

VICTORIA UNIVERSITY OF WELLINGTON



Faculty of Commerce & Administration

**GRADUATE SCHOOL OF BUSINESS &
GOVERNMENT MANAGEMENT**

**THE IMPACT OF THE
OFFICIAL INFORMATION ACT 1982
ON THE
POLICY DEVELOPMENT PROCESS**

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**A RESEARCH PAPER
FOR THE DEGREE OF
MASTER OF PUBLIC POLICY**



**THE IMPACT OF THE
OFFICIAL INFORMATION ACT 1982
ON THE
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**A research paper submitted
to the Victoria University of Wellington
in partial fulfilment of the requirements for the degree of
Master of Public Policy**

Victoria University of Wellington

December 1997

ABSTRACT

The Official Information Act was passed into statute in 1982. Among the purposes of the Act is the enhancement and respect for the law and the promotion of good government. The aim of this paper is to determine, from a *participation* perspective, the impact of the Official Information Act 1982 on the core public sector policy process. The paper starts with a background to the Act before reviewing the expected and actual impact of the Act, as outlined in the literature. The policy making process in New Zealand's core public sector is considered, highlighting opportunities for participation. Participation theory is discussed.

The research involves a survey across the core public sector to gain general views of the impact of the Act on the policy development process. The results are used as the basis for three in-depth case studies of core public sector agencies. The conclusions are that while the Act is an important instrument of accountability, the success of the Act in enabling more effective participation is not so clear. While information is more readily obtainable, technocratic officials and Ministers keen to control information impact on the ability of citizens to participate. It is concluded that for the Act to be of maximum benefit education of officials and a loosening on the control of information will be needed.

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ACKNOWLEDGEMENTS

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

James Madison, 1822¹

I want to express heartfelt thanks to those who have assisted in the completion of this research paper and in my studies for the Master of Public Policy (MPP) degree. First I wish to acknowledge the very great debit I owe the three public sector agencies, and in particular their chief executives, for agreeing to act as case studies for my research. In the interests of their continued protection I am unable to name them, but they know who they are. Without the assistance of these agencies and the time and candid views of their staff, this research would not have been possible.

To the Royal New Zealand Air Force, my employer, which provided the opportunity for me to start the degree and paid for my fees. To my colleagues and lecturers on the MPP programme who provided stimulation and encouragement; in particular those who made up our study group for the three years of the degree: Karen Stewart, Annabel Taylor and Dale Stephens. To my supervisor, John Martin, for his helpful comments and the benefit of his wisdom and experience. To Janet Keilar, Commerce Librarian, who was extremely helpful in obtaining reference material and helping with the finer points of referencing. To Joyce McEwan from the Office of the Ombudsmen for assisting with reference material. To (Catherine) Austin, Jo Kennelly, Evan Voyce and Nicola White for reviewing my drafts and providing a counterpoint to my views. To Louise Hamilton for proof-reading. To the Department of Prime Minister and Cabinet and its staff for all I have learned about the practice of public policy during my secondment - in particular Adrian Simcock my Director and mentor in my first year at DPM&C. Finally to my flatmates (and Sagapor) who have lived with my absence during the last few years of study and to my

¹ Letter from James Madison to W.T. Barry, 4 August 1822. The quote is borrowed from Liddell (1997: 18).

friends and family who remained true despite the costs of undertaking an MPP. I thank you all for your help and understanding.

Edward H. Poot

December 1997

FOREWORD

The Official Information Act was passed into statute in 1982. It has been in effect for 15 years. One of the purposes of the Official Information Act 1982¹ is to progressively increase the availability of official information to the people of New Zealand in order to ensure that they are able to *participate* in the making and administration of laws and policies and to promote *accountability* of Ministers of the Crown and officials. This is to be done to enhance respect for the law and to promote good government. *Accountability* and *participation* are not seen as ends in themselves; the true end is respect for the law and good government.

Recently the Law Commission has completed its *Review of the Official Information Act 1982* (Law Commission², 1997). There is general agreement between the Law Commission (NZLC, 1997: ix) and other authors (Belgrave, 1997: 26, McLeay, 1995: 137&187; Palmer & Palmer, 1997: 187) that the OIA has achieved its purpose of improving accountability. There is not the same consensus on whether the Act has increased participation in the making and administration of laws and policies (Voyce, 1996: 42). Therefore, this paper does not address the issue of *accountability* of ministers and officials. Instead, this paper focuses on the impact of the OIA on the policy development process and the opportunities for and effectiveness of *participation*, an area where there has been little work done to date. The work is timely since the Law Commission review was submitted to the Minister of Justice on 7 October 1997, less than two months before this work was completed. At the time of writing, the review is still under consideration; therefore, this work offers additional material for consideration in assessing amendments to the OIA.

The aim of this paper is to determine, from a *participation* perspective, the impact of the Official Information Act 1982 on the core public sector policy process. Chapter one will provide background about the OIA and the process that led to the introduction of the OIA. Succeeding chapters will explore what is meant by the policy process (chapter two) and the concept of participation; and note the opportunities for participation to occur (chapter three). The paper will then examine the policy process in action and the role of the OIA in and on this process

¹ Hereafter the OIA or the Act.

² Hereafter abbreviated to NZLC for references.

(chapter four). Three case studies are then used to investigate in detail the way the OIA impacts on the policy process in departments (chapter five). This will lead to an assessment of the impact of the OIA on the policy process and how successful it has been in achieving its purpose “... [t]o 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 ...” (OIA s.4).

Readers are assisted with extracts of the Act, referred to in this paper, included at appendix one. For those readers who are not familiar with the OIA, appendix two outlines the key provisions of the Act that relate to the policy development process. Appendix two also reviews the public service guidance covering these provisions.

CHAPTER ONE: INTRODUCTION

"Information gives power to those who have it and deprives those who do not".

Sir Geoffrey Palmer (1987: 260).

Governments and Information

Governments hold considerable quantities of information of various kinds. Much is acquired by legal compulsion from sources outside government. A prominent category is personal information about people and their affairs. Much is generated inside the public service in the course of its functions of developing policy, advising ministers and administering legislation (State Services Commission¹, 1995a: 1). Allan (1990: 5-6) argues that such information is a special commodity because it affects the lives of all citizens and because it is already owned by the taxpayer. Information generated within the public service is produced at the taxpayer's expense. So just as it is often argued that government has no money of its own, only that provided by tax payers, so too can it be argued that government does not "own" the information it holds.

Information is basic to the processes of government; its dissemination affects the relationships among the players in our constitutional arrangements (Shroff, 1997a: 23). There is a tension that exists between the preservation of the State's right to acquire, use and disclose information on the one hand and the protection of individual rights, freedoms and personal privacy on the other (SSC, 1995a: 1). Finding the appropriate balance is at the heart of the "freedom of information" debate in democracies worldwide.

Open Government and Freedom of Information

In 1946, the General Assembly of the United Nations resolved that "*Freedom of information is a fundamental human right and is the touchstone for all the freedoms to which the United Nations is consecrated*" (Chapman, 1987: 12). Subsequent UN declarations of human rights in 1948 built on this assertion. Much of the drive for such declarations came from a realisation of the abuse of information by totalitarian regimes prior to and during World War II.

¹ Hereafter abbreviated to SSC.

Chapman (1987: 11) notes that the term “open government” refers to various issues associated with government secrecy. These include the rights of individual citizens in relation to information about them held in public organisations and the ability of the public in a democracy to assess the validity of actions taken by governments in order to hold governments fully accountable for their actions. Such a debate on open government must therefore include discussion of freedom of information, data protection, official information legislation (or secrets Acts as applicable) and the necessity for publicly available information on all important topics of government activity in order to maintain a healthy democracy. Chapman (1987: 24) goes on to look at democracy and the arguments advanced by “open government” enthusiasts that their demands and expectations are consistent with – even essential to – the principles of democracy. Such enthusiasts argue that if citizens are to participate in government, whether directly or through representatives, there must be effective two-way communication between those engaged in government and the people in whose interests democratic government is practised.

In New Zealand, the desire for more open government has found form in emphasis on greater transparency in government decision-making and policy development. This is given legislative form, not only in the statutes covering official information, but in legislation governing the government’s spending and fiscal policies, especially the Public Finance Act 1989 and the Fiscal Responsibility Act 1994 (Keith, 1996: 7).

The Introduction of the Official Information Act 1982

Prior to the passage of Official Information Act (OIA) in 1982, the release of official information was controlled by the Official Secrets Act 1951. The Official Secrets Act underpinned a culture of bureaucratic secrecy. In effect, it barred all access to official information. In practice, those involved in administering the Official Secrets Act were more liberal and enlightened than the law (Belgrave, 1997: 24).

Palmer (1987: 260-264) and the Law Commission (1997: 144-148) discuss the impetus in New Zealand during the 1960s and 1970s for reform of legislation covering official information. Demand for change resulted from a chorus of criticism of the unrelenting severity and unreasonableness of the Official Secrets Act. Comment from politicians, Ombudsmen and

respected senior officials also highlighted the fact that "... *excessive secrecy is not only undemocratic, it is [also] inefficient*" (Palmer, 1987: 261).

In 1978, public and political pressure eventually led the Government to respond by setting up a committee to make recommendations on official information. Known as the "Danks Committee", after its chairman Sir Alan Danks, the Committee on Official Information spent two-and-a-half years reviewing the status quo and reaching recommendations on how the system should be changed.

The Danks Committee concluded:

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 interest of individuals. A no less important consideration is that the Government requires public understanding and support to get its policies carried out. This can only come from an informed public (Danks Committee, 1980: 14).

The reasons articulated by the Danks Committee for more open access to official information can be summarised as follows:

- *A better informed public can better participate in the democratic process.*
- *Secrecy is a significant impediment to accountability when parliament, press and public cannot properly follow and scrutinize 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 Government will be enhanced by more information being available.*

(Palmer, 1987: 263)

Such was the pressure for change and the persuasive quality of the Danks report, that the draft Official Information Bill was introduced to Parliament in July 1981 in the precise terms that it had

been drafted by the Danks Committee.² The legislation was promoted by the Minister of Justice, the Hon. J.K. McLay who said that "... *the Bill represents one of the most significant constitutional innovations to be made since the establishment of the office of the Ombudsmen in the early 1960s*" (McLay, 1981: 1908).

The Official Information Act and its Purpose

Official information is defined in section 2 of the OIA. In essence, official information is any information held by a department or organisation or Minister of the Crown in their official capacity. Unlike similar legislation in other jurisdictions, the Act is not framed in terms of documents but of information. Official information can, therefore, include aural or video tape and knowledge contained in someone's head. It may include information generated within an organisation, or obtained from outside sources (SSC, 1995a: 3).

One of the purposes of the OIA, as defined in section 4(a), is:

- (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 promote the good government of New Zealand.

There are two key implications of this formulation. First, the regime established by the Act is dynamic, not static. In passing the Act, Parliament envisaged that information would become more freely available as time went by. Secondly, and critical to this paper, Parliament expressed a desire that members of the public be able to take an effective part in the making and administration of laws and policies. However, as Sir John Robertson, a former Chief Ombudsman, has stated, this does not do away with representative democracy and the supremacy

² Membership of the Committee included the Chief Parliamentary Counsel, the Deputy Secretary of Justice, the Secretary of the Cabinet, the Chairman of the State Services Commission and Professor Keith of the Faculty of Law at Victoria University. Therefore introduction without amendment was not just a reflection of the good work of the Committee but a function of the fact that those on the Committee were well versed in the views and process of government.

of Parliament (Office of the Ombudsmen³, 1993: 8). It does not mean that the public are to 'sit in' on decision-making. But if there is to be effective participation in policy-making the individual must have:

- *The right to know what options are open and being considered;*
- *Sufficient information about them to form a proper judgement; and,*
- *Time to enable him or her to consider and express views before the government is committed to a policy*

(SSC, 1995a: 4).

The view of the State Services Commission (SSC) is that the OIA is not just an important piece of primary legislation. The Act also:

- stresses the twin objectives of participation (s.4), and availability (s.5);
- promotes accountability (s.4);
- reinforces the constitutional principles concerned with an open democracy; and,
- articulates fundamental principles guiding proper attitudes and behaviour about information.

(SSC, 1995a: 1)

The Act reversed the former presumption of secrecy to one of availability. Under the OIA's principle of availability, the test for release of information is that information shall be made available unless there is good reason for withholding it (OIA s.5). The principle of availability has been interpreted by the Court of Appeal in the following way:

*"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 that guidance in the last limb of section 5."*⁴

The range of circumstances under which information can be withheld is extremely narrow. Any manual or other document which contains policies, principles, rules or guidelines which may apply to decisions made by any Minister, department or organisation subject to the OIA, is available (Palmer, 1987: 276). The "good reason" for withholding information must be found in the Act itself or in some other enactment (SSC, 1995a: 3). "Good reasons" are divided by the OIA into

³ Hereafter abbreviated to 'Ombudsmen' for references.

⁴ *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 391.

conclusive reasons (s.6) and *conditional reasons* (s.9). The conclusive reasons are concerned with preventing harm to the nation, to the national economy, to the maintenance of the law or to the safety of any person. In contrast, the conditional reasons concern forms of prejudice or harm not quite as all-pervasive or irreparable and, therefore, subject to the overriding public interest (Belgrave, 1997: 26).

If the author refuses to release information, the OIA requires the applicant to be informed of the reasons for refusal and their rights "... *by way of complaint ... to an Ombudsman, to seek an investigation and review of the refusal*" (OIA s.19).

The Role of the Ombudsmen

In exercising their review role under the OIA, the Ombudsmen only act on the basis of a complaint. In investigating a complaint, the Ombudsman's statutory function is to form his or her independent opinion as to whether, in the circumstances of the particular case, the request should have been refused (Ombudsmen, 1994d: 9). As observed by Jefferies J in *Wyatt Co Ltd v Queenstown Lakes District Council* [1991] 2 NZLR 180, 191, in discharging the review function under the OIA, an Ombudsman is required to:

"... exercise his judgement using experience and accumulated knowledge which are his by virtue of the office he holds. Parliament delegated to the ... Ombudsman tasks, which at times are complex and even agonising, with no expectation that the Courts would sit on his shoulder about those judgements which are essentially balancing exercises involving competing interests. The Courts will only intervene when the ... Ombudsman is plainly and demonstrably wrong, and not because he preferred one side against another"

In the final analysis, even a recommendation from the Ombudsman to release information can be ignored. There are no sanctions for breaching the OIA.⁵ Therefore, it is argued, there is little damage to a department or Minister to contend with other than a scolding from an irked Ombudsman and/or comment in the Ombudsmen's annual report to Parliament with its consequent questions and debate that may follow (Morrison, 1997: 32). However, given the

⁵ The right to personal information, previously in the OIA, was legally enforceable in the Courts (*Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 391). The availability of personal information is now covered by the Privacy Act 1993.

convention of vicarious ministerial responsibility which dictates that ministers are answerable for the actions of their departments (Martin, 1991: 40), such unfavourable reports in Parliament may have more punch than it first appears.

The recent *Review of the Official Information Act 1982* by the Law Commission recommended that "... *the Solicitor-General should enforce the public duty to comply with an Ombudsman's recommendations on his or her own initiative in accordance with constitutional practice*" (NZLC, 1997: 127). The *1997 Report of the Ombudsmen* notes that pursuit of the public duty in a number of recent cases resulted in agencies releasing information in accordance with the Ombudsman's recommendations (Ombudsmen, 1997a: 26).

The Predicted Impact of the Act

The OIA flowed from the work of the Danks Committee. In its reports, the Committee anticipated possible negative effects of the Act in modifying the behaviour of departments and officials in the way they handled information and the potential impact that such changes in behaviour would have for the capability and integrity of the public service. The Committee reported that:

...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 are arrived at would be incomplete or inaccessible (Danks Committee, 1980: 19).

Believing that "knowledge is power" some within government feared that the increased availability of information would lead to a corresponding loss of power and ability to govern effectively (Shroff, 1997a: 19).

The General View of the Impact of the Act

The impact of the OIA was immediate and fundamental (Shroff, 1997a: 19). The OIA has been described as one of the most important constitutional and civil rights developments of the last 30 years and may be viewed as a radical and significant element of New Zealand's constitution (SSC, 1995a: 1 & 14). Radical, in that it has "... *significantly altered the balance between the*

State and the individual".⁶ Significant, in that has fundamentally altered the way public servants have had to think about the status of official information, the rights of individuals and public servants' place in the constitutional scheme of things (SSC, 1995a: 14). The Secretary of the Cabinet has also underlined the constitutional significance of the Act (Shroff; 1996, 1997a, 1997b).

The significance of freedom of information and the OIA is underlined by the New Zealand Bill of Rights Act 1990, section 14, which affirms that:

"Everyone has the right to freedom of expression, including freedom to seek, receive and impart information and opinions of any kind in any form".

The SSC in its guide to the public service, *Working Under Proportional Representation*, notes that "...the principle that official information should be more readily available is now well established" (SSC, 1995b: 31).

This study will add substantive weight to the existing anecdotal evidence which suggests that virtually all written work in the government these days is prepared on the assumption that it will be made public in due course. Rather than maintaining secrecy over official information, the focus in the current open style of government is on managing the dissemination of official information (Shroff, 1997a: 19). But the impulse to shelter behind secrecy has not entirely disappeared (SSC, 1995a: 1), a view stated more strongly by du Fresne (1996: 187), who argues that the basic instinct of the bureaucrat, if not the politician, is still to suppress information.

Voyce (1996: 43) found in interviews that the overwhelming view of public servants he surveyed was that the OIA was encouraging the generation of more *informal* advice and discouraging the generation of *written* advice. His view was that:

...Ministers do not want to be haunted by a paper trail which could demonstrate that they have made decisions contrary to the advice proffered by officials (Voyce, 1996: 43).

⁶ McMullin J in *Fletcher Timber v Attorney General* (1984) 1 NZLR 290, 305. (CA).

Hensley (1995: 22; 1996: 182) provides anecdotal evidence to support this view, noting some of the potential costs to the public service, the public they serve and to good government. Hensley (1995: 23) also argues that officials tend to forget that the second purpose of the OIA is to provide 'proper protection' to official information. "*The perception [that the OIA does not provide adequate protection] is what is damaging the proper recording of government processes*" (Hensley, 1996: 183). My own experience in talking to senior advisors prior to commencing the work for this paper confirmed these views.

Palmer (1987: 272) noted that some departments have been obstructive to the extent of delaying replies to queries by the Ombudsman when investigating a complaint. From 1988 to 1991, the Ombudsmen's annual report to Parliament contained a list of departments who had defaulted in meeting the OIA's timeliness requirements for responses to requests for official information (Ombudsmen, 1992b: 25).⁷ Reports since then have noted failures to comply with recommendations of an Ombudsman.⁸ Politicians and officials know that the issue is not the release of information, but the timing and form of its release (Morrison, 1997: 33). Chief Ombudsman Sir John Robertson reported in 1990 that "*[g]enerally speaking information is a perishable commodity. In many instances unless what has been requested is released promptly it is of no value to the person requesting it*" (Ombudsmen, 1990: 30).

Morrison (1997: 33) has also highlighted a range of other tactics used by ministers and officials to minimise the impact of information released; for example, release of information on Christmas Eve after many delays.

Implementation of freedom of information under the OIA has also been affected by the government reforms. SOEs take refuge in the commercial confidentiality provision of the Act, an action that du Fresne (1996: 188), argues has become reflexive. Privatisation and deregulation have meant that government has moved out of many activities in which it was previously involved, while at a practical level paper records or knowledge of their existence were sometimes "lost"

⁷ Agencies still in existence from the last list (1991) include: Department of Labour, Police, Treasury, Department of Justice and Department of Internal Affairs (Ombudsmen, 1991: 44). The 1990 list included 16 agencies (Ombudsmen, 1990: 50).

⁸ These Agencies include New Zealand Rail (Ombudsmen, 1993: 41) and three CHEs (Ombudsmen, 1995: 40).

when departments were restructured or abolished.

Protecting the Principle of Participation

Citizens can only participate in the development and administration of laws and policies if they have access to relevant information (Belgrave, 1997: 25). The principle of participation is one of the important democratic principles that the OIA seeks to underpin. Citizens can only respond to decisions that affect them if they know about the decisions and the reasons on which they are based. The availability of official information is a necessary condition for effective exercise of civil rights and for the effective operation of participatory democracy. In enabling greater public participation the availability of official information also enhances the quality of governmental decision-making (Belgrave, 1997: 25).

According to Ralph Nader, information is the currency of democracy (du Fresne, 1996: 186). Public debate is vital to democratic politics (Chen & Palmer, 1994: 834). In 1989 Jim Bolger, then Leader of the Opposition, argued that *"[f]or true democracy to flourish the public must have the facts before them before an issue can be debated and settled"* (Morrison, 1997: 30). Chief Ombudsman Sir John Robertson in his 1993 annual report to Parliament noted that the Government had failed to make information available in time for proper public debate to influence decisions. He said *"[i]t is unarguable and acknowledged that for some time now the public's perception is that successive governments have lost credibility through ineffective consultation before decisions are taken"* (Ombudsmen, 1993: 8).

The public service exists to serve the government of the day, to implement its policies, to provide it with the most comprehensive, accurate and timely advice available, and to support it with professionalism, probity and integrity under all circumstances (SSC, 1996a: 2). The complexity of modern government and the speed of social and economic change make the quality of public policy formation a critical element in current and future national welfare (SSC, 1993: 11).

If the quality of public policy formation is a critical determinant of current and future national welfare, and if participation is essential to get the best out of democratic governmental decision-making, then effective public participation in the policy development process would appear to be

highly desirable. Such participation is integral to the purpose of the OIA and it is, therefore, imperative that ministers and officials do not lose sight of the principles embodied in the Act in their daily duties.

The OIA and the Policy Process

The aim of this paper is to determine, from a *participation* perspective, the impact of the Official Information Act 1982 on the core public sector policy process. It was noted in earlier remarks that disclosure of information in a democracy is always a balancing act between the proper protection of information and the protection of individual rights, freedoms and personal privacy. One of the most vital questions in any assessment of the OIA is whether the balance between openness and secrecy is right, that is whether it continues to meet changing social needs and the expectations of the various parties with an interest (Belgrave, 1997: 25).

The discussion in this chapter has highlighted the aims and purpose of the Act, some of the expectations of the impact of the Act, general views on the positive and negative aspects of the impact of the Act and the importance of the Act working as intended. The principle of participation has been introduced. To understand the relationship between the OIA and the policy process and the impact of the OIA on this process, it is first necessary to explore this concept called 'policy'. An exploration of the policy process is the purpose of the following chapter.

CHAPTER TWO: POLICY AND THE POLICY DEVELOPMENT PROCESS IN NEW ZEALAND

“Single-issue lobbies work best on politicians. The secret is to find an exposed corn and tread on it as hard as you can. If you manage to make the corn hurt more fiercely than the rest, something will be done to ease the pain.”

Colin James, political columnist.¹

This chapter seeks to outline the process by which policy is developed. It first looks at the broader context: what is policy, and, how is policy made? It then focuses on policy-making in central government – the core public sector – in New Zealand, outlining a generic approach. Discussion focuses on the practicalities and realities of policy-making in New Zealand, rather than the debate on policy-making theory, often associated with authors such as Lindblom². This chapter explores possible origins of policy, how policy initiatives are developed, the concept of policy advice and the decision-making procedure through which it is processed before becoming ‘policy’ and/or becoming law. In closing, the chapter notes the elements of the process that are specifically referred to in the OIA.

The Concept of Policy

What is policy? ‘Policy’ has many meanings and covers a range of levels or types. Boston et al. (1996: 122) differentiate among three types of policy: strategic, substantive and operational. Hogwood and Gunn (1984: 12-19) note the frequent use of ‘policy’ as a synonym for a ‘field’ of government activity. Hogwood and Gunn (1984: 14-16) also discuss policy as: an expression of general purpose or desired state of affairs; specific proposals; decisions of government; formal authorisation; a programme; output; outcome; theory or model; and process.

In seeking to define policy, Hogwood and Gunn (1984: 19-24) look at its important elements and characteristics. They note ‘policy’ is larger than ‘decision’, inevitably involves a whole series of decisions³ and rarely involves only one decision maker. Hogwood and Gunn (1984: 20-24) also

¹ *National Business Review*, 23 August 1978.

² For a review of the contribution of Lindblom see Gregory (1989).

³ While noting there may be a crucial decision or ‘moment of choice’.

note that policy is less readily distinguishable from administration than is sometimes suggested, it involves observed behaviour as well as intentions (actions speak louder than words), involves inaction as well as action, includes intended and unforeseen outcomes; may have purposes defined retrospectively⁴; arises from process over time and involves intra and inter organisational relationships.

MacRae and Wilde (1985: 12) define policy as “*a chosen course of action significantly affecting large numbers of people*” but policy may also be specific enough to affect just a few. Hogwood and Gunn (1984), in attempting to define policy, conclude that:

“... policy is subjectively defined by an observer as being such and is usually perceived as comprising a series of patterns of related decisions to which many circumstances and personal, group and organisational influences have contributed. The policy-making process ... may extend over a considerable period of time. ... aims are usually identifiable at a relatively early stage in the process but these may change over time and ... may be defined only retrospectively” (Hogwood and Gunn, 1984: 23-24).

The *Oxford Dictionary* lists a policy as:

“a course or principle of action adopted or proposed by a government, party, business or individual ... ”

For the purposes of this paper, discussion will focus on the rational policy approach. While within this approach there are many variants, our interests will be met by the definition of policy which considers it as “*... a course or principle of action adopted or proposed by a government, or government agency*”⁵.

A Generic Approach to Policy-Making

There is no one right way of developing policy but a number of authors identify a broad process with identifiable characteristic stages.⁶ They therefore posit frameworks within which consideration of any given system for policy development may be debated. Hogwood and Gunn

⁴ In order to suggest greater foresight about outcomes than prevailed at an early stage.

⁵ For the purposes of this paper ‘agency’ is defined as including departments, ministries and other public service organisations.

⁶ While this paper uses the framework from Hogwood and Gunn as an example, similar models are offered by Bobrow and Dryzek (1987), MacRae and Wilde (1985) and Putt and Springer (1989).

(1984) offer one such framework which lists the stages through which an issue must pass.

- (1) Deciding to decide (issue search or agenda-setting)
- (2) Deciding how to decide (or issue filtration)
- (3) Issue definition
- (4) Forecasting
- (5) Setting objectives and priorities
- (6) Options analysis
- (7) Policy implementation, monitoring and control
- (8) Evaluation and review
- (9) Policy maintenance, succession or termination

(Hogwood and Gunn, 1984: 4)

The above framework is not meant to provide a step-by-step recipe for policy development. Hogwood and Gunn (1984: 6) note that the dividing lines between stages are artificial, stages are not necessarily completed in the order provided and progress to a subsequent stage often requires a revisiting and reworking of an earlier one. They also argue that there are two reasons why the process is generally not linear: first there is a need to assess the implications of each stage in advance of carrying it out; secondly the process is frequently iterative or recursive, with preliminary work on subsequent stages being used to better understand the earlier stages in the policy development process. Those with experience in policy development can usually recite stories of implementation or evaluation showing up deficiencies in the original definition of the policy problem.

Another important issue in policy development is the background against which it is undertaken. There is always a policy setting within which development of a new policy takes place. Policy proposals may either amend policy already in place or may just require cognisance of the greater policy environment within which the proposal will fit. It is rare that policy development starts from scratch.

Many policy proposals are reactive in nature; far more than are proactive. Not all policy is developed from hypotheses worked up to a fully fledged proposal and resulting programme. More often than not, something changes in the external environment within which a policy is set or a deficiency is discovered that requires action. David Lange is reported to have said that in his time in parliament only two ministers ever saw a policy move unequivocally from concept through

to enactment and implementation. These two were the Rt. Hon. Bill Birch – Employment Contracts Act 1991 – and Sir Roger Douglas and the various pieces of legislation associated in the 1980s with ‘Rogernomics’.

The Origins of Policy in New Zealand

Policy is the means by which a Government turns its electoral mandate into decisions (SSC, 1995b: 26). How issues get on the policy agenda is a difficult and complex question. In New Zealand the policy agenda at the strategic and substantive level is set by ministers’ purchase agreements with chief executives of government departments and ministries. The operational policy agenda is in general influenced to a greater degree by the chief executive. However, some policies are the outcome of domestic and international forces over which neither citizens or the Executive have much control.

In New Zealand, a policy often starts life as the result of the public service perceiving a lack of policy or a defect in current policy (Palmer, 1987: 9), or at the ministerial level when a minister decides a policy should be developed. The minister’s decision may be the result of party influence (from either inside the caucus or from the party at large), pressure group activity, personal contacts or the minister’s own initiative.

Ministers and their private offices rarely have the capacity or the capability to fully develop policy proposals and ministers are rarely experts in the specialist areas of their given portfolios. As Hawke (1993) notes “... *good intentions do not make good policy although they are an essential ingredient and a sound starting point*” (Hawke, 1993: 6). Thus, ministers rely on experts within departments to interpret their ideas, often expressed in general terms as outcomes or solutions to a perceived problem, and develop them into fully fledged policy options or proposals. Departmental officials will often have a great deal of discretion within which to interpret what the government’s actual policy intentions are. Therefore, officials must work with their Minister to operationalise policy initiatives statements within a framework faithfully reflecting the intended outcomes of the government (Dickens, 1991: 10). This is important because as Putt and Springer (1989) note:

“The way a policy problem is interpreted, clarified and designed implies the range of

solutions that may be applied to its resolution providing a guide for future policy action” (Putt and Springer, 1989: 33).

The process is generally an iterative one and not all initiatives are feasible. Policy may be misguided or simply wrong; as in the case where an output can in no way lead to a minister’s explicitly desired outcome. The department may need to return to the minister for clarification and guidance and consultation with other organisations or individuals may be necessary.

If the policy does not fall within the minister’s portfolio responsibilities, the minister may take the policy idea to caucus, for consideration and development by the caucus committee system. It will then be passed to the responsible portfolio minister to take further, with the work once again being undertaken by the department concerned.

In general terms, it is the responsibility of ministers to determine and promote policy and to defend policy decisions; it is the responsibility of officials to advise ministers and to implement government policy (Cabinet Office⁷, 1996: 24). But public servants enjoy a dual function acting as both initiators of policy developments and advisors to government on other policy proposals. Public servants tend to provide much of the detail of policies within the guidance given by ministers as officials have the influence of information at their disposal (Palmer, 1987: 10). Access to information and to the expertise which generates that information is of considerable importance in terms of policy development (SSC, 1995b: 27); information is the foundation of advice; and advice is the fundamental component of policy.

Policy Advice

At present, the organisation and purchasing of policy advice in New Zealand is conducted within the principles and practices of the Westminster model (Boston et al., 1996: 121). In the New Zealand model, one of the major roles of the departmental chief executive is to be the responsible minister’s chief policy advisor (SSC, 1995b: 23). Under section 32 of the State Sector Act 1988, chief executives are responsible for the tendering of advice to the portfolio minister and other Ministers of the Crown. (CO, 1996: 23). Governments largely rely on in-house advisors employed in policy ministries and departments. Such advisors – usually referred to as “officials”

⁷ Hereafter abbreviated to CO for references.

– are required to offer impartial advice without “fear or favour” and to serve governments of varying ideological persuasions with equal dedication and loyalty (Boston et al., 1996: 121).

The SSC states that public servants have a responsibility to ensure the debate which takes place on policy initiatives is well informed (SSC, 1995b: 26). The traditional expression of this responsibility has been the convention of ‘free and frank’ advice; a convention that goes to the heart of the Westminster system (Hensley, 1995: 21). Free and frank advice is advice which Voyce (1997) has defined as:

- *honest* – it truly reflects the views of the advisor;
- *independent* – it truly reflects the advice of the advisor and/or the ministry the advisor represents and is not unduly influenced by the views/opinions of a third party;
- *objective and impartial*, – it does not unduly reflect the individual’s partisan views;
- *forthright*, – it is the advice the Minister needs to hear rather than advice the Minister wants to hear;
- *comprehensive*, – it is well researched and reasoned, contains options and focuses (where appropriate) on the long term;
- *sympathetic*, in that it takes into account the policy needs and objectives of Ministers and/or Government of the day, but is mindful of the wider public interest; and
- *unconditioned* by fear of possible consequences.

(Voyce, 1996:14; 1997: 9)

In arguing the need for advice to be independent, the SSC make the point that the advice should be *independent* of, but *not ignorant* of the Minister’s views (SSC, 1995b: 26). The SSC also argue that while the public servant’s first duty is to their Minister and Ministers collectively, the same expectation of high quality and well-informed advice extends to other situations in which public servants provide advice.

Dickens (1991) notes that all advice presented by officials to the Government should meet two key constitutional conventions (Dickens, 1991: 10):

- *All policy advice must be formulated to achieve the responsible minister’s, cabinet’s and in the final instance the PM’s policy intentions; and,*

- *The Government should be warned of the likely consequences of following or not following a recommended course of action. The Government should be kept in touch with any matters of political importance (the 'no surprises' principle)*

But what if the Minister doesn't accept the advice? The SSC suggests that:

Policy analysts should offer free and frank advice and if that advice is rejected as unacceptable because it does not support their Minister's position on a particular policy issue, then they should supply advice which includes an analysis of their Minister's policy position. Failure to do this results in time and resources continually being expended on policy advice which, while possibly well argued and factually correct does not address the policy concerns of the Minister (SSC, 1995c: 18).

Martin (1994: 47) notes that policy advice is increasingly sought from outside the departmental structure. Task forces and consultants now play a major role in the policy process. In part, the need for such outside help stems from the reforms and downsizing which have pared department's policy advice staff. Departments may no longer maintain expertise in certain fields or maintain the capacity needed for some tasks.

The Legislation Advisory Committee (1990: 4) determined that in 1990, at any one time, there were likely to be more than 100 non-departmental advisory bodies providing advice to government on various policy issues. Many of these advisory bodies are independent statutory bodies (Keith, 1993: 4), and some, such as the Law Commission, are considered to be very influential (Boston et al., 1996: 123). In addition to seeking advice from officials, political advisors, caucus colleagues and departmental officials, ministers also seek advice from interest group representatives, personal friends and contacts in the wider community (Boston, 1990: 76).

While competing streams of advice are encouraged under the present public management system, there have been difficulties in integrating the advice of outside consultants and ministerial staff into the Cabinet policy-making process.

Once the minister has received a report (advice) from the department, and such other advice as he or she deems necessary, the minister will then decide whether to adopt or reject the advice. Such consideration may involve others in the party before the decision is made to advance the policy through the formal system of the Cabinet Committees and ultimately Cabinet itself. How

does the system work in New Zealand in the late 90s?

Policy Development in the Cabinet System

The Cabinet Office Manual (CO, 1996: 37) suggests that as a general rule ministers should take to Cabinet the sort of issues on which they themselves would wish to be consulted. Cabinet as a whole has an interest in the policies of each of its constituent ministers. So while ministers have authority and responsibility to determine policy within the ambit of their portfolios, major decisions are taken through the collective decision-making process of Cabinet (CO, 1996: 18) making Cabinet the ultimate policy-making body in New Zealand.

Cabinet directs and coordinates the implementation of government policy, proposes the key issues of supply and level of government expenditure for approval by Parliament, decides new policy to address changing circumstances, agrees on the legislative programme to be deliberated in Parliament and coordinates the decision-making responsibilities of government (Eaddy, 1992: 163-164). Palmer notes that *"few major items of government policy are settled without the approval of Cabinet or a cabinet committee"* (Palmer, 1987: 10).

Ministers act as gatekeepers of the Cabinet system. Only ministers may make or authorise submissions to Cabinet or Cabinet committees (CO, 1996: 41). Therefore, while ministers are not the only people who can initiate policy, they are the critical arbiters of whether or not a policy initiative will be considered by the Government.

In general, Cabinet requires departments bringing policy proposals forward to certify that they have consulted with other agencies which have an interest in the matter to be considered (SSC, 1995b: 26). The Cabinet Office also enforces other reasonably strict requirements for Cabinet papers, in particular the length of papers. Because of the volume of issues ministers must consider, briefing papers must be thorough, considered and concise.

Cabinet Committees

Cabinet is supported by a committee structure which provides the forum for more detailed consideration and discussion of issues before reference to Cabinet. Cabinet Committees in turn

may be supported by officials' committees which in theory provide a forum for ensuring interdepartmental and whole of government issues are addressed. In considering policy in committee, ministers may call in officials to assist (CO, 1996: 36). Thus, while the means of transmission of advice and policy implementation is through the minister/chief executive link, the process of Cabinet Committee consideration plays a role in helping officials gain an understanding of ministers' aims, interests and intentions. Perhaps a more important role is the opportunity committees provide for ministers to question officials from departments other than their own.

"You've got the opportunity at Cabinet to have the political debates on your own, no officials are there at all. But it is very important in the process leading up to making decisions for a Minister to be able to access advice from officials outside his or her own agency." Rt. Hon. Bill Birch (Voyce, 1997: 13).

Cabinet retains the ultimate power of decision and Cabinet committee decisions cannot be acted upon by ministers and departments until they have been confirmed (or amended) at the following week's Cabinet meeting. Occasionally Cabinet will grant a committee "power to act" but such delegations will generally be limited to clearly defined items (CO, 1996: 38).

The reality of debate and decision-making in the Cabinet system may be somewhat different from the procedure laid down in the Cabinet Office Manual. In reviewing the administration of the fourth Labour Government, Boston noted a great deal of discussion and bargaining between ministers over policy issues and matters of political strategy went on outside Cabinet and its committees. Indeed, he noted that "*... it seems key Ministers hammered out the details of even major policy initiatives before the relevant papers have been put before a Cabinet committee*" (Boston, 1990: 69). But while much of the groundwork and debate may occur elsewhere, one of the key functions of Cabinet remains the provision of a system through which the *formal* decisions are taken, confirmed, recorded and communicated to the wider public service.

The doctrine of collective responsibility means once decisions are made by Cabinet, all ministers are meant to stand behind them. But not all policy issues make it to Cabinet; in fact some policy does not even make get to the level of ministerial decision-making. Ministers are not all-powerful. Keith (1996) notes:

Members of the public service sometimes have independent statutory powers of decision, over which ministers do not have control and for the exercise of which they are not responsible. Other parts of the broad public sector are also distinct from ministers and not subject to their control and responsibility in the same way as departments and their members usually are. The bodies set up separately from government include regulatory agencies, providers of a wide range of services, state trading bodies, and supervisory or control agencies (Keith, 1996: 6).

The Strategic Policy Framework

Policy in the New Zealand public sector does not emerge from a vacuum. The original public sector reforms of the 1980s were perceived to have shortcomings. In particular, the National Government was apprehensive that the collective interest was not given sufficient attention. Difficulties existed in the specification and assessment of outcomes and policy was oriented towards the short term. To address this need the National Government introduced the Strategic and Key Result Areas (SRAs and KRAs) in 1995 (Schick, 1996: 54). The first publication, at the highest level of strategy, was the Government's vision statement, *Path to 2010* (New Zealand Government, 1993), which set out a general statement of the Government's policy objectives and a vision of New Zealand into the next century (SSC, 1995b: 14). This was followed by the publication of the first set of SRAs, which were designed to be:

" ... the link between the Government's long term objectives and the operational activities of departments. They aim to bridge the gap between the broad vision of a future New Zealand as stated in the 1993 document Path to 2010 and the one-year focus of existing departmental budgets and chief executive performance agreements"

Rt. Hon. J.B. Bolger, Prime Minister (New Zealand Government, 1995: 3).

Subsequent documents such as *Towards 2010: The Next Three Years* (New Zealand Government, 1994), *Investing in Our Future* (New Zealand Government, 1995) and *New Opportunities* (DPM&C, 1996) applied this vision to coming three year periods. In June 1997, SRAs covering the period 1997-2000 were published (DPM&C, 1997). Schick suggests that "... given the broad sweep of the SRAs, it is not hard for most ministers to demonstrate that their initiatives are justified by the government's strategic result areas" (Schick, 1996: 55). In practice, the SRAs' main purpose is to guide Vote allocation and to act as the overarching framework within which departmental chief executive's performance agreements and KRAs are set.

After Cabinet

Cabinet decisions take one of three routes. Some policy decisions need no further action after Cabinet has reached a decision before the department or agency concerned may implement them.⁸ Other Cabinet decisions require regulations to be made and therefore require presentation to the Executive Council. These are usually actioned at the meeting of the Council held later that day. Once approved by the Executive Council, Orders in Council are gazetted in the *New Zealand Gazette* – the official journal of Government – usually on the Thursday of that same week. In general, Orders then take effect 28 days after their publication (CO, 1996: 14).

The third route involves the passage of Bills through Parliament. Bills pass through the stages of introduction and first reading, seconding reading, consideration by select committee, consideration by a committee of the whole House (committee stage), third reading and Royal assent (New Zealand House of Representatives⁹, 1996: 59-68). Passage of the bill is controlled by the legislation programme, the government's tool for managing the consideration of legislation by Parliament. Standing orders provide for consideration of all bills – except appropriation and imprest supply bills – by a select committee (NZHR, 1996: SO 281). The roles of select committees are covered in more detail in chapter three.

Protection Under the OIA

Certain portions of the policy development process are provided with conditional protection by the OIA.¹⁰ These provisions include protections to maintain the constitutional conventions which protect collective and individual ministerial responsibility [s.9(2)(f)(ii)]. Conditional protection also covers the confidentiality of advice tendered by Ministers of the Crown and officials [s.9(2)(f)(iv)]. One of the better known and more used provisions is for the maintenance of the effective conduct of public affairs through the 'free and frank' expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employee of any department or organisation in the course of their duties [s.9(2)(g)(i)]. On the face of it, all stages of the policy development process are afforded conditional protection.

⁸ Often Cabinet holds a decision on implementation and awaits consideration of the communication strategy before implementation is authorised to proceed.

⁹ Hereafter NZHR for references.

¹⁰ Discussed in greater detail in chapter three and appendix two.

Non-Departmental Participation in Policy Development

This chapter opened with a definition of policy as "*Government's plan of what to do on a certain issue or in a given set of circumstances*". The chapter then outlined the system of policy development in New Zealand. An important feature of this system is the concentration of power in the executive, comprising Cabinet Ministers, the public service and a large number of other bodies connected with government.

In the next chapter, I examine the role and scope of public participation in the policy development process. In particular I focus on the intent and application of the OIA.

CHAPTER THREE: PARTICIPATION

"Open government makes it harder to govern - but even harder to govern badly."
Anon (Cath Wallace, 1994: 52).

Part of the declared purpose of the OIA 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 thereby to enhance respect for the law and promote the good government of New Zealand" (OIA s.4).

This chapter explores the term "participation" and seeks to establish what the Act envisaged "effective participation" to mean. The literature is first reviewed before the OIA and the opportunities for participation in the policy process described in the last chapter are examined.

Definition

Pateman (1970: 1) in *Participation and Democratic Theory*, notes the widespread use of the term 'participation' in the media has tended to mean that any precise meaningful content has almost disappeared; 'participation' is used by different people to refer to a wide variety of different situations. Parry et al. (1992) define participation as:

" ... taking part in the process of formulation, passage and implementation of public policies. It is concerned with action by citizens which is aimed at influencing decisions which are ... ultimately taken by public representatives and officials. This may be action which seeks to shape the attitudes of decision-makers to matters yet to be decided, or it may be action in protest against the outcome of some decision" (Parry et al., 1992: 16).

Or more simply as Nagel (1987) puts it:

"Participation refers to actions through which ordinary members of a political system influence or attempt to influence outcomes." (Nagel, 1987: 1)

Two Approaches to Participation

Parry et al. (1992: 3) note that 'government by the people' is a widespread characteristic of democracy and one which by definition implies participation by the people. Brown (1995: 11) states that participation in the political process is generally held to be a necessary condition for a democratic society. Without participation by citizens, there would be no democracy (Parry et

al., 1992: 4).

Parry et al. (1992: 4) outline two broad theories of democracy, each with quite different implications for participation. The first – the participatory variant of democratic theory – has a long history. The ancient Greek tradition of government by the people implies the maximum participation of the citizen in shaping laws and policies.

The modern embodiment of the Greek tradition would be a populace consistently interested in politics, turning out in large numbers to vote, forming groups to campaign for shared objectives and in regular contact with representatives and officials. Beyond voting, attempts to influence would include writing letters, meeting representatives, signing petitions, attending public enquiries or demonstrating. Underlying all such action would be a desire to sway the opinion of those in a position to influence policy and/or the decision-making process. Empowered through the twin catalysts of information and opportunity, citizens would be able to participate in a meaningful way. Their interest in politics could be expected to ensure that many societal issues and problems took on a political dimension and their solutions would be sought through political means. Government institutions would provide many points of access for citizens to communicate their views (Parry et al., 1992: 4) at a time when such views could still contribute to the debate.

The alternative view, supposedly grounded in the actual practice of democracies and hence often known as the ‘realist’ view, sees a limited role for participation by citizens (Parry et al., 1992: 4). In this view, participation is largely limited to periodic elections where a party obtains authority to govern. Between elections, participation is limited to indirect involvement in decision-making such as criticism; citizens are not expected to act as ‘back-seat drivers’. Citizens therefore act more as controllers than participants. In the realist view, most people are uninterested in politics, except where their own interests are directly involved; to encourage their participation would be to introduce ignorance and indifference in place of the expertise of the ‘professional’ politician (Parry et al., 1992: 4).

In contrast to the participatory democrats, who measure the health of a liberal democracy by the high levels of involvement of the citizenry, the ‘realists’ measure the health of the system by

assessing its stability and its capacity to permit checks on the leaders – accountability. What constitutes impressive or ‘healthy’ levels of participation will, therefore, be determined in part by the school of democratic theory subscribed to. It will also depend on the related issue of what one believes participation can achieve (Parry et al., 1992: 5).

Participation as Envisaged by the OIA

What is envisaged in section 4 of the OIA, which includes in the purpose of the Act “... *more effective participation in the making and administration of laws and policies*” (OIA s.4)? The Danks Committee mentioned participation both directly and indirectly:

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; ... A no less important consideration is that the Government requires public understanding and support to get its policies carried out (Danks Committee, 1980: para 20).

For many people the arguments for greater access to official information start with participation, on the principle that a better informed public is better able to play the part required of it in the democratic system – and to judge policies and electoral platforms. It is expected too that the critical and at times difficult choices that government have to make for our society will be better resolved if the community is well informed. ... A number of structures have been set up ... to involve more groups in policy discussion before decisions are taken and so to take public consideration of policy options a stage further than previously. These statutes demonstrate the growing acceptance by Parliament of the value and importance of the wider participation of individuals who are affected by regulatory and planning decisions or who for other reasons, can usefully contribute to the process of decision [making] (Danks Committee, 1980: para 22).

Participation is, therefore, advocated on the basis of democratic principles, in particular as a means to enhanced accountability, enhanced decision-making and obtaining greater support for policy decisions taken (compliance). The purpose of the OIA gives a further clue. The end of s.4(a) states “*and thereby to enhance respect for the law and to promote good government in New Zealand*”.

The Arguments for Participation

The literature provides support for the arguments of the Danks Committee. Majone (1989: 2) suggests participation within the policy process increases the likelihood of innovation in problem

definition by seeking out and presenting contrasting points of view. Public discussion mobilises the knowledge, experience and interest of many people while focussing their attention on a limited range of issues. Each participant is encouraged to adjust his or her views of reality and even to change their values as a result of the process of reciprocal persuasion. In this way, discussion can produce results beyond the capabilities of authoritarian or technocratic methods of policy-making.

Nagel (1987: 14) suggests participants should tend to accept particular decisions more readily. Having heard the pros and cons of a policy debated, citizens better understand its nature and justification. Participants perceive the process as fair, even when the outcome goes against their immediate interests, because they have had a chance to influence the decision. Nagel (1987: 14) argues that group approval of a policy harnesses powerful social forces in favour of compliance.

More recently, discussion by a range of commentators has tended to focus more on the value of participation as a vehicle for accountability and increasing public acceptability and thereby compliance with government policy (Belgrave, 1997: 26; McLeay, 1995: 178; NZLC, 1997: 82; Palmer & Palmer, 1997: 187). However, in many circumstances public servants have grown to appreciate that sharing knowledge means better government, a better decision-making process, and a better informed public (Shroff, 1997a: 19).

These are the benefits envisaged by the Danks Committee, but Parry et al. (1992: 6-14), Nagel (1987: 14-15) and Barber (1984: 152) also note other potential benefits. These include opportunities for participants to promote their own goals with minimum cost and maximum effect, educative and developmental effects, opportunities for expression and intrinsic benefits.

Opportunities for Participation in the Policy Development Process in New Zealand

The previous chapter outlined the generic process of policy development in New Zealand. Where then within this process do the opportunities for participation for the citizenry lie? Essentially within this process there are four opportunities. Citizens may individually or collectively try to influence ministers since they generally drive the policy agenda and are arguably the most powerful group in the policy development process. Opportunities also exist to influence the agency(ies) that advise on a particular policy initiative. Such opportunities are nowadays often

enhanced by public consultation being included as a stage in the policy development process. Policies requiring legislation provide an additional opportunity for citizen influence at select committee stage. Finally, Parliament as a whole offers a venue whereby political pressure can be applied to any particular issue. While the procedures of Parliament (other than petitions) are only accessible to members, MPs offer their constituents a means of attempting to apply pressure in the development or change of any given policy.

However, as noted, the case for participation must be balanced with the need for effective government. How are these competing needs to be met? Three issues need to be addressed: how government can maintain an effective policy development process; timing; and consultation.

Maintaining An Effective Policy Development Process

Nothing in either the Danks report or commentary on the OIA, in particular by the Office of the Ombudsmen, envisages participation to the extent that government is unable to function. As Huntington puts it *"a value which is normally good in itself is not necessarily optimized when it is maximised"* (Huntington, 1975: 115). In fact the Danks Committee noted that *"[n]otwithstanding the need for participation and accountability, the Government's essential task is still to govern"* (Danks Committee, 1980: para 26). This point has also been raised more recently by the Law Commission which notes that it is, despite the desirability of participation and accountability, *"[a]lso critical ... that the government, elected by the people is able to govern effectively"* (NZLC, 1997: 82).

In determining an appropriate extent for citizen participation in policy development, the most useful comment is that of the then Chief Ombudsman, Sir John Robertson.

Clearly this [the OIA's] purpose contemplates that authoritative information about government proposals for change of policy, or for major decisions affecting the lives of people, should be available to the public for debate before decisions are taken. Effective participation does not mean that the public should sit on the councils of government when decisions are taken. What it does mean is that the public should be able to debate the issues involved and, through their representatives, whether Members of Parliament or special interest groups, put their views so that decision makers can take them into account when the decision is taken (Ombudsmen, 1993: 8).

The Danks Committee saw it this way:

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 the 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 (Danks Committee, 1980: para 47).

Participation is supposed to be accommodated by giving appropriate opportunities for public input at specific regularly spaced stages of the policy-making process (Donnelly, 1990: 11). Therefore, in practice, policy development should proceed along the following lines. Policy decisions on an initiative should be preceded by a period of consultation with interested parties. During this phase information should be freely available to enable genuine consultation to take place (Belgrave, 1997: 27). However, once advice has been received most authors argue the need for a “cone of silence” to descend to allow ministers and officials to distill the issues and deliberate (eg. Belgrave, 1997: 27; Donnelly, 1990: 11; NZLC, 1997: 79-80; Shroff, 1997a: 19).

The Law Commission notes that official information regimes universally recognise that some parts of the process of government will be conducted in private (NZLC, 1997: 79). Once the decision is made, it should be publicly announced, again exposing the final stage of the policy development process to the sunlight of public scrutiny. Since policy development is often iterative, announcement or release of early decisions that proceed more detailed policy development will provide further opportunity for participation. Such opportunities may also provide a covert opportunity to revisit earlier decisions depending on the reception decisions receive.

Timing

Motivation to participate is often concerned with influencing the specifics of a policy initiative or the formulation of alternative policies (Parry et al., 1992: 9-14). In some respects, this is the most important stage of policy decision-making. Complaints and protests *after the event* can be expected to have less prospect of success in obtaining the policy outcome sought (Parry et al., 1992: 18). Brown (1995: 18) notes that the earlier one is able to gain access to the process the more influence one can exert.

One of the biggest issues facing a would-be participant is knowing what is on the policy agenda.

The most active participants are likely to develop contacts on the ‘inside’ of the executive so that they are aware of what is and is not being worked on at any given time. This is the *raison d’être* of lobby groups and ‘public affairs’ consultants – to keep their ears to the ground in the corridors of power. For those without such access, the lack of knowledge of issues under consideration is a fundamental problem. While parliamentary debates and the work of select committees are relatively accessible to those wishing to find out what is going on, generally the bulk of policy development is done prior to policy reaching the parliamentary arena – if it reaches Parliament at all.

If a would-be participant is aware of a policy initiative under consideration, timely access to information is critical. The availability of official information can only contribute to public participation in the policy development process if relevant government decisions have not already been made (NZLC, 1997: 18). However, even with the OIA to assist, obtaining information can be difficult. In *Open Government* Hunt, writing about the United Kingdom, notes:

For those outside government the problems of gaining access to specific information in enough time to make a contribution to policy-making are enormous. Much of the discussion about a policy may not be written down – it may arise from informal contacts or involve telephone conversations with nothing other than a summary of the conclusions recorded in the formal sense. Discussion between ministers and civil servants may well not be written up in a way which gives any real insight about the advice given to a minister or the arguments given to support that advice (Hunt, 1987: 180).

Information is a perishable commodity (Ombudsmen, 1990: 30): “*stale information is often useless to the requester*” (NZLC, 1997: 63). Therefore, unless the participant is well informed on the policy agenda and is pre-equipped to address the issue, the OIA may be of little assistance in gaining the information needed for effective participation. For this reason timing of releases, “*playing games*”, has been used by ministers as a means of minimising political damage arising from release of information under the OIA.¹

Consultation

‘Consultation’ has become one of the words that define democratic government in the nineties.

¹ See Morrison (1997).

Public agencies, Parliament through select committees² and the courts, all increasingly emphasize open and consultative processes of policy and decision-making. More than 1200 statutory provisions use the word “consult” or its variations (NZLC, 1997: 16). The Law Commission has also stressed the importance of open consultative processes as a precondition for democratic law-making (NZLC, 1994: 4-7), while the Legislation Advisory Committee (LAC) has highlighted practical reasons for consultation:

In some cases the group or organisation will have knowledge and experience about the issues without which it will not be possible to develop the proposal adequately. In other cases early understanding and support for the proposal by the organisation concerned will be essential to its political acceptability (LAC, 1991: 7)

Few issues are compartmentalised to the extent that they only involve a single agency. Sources of advice and information are wider than ever before and international expertise and experience is readily obtainable. The way in which governments collect information, analyse it, and reach decisions, is therefore changing. Quality consultation processes, within governments and with the public, are a key part of managing these changes successfully (Shroff, 1994: 60) and it is difficult to overstate their importance.

But the term ‘consultation’ is often misused. ‘Consultation’ has been defined by the Court of Appeal in these terms:

“It clearly required more than mere notification. If a party having the power to make a decision after consultation held meetings with the parties it was required to consult, provided these parties with relevant information and with such further information as they requested, entered the meetings with an open mind, took due notice of what they said and waited until they had had their say before making a decision: then the decision was properly described as having been made after consultation” ([1993] 1 NZLR 672).

Taking the definition a step further, McKay J said:

“it is implicit that the party obliged to consult must keep its mind open and be ready to change and even to start afresh” ([1993] 1 NZLR 671, 675).

² A discussion of participation and select committees is included in the next section of this chapter.

The Cabinet Office Manual (CO, 1996: 42) notes the expectations Cabinet has of departments in consulting within government and with outside interest groups as appropriate. Consultation is considered essential to ensure ministers receive sound, comprehensive and coordinated advice. Cabinet Office advises departments preparing submissions to ensure they consider all the implications for other government agencies and consult them at the earliest possible stage. The Cabinet Office Manual goes on to say that consideration should also be given to whether other interested groups or individuals should be consulted, including Crown entities, other statutory agencies and officers of Parliament.

Wallace (1994: 49) provides case evidence in support of early consultation and release of policy papers. She argues that while consultation at the front end of the policy process may be time-consuming, the overall effect is smoother passage through later stages of policy development and overall efficiencies in the policy development process.

Brown (1995: 13) also raises the issue of whether 'consultation' differs from 'participation'. She notes the various rulings by the Court of Appeal and reviews American experience (Gruber, 1987: 19-22) which distinguishes between a clientele-oriented approach to decision-making, and participatory control. Gruber's distinction serves to emphasise two possible roles for the public in the decision-making processes: as passive consumers who respond to requests to state their preferences, or as active citizens who take the initiative in their interaction with bureaucracy. Both approaches involve consultation, but the clientele-oriented approach seeks consultation "*... that differs from that sought by advocates of participatory control in that the later value involvement for its own sake, whereas clientele-oriented strategists seek more limited agency-citizen contacts to transmit information about the needs and values of client groups*" (Gruber, 1987: 20).

Brown's conclusion is that participation includes clientele-oriented consultation, but also the situation where an informed public has the opportunity to persuade decision-makers that consultation *ought* to take place. In other words, consultation does not just occur as a result of the duty or at the discretion of authority. There must be opportunities for the public to initiate the consultation process (Brown, 1995: 14-15).

If participation, as envisaged under the OIA, is to be catered for by consultation then such consultation should meet a number of requirements. First, it should meet the definition of consultation provided by the Court of Appeal: the consulting agency must listen with an open mind, and be prepared to change its mind on the policy under consideration. Consultation should also not just be undertaken at the decision of the agency but should be able to be initiated by the public. A recent example of government provision of such a vehicle is the introduction of the citizen initiated referenda.³

Select Committees

The present select committee structure was adopted in 1985 and reviewed in 1995 as part of the modification of standing orders that preceded the introduction of MMP. The rationale of the system is to strengthen the accountability of the Government to Parliament. Select Committees have a dual function of scrutiny of government activity in a subject area and consideration of legislation. Work can be undertaken on their own initiative.

Select committees have become the workhorses of Parliament undertaking the detailed scrutiny for which the House does not have the time and reporting their findings to the House. They allow members of the public to have a direct input into the parliamentary process by making written submissions and attending public hearings. The time available for submissions is not restricted by Standing Orders although the report of the Committee that reviewed Standing Orders noted that wherever possible a minimum of four weeks should be allowed when calling for submissions. Hearing of evidence is open to members of the public, allowing them to 'direct input' into parliamentary proceedings and for the media to report proceedings (NZHR, 1995: 37).

Nowhere else in the Commonwealth do parliamentary committees give such open and in-depth consideration to legislation (NZHR, 1995: 31). Governments are coming to rely on the select committee system to provide for the public discussion and refinement of the legislation (NZHR, 1995: 31).

All bills, except some money bills, are now referred to select committees. Palmer (1987: 11) has

³ Citizens Initiated Referenda Act 1993.

described the system as “most beneficial” enabling changes to be made as a result of views expressed by the public. Select committees therefore provide a vehicle for participation accessible to all, albeit late in the policy development process with the attendant costs in terms of the likelihood of achieving significant change.

Using the OIA to Gain Official Information to Enable More Effective Participation

Since many readers will be familiar with the OIA a detailed discussion of the provisions of the OIA and guidance on its use is not provided here but is included as appendix one to this paper.⁴

Earlier it was noted that information is power (Palmer, 1987: 260). The OIA enables those making requests to seek information from agencies detailed in the OIA.⁵ To assist those seeking information, the Act also requires the publication of details of all departments and organisations covered by the Act (OIA s.20). Currently this requirement is met by *The Directory of Official Information*, published by the Ministry of Justice and updated every two years (Ministry of Justice, 1995). But release of information is far from automatic. As previously discussed, the OIA provides a range of protections for information that properly should not be released.⁶

But the SSC, commenting on the effect of freedom of information on policy-making, notes that s.9(2)(f) and s.9(2)(g) of the OIA are not “... a licence to keep the policy advisory, or policy development, participation of public servants only a matter of confidence between themselves and their Ministers. The provisions of the Act should allow for a free exchange of ideas and information, but in the knowledge that such communications may still become known publicly in the fullness of time” (SSC, 1995a: 12).

Recall that the Ombudsman has said that “... effective participation ... mean[s] ... that the public should be able to debate the issues involved and, through their representatives, whether

⁴ See pp 82-105.

⁵ The OIA is applicable to all Ministers of the Crown, all Departments (except the Parliamentary Counsel Office) listed in Part I of the First Schedule of the Ombudsmen Act 1975 (46), all organisations listed in Part II of the First Schedule of the Ombudsmen Act 1975 (over 100) and organisations listed in the First Schedule of the OIA (over 100). Note some organisations are listed in both the OIA and the Ombudsmen Act; the total number of organisations subject to the OIA is therefore still less than 200.

⁶ See p5 and pp 113-116.

Members of Parliament or special interest groups, put their views so that decision makers can take them into account when the decision is taken (Ombudsmen, 1993: 8). On issues not protected by conclusive reasons for withholding information, ministers and agencies will have to rely on the provisions protecting the ‘policy development sections’, s.9(2)(f) and s.9(2)(g), which in broad terms protect constitutional conventions and the maintenance of the conduct of public affairs [OIA s.9(2)].⁷

Protections for effective government and administration do not provide categorical protection. Not only must the protection of the information pass the test of outweighing the public interest, but it must also involve a judgement on the potential degree of damage. The Law Commission notes that the person wishing to withhold must show that withholding is *necessary to maintain* the particular interest. That phrase has been interpreted by the Ombudsmen as requiring that release would go “to the heart” of the relevant interest (NZLC, 1997: 79). As discussed earlier in this chapter, factors such as age of the information and timing of the request, may be relevant. Timing will not only be critical if public participation is to be appropriate, but timely processing of the OIA request will be necessary to ensure that participation is possible.

In general, the OIA should be able to be used to obtain information on the policy development process and, in particular, what is on the policy agenda and information on any given policy initiative. Once the decision is made, it should be publicly announced, and a considerably more relaxed approach to the release of information into the public domain might then be expected. For those seeking to participate in the policy development process, the Law Commission has identified 11 distinct types of information that might be sought:

- the very fact that a matter is being discussed or that certain information is held;
- the range of issues or questions being considered;
- the relevant facts, some of which might be disputed or be more in the nature of an opinion (particularly an expert opinion);
- the relevant principles to be applied;
- the application of the principles to the facts;
- the statement of possible courses of action;
- evaluation of the options;
- competing views about the options;

⁷ See discussion in appendix two, pp 114-116.

- an account of consultations or deliberations about the options;
- advice to adopt a particular option; and,
- the decision taken and the reasons for it.

(NZLC, 1997: 83)

Earlier in this chapter, it was noted how the policy development process was supposed to work to allow participation while maintaining the effectiveness of the process. The Ombudsmen's views, discussed earlier, suggest that in reality there is little that can be protected by the 'policy development provisions' except during that short period when Ministerial consideration and deliberation of the options is required or when advice is 'particularly sensitive'. In saying this, it should be noted that a review of the Ombudsmen's case note evidence suggests that their threshold for 'particularly sensitive' is set at quite a high level.

Participation, by way of using the OIA to gain information to build a case to achieve a participant's desired policy outcome, should be possible at the early stages of policy development – through ministers and the agencies developing the policy initiative. It is then unlikely that participation will be possible while caucus and ministers consider and deliberate on the initiative because of the protection afforded by s.9(2)(f). Further participation should be possible after Cabinet has decided on the policy, but only if it undergoes a further iteration or proceeds to Parliament and the select committee process.

Balancing the Interests of Government with Encouraging Participation

This chapter started with a definition of participation. It then reviewed two broad theories of democracy and their implications for participation: direct participation of citizens along the lines of the Greek city-state and the 'realist' view where participation is limited to voting at elections and criticism in-between elections.

The views of the Danks Committee were considered. The Committee included participation in the purposes of the OIA on the basis of enhanced accountability, enhanced decision-making and obtaining greater support for policy decisions taken (compliance). More recently, discussion by a range of commentators (Belgrave, 1997: 26; McLeay, 1995: 178; NZLC, 1997: 82; Palmer & Palmer, 1997: 187) has tended to focus on the value of participation as a vehicle for *accountability* and *compliance*, despite an appreciation within the public service that sharing

knowledge means better government, a better decision-making process, and a better informed public.

The opportunities for participation, such as they are, have been discussed and the need to balance participation with the need for the maintenance of effective government raised. Two issues stand out. First, timing is everything in participating and adequate information is critical. Second, while greater consultation may have reduced the need for requests under the OIA, consultation does not always meet the standards defined by the courts. Participation also requires consultation not just at the behest of the agency but also when initiated by the citizenry. In such consultation, the OIA may be needed as a means of obtaining more information where agencies are reticent in providing all relevant information.

While the OIA may address the information need, it will not necessarily guarantee participants their desired outcome. To be fair, however, it was only ever the intention of those who drafted the OIA to ensure citizens choosing to participate were *informed* (Danks Committee, 1980: 7&14) thereby leading, it was assumed, to more effective participation.

Effective participation, in the context of the OIA, should be the ability of individual citizens to obtain official information to enable them to become informed. Informed citizens should then be in a more effective position, using the combined power of their own knowledge and that gained with the assistance of the OIA, to:

- hold ministers and officials to account for the administration of laws and policies;
- contribute to the policy debate on issues of interest to citizens; and to,
- understand why policy decisions have been taken.

This discussion would, therefore, suggest that the OIA should allow citizens to participate in the policy development process and influence the final shape of policy. In the next chapter, this thesis is put to the test by reviewing the practice of core public sector agencies to assess the impact of the OIA on the policy development process.

CHAPTER FOUR: THE PRACTICE OF CORE PUBLIC SECTOR AGENCIES

“... democracy demands a great deal more than allowing people to elect the politicians to whom they will entrust legislative power for the next term.”

Nadja Tollemache, Ombudsman (Ombudsmen, 1993: 43)

Background

In this chapter, the thesis that the OIA should allow citizens to participate in the policy development process and influence policy is put to the test by using three case studies of public sector agencies to assess the impact of the OIA on the policy development process. Prior to undertaking the case studies, anecdotal evidence provided in Voyce (1996, 1997), Morrison (1997) and others was reviewed and a survey undertaken across the core public sector.

The survey involved the circulation of a questionnaire to the offices of all Ministers, excluding the Prime Minister¹, and to all agencies listed in the first schedule of the State Sector Act 1988.² In total 24 questionnaires were sent to Ministers and 37 questionnaires to agencies.³ The aim in circulating the questionnaires was to gain an insight as to what those working in the core public sector saw as the impact of the OIA on the policy development process and to identify issues that should be explored during the case studies.

Part One: The Survey

The Views from Ministers' Offices

Questionnaires were addressed and sent to each of the Ministers⁴. Of the 24 questionnaires sent out, nine questionnaires were completed and returned, a response rate of 38%.⁵ Of the nine, two

¹ It would not have been possible for the Prime Minister to participate on an anonymous basis, an option open to all other participants, since I worked for his department.

² The first schedule is copied at appendix three while the questionnaires are included at appendices four and five.

³ Questionnaires were not sent to the three agencies used as case studies as this material was covered a number of times in interviews with staff of the agencies.

⁴ Neil Kirton was no longer a Minister at the time of writing and Christine Fletcher's office advised that the questionnaire had been transferred to the new Minister of Local Government at the time she resigned.

⁵ In addition three Ministers or their staff advised that the Minister concerned did not respond to surveys or questionnaires [Hons Shipley, Upton and Williamson].

were answered by Ministers personally, the remainder were answered by either the Senior Private Secretary (2) or by a Private Secretary(5) who dealt with OIAs for the Office.

Two thirds of the respondents felt the OIA impacted on the way policy was developed in the portfolio. All respondents (6) who answered the question on the extent of the impact of the OIA on the policy development process considered the impact to be *moderate*. The two Ministers agreed that the impacts of the OIA were: a public better informed on the organisations for which they were responsible and the current policy issues under consideration; better or more informed debate on those policy issues; and, greater accountability. The two Ministers differed over whether the OIA led to a *better informed public*, one Minister suggesting the result was an overload of information in the public domain.

The Views from Agencies

Questionnaires were addressed and sent to the Manager of Corporate Services for each agency listed in the first schedule of the State Sector Act 1988. Of the 37 questionnaires sent out, 15 questionnaires were completed and returned, a response rate of 41%.

Ten of the 15 respondents felt the OIA impacted on the way policy was developed in their organisation. Of these 10, nine considered the impact to be *moderate* while one considered the impact to be *significant*.

Views Across the Survey

The following discussion reports views of both Ministers Office's and agencies. To simplify reporting, the term 'Beehive' is used to refer to results of responses from Ministerial Offices while the term 'Sector' is used to cover those from agencies.

Respondents were asked about a range of possible effects of the OIA. The following table records the percentage who indicated they believed the OIA had had that effect. The middle column records whether respondents saw the effect as a positive or negative effect.

	Beehive		Sector
Greater accountability	100%	+	73%
Better or more informed public debate on policy issues	78%	+ ⁶	47%
Public better informed on your organisation and current policy issues	78%	+	53%
Improved quality of written advice to Minister	56%	+	47%
The organisation now releases information to the public on a much more proactive basis	56%	+	40%
Move from written to oral advice	56%	+/- ⁷	33%
Greater incentive for participation in policy development process	44%	+	20%
Development of a culture that seeks to avoid accountability for advice	44%	-	0%
Organisation now provides for greater public consultation in the policy development process	22%	+	40%
Reduction in the written record of how policy was developed	33%	-	27%
Degradation of corporate memory	33%	-	20%

Table 5.1 – Effects of the OIA

Other options canvassed returned less support. One telling comment was made by one Sector respondent, at the level of first report to CEO who said “... *the Minister prefers to withhold information except where unavoidable. Information is seen as creating problems not opportunities*”.

When asked to what extent the OIA had allowed greater participation in the policy development process respondents replied:

⁶ One respondent thought information overload resulted in a negative impact.

⁷ While Ministers Offices’ had mixed views on whether this was a positive or negative, agencies who noted this trend all saw it as a negative development.

Beehive Sector		
Much greater extent	0%	0%
Significant increase	0%	0%
Moderate increase	33%	60%
Minimal increase	22%	20%
No change from prior to OIA	44%	13% ⁸

Table 5.2 – Increase in Participation in the Policy Development Process as a Result of the OIA

More than half (56%) of the Beehive responses reported “... *the organisations [they] were responsible for write policy papers in a manner intended to be released in full under the OIA.*” Sector respondents answered similarly; 53% reported papers were written with the intention that they be releasable in full. Note that two respondents who answered that papers were *not* written with the intention of being released made the point that advice was written to serve the needs of the Minister, and release of information under the OIA was a secondary issue dealt with on a case by case basis.

Beehive opinion was equally split as to whether the overall impact of the OIA on the policy development process was positive or neutral; one response suggested it was negative. Sector opinion was similarly split; seven of the 15 suggested it was positive, six neutral and two negative.

Of the Beehive returns, four of the nine respondents thought material released under the OIA was used to some extent in the policy development process while a further three thought it was used to a moderate extent; one of the *some* respondents noting information was “... *mostly used to attack policy positions, rarely to improve the standard of policy debate*” (Cabinet Minister). Sector returns were *some* 60%, *moderate* 27%.

When questioned on the way those requesting information under the OIA used such information the following positive responses were obtained:

⁸ One organisation had only recently come into being and therefore could not comment.

Beehive Sector

To encourage wider or more in-depth coverage of the issues in the news media	67%	66%
To make submissions to the Minister	56%	60%
To support submissions or appearances at select committee	56%	53%
To make submissions to the organisation	44%	40%
Other (please specify) – seek information for legal action ⁹	11%	13% ¹⁰

Table 5.3 – Use to Which OIA Information is Put

Respondents were asked to rank users of the Act with “1” being the most frequent user. The scores for all questionnaires were added to provide the following results on the relative use various parts of society make of the OIA – the lowest total representing the consensus view on the most frequent user.¹¹ (The figures in brackets are the scores which would be obtained if consensus on the order was 100%.)

Beehive Sector

Political party research units	11 (9)	34(15)
The media	23(18)	38(30)
Interest/lobby groups	30(27)	39(45)
MPs	34(36)	54(60)
The general public – individual citizens	37(45)	57(75)
Maori or other ethnic minorities	51(54)	79(90)

Table 5.4 - Principal Source of Requests Under the OIA

Three Beehive respondents offered views on issues, in the invitation for general comment. The extent of resources used in answering vague or extensive requests, was raised as a negative effect. The second respondent offering comment noted:

⁹ Since this option was not listed in all respondents questionnaires it may be under reported.

¹⁰ From comment made in the questionnaire.

¹¹ A score of “9” would have indicated all Beehive respondents agreed that this sector of society was the most frequent user of the OIA; for Sector respondents the equivalent score would have been 15.

I agree with the content and intention of the OIA – increased public accountability is highly desirable. But on balance I believe the major use of material obtained under the OIA is to destroy rather than build public understanding, the standard of public debate, better policy outcomes and the like (Cabinet Minister).

This contrasted with:

Overall the OIA has a positive impact on the policy development process and, particularly within the Minister's portfolio, creates a genuine commitment to open and transparent processes and government. However, different ministries tend to have different attitudes to, or applications of, the legislation (Cabinet Minister's Private Secretary).

Five of the Sector respondents raised issues. Two raised time/resource/compliance cost issues in answering OIA requests, particularly where the search required going back a number of years. In this respect, it was also suggested that the decentralised public sector had increased the transaction costs of such requests. One respondent suggested use of the OIA as a pre-trial discovery mechanism by defence lawyers seeking information from the prosecuting department to help the defendant's case "*... does little to encourage officials to treat the OIA with respect*".

Another noted the "*... Minister actively manages the creation and dissemination of information on policy issues – especially 'difficult' issues, with the result that some policy processes are not comprehensively documented*".

One response noted that the OIA promoted greater care in the presentation /context of the advice given, suggesting officials are now more conscious of the possibility of information being discovered under the OIA. The final respondent noted that while the OIA provided a useful means of making information available, the majority of users did not use such information to participate in the policy development process. Rather, information requests tended to be '*politically motivated*'.

Part Two: The Case Studies

General Approach

The case studies proceeded as follows. Clearance for the agency to participate in the study was obtained by writing to the chief executive of each of the agencies. In each case, the agency chief executives nominated their senior legal official as the principal point of contact for the agency. An interview was held with this official to investigate his/her overview of OIA processes within the agency.¹² The interview investigated the general approach of the agency to the handling of OIA requests and complaints. Wherever possible, the interview with the senior legal official was also used to obtain background material such as the agency's guidance to staff on the handling of OIA requests and complaints. Finally the interview identified those staff within the agency who would be of most assistance in addressing the interests of the proposed case study.

From this interview a policy development manager was identified. A series of interviews in the policy development area of the agency followed, involving at least one senior policy manager, policy analysts and support staff associated with the OIA process. Support staff assistance was also used to gain background information needed to support the case study, such as statistical information.

As part of the case, a complaint under the OIA and the matching original request was identified and used as the basis of discussion. This approach allowed the use of a concrete example as the basis for investigation of handling, processing and release of information under the OIA. Investigation covered both the initial request and subsequent complaint to the Ombudsman. Consideration of this specific example then allowed investigation of the general OIA regime in the agency.

Case Study – Agency 'X'

The Policy Development Process in Agency 'X'

The policy unit in Agency 'X' develops policy at a strategic level, largely removed from day-to-

¹² The initial work plan for the agencies, which was used as the basis for early interviews is included in appendix six.

day operational policy development. Policy tends to be proactive, developed in response to an agenda set with the negotiation of the purchase agreement. Policy is developed in accordance with a generic process based on a conventional policy development model supported by written documentation.

Ministerial input starts with consideration of the Agency's policy priorities for the coming year during negotiation of the Minister's purchase agreement with the CEO. Outputs may be specified generally, but in some cases are detailed to sub-output level. A background policy paper on the issues, options, and advice on the possible process, acts as the basis for the strategic conversation. Usually this results in yes/no decisions to move forward and may include guidance on the policy. Since ministers always had their own policy agenda, the agreed agenda often differed from that initially proposed. Ministerial input continued to be included in the subsequent policy development process through weekly meetings between the managers of the Agency and the Minister.

Consultation

Normally a process for advancing the policy initiative would be suggested to the Minister. This included the agency's suggestions on consultation. Ministers' approach to the degree and timing of consultation varied with some ministers preferring involvement of their peers in advance of consultation. Others wanted the range of options narrowed or the policy more developed prior to wider discussion. Consultation was issue-dependent and often the short timeframe limited the possibilities.¹³ Control of the consultation process did not always lie with ministers. Some legislation dictated a requirement for certain actors to consult. However, in general, ministers exercised control over the process of consultation, even where policy issues did not make it to Cabinet.

Consultation would normally occur before the Agency determined the preferred option. The policy manager considered it was *"... important to consult at the point where you can still have a meaningful discussion in terms of options or alternatives otherwise it is just a farce. At the same time, I don't think it makes sense to go into consultation with just an idea; otherwise it*

¹³ Analysts suggested the majority of smaller policy initiatives were developed within a six month time frame.

becomes a random discussion".

Consultation was a standard part of the policy development process but generally only involved government agencies. It was rare to consult the public and there was, therefore, little public input in the policy development process. Consultation usually involved the Agency tapping into networks on a specific issue. Some policy issues required consultation for policy to be implemented successfully, because it relied on the buy-in of those who would put the policy into action.

How groups or individuals came to be included in the consultation process seemed to be a policy-dependent issue. Some groups with well known policy agendas were not consulted because their views were well known. Timeframes also meant consultation often favoured accessible groups, generally those represented in Wellington. Consultation also raised issues of mandate and conflicting advice from within sectors.

One analyst raised a significant issue; *"... with the OIA, ... information can be requested by anyone, whereas typically with consultation processes you may only be seeking views from a limited number or group of people"*. Looking to the wider public sector, government taskforces were seen as the only policy development processes where true consultation seemed to have occurred. These processes included a series of consultation rounds, each round touring the country.

The Agency did not consider public consultation to be one of its roles. Staff had strong views that their Minister was their client and ministers wanted to control the consultation process. For greater consultation to occur, it required ministers or Parliament to assign the Agency that role. Nonetheless, agency staff noted that whether it was the OIA or something else, there was a much greater consultation philosophy in the public service these days. Public participation in policy development could easily be increased with Ministerial direction.

Sources

The policy unit received three broad categories of OIA requests: requests seeking information on

the contractors used by the Agency and what big blocks of work were available (to enable those requesting the information to be better placed for bidding for such work); requests seeking information on the policy agenda, and requests seeking information on specific policy initiatives.

Those interviewed agreed that the majority of requests came from opposition party research units. Many of these fell into the “fishing expedition” category and the policy manager thought numbers peaked around select committee time. The media also made a considerable number of OIA requests. Few of the requests came from the general public.

Processing Requests

In Agency ‘X’, OIA requests and complaints are handled by the analyst responsible for development of the policy initiative that is the subject of the request.¹⁴ The underlying philosophy is that the subject analyst is the individual best equipped to move the request through its various stages in the most expeditious manner possible. This analyst is also considered to be the person most *au fait* with the issues of the day surrounding the request, the stage of the development of the policy, and the likely view and concerns of the Minister.

The priority given to answering requests was workload dependent, but staff aimed to do requests quickly. It seemed obvious the 20 day time limit had become a de facto standard. Early attention was unlikely to considerably reduce the time taken to process the request because of the number of steps involved in the process and the need to have the processed OIA request reach the Minister’s office three days in advance of release.

Staff were encouraged to assist requesters and to make an early decision on whether there was a need to transfer a request. Those requesting information were often clear in their own mind as to what they wanted. But the senior legal official thought they either expressed this poorly or were reluctant to make the request specific out of concern for “*missing out*”.

No protocols existed on how information should be collected to answer requests. The question of E-mail was raised as an increasingly important issue by a number of those interviewed. It was

¹⁴ The Ombudsmen always address correspondence to the Chief Executive.

apparent E-mail was becoming a standard way of working, with the result that often a minimal amount of the development process ended up on file. Sometimes E-mail was printed and "*on file*" but in general it wasn't and could escape consideration. The senior legal official wondered whether a test case would support this approach, as retrieval from computer systems might fall within the OIA's provisions for 'substantial collation and research'.

Similar issues were raised concerning Ministerial input. This tended to be oral and often only informally noted by managers and analysts. Thus papers would be produced where background information on their development was not recorded anywhere.

Some portions of the OIA were considered quite difficult to deal with. Even the Ombudsmen had been unable to be clear on exactly what was and was not covered by the "confidentiality of advice" and "free and frank" provisions. What made it more difficult were expectations from ministers on what would or would not get released.

The following process was typically used to determine what should be released in response to an OIA request. A basic review of papers would be conducted to determine those covered by the request and their content. If these papers did not cover policy under development, they would be reviewed to see what could be released in the spirit of the Act. Policy under development was considered differently, particularly in response to requests from opposition party research units.

Such political requests were processed with much more caution. First, an assessment was made of what was public knowledge, since this could be released without further consideration. Second, papers were reviewed to address what Agency 'X' wanted withheld and information that 'pointed to' the information being withheld. Detailed reasoning and justification for withholding were not totally thought through. Rather the assessment was whether "... *we wanted that information out.*" The analyst then considered deletions in detail to "*come up with reasons*" for withholding the information. The process was described as "... *ex post justification of what you think a Minister would want to withhold in terms of options under development and in terms of our own professional policy development process*". Prior to release, consultation with legal staff might be undertaken to ensure grounds for withholding were valid. Detailed reasoning for the

withholding was only undertaken at the complaint processing stage. However, by the time a complaint was received it was inevitable that policy debate had moved on. Generally speaking, the Agency could therefore release more information.

The senior legal official noted their experience suggested departments had different thresholds and sensitivity to OIA requests. Some departments were more politically sensitive. While political reasons did not provide a reason for withholding, "... *it clearly had to be a factor when staff were scrutinising something*". Confidentiality and the issue of free and frank advice were certainly issues. They also felt a better assessment of the time requirements for processing was needed, too often staff tackled requests requiring better specification.

The Role of Legal Advisors

The senior legal official was quite clear in what was seen as the role of legal staff in the OIA process. The legal role was one of monitoring the Agency's performance and addressing problems that arose. Legal advice was available to confirm decisions made by analysts on information to be withheld where an analyst wanted a second or legal opinion. Processing of requests without unnecessary resort to legal advice was encouraged. Legal advisors would only initiate involvement in the detail of a case where the issue was very delicate or where there were much wider ramifications arising from the request. However, analysts saw the legal staff as providing a valuable objective viewpoint on information they might be inclined to withhold for dubious reasons.

All complaints were copied to the senior legal official as part of the oversight process. Legal input then varied from simple advice to requesting involvement prior to a response being prepared. Legal staff discouraged analysts from seeking a "legal interpretation" of what the OIA requests meant. They advised staff to contact the requester and discuss the request if doubt existed as to what was wanted. The senior legal official noted that while ministers might argue that the OIA was inefficient, the Act included tools to make the process more efficient. They also noted that there had only been one case where the Agency had been asked to "compile information from someone's head".

Impact on the Policy Development Process

Overall, those interviewed considered that the OIA made little impact on the policy development process. Opinion varied as to whether it influenced analysts to write better, but all agreed it made them write differently. Things that might be said directly were written in more opaque language. Analysts were aware that they drafted papers in a public arena and that anything committed to paper could come back to haunt them.¹⁵ This was considered a benefit since it probably meant only defensible positions went into papers. The problem occurred if sensitivity about ‘discovery’ impacted on the frankness of advice. Free and frank advice was more likely to be offered orally and papers might be a bit more “fuzzy” and general than they needed to be. While it might make it more difficult for those requesting information to determine what was happening, analysts felt that such general advice also made it more difficult for ministers to get to the heart of the issue.

It was felt that the OIA stifled some lateral thinking and that scoping papers often no longer covered a full range of options. Analysts would think carefully about spreading the net too wide in view of the potential for release. This led to a thinning down of options prior to commitment to paper.

Analysts believed that, in general, citizens tended to write to ministers to express concerns. Only those interested in undertaking some work on the policy took the step of requesting information under the OIA. Estimates varied, but consensus suggested around 80 percent of requests came from opposition party research units.

Analysts also noted that the OIA worked in their favour. If ministers did not follow objective advice, a subsequent OIA release might well show the advice provided by the Agency. OIA information was generally released too late for involvement in the policy development process to be an issue. The tension in releasing information was timing. Information released too early was considered to impact negatively on the ability to manage a rational policy process. In justifying this view, analysts argued that options and issues released at an early stage may not be what they were later discerned to be. Meantime the attendant publicity was considered to be counterproductive.

¹⁵ This sensitivity increased as one moved up the Agency hierarchy.

MMP had provided some new issues. The Coalition Agreement (New Zealand Government, 1996) had, for the first time, set out policy initiatives in public, even before officials started to develop them. This meant proposals were in the policy-mill longer than usual and therefore accessible under the OIA for longer. However, the same analyst did not consider this critical. Generally information only came to the public's attention not long before ministers were due to make decisions.

Analysts preferred to "get on with" policy development and saw OIA requests as a burden they could do without. OIA requests were seen as diversions from their primary task in life of providing quality policy advice to their Minister. The view was that if analysts were allowed time to work on the policy rather than working on OIA requests, policy might get developed sooner.

Impact on Policy Development

Those interviewed felt that the OIA rarely impacted on the policy developed. Analysts considered information released under the OIA to be very bland and therefore of little use to requesters. The "juicy stuff" tended to get withheld and even comment that might lead to the critical paragraphs in papers was often withheld. They were not aware of information released under the OIA that had created a basis for change in policy under development. Analysts considered that if the OIA impacted on policy, it did so at the margins.

The Games People Play

It was clear that there was an element of "manipulating" the process to delay or avoid release of information during critical periods of the policy development process. It was generally considered that this occurred more at the political level than at the agency level. One analyst offered this view: "... I know ["playing games"] is not within the spirit of the Act; but everyone does it. Material is released strategically. Your first preference may be to withhold everything. You know that there is no real justification for doing that, but you release enough to keep the Ombudsmen happy for a while. You know the Minister is going to make decisions, and announcements may be a couple of months down the track. All it takes is two exchanges of letters with the Ombudsmen and suddenly the Minister has made the decision and you can probably release everything at that stage."

The senior legal official expressed this view: *“There are those, and the numbers are not numerous or significant, who from time to time think they would do the Minister a favour by adopting this sort of approach [manipulating the release of information]. I have quite often heard ministers take that approach; and not just our Minister. And I’m not saying our current Minister. But I have heard ministers say ‘these are the tactics. We’ll sit on it. We’ll sit on it to the last day; we’ll sit on it after that. The Ombudsman will take two or three months to get around to dealing with it [the complaint]’ – or the election will come up or whatever. If that were documented at the time it would create real difficulties.”*

Part of the impetus for such views seemed to come from the technocratic side of the Agency’s staff. Analysts wanted Cabinet to make decisions on the basis of objective analysis provided – the politically neutral advice that the Agency put before them. OIA requests had the potential to undermine this system if ministers were distracted from the advice provided to Cabinet Committees and Cabinet by what was described as *“the side show happening in the media”*. Analysts considered that release of information after ministers had made decisions was more likely to achieve a rational decision on a proposed policy. The senior legal official suggested that a lot of analysts probably don’t appreciate the constitutional role of the OIA and saw it in terms of their time pressures. There was still a need for a mind shift in the junior levels.

Proactive release did not appear to have been accelerated by the OIA. Two factors counteracted proactive release, despite knowledge of the wider aims of the Act and awareness training for staff on the OIA. First, analysts viewed release of information as a burden. Second, the policy team saw their ‘core’ role as provision of policy advice. They were strongly client-focussed and it was very clear that they saw their client as the Minister. Proactive release was likened by one analyst to an advertising company releasing information on a campaign in advance of its launch.

Case Study – Agency ‘Y’

The Policy Development Process in Agency ‘Y’

Agency ‘Y’ had a much bigger policy unit than Agency ‘X’. Policy development covered the full breadth of settings, ranged from proactive to reactive, and from strategic to operational.

Ministers were involved in much of the policy development, input coming from regular meetings between Agency staff and ministers.

Sources

A view was expressed that the number of OIA requests received by Agency 'Y' was decreasing. By far the majority of OIA requests were received from the Labour Party Research Unit. Most were described as "fishing expeditions" asking very broad questions on either process or subject issues. A few requests were received from academics. Some sections of the Agency, particularly those sections dealing with issues with high public profiles, received a significant number of requests from lobby groups.

Processing Requests

Processing of requests was carried out by the analyst who had worked on the policy initiative. All OIAs were received centrally, then pushed out to the most appropriate policy manager. One manager noted that not many of Agency 'Y's staff get to handle a lot of OIAs, so processing a request always involved a certain degree of learning. To offset this staff were encouraged to make use of the Agency's handbook for OIA requests and refer to the legal team. Processing would usually commence with a "commissioning" brief from the manager which would also include guidance or ideas on how to handle the request.

OIAs requests were given a high priority in the work programme; first, because managers saw there was nothing to gain by letting the request take 20 days to answer – "*early release puts less stress on the Agency*" and second, timeliness was one of the few measurable outputs in a policy unit. This provided an accountability incentive for managers. It was acknowledged that the 20 day timeframe had become a default. Managers thought that in a busy work environment the 20 day timeframe, in which to answer an OIA request, quickly passed by even if you didn't procrastinate. However, they thought the Law Commission's recommendation of a 15 day time-limit was achievable on all but the larger OIA requests.

While the variety of information covered by the OIA was mentioned in the Agency OIA guidelines there was no protocol for the gathering of information. All information to be considered was

assembled even if it were planned to withhold everything. This was done to avoid collation a second time should the request become a complaint to an Ombudsman. The information provided tended to be copies retrieved from the electronic database. As such informal file notes and jottings on policy papers were likely to be missed out.

A number of staff mentioned the issue of information in people's heads. Nobody was aware of a request to the Agency that had required this to be put into written form. Staff noted that it would be interesting to see how the Agency would handle such a case. The view usually provided was that since most meetings with ministers involved discussions of papers, generally information was available in a recorded form. Information arising from discussions was often picked up in the next report. Few meetings with ministers were formally recorded in notes for file. It was noted that there were incentives for the bureaucracy to keep paper trails of how a policy develops. File records could show the basis on which certain options had been considered and discarded.

Approaches to the processing of OIA requests varied within the Agency. On some issues there was clear consensus. If information was going to be released quite soon or if a decision had yet to be made the Agency's first reaction would be not to release because it would be cutting across the process of policy formation by ministers. Once the policy was agreed the Agency would probably be quite relaxed about releasing information since few grounds would exist for withholding it.

In deciding to withhold information, staff would work out which provisions of the legislation they would rely on. However, one manager noted that *"... if we think it's going to be a fifty-fifty call if the Ombudsmen ever reviews our decision, we probably err on the side of withholding. There is a bit of a sense of 'withhold and take our chances'. A lot of the time we are pretty clear in terms of there being legitimate grounds. But if we think it's a line call, but we think we'll succeed, we'll withhold. The 'free and frank' is the most problematic stuff to deal with."*

The Minister's office was advised that information was about to be released. Part of the reason for this was to ensure that *"...[opposition research units] aren't touting them as leaked papers."*

One of the big issues for the Agency was the nature of the information being requested. A clear example was provided of an issue where the Agency had been successful in withholding information after consultation with the Ombudsman. Information was withheld on the basis that the Agency did not want to create a precedent for future release of the same information. In this case, switching from release of this cyclical document to withholding would send as clear a message as release of the contents of the document.

Compliance issues were raised, particularly in relation to the “fishing expeditions” of opposition party research units. While these were often returned for reworking into a more specific form, Managers felt that they could only do this once on any given request. Middle management made the calls on what was and was not withheld as they held the delegation for sign-out of the OIA releases.

Agency staff felt they transferred fewer OIA requests to the Minister’s office than they should. Transfers to other agencies were relatively common and the Minister’s office frequently transferred requests to the Agency. Some managers recognised the importance of transferring requests to the Minister’s office because, in some cases, it was more appropriate that the judgement about release was made by the Minister.

Legal staff tended to get involved only in those OIA requests that proved problematic. Managers were able to seek advice, but the release of information was delegated and managers were encouraged to determine what got released without legal consultation.

Impact on Policy Development Process

The OIA had impacted on the behaviour of the staff at Agency ‘Y’ in the opinion of the majority of those interviewed for the case. Two particular gradual changes in behaviour were noted.

The fact that papers were now regularly released meant that people writing them were more cognisant of that fact. “Soft” advice was often left out and papers tended to contain just the hard evidence; numbers, facts and figures. This acted almost as a quality control in the opinion of a senior legal advisor. Information was probably better tested prior to it being committed to paper

than prior to the introduction of the Act. This improved the quality of advice offered to ministers.

The second change was a move to oral advice. This was more prevalent in sections of the Agency where managers felt that they would have few grounds for withholding information that they did not wish to have released. Oral advice was also increasingly used to convey “soft” and more anecdotal information to ministers. This approach had some efficiency costs. Often it required the manager to not only provide the Minister a policy paper, but also to arrange to have an oral briefing on it.

The concern of one manager was “... *I deal with so many issues and such complex processes that to have to rely on keeping track of oral communications would be impossible.*”

Another manager discussed his/her approach to the early stages of policy development. “*When I first joined the Agency 12 years ago we were reasonably free about putting the lateral thinking idea on a piece of paper, chucking that over to ministers and saying what do you think? At the moment I’ll go over and have an informal chat with our minister, because I am worried about the paper trail. I don’t think that hinders my effectiveness, but I consciously think about doing it that way.*”

“Before I go over I am going to send a note saying ‘this is where we think you are, where we think you want to get to and here are some paths that you could go down’. I’ll send that over on a blank piece of paper. Some of the ideas we are floating may be quite controversial because of the vested interest of some of those in the public domain. If someone ever tried to trace the note back, it’s not going to be traced back to Agency ‘Y’. It’s a piece of paper that materialised from nowhere. I know that the OIA covers formal notes, informal notes, jottings, ideas in your head; theoretically it covers all those things. But frankly, you can make your way round that and limit requests to the formal notes.”

The same manager noted that s/he “... *wouldn’t want to overstate it, there are probably two or three things a year in the portfolio I have, where I would modify my behaviour in those ways I have identified. For 95 –97 percent of stuff I put it down in black and white. People know what the Agency stands for and they’d be kind of surprised if we didn’t say what we said.*”

Another manager suggested that “... *the quantity of oral advice really depends on the*

personalities of the persons that you are dealing with in the Beehive. Some want written material so they can get their heads around it. I have had ministers react to written advice by saying that 'this document doesn't exist'. Life can be a bit difficult at that stage. There is a sensitivity [at the Beehive] to the OIA and to leaks. Once advice is 'on paper', it's 'on paper'. Can you search and destroy? There may be ways of trying to do that, but I have never gone through that process. Without thinking through every situation, my first reaction is that it would be a very worrying practice for us to start to go back and take away things every time a Minister decided that he didn't like to see what we said. At the end of the day it's our advice and it would be a very worrying precedent if we only showed them advice that they wanted to see."

A policy manager offered the view that information on initiatives that were rejected tended to be more sensitive than information on initiatives carried forward. Where issues were floated as ideas, there was little incentive to engage openly in consideration of the idea if ministers thought that the initiative was going to be rejected. Ministers could then be in a position of defending why a decision against the initiative was taken. *"Ministers don't want to get flack for something that isn't decided."*

The manager argued that much of the quality of the policy formation process relied on the free passage of information between ministers and between ministers and officials. *"What would concern us is the incentives or the implications of release for the way that we would do our work in the future and the potential of releasing information which causes difficulties in decision-making. ... If you have a situation where the information is subsequently released you skew the incentives for those people to engage in the game at the start and to be as open as you would like them to be."*

Managers did not see information released to opposition research units impacting on either the way policy was developed or the policy developed. Some of the manager's views on the impact of the OIA were quite candid. *"I see it being used more for political grandstanding than for improving policy development."* Such requests caused more concern with timing of release than with content. Managers saw the OIA used in this context as a means to *"... create some sort of media storm prior to the decision being taken."* Again the viewpoint was technocratic. *"If*

ministers have the public saying one thing on an issue at the same time as they are trying to get their head around it themselves, it doesn't tend to promote good policy-making. I have found most ministers are quite comfortable with the decisions they make and explaining their decisions to the public.

"Frankly, in terms of processing [OIA requests] they are a bit of a pain because they do generate quite a bit of work. It is dead time for my people and from my perspective you are not progressing a policy debate any further, ... it's about releasing a historical record, and they are a pain from that perspective. Frankly I would rather not have them. But on the other side I understand the purpose of freedom of information legislation. It's just part of the territory that you deal with. But I wouldn't say that I was over the moon about having to process them."

The Games People Play

The policy staff of Agency 'Y' saw their Minister's management of the OIA process as pretty much by the book. Their Minister wanted requests played very straight. *"Give them exactly what they want; nothing more, nothing less."* They did, however, note tactics that had been employed. The Agency had used proactive strategies on a number of occasions to minimise the effect of the release of information. One strategy involved proactive release of papers of high interest value. This was considered more efficient than handling the expected demand for the papers under the OIA. Papers were released with only a minimum amount of material withheld. The senior legal advisor noted that the media had concluded that there was insufficient marginal benefit to make OIA requests for the remaining portions worthwhile, despite the fact that more information could probably have been obtained. The only OIA requests received, in this case, were from people unaware that the information had already been widely released to the media and other interested parties.

Select Committees

Managers expressed the view that select committees now offered the greatest opportunity for public participation. *"My impression is that 20 years ago whatever went to select committee came out looking pretty much the same. I don't think that's the same anymore. More opportunity has been taken over the last five or six years for policy to be shaped at select committee level. Those fronting at the committee may have been given access to officials, the Minister, or information via the OIA, and so have access to background material. I think the*

select committee process is actually providing a lot more opportunity for participation in the policy-making."

Case Study – Agency ‘Z’

Setting

Unlike the two previous cases, Agency Z was deliberately picked as an agency which had a very high media profile and operated in a sector where it was subject to the pressure of strong lobby groups.

The Policy Development Process in Agency ‘Z’

Policy development in Agency ‘Z’ was guided by a policy manual. In practice a framework similar to that required by the Department of the Prime Minister and Cabinet for Cabinet papers was followed as the basis for an analytic framework. While policy development on particular issues followed a common pattern, each process was *"tailor made"*, and the process varied enormously. One of the policy managers noted that there was now *"... less ad-hocracy, more coherent, more integrated framework"*.

Policy development was guided by the Coalition Agreement¹⁶ which had set the overall policy agenda for the agency. A short term policy strategy document had been produced, largely shaped by things that came out of the Coalition Agreement. The agreed work programme was probably split 65/35 between Agency and Ministerial initiatives. The "big" policy issues were signalled in the corporate plan and in the departmental forecast report. The smaller issues, many of which tended to be reactive, weren't spelt out in any public document and were described as the *"thinking out loud"* policy initiatives. Many of these involved explorations to determine if a problem really did exist and if it did whether the problem was policy, implementation or *"a rub I can't do something about."*

The senior policy manager noted that the majority of policy initiatives were proactive rather than reactive. The Agency was also continually trying to increase the proportion of proactive policy

¹⁶ See New Zealand Government (1996).

as it attempted to get onto the front foot of the policy agenda. Ministerial input is provided by direct contact between the Minister and officials of various grades and seniorities. Input may come from regular scheduled meetings or from meetings arranged to discuss specific issues.

The senior legal advisor suggested "...[people] are not really aware of what policy you might be developing, because of some of the ways policy gets developed. We do have a policy work programme, but let's face it; if something comes up and the Minister wants it looked into, who is going to know? S/he's not going to go on One Network News and say I've just asked the [Agency] to look into something really unpopular, say , and they'll be reporting back to me in six weeks is s/he? So who is going to know? Nobody. If you don't know how can you ask [for the information]? That's always been to me the [issue]."

Consultation

For Agency 'Z', 'public' consultation involves the use of advisory groups as well as ad-hoc arrangements as required. Composed of organisations in the sector, the advisory groups provide Agency 'Z' with advice on what they see as issues in the sector. Some of these advisory groups also have sub-groups. The advisory groups meet regularly to talk about issues and to discuss the Agency policy work-programme. The senior policy manager noted that this didn't really take the Agency out into the wider public. However, it did collect up a great number of those within the sector.

The role of wider consultation was explained by a senior legal advisor as follows. "*Because of this embarrassment factor and the whole leak thing, the minister seems to have developed a kind of network of trusted consultees. Although they represent sector groups, they have almost become tied to us and we have made them part of the establishment. These committees come in on a regular basis; we use that as a kind of consultation. But it's probably a tame kind of consultation. Consultation is always a balancing problem. Ministers don't like to have themselves preempted.*"

"And there are wheels within wheels as well. Our Minister is going back to his/her electorate on a regular basis. S/he's in touch with a lot of people in [the sector] in [the electorate]. Plus s/he has this other set of parliamentary contacts and official contacts

that s/he meets with that don't necessarily involve the [Agency] but s/he brings up things. So s/he's got lots of loops of people s/he meets with and it all affects [policy]. The same with senior management here. CEOs meet together. Consultation is a funny thing; the formal process is not even the tip of the iceberg. There are lots of informal processes and things that you couldn't even call that. They're just loops going around and around and around."

The views of policy managers again stressed a "layered" approach to consultation – largely focused on "in-groups". On really big issues the Agency would advertise through a variety of means and invite submissions from anybody. It was noted that "... generally we are doing policy under too tight a timeframe for that, [with] Cabinet papers [developed] in six weeks."

Ministers were not keen to follow the suggestion of the Agency's communication advisors that release of large quantities of information to keep the public informed, would diffuse the issues and reduce the significance attached to policy issues. Staff felt that ministers "... like to do it in their own way. They like to bring people to their offices and discuss ideas very frankly with them but they won't do it any other way."

The Agency had taken a very open approach to the consultation it conducted. In consulting, the Agency had made it clear it was prepared to discuss ideas frankly and spell out all the options and their implications. However the Agency also suggested to groups that the Agency's discussions were based on trust. Discussions would probably stop if they were twisted and ended in the media as ammunition to argue that the Agency was following a "scurrilous agenda". Policy managers found that some groups were very up-front and did not abuse the privilege. Rather, these groups used the information provided to focus the group's own work programme. Such groups made an invaluable contribution to the policy debate with counter arguments based on high quality work and research valued by the Agency. A policy manager noted that engagement of groups "... really depends how the outside groups are prepared to respond. When people accuse you of running hidden agendas you just can't make much progress. You can't engage someone... [who keeps saying] look there is the evidence of that hidden agenda".

"I think the [time] is worth it because it helps us understand alternative perspectives. We get a lot more from it than you might think. And it's getting buy-in and getting us something that is going to work in the long-run. It also helps reduce demand for OIAs;

people don't think they'll have very much to learn from it [an OIA release]."

One manager noted that in other sectors those in the sector regularly had access to, or knew of the contents of, government papers they should not have. *"Nobody considered that as a leak. Because it never went public. Whether their Minister was a mate and they went and talked about it or whatever, they did it in a different way. They occasionally used the OIA; but not very often."*

Sources

Staff felt that OIA requests to the Agency could be broadly broken down into three categories. Requests on policy issues came from parliamentary opposition parties and the media. 'Pressure groups' were the second category while the remainder of the requests tended to be requests from individuals that involved 'personal interests' many of which related directly to them or people who were of immediate interest to them.

OIA requests were, in the view of a senior legal advisor, cyclical with a lot of interest in the *"flavour of the month"*. Budget time created a lot of OIA requests on policy and there was an increase in the year preceding an election as opposition research units developed election policy for their own party. Elections also created requests from sector groups and pressure groups as they developed their election agenda. One policy manager suggested that the number of OIA requests received by an agency was influenced by literacy levels of those with a direct interest in the sector.

Processing Requests

The handling and processing of requests was devolved, although the monitoring continued to be a centrally managed function. OIA requests came into the Agency and went directly to the policy manager responsible. Complaints went directly to the area where the initial request was processed. Both requests and complaints were processed and a submission for information or action by the Minister was provided. The Agency frequently transferred requests to the Minister where it was *"... more appropriate that s/he responds."*

In processing of requests a senior legal advisor noted *"... different departments have a slightly*

different approach to official information. Any law can be interpreted. Some of it is a bit vague. 'Soon to be publicly available', what does that mean? 'Due particularity' what does that mean? I believe that it has to be reasonable under the circumstance. But you can take a hard line; you can say that unless you can readily identify the document or it's clear in someone's mind that they know what it is, then you'll reject it. I have noticed that when we have staff come in from other departments, appointed at a fairly senior level, that the understanding that they have gained of what they do there with the Act is different from how we approach it."

Where "no decisions have been taken" by ministers, the Agency often relied on s.9(2)(f) despite the discomfort of their legal advisors

One of the principal issues in processing requests was the sheer time taken. The workload created was equivalent to more than an additional staff-member. Current issues presented fewer problems than more historical requests. Once the corporate memory had moved on, it was much more difficult and time consuming to determine the issues at the time and what did or did not need protection.

A further issue noted was that *"... private individuals tend to be poorer at expressing what they want ... You often end up doing quite a lot of work trying to identify what they want."*

The Role of Legal Advisors

Complaints didn't automatically go to the legal advisors. This was a direct consequence of the overall devolved approach to the processing and handling of OIA requests. However, policy staff said that legal staff were used a lot to check compliance with the law. *"Any request that involved withholding or any ambiguity [would] always take them to legal."* Final release could be signed off at [division] manager level.

Impact on Policy Development Process

A senior legal advisor thought *"... in general people have become more aware of the OIA. I notice that people say things like 'be careful in writing that submission'. For example, I have heard the comment, when a draft say has been circulated, 'you have to be aware that this may*

be asked for later; so maybe you shouldn't write that.' So it's put slightly differently or it's taken out."

S/he also thought the OIA "... has done more than snip around the edges. I think there is a higher awareness among people about it, and particularly about the embarrassment factor. Public servants are acutely aware of that. ... They don't want to be seen as the one who has embarrassed their Minister. This influences how they might write it or how they might approach it. But it doesn't stop the work being done even though it may be an unpopular policy."

A policy manager thought the OIA "... has really focused my mind on what you put in drafts and how you incorporate comments. I think overall it has probably improved the quality of policy advice because the advice really has to contain its rationale rather than look like just opinion and hearsay."

In the view of the senior policy manager, the OIA certainly made analysts aware that they write for a public audience. This caused analysts to "... slightly pull your free and frank advice". Greater care was taken in writing with the result that simple ideas might take more space to express. "You might be inclined to write 'our analysis is that this isn't a good idea'. That's the short way of saying it. The long way of saying it won't make a headline whereas the short way will. '[Agency Z] says this isn't a good idea'. ... the headline will make you write three sentences instead of one."

The senior policy manager thought the "... OIA does make you focus on how the policy will appear to the external audience. That might actually be good because it gets you focussed on what the implementation implications of your policy might be. But it may also stop you freewheeling down some quite fruitful paths simply because in writing about the paths ... sometimes you'll get the Minister saying I don't want you ... writing about that. And it does stop you, other than in conversation and debate If you said to somebody go and write a think-piece, go and really nut out what it would look like if we went down that road, we'd probably be very worried about that paper."

From another policy manager. *"It's making people much more careful about what we might want to put in writing and it's stuff where, I think if we're not ready to move on it we're much more coy about creating think-pieces around it. If those think-pieces are almost certainly going to get asked for under the OIA, and are going to be difficult to deal with, then we're much less likely to do the think-pieces."*

"Political party research units are being very methodical. In a recent policy development, every paper at every stage was requested. The requester not only wanted to know what the fullness of the advice was that helped ministers reach their final position; s/he was actually asking how many iterations of thought we went through in reaching that and what bits came up on the table and eventually subsided. My view is that is slightly constraining because the nature of the policy development process, if it is good, is that people write to clarify their thoughts."

"Knowing that everything you write is going to get asked for under OIA and is somehow going to be taken to have meaning is really quite a constraining process. It's just that feeling of frustration as a policy analyst of wanting to get the ideas down. That nobody can begin to interact with the arguments and what their thinking until it is down on paper, and when it's down on paper somehow it's taken to be indicative of final thought. And it might have been a totally rabid idea. We've experimented with all sorts of ways to make clear it's status. Both for protection of information should it accidentally get into the public domain when you don't want it in the public domain and for when it is finally put into the public domain because it reasonably has to be released under the OIA. We are looking at ways in which you can use footnotes and footers to make it clear that this is a think-piece, this is a thinking out loud. It is not a Cabinet paper."

"But in order to get the sort of interdepartmental engagement you need, you actually have to say this is my thinking on the Cabinet paper, so you put the title Cabinet paper at the top to get them engaged. It's heads you win and tails I lose. Doesn't matter which way you go."

The issue of leaks and their relationship with the OIA was raised. The Agency had recently had significant leaks. It was noted that these accelerated the OIA requests. *"Drafts are often not well written. They are put together to give people a sense, a flavour of what is proposed. What might a package look like. In that sense leaks have had a greater impact on what we might write in a policy paper; greater impact than OIA, which gives you lag time. In the end it probably doesn't matter what you have written once a decision is taken, in fact it's probably quite useful for people to see what the decision-making process is. Whereas leaks are released at a bad time and are only one part of the story. Leaks are much more difficult to deal with."*

"I don't think it's a bad Act. I think if we didn't have it we would get shoddy decision-making. It does [impact in a negative way on ability to develop policy] because you do things like verbally discuss things rather than put them in writing. I have ideas for long-term strategies; I don't dare put them down in writing. It's not the OIA that worries me it's leaks. I don't think it is possible to be 'leak proof'. The more we try to be 'leak proof' the more that stifles policy development; more than this [the OIA]."

"There are policy papers in government departments at the moment that will not circulate, they have had so many leaks. People have to physically go to another building and read the paper. If something is designed to stifle discussion and debate, that must be it. Even by having copies that you are only allowed to show to one person in a department rather than being able to discuss them with your colleagues you immediately stifle debate enormously. I think these are actually bigger problems and these problems arise from leaks rather than the OIA. I don't think you can stop leaks. If people are really determined, as seems to be the case at the moment, for the public to know what government is thinking of doing, things will leak."

"You can debate ideas quite robustly under the OIA and not share them until after the decision is taken. I think one of the real strengths that has developed in New Zealand in the last 10 years is the quality of policy analysis. You really do generate and debate alternative options and they all have all their arguments put on the table. Officials reach conclusions and different officials might reach different conclusions and ministers might reach alternative conclusions but at least everybody knows the nature of the debate".

"I don't think it's a bad idea for the public to see that there were dissenting views leading to the decisions that were taken. And to see that no issue is quite as black and white as it looked on the surface. I think that really helps people understand why things are the way they are and I think that is really positive. I think if the public sees half the debate before it is finished, as happened with our leaked paper, that can be incredibly destructive. I don't think the OIA makes that happen, so it's not really a problem."

The efficiency impacts of some of the users of the OIA was noted. Research units appeared to work hand in glove, cross referencing and using each deadline specified in a paper as an automatic cue for the next OIA request. The Agency felt like the units hovered like hawks waiting for each subsequent stage of work to be completed. The policy manager thought that *"... they are not actually doing it to follow policy. I don't believe it has added to the policy developed or changed the policy that would have been developed"*.

The Policy Manager also expressed concern about public criticism resulting from use of the OIA. An example was given of an official who had been named in parliament by a senior

opposition MP. The official had been "...absolutely vilified ... for the quality of their advice. ... That was a fairly sobering experience for anybody ... [especially] given that I am a manager who puts my name to the bottom of lots of papers that I don't write. I am very aware that one day someone is going to ask for one of those papers under the OIA and is going to stand up and use my name and criticize it in terms of the quality. So I am very aware that I have to be willing to stand by the quality [of papers I sign]. The area where it is most constraining, most difficult, is that policy development is not a one hit. It's an iterative process. They [critics] tend to take single papers out of context. If you are having a dialogue with a minister, or a Cabinet, for the purpose of developing a policy then you don't always go back to the beginning of the story and balance the advice up. It's almost saying that every paper you write has to go back and canvass the wider issues otherwise you'll be vilified in public for the lack of fullness of your advice."

A recent example of a such a case was provided. Papers created in the policy development process did not show the full picture of the Agency's thinking on a particular subject, but were touted in the public domain as doing so. The impact of resulting criticism when such papers were released under the OIA, or leaked, appeared to be reluctance from the Agency to release papers. The Agency tended to prefer policy decisions to be made prior to release of all relevant papers, although in practice papers were often released earlier.

"I can't think of any example where [the OIA] has made that much difference to policy. I think one of the reasons it doesn't is that what we are actually recommending isn't that far from what the people who are arguing with us want. They just think we are doing something much worse. So it's important to keep us honest. But in reality, the things that we are recommending aren't that bad. And the kind of thing that they want might be completely unrealistic or just not make sense."

"I don't think it changes the ultimate decision. What it does do is make you very careful that you fully articulate the arguments and take seriously their point of view. If the OIA didn't exist maybe you wouldn't do that to the same extent. Maybe those points of view wouldn't get articulated, so maybe the decisions might have gone a different way."

"Policy is quite a sequential process, I think it [the OIA] probably does have an impact on the policy developed. I think when I was in ... it definitely did. If those ... groups didn't have access to as much information on what was going on they wouldn't have

been nearly so effective in actually persuading government. Their main avenue of persuasion is inevitably the general public. They work quite differently there."

"When you are on the outside you want more information, when you are on the inside you definitely don't. You want to control it. After the first Cabinet decision, people can get all the papers that lead up to that. Because policy development is an iterative process it does actually help them to participate."

"The main thing that is making me not commit things to paper is that I am not quite sure what will happen to that piece of paper. Provocative ideas can be really misinterpreted. This is really the agenda and this is what people are going to do. The OIA is limiting the ability to put together paper that just explores options. It stops you writing things down. Release of this kind of paper under the OIA can subvert what we are trying to achieve and what people out there really want. That's the sad thing about it."

"I think in reality who and who can't play isn't that controlled. Anybody who wanted to play could probably start playing. In reality, people don't have that much time and aren't really that interested. These bodies tend to do it for them, because that is what they are there for. Most individuals don't take part in policy development and, when they choose to, they have opportunities to do so. I don't have a sense that they are excluded. In reality, the OIA is almost never used by people who aren't part of a group that you consult. Except political parties. It's not a tool that is used by the general public. I only think it assists the general public if it assists bodies who are representing the public interest in some way. The media is, I suppose, the obvious one. They then write more informed and in-depth articles. If the media did more of that, then the OIA would probably be more useful for the general public. So in that sense of the general public, the OIA does provide opportunity and I think that without it things would be much worse for the general public. Without the OIA behaviour of officials would change back to the kind of stuff that people used to do when they knew it was never going to be seen by anybody."

The Games People Play

The issue of proactive release in the spirit of the OIA was examined using two recent cases that involved the Agency commissioning policy pieces. In the first case, the papers were released proactively to allow the wider public to write and comment on the issues and solutions proposed. The response to this approach was described as "*generally extremely positive*". A second set of papers were commissioned and it became apparent from OIA requests that people were aware that the work was being undertaken. "*We wanted to release those papers immediately so that people could do exactly the same [comment]. The Minister wouldn't let us. The Minister said that s/he didn't want hares running. The Minister didn't want them*

released till the final policy paper was completed. The requests were transferred to the Minister."

A senior legal advisor thought that those who tried to influence policy generally had inside help. *"I think that most people that want to get information – leaving aside the average person who doesn't really have any or want to develop any awareness of public policy – for example a pressure group, rely on having sources if you like. Underground networks, that tell them, some work has started on that... that's how they find out, I think. I'm sure that's what they do. Because somehow or other they do find out".*

Of interest was a comment from the policy manager. *"If you get an issue where the thing under debate is just too technical for the public, you don't get a bite in the media."*

"The bit that is most difficult with the OIA is that, we were well schooled in the Act. I have found that there have been whole departments and certainly ministers and others who are quite cavalier about the Act. I had the experience of very, very senior people from departments, who should know better, trawling through line by line for several thousand pages of text and saying that they didn't want to release things. And they actually had no grounds under the Act and they weren't going to be able to. It seemed a huge waste of resources and there seemed to be a real belief that they could just override the Act. Where ministers are not keen on releasing information, they will ultimately have to release it. It's just playing for time. But it puts us in a very awkward position because sometimes the request is to us. So we transfer the request over to the Minister."

"I think ministers would generally prefer not to release things and they are always looking for grounds not to release. They interpret the law somewhat differently to our legal people and it's always in one direction. I have never seen them keener to release. I think that that is probably just the way ministers are feeling."

A User's Perspective: Forest and Bird

To provide a user's view, in a sector where arguably the OIA has worked to assist participation I interviewed Mr Barry Weber, of Forest and Bird. Mr Weber has used the Act since it was introduced.

Mr Weber noted that often there is no mention made of the OIA when requesting information; it is taken as read that the request is made under the Act. In many cases it is taken for granted that the information will be released. Often the request is not even required in writing. His experience is that usually only papers to ministers or Cabinet create an issue of whether information should be released.

Access to information was not always timely. Sometimes things got lost in the system. Some of these were genuinely lost, but at other times it seemed that information was intentionally delayed or withheld. Departments were much more open about their processes than prior to the Act, and the 1987 amendment in particular, coming into force. Proactive release of information was also much better now than before the introduction of the OIA. Mr Weber noted that "release" went through patches depending on the people, policy and agency he was dealing with. From his perspective, some departments were quite proactive. Such departments appeared to consider it part of public process. These agencies took the approach that they had an obligation, in terms of their conservation mechanisms, to ensure Forest and Bird had the information required to make decisions. It was in the agency's interests to release more information, since the agency received good submissions in return. Other departments were more protective of information and less open in what they were prepared to release.

The biggest problem occurred when an issue became sensitive. This would often lead to exclusion from the policy process. Mr Weber provided a recent example where Forest and Bird were aware that a policy paper was being produced and wished to participate. However, the department concerned had excluded other participation until the discussion paper was released. That process took eight months. Applications to gain information using the OIA prior to release of the discussion paper were refused, on the basis that the issues were under discussion with ministers. It was noted that some ministers were more open than others.

In terms of the Forest and Bird's input into the policy development process, Forest and Bird felt it was important for their views to get taken into account in the process. In particular they were concerned to ensure that their views were not misunderstood. Some departments were good in this respect, sending back drafts to ensure views were accurately recorded, even if these views

were dismissed in the conclusions of the report.

Government often appeared to "clam up" and either not release or only selectively release information. At times there was a sense of government playing games with documents. Some ministers and departments seem to consistently employ delaying tactics or tried to deny the information existed. By comparison, other departments were very helpful and wrote to advise they were unable to release information now, as the agency was in discussion with ministers, but expected to be able to release information at a specified date. The process of release appeared to be getting worse at present; delays were getting longer. The 20 day limit in the Act tended to be the minimum time. Mr Weber said he was usually surprised if information arrived within 20 working days.

Delays in the release of information created problems, particularly in terms of Forest and Bird ability to provide input into the policy processes. Late last year Mr Weber was trying to make submissions on a bill. Despite a request in plenty of time for papers under the OIA, papers did not arrive prior to the select committee meeting. He then had to appear at select committee and question why the bill was couched the way it was. Forest and Bird requested, and was granted, permission to make submissions after they received the papers. Mr Weber noted that such situations created problems for the parliamentary processes. Likewise delays sometimes impacted on the ability of ministers to meet and discuss issues with people. Mr Weber suggested that there needed to be some sort of compliance measure for OIA requests. Just as departments report the number of OIAs, he thought they should report timeliness in answering requests.

One of the issues that Mr Weber thought government had yet to come to terms with was the pressure put on the system to leak as a result of withholding information. Where departments were not forthcoming with information under the OIA, information tended to get into the public domain by other means.

Mr Weber sensed that many of the new public servants were not as *au fait* with the Act as the older hands. The skill base seemed to have been depleted either through a change in personnel or a lack of "up skilling" people in departments. There were usually insufficient good policy

people who knew the history of policy in departments. This not only created problems for release of information, but for providing good advice to ministers as well.

Mr Weber thought that the principal benefit of the OIA was that it created a culture of information exchange. It had improved government decision-making because officials were now more able to consult. This created a culture where there was more robust decision-making. The OIA improved democracy by improving the policy development process. On some issues Forest and Bird was heard and ignored; but at least its views were recorded.

The Impact of the OIA on the Policy Development Process

These case studies cannot provide definitive answers to the impact of the OIA on the policy development process. However, they provide an indication of the impact and changes in the way agencies and their staffs act as a result of the OIA. They also indicate the extent to which the OIA has affected the policy development process. The next chapter reviews the earlier chapters and sets the results of the survey and the case studies in context in order to make an assessment of the impact of the OIA on the policy development process.

CHAPTER FIVE: DISCUSSION AND CONCLUSIONS

"We are satisfied that, in general, the Act works relatively effectively to further its stated purposes. Since 1982 there has been a substantial increase in the availability of official information. Public participation in the making of laws and policies, and the accountability of Ministers and officials, has been enhanced."

Law Commission, *Report on the Official Information Act 1982* (NZLC, 1997: ix).

The Official Information Act 1982

The OIA was introduced in a response to the demand from the people of New Zealand for more open government. The OIA is a tool designed, among other reasons, to facilitate the process of open government. One of the Act's aims is to assist the participation of the public in the making and administration of laws and policies. By providing access to information, the Act has the potential to empower people to participate in a meaningful and effective way in a participatory democracy.

To be able to participate effectively a citizen must have the right to know what options are open and being considered; sufficient information about them to form a proper judgement; and time to enable him or her to consider and express views before the government is committed to a policy (Ombudsmen, 1993: 8). Effective participation therefore requires two key elements: information and opportunity, both in a timely manner. As discussed in chapter three, timing is critical. Participation at an early stage offers a greater chance of influencing the policy developed; participation late in the policy development process has to contend with the inertia in the direction an initiative has gained.

The principle that official information should be more readily available is now well established (SSC, 1995b: 31). But prior to this study there was already considerable anecdotal evidence suggesting there was still a tendency amongst officials and politicians to seek to control information. One element of this perceived tendency was reported manipulation of the release of information under the OIA. In addition the public perception was that successive governments had been less effective in consulting the public than they might have been.

This paper argued that the quality of public policy formation is a critical determinant in current and future national welfare. It then noted that the literature advocated participation as an essential element in obtaining the best possible democratic governmental decision-making. The tentative conclusion was, therefore, that effective public participation in the policy development process was highly desirable. It was also noted such participation was integral to the aim of the OIA.

The Policy Development Process

Chapter two reviewed policy and the policy development process in New Zealand. Policy was defined as "... a course or principle of action adopted or proposed by a government, or a government agency"¹. In reviewing the policy development process the paper focussed on the system of policy development followed in the core public sector. The review indicated policy development is typically an iterative process; any given initiative culminates in consideration by an agency on its own, interdepartmental consideration, consideration by Cabinet and/or its supporting Committees or consideration by Parliament, which includes the select committee system. While there are policies developed by a range of bodies who do not need to consider ministerial involvement, by far the majority of policy initiatives are developed in an environment where ministerial involvement and direction in the process are fundamental.

Since ministers control the process, either directly or through instructions passed to their departments, they are in a position to control the degree to which the public are invited to participate in the policy development process. In addition, by setting the overall strategy for release of information in their portfolio, including the limitations on proactive release by their agencies, ministers control the degree to which the public are kept informed of the policy agendas, considerations and activities of the Executive.

Participation

Participation was defined as "... actions through which ordinary members of a political system influence or attempt to influence outcomes" (Nagel, 1987: 1). Recall that the Danks Committee

¹ For the purposes of this paper 'agency' was defined as including departments, ministries and other public service organisations.

noted "... the growing acceptance by Parliament of the value and importance of the wider participation of individuals who are affected by regulatory and planning decisions or who for other reasons, can usefully contribute to the process of decision [making]" (Danks Committee, 1980: para 22).

In seeking to find opportunities for public participation, four opportunities were identified in the generic policy development process. Citizens might individually or collectively try to influence ministers, since ministers generally drive the policy agenda and are the most powerful group in the policy development process. Opportunities also existed to influence the agency(ies) that advise on a particular policy initiative. Policies requiring legislation provided an additional opportunity for citizen influence at select committee stage. Finally, Parliament as a whole offers a venue whereby political pressure can be applied to any particular issue. While the procedures of Parliament (other than petitions) are only accessible to members, MPs offer their constituents a means of attempting to apply pressure in the development or change of any given policy.

However, in advocating participation the obverse argument of the need to maintain effective government was registered. This point, first made by the Danks Committee in 1980, was reiterated in the recent Law Commission report on the OIA. In seeking to address the balance between participation and effective government, Sir John Robertson's often quoted view was noted.

Clearly this [the OIA's] purpose contemplates that authoritative information about government proposals for change of policy, or for major decisions affecting the lives of people, should be available to the public for debate before decisions are taken. Effective participation does not mean that the public should sit on the councils of government when decisions are taken. What it does mean is that the public should be able to debate the issues involved and, through their representatives, whether Members of Parliament or special interest groups, put their views so that decision makers can take them into account when the decision is taken (Ombudsmen, 1993: 8).

The differences between the concepts of participation and consultation were discussed. The rulings of the Courts were reviewed and in particular it was noted that consultation was more than listening or considering views. Those consulting had to engage in the process with an open mind and wait till consultation was complete before making their decision. Those consulting had to be ready to change or even start afresh. The conclusion of Brown (1995: 14-15), that participation

included not only clientele-oriented consultation, but opportunities for public to initiate consultation, was noted.

The Case Studies

This study made use of a survey across the public sector to obtain a broad base of views prior to a more in-depth investigation using three case studies. The identities of the case study agencies cannot be revealed for good reasons. In selecting the case studies, care was taken to ensure that each agency was very different from the others in terms of the sector it operated in, its public profile and the degree to which it was subject to strong lobbying. In view of this, it is expected that any future study would find the results reported here generally representative of the core public sector.

Findings of this Study

The Users of the Official Information Act 1982

This study found, through both the survey of the core public sector agencies and the case studies, that the major users of the OIA as a means of requesting information from these agencies are the opposition parties and, in particular, their party research units. While such use of OIAs may enhance accountability of ministers and officials in the development of policy, nothing found in this study demonstrates that these OIA requests contribute to the development of policy and, in particular, the increased participation of the public in the policy development process.

It may be exposure of policy and its development to the light of public attention and consideration by the media provides avenues for citizens to become involved. It makes for a more informed citizenry, but while an informed citizenry is a necessary condition for participation, it is not a sufficient condition. The three case studies would support such an argument. Staff of the case study agencies interviewed in this study adopted a technocratic viewpoint. They saw use of the OIA by opposition research units as merely creating a diversion that distracted ministers from an objective consideration of the policy proposals. The staff did not see evidence of opposition party OIA requests leading to participation in the policy development process.

To use the OIA a request must meet the test of 'due particularity'. Would-be requesters need to have an idea or knowledge of what it is they are looking for. Information will enable more information to be gained, but gaining the foothold required for the first step to effective participation may be quite difficult. In this area the work of the opposition political parties may offer greatest benefit to would-be participants. By alerting members of the public to what is happening in government policy, the public may gain the initial information to make an OIA request not only possible but effective in obtaining the information they desire.

Participation in policy development is only a realistic goal when the participant is aware a particular policy issue is on the work programme or is being considered. The case studies suggest it is the norm for the policy development process not to make provision for consultation wider than those select contacts an agency might have cultivated. This finding is, in general, consistent with work by McLeay (1995: 171-185). Since the work programme of an agency is often not disclosed, prospective participants are often poorly placed to participate at the early stages of development of a policy initiative. Later, the need for consideration of options by ministers within a "cone of silence" will exclude would-be participants. Should the policy not require legislation, would-be participants may be excluded until the policy is all but signed, sealed, and delivered.

Parliament's select committees have become more powerful over the past decade and are far removed from a rubber stamping process for legislation; but they see only a small portion of the policy developed in the public service. Further, whereas policy development by an agency may extend over months or years, there are greater constraints in terms of time, resources and the expertise a select committee can harness to rework legislation under its consideration. It is therefore, arguable that participation by the public at this late stage of the policy development process, faces greater odds of being effective in achieving the outcomes desired by the participant.

This study found the OIA is not well used as a tool by the general public, as opposed to political parties and the media. In certain sectors, lobby groups (for instance in environmental issues) have used the OIA to good effect, as a means of staying in touch with the policy agenda, and as a means of obtaining information that can be used to prepare or support their case. Information is power, and once power is obtained such groups become a force that requires greater reckoning

in the policy development process. This view is supported by the case of Agency 'Z', where it was clear the Agency had developed processes that resulted in lobby groups becoming part "... of a network of trusted consultees ... tied to ... the establishment although they represent sector groups". The Agency suggested that doing so had reduced the need for these groups to utilise the OIA.

The Impact of the Official Information Act on Officials

In addition to direct impact on the policy development process, the OIA has also impacted on the behaviour of those who develop policy. Both the survey and the case studies suggest, if not at a junior level, then certainly at middle and senior level, analysts and policy managers are well aware that these days they write in a public environment. The effect of this is to reduce the range of options put forward, to reduce the amount of opinion or "soft" information in policy papers, and to tend to only offer written advice that is defensible. At times, this results in papers which are not as explicit in the points they attempt to make as they could be and in papers that do not present the full picture. The case studies demonstrate that softer information, and the more contentious information is more often being passed by oral rather than written advice. Officials are frequently aware of the costs this imposes on the integrity of the policy development process, particularly from a policy development review perspective. This is broadly consistent with the conclusions reached by Voyce (1996: 55-56).

Scoping papers are more limited and generally do not canvass the full range of policy options. There appears to have been constraint in the consideration of lateral thinking because of the OIA environment within which officials work.

The OIA is considered to create a burden on officials by those who must comply with its provisions. While many acknowledge its constitutional importance, they more keenly feel the additional burden requests make on their busy agendas.

Processing Official Information Act Requests

Processing OIA requests is considered run of the mill business and is delegated to commensurate levels to that at which the policy documents requested are developed and authorised. In the case

study agencies at least, those who can sign out policy papers can invariably sign out the replies to OIA requests.

The study found that only the 'official' documentary record is generally released in response to OIA requests. Case study evidence shows marginal notes on the official record, and informal notes, of interest to those requesting information, are seldom released. To date, agencies have yet to develop protocols for handling E-mail and other electronic traffic as part of the OIA management process. It is likely this will increasingly become an issue as the public service increasingly moves to an electronic world.

The OIA has not generated a huge demand for legal advice within agencies. After talking to the senior legal advisors in three agencies, the impression is that, nowadays, OIA work is only a very small portion of their day-to-day activity.

Evidence from the case studies showed the agencies worked, as the Law Commission surmised, to the 20 day timeframe for meeting requests. The limit has therefore become the standard default in the case study agencies. Staff in these agencies suggested that they could, in general, meet a move to a 15 day limit as proposed in the recommendations of the Law Commission (NZLC, 1997: 7).

Manipulation of the Official Information Act Process

It is clear that not everybody enters into the spirit of the Act. It would appear some well-meaning officials or technocrats manipulate the OIA process in order to meet their own ends of consideration of policy initiatives without exposure to a wider audience. It is even more clearly apparent that some ministers seek to control information and in doing so clearly run contrary to both the spirit and the letter of the Act.

If as proposed by the Law Commission (1997: 127), the Solicitor-General starts to enforce the public duty arising from a recommendation for release of information by an Ombudsman, there may be some change and improvement in this situation. Ministers, it can be presumed, will not want to be seen on the wrong side of the Court.

Likewise, continued education of those in the bureaucracy in issues of official information offers a means of countering technocratic views through increased understanding of the purpose of the OIA and its key role in open government. This need has already been identified by Boston et al. (1996: 343) and the Law Commission (NZLC, 1997: E31).

The Impact of the Official Information Act on the Policy Development Process

The OIA has undoubtedly contributed to a change in culture which has resulted in more open government in New Zealand. Much more information is released into the public domain than was the case prior to the introduction of the OIA. Such information allows greater opportunity for citizens to assess the performance of government. The OIA is, therefore, recognised as an important instrument in the range of mechanisms which hold the Executive *accountable* (McLeay, 1995: 187; Palmer & Palmer, 1997: 187). Accountability is not however the focus of this paper.

The Act's direct impact on the *policy process* is not, however, immediately clear. Information can be obtained much more easily than before, but while the Act provides an extremely useful tool to gain information that is only half of the necessary equation.

From the interviews reported in chapter four, the technocrat who is suspicious of 'political' involvement in policy development is not well-disposed to the OIA. While aware of the significance of open government, these officials favour control of information to speed and ease the process of policy-making. Such attitudes constrain the ability of the citizenry to participate in the development and administration of laws and policies.

Ministers have the policy development process firmly under their control. While individual ministers choose to control information and thereby indirectly discourage participation, the users of the OIA are further constrained in the degree to which they can participate.

Such views are not limited to those *inside* the bureaucracy. Evidence from Mr Weber was provided to show that the views of those within the agencies were not exclusively the views of *insiders*; that the experience of *users* of the Act also suggested that ministers and technocratic

officials sought to control information. If the experience of Mr Weber is typical, it appears that despite a desire by citizens to participate, their efforts are often frustrated.

This is not to say that the OIA has failed in its purpose; the OIA has facilitated the participation of the public in the making and administration of laws and policies. Broadly the OIA is an effective piece of legislation and that was the conclusion of the recent Law Commission review (NZLC, 1997: 1-11). Politicians would seem to have been the greatest users of the Act. For the Act to be of maximum benefit to the ordinary citizen, it seems a loosening on the control of information will be needed. Dissemination of information allows greater use of the OIA to be made. Information is, however, but one of the necessary conditions for effective participation in the making and administration of laws and policies. Opportunities must also be made to allow those wishing to participate to have their say.

APPENDIX ONE: EXTRACTS OF THE OFFICIAL INFORMATION ACT 1982

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Radio New Zealand Act (No. 2) 1995: ss. 1 (2), 2	48 (n)
Fish Export Processing Regulations 1995 (S.R. 1995/54)	62 (n)

In this index "(n)" after a page number indicates that the enactment is referred to in a note on that page.

ANALYSIS

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THE OFFICIAL INFORMATION ACT 1982
1982, No. 156

An Act to make official information more freely available, to provide for proper access by each person to official information relating to that person, to protect official information to the extent consistent with the public interest and the preservation of personal privacy, to establish procedures for the achievement of those purposes, and to repeal the Official Secrets Act 1951 *[17 December 1982]*

1. Short Title and commencement—(1) This Act may be cited as the Official Information Act 1982.

(2) Except as provided in subsection (3) of this section, this Act shall come into force on the 1st day of July 1983.

(3) This section, and Part VI of, and the Second Schedule to, this Act shall come into force on the day on which this Act receives the Governor-General's assent.

2. Interpretation—(1) In this Act, unless the context otherwise requires,—

“Department” means a Government Department named in Part I of the First Schedule to the Ombudsmen Act 1975 (other than ... the Parliamentary Counsel Office):

“Document” means a document in any form; and includes—

(a) Any writing on any material:

(b) Any information recorded or stored by means of any tape-recorder, computer, or other device; and any material subsequently derived from information so recorded or stored:

(c) Any label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means:

(d) Any book, map, plan, graph, or drawing:

(e) Any photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced:

“Enactment” means any provision of—

(a) Any Act of Parliament; or

(b) Any regulations within the meaning of the [Acts and Regulations Publication Act 1989] made by Order in Council:

“International organisation” means any organisation of States or Governments of States or any organ or agency of any such organisation; and includes the Commonwealth Secretariat:

["Local authority" means a local authority or public body named or specified in the First Schedule to the Local Government Official Information and Meetings Act 1987:]

["Member" means, in relation to an organisation, any person (not being an officer or employee of the organisation) who, whether by election or appointment or otherwise, holds office as a member of the organisation; and includes—

(a) Where the organisation is a company or corporation, a director; and

(b) Where the organisation is a trust, a trustee; and

(c) Any temporary, acting, or alternative member of the organisation:]

“Official information”—

(a) Means any information held by—

(i) A Department; or

(ii) A Minister of the Crown in his official capacity; or

(iii) An organisation; and

(b) Includes any information held outside New Zealand by any branch or post of—

(i) A Department; or

(ii) An organisation; and

[(c) In relation to information held by the Department for Courts, includes information held by the Rules Committee appointed under section 51b of the Judicature Act 1908; and]

[(d) In relation to information held by a University (including Lincoln College), includes only information held by—

(i) The Council of the University; or

(ii) The Senate, Academic Board, or Professorial Board of the University; or

(iii) Any member of the academic staff of the University; or

- (iv) Any other officer or employee of the University; or
- (v) Any examiner, assessor, or moderator in any subject or examination taught or conducted by the University; but
- (e) Does not include information contained in—
 - (i) Library or museum material made or acquired and preserved solely for reference or exhibition purposes; or
 - (ii) Material placed in the National Library of New Zealand by or on behalf of persons other than Ministers of the Crown in their official capacity or Departments; and
- (f) Does not include any information which is held by a Department, Minister of the Crown, or organisation solely as an agent or for the sole purpose of safe custody and which is so held on behalf of a person other than a Department or a Minister of the Crown in his official capacity or an organisation; and
- (g) Does not include any information held by the Public Trustee or the Maori Trustee—
 - (i) In his capacity as a trustee within the meaning of the Trustee Act 1956; or
 - (ii) In any other fiduciary capacity; and
- (h) Does not include evidence given or submissions made to—
 - (i) A Royal Commission; or
 - (ii) A commission of inquiry appointed by an Order in Council made under the Commissions of Inquiry Act 1908; or
 - (iii) A commission of inquiry or board of inquiry or Court of inquiry or committee of inquiry appointed, pursuant to, and not by, any provision of an Act, to inquire into a specified matter [; and]
- [(i) Does not include information contained in any correspondence or communication which has taken place between the office of the Ombudsmen and any Department or Minister of the Crown or organisation and which relates to an investigation conducted by an Ombudsman under this Act or under the Ombudsmen Act 1975, other than information that

came into existence before the commencement of that investigation] [; and]

[(j) Does not include information contained in any correspondence or communication that has taken place between the office of the Privacy Commissioner and any Department or Minister of the Crown or organisation and that relates to any investigation conducted by the Privacy Commissioner under the Privacy Act 1993, other than information that came into existence before the commencement of that investigation:]

“Ombudsmen” means the Ombudsmen holding office under the Ombudsmen Act 1975:

“Organisation” means—

(a) An organisation named in Part II of the First Schedule to the Ombudsmen Act 1975 [(other than the Parliamentary Service Commission)]:

(b) An organisation named in the First Schedule to this Act:

“Permanent resident of New Zealand” means a person who—

(a) Resides in New Zealand; and

[(b) Is not—

(i) A person to whom section 7 of the Immigration Act 1987 applies; or

(ii) A person obliged, by or pursuant to that Act, to leave New Zealand immediately or within a specified time; or

(iii) Deemed for the purposes of that Act to be in New Zealand unlawfully:]

“Person” includes a corporation sole, and also a body of persons, whether corporate or unincorporate:

“Personal information” means any official information held about an identifiable person:

["State enterprise" means—

(a) An organisation that is a State enterprise within the meaning of section 2 of the State-Owned Enterprises Act 1986 and that is named in the First Schedule to this Act:

(b) An organisation that was a State enterprise within the meaning of section 2 of the State-Owned Enterprises Act 1986 but which continues to be named in the First Schedule to this Act:]

“Statutory officer” means a person—

(a) Holding or performing the duties of an office established by an enactment; or

(b) Performing duties expressly conferred on him by virtue of his office by an enactment:

【“Working day” means any day of the week other than—

(a) Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, Labour Day, the Sovereign’s birthday, and Waitangi Day; and

(b) A day in the period commencing with the 25th day of December in any year and ending with the 15th day of January in the following year.】

【(1A) For the purposes of the First Schedule to this Act, a company is a related company of a State enterprise if the State enterprise, whether alone or together with any other State enterprise, directly or indirectly owns, or controls the exercise of all the voting rights attaching to,—

(a) In the case of a company registered under the Companies Act 1955, the equity share capital (as defined in section 158 of that Act) of the company; or

(b) In the case of a company registered under the Companies Act 1993, the issued shares of the company, (other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital),—

as the case may be.】

(2) Where information is held by an unincorporated body (being a board, council, committee, subcommittee, or other body)—

(a) Which is established for the purpose of assisting or advising, or performing functions connected with, any Department or Minister of the Crown or organisation; and

(b) Which is so established in accordance with the provisions of any enactment or by any Department or Minister of the Crown or organisation,—

that information shall, for the purposes of this Act, be deemed—

(c) In any case where that body is established in respect of any Department or organisation, to be information held by that Department or organisation; and

(d) In any case where that body is established in respect of a Minister of the Crown, to be information held by that Minister.

(3) Where subsection (2) of this section applies in respect of any unincorporated body and that body is established for the purpose of assisting, advising, or performing functions [connected] with any Department or organisation, that unincorporated body shall, for the purposes of this Act, be deemed to be part of that Department or organisation.

[(4) Subject to subsection (4A) of this section, information held by an officer or employee or member of a Department or organisation in that person's capacity as such an officer or employee or member or in that person's capacity as a statutory officer shall, for the purposes of this Act, be deemed to be held by the Department or organisation of which that person is an officer or employee or member.

(4A) Nothing in subsection (4) of this section applies in respect of any information that any officer or employee or member of a Department or organisation would not hold but for that person's membership of, or connection with, a body other than a Department or organisation, except where that membership or connection is in that person's capacity as an officer or employee or member of that Department or organisation or as a statutory officer.]

(5) Any information held by an independent contractor engaged by any Department or Minister of the Crown or organisation in his capacity as such contractor shall, for the purposes of this Act, be deemed to be held by the Department or Minister of the Crown or organisation.

(6) For the avoidance of doubt, it is hereby declared that the terms "Department" and "organisation" do not include—

- (a) A Court; or
- (b) In relation to its judicial functions, a Tribunal; or
- (c) A Royal Commission; or
- (d) A commission of inquiry appointed by an Order in Council made under the Commissions of Inquiry Act 1908; or
- (e) A commission of inquiry or board of inquiry or Court of inquiry or committee of inquiry appointed, pursuant to, and not by, any provision of an Act, to inquire into a specified matter.

In subs. (1), a definition of the term "Authority" expired as from the close of 30 June 1988, and consequentially it has been omitted from this reprint; see s. 53 (a) (i) of this Act.

In subs. (1), in the definition of the term "department", the words "the Legislative Department and" were omitted by s. 71 (1) of the Parliamentary Service Act 1985.

In subs. (1), in para. (b) of the definition of the term "enactment", the Acts and Regulations Publication Act 1989, being the corresponding enactment in force at the date of this reprint, has been substituted for the Regulations Act 1936, which was repealed by s. 11 of the Regulations (Disallowance) Act 1989.

In subs. (1) the definition of the term "local authority" was inserted by s. 57 (1) of the Local Government Official Information and Meetings Act 1987. See s. 1 (2) of that Act.

In subs. (1), the definition of the term "Member" was inserted by s. 2 (1) of the Official Information Amendment Act 1987.

In subs. (1), para. (c) of the definition of the term "official information" was substituted for the original para. (c) by s. 10 (3) of the Department of Justice (Restructuring) Act 1995; the original para. (d) of the definition of the term "official information" was repealed by s. 71 (2) of the Parliamentary Service Act 1985, and a new para. (d) of that definition was inserted by s. 2 (2) of the Official Information Amendment Act 1987; the word "and" was inserted after para. (h) and a new para. (i) inserted by ss. 2 (3) and 2 (4) respectively of the latter Act; and the word "; and" was added to para. (i) by s. 2 (1) of the Official Information Amendment Act 1995, and para. (j) was added by s. 2 (2) of the Official Information Amendment Act 1995.

In subs. (1), in the definition of the term "organisation", the words in square brackets were inserted by s. 71 (3) of the Parliamentary Service Act 1985.

In subs. (1), para. (b) of the definition of the term "permanent resident of New Zealand" was substituted for the original para. (b) by s. 151 (1) of the Immigration Act 1987. See s. 1 (2) of that Act and S.R. 1987/300.

In subs. (1) a definition of the term "prohibited immigrant" was omitted by ss. 1 (2) and 151 (1) of the Immigration Act 1987. See S.R. 1987/300.

In subs. (1) the definition of the term "State enterprise" was inserted by s. 2 (1) of the Official Information Amendment Act 1992.

In subs. (1) the definition of the term "working day" was substituted for a definition of the term "subsidiary" by s. 2 (5) of the Official Information Amendment Act 1987.

Subs. (1A) was originally inserted by s. 2 (2) of the Official Information Amendment Act 1992, and a new subsection was substituted therefor by s. 2 of the Company Law Reform (Transitional Provisions) Act 1994.

In subs. (3) the word "connected" was substituted for the word "conducted" by s. 2 of the Official Information Amendment Act 1983.

Subss. (4) and (4A) were substituted for the original subs. (4) (as amended by s. 2 (6) of the Official Information Amendment Act 1987) by s. 2 (3) of the Official Information Amendment Act 1993.

3. Act to bind the Crown—This Act shall bind the Crown.

PART I

PURPOSES AND CRITERIA

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.

5. Principle of availability—The question 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.

6. Conclusive reasons for withholding official information—Good reason for withholding official information exists, for the purpose of section 5 of this Act, if the making available of that information would be likely—

- (a) To prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or
- (b) To prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by—
 - (i) The government of any other country or any agency of such a government; or
 - (ii) Any international organisation; or
- (c) To prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or
- [(d) To endanger the safety of any person; or
- (e) To damage seriously the economy of New Zealand by disclosing prematurely decisions to change or continue Government economic or financial policies relating to—
 - (i) Exchange rates or the control of overseas exchange transactions:
 - (ii) The regulation of banking or credit:
 - (iii) Taxation:
 - (iv) The stability, control, and adjustment of prices of goods and services, rents, and other costs, and rates of wages, salaries, and other incomes:
 - (v) The borrowing of money by the Government of New Zealand:
 - (vi) The entering into of overseas trade agreements].

Paras. (d) and (e) were substituted for the original para. (d) by s. 3 of the Official Information Amendment Act 1987.

7. Special reasons for withholding official information related to the Cook Islands, Tokelau, or Niue, or the

Ross Dependency—Good reason for withholding information exists, for the purpose of section 5 of this Act, if the making available of the information would be likely—

- (a) To prejudice the security or defence of—
 - (i) The self-governing state of the Cook Islands; or
 - (ii) The self-governing state of Niue; or
 - (iii) Tokelau; or
 - (iv) The Ross Dependency; or
- (b) To prejudice relations between any of the Governments of—
 - (i) New Zealand;
 - (ii) The self-governing state of the Cook Islands;
 - (iii) The self-governing state of Niue; or
- (c) To prejudice the international relations of the Governments of—
 - (i) The self-governing state of the Cook Islands; or
 - (ii) The self-governing state of Niue.

8. *Repealed by s. 4 (1) of the Official Information Amendment Act 1987.*

9. Other reasons for withholding official information—(1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5 of this Act, 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.

(2) Subject to sections 6, 7, . . . 10, and 18 of this Act, this section applies if, and only if, the withholding of the information is necessary to—

- (a) Protect the privacy of natural persons, including that of deceased natural persons; or
- [(b) Protect information where the making available of the information—
 - (i) Would disclose a trade secret; or
 - (ii) Would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; or
- (ba) Protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—

- (i) Would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or
- (ii) Would be likely otherwise to damage the public interest;] or
- (c) Avoid prejudice to measures protecting the health or safety of members of the public; or
- (d) Avoid prejudice to the substantial economic interests of New Zealand; or
- (e) Avoid prejudice to measures that prevent or mitigate material loss to members of the public; or
- (f) Maintain the constitutional conventions for the time being which protect—
 - (i) The confidentiality of communications by or with the Sovereign or her representative;
 - (ii) Collective and individual ministerial responsibility;
 - (iii) The political neutrality of officials;
 - (iv) The confidentiality of advice tendered by Ministers of the Crown and officials; or
- (g) Maintain the effective conduct of public affairs through—
 - (i) The free and frank expression of opinions by or between or to Ministers of the Crown [or members of an organisation] or officers and employees of any Department or organisation in the course of their duty; or
 - (ii) The protection of such Ministers [, members of organisations], officers, and employees from improper pressure or harassment; or
- (h) Maintain legal professional privilege; or
- [(i) Enable a Minister of the Crown or any Department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities; or
- (j) Enable a Minister of the Crown or any Department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations); or]
- (k) Prevent the disclosure or use of official information for improper gain or improper advantage.

In subs. (2) the expression "8 (1)" was omitted by s. 4 (2) of the Official Information Amendment Act 1987.

In subs. (2); paras. (b) and (ba) were substituted for the original para. (b) by s. 5 (1) of that Act.

In subs. (2) (g) (i) and (ii) the words in square brackets were inserted by ss. 5 (2) and 5 (3) of that Act respectively.

In subs. (2), paras. (i) and (j) were substituted for the original paras. (i) and (j) by s. 5 (4) of that Act.

10. Information concerning existence of certain information—Where a request under this Act relates to information to which section 6 or section 7 or [section 9 (2) (b)] of this Act applies, or would, if it existed, apply, the Department or Minister of the Crown or organisation dealing with the request may, if it or he is satisfied that the interest protected by section 6 or section 7 or [section 9 (2) (b)] of this Act would be likely to be prejudiced by the disclosure of the existence or non-existence of such information, give notice in writing to the applicant that it or he neither confirms nor denies the existence or non-existence of that information.

The expressions in square brackets were substituted for the former expressions by s. 4 (2) of the Official Information Amendment Act 1987.

11. Exclusion of public interest immunity—(1) Subject to subsection (2) of this section, the rule of law which authorises or requires the withholding of any document, or the refusal to answer any question, on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest shall not apply in respect of—

(a) Any investigation by or proceedings before an Ombudsman . . . ; or

(b) Any application under section 4 (1) of the Judicature Amendment Act 1972 for the review of any decision under this Act;

but not so as to give any party any information that he would not, apart from this section, be entitled to.

(2) Nothing in subsection (1) of this section affects—

(a) Section 31 of this Act; or

(b) Clause 8 of the Second Schedule to this Act; or

(c) Section 20 (1) of the Ombudsmen Act 1975.

In subs. (1) (a) the words "or the Authority" were omitted as from the close of 30 June 1988 by s. 53 (b) of this Act.

PART II

REQUESTS FOR ACCESS TO OFFICIAL INFORMATION

12. Requests—[(1) Any person, being—

(a) A New Zealand citizen; or

(b) A permanent resident of New Zealand; or

- (c) A person who is in New Zealand; or
- (d) A body corporate which is incorporated in New Zealand;
or
- (e) A body corporate which is incorporated outside New Zealand but which has a place of business in New Zealand,—

may request a Department or Minister of the Crown or organisation to make available to him or it any specified official information.]

[(1A) Notwithstanding subsection (1) of this section, a request made, on or after the date of commencement of this subsection, by or on behalf of a natural person for access to any personal information which is about that person shall be deemed to be a request made pursuant to subclause (1)(b) of principle 6 of the Privacy Act 1993, and shall be dealt with accordingly, and nothing in this Part or in Part V of this Act shall apply in relation to any such request.]

(2) The official information requested shall be specified with due particularity in the request.

(3) If the person making the request asks that his request be treated as urgent, he shall give his reasons for seeking the information urgently.

Subs. (1) was substituted for the original subs. (1) by s. 6 of the Official Information Amendment Act 1987.

Subs. (1A) was inserted by s. 3 of the Official Information Amendment Act 1993.

13. Assistance—It is the duty of every Department, Minister of the Crown, and organisation to give reasonable assistance to a person, who—

- (a) Wishes to make a request in accordance with section 12 of this Act; or
- (b) In making a request under section 12 of this Act, has not made that request in accordance with that section; or
- (c) Has not made his request to the appropriate Department or Minister of the Crown or organisation [or local authority],—

to make a request in a manner that is in accordance with that section or to direct his request to the appropriate Department or Minister of the Crown or organisation [or local authority].

The words "or local authority" were inserted in 2 places by s. 57(1) of the Local Government Official Information and Meetings Act 1987. See s. 1(2) of that Act.

[14. Transfer of requests—Where—

- (a) A request in accordance with section 12 of this Act is made to a Department or Minister of the Crown or organisation; and

- (b) The information to which the request relates—
- (i) Is not held by the Department or Minister of the Crown or organisation but is believed by the person dealing with the request to be held by another Department or Minister of the Crown or organisation, or by a local authority; or
 - (ii) Is believed by the person dealing with the request to be more closely connected with the functions of another Department or Minister of the Crown or organisation, or of a local authority,—

the Department or Minister of the Crown or organisation to which the request is made shall promptly, and in any case not later than 10 working days after the day on which the request is received, transfer the request to the other Department or Minister of the Crown or organisation, or to that local authority, and inform the person making the request accordingly.]

This section was substituted for the original s. 14 (as amended by s. 7 (1) of the Official Information Amendment Act 1987) by s. 57 (1) of the Local Government Official Information and Meetings Act 1987. See s. 1 (2) of that Act.

[15. Decisions on requests—(1) Subject to this Act, the Department or Minister of the Crown or organisation to whom a request is made in accordance with section 12 or is transferred in accordance with section 14 of this Act **[[**or section 12 of the Local Government Official Information and Meetings Act 1987**]]** shall, as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received by that Department or Minister of the Crown or organisation,—

- (a) Decide whether the request is to be granted and, if it is to be granted, in what manner and for what charge (if any); and
- (b) Give or post to the person who made the request notice of the decision on the request.

[(1A) Subject to section 24 of this Act, every Department or Minister of the Crown or organisation (including an organisation whose activities are funded in whole or in part by another person) may charge for the supply of official information under this Act.**]]**

(2) Any charge fixed shall be reasonable and regard may be had to the cost of the labour and materials involved in making the information available to and to any costs incurred pursuant to a request of the applicant to make the information available urgently.

(3) The Department or Minister of the Crown or organisation may require that the whole or part of any charge be paid in advance.

(4) Where a request in accordance with section 12 of this Act is made or transferred to a Department, the decision on that request shall be made by the **[[chief executive]]** of that Department or an officer or employee of that Department authorised by that **[[chief executive]]** unless that request is transferred in accordance with section 14 of this Act to another Department or to a Minister of the Crown or to an organisation **[[or to a local authority]]**.

(5) Nothing in subsection (4) of this section prevents the **[[chief executive]]** of a Department or any officer or employee of a Department from consulting a Minister of the Crown or any other person in relation to the decision that the **[[chief executive]]** or officer or employee proposes to make on any request made to the Department in accordance with section 12 of this Act or transferred to the Department in accordance with section 14 of this Act **[[or section 12 of the Local Government Official Information and Meetings Act 1987]].]**

This section was substituted for the original s. 15 by s. 8 (1) of the Official Information Amendment Act 1987. See s. 8 (2) of that Act.

In subss. (1), (4), and (5) the words in double square brackets (other than those referring to the chief executive) were inserted by s. 57 (1) of the Local Government Official Information and Meetings Act 1987. See s. 1 (2) of that Act.

Subs. (1A) was inserted by s. 2 of the Official Information Amendment Act 1989.

In subss. (4) and (5) the references to the chief executive were substituted for references to the permanent head by s. 90 (d) of the State Sector Act 1988.

[15A. Extension of time limits—(1) Where a request in accordance with section 12 of this Act is made or transferred to a Department or Minister of the Crown or organisation, the **[[chief executive]]** of that Department or an officer or employee of that Department authorised by that **[[chief executive]]** or that Minister of the Crown or that organisation may extend the time limit set out in section 14 or section 15 (1) of this Act in respect of the request if—

- (a) The request is for a large quantity of official information or necessitates a search through a large quantity of information and meeting the original time limit would unreasonably interfere with the operations of the Department or the Minister of the Crown or the organisation; or
- (b) Consultations necessary to make a decision on the request are such that a proper response to the

request cannot reasonably be made within the original time limit.

(2) Any extension under subsection (1) of this section shall be for a reasonable period of time having regard to the circumstances.

(3) The extension shall be effected by giving or posting notice of the extension to the person who made the request within 20 working days after the day on which the request is received.

(4) The notice effecting the extension shall—

(a) Specify the period of the extension; and

(b) Give the reasons for the extension; and

(c) State that the person who made the request for the official information has the right, under section 28 (3) of this Act, to make a complaint to an Ombudsman about the extension; and

(d) Contain such other information as is necessary.]

This section was inserted by s. 9 (1) of the Official Information Amendment Act 1987.
In subs. (1) the references to the chief executive, in double square brackets, were substituted for references to the permanent head by s. 90 (d) of the State Sector Act 1988.

16. Documents—(1) Where the information requested by any person is comprised in a document, that information may be made available in one or more of the following ways:

(a) By giving the person a reasonable opportunity to inspect the document; or

(b) By providing the person with a copy of the document; or

(c) In the case of a document that is an article or thing from which sounds or visual images are capable of being reproduced, by making arrangements for the person to hear or view those sounds or visual images; or

(d) In the case of a document by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form, by providing the person with a written transcript of the words recorded or contained in the document; or

(e) By giving an excerpt or summary of the contents; or

(f) By furnishing oral information about its contents.

(2) Subject to section 17 of this Act, the Department or Minister of the Crown or organisation shall make the information available in the way preferred by the person requesting it unless to do so would—

(a) Impair efficient administration; or

- (b) Be contrary to any legal duty of the Department or Minister of the Crown or organisation in respect of the document; or
 - (c) Prejudice the interests protected by section 6 or section 7 . . . or section 9 of this Act and (in the case of the interests protected by section 9 of this Act) there is no countervailing public interest.
- (3) Where the information is not provided in the way preferred by the person requesting it, the Department or Minister of the Crown or organisation shall, subject to section 10 of this Act, give to that person—
- (a) The reason for not providing the information in that way; and
 - (b) If that person so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the interests protected by section 6 or section 7 . . . or section 9 of this Act and (in the case of the interests protected by section 9 of this Act) there is no countervailing public interest.

In subs. (2) (c) and (3) (b) the expression "or section 8 (1)" was omitted by s. 4 (2) of the Official Information Amendment Act 1987.

17. Deletion of information from documents—

- (1) Where the information requested is comprised in a document and there is good reason for withholding some of the information contained in that document, the other information in that document may be made available by making a copy of that document available with such deletions or alterations as are necessary.
- (2) Where a copy of a document is made available under subsection (1) of this section, the Department or Minister of the Crown or organisation shall, subject to section 10 of this Act, give to the applicant—
- (a) The reason for withholding the information; and
 - (b) If the applicant so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the interests protected by section 6 or section 7 . . . or section 9 of this Act and (in the case of the interests protected by section 9 of this Act) there is no countervailing public interest.

In subs. (2) (b) the expression "or section 8 (1)" was omitted by s. 4 (2) of the Official Information Amendment Act 1987.

18. Refusal of requests—A request made in accordance with section 12 of this Act may be refused only for one or more of the following reasons, namely:

- (a) That, by virtue of section 6 or section 7 . . . or section 9 of this Act, there is good reason for withholding the information:
- (b) That, by virtue of section 10 of this Act, the Department or Minister of the Crown or organisation does not confirm or deny the existence or non-existence of the information requested:
- (c) That the making available of the information requested would—
 - (i) Be contrary to the provisions of a specified enactment; or
 - (ii) Constitute contempt of Court or of [the House of Representatives]:
- (d) That the information requested is or will soon be publicly available:
- (e) That the document alleged to contain the information requested does not exist or cannot be found:
- (f) That the information requested cannot be made available without substantial collation or research:
- (g) That the information requested is not held by the Department or Minister of the Crown or organisation and the person dealing with the request has no grounds for believing that the information is either—
 - (i) Held by another Department or Minister of the Crown or organisation [or a local authority]; or
 - (ii) Connected more closely with the functions of another Department or Minister of the Crown or organisation [or of a local authority]:
- (h) That the request is frivolous or vexatious or that the information requested is trivial.

In para. (a) the expression "or section 8 (1)" was omitted by s. 4 (2) of the Official Information Amendment Act 1987.

In para. (c) (ii) the words "the House of Representatives" were substituted for the word "Parliament" by s. 10 of that Act.

In para. (g) (i) and (ii) the words in square brackets were inserted by s. 57 (1) of the Local Government Official Information and Meetings Act 1987. See s. 1 (2) of that Act.

19. Reason for refusal to be given—Where a request made in accordance with section 12 of this Act is refused, the Department or Minister of the Crown or organisation, shall,—

- (a) Subject to section 10 of this Act, give to the applicant—
 - (i) The reason for its refusal; and

- (ii) If the applicant so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the interests protected by section 6 or section 7 . . . or section 9 of this Act and (in the case of the interests protected by section 9 of this Act) there is no countervailing public interest; and
- (b) Give to the applicant information concerning the applicant's right, by way of complaint under [section 28 (3)] of this Act to an Ombudsman, to seek an investigation and review of the refusal.

In para. (a) (ii) the expression "or section 8 (1)" was omitted by s. 4 (2) of the Official Information Amendment Act 1987.

In para. (b) the expression "section 28 (3)" was substituted for the expression "section 28 (2)" by s. 16 (2) of that Act.

PART III

PUBLICATION OF, AND ACCESS TO, CERTAIN DOCUMENTS AND INFORMATION

[20. Publication setting out functions of Departments and organisations]—(1) The **[[Ministry of Justice]]** shall cause to be published, not later than the end of the year 1989, a publication that includes in respect of each Department and each organisation,—

- (a) A description of its structure, functions, and responsibilities including those of any of its statutory officers or advisory committees; and
- (b) A general description of the categories of documents held by it; and
- (c) A description of all manuals, and similar types of documents which contain policies, principles, rules, or guidelines in accordance with which decisions or recommendations are made in respect of any person or body of persons in his or her or its personal capacity; and
- (d) A statement of any information that needs to be available to members of the public who wish to obtain official information from the Department or organisation, which statement shall include particulars of the officer or officers to whom requests for official information or particular classes of information should be sent.

(2) The **[[Ministry of Justice]]** shall, at intervals of not more than 2 years, bring the material contained in the publication published under subsection (1) of this section up to date either

(h) The request is frivolous or vexatious, or the information requested is trivial.

[(1A) No reasons other than one or more of the reasons set out in subsection (1) of this section justifies a refusal to disclose any personal information requested under section 24 (1) of this Act.]

[(2) For the purposes of subsection (1)(c) of this section, the term "evaluative material" means evaluative or opinion material compiled solely—

- (a) For the purpose of determining the suitability, eligibility, or qualifications of the person to whom the material relates for the awarding of contracts, awards, or other benefits; or
- (b) For the purpose of determining whether any contract, award, or benefit should be continued, modified, or cancelled; or
- (c) For the purpose of deciding whether to insure any person or property or to continue or renew the insurance of any person or property.]

In subs. (1), para. (a) was substituted for the original para. (a) by s. 4 (2) of the Official Information Amendment Act 1987.

Subs. (1A) was inserted by s. 15 (2) of the Official Information Amendment Act 1987.

Subs. (2) was substituted for the original subs. (2) by s. 7 (2) of the Official Information Amendment Act 1993.

PART V

REVIEW OF DECISIONS

Decisions Under Part II and Section 10 of this Act

[28. Functions of Ombudsmen—(1) It shall be a function of the Ombudsmen to investigate and review any decision by which a Department or Minister of the Crown or organisation—

- (a) Refuses to make official information available to any person in response to a request made by that person in accordance with section 12 of this Act; or
- (b) Decides, in accordance with section 16 or section 17 of this Act, in what manner or, in accordance with section 15 of this Act, for what charge a request made in accordance with section 12 of this Act is to be granted; or
- (c) Imposes conditions on the use, communication, or publication of information made available pursuant to a request made in accordance with section 12 of this Act; or
- (d) Gives a notice under section 10 of this Act.

(2) It shall be a function of the Ombudsmen to investigate and review any decision by which the **[[chief executive]]** of a Department or an officer or an employee of a Department authorised by its **[[chief executive]]** or a Minister of the Crown or an organisation extends any time limit under section 15A of this Act.

(3) An investigation and review under subsection (1) or subsection (2) of this section may be made by an Ombudsman only on complaint made to an Ombudsman in writing.

(4) If, in relation to any request made in accordance with section 12 of this Act, any Department or Minister of the Crown or organisation fails within the time limit fixed by section 15 (1) of this Act (or, where that time limit has been extended under this Act, within that time limit as so extended) to comply with paragraph (a) or paragraph (b) of section 15 (1) of this Act, that failure shall be deemed, for the purposes of subsection (1) of this section, to be a refusal to make available the official information to which the request relates.

(5) Undue delay in making official information available in response to a request for that information, shall be deemed, for the purposes of subsection (1) of this section, to be a refusal to make that information available.]

This section was substituted for the original s. 28 by s. 16 (1) of the Official Information Amendment Act 1987.

In subs. (2) the references to the chief executive, in double square brackets, were substituted for references to the permanent head by s. 90 (d) of the State Sector Act 1988.

29. Application of Ombudsmen Act 1975—(1) Except as otherwise provided by this Act, the provisions of the Ombudsmen Act 1975 shall apply in respect of investigations and other proceedings carried out under this Part of this Act in respect of decisions under Part II or section 10 of this Act as if they were investigations carried out under the Ombudsmen Act 1975.

(2) Nothing in sections 13, 14, and 25 of the Ombudsmen Act 1975 shall apply in relation to any function or power conferred on an Ombudsman by this Act or in relation to any proceeding, decision, recommendation, or act of an Ombudsman under this Act.

[29A. Requirements of Ombudsman to be complied with within certain period—(1) Subject to this section, where, during the course of an investigation, under section 28 of this Act, of any decision of any Department or Minister of the Crown or organisation, an Ombudsman, pursuant to any power conferred on that Ombudsman by section 19 of the

SCHEDULES

[FIRST SCHEDULE

Section 2 (1)

ORGANISATIONS (ADDITIONAL TO THOSE NAMED IN PART I OR PART II OF THE FIRST SCHEDULE TO THE OMBUDSMEN ACT 1975) TO WHICH THIS ACT APPLIES

Abortion Supervisory Committee
[[Accounting Standards Review Board]]
[[Airport Companies (as defined in section 2 of the Airport Authorities Act 1966)]]
 Airways Corporation of New Zealand Limited
 Alcoholic Liquor Advisory Council
[[Animal Control Products Limited]]
 Apple and Pear Prices Authority
 Area Health Boards
 Armed Forces Canteen Council
 Berryfruit Marketing Licensing Authority
[[Boards of Trustees constituted under Part IX of the Education Act 1989]]
[[Broadcasting Commission]]
[[Broadcasting Standards Authority]]
[[Camp Committees under the Children's Health Camps Act 1972]]
 Clean Air Council
 Coal Corporation of New Zealand Limited
 Coal Mining Industries Welfare Council
 Commerce Commission
[[Conservation Boards]]
 Dairy Products Prices Authority
[[DFC New Zealand Limited]]
[[Early Childhood Development Unit Board]]
 Education Authorities (as defined in section 2 (1) of the Education Act 1964)
 Electricity Corporation of New Zealand Limited
[[Fish and Game Councils]]
 Fisheries Authority
[[Forestry Corporation of New Zealand Limited]]
 Fruit Distributors Limited
 Game Industry Board
 Government Property Services Limited
[[Hazards Control Commission]]
[[Health Research Council of New Zealand]]
 Higher Salaries Commission
 Hospital Boards
[[Housing New Zealand Limited]]
 Information Authority
 Land Corporation Limited

[FIRST SCHEDULE—*continued*]

ORGANISATIONS (ADDITIONAL TO THOSE NAMED IN PART I OR PART II OF THE FIRST SCHEDULE TO THE OMBUDSMEN ACT 1975) TO WHICH THIS ACT APPLIES—*continued*

- Law Commission
- Local Authorities Loans Board
- Marine Reserve Management Committees
- Maternal Deaths Assessment Committee
- [[MCS Limited]]
- [[Meteorological Service New Zealand Limited]]
- National Council of Adult Education
- National Library of New Zealand
- National Research Advisory Council
- New Zealand Apple and Pear Marketing Board
- New Zealand Council for Educational Research
- New Zealand Dairy Board
- New Zealand Film Commission
- New Zealand Fishing Industry Board
- New Zealand Forestry Corporation Limited
- New Zealand Geographic Board
- New Zealand Government Property Corporation
- [[New Zealand Hop Marketing Board]]
- New Zealand Kiwifruit Authority
- [[New Zealand Lottery Grants Board]]
- New Zealand Meat Producers Board
- [[New Zealand Milk Authority]]
- New Zealand Pork Industry Board
- New Zealand Post Limited
- New Zealand Potato Board
- [[New Zealand Racing Industry Board]]
- New Zealand Security Intelligence Service
- [[New Zealand Symphony Orchestra Limited]]
- [[New Zealand Trade Development Board]]
- New Zealand Walkway Commission
- New Zealand Wool Board
- Noxious Plants Council
- Overseas Investment Commission

[FIRST SCHEDULE—continued

ORGANISATIONS (ADDITIONAL TO THOSE NAMED IN PART I OR PART II OF
THE FIRST SCHEDULE TO THE OMBUDSMEN ACT 1975) TO WHICH THIS ACT
APPLIES—continued

Parliamentary Commissioner for the Environment

[[Power Company Limited]]

[[Privacy Commissioner . . .]]

Provincial Patriotic Councils

[[Public Advisory Committee on Disarmament and Arms Control]]

Public Trust Office Investment Board

Queen Elizabeth the Second National Trust

Radiation Protection Advisory Council

[[The Radio Company Limited]]

[[Radio New Zealand Limited]]

Raspberry Marketing Council

Raspberry Marketing Export Authority

Regional Co-ordinating Committees established under section 22 of the
Noxious Plants Act 1978

**[[Related Companies of the State enterprises (within the meaning of
s. 2 (1A) of this Act]]**

Representation Commission

Reserve Bank of New Zealand

Rural Electrical Reticulation Council

Securities Commission

[[Special Education Service Board]]

[[State Forest Parks Advisory Committees]]

Survey Board of New Zealand

[[Takeovers Panel]]

[[Teacher Registration Board]]

[[Television New Zealand Limited]]

**[[Temporary Safeguard Authorities appointed under the Temporary Safe-
guard Authorities Act 1987]]**

Testing Laboratory Registration Council

[[Timberlands West Coast Limited]]

Totalisator Agency Board

[[Transferee Company of New Zealand Railways Corporation]]

[[Transitional Fish and Game Council]]

[[Victims Task Force]]

Waikato Carbonisation Limited

Waitangi National Trust Board

[[War Pensions Advisory Board]]

Winston Churchill Memorial Trust Board

[[Works and Development Services Corporation (NZ) Limited]]

This Schedule was substituted for the original First Schedule (as variously amended) by
s. 28 (1) of the Official Information Amendment Act 1987.

**APPENDIX TWO:
THE OFFICIAL INFORMATION ACT 1982
AND GUIDANCE ON ITS USE**

" ... it would be wise to act on the assumption that the enquirer already has the information and is merely seeking confirmation of it"

George Laking, Chief Ombudsman (1984: 135)

Sources of Guidance

The OIA has been in operation for nearly 15 years.¹ During its initial years, the Information Authority, recommended in the Danks Report, was responsible for the day to day administration of the OIA. The principal function of the Information Authority was to open up new categories of information to which access would be given as a matter of right. One of the early tasks of the Authority was to review the statutes (over 100) that, at the time the OIA was enacted, prohibited the release of certain information (Keith, 1984: 41 & 43).

In addition to the Information Authority, a small information unit was established within the SSC. The work of the SSC unit was to:

- work with departments and agencies to develop systems and standards which could help them carry out their responsibilities under the OIA;
- advise on mechanisms, develop training programmes and coordinate the preparation of first-line information aids such as directories of government organisations and their functions and powers;
- advise the Information Authority of progress made and problems encountered in these areas.

(Danks Committee, 1980: para 94)

The Information Authority was dissolved by a legislative 'sunset clause' on 30 June 1988. No substitute body was established to replace it. Since that time guidance and educational material has been disseminated by the Office of the Ombudsmen, the State Services Commission, the Cabinet Office² and many individual agencies. The following guidance is available to government

¹ The OIA was enacted on 17 December 1982 and came into full effect on 1 July 1983 (Ombudsmen, 1983: 3)

² As part of the Cabinet Office Manual.

agencies:

- *Practice Guidelines*, published by the Office of the Ombudsmen (1994-);
- *The Public Servant and Official Information*, published by the State Services Commission (1995a),
- *The Cabinet Office Manual* (CO, 1996);
- *Compendium of Case Notes of the Ombudsmen*, published by the Office of the Ombudsmen between 1984 and 1993;³
- The Law Commission's (1997) *Review of the Official Information Act 1982*;
- *Memorandum on Charging for Requests under the Official information Act 1982* (Department of Justice [DOJ], 1992);
- *Release of Official information : Guidelines for Co-ordination* (SSC, 1992); and,
 - *Ombudsmen Quarterly Review* (Ombudsmen, March 1995-)⁴

In addition to these official publications one major academic text has been devoted to the subject, while other authors have made reference to the OIA and its provisions.⁵ The text is *Freedom of Information in New Zealand*, by Eagles, Taggart and Liddell (1992).

Other guidance can be found in the two principal rulings by the Courts on cases involving the OIA; *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 and *Television New Zealand Ltd v Ombudsman* [1992] 1 NZLR 106. While the case of *Wyatt Co v Queenstown Lakes District Council* [1991] 2 NZLR 180 relates to the Local Government Official Information and Meetings Act 1987, it also provides useful insight into how the Courts view the role of the Ombudsmen in interpreting the OIA. In addition the annual *Report[s] of The Ombudsmen* to Parliament provide insight into issues and developments arising during each preceding year.

It is not possible in the space available to provide a full explanation of the various provisions of

³ The 10th Compendium was published in 1993; the 11th Compendium was not published in the year ended 30 June 1996, because there were insufficient new case notes to justify the cost of a printing (Ombudsmen, 1996: 55).

⁴ This publication contains guidance as to the interpretation of provisions in the Act and provides examples of best practice.

⁵ See in particular Taylor (1991).

the OIA and their workings. As most agency guidelines state, ultimately reference must be made to the Act itself. However, it is worth briefly covering in general terms key pieces of guidance provided to the state sector and the key provisions of the OIA that relate to this paper. The importance of these provisions is apparent in the case studies because of the perception about what is, and is not, able to be withheld under the OIA.

State Services Commission Guidance to Public Servants

The SSC produced a paper in its guidance series *Public Service Principles, Conventions and Practice* (SSC, 1995a) to advise public servants of the principles which should guide their actions in issues of information. The paper notes that it does "not ... provide a detailed guide to making decisions nor a commentary on the law. That guidance is to be found principally in practice notes issued by the State Services Commission and the Ombudsman and in the Ombudsmen's *Practice Guidelines*." (SSC, 1995a: 2)

The SSC paper provides a synopsis of the OIA and the philosophy that underlies it. It also discusses the Privacy Act 1993 and the relationship between the two Acts. The paper highlights issues in handling OIA requests, the respective roles of ministers and public servants, consultation, the ministerial veto and the sensitivities associated with OIA requests close to elections.

More recently in its handbook for the public service on *Working Under Proportional Representation* (SSC, 1995b: 9) the SSC reviewed the general philosophy of open government supported by the OIA and the particular arrangements requiring care in the mixed member proportional representation (MMP) environment.

The SSC has also circulated guidelines for coordination where OIA requests potentially impact on more than one agency and/or Minister.⁶ The guidelines aim to ensure that coordination arrangements adequately address the interests of affected agencies and that release of information provides 'no surprises' for other agencies and/or ministers.

⁶ SSC (1992).

Guidance on Charging

Charging for provision of information under the OIA is covered by the Department of Justice's guidelines (DOJ, 1992) which were approved by Cabinet in 1992⁷ and apply to all organisations covered by the OIA.⁸ Essentially, the first hour is provided free while subsequent assistance is provided at \$28 per half hour. In practice many agencies do not charge for requests, especially where the amount of work is minimal. Many of the more demanding requests, in terms of the work in collation and consideration of what should or should not be released, are those made by opposition research units and MPs.⁹ Such requests are not generally charged for as the collection of information by this group is deemed to be part of "*the reasonable exercise of their democratic responsibilities*" (DOJ, 1992: 186). In general, requests by the media, another significant user group of the provisions of the OIA, are also answered free of charge.

Some agencies make use of the charges that are permissible as a disincentive to requests by frequent or "nuisance" users of the Act. Later case evidence will show that political party research units are one of the major users of the Act. Given their exemption from charges, cost is not a factor that can be used to influence their behaviour in use of the OIA.

The Purpose of the Official Information Act 1982 and Participation

The purpose of the OIA is, in part "*to increase progressively the availability of information to the people of New Zealand in order to enable their more effective participation in the making and administration of laws and policies*". Information is to be available under the principle of availability "*unless there is good reason for withholding it*" [OIA s.5]. Two points in particular are worth noting:

- the regime established by the OIA is dynamic. Parliament envisaged information becoming more freely available as time went by;
- private individuals are to be able to take an effective part in the making and administration of laws and policies.

This second point is critical to this paper. In the chapter three the Chief Ombudsman's views on

⁷ STA(92) M 1/3.

⁸ This includes Public Service Departments, SOEs, and Education and Health Boards (DOJ, 1992: 182).

⁹ See also the most recent report of the Ombudsmen to parliament (Ombudsmen, 1997a: 24).

what constituted effective participation were noted. The SSC view is that to participate effectively an individual must have:

- *the right to know what options are open and being considered;*
- *Sufficient information about them to form a proper judgement;*
- *time to enable him or her to consider and express views before the government is committed to a policy.*

(SSC, 1995a: 4)

'Information' is broadly defined in the OIA and covers not only written information but includes information from video or audio tapes, films or information stored in computers. It can even include information that is not recorded at all but is within the knowledge of an officer, employee or member of an organisation. It does not matter who owns the information or where it came from, so long as it is in the possession of the organisation or its officers, employees or members (Ombudsmen, 1994c: para 15).

Administrative Provisions

Requests under the OIA can be made by a New Zealand citizen, a permanent resident of New Zealand, a person in New Zealand, a body corporate incorporated in New Zealand or a body corporate which has a place of business in New Zealand [OIA s.12]. Requests can be made to a Department, Minister of the Crown or organisation listed in the first schedule of either the Ombudsmen Act 1975 or the OIA. Oral requests are permissible (Ombudsmen, 1991: 21).

It is important to note that the OIA only allows requests to be made to MPs in their capacity as Ministers of the Crown. Information held by ministers in their capacity as members of Caucus rather than in their *official capacity* as a minister is not *official information* as defined in s.2 of the OIA and is therefore not subject to discovery under the OIA.¹⁰ However, if information prepared for caucus is later attached or incorporated into advice by, or to, a Minister the status of the information changes to *official information* (Ombudsmen, 1994e: 26).

Requests must be specified with "*due particularity*" which means that the recipient of a request

¹⁰ 9 CCNO 1374: 87 and Ombudsmen (1994e: 26).

must be able to identify the information requested (Ombudsmen, 1994a: para 2.4). Where the information cannot be identified, s.13 of the OIA imposes a duty on the recipient to give reasonable assistance to the requester so that the request is specified with *due particularity*. The Ombudsmen have noted that in many cases those requesting information simply do not have sufficient knowledge of the precise nature of the information they are seeking (Ombudsmen, 1994a para 2.6). "Fishing expeditions" – broadly expressed requests that hope to turn up something of interest – can only be declined if they fail the *due particularity* test or for an administrative reason (discussed next), but can be discouraged by charging in accordance with the Department of Justice's guidelines, assuming that they fall within the prescribed criteria. However, the Ombudsmen have noted that agencies can make life easier by assisting the requester to better specify their request or extending the 20 day time limit (Ombudsmen, 1995: 34).

The OIA also includes justifications for refusing requests for information on an administrative basis. Such justifications include cases where the information will soon be publicly available [s.18(d)], where the document alleged to contain the information does not exist or cannot be found [s.18(e)], where the information cannot be made available without substantial collation or research [s.18(f)] or where the information is not held by the organisation or Minister and there is no reason to believe that it is held by another organisation or Minister [s.18(g)]. However, the Ombudsmen note that the 'information will soon be publicly available' clause, s.18(d), "*... should not be used ... to delay release of information intended to be incorporated in other material which, although to be made public at a later date, may still require the making of other policy decisions. If such a refusal has the effect of preventing effective participation in the making or administration of laws or policies where the Act provides no good reason for withholding ... it could be seen as inconsistent with the stated purposes of the Act*" (Ombudsmen, 1994a: 5).

Provision is also made in s.10 of the OIA to decline a request covering an interest specified in s.6 [conclusive reason], s.7 [special reasons]¹¹ or s.9(2)(b) [trade secrets or commercial positions] where confirmation or denial of the existence of certain information could prejudice some of the specific interests that the OIA seeks to protect (Ombudsmen, 1997a: 34).

¹¹ Section 7 provides special reasons to cover security, defence and international relations issues with respect to the Cook Islands, Tokelau, Niue or the Ross Dependency.

Information may be provided in a variety of ways [s.16] but the OIA requires it to be made available in the way preferred by the requester unless to do so would meet a number of specified conditions [s 16(2)]

Requests are to be processed "as soon as reasonably practicable" and in any event within 20 working days [s.15(1)]. The 20 day limit was added in the 1987 amendment of the OIA. The views of Parliament on the issue were clear (Ombudsmen, 1994a: para 2.9.4).

The provision of 20 working days must be the absolute maximum because it would be easy for a government department to specify 20 working days in its manual and for that period to become normal rather than the exception. It should be placed on record that Parliament expects requests for official information that are made to government departments to be treated urgently within a matter of days, not weeks, and that legislation will again be reviewed if there should be any attempt to make that maximum period of 20 working days normal (Ombudsmen, 1995: 35).

The recent Law Commission report recommends that the Government review the 20 day limit with a view to reducing it to 15 days (NZLC, 1997: 65).

A single extension to the time limit is possible where the quantity of information necessitates a search of large quantities of information or where consultation requirements mean it is not possible to meet the 20 day requirement [s.15A]. Such extensions are subject to the right of complaint to an Ombudsman [s.15A(4)(c)]. Breaches of time limits are deemed refusals to make available the official information to which the request relates [s.28(4) & (5)].¹²

Transfer of Requests

Transfer provisions [s.14] allow requests to be transferred between agencies, organisations and/or ministers, where the information is not held by the receiver of the request or where the receiver believes that the request is more closely connected with the functions of some other agency, organisation or Minister.¹³ One of the principal uses of these provisions has been the facility of transferring requests received by agencies to their Minister (Ombudsmen, 1997b: 5).

¹² The Law Commission recommended the time limit for response to an OIA request should be reduced to 15 days (NZLC, 1997: 7).

¹³ Requests can also be transferred in part.

Where the Minister wants to withhold more information than the agency believes appropriate, the request may be transferred to the Minister's office. In such cases any complaint will be to the Minister's Office not the agency. This provision allows for appropriate accountability for withholding information. The Cabinet Office Manual provides the following guidance:

A department can consult with its Minister over the decision it proposes to make on a request for information but it must then either make the decision itself, or transfer the request to the Minister concerned. ... transfer [where the Minister disagrees with the agency's view that information should be released] ... to the Minister is the only way in which a department can meet its constitutional duty to follow Ministerial direction and the obligation to comply with the Official Information Act 1982 (CO, 1996: para 6.22 – emphasis added).

The propriety of transfers to ministers is not subject to review by an Ombudsman, but may be subject to judicial review (SSC, 1995a: 10).

Withholding Provisions

No class of document is automatically protected from release (CO, 1996: para 6.2). In 1984 the Chief Ombudsman of the day noted that in his opinion "... *there is no absolute protection for any information, except that which is excluded from the definition of official information in s.2 of the Act*" (Laking, 1984: 135). The approach of the OIA is to define and delimit those interests that do or may override the principle that information is to be made available. Two points should be borne in mind. First, only those reasons listed in the OIA may be used as the basis for withholding. Second, the reasons do not prohibit the release of information. Information that the OIA would legitimately protect may be released if a Minister or public servant, with appropriate authority, decides that the information should be released.

Two sets of reasons are provided for withholding: *conclusive reasons* and *other reasons*. Conclusive reasons include avoiding prejudice of the defence, security or international relations of New Zealand; the entrusting of information to the Government on a basis of confidence; the maintenance of law; the safety of any person or serious damage to the economy [s.6]. The test for the conclusive reasons is that the release of the information *would be likely to* prejudice the proscribed interest.

'Other reasons' are provided for withholding information but are subject to "*countervailing public interest considerations*". Of particular interest to this paper are those provisions which seek to protect the political and administrative processes; I shall refer to these as the 'policy development sections'. These sections include protection to:

- *maintain the constitutional conventions for the time being which protect* [s.9(2)(f)]:
 - *the confidentiality of communications by or with the Sovereign or her representative;*
 - *collective and individual ministerial responsibility;*
 - *the political neutrality of officials;*
 - *confidentiality of advice tendered by Ministers of the Crown and officials;*
- or to maintain the effective conduct of public affairs through [s.9(2)(g)]:
 - *the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any Department or organisation in the course of their duty; or*
 - *the protection of such Ministers, members of an organisation, officers and employees from improper pressure or harassment.*

[OIA s.9]

By comparison with the test for conclusive reasons, the test for withholding information over countervailing public interest considerations is that withholding the information *is necessary* to protect the interests detailed. The SSC suggest that those processing requests need to test their decision on the information to be released against whether their decision would stand review by an Ombudsman (SSC, 1995a: 5).

One of the difficulties that has occurred for users of the OIA had been the precise nature of the interests protected by the "*constitutional conventions*". The OIA specifies these as "*conventions for the time being*" thereby noting that their definition may be valid only at a particular point in time and may evolve. The Ombudsmen have described them as "*moving targets*" (Ombudsmen, 1992a: 2). Eagles et al. (1992: 337-367) cover the issue in depth and argue that they are not all "*conventions*" in the proper sense of the word and that s.9(2)(f)(iii) is a purpose while s.9(2)(f)(iv) is merely a practice.

The Ombudsmen note that the purpose of s.9(2)(f)(iv) [confidentiality of advice] and (g)(i) [free and frank advice] is "not so much to protect information as to protect the particular processes of government to which the information relates" (Ombudsmen, 1994b: para 2.6) and that "neither advice tendered by Ministers or officials, nor the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation always have to be withheld to maintain either the constitutional convention or the effective conduct of public affairs requiring protection" (Ombudsmen, 1994b: para 3.7— emphasis in original).

The Ombudsmen have concluded, on the basis of their experience in reviewing decisions to decline requests reliant upon s.9(2)(f)(iv), that the convention may protect advice by officials to ministers in at least four situations:

1. *To prevent premature disclosure of advice where necessary to allow undisturbed ministerial consideration of different options available in relation to a particular matter;*¹⁴
2. *To protect advice given by officials which has not been followed by a Minister and so to ensure that the responsibility for the decision lies with the Minister;*
3. *To protect advice given by officials in relation to legislation where, for example, there are political and administrative considerations involved in meeting legislative timetable;*¹⁵ and,
4. *Where the protection of advice of a particularly sensitive nature, or on a matter of particular sensitivity, is necessary even after the advice has been accepted.*

(Ombudsmen, 1992a: 4)

Similarly, the Ombudsmen have suggested that at a general level s.9(2)(g)(i) provides good reason to withhold information where:

- (a) *In the circumstances of a particular case, the "effective conduct of public affairs" is dependent on the free and frank expression of opinions; and*
- (b) *disclosure of the information at issue would be so likely to prejudice the provision of such free and frank opinions, thereby prejudicing the "effective conduct of public*

¹⁴ 8 CCNO 1089: 86.

¹⁵ 8 CCNO 714/728: 56.

affairs", that

- (c) *It is necessary to withhold the information to "maintain the effective conduct of public affairs".*

(Ombudsmen, 1992a: 4-5)

Complaints to an Ombudsman

A person making a request under the OIA may complain in writing to an Ombudsman when an organisation, department or Minister refuses to make official information available; makes excessive charges for such information, imposes conditions on the use of the information released or gives notice neither confirming nor denying the existence of the information [s.10]. An Ombudsman will then investigate the complaint in an impartial and non-adversarial way. The Office of the Ombudsmen frequently uses investigating staff and an informal approach to the organisation to seek to resolve the matter without the need for a formal investigation (Ombudsmen, 1994c: para 5.2).

The complaint process may be of little assistance to the complainant, given the requirement for timely information for participation in the policy development process. The 1997 *Report of The Ombudsmen* shows that only 58% of complaints under the OIA are completed within three months of their receipt and that 21% take more than six months to resolve (Ombudsmen, 1997a: 65). However, the 'informal approach' technique for resolving or addressing complaints in a timely manner continues to be successful. The Ombudsmen provide an example in their annual report where this process allowed resolution of an urgent complaint by a journalist within 24 hours (Ombudsmen, 1996: 41).

**APPENDIX THREE:
STATE SECTOR ACT 1982: FIRST SCHEDULE**

R.S. Vol. 33

State Sector Act 1988

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SCHEDULES

FIRST SCHEDULE

Sections 2 (1), 27

DEPARTMENTS OF THE PUBLIC SERVICE

Ministry of Agriculture and Fisheries.
Audit Department.
Ministry of Commerce.
Department of Conservation.
[[Department of Courts.]]
Crown Law Office.
[[Ministry of Cultural Affairs.]]
Customs Department.
Ministry of Defence
Ministry of Education.
Education Review Office.
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Ministry for the Environment.
[[Ministry of Fisheries.]]
[[Ministry of Foreign Affairs and Trade.]]
Ministry of Forestry.
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Government Superannuation Fund Department.
[[Ministry of Health.]]
[[Ministry of Housing.]]
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Inland Revenue Department.
Department of Internal Affairs.
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Department of Justice.
Department of Labour.
Department of Survey and Land Information.
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[[Ministry of Maori Development.]]
National Library Department.
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[[Ministry of Pacific Island Affairs.]]
Department of the Prime Minister and Cabinet.
Public Trust Office.
Ministry of Research, Science, and Technology.
Department of Scientific and Industrial Research.
Serious Fraud Office.
Department of Social Welfare.
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State Services Commission.
[[Statistics New Zealand.]]
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Ministry of Transport.
The Treasury.

FIRST SCHEDULE—*continued*DEPARTMENTS OF THE PUBLIC SERVICE—*continued*

Valuation Department.
Ministry of Women's Affairs.
Office of Youth Affairs.]

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This Schedule was substituted for the original First Schedule by s. 28 (1) of the State Sector Amendment Act (No. 2) 1989.

The item relating to the Department of Courts was inserted from 1 July 1995 by S.R. 1994/288/2.

The item relating to the Ministry of Cultural Affairs was inserted by reg. 2 of the State Sector Order (No. 2) 1990 (S.R. 1990/171).

In the item relating to the Ministry of Defence, words were omitted by s. 103 of the Defence Act 1990.

An item relating to the Ministry of Energy was omitted by s. 3 (2) of the Ministry of Energy (Abolition) Act 1989 as from 31 December 1990 (see S.R. 1990/355/2).

The item relating to the Ministry of Fisheries was inserted from 1 July 1995 by S.R. 1994/288/3.

The item relating to the Ministry of Foreign Affairs and Trade was substituted for an item relating to the Ministry of External Relations and Trade by s. 6 (1) of the Foreign Affairs Amendment Act 1993.

An item relating to the Government Printing Office was omitted by s. 32 (1) of the Acts and Regulations Publication Act 1989 from 31 December 1990. (see S.R. 1990/354/2).

The item relating to the Ministry of Health was substituted for an item relating to the Department of Health by s. 32 of the Health Reforms (Transitional Provisions) Act 1993.

The item relating to the Ministry of Housing was inserted by reg. 2 of the State Sector Order (No. 2) 1991 (S.R. 1991/279).

An item relating to the Housing Corporation of New Zealand was omitted by s. 17 of the Housing Corporation Amendment Act 1992 from 1 May 1993 (see S.R. 1993/110).

Items relating respectively to the Iwi Transition Agency and to the Ministry of Maori Affairs were omitted by s. 9 (1) of the Ministry of Maori Development Act 1991.

The item relating to the Ministry of Maori Development was inserted by reg. 2 of the State Sector Order 1991 (S.R. 1991/95).

An item relating to the National Provident Fund Department was omitted by s. 16 of the Finance Act 1991 from 17 April 1992 (see S.R. 1992/79/2).

The item relating to the Ministry of Pacific Island Affairs was inserted by reg. 2 of the State Sector Order 1990 (S.R. 1990/97).

The item relating to the Department of Scientific and Industrial Research is to be omitted from a date to be specified by s. 48 (3) and (5) of the Crown Research Institutes Act 1992.

An item relating to the State Insurance Office was omitted from 28 June 1990 by s. 23 (1) and (2) of the State Insurance Act 1990. See S.R. 1990/142.

The item relating to Statistics New Zealand was substituted for a reference to the Department of Statistics by s. 2 (6) of the Statistics Amendment Act 1994.

An item relating to the Tourist and Publicity Department was omitted by s. 18 (2) of the New Zealand Tourism Board Act 1991. That item had been changed to the New Zealand Tourism Department on 8 August 1990 by s. 3 (2) of the New Zealand Tourism Department Amendment Act 1990.

As to members of a committee under the Social Welfare (Transitional Provisions) Act 1990, see s. 31 of that Act.

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APPENDIX FOUR:

**The Impact of the Official Information Act
on Policy Development**

Survey of Ministers¹

Part A. Respondent Information

Please identify who completed this questionnaire.

Minister	
Senior Private Secretary	
Chief of Staff	
Private Secretary	

Other (please specify)

Please identify whether you are a Minister (or work for a Minister) inside or outside of Cabinet and whether you (or your Minister as appropriate) have served a previous term as a Minister.

Cabinet Minister	
Minister Outside of Cabinet	
Previously a Minister	
First term as Minister	

¹ The survey completed by organisations has the same format in Part B: Impact of OIA

Part B Impact of OIA

1. Do you think that the existence of the OIA has an impact on the way policy is developed in your portfolios? yes / no

2. If yes, to what extent has the OIA impacted on the policy development process in your portfolios?

Significant	
Moderate	
Negligible	
None	

3. A number of possible effects of the OIA have been suggested. Please tick the first column where you believe the OIA has had an impact in your portfolio. In the second column please identify whether you consider these effects to be positive or negative (+/-). Space is provided on the next page for you to identify other effects or to comment on the effects listed.

Improved quality of written advice to Minister		
Public better informed on your organisation and current policy issues		
Greater accountability		
Greater incentive for participation in policy development process		
The organisation now releases information to the public on a much more proactive basis		
Better or more informed public debate on policy issues		
Organisation now provides for greater public consultation in the policy development process		
Move from written to oral advice		
Reduction in quality of written advice to Minister		
Policy papers no longer cover a comprehensive range of options		
Reduction in the written record of how policy was developed		
Degradation of corporate memory		
Development of a culture that seeks to avoid accountability for advice		
Stifling of lateral thinking in policy development process		

Other (please specify)/ Comment

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4. To what extent has the OIA allowed greater public participation in the policy development process in your portfolio?

Much greater extent	
Significant increase	
Moderate increase	
Minimal increase	
No change from prior to OIA	

5. Do the organisations you are responsible for write policy papers in a manner that is intended to allow them to be released in full under the OIA? Yes / No

6. Has the overall effect of the OIA on the policy development process been positive, neutral or negative?

7. To what extent do people use information gathered under the OIA to participate in your policy development process?

Significant	
Moderate	
Some	
Nil	

8. In what ways do people use information gathered under the OIA to participate in your policy development process? (Tick those that apply)

To make submissions to organisations in your portfolio	
To make submissions to Ministers or other MPs	
To support submissions or appearances at select committee	
To encourage wider or more in-depth coverage of the issues in the news media	

Other (please specify)

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9. Do certain sections of society use the OIA more than others. Please rank users based on how frequently they use the OIA to request information from your office or portfolio (use 1 for most frequent user group, 2 - next most frequent etc)

The media	
Interest/lobby groups	
Maori or other ethnic minorities	
MPs	
Political party research units	
The general public - individual citizens	
Other	
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10 Please provide any other comment that you wish to make on the impact of the OIA on the policy development process both in your portfolio and in general. (Continue over if required)

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CONSENT FORM
Master of Public Policy - Research Paper

Thank you for your time and assistance in completing this survey. If you would like to remain anonymous, then you have finished this survey. Please return the survey to Edward Poot, PO Box 55, Wellington.

Some respondents may feel comfortable discussing these issues or having their particular views expressed in the survey attributed to them. If you do then the Human Ethics Committee of Victoria University require me to obtain your written consent to discuss the issue with you and/or attribute views to you. In signing this consent you acknowledge that you have been provided with and understand the outline of the research project and that the research paper written at the conclusion of the project will be accessible to the public through the Victoria University library. Subsequent use of the material for research may therefore result in your views being published if you agree to having views attributed to you.

Would you be prepared to discuss your responses? Yes / No

Would you be prepared to have your views attributed to your office? Yes / No

If you answered yes to either question please identify yourself and sign the consent below.

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Signed:.....

Date:.....

APPENDIX FIVE:

**The Impact of the Official Information Act
on Policy Development**

Survey of Core Public Sector Organisations¹

Part A: Respondent Information

Please identify the nature of your organisation

Central Agency	
Ministry	
Department	
Review Agency	
Other (specify)	

What part of the organisation do you manage?

Chief Executive	
Policy	
Corporate	
Regulatory	
Operational	

Other (please specify)

For organisations, please identify where you fit into the hierarchy

Chief Executive	
First report CEO	
Second report CEO	

¹ The survey completed by Ministers has the same format in Part B: Impact of OIA

Part B. Impact of OIA

1. Do you think that the existence of the OIA has an impact on the way policy is developed in your organisation? yes / no

2. If yes, to what extent has the OIA impacted on the policy development process in your organisation?

Significant	
Moderate	
Negligible	
None	

3. A number of possible effects of the OIA have been suggested. Please tick the first column where you believe the OIA has had an impact in your portfolio. In the second column please identify whether you consider these effects to be positive or negative (+/-). Space is provided on the next page for you to identify other effects or to comment on the effects listed.

Improved quality of written advice to Minister		
Public better informed on your organisation and current policy issues		
Greater accountability		
Greater incentive for participation in policy development process		
The organisation now releases information to the public on a much more proactive basis		
Better or more informed public debate on policy issues		
Organisation now provides for greater public consultation in the policy development process		
Move from written to oral advice		
Reduction in quality of written advice to Minister		
Policy papers no longer cover a comprehensive range of options		
Reduction in the written record of how policy was developed		
Degradation of corporate memory		
Development of a culture that seeks to avoid accountability for advice		
Stifling of lateral thinking in policy development process		

Other (please specify)/ Comment:

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4. To what extent has the OIA allowed greater public participation in your organisation’s policy development process ?

Much greater extent	
Significant increase	
Moderate increase	
Minimal increase	
No change from prior to OIA	

5. Does your organisation write policy papers in a manner that is intended to allow them to be released in full under the OIA? Yes / No

6. Has the overall effect of the OIA on the policy development process been positive, neutral or negative?

7. To what extent do people use information gathered under the OIA to participate in your policy development process?

Significant	
Moderate	
Some	
Nil	

8 In what ways do people use information gathered under the OIA to participate in your policy development process? (Tick those that apply)

To make submissions to the organisation	
To make submissions to the Minister	
To support submissions or appearances at select committee	
To encourage wider or more in-depth coverage of the issues in the news media	

Other (please specify)

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9 Do certain sections of society use the OIA more than others. Please rank users based on how frequently they use the OIA to request information from your organisation (use 1 for most frequent user group, 2 - next most frequent etc)

The media	
Interest/lobby groups	
Maori or other ethnic minorities	
MPs	
Political party research units	
The general public - individual citizens	
Other	
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10. Please provide any other comment that you wish to make on the impact of the OIA on the policy development process both in your organisation and in general. (Continue over if required)

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CONSENT FORM
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Thank you for your time and assistance in completing this survey. If you would like to remain anonymous, then you have finished this survey. Please return the survey to Edward Poot, PO Box 55, Wellington.

Some respondents may feel comfortable discussing these issues or having their particular views expressed in the survey attributed to them. If you do then the Human Ethics Committee of Victoria University require me to obtain your written consent to discuss the issue with you and/or attribute views to you. In signing this consent you acknowledge that you have been provided with and understand the outline of the research project and that the research paper written at the conclusion of the project will be accessible to the public through the Victoria University library. Subsequent use of the material for research may therefore result in your views being published should you agree to having views attributed to you.

Would you be prepared to discuss your responses? Yes / No

Would you be prepared to have your views attributed to you or your organisation? Yes / No

If you answered yes to either question please identify yourself and sign the consent below.

.....

Signed:

Date:

APPENDIX SIX:

WORK-PLAN FOR DEPARTMENTS ASSISTING IN THE MPP OIA STUDY

Policy

- Investigate the policy development process in the department to obtain an overview. Does it fit with the outline of the process in chapter two. If it doesn't what are the significant differences and why?
 - Rational process } How do they differ?
 - Circumstantial process (pressure of circumstance) }
- Does the department have a policy development manual or standard operating procedure?
- How is Ministerial input into policy development obtained?
 - is it through regular meetings; if so who goes?
 - form of advice (oral/written/phone)
 - [who is contact with the Minister – Chief Executive, policy advisors, or does the Minister spread contact throughout the department]
 - channelling – is the chief executive aware of all the ministerial input coming into the department/ministry?
 - who receives it?
- What consultation is undertaken in the policy development process?
 - interdepartmental
 - other stakeholders
 - style – is the organisation pro or anti consultation (hassle value)?
 - is consultation an automatic response on every policy issue (vs unwilling/drag)?

OIA Requests – Nature

- Review the OIAs made to the organisation
 - what are they about?
 - personal information about themselves or are they trying to get at policy issues?
 - who is making the requests?
 - are they trying to influence policy or are they one offs [media, political gain]?
 - where do they occur in the policy process [take examples and look for trends – what is the concurrent activity in the policy development arena]?

IN-CONFIDENCE

- What are the impacts of the OIA requests on the organisation?
 - are there any policy changes?
 - are the OIAs then used as the basis for submissions?
 - to Ministers?
 - PQ's?
 - select committee?

OIA Requests – Processing

- Public Information strategy – is it active enough to negate OIA?
- Is there a departmental policy or handbook for handling OIA requests [if so review– check that it is used]?
- Who receives the request?
- Is there any difference between the way OIAs are handled that cover items of Ministerial interest (their pet projects)? Reality of carriage– how did it get there.
- Who processes?
 - policy advisor who dealt with the issue?
 - policy manager?
 - legal?
 - other (corporate)?
 - is this a centrally managed process (no surprises)?
- What is the procedure that is followed?
 - action to ensure all information is considered?
 - oral/e–mail etc?
 - basis of procedure?
 - manual?
 - training?
 - on the job experience?
 - is there one person who keeps the register/tracks OIAs? [corporate or legal]?
- Clearance – who?
- What use is made of transfers (up and down)?
- Timeliness and tactics
 - How do you use the provisions of the act to minimise damage?
 - delays etc
 - Does the Ministry use the act to advantage to raise issues in public, to get issues moving that are frustrating the department ?

IN-CONFIDENCE

OIA Complaints – Processing

- Who receives the request?
- Who processes?
 - person who answered the request
 - policy manager
 - legal
 - other (corporate)
- What is the procedure that is followed?
- Clearance – who?

Select Committees

- are OIAs being used by those appearing at select committee to help gain information for their case?
- do select committees result in OIAs?

Contacts

Contacts that may be required:

- Policy Manager
- Person who signs off the process (as distinct from signing the covering letter)
- Those who process
- Legal
- Access for files

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