Education Review Office

OPEN GOVERNMENT IN NEW ZEALAND

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Introduction

This chapter describes the issues and events surrounding the introduction of open government in New Zealand. The purpose and principles of the Official Information Act 1982 are described, including the provisions relating to official advice. The chapter considers the impact of open government, in particular on the relationship between Ministers and public servants. It examines the extent to which open government has contributed to the effectiveness of government and achieved its purpose of improving accountability and participation. It concludes with a brief section outlining ways in which the system of open government will need to adapt in the future.

Background - New Zealand's Constitution

New Zealand's constitution has its origins in the British Westminster system. The basic elements of the system of government are the sovereign, the legislature, the judiciary and the executive.

Over the last few decades concerns have been expressed in many quarters about the extent to which this system provides sufficient checks on executive powers. There are several factors which have tended to allow the executive arm of government a freer hand in New Zealand than other countries:

Firstly, New Zealand, along with other countries that have adopted the Westminster system, has a parliamentary executive, under which only Members of Parliament can be appointed as Ministers of the Crown. There is thus considerable overlap between the executive and the legislature.

Secondly, because of New Zealand's small population (currently 3.7 million) the Parliament is small. Until recently it had only 99 members. This has just been increased to 120. There have often been nearly as many Ministers as government backbenchers, allowing Cabinet to dominate Parliament.

Thirdly, New Zealand has no upper house to act as a brake on the House of Representatives.

Over the last few decades, a series of changes has been introduced designed to restrain the power of government and achieve greater accountability for administrative actions.

The office of Ombudsman was established in 1962. Ombudsmen are Officers of Parliament and are empowered to investigate government actions involving individuals. The Ombudsman's Office provides individuals who are aggrieved by a government decisions with a power of redress. The Ombudsman was given strong powers in the Act and the office has been held by some formidable individuals. As a result the impact of Ombudsmen on the overall system of government has been significant.

The Official Information Act was introduced in 1982. This Act sets out the principle that

government information shall be made available unless there is good reason for withholding it, reversing the presumption of secrecy in the Official Secrets Act 1951 which it repealed.

Parliamentary select committees were reformed in 1985. Almost all parliamentary Bills now go to select committees and are sometimes changed considerably as a result of public submissions. Some Bills are actually stopped by the Select Committee process. Select committees can examine the operations of government departments in detail as well as more general issues of public concern.

The State Owned Enterprises Act 1986 transferred the management of public enterprises to corporate bodies. The intention of this Act was to provide for open accountability for performance, based on successful business practices rather than political objectives.

Increased recognition has been given over the 1980s and 1990s to the legal status, constitutional significance and policy implications of the Treaty of Waitangi The Treaty of Waitangi is New Zealand's founding document. It legitimises the Crown's right to govern and sets out the rights and freedoms of the Mäori people. Statutory recognition is now given to the Treaty in a number of pieces of legislation including the State-Owned Enterprises Act 1986, the Environment Act 1986, the Conservation Act 1987 and the Education Act 1989. As a result of the greater recognition now given to the Treaty, the executive has had to operate in a way that take Mäori rights into account.

The accountabilities of Ministers and public service departments were clarified in the State Sector Act 1988 and Public Finance Act 1989. Former permanent heads of departments have been replaced by chief executives on a five year contract term with tenure based on performance. Chief executives are the legal employers of staff in their departments. Annual performance agreements are developed between Ministers and chief executives which specify what is to be delivered, and expectations of quality and cost, together with management objectives for ensuring the efficient use of resources. Chief executives are accountable for "outputs" (the goods and services delivered by departments) and Ministers are accountable for "outcomes" (the broad policy objectives the outputs contribute to).

The rights and freedoms of individuals were affirmed in the Bill of Rights Act 1990. This Act sets out the rights of individuals and protects them from the actions of the legislative, executive and judicial branches of government.

Individual privacy was promoted and protected in the Privacy Act 1993. This Act establishes principles relating to the collection, use and disclosure by public and private sector agencies of personal information, and to access by individuals to information held about themselves by public and private sector agencies.

A requirement for the Crown to state its fiscal objectives and report progress towards achieving those objectives was set out in the Fiscal Responsibility Act 1994. The intention of this Act is to create more informed public decision making and encourage governments to take a longer term approach towards fiscal management, thus reducing risk.

Changes were made to electoral law including the introduction of a form of proportional representation similar to that in Germany in 1996. This is known as the Mixed Member

Proportional or MMP system. One of the arguments advanced in support of this system was that it would provide more effective representation of Mäori and other minority groups, and better recognise the diverse nature of New Zealand society. The composition of the first MMP Parliament suggests that this objective has been achieved, at least in part. Proponents of the system also argued that, through ensuring that every vote counted, it would give greater legitimacy to the political system than the previous first-past the post method of elections. Opinions continue to be sharply divided about the overall effectiveness of MMP.

The cumulative effect of these changes is that New Zealand's system of government is considerably more open than in the past and has diverged in several key respects from British traditions and the central features of the Westminster system. There is greater transparency in the relationship between Ministers and public servants, more effective parliamentary scrutiny of the executive and more explicit measures to protect the rights of citizens.

The constitutional implications of the changes are considerable. It has been argued that open government is the most significant constitutional development of the 20th century, equivalent in scale to the introduction of the franchise in the 19th century. According to Gregory (1984):

> Just as the middle and working classes sought power and were given the vote, so today's professional classes seek power and are given information. The process is called participation, and the result is called accountability.

The Official Information Act 1982

Background

The introduction of the Act followed a long period of public concern and criticism about the lengths to which the government went to preserve secrecy. Before the Act, the only reference in law to official information was in the Official Secrets Act 1951, which presumed that official information would be kept secret unless specifically authorised for disclosure. This Act created offences for people who communicated, failed to safeguard, or abused official information to which they were entrusted. It also addressed other issues such as the harbouring of spies. The Act was "widely regarded as absurdly restricted and unworkably harsh" (Roberts, 1987), and placed the burden of proving their innocence onto the accused.

Other countries (notably Sweden and the USA) had already provided a model of how freedom of information legislation could work. New Zealand was affected by proposals and discussions relating to freedom of information in Britain, Australia and Canada. Some of the most important concerns were local, however. An important factor was the rise in the 1970s and early 1980s of the environmental movement including articulate lobbyists who were opposed to government programmes (known as "Think Big") for the large scale development of natural resources. There were a series of conflicts between citizens' groups and government departments responsible for large scale energy and forest projects in which refusal to supply information was a major issue.

A Freedom of Information Bill was introduced in 1977 by an opposition Labour MP, Richard Prebble, but it lapsed after the first reading. In 1978 the Government responded to the pressure for freedom of information by establishing a committee, known as the Danks Committee, "to contribute to the large aim of freedom of information by considering the extent to which official information [could] be made readily available to the public." The Committee was

chaired by the Chairman of the University Grants Committee, Sir Alan Danks, and included Professor Kenneth Keith of the Faculty of Law at Victoria University. Its other members were senior officers of government departments. One of its functions was to review the Official Secrets Act 1951.

In the two and a half years following the establishment of the Committee, pressure for freedom of information continued to grow. For example the opposition Labour party announced a complete freedom of information policy including a new Official Information Act in 1980. As a result the Committee felt able to go beyond its original terms of reference and produce a report more radical than that envisaged in 1978.

The report of the Danks Committee was entitled *Towards Open Government.* The reasons the report advanced for more open access to official information were summarised by Palmer (1987) as follows:

> a better informed public can better participate in the democratic process;
>
> secrecy is an important impediment to accountability when Parliament, press and public cannot properly follow and scrutinise the actions of government;
>
> public servants make many important decisions which affect people and the permanent administration should also be accountable through greater flows of information about what they are doing;
>
> better information flows will produce more effective government and help towards the more flexible development of policy. It is easier to prepare for change with more information available;
>
> public co-operation with the government will be enhanced by more information being available. (Palmer, 1987).

The Danks Committee provided a draft Bill which the National government immediately introduced into Parliament. At the time the government was under pressure from the opposition Labour party which was intending to make freedom of information an election issue in 1981. Introducing the Bill effectively "killed" the issue for the election. In describing the introduction of the Bill, Palmer (1987) notes:

> The proximity of elections and the policies of the Opposition are always important ingredients in the development of public policy in New Zealand.

After referral to a parliamentary select committee, the Official Information Act became law in 1982. The Act was widely supported although the Prime Minister of the day, Sir Robert Muldoon, reportedly regarded it as "a nine day wonder".

Purpose and Principles

The purpose of the Official Information Act 1982, as stated in Section 4, is:

> To increase progressively the availability of official information to the people of New Zealand in order:

to enable their more effective participation in the making and administration of laws and policies; and

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.

The Act reverses the principle of secrecy set out in the Official Secrets Act 1951, which it repeals. It creates a legal requirement that official information is to be made available to anyone who seeks it unless there is good reason to withhold it.

New Zealand has departed from comparable legislation overseas by making "information" not documents or records the subject of access. The decision not to define the word "information" considerably broadens the scope of the Act. According to the Danks Committee: "for the purposes of [the Act] information includes not merely recorded data but knowledge of a fact or state of affairs by officers of the agency in their official capacity".

One of the advantages of not restricting a freedom of information regime to documents or records is that there is less incentive to attempt to evade the regime by not recording information in some form. However, the effective operation of Government business requires records to be kept. In practice information released under the Act is in the form of written records. As an Ombudsman has noted "all memories are fallible and an investigation [of failure to release information] on that basis poses problems".

The New Zealand Act, in common with comparable legislation in other countries, recognises that there are reasons why some information cannot be made available to everyone. Reasons for withholding information are established in the Act itself. What is unique about New Zealand is that the reasons for withholding information do not give rise to rules defining classes of documents that may not or need not be released. No class of document or information is automatically protected from release. Rather, the approach of the Act is to define and delimit those public interests that do or may override the principle that information is to be available. In most cases a balancing process is required.

Some reasons are conclusive, however. For example information may be withheld if its release would be likely to prejudice the defence and security of New Zealand, and the maintenance of law, including the prevention of, investigation and detection of offences. Others are contingent. They justify the withholding of information unless other circumstances render it desirable in the public interest to make it available.

The protected interests relating to constitutional conventions and advice are of particular relevance to the relationship between public servants and Ministers. Subject to countervailing public interest considerations, information may be withheld if it is necessary to:

Maintain the constitutional conventions for the time being which protect:

- the confidentiality of communications by or with the Sovereign or her representative;

- collective and individual Ministerial responsibility;
- the political neutrality of officials;
- the confidentiality of advice tendered by Ministers of the Crown or officials; or

Maintain the effective conduct of affairs through:

- the free and frank expression of opinions by or between or to Ministers of the Crown or officers and employees of any Department or organisation in the course of their duty; or
- the protection of Ministers, officers and employees from improper pressure or harassment.

The Danks Committee considered carefully the rationale for requiring decisions about access to be made on the basis of broad criteria rather than rules relating to particular classes of documents. The Committee took the view that the nature of information and the expectations of society were constantly shifting, and that any new legislation needed to be sufficiently flexible to accommodate changes in both areas. According to the Danks report:

> Judgements cannot, in our view, be properly and satisfactorily made all at one time by legislation. We were faced early in our work with the choice of trying to design a once and for all static framework, with a complex set of exceptions, or a more flexible mechanism, operating by reference to principles and competing criteria that reflect a continuing shift away from the presumption of secrecy. We opted for a flexible process.

One of the drawbacks of providing for wide exceptions to the release of information is that this rules out the possibility of opening up certain areas of government activity to public scrutiny in the future. According to Sir Kenneth Keith (1984):

> [T]he committee became more and more aware of the great difficulties in reaching final and acceptable views in respect of difficult areas of information, particularly those relating to economic development and the environment. Final views were possible in such areas but they would probably have been in terms of wide exceptions which would have excluded from public view much commercial information and much of the advisory process. The committee did not want to write hard edged exceptions which would close up the areas that were under most substantial pressure. It also had considerable doubt about the viability of general answers which were supposed to apply across the whole face of government, and which were to apply into the future. In a sense, therefore, it considered that continuation and development of the committee process were called for. Those processes would be informed by principle.

Decisions to Withhold Information - The Role of Public Servants

The decision to draft the Act in a way that did not give the public general rights of access but required enabling criteria to be applied flexibly had the potential to "create a bureaucratic monster fed by the unreasonable antics of those seeking information and those seeking to deny it". (Danks, 1992). Shortly after the introduction of the Act a *National Business Review* journalist, Warren Berryman, described it as "a political hucksters trick - the same rotten deal

[as the Official Secrets Act] in a bigger, brighter, more publicly acceptable package".

Since the Official Information Act requires flexible interpretation by public servants, it potentially gives them considerable power in deciding what information to withhold. The State Services Commission (SSC) carried out an intensive training programme for public servants at the time the Act was introduced to make them aware of their obligations and responsibilities, and this undoubtedly contributed to the Act's smooth implementation. Since the introduction of the State Sector Act 1988, which devolved wider powers to departmental chief executives, individual departments have been responsible for training their own staff about the requirements of the Act.

From time to time the SSC has issued guidance to public servants about processes for the release of information under the Act. For example it stated in guidance notes in 1995 that the reasons given for withholding information under the Act are comprehensive and that "reasons, and constitutional conventions, may not be unearthed from elsewhere". Thus it is not a valid reason for withholding information that its release:

- would be inconvenient to the Minister (or the department);
- might show the department in a bad light;
- might embarrass the Minister politically;
- is no business of the requester;
- might be misunderstood by the requester, or by the media, (in which case the wisest course may be to provide an explanation or material that will set the information in its proper context). (State Services Commission, 1995).

The exceptions provide grounds on which information *may* be withheld. They do not themselves prevent the release of any information. Therefore, a Minister, or a public servant acting with authority, may decide to release any information even though there are grounds under the Act to withhold it. The policies of individual Ministers and government departments vary in this respect, and some are adopting a more pro-active approach than others to the release of information.

The Act requires reasonable assistance to be given to those seeking information to enable them to make a request in the correct manner. One of the potential difficulties with freedom of information legislation is that people do not know what they do not know. In other words to ask a sensible question it is sometimes necessary to know the answers to related questions. The Act does not allow public servants to obfuscate by ignoring requestors who are incapable of correctly framing their query through lack of background knowledge.

Where a request is refused, the department or Minister must give the requester grounds supporting the reason for refusal and inform the requester of his or her right to make a claim to the Ombudsman.

The Role of the Office of the Ombudsman

Complaints about the release of information are handled by the Ombudsman. The office of the Ombudsman provides the main safeguard against the unreasonable withholding of information. The Ombudsman has no power of decision but power to make recommendations in cases where he or she considers the request should not have been refused. A decision to override the Ombudsman's recommendation needs to be made by an Order in Council and therefore be a

collective decision of Cabinet.

The collective veto was introduced in 1987 in place of the previous system of veto by individual Ministers, which had been one of the most controversial aspects of the legislation. The rationale was that a collective veto would be "a much more solemn and deliberate process than one Minister, in privacy of his or her own office, deciding whether a veto ought to be applied." (Palmer, 1987). In the years since 1987 the collective veto has never been used.[7]

The Danks Committee considered making the courts the final arbiter of decisions about the release of information but rejected this for the following reasons:

> We believe that in the New Zealand context there are convincing reasons not to give the courts ultimate authority in such a matter. The system we favour involves the weighing of broad considerations and the balancing of competing public interests against one another, and against individual interests. If the general power to determine finally whether there should be access to official information was given to the courts, they would have to rule on matters with strong policy and political implications.

The 1996 *Annual Report* of the Ombudsmen indicates that 1,165 complaints under the Official Information Act were reviewed in 1995/6 (compared with 1,093 in 1994/5 and 1,168 in 1993/4). This number is a substantial increase on that a decade ago (343 complaints were made in 1985/6 and 354 in 1984/5). Complaints were lodged by:

Individuals 42%

Media 13%

Special Interest Groups 11%

Parliamentarians 15%

Companies and Associations 10%

Researchers 1%

Government Departments/ Local Authorities 1%

Trade Unions 3%

Sentenced Inmates 4%

In the early days complaints about delays in releasing information formed the majority of the Ombudsmen's' caseload, but in recent years refusals of requests have been the primary reason for complaints. In 1984, the retiring Ombudsman, Sir George Laking noted that there "have been instances of an over-protective attitude towards the release of information by some agencies"[8] As Palmer has noted "in the end, under the sort of legislation we have, the attitudes

of those working in Government are the critical variable on how the Act works." (Palmer, 1987). It should be added that, given the pivotal role of the Ombudsmen in the New Zealand system, the general approach and reputation for fairness of individual Ombudsmen have helped to create public confidence in the Act and been critical to the Act's successful implementation.

Open Government in Practice

The Danks report indicates that two of its major areas of concern were policy advice and commercial matters, including the commercial activities of the State. These issues both came together in the context of the "Think Big" energy and forest projects. It is accordingly interesting to examine the effect of the Official Information Act on these two areas of activity.

Policy Advice

One of the aims of the Official Information Act was to promote the accountability of Ministers and officials. The justification used was that "as Minsters are accountable for their decisions, so should officials be obliged to reveal their part in and share the consequences of these decisions". (Danks report, 1980).

The Danks Committee recognised clearly, however, that requiring policy advice always to be disclosed could run counter to the interests of effective government:

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

The Committee argued that unless some protection was given to policy advice, there could be implications for the effectiveness of the public service:

> The requirement of openness could be evaded, for example, by preparing and giving advice orally, or by maintaining parallel private filing systems; the record of how decisions were arrived at would be incomplete or inaccessible; public confidence would suffer, and if the relative roles and responsibilities of Ministers and officials became the subject of public debate, mutual recriminations could all too often develop. The desire to avoid this sort of situation could incline governments to look for politically acceptable or compliant people at senior levels in the public service; such a service is not likely to be able to recruit and retain staff of ability and integrity.

The Danks Committee considered that "these dangers are not such as to deter us from supporting greater openness." However, "they should be taken carefully into account in mapping out the critical path for change".

Since no categories of information (for example Cabinet documents) are specifically excluded from the Official Information Act, there is potentially wider access to policy advice than in

countries where specific categories of information are protected. The Danks report sets out the rationale for the New Zealand provisions:

> All overseas "right of access" legislation includes exemptions which cover the advisory function. In New Zealand, however, there is a general movement towards more public discussion of options and advice; some at least of the advisory process can be undertaken in public. If the final line were to be drawn now in respect of the whole range of government activities, on the basis of overseas precedent it would probably exclude most of the advisory process.

There is no doubt that there is some tension between New Zealand's system of open government and the principles of the Westminster system. It has been argued that the efficient control of executive power under the Westminster system requires that there are no perceived differences in opinions between public servants and their Minister, and between the decisions of individual Ministers and the collective decisions of Cabinet. Instead "each level is...absolutely dependent upon the other; the higher accounts for and accepts unconditional responsibility for the lower". (Roberts, 1987). Sir Kenneth Keith (1984) draws attention to the conflict in principles between the Westminster system and open government.

> How do you reconcile these principles and conventions [of collective and individual Ministerial responsibility] with the new principle that information ought to be made available unless there are good reasons to the contrary? How do you reconcile the principle of a neutral public service with the need for openness?

The Danks Committee noted that, as a result of greater openness, changes clarifying the roles of Ministers and public servants would probably be necessary in the future:

> A new and sharper definition of areas of responsibility at senior levels, and the development of new and perhaps more explicit codes governing the relationship between Ministers and officials might be required.

By promoting greater accountability of public servants as well as Ministers, the Official Information Act foreshadowed the statutory changes to the accountabilities of Ministers and chief executives set out in the State Sector Act 1988 and Public Finance Act 1989. At the time of the introduction of the State Sector Act there was considerable debate about the constitutional implications of separating out the responsibilities of Ministers and chief executives. However, concerns that this would lead to the widescale politicisation of the public service have proved largely unfounded.

Nevertheless there continues to be debate about the effects of open government on the conduct of the government's business and the relationships between Ministers and public servants. According to Martin (1991) the "virtually uninhibited release into the public domain of exchanges between Ministers and their advisers brings the latter...clearly into the public arena". Martin considers that the implications are profound:

> At the heart of the matter is the extent to which the public revelation of divisions among departments, between Ministers and their advisers, or indeed among Ministers themselves can go before it is necessary to acknowledge that our system of government has fundamentally changed..."Open government" may at some point be seen to impose such strains on the relationship between Ministers and

officials that ...the convention of neutrality can no longer be maintained.

Against this it can be argued that the provision in the Official Information Act for information relating to the free and frank exchange of opinion between Ministers and officials to be withheld, subject to overriding public interest considerations, does provide some protection for the advisory process. Although open government may have caused strains in terms of the constitutional roles of Ministers and their advisers, there is no evidence that it has caused strains in working relationships or compromised the effectiveness of Government. Despite the acknowledgment of their separate statutory role, public servants are still bound by a code of conduct which emphasises that "in broad terms the first priority for public servants is to carry out government policy".

Overall there does not appear to have been any significant chilling in personal relationships between Ministers and public servants as a result of the recent changes. While there have been isolated cases where Ministers and chief executives have been unable to work together satisfactorily, there is no evidence that these are as a result of the system of open government. Many Ministers and chief executives appear to appreciate the clearer specification of their responsibilities and accountabilities contained in legislation.

A large number of briefing papers to Ministers are now published. These include, for example, most of the briefing papers from departments to an incoming government. It is not unusual for Ministers to introduce policies which ignore or run counter to the advice of their officials.[9] Where this happens there is often comment in the media that Ministers have not adopted the advice of their officials. Ministers may be called upon to justify their policies, which they usually do by reference to the democratic process and the need to take into account the wishes of their electors. The situation does not appear to be particularly embarrassing to either the Ministers or the departments involved. Indeed it could be argued that one of the consequences of the Official Information Act is that it has helped to reduce the politicisation of the public service by making it more obvious if advice is partisan.

The moves away from secrecy appear to have been welcomed by public servants. Before the introduction of the Official Information Act there was "a tendency...for official information to fall mysteriously off the back of trucks". (Gregory, 1984). In recent years there has been a significant shift in the culture of the public service from secrecy to openness. One of the direct consequences is likely to have been a reduction in the instances of "whistleblowing" or leaks of information.[10]

Government departments now appear more willing to make information available pro-actively, in some cases as a deliberate strategy to improve the basis on which the public can make decisions. For example, the Education Review Office decided a few years ago to publish all its reports on schools and make them widely available to all interested parties.

Commercial Issues

Commercial information, whether held by public sector commercial enterprises about themselves or by public agencies about private or public sector enterprises, is not automatically outside the bounds of the Official Information Act. The Act enables commercially sensitive information to be withheld, but only subject to the same public

interest considerations as other government information. The Act's jurisdiction applies to all

the commercial operations of government, including government departments and State Owned Enterprises (SOEs).

Some SOEs have argued that this places them at a competitive disadvantage in relation to comparable businesses not owned by the Crown. However, a parliamentary select committee, which reviewed the effect of the Ombudsmen and Official Information Act on the operation of State enterprises in 1990, took the view that:

> [These Acts] provide a measure of accountability for the public, particularly on matters that affect individuals and which the other SOE accountability processes do not address, and to remove the jurisdiction of the two Acts would result in a significant loss in the Government's oversight of the SOEs.

The select committee argued that although the State Owned Enterprises Act 1986 gave State enterprises the principal objective of being "as profitable and efficient as comparable businesses that are now owned by the Crown", it also imposed on them the obligation to be a good employer and to exhibit a sense of social responsibility. SOEs were still owned by the public and the committee considered that the "hybrid" nature of their functions as well as their role in the community justified their inclusion in the Official Information Act.

The committee noted that there was a tendency simply to assert that issues were commercially sensitive, when under the Official Information Act it was necessary to make a careful justification for withholding information in the particular context of a request.

> Submissions to the committee...show that some SOEs may not always apply realistic tests in their assessment of what is commercially sensitive information, or take a considered approach that recognises the purpose of the OIA. The Ombudsmen stated in their submission that to their knowledge "to date no case has arisen where the release after review by an Ombudsman of information which a State enterprise deemed to be commercially sensitive has in fact been shown to have affected adversely the business operations of that organisation".

The New Zealand experience suggests therefore that commercial information, like policy advice, does not need to be automatically excluded from freedom of information provisions. Instead it is possible to use an approach which allows for the weighting of relevant matters in each specific context.

The News Media and Opposition Parties

Changes in the last few decades towards open government have had a profound influence on the activities of the news media and opposition parties, both of which have a role to play in opening the activities of the executive to public scrutiny.

If open government is to achieve its aim of promoting wider participation in decision making, information needs to be made available and interpreted to the general public or special interest groups in a form that enables them to express an opinion or take a particular course of action. This places a considerable onus on the media to discover information and to use it objectively in a way that will throw some light on the processes of government.

A key concern for the media is speed of access to official information. When the Official

Information Act was introduced in 1982, decisions on requests had to be made "as soon as reasonably practicable". It became evident that this was leading to delays, and an amendment passed in 1987 required decisions to be made within twenty working days of the request. However there is provision to extend the time limits in some circumstances. The media frequently comment on the difficulties of obtaining information on key decisions within a reasonable time limit.

Doubts have been expressed about whether New Zealand has a sufficiently large pool of journalists with the expertise necessary to carry out investigations and inform the public about the implications of government decisions.[11] The *Annual Report* of the Ombudsmen for 1996 reports favourably, however, on a growing recognition of the Official Information Act by the print media:

> Newspaper reports regularly refer to information having been obtained under the Act. We consider this is an encouraging sign because the media thereby show that the Act does work to get access to official information. This helps the public to understand the key purposes of the Act and how it can be used effectively.

The introduction of open government has changed the nature of the political process. As a result of the Official Information Act, opposition parties in Parliament have had access to more detailed information about the decisions and activities of Ministers and their departments. In their task of opposing the government of the day these parties have had to rely less on a "scatter gun" approach and have been able to obtain and make public the details of controversial government policy decisions more easily. Arguably, more ready access to information has enabled opposition parties to perform more effectively.

Not surprisingly opposition parties as well as the news media have been particularly active in requesting information under the Official Information Act in the period leading up to general elections. Concerns have been expressed that some public servants are unclear about the correct manner in which to handle information requests during these periods. According to the 1991 *Annual Report* of the Ombudsmen, "officials appeared not to appreciate the significance of the need for speedy decisions and the extreme importance of a well informed electorate at the time of a General Election".

In response to these concerns, in 1993 the State Services Commissioner published guidelines for the release of official information prior to a general election. These emphasised that the purposes and basic principles underlying the Act should govern the actions of departments at all times:

> The requirements of the Official Information Act do not alter in any fundamental way simply because a general election is pending. Rather there is a need for a heightened awareness of the purposes of the Official Information Act and the way in which certain requirements under the Official Information Act should be applied at this time. Public servants must be aware that they will be judged as much by perceptions of their actions as by their actual conduct. A general election places a particular demand on the Public Service to maintain its political neutrality whilst continuing to serve loyally the government of the day.

The Effectiveness of Government

The purpose of the Official Information Act, as already discussed, was "to increase progressively the availability of official information...in order to...**promote the good government of New Zealand**" (emphasis added). The Act therefore equates open government with good government.

It is difficult to state conclusively whether the processes of government have been more effective over the last decade and a half as a direct result of being more open. The effectiveness of government is not easy to measure. The Official Information Act was only one in a series of changes designed to create greater transparency and accountability. It reflected part of a general culture change occurring at many levels in New Zealand society away from secrecy towards greater openness. In view of the pressure for freedom of information which had been increasing over a number of years, the Official Information Act can be seen as an idea whose time had come.

The culture of greater openness is now firmly entrenched within the public service. While the system of open government can at times prove cumbersome, there are no calls for the processes of government to become more secret.

One aspect of some of the overseas debates on freedom of information appears to be that openness will somehow hinder the efficiency and effectiveness of government. This argument has not featured strongly in New Zealand. Rather the question has been how openness can contribute to greater effectiveness.

The effectiveness of government is a much wider issue than whether the processes run smoothly and make life easy for Ministers and public servants. The objectives of the Official Information Act, as described on page 4-5, were to enhance the democratic process through "encouraging participation in public affairs and ensuring the accountability of those in office". (Danks report, 1980). One of the measures that can be used to assess government effectiveness is how far these twin objectives of accountability and participation have been met.

It is reasonable to conclude that the Official Information Act has enhanced accountability, and thus contributed to the effectiveness of government, through making the actions of Ministers and public servants more transparent.

Openness is likely to have improved the quality of advice. Public servants are always aware that the advice they provide may be released under the Official Information Act and be scrutinised by a range of interested - and potentially critical - parties. Although the effect is less certain, openness may also have improved the quality of decision making. As already noted, if Ministers make decisions that are contrary to the advice of their departments they are more likely to be called upon to justify them publicly. This increases the likelihood that they will think carefully about the implications of their decisions.

The Chief Ombudsman, Sir Guy Powles (1976), in a report on the Security Intelligence Service,[12] argued that excessive secrecy was not only undemocratic, it was also inefficient:

> There is nothing like having to justify one's opinions and emotional reactions to other people to ensure that one thinks these through as fully as possible.

Openness has the potential to expose any abuse of powers by government and cause pressure for it to be curbed. In a recent international survey of official corruption, based on the subjective evaluations of business people, New Zealand was perceived to be less corrupt than any other nation.[13] While there may be other factors at work here, the transparency of government processes and decisions is likely to be an important influence.

Although open government can be seen to have improved accountability, it is much less clear that it has improved participation. What is needed if open government is to fulfil its participatory purpose is not just greater availability of official information but also more diversity in the type of information and in the interpretations that are placed upon it. According to Gregory (1984):

> [O]fficial information legislation may in one sense prove to be anti-democratic if it simply amplifies the voices of those who can understand and use specialised technical information while in effect - if not in intent - muffling further the voices of those who cannot.

At the time of the Official Information Act's introduction, it was emphasised that wider access to information was a two way process.[14] There was an expectation that the effectiveness of government would be enhanced through enabling it to obtain public understanding and support that would assist it in carrying out its policies. It is not clear that this expectation has been met. In the years since the Act's introduction, successive governments have carried out widescale economic and social reforms which have had a profound effect on all New Zealanders. While many would argue that the scale and speed of the reforms were necessary, it would be stretching a point to say that they received widespread public support.

Open Government and the Future

As New Zealanders become used to open government, they expect more of it. The Official Information Act's flexibility, and its intention to make information progressively more available, allow government to become more open as technology improves. The growing powers of electronic information are presenting new challenges and opportunities for the New Zealand government as it confronts the issue of how to meet the objectives of accountability and participation.

The government holds a huge data base of information, which potentially could be made available to the public through networks such as the Internet. The costs of making information available electronically are in most cases significantly less than the costs of printing. Most government departments have now established home pages on the World Wide Web, and some departments are making large volumes of information available this way as a matter of course.

There is scope for the public to have much wider access to government information than in the past. However, there are issues to do with what information can and cannot be shared and the terms on which information should be made available which need to be resolved.

One important issue that improvements in technology have highlighted is the balance between the public interest and an individual's right to privacy. The precise relationship between the Official Information Act 1982 and the Privacy Act 1993 has not been defined. The Privacy Act underlines and enhances the importance of personal privacy as a public interest that may justify

withholding official information. However there may be instances where the accountability requirements of the Official Information Act will override the right to privacy. This is an area that is likely to continue to be debated vigorously.

The *Policy Framework for Government Held Information* (August 1996) contains a set of principles to inform decisions about the release of information. This document suggests among other things that all government departments should make publicly accessible information available pro-actively through the Internet rather than waiting for it to be requested under the Official Information Act. It is expected that there will be costs in making such information available but that Official Information Act requests will be reduced with corresponding savings in processing time.

Improved access to information, however, will not in itself enhance participation in decision making. Not everyone has ready access to technology, but all citizens have a right to contribute to decisions which affect them.

One of the factors that may determine how far the objective of improving participation can be met is the ability of the news media to respond to the changing role required of them. With wider availability of information, it will no longer be sufficient for the media to concentrate solely on reporting events, since people will be able to obtain information on topics they are interested in through sources such as the Internet. The role of the media will need to switch to investigation and interpretation to create "news". It remains to be seen, but there is a potential for this process to improve the capacity of the public to question and contribute to government decisions.

Conclusions

Over the last few decades there have been a series of changes in New Zealand designed to shift the balance of relationships between the government and citizens. The Official Information Act is one of the most important but by no means the only significant change. In parallel with these changes there has been a profound culture change in the government and the public service away from a climate of secrecy towards greater openness.

One of the aims of the changes was to make public servants and Ministers more accountable for their respective spheres of responsibility. In this respect the provisions of the State Sector Act, the Public Finance Act and the Fiscal Responsibility Act reinforced and gave legislative effect to the objectives of the Official Information Act. The constitutional implications have been significant, and there is no doubt that in the process of specifying responsibilities the New Zealand system of government has moved away from its origins in the British Westminster system.

Whether this has contributed to the effectiveness of government is an issue on which there can be no clear cut opinion. Each country has its own measure of government effectiveness, as well as its own traditions and conventions which it holds important. New Zealand has always given great weight to the democratic principles of accountability and participation. Against these measures the success so far of the system of open government has been partial. Most would concur that the system has achieved greater accountability through making the processes of decision making more transparent. The extent to which it has improved participation is less

clear. The steps that have been taken so far towards open government are the beginning of an ongoing process.

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