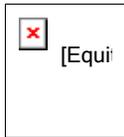


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## Information Equity

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# The New Zealand Model - The Official Information Act 1982

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**Chief Ombudsman OF New Zealand**

*'The history of liberty has largely been the history of the observance of procedural safeguards'*. Felix Frankfurter, American Jurist

The 'right to know' is one of the procedural safeguards fundamental to the structure of a society which seeks to be both liberal and democratic.

The New Zealand Official Information Act (the 'Act'), an early model of freedom of information legislation, has withstood use over 17 years and today functions remarkably well, notwithstanding the tensions inherent in any such legislation between accessibility to official information and the justification for withholding it.

In appearance and substance the Act furthers the right to know in a manner which so far as I know is unmatched.

The Act was reviewed by the New Zealand Law Commission in 1997 in a detailed and thorough assessment of its place in a democratic society, its practical operation and the need for any amendments to improve its relevance and effectiveness.[\[1\]](#)

The Commission concluded that its review did not '*bring into question the underlying principles of the Act*'.[\[2\]](#)

This paper will focus upon some of the relevant purposes and principles which underpin the

Act, rather than upon the mechanics of its operation.

## Historical Setting

Throughout most of this century public expectation of the role of government was markedly different to contemporary thinking, particularly during the past two decades. Trends identifying the pressure for change in how governments functioned and what were the appropriate functions of government started to gain worldwide momentum in the early 1980's.

In fact New Zealand commenced its journey somewhat earlier by adopting the Scandinavian Ombudsman concept in 1965, the first Country outside the Nordic countries to do so. New Zealand's basic purpose for so doing was to enhance the accountability of the government for its administrative conduct especially when New Zealand had neither a written constitution nor an Upper House. In reality with a first past the post political system the executive reigned supreme, supported by an Official Secrets Act.

Acknowledging the need for government to be made more accountable for its administrative conduct, inevitably increased the pressure to open the processes of government to greater public scrutiny.

*'The case for more openness in government is compelling. It rests on the democratic principles of encouraging participation in public affairs and ensuring the accountability of those in office; it also derives from concern for the interests of individuals'.<sup>[3]</sup>*

In 1980 attempts to introduce freedom of information legislation were under consideration in Canada, Australia, the United States and Great Britain. Although New Zealand operated within the so-called 'Westminster' system of government it had developed institutions and procedures which were particularly relevant to its own circumstances. What others were considering doing would not necessarily be appropriate for New Zealand. Our Parliament, with some courage, set out on a course of its own to bring about a 'sea change' to the manner in which future governments were to operate.

From my contemporary position I can but admire the intellectual and political courage of those who at the time recognised that changes to the manner in which governments functioned were justified. They identified the correct principles on which that change should be structured and which were needed to underpin an appropriate legislative base. Based upon the work of a high powered committee, known as the Danks Committee, the necessary legislation passed into law in 1982.

## The Official Information Act 1982

With the passing into law of the Act, the New Zealand Government left behind an environment of secrecy to support its operation and moved to an environment of openness in which citizens were given the right to request access to official information. The Official Secrets Act, based on the British Statute of 1911 was repealed. Gone was the statutory base for assuming that official information was the property of the New Zealand Government and should not be disclosed except after specific authorisation, reinforced by criminal

sanctions for *'wrongful communication'*.

## **An Act of Constitutional Significance**

It is in the nature of things that the State is under the law and from the law can be drawn the ingredients of an operating, if unwritten, constitution to guide the conduct of State institutions. It was not long before the legislation came before the Courts for consideration. The Court of Appeal unhesitatingly acknowledged the Act as of constitutional significance:

*'The permeating importance of the Act is such that it is entitled to be ranked as a constitutional measure'*.

*Commissioner of Police v Ombudsman* [1988] 1NZLR 385 at page 391, Cooke P.

Then in the High Court it was said:

*'The Official Information Act was passed in 1982 following an exhaustive investigation into the subject in New Zealand, which also reflected the same movements elsewhere in the world. Governments of different political philosophies have endorsed the principles of freedom of information so as to express support for the concept that knowledge and information about the conduct of public affairs, and the application of public money, in a democratically governed country are essential to its rights to be so described. The Courts must zealously support those quite sweeping legislative intentions'*.

*Wyatt v Queenstown Lakes District Council* [1991] 2NZLR 180 at page 190, Jeffries J.

An understanding of what lay behind those acknowledgments can be gained from a consideration of the wording of s.4.

*'4. Purposes-*

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

*(a) To increase progressively the availability of official information to the people of New Zealand in order;*

*(i) To enable their more effective participation in the making and administration of laws and policies; and*

*(ii) To promote the accountability of Ministers of the Crown and officials;-*

*and thereby to enhance respect for the law and to promote the good government of New Zealand:*

*(b) To provide for proper access by each person to official information relating to that person:*

*(c) To protect official information to the extent consistent with the public interest and the*

*preservation of personal privacy.*'

Section 4 is identified as the purposes section. The expression of the purposes is both clear and succinct. In statutory form New Zealand expresses itself to be an open parliamentary democracy in which citizens progressively should gain access to more official information in order that they might better participate in the making and administration of laws and policies and in order to hold ministers and officials accountable. The sequencing of the purposes, participation first and accountability second is significant. Inherent in that sequencing is an acknowledgement that in order to enable citizen participation in the process of government by their representatives, for their benefit, and hold the system accountable, access to information about what the system has done or is proposing to do is fundamental.

In that light it is perhaps surprising I need comment that until quite recently, the Act was mainly used to reinforce the purpose of accountability rather than of participation. Recent evidence suggests however that the main focus is slowly changing, towards recognising the benefit which follows from influencing the formulation of laws and policies. In other words if laws and policies are better formulated from the beginning there will be less need to hold accountable those who administer the laws and policies.

## What is Official Information?

What constitutes official information is comprehensively defined in s.2 of the Act. Basically official information means any information held by Ministers in their official capacity, Departments and organisations. Significantly the definition does not require that the information be held in any particular manner, thereby bringing within the definition information held in the minds of those subject to the Act. Information is information, however held. Again, significantly, the New Zealand definition of 'official information' does not refer to documents, nor is there a class exemption for any particular information or document. Information held by Ministers in their official capacity is official information thereby bringing within the provisions of the Act information held by the Cabinet.

Any '*official information*' held by those subject to the Act is therefore open to request. The wide definition of what constitutes '*official information*' has ensured that the principle of open government has become a central feature of New Zealand's public administration and has had a profound effect upon the quality of the information and documents generated by public officials.<sup>[4]</sup>

## Principle of availability

When set against the former environment of official secrecy, the Act identified the guiding principle for its application.

Section 5 states:

*'The question of whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise*

*expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it'.*

The effect of that section, as with s.4 has been the subject of judicial comment. In *Television New Zealand v Ombudsmen* 1992 1NZLR106, Heron J at page 118 says:

*'Dominating the Official Information Act is its purposes and principles as set out in s.4 and s.5 There is no question of establishing a need for information. Information by its very nature needs to be available if the purposes of the Act are to be achieved. That the onus is cast on the holder to show good reason why it should be withheld, runs contrary to any question as to its ultimate relevance or utility.'*

In *Commissioner of Police v Ombudsman*[1988] 1NZLR 385, Cooke P at page 391 says:

*'If the decision-maker, ... is in two minds in the end, he should come down on the side of availability of information. I say this ...because the Act itself provides guidance in the last limb of s.5'.*

## **Reasons for withholding information**

Section 4 of the Act, identified the purpose for making official information available whilst recognising a need to protect such information to the extent consistent with the public interest and the preservation of personal privacy. Information can be withheld provided there is a 'good reason' for so doing. Good reasons for withholding information are set out in the Act. Leaving aside the administrative reasons identified in s.18 of the Act allowing for the withholding of information, ss.6 and 9 identify the main reasons recognised for withholding information. The reasons are expressed to be conclusive or qualified. The conclusive reasons relate to such matters as prejudice to the Government's international relationships or the maintenance of the law and, as such, are deemed in the public interest to provide good reason to withhold information. Only a limited range of information is withheld pursuant to that provision.

The qualified reasons for withholding information require that a particular prejudice be established as being so likely to result from the release of particular information that it is necessary to withhold it. Where such prejudice can be demonstrated, good reason for withholding information is said to exist unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable in the public interest to make that information available. Most information is withheld at least initially because of the necessity of avoiding one or more of the prejudices identified in s.9. The more difficult, sometimes agonising task is to determine whether the public interest in the release of the particular information outweighs the prejudice which has been identified, should the information be released. It is rare indeed for the holder of information once having established a prejudice under s.9 to then proceed to acknowledge that the reason for withholding is outweighed by the public interest. The task for determining the public interest and the weight to be accorded to it, inevitably falls to the review authority, in New Zealand, the Ombudsmen appointed under the Ombudsmen Act 1975.

What guides the holder of the information and the Ombudsmen on review in determining the public interest in disclosure and the weight to be accorded to it?

Fortunately the Act itself provides a significant measure of guidance through the purposes section, s.4, in particular the reference to public participation in the formulation of laws and policies and the accountability of ministers and officials, to enhance respect for the law and the good governance of the Country. If release of the information would further those purposes then the public interest in release may outweigh the identified prejudice from release.

The High Court has also given some guidance:

(a) In *TV3 Network Services v BSA* 2NZLR 720, Eichelbaum CJ at page 733 says:

*'...it is necessary to draw attention to the distinction between matters properly within the public interest, in the sense of being of legitimate concern to the public and those which are merely interesting to the public on a human level - between what is interesting to the public and what it is in the public interest to be made known'.*

## The Review Mechanism

The principle of open government is reinforced by an explicit statutory process:

- (a) for requesting official information;
- (b) the manner in which the request is to be processed and a decision on it reached;
- (c) and for reviewing any decision made where the requestor is dissatisfied with the decision of the holder.

Of particular importance, given the tension between accessibility of official information and the justifiable withholding of it, was the need to establish a mechanism for resolving disputes. Where would the final responsibility lie to determine whether to release or withhold information?

Some countries have adopted a role for the Courts as the ultimate review authority. The decision made in the New Zealand context, was not to vest that authority in the Courts. In the Supplementary Report from the Committee on Official Information in 1981, it was written:

*'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 were given to the Courts, they would have to rule on matters with strong political and policy implications. This is not a normal or traditional function of the Courts in New Zealand, and the judges themselves have shown a reluctance to embrace it'.<sup>[5]</sup>*

Whilst the Courts would not have a role in the review process, the Act originally provided that the Executive would have the final power, after having received a recommendation

from the Ombudsmen, to resolve disputes about access to information. The rationale was that the Ombudsmen were not accountable to the people through an electoral system. Originally, the individual Minister involved had a right of veto against the recommendation of an Ombudsman. Ultimately that was changed to give a right of veto to the Executive Council collectively. Whilst a few vetoes were exercised by individual Ministers in the early days of the Act, since the Act was amended in 1987, changing the location of the veto, the veto has not been exercised against any recommendation of the Ombudsmen.

Currently, a statutory duty to comply arises 21 days after an Ombudsman's recommendation is made pursuant to the provisions of the Official Information Act.

Over the years a climate of compliance with Ombudsman's recommendations has developed in New Zealand. During my term of office I have known of only 3 situations where a recommendation has not been complied with. In order to avoid the need for an Ombudsman to be seen to be enforcing his/her own recommendation it has been accepted that the Attorney-General, in the public interest, will institute proceedings in the High Court to enforce compliance with the statutory duty to comply with an Ombudsman's recommendation. Experience has shown that once the Attorney-General takes proceedings, the organisation against whom the Ombudsman's recommendation is directed, complies. There have been no recent examples of failure to comply with an Ombudsman's recommendation.

There was debate at the time about the suitability of the Ombudsmen to act as the review authority, largely because of a fear that the Classical Ombudsman role, that of making recommendations rather than determinative and binding orders, may be compromised. Those fears were allayed by utilising the Ombudsman's traditional inquisitorial investigative processes resulting not in a formal determination, but in a recommendation which gave rise to a statutory duty to comply. Enforcement through the Attorney-General of the statutory duty to comply therefore ensured that the Ombudsman's role remained investigative and recommendatory and did not force the Ombudsman into a dispositive process where in some measure the incumbent could be seen as a Court by another name.

My own assessment is that the balance between availability and withholding of official information relating to matters which have significant political and public interest overlays has worked particularly successfully using the Ombudsmen as the review authority. From every point of view the process has been made non-adversarial, cost efficient and reasonably timely. Last financial year the more than 1,000 reviews under the Act completed by the Ombudsmen were achieved in the following time frame: 80% within 6 months and 97% within 12 months of receipt.

## **State Owned Enterprises**

State Owned Enterprises are subject to the provisions of the Official Information Act.

When the State Owned Enterprises Bill was introduced in 1986 including coverage for SOE's by the Ombudsmen Act and the Official Information Act, there was a proviso that such coverage be reviewed by 31 March 1990. SOE's argued that they did not believe that either Act should apply to the new bodies. A Committee of Parliament therefore reviewed the application of the two Acts and concluded that both Acts provided a measure of

accountability for the public, particularly on matters that affect individuals and which other accountability processes did not address. The Committee concluded that *'to remove the jurisdiction of the two Acts would result in a significant loss in public confidence in the Government's oversight of the SOE's'*.<sup>[6]</sup>

No changes were made in the application of the two Acts to SOE's and that remains the position.

## The Situation Today

The manner in which the New Zealand Government goes about its business has changed dramatically since the mid-1980's. The Official Information Act in 1982 set New Zealand on a course to open its Government processes. Whilst the Act initially stood alone as a statutory mechanism to achieve that purpose, *'...the Act now operates in a wider context of statutory and administrative provisions which have further enhanced the principle of openness'*.<sup>[7]</sup> It is realistic to conclude that New Zealand has now achieved across the total public sector as open a process of governance as any yet devised, which has established a right to request access to official information whilst preserving the capacity for a government to operate effectively. The right balance between apparently irreconcilable objectives, openness and secrecy has been found, and shown to work.

The Act now joins the Public Finance Act 1989, the Fiscal Responsibility Act 1994 and the Privacy Act 1995, pursuant to which significant information about public administration and the economy is placed into the public domain without the need to resort to the Official Information Act. In addition, of its own accord, the State Services Commission in 1997, finalised a policy framework for the management of Government-held information in the collective interest of the Government and the public.<sup>[8]</sup> That administrative decision of the State Services Commission was accepted by Cabinet.

## Local Government

Central government imposed on itself first the obligation to operate an open regime with rights given to citizens to request access to official information. Complementary provisions were made applicable to local government in 1987.<sup>[9]</sup>

## Problems with the Act and its operations

The Law Commission's Review of the Act identified four problems:

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

The Commission concluded however that these problems did not:

*'...bring into question the underlying principles of the Act'*.<sup>[10]</sup>

In respect to the first two problems, the burden of large and broadly defined requests could be dealt with by the better application of the administrative provisions of the Act. Requests could be declined if they were not specified with *'due particularity'*. Reasonable charges could be fixed for the supply of information requested thereby encouraging a focused request for information. Tardiness in responding to requests could be dealt with by ensuring that Ministers and organisations were adequately resourced to deal with official information requests as part of their normal administrative budgets. The resistance by agencies outside the Core State Sector, where those agencies were in public ownership could not be justified if the accountability of those agencies was to be considered in the same light as the accountability of the Core State Sector. There remains a need to provide co-ordinated advice and education regarding the Act and other information issues to the total public sector especially in a situation where entry to the sector at middle to senior level is often from the private sector and on short term contract. The private sector not itself being subject to the openness predicated by the Official Information Act often finds difficulty in adjusting to the open public sector environment.

## **What of the future?**

The Official Information Act has operated well in New Zealand having underpinned the move to an open and accountable governance process. The basic purpose of the Act appears admirably suited to a governance process based on democratic principles recognising the importance of the individual citizen in that process. The availability of information provides for a genuine opportunity to participate in the making of laws and policies and to hold Ministers and officials accountable for their performance other than through the electoral process.

The pursuit of that democratic goal has also recognised that on occasions the availability of information needs to be tempered in the public interest, in the interests of good government. The Act has been interpreted by the Ombudsmen and by the Courts in a practical and pragmatic manner designed to achieve its objectives but without allowing requesters to claim a right to sit at the Cabinet table.

My hope is that more information will be released into the public domain as a matter of course for the purposes so clearly expressed in s.4 but without the need to make a formal request for it. The general public, with better information about the problems which the Government needs to address on their behalf, will better understand and more likely accept the preferred solution. The more closely a government guards its information to keep it from public scrutiny, the more difficult it will be for that government to have its decisions accepted, let alone, understood. Official information and its ready and timely availability may well be the single most significant means of restoring confidence in Government and those who bear the burden of governing.

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[1]New Zealand Law Commission Report 40 - Review of the Official Information Act 1982.

[2]Ibid page xi

[3]Towards Open Government - General Report - The Committee on Official Information 1980 para 20.

[4]John Belgrave. 'The Official Information Act and the Policy Process', in the Official Information Act (Legal Research Foundation, Auckland 1997).

[5]Towards Open Government - The Committee on Official Information - Supplementary Report 20 July 1981.

[6]Report of the State Owned Enterprises (Ombudsmen and Official Information Acts) Committee - on the Review of the Effect of the Ombudsmen Act 1975 and the Official Information Act 1982 on the operation of State Enterprises presented to the House of Representatives in 1990.

[7]Law Commission Report 40 Review of the Official Information Act 1982 Executive Summary page 3.

[8]Policy Framework for Government-held Information (State Services Commission, Wellington, 1997).

[9] Local Government Official Information and Meetings Act 1987.

[10]Law Commission Report 40 Review of the Official Information Act 1982 Executive Summary page 1.

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