a recent example. One night earlier this year the police emergency call centre, the 111 (999 UK) service, received a mobile phone call from a young woman in an outer suburb of Auckland who said that she was in danger and wanted a police car to pick her up; she rang several times in increasing distress; the police dispatchers sent a taxi to pick her up, which went to the wrong address. The young woman disappeared that night and has never been found. In the ensuing row, the transcript of the emergency phone calls was largely released, and the Police Commissioner went on national television to apologise and explain. The government commissioned an expert enquiry; the report of this enquiry was publicly released including much administrative detail about police operations. The government immediately announced a substantial increase in resources for the police 111 call system, and among other responses created a community advisory board to oversee the 111 service. This entire sequence of events took place in a matter of months.

This is open government in practice.

So far I have given you two major examples; one about the legislation programme which is at the heart of the political system, another about the Police at the operational end of the government; I now give you a third which focuses more on advice to individual Ministers.

This example is slightly disguised – not everything is released under FOI! In New Zealand the Minister for the Environment has the power to “call in” major projects which have environmental impacts. Some years ago there was a proposal to build a thermal power station in a beautiful rural area. There were extremely strong arguments for and against this project, many of them quite technical in nature, such as the impact of emissions on the surrounding countryside. The Minister chose to call in this project for Ministerial and Cabinet decision. The Ministerial and Cabinet papers contained reports of conflicting scientific, policy and legal advice to the Minister. Before too long the papers were requested and released. It will be fairly obvious that it was in the public interest for the arguments for and against the project to be known. In other words, any desire to withhold simply could not be sustained against the public interest test. What followed was a brief, vigorous, and at times uncomfortable, public debate. But in my strong view, no lasting damage was sustained. In fact, to the contrary, it was clear from the papers that full scientific, environmental, legal and practical considerations had been taken into account and the Minister emerged as having taken a very difficult decision on comprehensive and well considered grounds. If anything, public confidence in government and its processes was enhanced. This took place some years ago; these days the Cabinet paper would probably be put on the Department’s website immediately.

I hope that the major examples I have given will have increased your understanding of how these matters play out in practice in New Zealand without causing major damage to the quality of government. But examples aren’t enough – I will also attempt to give you some general conclusions which are, of course, largely my own views.

Even at the hardest end of FOI – access to Cabinet documents – the benefits are clear. If I, as a civil servant, write a Cabinet paper which I expect to be sought for public release I am going to be extraordinarily careful to get my facts right, to avoid trespassing into politics, to give comprehensive reasons for and against a proposal, and to think very carefully about my recommendations. My advice will therefore be balanced, accurate and comprehensive. Sometimes I will put in more detail than might formerly have been the case; I might quote from sources rather than summarising them, especially where unpalatable advice might be needed; and I might clearly identify legal advice and separate it from policy advice to allow for possible protection under legal professional privilege. I will record carefully the reasons for my particular recommendations - although this will largely be to ensure decisions can withstand judicial review. Because I know, as a very senior official, that my name will be attached to some of the advice, I will be especially careful to ensure that my reputation as a professional and neutral public servant will be enhanced if the advice is released. I will avoid the temptation to make cute remarks. I will often have robust face-to-face discussions with my Minister on the way towards a final piece of advice or a Cabinet paper.

The discomforts of an open government environment are real, but less obvious and sometimes only readily defined by reference to benefits. (I avoid the word disadvantages because it really does not fit the case.) For example, the roles of civil servants and politicians become more clearly defined in the strong light of public exposure. Relationships between Ministers and officials as a consequence can become more distant and more structured. Strong and direct advice to Ministers may become tempered by caution and paraphrase. Few senior public servants in New Zealand will risk compromising their Minister by going into writing with strong criticism of a government policy. But ways will be found of recording disagreement and of supplying information which illustrates the risks of government intentions. As long as the advice is balanced it is possible to give it. In parenthesis, I ask whether this is such a radical change as some of you might imagine – I still value the memory of “Yes Minister” and the useful phrase: “A very courageous decision Minister”. Sometimes other routes for transmitting unpalatable advice or information will be used. Political advisers for example will often be more than willing to hear information which may avoid political disasters further down the track, even if a Minister is not. You may make up your own minds as to whether you think these are benefits or disadvantages of FOI.

Open government takes more time. Undoubtedly we spend significant amounts of the taxpayers’ money on responding to official information requests. Staff must be allocated, systems have to be set up, senior time and judgement have to be applied to minimise risk. The “front page test” is in your mind at all times in writing official documents. Emails are carefully phrased, detachable yellow post-its have taken the place of marginalia, and jokes are more infrequent.

Occasionally I believe ideas from the civil service will not make it through to the political level in an FOI environment. Officials become wary of putting up lateral thinking options in written advice to Ministers, when this has the capacity to end up on the front pages of the newspapers – for example “government proposes to charge for treatment at public hospital emergency departments”. Political damage can be sustained before it emerges from the fine print that it was simply a bit of radical

thinking from a junior Treasury official. Our experience, however, is that levels of inhibition are not as high as might have been anticipated, and certainly are not overwhelming. You just think a bit more carefully before letting that radical idea through – which probably saves Ministers spending time on underdeveloped policy options.

In summary, free, frank and robust advice continues to be given. My strong view is that the costs of FOI are relatively minor compared with the benefits. Open government may take a little more time and effort from appointed or elected officials. But in New Zealand we believe that this is a tiny price to pay for the power we have over citizens' lives. Open government is good government; it is now our job and we get on with it.

I have been told you will be especially interested in our experience of the Privacy Act/FOI interface. Despite an apparently complex structure this works well in New Zealand. We have two Acts, the OIA and the Privacy Act; two independent review bodies, myself as Privacy Commissioner for the Privacy Act and the Ombudsmen for the OIA. Requests made by individuals for information about themselves must be dealt with under the Privacy Act (even though it is also, technically, official information). All other official information (that is, government-held information that is not personal information about the requester), must be considered under the OIA. This includes personal information about identifiable individuals other than the requester, or which otherwise affects the privacy of individuals. Privacy gets considered – but it gets considered under the privacy withholding grounds of the OIA.

It might be useful to see these sorts of third party requests under the OIA as involving two circles, a small one inside a large one. In the inner circle is information which needs to be withheld to protect privacy. Outside it, lies official information where no privacy interest exists to impede release. Both circles are governed by the OIA. Once the privacy interest has been assessed the public interest test must be applied to see whether interests in release outweigh that privacy interest.

So, official information may be withheld to protect the privacy of natural persons. In considering a request, agencies should:

- identify and weigh the strength of the privacy interest requiring protection;
- identify and weigh the strength of any public interest considerations supporting disclosure;
- assess whether the public interests in disclosure are strong enough to outweigh personal privacy. Where that calculation is uncertain or finely balanced, the information can be withheld. The public interest needs to actively outweigh privacy under the legislation.

This balancing exercise is sometimes easy, sometimes very difficult. Typical cases include:

- requests for the remuneration of a particular official – sometimes on appointment or perhaps when the official concerned is in some sort of trouble;
- requests for the size of golden handshake packages;
- requests for information about job appointment processes from disappointed applicants;
- lists of names of officials;
- applications by parents for information about their children (this is very common)

Reviews of decisions to withhold on the grounds of protecting privacy operate through a consultative process between the Privacy Commissioner and the Ombudsman. If it's unclear whether a matter falls within the Privacy Act or the OIA, then we discuss it. If necessary, we'll transfer complaints from one office to the other, to assist the requester. Both the original decision to withhold or release, and the review, consider some of the following principles:

- is the information personal information at all? (this can be harder than you might think)
- why is the information held?
- was it acquired compulsorily or voluntarily?
- Have the individuals concerned been asked for their reaction to disclosure?
- has the requester identified a public interest reason?
- does the agency see other public interest reasons that favour release (such as the accountability of officials, the expenditure of public money, maintaining confidence in official decision making)?
- can any conditions be effectively imposed on the requester to limit further infringement of privacy (such as releasing part of the information, or a summary of a letter or sensitive report, or releasing the report but with a contextual statement)?

Often a good compromise will be reached – for example releasing salaries in bands, or a summary of information. Sometimes it will be withheld – a recent example was a list of names of officials working on animal experimentation. A case by case, flexible, consultative, approach works well in striking the necessary balance.

Ultimately, the decision on release or otherwise lies with the Ombudsmen. But my view as Privacy Commissioner is of considerable assistance to the Ombudsmen in making that decision. Where there are common but contentious issues, such as naming fines defaulters, it is helpful if the Ombudsmen and the Privacy Commissioner can present a considered opinion. If this is a joint opinion, all well and good. If it isn't, then this too is useful.

One type of official information which has generated considerable controversy at times in New Zealand has been that held on public registers such as the Electoral Roll; the Register of Motor Vehicles; or the Register of Land Titles. At a fundamental level where citizens are required to provide personal information to the state there is, on the one hand, a recognition that the information is likely to be made available; but on the other hand an increasing concern and fear from citizens that

public availability will lead to misuse. The computerisation of registers has brought these concerns into sharp relief. Should a potential stalker be able to access via the motor vehicle license number the name and address of the pretty blonde he saw driving past in the red convertible? Should bulk marketers be able to access lists of names and addresses using FOI laws? Should government information matching be allowed to permit a landlord to track down a beneficiary who has defaulted on his rent?

I believe our legislation, and our review processes, at least allow for careful judgement to be applied to the difficult boundary between the public interest and personal privacy.

Conclusions

Democracy in New Zealand has moved strongly towards the citizen participation model; and is increasingly intolerant of the “elect them and let them get on with it” model. How successful have the OIA and the Privacy Act been in supporting citizen participation? The answer will again have to be my own personal views, as very little data is available.

What evidence there is suggests that the OIA has worked for the ordinary citizen - about 50 percent of OIA reviews are about citizen requests – but also for the media, politicians and increasingly, lawyers and business. I believe the Privacy Act is working successfully, especially for the ordinary citizen. Together these Acts work effectively as a check and balance on the operation of government.

Perhaps the greatest success of our open government regime is its wide and inconspicuous acceptance. Certainly the OIA, and to an increasing extent the Privacy Act, have been absorbed into the fabric of New Zealand government. Citizens and the media expect to be able to access official and personal information. There is some debate in government and academic circles about the merits of a little tinkering, but the OIA especially does not generate wider public controversy.

There have been wider benefits in pushing government towards proactive consultation, availability and release, although this should in my view go further. Using information technology, some other countries are making government information available in innovative ways. Perhaps we in New Zealand have become a little complacent with our older regime.

Delay continues to be a source of friction with media requesters. As Al Morrison, a former Radio New Zealand political editor said, “the news media are interested in creating history and not reporting it”. Delay can be a “turn off” for many in the media in making access requests. On the other hand almost daily the media announces that information has been obtained under the Act.

I believe that the concept of progressive availability particularly to the workings of inner government, has reached its limits. Partly as the result of proper concern from the political level, I believe a balance is increasingly being reached. To quote from my own speech of 1997: on the one hand “public servants have grown to appreciate that sharing knowledge means better government, a better decision making process,

and a better informed public”. On the other hand “there are times when it is genuinely beneficial to allow Ministers and officials to consider policy options well away from the glare of publicity and the pressure of interest groups”.

The freedom of information ship is well constructed with good timbers. But renovation work will have to continue in a number of areas. The impact of information and communications technology will both drive and assist us towards two important new features. Good information management policies and practices will open up and facilitate access requests. Information must also be proactively pushed out into the public arena to achieve a truly participative democracy.

I think it is likely that further development of the OIA is imminent, and will focus on the electronic environment and practical problems of compliance, for example, where many versions of the same document are collected; and secondly, on the recurrent issue of the administrative burdens of OIA requests.

Twenty five years on, our ship of state sails on a sea of information. Occasionally a wave breaks across the deck and washes away a few public service spars or even a political deck officer; but we are still afloat and making headway.

In the words of that great sailor and New Zealander Sir Peter Blake, “if it’s not hard it’s not worth doing”.