A few more pieces in the puzzle of Freedom of Information in New Zealand

The 1997 Law Commission Review of the Official Information Act 1982

Apart from the current cricket tour there are other reasons why thoughts about New Zealand are currently preoccupying the authors of this article. In 1996 one of the authors visited New Zealand on a fellowship from the New Zealand Institute of Public Law to study the *Official Information Act 1982*. The results of that trip are currently in an unpublished article called 'The Kiwi Paradox — A Comparison of Freedom of Information in Australia and New Zealand' and the introduction reads:

> On first encounter with New Zealand's Official Information Act Australian freedom of information specialists tend to scratch their heads about this quaint and quixotic variant of access legislation. Viewed from a trans Tasman perspective the OIA appears riddled with extremely flexible provisions which would offer hard bitten bureaucrats easy escape routes to avoid providing requested information. An initial glance at the history of the OIA merely confirms that observation. When it was launched the OIA was seen by many New Zealanders as a poor compromise between an Official Secrets Act and Freedom of Information legislation. The paradox is revealed when Australian Freedom of Information legislation is directly compared to the OIA on a range of performance criteria. The OIA has managed to outperform its Australian counterparts in achieving an increased level of open government.[1]

The purpose of this article is to bring readers up to date with recent developments in New Zealand in relation to the *Official Information Act* and to partly explore another intriguing aspect of access to information in New Zealand. Apart from articles appearing in the *FoI Review,* a considerable literature has been generated about freedom of information in Australia. Yet in New Zealand with the notable exception of the massive work *Freedom of Information in New Zealand* by Eagles *et al.*[2] and a small handful of articles,[3] there is very little detailed study of the *Official Information Act*. Recent significant additions have been the New Zealand Law Commission's *Review of the Official Information Act 1982* and the published papers of a seminar held by the New Zealand Institute of Public Law and the Legal Research Foundation in February 1997 (see summaries below).[4]

Background to the Law Commission Report

In New Zealand, for the past 15 years, the *Official Information Act* has been the official means by which public access to information has occurred. The first review of its operation by the New Zealand Law Commission has recently been released (October 1997). The report responds to a reference from the Minister of Justice to report on certain aspects of the Act, and addresses other issues not directly within the terms of reference but which affect the operation of the Act. The review had commenced with a reference in 1992 and a draft report was circulated in December 1993. However, for a number of reasons — workload and the pending change to the New Zealand electoral system being the key factors — the Commission put its final report on the backburner. In December 1996 the coalition agreement between the Nationals and New Zealand First revived the Law Commission project because it stipulated that:

> [The Government will] Review the Official Information Act with a view to increasing the availability and transparency of official documents'.[5]

Structure of the Report

The report is to be highly commended for its logical structure of information and clarity of expression. Indeed, the clearly defined executive summary is a prime example. Chapter one of the report provides a backdrop to the operation of the Act, as it comments on the changing context in which the has Act operated since 1982. Factors discussed include changes in the role and structure of the state, increased consultation in law making and policy making and the growing international influences on the making of public policy and law. The remaining chapters are devoted to the individual discussion of each term of reference and also include the Commission's recommendations for the future.

Terms of reference

Appendix A of the Report sets out the terms of reference that the Commission was required to report on. Specifically, it was required to examine the following:

1. provisions relating to confidentiality of advice (s.9(2)(f) (iv), and the free and frank expression of opinion section (s.9(2)(g)(i)) with a view to ascertaining whether it was possible to define more precisely the interests that the provisions were intending to protect;
2. the adequacy of ss.12(2) and 18(f) with particular regard to broadly defined requests, or requests for large volumes of information;
3. the appropriateness of time limits in ss.15(1) and 29A(1), and whether there should be a charge imposed under s.15, to cover time spent and expenses incurred in deciding whether or not to release information;
4. whether the grounds for refusal set out in s.18(d)-(f) should apply in relation to personal information requests;
5. what the responsibilities of decision makers should be vis à vis the Ombudsmen, where the decision makers actions are subject to an Ombudsman's review;
6. the appropriateness of the Order of the Council procedure in ss.32-34, with a view to ascertaining the need for any changes;
7. whether there should be special rules governing the treatment of some or all classes of diplomatic documents.

Overview

Overall, the Commission was satisfied that the Act generally achieves its stated purposes. However, it did note a number of factors which it said served to inhibit the effective operation of the Act and, as a result, the wider availability of official information. These included:

- the burden caused by large and broadly defined requests;
- tardiness in responding to requests;
- resistance by agencies outside the core state sector;

the absence of a co-ordinated approach to supervision, compliance, policy advice and education about the Act and other information issues.

Specific recommendations

The Commission divided its recommendations into two groups: those which respond to the major problems identified by the Commission and so are deemed to warrant immediate consideration in order to improve the operation of the Act, and those whose implementation is deemed less urgent.

Large and broadly defined requests

The Commission recommended that ss.12 and 13 of the Act be amended to encourage dialogue between an agency and the requester. It is suggested that this could include discussion of the terms of the request, any problems that the request poses for the agency, and the form in which or conditions on which the agency intends to release the information. The Commission recommended that the Act expressly allow a requester to specify, and an agency to have regard to, the purpose for which the information is sought. This also prevents an agency from relying on a failure to specify a purpose as a ground for refusing the request.

Currently s.18(f) of the Act permits an agency to refuse a request where the information requested 'cannot be made available without substantial collation or research'. It is suggested that this section be widened to include consideration by the agency before refusing a request as to whether fixing a charge for the information, or extending the time limit for response might enable the request to be granted.

Charging provisions

The Commission proposed no change to the charging provisions under s.15. In particular, the Commission was of the view that that the Act should not allow agencies to charge for time and expenses incurred in deciding whether or not to release information. Further, the Commission recommended that the Act did not require amendment to enable agencies undertaking commercial activities for profit to charge in any different way from other agencies. The test should remain one of reasonableness as qualified by s.15(2).

Time limits

The Commission suggested that the government should review the 20 working day time limit in s.15 in three years, with a view to reducing it to 15 working days. It suggested that such a move would recognise the increasing developments in information technology which have made information more accessible. In the meantime, the Commission suggested that the Government should adopt a three-year strategy aimed at improving the ability of all agencies to respond to requests, through better information technology and management.

Other recommendations pertain to the ability to transfer a request under s.14, specifically:

that a decision to transfer and a failure to comply with the time limits should be grounds for complaint to the Ombudsman under s.28(2); and

that s.30(1)(a) should be amended to allow the Ombudsman to make recommendations following a complaint concerning the transfer of a request.

Enforcement

The Commission did not recommend any change to the 'Cabinet veto' — the power of the Governor-General-in-Council under s.32 to direct non-compliance with an Ombudsman's recommendation. It did note, however, that s.32 should stipulate that an agency seeking judicial review of an Ombudsman's recommendation to release information must commence proceedings within 20 days of the recommendation. Where the agency ignores the recommendation and does not have a Cabinet veto, the Solicitor-General, should enforce the public duty on the agency to comply with the recommendation.

Co-ordinated administration of the Act

The Commission recommended that the Ministry of Justice should be given responsibility for ensuring a more co-ordinated and systematic approach to the functions of oversight, compliance, policy review and education in relation to the Act. Further, it recommended that adequate resources be provided to both the Ministry and the Ombudsman, particularly for the latter's work in publishing guidelines and holding seminars and training sessions.

Other recommendations

Other recommendations of the Commission are:

- that s.9(2((f) and (g) adequately protect internal processes of government and do not require amendment. The interests recognised in these provisions should continue to be the subject of an explicitly stated good reason for withholding official information;
- that in relation to the provisions protecting diplomatic documents, there be no change to the relevant provisions of the Act. But it is suggested that the Government should review the need for s.31(a) which concerns the Prime Minister's power to issue a certificate preventing the Ombudsman from recommending the release of information;
- that the three administrative reasons stated in s.18(d)-(f) should not be applied to personal requests;
- that s.28(3) should be amended to allow for oral complaints to the Ombudsman, which could be put into writing as soon as practicable.

The Commission notes its support for the general approach of s.19(5A)–(5B) of the *Ombudsman Act* and s.94(1A)-(1B) of the *Privacy Act*. These provisions allow the Ombudsmen and Privacy Commissioner to require the supply of information to assess the validity of a claim that the information is privileged.

Seminar Papers on the Official Information Act

New Zealand Institute of Public Law and the Legal Research Foundation, February 1997

This slender 70-page volume offers a rare insight into the workings of the *Official Information Act* in New Zealand. The rarity of articles about the operation of the *Official Information Act* and the relatively brief coverage of the 1997 seminar may very well reflect an intuitive feeling by New Zealand academics and leading administrators that the deliberate design divergence of the *Official Information Act* from other freedom of information legislation has been successful and little attention is needed about something working well. Grant Liddell puts forward the strongest case for the relative superiority of the *Official Information Act* over other FoI Acts:

New Zealand's OIA suffers from fewer deficiencies than most if not all other freedom of information statutes. It is an Act concerned with information, not documents; it creates rights of process rather than rights of access to official information; its dispute resolution and enforcement mechanisms are relatively inexpensive, accessible and speedy; it requires decisions on access to be made on a time- and information-specific basis; and, most importantly, it states a guiding principle of availability, informed by the purposes of accountability and participation, as the foundation on which the Act is built. Unlike other freedom of information statutes, it does not categorise certain classes or categories of information, eg Cabinet papers, as beyond its reach. Its coverage is defined and, in most instances, easily ascertained. Thus disputes are principally disputes over matters of judgment: is information, properly subject to the Act, properly withheld or not? There are very few disputes about boundary issues, such as what is information?; is the body holding the information subject to the Act? And the cases that have progressed to the regular courts have emphasised the role of the decision-maker's judgment in determining access to information issues, thus emphasising that they have been genuinely difficult cases.[6]

The rest of this article reviews the key points made by each of the articles presented at the New Zealand seminar.

'The Danks Report' by Bryce Harland, former diplomat and member of the Danks Committee

This paper provides the background to the compilation of the report 'Towards Open Government' by the Danks Committee 15 years ago. It is suggested that reviewing the Danks Report provides a good starting point for discussion of the current situation of the *Official Information Act* in New Zealand and the options for its future. The terms of reference given to the Danks Committee required it to review the criteria for the classification of documents, to examine the working of the *Official Secrets Act,* and to make 'appropriate recommendations on changes in policies and procedures which would contribute to the aim of freedom of information'. It is stated that 'the basic task of the Committee [was] to contribute to the larger aim of freedom of information by considering the extent to which official information can be made readily available to the public'. The paper outlines in detail the process by which the Committee reached its final conclusions. Such conclusions centred around the need for the establishment of an independent Information Authority, responsible to Parliament, whose primary task would be to keep the system under review and recommend changes to the Government. The author concludes with personal comments on how successful the operation of the Committee's recommendations have been. He also notes in passing that the Committee's Report concentrated on freedom of information (a minor part of its terms of reference) but 'I should add that the task of reviewing the classification of official documents was not overlooked, even though the question proved not to be central to the Committee's work'.

'The Official Information Act 1982 and the Legislature: A Proposal' by Grant Liddell, Senior Lecturer, University of Otago

This paper centres around the idea that it is now timely to consider the application of the *Official Information Act* to the legislative branch of government. The paper suggests reforms to the Act that are required such as changes to the tests for withholding information and rationalising the coverage of the Official Information and Ombudsmen Acts, as well as whether the existence of the *Official Information Act* has encouraged a volunteer 'disclosure' mentality within government. It then moves to a large canvas — the legislature. In discussing the justifications for such an extension, the author looks to the purposes of the Act contained within s.4, discussing in detail the notion of 'democratic theory'. Consideration is then given to how, and in what terms, the various institutions of Parliament (such as caucus involvement in policy making, select committees, members and the Parliamentary offices and bodies of Parliament) could be made subject to the Act. Finally, objections to the extension of the Act's ambit into the legislative sphere are noted, including the idea that it is not necessary, that it is constitutionally inappropriate, parliamentary privilege, balance of power issues, and the coalition agreement.

'Behind the Official Information Act: Politics Power and Procedure' by Marie Shroff, Clerk of the Executive Council and Secretary of the Cabinet

This paper provides an overview from the perspective of government (particularly politicians), as to the procedure and protocols involved in deciding whether to release information, as well as how, when, by whom and of what type. The paper commences with a brief introduction about the initial impact the operation of the *Official Information Act* had on politicians and public servants, suggesting that after the initial shock, government soon came to appreciate that sharing knowledge means 'better government, a better decision-making process, and a better informed public'. Following discussion on the administrative protocols determining the release of information and the political constraints that affect the way such information is released, the author provides examples as to how the operation of the *Official Information Act* has affected the workings of central government processes. Discussion includes the way that existing parliamentary channels of communication are utilised, the convention on the release of Cabinet documents of previous opposition administrations, as well as alternative methods of providing information to political parties during the coalition negotiations. The author concludes with the view that information access in New Zealand has come a long way since the introduction of the Act stating that 'public servants now expect virtually all written work to be released eventually'.

'The Official Information Act and the Policy Process' by John Belgrave, Secretary for Justice

This paper provides a summary of the general purpose and objectives underlying the *Official Information Act,* with commentary on their perceived effectiveness. First, the principle that official information should be made available unless there is good reason for withholding it is discussed, as well as the democratic principles of participation, accountability and availability. Analysis then centres around what may constitute a 'good reason' in terms of non-disclosure of information under the Act, particularly with respect to s.9 and forms of prejudice or harm. Detailed criticisms are also made about the lack of clarity of reasons that seek to protect government, namely the protection of constitutional conventions and the maintenance of the effective conduct of public affairs through free and frank expressions of opinions. The author sug-

gests that the Act should actually address the values at stake and the harm that is to be avoided. The issue as to the blurred boundary between official and political information held by Ministers is also addressed.

'The Games People Play: Journalism and the Official Information Act' by Alastair Morrison, education correspondent, Radio New Zealand

This paper gives a journalist's perspective on the usefulness of the *Official Information Act* as a tool for the media. The author alludes to the fact that the Ombudsman's annual report statistics demonstrate a low usage of the Act by the media and cites such reasons as the Government's general reluctance to release information to journalists. Specific case studies are provided in an attempt to demonstrate how time delays can lead to the frustration of information release, which is suggested to be more problematic for journalists than other users of the Act, given that information becomes stale over time. The author then outlines tactics that he suggests are used by agencies in releasing information to journalists such as swamping them with information, and in so doing burying the desired paragraph in a mass of material, or releasing the requested information to the rest of the journalist market rendering its exclusivity useless, or deleting significant portions of information. In summing up, the author opines that the *Official Information Act* 'is not a very useful tool' in the current commercial environment of restructuring and cost cutting, as there is 'greater accent on the generalist processing spot news rather than the specialist digging and delving'. Issues relating to public media ownership, funding and political journalism are also discussed.

'Review of the Official Information Act' by John Allen, General Manager, Planning and Communications, New Zealand Post Limited

This paper suggests that New Zealand has changed significantly since the delivery of the Danks Committee report. It argues that changes in information and technology, as well as the reform of state trading activity under the *State-Owned Enterprises Act 1986*, raise the question whether the *Official Information Act* should continue to apply to state enterprises. The author asserts the answer is no. In justifying this position the author suggests that state enterprises are only successful if they are able to compete effectively in the markets in which they operate. Effective competition now requires (according to the author) the ability to share information and appear open to customers. Electronic substitutes for information access (such as the internet) help to serve such a purpose. It is further suggested (in line with John Ralston Sauls' argument in *The Unconscious Civilisation)* that statutes such as the *Official Information Act*, which promote access to information can often become an effective barrier to the sharing of that information.

'The Official Information Act in respect of State-Owned Enterprises' by Geraldine Baumann, General Counsel ECNZ

The first part of the paper discusses the accountability provisions under the State *Owned Enterprises Act*, particularly with regard to state-owned enterprise (SOE) directors, and from the perspective of the ECNZ. Second, it discusses the accountability provisions under the *Official Information Act*, with the view expressed by ECNZ that the *Official Information Act* should aim to make freely available (subject to good reason for withholding) all information held by shareholding Ministers in the course of their duties. It is suggested that information of an operational nature, which is the accountability of SOE directors is not required by shareholding Ministers for the performance of their duties and so should not be covered by the Act's operation. This idea that any accountability measures should be focused on the accountability between the shareholding Ministers and the SOE is discussed as being justified in relation to the stated purposes of the Act, as well as the view that it is not the significance of the activity carried out by an organisation that dictates whether public participation through the *Official Information Act* is desirable but the fact that the activity is undertaken by government. Thus it is suggested that the ECNZ is placed in the somewhat difficult position of being neither a private sector enterprise nor part of the public service.

'The Official Information Act in the Corporatised World,' by Leo Donnelly, Assistant Ombudsman

The paper examines how the Ombudsmen in New Zealand have approached the issue of investigation and review of decisions to withhold commercial information. The first part of the paper demonstrates how the Danks Committee set the basic operating principles for the handling of commercially sensitive information. First, the committee recognised that in the context of the commercial activities of the state there is a distinction between: commercial activities which have 'the profit-seeking, competitive colour of private enterprise' and commercial activities where 'commercial, social and economic objectives become conjoined'. The *Official Information Act* did not, as with its general approach to exemptions, provide a blanket protection for such information but allowed for a public interest test. Amendments to the *Official Information Act* in 1987 and the 1990 Report of the State-Owned Enterprises Committee deliberately retained the ability under the *Official Information Act* to release commercially sensitive information if required by the public interest. The current approach to interpretation of commercial information protection is to stress how the *Official Information Act* provides adequate protection without resorting to unnecessary blanket protection. The article concludes by showing how the New Zealand Courts and Ombudsmen have refused to uphold the practice of public sector agencies including confidentiality clauses in contracts with third party commercial clients and then claiming such clauses provide a conclusive reason for non-release of information.

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VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

PANDAZOPOULOS and AUSTRALIAN GRAND PRIX CORPORATION
(1996) 10 VAR 249

D cided: 8 August 1996 by Deputy President Macnamara.

Section 34(4) (business affairs) — legislation excluding the operation of the Act.

Factual background

Transurban, a joint venture between an Australian company (Transfield) and a Japanese company, was announced on 29 May 1995 by the Premier as the consortium selected to build and operate the City Link freeway complex in Victoria. In early October 1995, the *Age* newspaper indicated that 'the project was in danger of falling over', apparently because of a dispute concerning the allocation of financial risk between Transurban and the Victorian Government. The dispute, during which the Victorian Government threatened to cancel the appointment of Transurban in favour of the reserve bidder, was resolved some time shortly after 20 October 1995.

Subsequently, on 14 November 1995, it was announced that Transurban would be the naming rights sponsor for the Australian Grand Prix, which was relocated from Adelaide to Melbourne for 1996 and following years. Evidence provided to the Tribunal for the applicant indicated suspicion that there was 'an illicit connection' between the resolution of the dispute in the City Link negotiations and the announcement of Transurban as the naming rights sponsor for the Grand Prix.

Procedural history

Mr Pandazopoulos, MP requested access to documents, including records of communications and contracts in relation to the decision to appoint Transurban as the major sponsor for the Australian Grand Prix to be held in Melbourne in March 1996. The respondent Australian Grand Prix Corporation (the AGPC) identified two documents as answering the request.

The first document answering the request was a set of Minutes of the AGPC of a meeting held on 31 October 1995 (the Minutes). The relevant portions recorded 'an oral report from the Chief Executive Officer to the effect that agreement in principle had been reached with Transurban to become the naming rights sponsor for the 1996 Australian Grand Prix'. There was evidence that the terms reported to the members by the Chief Executive Officer 'were ultimately reduced to writing in the form of a confidential naming rights sponsorship agreement' (the Final Agreement). The Final Agreement postdated the request and was therefore not dealt with by the Tribunal.

The second document answering the request was a naming rights sponsorship proposal made by the AGPC to a company known as 'Transfield' and bearing the date September 1995 (the Naming Proposal). There was evidence that the Naming Proposal was 'similar' to the Final Agreement.

The AGPC claimed exemption for the entirety of the relevant parts of both documents under s.34(4)(a)(ii) of the *FoI Act* and claimed, in addition, that part of the Minutes and the whole of the Naming Proposal were excluded from the operation of the Act by virtue of s.49 of the *Australian Grand Prix Act 1994* (the AGPA).

The decision

The Tribunal ordered the release of those parts of the Minutes that contained information that: (i) was already publicly known; (ii) was not commercially sensitive; or (iii) may have been commercially sensitive at one time but was, at the time of the Tribunal's decision, of historical significance only. The decision of the AGPC was otherwise affirmed.

The reasons for the decision

Section 49 of the AGPA

Section 49(1) of the AGPA relevantly provides that, despite anything to the contrary in the *FoI Act,* that Act does not apply to a document, whether created before, on or after the commencement of the section, to the extent that the document is, or discloses information about, a contract between the AGPC and one or more of:

(a) the bodies, whether corporate or unincorporate, partnerships or trusts —
  (i) granting the right to hold a round of the Federation Internationale de l'Automobile Formula One World Championship; or
  (ii) responsible for the organisation of, or granting the right to hold, an approved motor sport event;
(b) bodies, whether corporate or unincorporate, partnerships or trusts owned by, or associates of, a body, partnership or trust referred to in paragraph (a);
(c) a person not ordinarily resident in Australia in concert with whom a body, partnership or trust referred to in paragraph (a) or (b) is acting in relation to that contract.

The Tribunal was content to assume that s.5 of the *FoI Act* applied to impose the burden of proof on the respondent seeking to establish that the *FoI Act* did not apply by virtue of s.49(1) of the AGPA. The Tribunal also noted that the sub-section does not create an affirmative secrecy provision prohibiting the release of information but rather withdraws certain information from the FoI system.

The AGPC submitted that s.49(1) of the AGPA applied to parts of the documents in dispute because an entity satisfying the requirements of paragraph (c) was involved in the Final Agreement (paragraph (c) party). The Tribunal accepted evidence from the AGPC's solicitor that