

Review of the Freedom of Information Act 2000

Submission to the Independent Commission on Freedom of Information

About Andrew Ecclestone

I am a specialist in Freedom of Information (FOI) laws, with 22 years of experience in this field. I have 10 years of FOI experience in the United Kingdom, working for civil society and the government, and have worked for the FOI appeals regulator in New Zealand for the last 10 years. I was the Policy Manager and then Head of Freedom of Information Policy Branch in the Lord Chancellor's Department and the Department for Constitutional Affairs between September 2001 and December 2003. In addition to general policy advice and work on implementation of the FOI Act, I led the work to develop the system for monitoring the handling of FOI requests within central government and the publication of these statistics that the Commission's *Call for Evidence* relies upon. I was also Secretary to the Lord Chancellor's Advisory Group on Implementation of the FOI Act, and represented the UK in concluding negotiations on the Council of Europe *Recommendation 2002(2) on Access to Official Documents* – a model FOI law for CoE member states that the UK Government endorsed. In 2004-5 I undertook a Masters in Public Policy at Victoria University of Wellington, New Zealand. This included research on communities of practice on FOI within New Zealand government agencies, and on the management of FOI requests by government agencies. I have worked as a consultant on FOI for the Council of Europe in Serbia, the Open Society Foundation in Mexico, the World Bank in Indonesia and Bangladesh, the UNDP in the Pacific and for USAID in Cambodia.

I am making this submission in a personal capacity, and the views expressed should not be taken to represent the views of my employer.

Introduction

I am unable to make as full a submission to the Commission as I would like, as the current pressure of work in my job means that I have insufficient time. However, given the experience outlined above, I am singularly qualified to provide the Commission with information comparing the construction and operation of freedom of information regimes in the UK and New Zealand, and would be happy to provide further evidence orally if that would be helpful. There are three main reasons why New Zealand is probably the best comparator for the UK to consider when reviewing the FOI Act.

First, New Zealand has a Westminster style system of Cabinet government, with Ministers appointed from those elected to the legislature and a permanent neutral civil service.

Second, New Zealand – like the United Kingdom – does not have an entrenched constitution, meaning the interaction of its FOI legislation with constitutional conventions, primary and secondary legislation can be more easily understood.

Third, if one of the desired outcomes of FOI legislation is a country whose system of public administration where the Executive can still develop and implement its policies effectively but it is open, transparent and trusted to be corruption-free, New Zealand has demonstrated this in spades, consistently scoring higher than the United Kingdom in comparative governance benchmarks such as the Transparency International *Corruptions Perceptions Index*.

Most of the rest of this submission will consist of pointers to New Zealand publications which the Commission should consider, given the similarities of its governance arrangements to the United Kingdom.

That said, the most important point I would like to make to the Commission is that its *Call for Evidence* is dominated by an assumption that systems and processes of administration in UK public authorities and Cabinet are working to a very high standard and that the ‘problems’ of FOI all stem from demand-side impositions it creates. This is a serious misconception of the issue, and pretends that nothing on the supply-side of the equation can be improved or should alter following the passage of the FOI Act. There are two key areas where the Commission should consider that supply-side changes should be made.

First, improvements to the recording and management of information in public authorities, and the legislation that governs this.

Second, changes to the way that Cabinet minutes are recorded.

Improving the recording and management of information

FOI laws are pretty useless in practice if public authorities do not record information and store it in systems that enable its easy retrieval. Equally, public authorities at all levels cannot function efficiently or effectively if they fail to do this.

The UK’s FOI Act was ahead of the game at the time it was drafted, as it made provision in section 46 for a Code of Practice on records management. This enabled the Information Commissioner to work with the National Archives to ensure that information management practices were not hindering public authorities’ abilities to discharge their functions under the FOI Act.

The importance of good records management was further stressed by the Government in November 2001 when it announced the timetable for implementation of the FOI Act. In introducing the publication scheme provisions first, and only implementing the right to make requests for information in January 2005, the Government explained that this was to enable public authorities to get their records management systems up to scratch first:

“The timetable that the Government has adopted enables Departments to take full advantage of the current Electronic Records Management initiative. The [Modernising Government White Paper](#) set a target of 2004 for all government organisations to manage their records electronically. This initiative will enable participating bodies to update their record keeping to meet the demands of the Act and it reinforces the importance of good records management to successful implementation of the Act.”¹

Ensuring that public authorities have systems and processes for the effective and efficient management of their information is a matter of management that can be addressed partly through the existing Code of Practice and the work of the Information Commissioner and National Archives (assuming all parties are adequately funded to do so).

¹ Annual report on proposals for bringing fully into force those provisions of the Freedom of Information Act 2000 which are not yet fully in force. Presented to Parliament by the Lord Chancellor pursuant to section 87(5) of the Freedom of Information Act 2000. November 2001, HC 367. Accessed 20 November 2015 from: <http://webarchive.nationalarchives.gov.uk/20040809170550/dca.gov.uk/foi/imprep/annrep01.htm>

However, where the UK legislation has a significant gap, which has a strong connection to public authorities' concerns about a 'chilling effect', is that there is no general statutory duty on public authorities to create and maintain adequate records of the work they do. In this regard, the Commission should consider the amendment of the UK public records legislation to include a provision similar to sections 17 and 18 of the New Zealand Public Records Act 2005, which state:²

17 Requirement to create and maintain records

- (1) Every public office and local authority must create and maintain full and accurate records of its affairs, in accordance with normal, prudent business practice, including the records of any matter that is contracted out to an independent contractor.
- (2) Every public office must maintain in an accessible form, so as to be able to be used for subsequent reference, all public records that are in its control, until their disposal is authorised by or under this Act or required by or under another Act.
- (3) Every local authority must maintain in an accessible form, so as to be able to be used for subsequent reference, all protected records that are in its control, until their disposal is authorised by or under this Act.

18 Authority required to dispose of public records and protected records

- (1) No person may dispose of, or authorise the disposal of, public records or protected records except with the authority of the Chief Archivist, given in accordance with the provisions of this Act.
- (2) Subsection (1) does not apply if the disposal of a public record or a protected record is required by or under another Act.

Legislation requiring the creation of records of decisions and related information can however be found in the UK legislation relating to local authorities. The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 require, in Part 4, that councils and elected individuals making 'executive decisions' must create records of these decisions, including a record of the reasons for the decision, and details of any alternative options considered and rejected by the decision-maker when the decision was made.³

Imposing these duties on government departments should not create any additional burden if they are already acting in accordance with good administrative practice. But we should not take such practice for granted, and creation of these legal duties – with appropriate sanctions for non-compliance – will incentivise the creation and effective management of systems and processes for doing so. This key supply-side improvement will have a fundamental effect on concerns regarding a 'chilling effect' argued to stem from disclosure: that FOI risks creating the perverse incentive of public authorities and individual officials not recording information (including opinion and advice) that they should.

² Public Records Act 2005 <http://www.legislation.govt.nz/act/public/2005/0040/latest/whole.html>

³ The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 <http://www.legislation.gov.uk/ukxi/2012/2089/contents/made>

Cabinet Minutes

Cabinet Minutes – and Cabinet Papers – are routinely disclosed in New Zealand, not just in response to FOI requests, but proactively. Indeed, the practice is now so commonplace that there has been a Cabinet Office Notice on the subject since 2009, which was updated on 19 November 2015. Both Notices are appended to this submission.

As a result, examples of New Zealand Cabinet Papers and Minutes can be found in plentiful supply across the websites of government departments. Some examples are appended to this submission. Such information is overwhelmingly made available after it has been considered by the relevant decision-making body, but the Official Information Act (OIA) does not explicitly make a distinction that accords greater protection to this information prior to its consideration by the Minister or Cabinet.

This has not led to the end of Cabinet government, collective Cabinet responsibility nor the degradation of Governments' abilities to make decisions in the 33 years since the Official Information Act was passed.

However, what has changed is the manner in which the minutes of Cabinet (and Cabinet Committee) meetings are recorded. These are no longer long-form notes of which Minister said what, but short, efficient documents that communicate the actions agreed on and decisions taken.

The concerns of successive UK governments regarding the effect of FOI on collective Cabinet responsibility could be addressed if they were to make a similar supply-side change in how the business of these meetings is recorded. If the Government wanted to ensure the continued creation and protection from disclosure of longer documents recording which Minister said what at Cabinet meetings, it could draft a provision giving effect to this distinction. This would ensure a solid historical record of government decision making at the highest levels, while providing for far greater contemporaneous government accountability and transparency.

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

Any FOI law which attempts to provide complete certainty to public authorities on this issue can only do so by making such information totally exempt from the right of access enacted by the law, with no overriding public interest test to be applied at the time a decision is taken on a request for information. To adopt such a regime would be a perversion of what a FOI law means, and place the United Kingdom in a category with Zimbabwe. It would also fail in its objective, since such information may still be obtained through discovery during litigation, or be leaked.

This issue lies at the heart of all FOI regimes, because the way it is treated both in the legislation and in practice demonstrates how committed governments are to the transfer of power, away from themselves and back towards the public they serve. Public authorities do not have a right to private internal deliberation; they have an obligation to justify to the public – the Principal who ultimately appointed them as their Agents – why the balance of competing public interests favours the withholding, for a limited time, of the information it holds. At one extreme, this balance may be struck by Parliament enacting an absolute class

exemption and the information only emerging in the National Archives after 20 or more years. At the other, would be a regime requiring contemporaneous proactive disclosure of all of an authority's internal deliberations. Neither would strike the right balance, nor create a regime where the quality of public administration is improved through appropriate opportunities for both public participation in the policymaking process and subsequent accountability.

There is no class exemption for internal deliberations of government departments in the New Zealand OIA,⁴ and it does not draw the distinction found in sections 35 and 36 of the UK FOI Act. There is a harm-tested withholding ground for the maintenance of the “effective conduct of public affairs through free and frank expression of opinion 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”. To establish that the withholding of the requested information is necessary, the public authority (or Minister) must also show that there is no overriding public interest in disclosure. The way in which the balance of competing public interests is constructed in the OIA is set out by considering sections 4, 5, 9(2)(g)(i) and 9(1) of the Act.

Section 4 of the OIA sets out the purposes of the legislation. Section 5 describes the principle of availability of information held by public authorities, and makes clear that if a public authority wants to depart from this principle, it must have good reason, and must have regard to the purposes of the legislation. Section 9(2)(g)(i) describes the interest in protecting the effective conduct of public affairs, and section 9(1) makes clear that before the withholding ground provides good reason to depart from the principle of availability, the information must nevertheless be disclosed if the public interest in disclosure outweighs the public interest in withholding it. These sections of the OIA are set out below for ease of reference.

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.

⁴ Official Information Act 1982 <http://www.legislation.govt.nz/act/public/1982/0156/latest/whole.html>

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, 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, this section applies if, and only if, the withholding of the information is necessary to—
 - (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

Complaints under the OIA are investigated by the Ombudsman, and I have appended the Ombudsman's *Practice Guidelines* on section 9(2)(g)(i) to this submission.

As can be seen from the way in which the withholding ground (exemption) is framed, it is focussed on the desired outcome, not just because it is internal deliberation. It is future-focussed and requires the decision maker to assess whether disclosure will either harm the effective conduct of public affairs at the present time, or whether disclosure will inhibit the future provision of free and frank opinions.

Much has been said by UK government Ministers, current and former senior civil servants about the so-called 'chilling effect' that FOI is alleged to have on the recording and provision of free and frank advice. A lot of it has suggested that civil servants will not be prepared to provide such advice if they think it will be disclosed. The experience of New Zealand proves otherwise, and suggests that actually these concerns are driven by Ministers seeking to avoid having to explain why they did not follow the course of action advised by officials.

What in fact appears to be the most significant factor driving the provision of free and frank advice is the level of trust between the Minister and the civil servants. Andrew Kibblewhite, the Chief Executive of the Department of Prime Minister and Cabinet, has touched on this in two speeches this year, on policy making and the provision of free and frank advice. In his speech from May 2015, Kibblewhite states:

"This brings me to the relationship between policy advisors and Ministers, the inner sanctum of the policy profession and the subject of quite a lot of conjecture and debate.

In that inner sanctum, trust is key. Ministers' trust in their public service policy advisors is built on a mutual understanding of roles, on the professionalism, integrity and impartiality of the advisors and finally but essentially on the quality of the advice given.

Trust creates the space for free and frank advice. Some commentators have recently argued that there has been a reduction in free and frank advice. I have thought quite hard about this and actually don't agree. This is not to say we can't do better. We need to. But my own observation, from the last 20 years and some since I first became a policy manager is that there has always been mixed performance.

Where the relationship between Ministers and advisors is high trust and respectful, there is and always has been room for candid and challenging views to be aired. Where relationships are weaker, a much less constructive exchange occurs.

Officials can build that trust by listening hard, playing with a straight bat and exercising appropriate judgement in how they record their interactions with Ministers. Ministers can help

build that trust by being open about their thinking – and the constraints and opportunities as they see them.

One of my hopes for the Policy Project is that by sharing good practice and experience, we will be able to build stronger relationships with Ministers where free and frank advice is offered and accepted. The State Sector Act makes it clear that free and frank advice is required even when it isn't always welcomed. It is a legislative obligation, not just a convention.”⁵

What the Chief Executive did not spell out (unsurprisingly) is that civil servants will provide free and frank advice if they know they can trust the Minister to receive it as just that – advice – and that the Minister will shoulder their own responsibilities in the governance process. Ministers who are unwilling to defend the decisions they have taken, either when they have followed or departed from the advice provided or worse, Ministers who publicly blame their officials for decisions they themselves took, are probably the single greatest factor in inhibiting the provision of free and frank advice. The political and bureaucratic incentives for blame shifting – and the consequent effects on transparency measures such as FOI laws were considered by Professor Christopher Hood in a 2007 paper entitled *‘What happens when transparency meets blame-avoidance?’* also appended to this submission.⁶ Hood suggests that ‘negativity bias’ in the media, and in our evolutionary imperative to learn from our mistakes in order to survive, means that we remember when things go wrong far more than when things go well. However, as the current UK Government’s work on ‘open policy making’ might suggest, the solution to this should not be an attempt to prevent the public from finding out when things have gone wrong how they did so, but to have a more open and inclusive policy development process – as described by the Purposes section of the OIA.

As noted by Andrew Kibblewhite in the passage quoted above, the convention that civil servants provide free and frank advice has been placed on a statutory footing in New Zealand. Section 32 of the State Sector Act 1988 (as amended in 2013) describes the ‘Principal responsibilities’ of the chief executives of government departments.⁷ It makes clear that:

The chief executive of a department or departmental agency is responsible to the appropriate Minister for—

- (c) the stewardship of the department or departmental agency, including of its medium- and long-term sustainability, organisational health, capability, and capacity to offer free and frank advice to successive governments; and
- (f) the tendering of free and frank advice to Ministers

It is clear therefore that the conditions necessary to ensure the continued provision of free and frank advice to aid good policy and decision making are not just those created by how the exemption in the FOI Act is framed. In New Zealand the environment is shaped by:

- A State Sector Act which creates a statutory duty on departmental chief executives to provide Ministers with free and frank advice

⁵ Andrew Kibblewhite, Address to IPANZ, 26 May 2015. <http://www.dpmc.govt.nz/sites/all/files/ipanz-speech-26may-v2.pdf>

⁶ Hood, Christopher (2007) 'What happens when transparency meets blame-avoidance?', Public Management Review, 9:2, 191 — 210 <http://dx.doi.org/10.1080/14719030701340275>

⁷ State Sector Act 1988 <http://www.legislation.govt.nz/act/public/1988/0020/latest/whole.html>

- A Public Records Act which creates a statutory duty on a department to create and maintain full and accurate records of its affairs, in accordance with normal, prudent business practice
- The fact that the OIA applies to information held by a public authority regardless of whether it has been recorded or not; in New Zealand if it is not recorded information, but known to the Minister or officials, the requester still has a right to the information and the Ombudsman may require the relevant person to make a record of what it is they know, so that it may be disclosed to the requester
- The ground for withholding information free and frank expressions of opinion by or between or to Ministers and officials being geared towards the maintenance of the effective conduct of public affairs, and not just because it is the expression of opinion or advice in and of itself
- The level of trust existing between Ministers and officials. This is, in part sustained by the ‘no surprises’ principle set out in paragraph 3.16 (a) of the *Cabinet Manual*.⁸

Here is what a former Ombudsman (and before that Clerk to the House of Representatives for 22 years) Dr David McGee QC had to say about a chilling effect. Note that the question is not ‘if’ advice will be disclosed, but ‘when’:

“The *timing* of release seems to me also to be an important factor in determining whether withholding is justified on advice/opinion grounds.

I do not see the advice/opinion grounds as ever giving perpetual protection from release. Even in the case of information falling into a context that protects it, it is likely that that context will cease to have relevance given a sufficient lapse of time. (Though this may be a considerable period of time in some cases so as not to undermine the context protection.) What is a suitable period of time will vary with the context. It may be able to determine this in advance so that it is known when such information will no longer be entitled to protection.

But most advice/opinion withholding will not arise in an identified context and will fall for assessment for release in its own terms. In those circumstances the point which the policy or other matter to which the advice/opinion relates has reached will be significant. If the good governance interest in promoting reflection is to be given expression, advice/opinion relating to policies or proposals still under development within government will warrant a higher degree of protection than policies or proposals at a more advanced stage. Of course, there *is* an interest in advice/opinion being widely known prior to a decision being taken. This is undeniable. But that interest is often likely to be outweighed by the need to maintain confidentiality at that stage if the ‘space’ to be created for measured decision-making is to be afforded. Consequently, at an early stage in the process a decision to withhold such information is more likely to be sustained. Conversely, the interest promoted by these withholding grounds is less strong, once a decision has been taken by government, even though the proposal has not yet been implemented or endorsed (for example, a law change is still before Parliament). The ‘democratic’ interest, as opposed to the ‘reflective’ interest may come to preponderate at some point after the decision is taken.

A factor which impinges on when exactly this is, is one raised quite often but which may be rejected as a general objection to release. This is that if advice/opinion is released at all, officials will be inhibited in the future from making candid contributions to government by way

⁸ Cabinet Manual, Cabinet Office, Department of Prime Minister and Cabinet, Wellington 2008. Paragraph 3.16 (a) states “In their relationship with Ministers, officials should be guided by a ‘no surprises’ principle. They should inform Ministers promptly of matters of significance within their portfolio responsibilities, particularly where these matters may be controversial or may become the subject of public debate.” <https://cabinetmanual.cabinetoffice.govt.nz/3.5>

of the future advice they give or the opinions they express. I do not accept this as a general proposition. The OIA and the greater openness that it has brought to governmental decision-making has operated for a quarter of a century. Public servants are no longer the largely anonymous figures they were before the State Sector Act was enacted in 1988. Two generations of public servants have never known the more restrictive conventions operating before the 1980s. Those still practising who entered government service before then can be assumed to be sufficiently senior and experienced to have accommodated themselves to the more open environment. While some early or creative work may warrant ongoing protection from release to give encouragement to uninhibited thinking (as discussed above) and informal exchanges among officials themselves deserve special consideration, **I do not accept that as a general rule public servants are such a self-effacing class that they will not give and express candid advice and opinions to Ministers except with an assurance of long-term, across the board, confidentiality for their contributions.**

I do accept, however, that there are circumstances in which even though a decision may have been taken within government, the policy or proposal may still be the subject of intense political debate and that it may be undesirable for public servants to have their views cited in that political debate while it is under way. Releasing their advice/opinion at such a time could expose them to that. I think therefore that officials when they give advice or express opinions can expect that that advice or opinion will not lightly be released so as to enter into contention in such circumstances. This is not wholly a question of inhibiting officials. It is undesirable in itself for officials' views to become part of political contention. It might undermine the perception of their political neutrality, for instance, if public servants' views were to be used in parliamentary debates (s 9(2)(f)(iii)). While there is something in this, it cannot be pushed too far. A system that prevented critics having access to government information, while leaving it open to Ministers to use officials' views as they saw fit, would not be satisfactory, for instance. A judgment as to the tenor of political debate at the time needs to be made, rather than relying on any absolute rule.

It can be said, however, that the further away one gets from a government decision after it has been made the less need there is for protection and the greater the case there is for openness, especially if one accepts that the OIA provisions that I have been discussing do not provide absolute protections, only relative ones.”⁹ (Emphasis added)

Finally, there is no set period for which information protected by any withholding ground in the OIA may be withheld. As is proper under an FOI law, the determination regarding whether there is good reason to withhold the requested information is made at the time the public authority makes a decision on the request for the information. If no request for the information is received, it will be made available in 25 years under the provisions of Part 3 of the Public Records Act 2005.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

The OIA makes separate provision for collective Cabinet discussion. Remembering that the principle of availability set out in section 5 of the Act requires decision makers to consider the section 4 purposes of facilitating public accountability and participation, the section 9 withholding ground is set out as follows:

⁹ Dr David McGee QC, Speech to LexisNexis Information Law Conference, May 2008, appended to this submission.

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, 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, this section applies if, and only if, the withholding of the information is necessary to—
 - (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;

In practice, the withholding ground most frequently used to protect Cabinet papers and minutes is section 9(2)(f)(iv) and I have appended the Ombudsman's *Practice Guidelines* on this section to this submission. The same document helps to explain why section 9(2)(f)(ii) is rarely relevant to the issues facing the Minister or agency that has received a request for information. Reading the *Practice Guidelines* will also clarify that the Commission's *Call for Evidence* errs when it describes this as qualified class-based exemption for Cabinet minutes and papers; any withholding of information must be necessary to maintain the constitutional convention protecting the confidentiality of advice tendered; but a constitutional convention may be departed from without destroying it. On this point, the *Practice Guidelines* quote Eagles, Taggart and Liddell's book *Freedom of Information in New Zealand*:

"The requirement that both the conventions and the effective conduct of public affairs be 'maintained' is not a legal license to withhold every time the former are breached, or the latter is made more difficult. This can, perhaps, be more clearly seen in relation to section 9(2)(f). ...[I]t is in the very nature of a constitutional convention that it can be departed from 'without necessarily impairing its effectiveness'." ¹⁰

In practice, decisions on requests made under the OIA have resulted in the disclosure of much more post-decisional information than pre-decisional information. Once Cabinet has agreed its position, unless disclosure of the information sought would harm one of the other interests protected under the OIA (international relations, commercial confidentiality, etc.) the public interest in promoting the accountability of the Government generally results in the disclosure of the relevant Cabinet paper and minute. It is less likely that the public interest (such as that in participation in the making and administration of laws and policies – s. 4(a)(i) refers) would favour the pre-decisional release of individual Ministers' potentially differing positions on any given policy issue, but the fact that the withholding ground is subject to a public interest test means that this cannot be entirely dismissed as a possibility. The post-decisional release of an individual Minister's position prior to the Cabinet adoption a view may sometimes occur, although this tends to result from a release of departmental advice to the Minister, which includes the Minister's indication of their view on the advice.

As noted earlier in this submission, the disclosure of Cabinet papers and minutes is now so common that the Cabinet Office has issued a Notice to Chief Executives and officials

¹⁰ Freedom of Information in New Zealand, Eagles, Taggart and Liddell, OUP, Auckland 1992, p 335

involved with preparing Cabinet papers on the proactive release of these documents. The original Notice was issued in August 2009, and it was updated on 19 November 2015 to take account of a new interdepartmental electronic system for managing Cabinet papers, CabNet. The proactive disclosure of Cabinet material is now so commonplace that the revised Notice has relaxed the manner in which Cabinet Ministers are informed that the paper will be published – it now just has to be noted in the publicity or communications section of the paper, and does not have to be a specific recommendation for Cabinet to approve.¹¹

The Cabinet Office Notices give practical effect to the general guidance on the proactive release of Cabinet material set out in paragraph 8.4 of the *Cabinet Manual*. This states:

- 8.4 Cabinet material (Cabinet and Cabinet committee papers and minutes) may be released proactively, most often through publication online. The proactive release of Cabinet material may result from a Minister directing its release, or from the relevant department seeking the Minister's approval to release it. The key principles for proactive release of Cabinet material follow.
- a. Only Ministers may approve the proactive release of Cabinet material (they may wish to first discuss the proposed release with Cabinet colleagues).
 - b. The person administering the release of the material should:
 - assess the information in light of the principles in the Official Information Act 1982, the Privacy Act 1993, and the *Security in the Government Sector* manual; and
 - consider deleting any information that would have been withheld if the information had been requested under the Official Information Act 1982.
 - c. Where appropriate, papers and relevant minutes should be published together so that readers have the background to the decisions made by Cabinet.
 - d. The material released should preferably show that it has been approved for release.
 - e. If the material is to be published online, the current *New Zealand Government Web Standards and Recommendations* should be followed (see www.e.govt.nz/standards).

Since the Commission and UK Government are unlikely at this stage of their FOI evolution to find the proactive release of Cabinet material palatable, the *Cabinet Manual* paragraphs on responding to requests for this information are reproduced below:

Requests for Cabinet material under the Official Information Act 1982

8.30 There is no blanket exemption for any class of papers under the Official Information Act 1982. Cabinet material is therefore covered by the Act in the usual way, and every request for Cabinet material must be considered on its merits against the criteria in the Act. See paragraph 8.34 for guidance on requests for documents with security classifications.

8.31 Departments or Ministers who receive requests for the release of Cabinet material of a current government must take the decision on release themselves, after consulting with other affected Ministers, departments, and agencies. (See paragraphs 8.36 - 8.42.) There is no requirement to consult the Cabinet Office on the release of Cabinet material, except in the case of Cabinet material of a previous opposition administration. (See paragraphs 8.83 - 8.84.) The Cabinet Office is available, however, for general guidance if departments have queries about the process for releasing Cabinet material.

8.32 As with Cabinet material that is released proactively (see paragraph 8.4), it is good practice to indicate on Cabinet material released under the Official Information Act 1982 that it has been approved for release.

¹¹ See paragraphs 8 and 9 of CO Notice (15) 3.

8.33 Ministers and departments are responsible for keeping a record of the Cabinet documents that they have made publicly available.

The Commission will note that paragraph 8.30 confirms that in New Zealand there is “*no blanket exemption for any class of papers under the Official Information Act 1982*”

In summary, the New Zealand legislation and practice provides sufficient protection to enable the maintenance of the constitutional convention of collective responsibility, so that while Ministerial differences of opinion or view are likely to be protected from disclosure, once Cabinet has adopted its position on an issue, if there is no other reason for withholding the information, the Cabinet paper and minute is likely to be disclosed. This practice is now so well established that when a major piece of policy development will take place over several stages, proactive disclosure is planned for from the outset in order to minimise the work required to respond to individual requests for information. This was already occurring in 2003 when I visited New Zealand on behalf of HMG to learn about its experience of FOI, 20 years after the passage of the OIA. The Department of Internal Affairs had been reviewing the law on regulation of gambling and in order to manage the anticipated lobbying pressure (including OIA requests) from both the gaming industry and anti-gambling groups, sought advance approval from Cabinet to publish the relevant Cabinet and Cabinet committee papers once each stage of the policy development work had been approved. The database of more than 100 papers and minutes is still on the Department’s website, and the introductory text is quoted below:

About the Gaming Review Cabinet Papers Database

The Minister of Internal Affairs has directed the Department to post the Cabinet papers and minutes on the Gaming Review and the Gambling Act on its website. This page gives you access to the Cabinet papers and minutes on the Gaming Review. These papers are released consistent with the Official Information Act 1982. A small amount of information has been withheld under the Act. We have indicated clearly in each paper where material has been deleted and why.

Please note that these are Cabinet papers, not Departmental papers, and that they appear on the Department's Website for reasons of convenience, because it will be helpful for interested people to find all the Gaming Review material and information on regulations under the Gambling Act in one place.¹²

After moving to New Zealand, I met one of the senior officials involved with the review and asked her about the impact of the disclosures. She explained that officials had sought approval for publication of the papers in order that they could respond to individual requests with an administrative refusal on the grounds that the information would soon be published (the equivalent of section 22 in the UK FOI Act). However, the process had had unanticipated benefits besides management of requests for the information; both the industry and anti-gambling groups had been able to see during the iterative policy development process that their views had been heard, considered and reported to Ministers by officials at the various stages of public consultation, and this had built their trust and confidence in both the officials and the policy development process. While neither side in the debate may have been satisfied with the eventual policy position, the supply-side changes to disclosure of information from the traditional policy development process resulted in richer levels of participation and greater trust in officials and confidence in the quality of the process.

¹² Gaming Review and Gambling Act, Department of Internal Affairs
http://www.dia.govt.nz/Pubforms.nsf/wpg_CabinetPapers_GAMREV?OpenView

The Gaming Review is not an isolated example. Similar processes were adopted by the Ministry of Business Innovation and Employment when reviewing the legislation on regulation of financial markets,¹³ and the State Services Commission hosts a large and growing collection of Cabinet papers on the development, implementation and progress tracking of the Government's 10 key 'Better Public Services' targets.¹⁴

In conclusion, an outcomes-based FOI Act like the New Zealand Official Information Act has not only enabled the maintenance of the convention of collective Cabinet responsibility, it has done so while enhancing public accountability and participation, and coped with a shift from single-party majority Governments elected under a first past the post system to coalition Governments elected under proportional representation.

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

As the Commission's *Call for Evidence* notes, requests for information concerning the assessment of risks have been refused under section 35 of the FOI Act. Similarly in New Zealand, the OIA does not have a specific section relating to this type of information. Depending on the circumstances some or all of such information may be withheld under section 9(2)(g)(i) where it is necessary to do so in order to maintain the effective conduct of public affairs through the free and frank expression of opinions (explained in answer to Question 1 above). Again depending on the circumstances, some or all of the information might also be withheld under section 6(c), to avoid prejudice to the maintenance of the law (this section is not subject to a public interest test), or under various other paragraphs of section 9(2), which *inter alia* protect personal privacy, avoiding prejudice to measures designed to protect public health and safety, avoiding prejudice to the substantial economic interests of New Zealand, or where it is necessary to enable a Minister or department to conduct negotiations without any prejudice or disadvantage (including commercial and industrial negotiations).

However, as with the answer to Question 1 above, it is unclear whether it is the potential for disclosure itself that might have a chilling effect on the candid assessment and recording of risks to a particular piece of work, or if it is the risk of senior officials and Ministers blame-shifting as they seek to avoid being held to account that would cause officials to be less forthcoming. One suspects that if provision did not exist for Permanent Secretaries to seek and publicly report accounting officer directions, information about the Ministerial decisions to override the advice of officials in relation to the Pergau Dam and Kid's Company might not have been disclosed.

If there were legal duties on officials to create and maintain records, and to provide free and frank advice some of the risks identified by the Commission may be mitigated. Similarly, in circumstances where technical professionals such as engineers, food safety or environmental scientists are asked to identify risks which may have an impact not simply on timely delivery of a project within budget but on public safety, the public are entitled to expect that these

¹³ Financial Markets Conduct Act, Ministry of Business Innovation and Employment <http://www.mbie.govt.nz/info-services/business/business-law/financial-markets-conduct-act>

¹⁴ Better Public Services: Cabinet Papers and Minutes, State Services Commission <http://www.ssc.govt.nz/bps-cab-papers-minutes>

professionals will identify these risks without fear or favour. One possible approach to ensuring proper recording of risks while facilitating disclosure of information to the public would be to anonymise who had identified the risk, while still disclosing the risk and proposed mitigation strategy, unless this itself should be withheld in order to avoid prejudice to a different public interest such as those identified above. Gateway Reviews, for example, anonymise the comments collected from officials when assessing the viability of and risks to a major project.

The effect of secrecy regarding risk assessments was well expressed by Tony Blair, when he addressed the annual awards ceremony of the Campaign for Freedom of Information, in March 1996:

“Now it is fairly clear and obvious to see the case even from the events of the past few days, when a health scare like BSE occurs, the public want to know the facts, people want to know what the scientific advice is in full, and they need to be sure that the public interest has always comes first. They want to know if there was any relaxation of regulations which resulted in public safety being compromised. They want to know what the risks are and whether the food they eat and the food they feed to their children is safe, and they want to know how to find out.

And the whole sorry saga of how this matter has been handled has resulted in the loss of public trust in government. It is because we have given so many absolute assurances in the past, so categorically, without necessarily providing the information to back it up that there is such little faith in what is said now. The only way to begin to restore people's trust is therefore to be completely open about what the risks are and to take whatever action is necessary to restore and renew confidence in our beef industry. And I think that that is the very least that the public have a right to expect.” (Emphasis added)

Mr Blair may have since renounced his support for FOI, but the Campaign’s analysis of how the FOI Act would be unlikely to help with the secrecy problems identified by the BSE Inquiry is still germane to the Commission’s current work on this issue.¹⁵

Risk registers are requested from New Zealand government agencies from time to time. A recent example where one was disclosed can be found in the disclosure log of the Treasury.¹⁶ This sets out the high level risk register for the department,¹⁷ and the Commission will note that while the Treasury was willing to disclose most of the document it did withhold some of the comments under section 9(2)(g)(i). Since the Treasury responded to the request on 11 November 2015, it is unlikely any potential appeal by the requester to the Ombudsman has been determined.

A second example of a risk register that has been disclosed, in this case proactively, relates to major road infrastructure project. In this instance, the New Zealand Transport Agency has disclosed the document in full, including the names of the officials who contributed to it.¹⁸

¹⁵ BSE and Secrecy: Implications for the FOI Bill, Campaign for Freedom of Information, November 2000 <https://www.cfoi.org.uk/wp-content/uploads/2013/12/bsesecrecy.pdf>

¹⁶ Responses to OIA requests, The Treasury <http://www.treasury.govt.nz/publications/oiaresponses>

¹⁷ Treasury’s risk register, The Treasury, November 2015 <http://www.treasury.govt.nz/downloads/pdfs/oia/oia-20150393.pdf>

¹⁸ MacKays to Peka Peka Expressway, Appendix E Risk Register, New Zealand Transport Agency 2011 <http://www.nzta.govt.nz/assets/projects/mackays-to-peka-peka/docs/scheme-assessment-report/sar-appendix-e.pdf>

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

The short answer to the first question above is ‘no’. An executive veto is philosophically incompatible with the fundamental principle of FOI legislation, which is that the Act transfers the power over disclosure of information held by public authorities away from those with a self-interest in non-disclosure to an independent and neutral third party. The Commission’s *Call for Evidence* make the case for an executive veto in the following way:

“The justification given for the existence of the Cabinet veto is that there will be a small number of situations in which the executive will be best placed to assess the public interest, and will have the authority granted to it by the electorate to do so. In those situations it is asserted that the executive should be able to make the final decision on where the public interest lies – subject to judicial oversight to ensure that decisions are not arbitrary or irrational.” (Emphasis added)

The three places where emphasis has been added to the quotation above are at the heart of the problem with an executive veto.

First, and most importantly, while the executive will be well placed to assess a range of public interests relevant to the question of disclosure, it does not have a monopoly of wisdom or perspectives on the matter. As Lord Radcliffe put it in *Glasgow Corporation v Central Land Board*,

“The interests of government, for which the Minister should speak with full authority, do not exhaust the public interest.”¹⁹

Because the interests of the government, for which the Minister should speak with full authority, do not exhaust the public interest, an independent person or organisation is required to assess the competing public interests in whether the information should be disclosed. This is hardly a foreign concept to public authorities, who daily submit to the judgment of the courts regarding the disclosure of information through discovery, even in cases where the Crown has asserted public interest immunity. The problem for the government is that with FOI, it is hardly likely to be able to take the alternative route of settling out of court if it dislikes the Court’s decision on disclosure of information to the other party.

Second is the appeal to ‘authority granted to [the executive] by the electorate’. There are two main problems with this notion. The first is the idea that the executive ever seeks or receives a mandate from the electorate for such specific questions as vetoing the decision of an independent regulator. Just as the public hardly ever throw out a government at a general election over a single policy failure or specific piece of legislation, they also do not tend to elect governments on the basis of how it will react to an unknown future event. I suspect most people would prefer to elect governments that agree to abide by the decisions of independent regulators (whether they be Information Commissioners, Ombudsman or Courts) who make their decisions based on the evidence and argument presented to them by both sides. If such decisions are wrong in law, or manifestly unreasonable, I suspect most people would expect

¹⁹ *Glasgow Corporation v Central Land Board* [1956] S.C. (HL) 1 at 18-19
http://www.bailii.org/uk/cases/UKHL/1955/1956_SC_HL_1.html

the government to exhaust its rights of appeal through to the highest relevant court. If after that, the government is adamant that the finest legal minds in the country have got it wrong, in a democracy – particularly one without an entrenched constitution – it can take a proposal to the court of Parliament, and seek to make its case for a change in the law. The public – from whom the executive derives its authority – are then able to play their part in the democratic process by seeking to persuade their representative to vote one way or the other.

The second problem with an appeal to electoral authority is one of principle, rather than political theory. If the authority to override the decisions of the Information Commissioner, Tribunals and Courts rests on having been elected, then every elected executive, at every level of government, from parish councils through to the executives mayors of major cities and police and crime commissioners should be entitled to the same authority. Indeed one could even make the case that directly elected executive mayors and police and crime commissioners have a greater right to exercise a veto supposedly derived from electoral authority since they have a far closer accountability relationship to their electorate than a Cabinet does.

The final problem with the proposition for the Cabinet veto set out above is that a decision to use the veto may be neither arbitrary nor irrational, and yet still be politically self-interested rather than a dispassionate neutral assessment of where the balance of public interest lies. This is why FOI Acts give dispute resolution to independent third parties in the first place. If the Commission does not believe that these arbitrators are capable of making a sound judgment on the balance of public interests, then why should they be entrusted with the power to decide whether the harm test in an exemption has been met, and should return all access to information decisions to the public authority, subject to judicial review.

However, since it is plain that there is no appetite in the present Government for getting rid of the veto, the remainder of the questions asked above need to be addressed.

As the Commission has noted, during the passage of the FOI Bill, the then Government introduced amendments which gave the Information Commissioner the power to issue binding orders that information be disclosed, but simultaneously made provision for the veto. The Government was urged to also introduce provisions found in the New Zealand OIA concerning the veto, but refused to do so. The concession it did make was to give an undertaking that while the veto would be exercised by an individual Minister, he or she would only do so after consulting their Cabinet colleagues, and to inform the House that the veto had been used. This is a nod to the requirements in the OIA, which requires that the veto be exercised in the form of an Order in Council and laid in the House. However, the Government refused to include the provision which has led to the veto not being exercised once in the 28 years since the OIA provisions on its use were amended. The rejected provision was that if the Government exercised the veto and blocked an Ombudsman's recommendation that information be released (before it became a public duty to comply with it 21 days after it was made), it must also fund the requester if he or she wished to seek judicial review of the Government's decision to use the veto. A Government that was truly confident that its decision to use the veto was legally sound and neither arbitrary nor irrational should have no hesitation in having its decision scrutinised on those grounds by the Courts. And since it is the Government that has blocked the recommendation made in favour of the requester by the arbitrator appointed by Parliament to decide complaints on their merits, the Government should fund the otherwise successful complaint to test the strength of the arguments underpinning its use of the veto.

It may help the Commission understand the background to the New Zealand arrangements – and potentially assist it with its consideration of Question 5 – if I include a fairly lengthy

quotation from a speech by Sir Geoffrey Palmer SC, a former Prime Minister who introduced the restrictions on the use of the veto in 1987:²⁰

“When the Official Information Act was passed by the Parliament in 1982 the task of resolving disputes over access was given to the Ombudsmen. There was some debate about whether that would adversely affect the nature of the Office and change it. The Danks Committee that recommended the policy contained in the Official Information Act did not want court decisions on access to information:

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

There can be no doubt that it was a significant step to make the Ombudsmen responsible for dealing with official information cases. The open-textured nature of the Act made the task a difficult one, but it was a task that was similar in some respects to the task performed within the ordinary jurisdiction of the office. It is important to note that the Ombudsman had always been able to access all the departmental information relevant to complaints with which he was dealing as provided by section 19 and 20 of the [Ombudsmen] Act. Further, the office had profound knowledge about how the public service works. So the Ombudsmen were already located in the ballpark where the official information game was being played.

The Danks Committee also proposed that ministers could impose a veto on the release of information. Indeed, this proposal walked in lock-step with the manner in which the Ombudsmen functioned in their ordinary work. When I was Minister of Justice I favoured eliminating the ministerial veto. Ten had been made from the commencement of the Act up until the 1984 general election. The policy was opposed by the Ombudsmen on the grounds that it would have given the office power of decision and that was contrary to the character of the office. They said: ‘The abolition of the ministerial power of directive would result in the Ombudsman’s decision becoming a binding directive and thus a decision. Such a change would herald a major departure from the traditional characteristics of the Ombudsmen’.

As Minister of Justice I was confronted with the choice of taking the Ombudsmen out of the Official Information Act if the veto were abolished and setting up an Information Commissioner. Since the Act was new and the public had confidence in the Ombudsmen I decided to stay with them. So I devised a solution to circumscribe the ministerial veto by requiring it to be done by order-in-council, and that required a Cabinet decision, not merely the minister exercising the veto in the privacy of his office. Further, the right to judicial review was made explicit on the face of the statute. Since then no order-in-council containing a ministerial veto has been made. The law on this issue remains as it was enacted in 1987.”

Sir Geoffrey then traversed the recommendations of a Law Commission review of the OIA before suggesting an alternative model for the future:

“The Commission’s recommendations will certainly improve the Act. But the recommendations go so far as to suggest an alternative policy narrative. The elements of that narrative seem to me to be:

- give an independent decision-maker power to make binding decisions
- remove the veto altogether

²⁰ Constitutional Reflections on Fifty Years of the Ombudsmen in New Zealand, Sir Geoffrey Palmer SC, Speech to the 10th World Conference of the International Ombudsmen Institute, Wellington, 2012. Copy appended to this submission.

- produce a certain and predictable set of guidelines that will reduce the uncertainty and smudginess of the present system
- locate the decision maker in a new Information Authority
- such a system would necessarily involve either appeal to the courts on a point of law or judicial review

Such a structure would allow the policy functions for the Information Authority as recommended by the Law commission to be combined under one roof so that what is learned in one arm of the office's activities could reinforce the activities in the other arm. The Ombudsmen would cease to have an official information jurisdiction. There are reasons why the alternative policy narrative may have strength. First, New Zealand has had thirty years of experience with the official information legislation and we should be learning more from our own experience than we have learnt so far. A greater tendency towards bright lines rules would be of an advantage. It is obvious that circumstances alter cases, but there is a great deal within the government information system that is routine and this should be recognised. There are real and practical issues about clarity in the Act's application that must bedevil the relatively junior public servants who have to deal with requests and it poses the same problems for the requesters. Secondly, my experience has been that the Official Information Act is disliked by ministers and by some officials. Sometimes there was a reluctance to comply with it and tactics were adopted to delay the release of information in order to reduce political embarrassment. I do not think anything has changed in that regard over time. And as has already been observed these information cases can be a source of tension between the Ombudsmen and ministers. **Third, after the experience New Zealand has had we know that lifting the veil on government secrecy was not the end of effective public administration, indeed the former State Services Commissioner Dr Mark Prebble remarked in 2010 that the Official Information Act 'is the best reform that's happened during my whole time in the public service; it has been good for every agency it's been applied in.'** Fourth, the importance of transparency in the government decision-making process is an important and growing trend internationally. More robust measures towards this end are warranted in New Zealand in my view. The New Zealand legislation has been a success, but as the Law Commission review demonstrates there are problems that need to be addressed. I would like to see the information issue elevated and enjoy the focus of a new agency that can develop new approaches. My conclusion is that the time has come in New Zealand to push boat out a little further on official information.

The major argument against the alternative policy narrative lies in the increased involvement of the courts that would be likely to ensue. The non-litigious nature of the Official Information Act in New Zealand is certainly one of its strengths. Just how much litigation would result from the change discussed here is difficult to estimate. The incentives upon the government not to litigate may be quite powerful. The price for dispute settlement by the Ombudsmen has been a 'fuzzy' jurisprudence. The issue is whether the trade off is remains worth it after thirty years.

An independent Information Authority could be set up and it could be entrusted with both the complaints function and the oversight function. The new model would be along the administrative lines the enacted by the Commonwealth of Australia in 2010 in the Australian Information Commissioner Act 2010. But I would not include the Privacy Commissioner within that office, as was done in Australia. The Privacy Commissioner in New Zealand was the subject of an extensive and separate review by the Law Commission. The New Zealand Law Commission's view was 'Removing the Ombudsmen as the complaints body would mean losing the institutional knowledge and awareness built up over more than 25 years of dealing with information complaints.' I think there are many answers to that observation, the most obvious of which is to move the relevant people to the new agency." (Emphasis added)

While I would not agree with everything suggested by Sir Geoffrey, there are some useful points to assist the Commission with considering how to proceed with the veto following the Supreme Court's ruling in *Evans*. The first thing to note is that although the concerns of the Danks Committee regarding the involvement of the courts in FOI appeals have some merit, things have moved on considerably in the intervening 35 years, and the evolution of judicial review means that courts are now frequently involved in cases which involve "strong political

and policy implications”. These may well include cases concerning access to information held by government departments, as was the case when Greenpeace successfully sought judicial review in 2007 of the then UK Government’s consultation on the future use of nuclear energy.²¹ Mr Justice Sullivan’s judgment included the following passage, which clearly shows the courts being involved in matters with strong political and policy implications:

“As a consultation it was manifestly inadequate. There was insufficient information for consultees to give an intelligent response. There was no information on the issues, particularly economics and waste. [Here] all the information of any substance only emerged after the consultation had concluded.”

It is worth noting that Greenpeace brought the judicial review after the Government failed to disclose information sought under the FOI Act.

The Supreme Court’s judgment in *Evans* has made clear that any government would be constitutionally unwise to proceed with a veto mechanism where the executive seeks to overrule the judiciary. The veto can, however, still be used to override the decision of the Information Commissioner. This effectively means that the UK government’s ability to use the veto is similar to that of the New Zealand government – the executive can override the decision of the independent appeals body, but not the courts. If the Commission and Government wish to retain the security blanket of the veto because government is not yet mature enough in the UK to be confident of winning FOI arguments on their merits, then it could opt to remove the courts from UK FOI appeals, and have the Information Commissioner as the sole arbiter of FOI complaints (subject to judicial review on *Wednesbury* grounds). This would place the Information Commissioner in a similar position to the New Zealand Ombudsman. However, as will have been noted in reading Sir Geoffrey’s remarks above, there are concerns that leaving the merits review of FOI cases in the hands of a single body has led to insufficiently clear and high quality jurisprudence, which has costs – in terms of uncertainty – for both agencies and requesters. Indeed the UK has developed vastly more FOI jurisprudence in the first 10 years of the Act’s operation than New Zealand has after more than 30 years. For all of government and senior officials’ protests about being uncertain where they stand because of the application of the public interest override to the particular circumstances of each case, they are arguably on much clearer legal ground than their counterparts in Wellington.

So, a potential model for the Commission to consider, which would enable the executive to retain its veto while still generating useful jurisprudence would be as follows:

- The exercise of the veto is limited to central government
- It may not be exercised before the Information Commissioner has reached a final decision on an FOI complaint
- If the relevant Minister wishes to exercise a veto of the Information Commissioner’s decision that the public interest favours disclosure (and they should be unable to veto the Commissioner’s decision on the application of an exemption, the scope of a request, etc.) he or she may only do so within 21 days of the Commissioner’s decision if:

²¹ *Greenpeace Ltd., R (on the application of) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) (15 February 2007) <http://www.bailii.org/ew/cases/EWHC/Admin/2007/311.html>

- Cabinet agrees at a meeting (not simply via correspondence) to veto the Information Commissioner's decision as a collective decision of the Government
- It does so in the form of an Order in Council which must be published appropriately and laid before both Houses of Parliament (and devolved Assembly as appropriate), as well as being provided to the requester and Information Commissioner
- It provides sufficient time in both Houses for an adjournment debate on the Order in Council, but without a vote to endorse or negate the Order
- Any such veto may be challenged in the courts through judicial review by the requester and the Information Commissioner
- The government will pay the full costs of the requester who exercises their right to bring the judicial review action, regardless of whether it wins or loses the case
- If the government loses the judicial review and appeals to a higher court it shall continue to fund the requester's participation in these proceedings, until all appeals and proceedings are exhausted
- The government will also pay the full costs of the Information Commissioner's participation in the legal proceedings, in addition to any other funds voted by Parliament for the operation of that office
- If the Court decides to quash the use of the veto, but nevertheless has concerns about the merits decision of the Information Commissioner, it may remit the case to the Information Tribunal and the Government shall not be permitted to exercise a fresh veto following the outcome of the Tribunal's consideration of the matter, but it may appeal the Tribunal's decision on a point of law, as is presently the case
- If the relevant Minister does not veto the decision of the Information Commissioner, either the requester or the Minister may appeal the decision on its merits to the Information Tribunal, and on points of law to the Upper Tribunal, Court of Appeal and so on, as is presently the case
- No veto may be exercised over the decision of any Tribunal or Court.

Funding the requester and/or the Information Commissioner to bring a judicial review of the veto is an essential component of this model, as it ensures the Government knows that judicial scrutiny of its arguments for exercising the veto is almost certainly guaranteed. A government that is confident it is on strong ground to exercise the veto should not shy away from having its reasons scrutinised by the courts, and the principle of 'equality of arms' implied by Article 6 of the European Convention on Human Rights means that the requester should be able to challenge the use of the veto on equal terms to those seeking to defend its use.

The outcomes of such a model are unclear. On the one hand, governments would still be able to veto the decisions of the Information Commissioner, and this model would incentivise earlier use of the veto, rather than appealing decisions to the Information Tribunal. This would have a deleterious effect both on requesters' rights, and on the production of jurisprudence from the Information Tribunal (and superior courts) that is of value both to requesters and public authorities. On the other hand, the experience of New Zealand suggests

that governments find the political cost of having their use of the veto scrutinised by the courts at their own expense is too high. It is uncertain whether this would be the case in the United Kingdom.

As a whole, I recommend that the Commission carefully scrutinise sections 32, 32A, 32B and 32C of the OIA, as these set out the mechanism for the veto in New Zealand.

In concluding, I should stress that I am opposed to the existence of a veto power in the FOI Act, and note that an eminent jurist and former Prime Minister of New Zealand, Sir Geoffrey Palmer, similarly believes that the veto power in the Official Information Act should be removed.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

I have outlined a potential model for appeals in response to Question 4 above, should the Commission recommend retention of the veto.

Generally speaking, I think the appeals and enforcement system in the FOI Act is sound. However there are some areas where it could be strengthened and streamlined.

The first is that the section 45 Code of Practice should be amended to get rid of internal review by agencies of their own decisions. While the statistics in Annex A of the *Call for Evidence* show that agencies vary their decision at internal review in 21 per cent of cases, this means that for the other 79 per cent of cases, it has been a waste of time for the requester and arguably a waste of public money (and staff time) for the public authority. This suggests that while internal review may offer benefits to those public authorities whose initial decision making on requests is of questionable quality but whose senior management is objective enough to admit when the agency has got something wrong, they should be incentivised to make a higher quality decision in the first place. Without reviewing a breakdown of the statistics, it is also not clear whether the decisions to vary a decision at internal review are distributed amongst all agencies, or simply the practice of a small subset of them. In any event, in a time of continuing pressure on the budgets of government departments and all other public authorities, I suggest it would be more economical to save the cost of internal review by agencies and divert a considerable portion of the savings to funding the Information Commissioner's FOI work, since removal of internal review will also increase the number of FOI complaints he receives.

Second, and also in relation to delays and increased costs, the ability of public authorities to extend the time for responding to requests in order to consider the balance of public interests should be scrapped altogether. Public authorities in New Zealand must make a decision on a request "as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received", although they may extend this if they need to consult interested parties, or 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 public authority. Such extensions are reviewable on reasonableness grounds by the Ombudsman. There is no extension of the time to make a decision and respond to the requester to enable a public authority to consider where the balance of public interests lies.

Third, the failure of a public authority to respond to a request within the permitted time (which should be amended to match the period in New Zealand outlined above) should be a deemed refusal of the request, making it a strict liability issue enabling the requester to immediately complain to the Information Commissioner. This has been the case in section 28(4) of the OIA since at least 1987, and was strengthened in 2015 to make clear that the failure of a public authority to respond to a request “as soon as reasonably practicable” was also a refusal of a request, meaning that the 20 working day outside limit was not the *de facto* requirement on agencies.

Fourth, there needs to be a provision for significant financial penalty for the head of any public authority where the Information Commissioner establishes that there is a pattern of delayed responses to requests for information, either by the public, or in the course of his investigation and review of the authority’s decision. While the decision to initiate a prosecution should be in the hands of the Information Commissioner, a member of the public should be able to take one of two courses of action if they are concerned about a decision of the Commissioner not to initiate a prosecution of an authority, or failure to even make a decision on the issue: make a complaint to the Parliamentary Ombudsman; or seek judicial review. Experience suggests that the timely response to FOI requests needs to be suitably incentivised, and not just with the possibility of a Practice Recommendation under section 47 of the Act or ‘naming and shaming’ in a report by the Commissioner and potential invitation to appear before a Select Committee. Such a provision would strongly encourage agencies to make the supply-side improvements to systems and processes to ensure that complying with people’s rights under the FOI Act are a priority. It is highly likely that an agency which does this will gain additional benefits for its other work from the improved information management systems required.

Fifth, and inherent in the previous suggestion, the FOI Act must be amended to require the collation and statistics that have been collected by the Ministry of Justice for the last 10 years. The statistics have proven themselves valuable time and time again in debates about the operation of the FOI Act, and the then government was mistaken in refusing to accept an amendment during the passage of the Bill to require statistics to be collected. It is simply daft in the second decade of the 21st century for there not to be a requirement to collect and collate data on the operation of a statute that provides the public with rights and has such a profound effect on the operation of public authorities. Indeed the Ministry of Justice has even recommended to local authorities that they also collect data about FOI requests in accordance with the same model. The Information Commissioner should not be solely reliant on insights derived from complaints made to him to identify where there are problems in the operation of the Act, and rigorous data collection is the basis of good business intelligence: it is easier to manage what you measure. Furthermore, the requirement to collect the statistics should be extended from central government to all public authorities, and an obligation should be placed on the Information Commissioner to create and maintain an electronic system for collation and publication of the data. Public authorities should be placed under a statutory duty to input the data they have collected into the Commissioner’s system. I am particularly concerned about this, not just because I developed the model that has been in use for the last 11 years, but because as a policy measure with no statutory underpinning, government could stop collecting the data at any point. Indeed the recent shift of responsibility for the FOI Act from the Ministry of Justice to the Cabinet Office fills me with a certain amount of foreboding on this point, given the latter’s poor record of publishing the datasets the Government sets such store in.

Sixth, the offence in section 77 needs to be punished with a much more significant penalty and the requirement for proceedings to be brought within six months of the offence occurring needs to be removed, since investigation of any FOI complaint where this offence may be a factor is highly likely to take more than six months. At present therefore, the offence has little or no deterrent effect.

Finally, the Act needs to be amended to better guarantee the independence and adequate funding of the Information Commissioner. In New Zealand the Ombudsman is appointed by the Governor-General on the recommendation of Parliament. The whole House votes on a motion put to it following a recommendation made by the Officers of Parliament select committee, which conducts the appointments process (usually with the assistance of a contracted recruitment consultant). Such recommendations are usually unanimous and all-Party. Other Officers of Parliament are the Controller and Auditor-General and the Parliamentary Commissioner for the Environment. It is past time the UK adopted a similar approach. Similarly, the Officers of Parliament Committee decides the funding for the Ombudsman's office, with the Treasury providing evidence to assist the committee with its deliberations. The Speaker of the House is the Minister for Officers of Parliament in terms of the Budget. However, the operation of the Ombudsman's office is most often scrutinised by the Government Administration Committee, which is roughly analogous to the Public Administration and Constitutional Affairs Committee in the UK. A regulator starved of the funds to do its work is a chimera of a redress body as far as the public is concerned, reducing the rights afforded to them in the Act to ones that exist on paper only, and not in practice. The Information Commissioner's office should not be subject either to the political temptations to constrain its work that are available if it is funded as an executive NDPB by a government department, or to that parent department's negotiating ability with the Treasury during the budget round.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FoI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

'Yes' is the answer to the first question above. Authorities are the agents of the public, and if they are inefficient agents they should strive to improve the efficiency with which they discharge their responsibilities under the Act. The remainder of the questions above betray a mind-set which considers that the problems are all on the demand-side of the equation, and that there is nothing that can be done on the supply-side to reduce the work and costs required by responding to people exercising their legal right to know. Besides this, the judgment in *Dransfield* provides authorities with adequate scope to refuse vexatious requests, and the 'appropriate limit' provides authorities with a much easier basis to refuse requests on cost grounds than is the case in New Zealand. There an agency may refuse a request on grounds of 'substantial collation and research' (section 18(f) of the OIA), but this may be investigated by the Ombudsman, who is unlikely to have much sympathy for agencies whose problems stem from poor information management. The OIA charging rates outlined in the *Call for Evidence* are accurate, but infrequently applied; a refusal under section 18(f) is more likely in the case of a broadly defined request, or communication with the requester to ascertain what information they really want and then to narrow the scope of the request that

will be responded to. The Treasury's response to a request for the risk registers it holds (mentioned in response to Question 3 above) is a good example of this.

I have previously drawn the Commission's attention to the need for authorities' to improve through investment in better information management systems and practices. Authorities also need to ensure they are properly training their staff on how to comply with the spirit as well as the letter of the Act, and even more importantly ensure that there is a pro-disclosure culture in the organisation. Civil servants have some of the most sensitive hearing in the world, and if they pick up messages from senior managers or politicians that delays and non-disclosure are acceptable or encouraged, this is what will result. This inevitably leads to more complaints to the Information Commissioner (and internal review), which inevitably drives up costs to the agency and ultimately the public. Being more open is cheaper than being averse to it.

However, there is one final thing that has not been mentioned yet, and that is publication schemes. This is a high level mechanism for improving the supply-side of the operation of the Act and the UK led the world in design and incorporation of this idea in its FOI legislation. Sadly, their implementation has been largely botched, and successive Information Commissioners have vastly underutilised the tools provided to them in the Act to ratchet up the level of proactive disclosure over time. When the then Government decided in November 2001 not to implement the right to make requests until January 2005, it also decided to phase in the publication scheme obligations in stages. Departments that piloted publication schemes genuinely innovated, with DFID going so far as to make available the minutes and papers of its management board, which enabled those with an interest in the UK's overseas aid work to see how the Department itself was reviewing the effectiveness of its programmes and securing value for money. Being proactively open is cheaper than responding to requests for information and the work to do this should be incentivising authorities to include far more information in their publication schemes, and make such information easily findable on their websites. Other examples from New Zealand included earlier in this submission show that even in a country with a 30 year old FOI law that makes almost no provision for proactive publication (besides a 'Directory of Official Information' that should include a listing of all agencies' internal guidance for officials), authorities have responded to the work generated by responding to FOI requests by seeking to avoid them through proactive disclosure of information.

No fee is chargeable for making a request for information under the OIA, and it is highly unlikely a proposal to introduce one would ever succeed. Agencies and Ministers recognise that they hold information on behalf of the public – it is their information and they should not have to pay to request it. In the UK, unless fees were set at an offensively high level, the cost of collection and processing them is likely to exceed the fee paid, meaning that a fee simply becomes a means to deter to people seeking information from those employed or elected to serve them. Any attempt to only charge some types of requesters for making requests – whether it be companies or those working for the media – would simply incentivise behaviour to game the process by making requests via proxies.



Cabinet Office

CO Notice (09) 5

Notice

7 August 2009

Intended for

- All Ministers
- All Chief Executives
- All Senior Private Secretaries
- All Private Secretaries
- All officials involved with preparing and/or processing Cabinet papers
- Office of the Ombudsmen

Publishing Cabinet material on the web: approval process and publication requirements

Summary

- 1 A Minister may decide that it is appropriate for Cabinet material to be published online, either proactively or following a request for the information made under the [Official Information Act 1982](#).
- 2 The Cabinet Manual (at [paragraph 8.4](#)) provides guidance about the proactive release of Cabinet material. This notice sets out in further detail the processes and responsibilities that follow a Minister's decision to publish Cabinet material on the web. It aims to support departments and staff in Ministers' offices to publish Cabinet material online consistently and effectively so that it is easy to find. The notice covers:
 - the approval process, including roles and responsibilities;
 - consideration of principles of the Official Information Act 1982 and other relevant considerations;
 - content and presentation requirements; and
 - quality assurance.
- 3 "Cabinet material" means submissions that have been considered by Cabinet or a Cabinet committee, and Cabinet and Cabinet committee minutes. "Publisher" means the person in a department or a Minister's office who is responsible for administering the publication of the Cabinet material on the web.
- 4 The notice relates only to Cabinet material of the current administration. The process for publicly releasing Cabinet material of a previous administration is set out in [paragraphs 8.83 and 8.84](#) of the Cabinet Manual.

Approval to publish Cabinet material

- 5 Cabinet material may be published on the web only if the relevant portfolio Ministers(s) has approved the release of the material in that way. The publisher is responsible for obtaining the approval or for checking that approval has been obtained.
- 6 Approval can be obtained by:
- the publisher (ie a Minister's office or department) seeking the portfolio Minister's approval to publish a Cabinet paper/minute online;
 - the portfolio Minister directing officials to publish a Cabinet paper/minute online; or
 - the Cabinet minute noting that the portfolio Minister will publish the information on the web.
- 7 Before approving publication, the Minister should consider:
- 7.1 the application of the principles in the [Official Information Act 1982](#), the [Privacy Act 1993](#), and the [Security in the Government Sector](#) manual to the information;
- 7.2 whether the document contains any information that would have been withheld if the information had been requested under the Official Information Act 1982;
- 7.3 whether the document contains any information that must be withheld under the terms of any other legislation; and
- 7.4 whether, in the circumstances, publication on the web is the best means of public release.
- 8 If a Minister decides before the paper is considered by a Cabinet committee or by Cabinet that publication will be appropriate, the paper should contain a recommendation noting that intention:
- note** that the Minister intends to publish this paper and related Cabinet decisions online, subject to consideration of any deletions that would be justified if the information had been requested under the Official Information Act 1982.

Content and presentation

- 9 It is the publisher's responsibility to ensure that only the final versions of Cabinet material are published on the web.
- Papers: the final version of a paper is that signed and dated by the Minister and considered by a Cabinet committee or Cabinet.
 - Minutes: the final version of a minute is that issued by the Cabinet Office following a Cabinet or Cabinet committee meeting.
- 10 Cabinet committee minutes should not be published, however, until they have been confirmed by Cabinet.
- 11 Depending on their administrative arrangements with departments, Ministers' offices may choose to review the finalised content before publication on the web.

- 12 Once Cabinet material is published on the web, the storage and handling requirements belonging to its original security classification (specified in the [Security in the Government Sector](#) manual and at <http://www.security.govt.nz/sigs/index.html>) may no longer apply. Unless some information has been withheld from the online version, departments may need to think about reviewing the security requirements of the original version stored on their document management systems.
- 13 Where possible, papers and relevant minutes should be published together so that readers have context for the decisions made by Cabinet. The Cabinet Office is able to provide electronic copies of minutes on request.
- 14 Where Cabinet material has been published on the web following a request under the Official Information Act, any deletions should be flagged in the body of the text at each deletion point. It is good practice to state the reasons for deleting information.
- 15 Do **not** publish:
 - Cabinet Office summaries, which do not provide information additional to that contained in Cabinet papers and/or minutes;
 - the distribution lists on Cabinet and Cabinet committee minutes, since their function is purely administrative for the distribution of hard copy documents;
 - the names and signatures of Cabinet Office committee secretaries; or
 - CAB100 consultation forms accompanying Cabinet papers.
- 16 Cabinet material published on the web should conform with the current New Zealand Government Web Standards 2.0. At the time of writing this notice, this is version 2.0 (dated March 2009) and is available at <http://webstandards.govt.nz/new-zealand-government-web-standards-2/>

Quality assurance

- 17 It is the publisher's responsibility to ensure the quality and accuracy of Cabinet material made available on the web.
- 18 The following points should be included in any quality assurance checklists used by publishers of Cabinet material:
 - the Minister has approved the item for publication
 - it is the final signed version being published
 - if it is a Cabinet committee minute, that it has been confirmed by Cabinet
 - the title and other reference information (eg shoulder number) is accurate
 - the date on which the paper was signed has been included
 - any distribution lists have been removed
 - the Cabinet Office summary (including its distribution list) has been removed
 - the signatures of the Secretary of Cabinet and/or of Cabinet committee secretaries have been removed
 - the related CAB100 consultation form has been removed
 - all related Cabinet material (paper, minute) is included

- 19 As a protection against misuse of Cabinet material, a Crown Copyright statement should be included with the content of each document published on the web.
- 20 A [diagram and checklist](#) for the approval and quality assurance process summarises requirements.

Rebecca Kitteridge
Secretary of the Cabinet

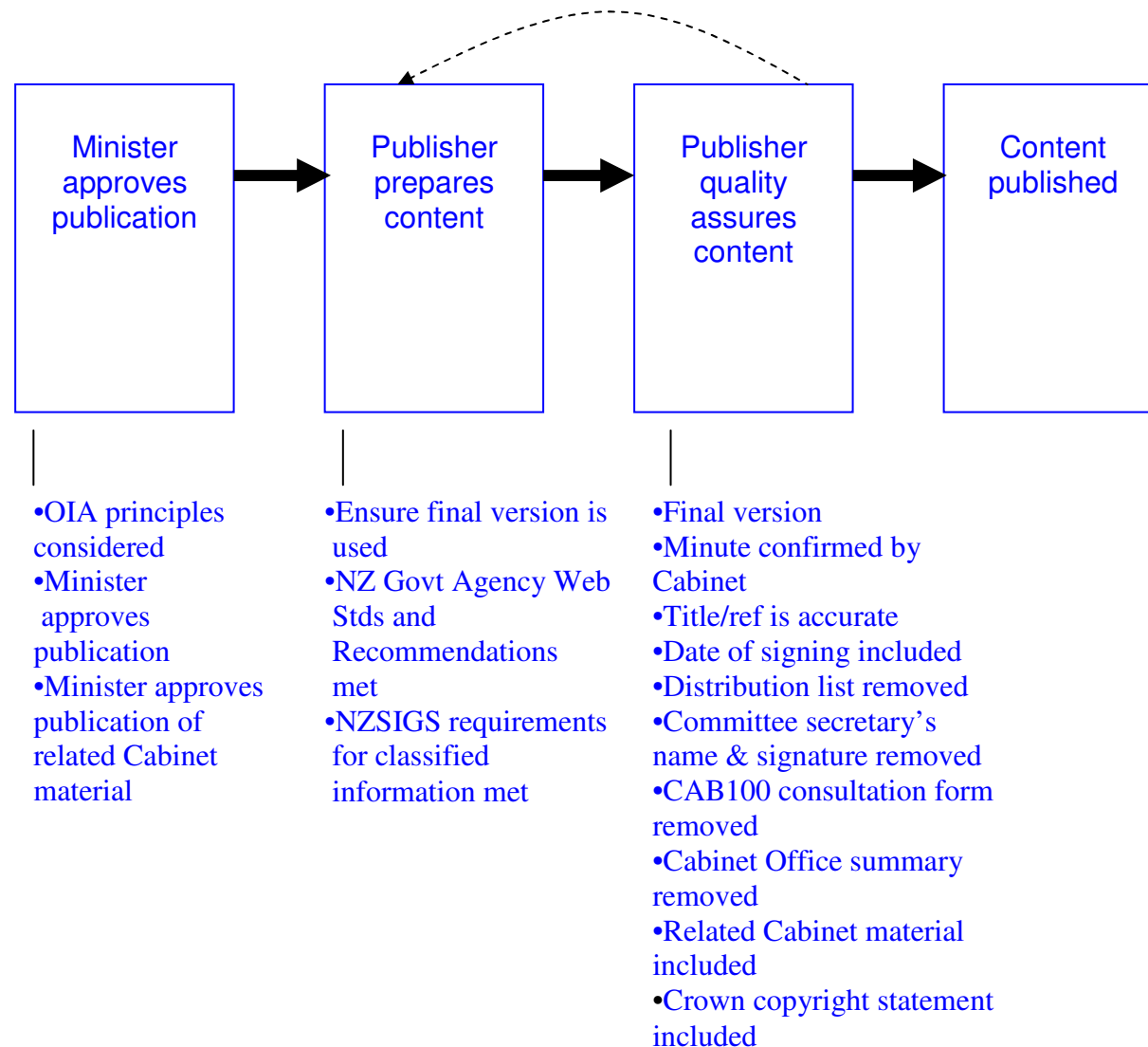
Enquiries:

Michelle Edgerley (for advice on publishing Cabinet material on the web)
michelle.edgerley@dpmc.govt.nz
Ph: 817-9735

Margaret Stacey (for electronic copies of Cabinet and Cabinet Committee minutes)
margaret.stacey@dpmc.govt.nz
Ph: 817-9758

Sean Kinsler (for advice on requests for Cabinet material made under the Official Information Act)
sean.kinsler@dpmc.govt.nz
Ph: 817-9741

Checklist for publishing Cabinet material on the web





Cabinet Office

CO Notice (15) 3

Notice

19 November 2015

Intended for

All Chief Executives
All Senior Private Secretaries
All Private Secretaries
All officials involved with preparing and/or processing Cabinet papers

Proactive Release of Cabinet Material: Updated Requirements

Key points

- Cabinet papers and minutes may be released proactively and published online with the approval of the relevant portfolio Minister.
- It should be indicated in Cabinet papers whether or not the Minister intends to proactively release the paper.
- The Minister's office or agency proactively releasing the Cabinet material is responsible for ensuring the quality and accuracy of the material that is released and published online.

Introduction

- 1 This notice reissues and updates the requirements and procedures for the proactive release of Cabinet material, taking into account the implementation of CabNet. It replaces the previous notice on this subject, CO Notice (09) 5.
- 2 General guidance about the proactive release of Cabinet material is provided in the Cabinet Manual ([paragraph 8.4](#)). This notice sets out further detail on the processes and responsibilities that follow a Minister's decision to proactively release Cabinet material and for it to be published online.
- 3 "Cabinet material" means papers that have been considered by Cabinet or a Cabinet committee and the associated minutes. "Publisher" means the person in a department or a Minister's office who is responsible for administering the proactive release and publication of the Cabinet material online.
- 4 The notice relates only to Cabinet material of the current administration. The process for publicly releasing Cabinet material of a previous administration is set out in [paragraphs 8.83 and 8.84](#) of the Cabinet Manual.

Ministerial approval required for proactive release

- 5 Cabinet material may be released proactively, usually through publication online. Ministers have authority to approve the proactive release of Cabinet material within their own portfolios.

- 6 A Minister may also decide that it is appropriate for Cabinet material to be proactively released and published online following a request for the information made under the Official Information Act 1982.
- 7 The following matters should be considered before Ministers give approval to proactively release and publish Cabinet material online:
- 7.1 the application of the principles in the Official Information Act 1982, the Privacy Act 1993, and the Protective Security Requirements <https://protectivesecurity.govt.nz/> to the information;
 - 7.2 whether the document contains any information that would have been withheld if the information had been requested under the Official Information Act;
 - 7.3 whether the document contains any information that must be withheld under the terms of any other legislation; and
 - 7.4 whether, in the circumstances, publication on the web is the best means of public release.

New requirement to indicate whether a paper is to be proactively released

- 8 Papers for Cabinet and committees (except for papers on Ministerial overseas travel, appointments and legislation (draft Bills and regulations)) should state in the publicity or communications section whether or not the Minister proposes to release the paper proactively.
- 9 A specific recommendation on proactive release does not need to be included in the recommendations of the paper.

Content and presentation

- 10 It is the publisher's responsibility to ensure that only the final versions of Cabinet material are proactively released and published online:
- Papers: the final version of a paper is the version approved by the Minister for lodgement on CabNet and which has been considered by a Cabinet committee or Cabinet;
 - Minutes: the final version of a minute is the version published by the Cabinet Office on CabNet following a Cabinet or Cabinet committee meeting.
- 11 Cabinet committee minutes should not be released until they have been confirmed by Cabinet.
- 12 Depending on their administrative arrangements with departments, Ministers' offices may choose to review the finalised content before publication on the web.
- 13 Where possible, papers and relevant minutes should be proactively released together so that readers have context for the decisions made by Cabinet. Electronic copies can be downloaded from CabNet for the purposes of proactive release. The watermark on these copies should be retained. The Cabinet Office can provide electronic copies of older minutes that are not on CabNet on request.

- 14 Where Cabinet material has been published on the web following a request under the Official Information Act, any deletions should be flagged in the body of the text at each deletion point. It is good practice to state the reasons for deleting information on the published document. Under the Official Information Act, it is a requirement to provide reasons for refusing a request.
- 15 There is no need to release the Cabinet Office summary of the paper, which exists as a separate document on CabNet.
- 16 Cabinet material published on the web should conform to the current Web Standards.

Review of security classification and availability on CabNet

- 17 Once Cabinet material is published online, the security classification of the original document may no longer apply. Unless some information has been withheld from the version proactively released, departments should review the security classification of the original version stored on their document management systems.
- 18 The proactive release of Cabinet material may mean that access to the material can also be made available in CabNet to all CabNet users. Contact the Cabinet Office Records Manager to arrange for the access to the paper to be updated accordingly (see below for contact details).

Quality assurance

- 19 It is the publisher's responsibility to ensure the quality and accuracy of Cabinet material that is proactively released and published online.
- 20 The following points should be checked:
 - the Minister has approved the material for proactive release and publication online;
 - it is the correct and final version of the paper approved by the Minister for lodgement on CabNet that is being published, subject to any redaction that may be necessary;
 - the Cabinet committee minute has been confirmed by Cabinet;
 - the title and other reference information is accurate;
 - related Cabinet material (paper and minute) is included.
- 21 As a protection against misuse of Cabinet material, a Crown Copyright statement should be included with the content of each document published on the web.

Further advice

- 22 The Cabinet Office is available to provide further advice on the proactive release of Cabinet material and publishing online. Contact details are set out below.

Michael Webster
Secretary of the Cabinet

IN CONFIDENCE

Enquiries:

Loma Pedro, Records Manager, (for advice on the proactive release of Cabinet material and requests for electronic copies of older Cabinet and Cabinet Committee minutes not on CabNet)

loma.pedro@dpmc.govt.nz

Ph: 817-9758

Anna Fleming, Legal and Constitutional Advisor, (for advice on requests for Cabinet material made under the Official Information Act and for requests on Cabinet material of previous administrations)

anna.fleming@dpmc.govt.nz

Ph: 817-9256



Cabinet External Relations and Defence Committee

ERD Min (13) 11/3

Copy No: 21

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Peace Support Operations Review

Portfolios: Defence / Foreign Affairs / Police

On 23 October 2013, the Cabinet External Relations and Defence Committee:

- 1 **noted** that, as at 1 October 2013, there were 77 New Zealand Defence Force (NZDF) personnel and 29 New Zealand Police deployed on international peace support operations;
- 2 **noted** that this number has fallen from 335 NZDF and 30 New Zealand Police personnel deployed in July 2009 and, with New Zealand's recent drawdowns from Afghanistan, Timor Leste and Solomon Islands, New Zealand now has the smallest number of personnel deployed to international peace support operations in almost 20 years, with renewed capacity to contribute to discretionary international peace support operations;
- 3 **noted** that New Zealand has a strong history of providing trusted, capable, and professional force elements to a variety of types of peace support missions, and that New Zealand retains a strong strategic rationale for continued involvement in these operations;
- 4 **agreed** that New Zealand's peace support priorities will continue to be focused on New Zealand's immediate region, and that discretionary peace support operations further afield should not affect New Zealand's capacity to respond to an emerging crisis in the South Pacific/Australia;
- 5 **noted** that the mandates and conditions in peace support operations continue to grow more complex, highlighting the need to continue to place high importance on managing risk to New Zealand personnel;
- 6 **agreed** to the refreshed guidelines set out in Annex 1 to the paper under ERD (13) 34, against which officials would frame advice to Ministers on potential New Zealand contributions to particular peace support operations;
- 7 **agreed** that New Zealand adopt an active approach to considering contributions to international peace support operations, with officials seeking potential opportunities that best fit New Zealand's national interest and strategic considerations for further consideration by Cabinet;

- 8 **noted** that the decision in paragraph 7 above does not commit the government to any peace support operations, and that new peace support operations would still need to be considered by Cabinet on a case by case basis;
- 9 **noted** that any future decision by Cabinet to make significant contributions to peace support operations may require additional funding.

Reference: ERD (13) 34

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

Chair,
External Relations and Defence Committee

Peace Support Operations Review

Proposal

This paper:

- a. seeks Cabinet agreement to refreshed guidelines to be used when considering New Zealand contributions to discretionary peace support operations;¹
- b. outlines the strategic rationale for New Zealand's continued participation in discretionary peace support operations; and
- c. seeks Cabinet agreement to one of three options for the scale of New Zealand's involvement in future discretionary peace support activities.

Executive Summary

Following the drawdown over the last 12 months of New Zealand's three substantive long-term peace support deployments from Afghanistan, Solomon Islands and Timor Leste, there is now an opportunity to take stock of New Zealand's commitments to international peace support operations.

2. This paper suggests some refreshed guidelines to assist in determining what peace support operations New Zealand might consider in the future, bearing in mind that separate Cabinet authorisation will be required before any particular commitments are made. These guidelines include a more specific consideration of direct foreign policy benefits, New Zealand's wider international interests and objectives, the mandate and nature of the proposed operation (including whether it is led by the UN or is a 'likeminded coalition'), the operational risks to New Zealand personnel deployed (and strategies to manage those risks), and the implications for the New Zealand Defence Force (NZDF) and other contributing agencies.

3. New Zealand's primary peace support responsibilities remain in the South Pacific. There is an expectation that New Zealand would, along with Australia, play a leading role in responding to conflict and crisis in this region. Accordingly, the NZDF and other agencies must retain sufficient capacity for non-discretionary regional engagement in the South Pacific and domestic requirements. This paper therefore focuses on discretionary peace support deployments beyond our immediate region which would not degrade our capacity to deploy within our region.

¹ Peace support operations may include some or all of the following tasks: conflict prevention; peace-making; peace enforcement; peacekeeping; peace building and humanitarian operations. They are usually in support of UN Security Council-mandated objectives (even if the operation is not a UN-led 'blue helmeted' operation), usually involving both military and civilian (police, diplomatic, development) elements.

4. This paper also identifies options for Cabinet to consider on the overall scale of New Zealand's involvement in discretionary operations in the immediate future:

- a. *Option 1:* Not to consider any new discretionary peace support deployments at this time, declining all requests for contributions. Officials do not recommend this option due to the negative impact on New Zealand's foreign policy and other national interests, and the consequences for the NZDF's readiness and retention;
- b. *Option 2:* Maintaining the status quo 'wait and respond' approach, providing flexibility to respond to requests from the UN and other security partners and considering these requests against the proposed refreshed guidelines; or
- c. *Option 3:* A more active approach to seeking opportunities with the UN and others that best fit the proposed refreshed guidelines and New Zealand's strategic considerations.

5. This paper does not invite Cabinet to agree to any specific peace support deployments. Nor does it intend to limit the options in responding to peace support requests or pursuing other peace support opportunities. Under options 2 and 3 new peace support operations will still need to be considered by Cabinet on a case by case basis with robust analysis and recommendations provided.

Background

6. New Zealand has primarily contributed to peace support operations (PSOs) over the last fifty years through the deployment of NZDF and NZ Police personnel. Currently, however, NZDF deployment numbers are at their lowest level since the early 1990s as, since 1994, New Zealand has made continual significant contributions to international peace and security through large-scale operational commitments in Bosnia, Bougainville, Timor Leste, Solomon Islands and Afghanistan.

7. Following the withdrawal of the New Zealand Provincial Reconstruction Team (PRT) from Bamyan in April 2013, there are currently only 77 NZDF personnel and 29 NZ Police deployed abroad to 11 operations. This is compared to more than 300 NZDF and 128 NZ Police in 2009.² Of these 106 currently deployed, 15 are part of UN-led peace support missions, ranking New Zealand 92nd out of 116 in terms of UN troop contributing nations.

Comment

Refreshed Guidelines for the Assessment of Proposed New Zealand Contributions to Peace Support Operations

8. There is now a good opportunity to take stock of New Zealand's peace support policy settings. This paper outlines the strategic rationale for New Zealand's continued participation in discretionary PSOs and, in light of this rationale, proposes some refreshed guidelines for officials to consider when providing advice to Ministers on potential contributions to PSOs. The refreshed guidelines are set out in Annex 1, while the existing guidelines, last updated in 2009, are attached as Annex 2. The guidelines do not determine whether a deployment will be approved, or not, by Cabinet. They are simply to

² These numbers do not include NZDF personnel deployed aboard RNZN ships.

be used to frame the advice to Cabinet which would make its own decisions on any particular deployment.

9. The proposed refreshed guidelines place a stronger emphasis on foreign policy and national interest considerations. They also reflect that peace support missions are increasingly difficult, complex and costly, usually dealing with prolonged intra-state conflicts involving multiple actors. Accordingly, the refreshed guidelines draw greater attention to the nature (and leadership) of the particular mission and, given the high premium placed on the safety and security of New Zealand personnel deployed on operations, to operational risk and risk management strategies surrounding any proposed deployment.

Foreign policy/national interest considerations

10. The NZDF and other New Zealand agencies stand ready to deploy on substantive operations for a variety of reasons, particularly to respond to: a direct threat to New Zealand or Australia; a crisis in New Zealand's immediate region; or to benefit New Zealand's wider national and security interests through discretionary contributions to international PSOs.

11. New Zealand will continue to place priority on contributing to stability, capacity strengthening and economic development of the South Pacific. Peace support responses to crises in our immediate region are considered non-discretionary in nature. New Zealand's priority will always be to ensure that New Zealand agencies have the necessary capabilities and capacity to respond in a timely manner to developments in our region.

12. Many of New Zealand's closest neighbours in the South Pacific face chronic social, economic, environmental, and governance stresses meaning that the outlook for the South Pacific over the next 25 years is one of fragility. Three of New Zealand's largest peace support deployments in the last few decades have occurred in our immediate region in Timor Leste, Solomon Islands and Bougainville.

13. While New Zealand's deployments to Timor Leste and Solomon Islands have been substantially wound down over the last twelve months, we retain a residual obligation and interest in potentially providing military and police resources at short notice.

There are also other potential challenges to stability in the region which may emerge with relatively little warning in other Pacific jurisdictions, as the riots in Tonga in 2006 demonstrated, and which may require the rapid deployment of New Zealand personnel.

14. Contributing to PSOs around the globe has traditionally been viewed primarily through the lens of 'being a good international citizen' or demonstrating 'solidarity with traditional partners'. These reasons endure today, yet threats to New Zealand's national interests are now also more overtly global in nature. The increase in globally connected supply chains, the rise of non-state actors, international terrorism, porous national borders, and the diffusion of geo-strategic power all contribute to a complex and challenging security environment that can directly affect New Zealand's interests from afar. In this environment, conflicts outside our region now have a more direct relevance to our economic, trade and security interests and to the safety of New Zealanders abroad. A commitment to collective security efforts outside our region can, therefore, support New Zealand's national security interests.

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Our recent smaller contributions to South Sudan, Israel/Lebanon/Syria, Egypt, Korea and Iraq, have met a range of interests such as contributing to stability in regions of global strategic relevance and meeting historical commitments.

withhold
s6(a) [16. Maintaining New Zealand's security credentials is also relevant in the context of the campaign for election to the UN Security Council (UNSC) in 2015/16. This, however, is not a consideration for this paper, as the national security and foreign policy rationales for involvement in PSOs extend well beyond the immediate UNSC campaign.

17. With the above rationale for peace support deployments in mind, it is proposed that officials consider the following questions when formulating advice for Ministers on foreign policy/national interest considerations around potential PSOs:

a. *Would a contribution to the proposed peace support operation:*

- i. *represent a useful contribution to New Zealand's foreign policy goals? and/or*
- ii. *contribute to New Zealand's broader national or international strategic interests and objectives, such as:*
 - *enhancing security in a region of global strategic importance?*
 - *enhancing security in a region of strategic or economic interest to New Zealand (especially in the Asia-Pacific)?*
 - *responding to a significant global or regional security threat?*
 - *enhancing/maintaining our reputation as a contributor to collective international peace and security? or*
 - *enhancing/maintaining our multilateral or bilateral relationships particularly with key partners?*

Nature of the mission/mandate and New Zealand's possible contribution to it

18. New Zealand has historically been involved in a range of PSOs and we could expect future missions to cover the same types of deployments:

- Regional missions in response to regional threats (e.g. Timor Leste, RAMSI);
- UN-led 'blue helmeted' missions further afield (e.g. UN missions in South Sudan (UNMISS), Afghanistan (UNAMA), Israel, Syria and Lebanon (UNTSO)); and
- Like-minded coalitions, led by a major regional organisation or state (e.g. the NATO-led International Security Assistance Force (ISAF) mission in Afghanistan;

the US-led Combined Maritime Forces (CMF) in the Gulf of Aden/Indian Ocean, and the US-led Multinational Force and Observers (MFO) in the Sinai).

19. The different types of PSOs each bring their own benefits and risks. Concerns remain over the complex mandates and resourcing of some UN missions, as well as variability in terms of leadership, command and control, and the quality of some contributors. However, the UN remains the principal source of legal legitimacy for the use of force in international affairs and New Zealand has a long history of supporting UN missions. Coalition operations often have the advantage of joining with preferred partners with whom we have much experience in working alongside which, at times, offers more comfort in terms of the safety and security of personnel. For more discussion of involvement in the different types of PSOs see Annex 3.

20. New Zealand will continue to look for opportunities to work with close partners, such as Australia, the US, the UK and Canada in peace support initiatives. Australia, notably, is also drawing down from Afghanistan, Timor Leste and RAMSI. Where such opportunities do not exist, however, New Zealand could look to develop partnerships, where the security environment allows, and capitalise on long-standing defence relationships with regional partners.

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21. Contributions from the NZDF will continue to make up a large proportion of New Zealand's overall peace support contributions. However, the complex nature of modern PSOs and our own recent experience suggests that a whole-of-government approach is desirable. Where appropriate, operations involving a combination of military, police, diplomatic, policy and development expertise would provide the most effective outcomes, particularly in the 'post conflict reconstruction' phase of PSOs.

22. It is proposed that officials consider the following questions when formulating advice for Ministers on the nature of potential PSO contributions:

- a. *Is the proposed mission established in accordance with international law? Is there a clear mission mandate (both for the mission as a whole and for any contributing New Zealand elements)?*
- b. *To what extent is the mandate achievable and is there sufficient flexibility for responding to changing conditions?*
- c. *What would 'success' look like? Are there opportunities to review New Zealand's proposed contribution? What is New Zealand's exit strategy?*
- d. *Are any of New Zealand's traditional security partners contributing to the mission and/or is there an opportunity to build/enhance relationships with other partners?*
- e. *Has a whole of government approach been considered, including the potential contributions that civilian agencies such as Police, Foreign Affairs, Customs, Justice, Treasury, Corrections and others could make to the mission?*

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Operational Risk and Risk Management Strategies

23. New Zealand lives have been lost in both UN-led and UN-mandated missions. There is inherent risk in any offshore deployment, and these risks continue to form part of the calculation of when and under what circumstances to send New Zealanders into conflict or post-conflict situations.

24. The growing complexity and risk involved in some PSOs was evident in the recent security incidents involving NZDF personnel stationed in the Golan Heights as part of the United Nations Truce Supervision Organisation (UNTSO). A high premium is placed on the safety and security of New Zealand personnel deployed on PSOs and officials will continue to take all possible steps to manage the risks. The Minister of Foreign Affairs and the Minister of Defence have separately been provided with additional information regarding force protection and risk management strategies for current New Zealand PSOs.

25. New Zealand officials in New York have been instructed to pursue proactively arrangements which would improve the safety and security of our personnel. Increased engagement with the UN Secretariat, particularly the UN Department for Peacekeeping Operations (DPKO) and the UN Department of Field Support, who together coordinate UN peacekeeping operations in the field, will ensure New Zealand is better informed of UN activities regarding the safety and security of UN personnel in the field.

26. It is proposed that officials would consider the following questions when formulating advice for Ministers on the operational risk/risk management strategies of potential PSO contributions:

- a. *Has a threat assessment been conducted? What are the types of risks that have been identified?*
- b. *What strategies have been/could be put in place to manage the risks identified? (Risk management strategies will include consideration of factors such as force protection elements, in-extremis support, intelligence support and resourcing).*
- c. *What is the residual risk level to New Zealand personnel?*

Implications for the NZDF and other Contributing Agencies

27. Threats to security and stability in the South Pacific/Australia are nondiscretionary and will require some sort of New Zealand response. Deployments in our immediate region are likely to be undertaken in concert with Australia and other partners with New Zealand playing a leading role. The NZDF will therefore need to continue to retain the capacity to respond to a crisis in our immediate region and to be able to deploy to the region at short notice as set out in the NZDF Output Plan. Accordingly, before recommending any contribution to a discretionary PSO further afield, officials would need to ensure that the NZDF and other agencies can still meet this capacity requirement.

28. Regular deployments to PSOs play an important role in building experience, maintaining capabilities, operational effectiveness and interoperability of the NZDF and other agencies as well as assisting with the recruitment and retention of personnel particularly in the NZDF. These are all vital should the NZDF and other agencies be required to deploy in response to a direct threat to New Zealand or respond to a regional crisis.

29. NZ Police see continuing value in operating in offshore operations and recognise the high regard with which the 'NZ Police brand' is held internationally. However, NZ Police resourcing must be directed in the first instance at domestic responsibilities. The Commissioner of Police must balance domestic requirements with a desire to operationally deploy NZ Police members on peace support activities. The Commissioner is likely to favour deployments in the Asia-Pacific region and will likely only have the capacity to deploy small teams or individual officers. In crisis situations NZ Police would have surge capabilities of up to 20 people for short periods of time.

30. As with any peace support contribution, the financial implications of deployments will need to be considered when officials make recommendations to Ministers, particularly if a proposed deployment extends beyond existing NZDF, or other agency, baselines.

31. Officials will consider the following questions when formulating advice for Ministers on the implications for the NZDF and other contributing agencies to potential PSOs:

- a. *What implications would a proposed commitment have on the capacity of NZDF or other contributing agencies to fulfil other objectives and/or respond to threats in New Zealand's immediate region?*
- b. *Is there any additional professional, training, or capacity building benefit for contributing agencies?*
- c. *What are the financial implications of the proposed contribution, where will the funding come from and is it affordable/sustainable?*

Current deployments

32. Officials have reviewed existing New Zealand PSO deployments and consider that all fit within the proposed guidelines.³

Alternative Contributions to Peace Support Deployments

33. In addition to providing military/police personnel directly into PSOs, New Zealand has other capabilities/options available to support international peace support at less risk or cost, while still achieving some of New Zealand's peace support objectives. Policy engagement and capacity building are two good examples.

34. New Zealand contributes to broader peacekeeping objectives through engagement with the UN in the development of peacekeeping policies and practices. New Zealand is placing a higher priority on the issue of the safety and security of UN personnel, in particular, especially against the background of recent events. The UN would also welcome greater New Zealand policy engagement on peacekeeping issues in New York as New Zealand is often seen as having an objective, pragmatic approach to issues. Such policy engagement would provide New Zealand with an opportunity to add some real value to UN peacekeeping discussions and policy formation as well as ensuring that New Zealand keeps closely abreast of any actions taken by the UN regarding the safety and security of UN personnel in the field. Such engagement would also be valuable should New Zealand's membership bid for the UN Security Council be successful - much of whose business is focused on the establishment and monitoring of peacekeeping and peace support operations.

³ A brief summary of each current PSO is found in Annex 4.

35. Training other peace support contributors is an area where New Zealand expertise can make a particular difference to the professionalism and capabilities of peace support missions. The United States, in particular, has identified peace support capacity building as an area of future bilateral co-operation as an outcome of the 2012 Washington Declaration. Accordingly, officials intend to investigate opportunities to deliver training jointly to those regional partners looking to increase their capacity to contribute to PSOs.

Options for New Zealand's future engagement in Peace Support Operations

36. With the drawdown from New Zealand's three decade-long deployments, there is now also an opportunity to take stock of the overall scale of New Zealand's on-going involvement in discretionary operations.

Option 1: Do not consider any new deployments at this time, a period of hiatus (ultimately reducing New Zealand's peace support footprint).

37. Not to consider any new international deployments would reduce New Zealand's residual peace support commitments, putting at risk the foreign policy and national interest gains from contributing to PSOs outlined in paragraphs 10-17. The operational and training benefits derived by the NZDF from engagement in PSOs would also be significantly affected should Ministers choose this option, impacting on NZDF's readiness to respond to a peace support crisis in our immediate region. A lack of deployments may also negatively affect NZDF retention. Officials do not recommend this option.

Option 2: Refreshed criteria with a status quo, wait and respond approach, alongside an additional policy/capacity building focus

38. Should Cabinet agree, officials would use the refreshed criteria proposed in the paper to advise Ministers in responding to requests for contributions to PSOs from the UN and other security partners. Separately New Zealand officials would continue to undertake the complementary initiatives discussed in paragraphs 33-35.

39. This approach provides the Government with flexibility to respond to requests as they come in and to consider these against the proposed refreshed guidelines. This option would also ensure New Zealand is in a position to retain the benefits of regular deployments and meet some of the foreign policy/national interest objectives identified in this paper.

Option 3: A more active approach to peace support contributions using the refreshed criteria.

40. Rather than waiting for the opportunity to respond to a request for a peace support contribution, New Zealand could take a more active and strategic approach to identifying opportunities.

42. A clear advantage with this option is that it would likely mean that New Zealand could identify, and if Cabinet subsequently agreed, contribute to those PSOs that best fit New Zealand interests, international priorities and available capabilities, rather than being limited to responding to requests for contributions to specific missions.

Consultation

43. This paper was jointly prepared by the Ministry of Foreign Affairs and Trade, Ministry of Defence, New Zealand Defence Force and New Zealand Police. Treasury was consulted. It was considered by the Officials Committee for Domestic and External Security Coordination (ODESC). The Department of the Prime Minister and Cabinet was informed.

Financial implications

44. There are no financial implications arising from the recommendations in this paper. Ministers should note, however, that in adopting either option 2 or 3 as a framework for New Zealand's future engagement in PSOs any future decision by Cabinet to make any significant contributions to PSOs may require additional funding.

Human rights and Legislative Implications

45. This paper has no inconsistencies with the Human Rights Act 1993. There are no legislative implications or regulatory impacts arising from the recommendations in this paper.

Regulatory impact analysis

46. A regulatory impact analysis is not required.

Publicity

47. No publicity is planned, although media and close security partners have already expressed an interest in the outcomes of this review.

Recommendations

48. The Minister of Foreign Affairs, Minister of Defence and Minister of Police recommend that the Committee:

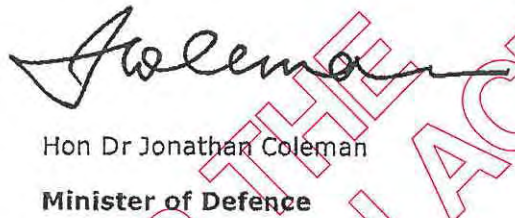
1. **note** that, as at 1 October 2013, there were 77 New Zealand Defence Force (NZDF) personnel and 29 New Zealand Police deployed on international peace support operations;
2. **note** that this number has fallen from 335 NZDF and 30 NZ Police personnel deployed in July 2009 and, with New Zealand's recent drawdowns from Afghanistan, Timor Leste and Solomon Islands, New Zealand now has the smallest number of personnel deployed to international peace support operations in almost 20 years, with renewed capacity to contribute to discretionary international peace support operations;
3. **note** that New Zealand has a strong history of providing trusted, capable, and professional force elements to a variety of types of peace support missions, and

that New Zealand retains a strong strategic rationale for continued involvement in these operations;

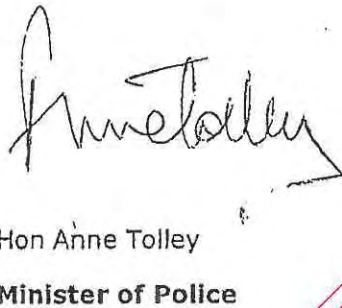
4. **agree** that New Zealand's peace support priorities will continue to be focused on New Zealand's immediate region and that discretionary peace support operations further afield should not affect New Zealand's capacity to respond to an emerging crisis in the South Pacific/Australia;
5. **note** that the mandates and conditions in peace support operations continue to grow more complex, highlighting the need to continue to place high importance on managing risk to New Zealand personnel;
6. **agree** to the refreshed guidelines set out in Annex 1, against which officials would frame advice to Ministers on potential New Zealand contributions to particular peace support operations;
7. **agree** to one of the following options for New Zealand's global peace support posture:
 - a. *Option 1:* Not to consider any new discretionary international deployments, reducing New Zealand's residual peace support commitments (this option is not recommended by officials due to the negative impact it would have on New Zealand's foreign policy and other national interests);
 - b. *Option 2:* A status quo, "wait and respond" approach providing flexibility to respond to requests, while maintaining complementary contributions to wider peace support activities, such as policy engagement and capacity building; or
 - c. *Option 3:* An active approach to considering contributions to international peace support operations, with officials seeking potential opportunities that best fit New Zealand's national interest and strategic considerations for further consideration by Cabinet;
8. **note** that, by agreeing to the recommendations in this paper, Cabinet is not committing to any peace support operations. New peace support operations would still need to be considered by Cabinet on a case by case basis; and
9. **note** that any future decision by Cabinet to make significant contributions to peace support operations may require additional funding.



Hon Murray McCully
Minister of Foreign Affairs



Hon Dr Jonathan Coleman
Minister of Defence



Hon Anne Tolley
Minister of Police

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Annex 1

Refreshed Guidelines for the Assessment of Proposed New Zealand Contributions to Peace Support Operations

The following provides proposed guidelines for officials to use when formulating advice to Ministers about possible New Zealand contributions to discretionary peace support operations.

It is recognised that Ministers will continue to assess potential New Zealand contributions to peace support operations on merit, recognising the need to manage strategic considerations, the nature of the mission, and the implications for government agencies.

Foreign policy/national interest considerations

1. Would a contribution to the proposed peace support operation:
 - i. represent a useful contribution to New Zealand's foreign policy goals? and/or
 - ii. contribute to New Zealand's broader national or international strategic interests and objectives, such as:
 - enhancing security in a region of global strategic importance?
 - enhancing security in a region of strategic or economic interest to New Zealand (especially in the Asia-Pacific)?
 - responding to a significant global or regional security threat?
 - enhancing/maintaining our reputation as a contributor to collective international peace and security? or
 - enhancing/maintaining our multilateral or bilateral relationships, particularly with key partners?

Nature of the mission/mandate and New Zealand's possible contribution to it

2. Is the proposed mission established in accordance with international law? Is there a clear mission mandate (both for the mission as a whole and for any contributing New Zealand elements)?
3. To what extent is the mandate achievable and is there sufficient flexibility for responding to changing conditions?
4. What would 'success' look like? Are there opportunities to review New Zealand's proposed contribution? What is New Zealand's exit strategy?
5. Are any of New Zealand's traditional security partners contributing to the mission and/or is there an opportunity to build/enhance relationships with other key regional partners?
6. Has a whole of government approach been considered, including the potential contributions that civilian agencies such as Police, Foreign Affairs, Customs, Justice,

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Treasury, Corrections and others [

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Operational Risk and Risk Management Strategies

7. Has a threat assessment been conducted? What are the types of risks that have been identified?
8. What strategies have been/could be put in place to manage the risks identified? (Risk management strategies will include consideration of factors such as force protection elements, in-extremis support and resourcing)?
9. What is the residual risk level to New Zealand personnel?

Implications for the NZDF and other Contributing Agencies

10. What implications would a proposed commitment have on the capacity of NZDF or other contributing agencies to fulfil other objectives and/or respond to threats in New Zealand's more immediate region?
11. Is there any additional professional, training or capacity building benefit for contributing agencies?
12. What are the financial implications of the proposed contribution, where will the funding come from and is it affordable/sustainable?

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Annex 2

Current Guidelines for the Assessment of Proposed New Zealand Contributions to Peace Support Operations: Last updated 2009 [CAB (09) 9/9 refers]

The following provides guidelines to help ensure fully considered and consistent decisions are made regarding New Zealand's contributions to peace support operations. Each request for a contribution should be considered on its own merit, recognising that there are difficult balances to be achieved between the strategic considerations, the nature of the mission, and the implications for the New Zealand Defence Force or other agencies.

Strategic Considerations:

Would a contribution to the peace support operation:

- (a) represent a desirable contribution to collective security including, as appropriate, support for UN-led and/or UN-endorsed peace support operations?
- (b) support humanitarian objectives, including the need for humanitarian intervention? Are there cost effective options (other than a military contribution) by which New Zealand could provide assistance?
- (c) enhance security in a region of strategic or economic interest to New Zealand?
- (d) enhance our multilateral or bilateral relationships?
- (e) offer a distinctive role?
- (f) be acceptable to the New Zealand public?

Nature of the Mission:

- (a) Is the mission established in accordance with international law? Is it supported by the region concerned as well as the broader international community? Do the main parties in the country/countries concerned support the mission? Are key New Zealand bilateral partners contributing to the mission?
- (b) Is the mandate for the mission clear and achievable, with options for responding to changing conditions, and an exit strategy? Is the mission adequately resourced, particularly in relation to force protection and in extremis support, as well as providing for civilian components as appropriate?
- (c) Is there a sound operational plan, including effective direction and control of military operations, force protection and in extremis support?

Implications for NZDF and other contributing agencies:

- (a) What implications would a commitment have on the capacity of NZDF or other contributing agencies to fulfil other policy objectives and respond to other situations?
- (b) What is the estimated duration and cost of the commitment? Are there options to review the New Zealand commitment? Is there an optimal timeframe for the contribution (e.g. early in; early out)?
- (c) What other countries are contributing to the mission? Would the New Zealand contribution be able to operate effectively with other contributors to the mission?
- (d) What is the risk assessment for the mission?
- (e) What role would New Zealand personnel have within the mission? Is there a professional or training benefit?
- (f) What opportunities are there to provide other forms of New Zealand assistance?

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Annex 3

Types of Peace Support Operations

Regional missions in response to regional threats

PSOs in response to threats to security and stability in the South Pacific are considered non-discretionary PSOs for New Zealand. Such deployments are likely to be undertaken in concert with Australia and other regional partners with New Zealand playing a leading role.

United Nations-led 'blue-helmeted' missions

2. New Zealand is currently involved in these types of missions through the United Nations missions in South Sudan (UNMISS), Afghanistan (UNAMA), Israel, Syria and Lebanon (UNTSO), and Korea (UNCMAC).

3. There has been some significant growth in UN-led missions over the past 15 years, particularly in Africa. Africa is – and will continue to be – a region of instability and conflict. Half of all current UN missions and 90% of all currently deployed UN peacekeeping personnel are in Africa.

4. The mandates of UN missions are increasingly challenging and complex, often dealing with a range of armed actors with the mandates including elements of 'peace-making' and protection of civilians. In short, future UN missions are likely to be more like we found in Bosnia in 1995 than the traditional 'observe and report' missions such as UNTSO in the Golan Heights.

5. UN personnel are no longer necessarily afforded non-combatant status by combatants. In fact on occasion the UN has become a specific target (e.g. in Iraq, Somalia). Accordingly, the UN has stressed that even traditional UN-led, 'blue-helmet' missions are likely to require additional elements of force protection, including armoured vehicles, enhanced firepower and robust Rules of Engagement that allow offensive action against infringements, i.e. a war-fighting capability. Military observers will require a commensurate level of protection. Reflecting the increasing complexity and risk, several UN missions have also included a 'fighting' component deployed alongside UN forces. A specialised "UN Intervention Brigade" has, for example, deployed to the UN mission in the Democratic Republic of Congo to subdue armed groups in the east of the country and French troops remain deployed in Mali to support the UN peace support mission in that country.

6. At the same time, there remain concerns over resourcing of UN missions, as well as variability in terms of leadership, command and control, the quality of fellow contributors to UN-led missions and force protection measures put in place to date by the UN DPKO.

7. Despite the many challenges that UN operations often have, there are instances of the UN working effectively in PSOs.

The large number of UN operations across the globe means that not all UN operations, or indeed other non-UN PSOs are managed equally. Officials would examine each potential PSO on its own merits before making recommendations to Ministers.

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Like-minded coalition missions, led by a major regional organisation or state

8. The command and control and force protection issues that can arise in UN-led missions are more manageable when partnering with traditional partners in 'like-minded' coalitions where resourcing and mandate constraints are less prominent and interoperability is more practiced. Some current examples are New Zealand's contributions to the International Security Assistance Force (ISAF) mission in Afghanistan (led by NATO) and the Combined Maritime Forces (CMF) in the Gulf of Aden/Indian Ocean (led by the US).

New Partners

9. There is a real potential for New Zealand to capitalise on the long-standing defence relationships with regional partners.

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Annex 4**Current New Zealand Peace Support Operations**

SCI BRANCH OPERATIONS BRIEF

NZDF Deployed Missions – OE 16

4 October 2013

**ISAF (Afghanistan)**

The closure of the New Zealand Provincial Reconstruction Team (PRT) in Bamyan province in Afghanistan marked the end of New Zealand's primary military contribution to Afghanistan. However, New Zealand has continued to support a number of development projects in Bamyan since the withdrawal of the PRT. Continued military contributions from New Zealand include a small number of training officers to the Afghan National Army Officer Academy from 2013 and personnel to the ISAF special operations forces headquarters in intelligence and planning roles. In addition New Zealand will contribute US\$2 million per annum in funding to Afghanistan's National Security Forces from 2015.

Timor Leste

2. At the end of 2012, at the request of the Government of Timor-Leste, both the United Nations Mission in Timor-Leste (UNMIT) and the International Stabilisation Force (ISF), of which New Zealand was a large contributor, ended their involvement in Timor-Leste. There are now no NZDF personnel in Timor-Leste. Two full time and 10 short term

Police personnel are deployed to Timor Leste in mentoring and advisory roles. The NZ Police mission in Timor-Leste is popular with the Timorese government and contributes to the increased capacity of the Timorese Police to maintain stability in a country which has needed the help of international peacekeepers (led by Australia and New Zealand) twice in the past 15 years.

RAMSI (Solomon Islands)

3. There are currently 17 NZ Police personnel deployed to the Regional Assistance Mission to the Solomon Islands (RAMSI). Cabinet agreed in March 2011 to extend the mandate for New Zealand's support to RAMSI to 30 September 2014.

4. RAMSI is now concentrating on building the capacity of the Royal Solomon Islands Police Force. That capacity and the Force's confidence is increasing. New Zealand development programmes currently located within RAMSI have almost all been completed, localised or moved to bilateral or other donor programmes. The RAMSI mission is expected to continue in a reduced form until at least 2017.

MFO (Sinai)

5. New Zealand has 28 NZDF personnel deployed with the Multinational Force and Observers (MFO) in the Sinai. The MFO was established in 1982 to supervise the security provisions of the 1979 Egyptian-Israeli Treaty of Peace. New Zealand provides the current Force Commander, Major General Warren Whiting, whose appointment has been extended until 1 March 2014. The current Cabinet mandate for this deployment extends until 28 February 2014.

6. The MFO exemplifies New Zealand's long-standing commitment to peace in the Middle East.]

UNMISS (South Sudan)

7. New Zealand contributes three military observers to the United Nations Mission in the Republic of South Sudan (UNMISS). The Cabinet mandate for these observers is set to expire on 31 August 2014.

8. The UN remains committed to the mission in South Sudan, which continues to make gradual progress to improve the prospects of the country. UNMISS is New Zealand's only sub-Saharan African deployment and as such is an important indicator of New Zealand's interest and concern in peace and security on the African Continent.

9. Around 90% of all currently deployed UN personnel operate in Africa and 50% of all current UN missions are in Africa.

UNTSO (Israel, Lebanon, Syria)

10. New Zealand's present mandate of up to eight NZDF personnel to the United Nations Truce Supervision Organisation (UNTSO) expires on 30 September 2014. Three personnel are located in Israel, with three in Lebanon, and the remaining two in the Israeli-controlled territory of the Golan Heights. UNTSO military observers are unarmed.

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11. UNTSO was established in 1947 to ensure that peace agreements and ceasefires between Israel, Lebanon and Syria are observed. New Zealand has contributed to UNTSO since 1954, our longest standing peacekeeping mission. The mission reduces day-to-day tensions along the border areas between Israel, Egypt, Syria and Lebanon and promotes dialogue to support the Middle East Peace Process amongst the international community. New Zealand's contribution to UNTSO reinforces a number of high level statements of support for the Middle East Peace Process and is a practical demonstration of New Zealand's commitment to the peace and security of the region.

UNCMAC (Korea)

12. New Zealand has three military observers in the United Nations Command Military Armistice Commission (UNCMAC) in Korea. The Cabinet mandate for the deployment expires on 31 August 2015. UNCMAC plays an important confidence building role on the Korean Peninsula and supports inter-Korean reconciliation measures.

13. Our role in UNCMAC builds on New Zealand's participation during the Korean War and is a highly valued aspect of our bilateral relationship with South Korea. Further it demonstrates our on-going commitment to international efforts to bring about stability and reconciliation on the Korean Peninsula.

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CMF (Indian Ocean/Gulf of Aden)

14. Cabinet has agreed to deploy NZDF personnel and assets to the Gulf of Aden/Indian Ocean as part of the Combined Maritime Taskforce (CMF) to combat piracy in the region. The main force element, a RNZN frigate will be deployed into the taskforce from November 2013 for three months.

15. New Zealand has a strategic interest in supporting the maritime security taskforces that are contributing to the downward trend of pirate attacks in the Gulf of Aden/Indian Ocean region. The CMF deployment package allows New Zealand to make a contribution to the protection of a vital route for global commerce, thereby protecting our trade and economic interests; demonstrating New Zealand's commitment to a major global security challenge; and enhancing our bilateral and multilateral defence relationships with traditional partners such as the US and Australia.

UNAMA (Afghanistan)

16. New Zealand has one NZDF liaison officer deployed to the United Nations Assistance Mission for Afghanistan. The Cabinet mandate for this deployment expires on 30 April 2014.

Bougainville

17. There are seven NZ Police personnel deployed to Bougainville in advisory roles. A continued NZ Police presence in Bougainville is desirable as capacity building of local police forces in the Pacific is necessary to decrease incidences of instability in our near abroad which may require costly peace support interventions by New Zealand personnel.

In Confidence

Offices of the Ministers of Finance and Statistics

Cabinet Economic Growth and Infrastructure Committee

A NEW ZEALAND DATA FUTURES PARTNERSHIP

Proposal

1. This paper proposes the establishment of a Data Futures Partnership (“the Partnership”) mandated by government and supported by citizens, Māori, the private sector and non-government organisations to drive high trust and high value data use for all New Zealanders.

Executive Summary

2. A high-value, trusted data-use environment will deliver ongoing benefits for New Zealand, enabling government, businesses and communities to use data to inform policy and advice, and to innovate and tailor more effective products and services for individuals.
3. In February 2015 and in response to the work of the New Zealand Data Futures Forum, Cabinet agreed that the four principles of value, inclusion, trust and control provide strong foundations to ensure that New Zealand can realise increased value from data use.
4. The Ministers of Finance and Statistics propose Cabinet agree to establish a small independent cross-sector Working Group charged with building an influential Data Futures Partnership. The Partnership will lift aspirations and champion change, by actively co-ordinating with citizens, businesses, Māori, non-governmental organisations and government agencies to facilitate more trusted data-driven value. It will provide an outside-in perspective that will inform the government agenda for greater data sharing and use.
5. The Partnership will work to strengthen the data-use environment by:
 - i. Progressing catalyst data-use projects;
 - ii. Championing data-use innovation;
 - iii. Promoting an inclusive social licence;
 - iv. Identifying key problems and opportunities for the data-use system; and
 - v. Finding solutions to systemic problems limiting trusted data-use.
6. Cabinet is asked to approve the drawdown of the tagged contingency for the Data Futures Partnership. The additional base funding required to support the Partnership in 2015/16 only has been secured via a club funding agreement with agencies with a direct stake in the proposal.¹ **Redacted***

BACKGROUND

7. Data unlocks opportunities both for government and those outside government. Data brings transparency to what is working and where improvements can be made, and can underpin a wide range of innovations including new products and services, operational efficiency and more effective decision-making. There is potential to create more economic and social value for New Zealanders by agencies and entities more effectively using their own data as well as sharing and re-using many types of data, including open data and personal information.

¹ Statistics NZ, Treasury, Internal Affairs, Land Information New Zealand, Inland Revenue, Ministries of Justice, Business Innovation and Employment, and Social Development.

*Information withheld under Section 9(2)(f)(iv) of the Official Information Act 1982 in order to maintain the convention which protects the confidentiality of advice tendered by or between or to Ministers or officials.

The Data Futures Forum and the Government response

8. From January to July 2014 an independent advisory group, the New Zealand Data Futures Forum (the Forum), engaged with people across the data-use environment and produced a suite of papers exploring the opportunities and risks of the data revolution and proposing guiding principles and actions to enable New Zealand to safely harness the power of data. The Forum noted the huge potential value for New Zealand if data sharing and use were guided by the four principles of value, trust, inclusion and control.
9. In February 2015 Cabinet endorsed the four principles proposed by the Forum and identified four priority areas for further work in response to the Forum's recommendations for action (EGI Min (15) 1/2). The first two are the focus of this paper:
 - A. Identify options to champion and enable catalyst data-use projects which innovate, solve real world problems and build strategic data assets for New Zealand;
 - B. Develop a business case for an independent Data Council to lead and promote a high-value, trusted data-use environment based on the four principles;
 - C. Review information policy and legislative settings across government to ensure that New Zealand has an enabling framework for data sharing and use; and
 - D. Continue to support the release and reuse of open data by government, and encourage those outside government to open up their data, by expanding the existing Open Government programme.

A & B. Catalyst projects and an independent Data Council

10. Since February 2015, Statistics New Zealand (Statistics NZ) has worked with experts and data practitioners from across the public, private and non-government (NGO) sectors to test and refine the proposals for catalyst projects and an independent Data Council, and to develop a business case for catalysts and the council.
11. Stakeholders identified the key gaps in the current data-use environment and suggested rather than a formal council, a partnership approach would be most effective at getting catalysts underway, and leading and promoting a high-value, trusted data-use environment. While effective regulation is important, a new regulatory or formal advisory body (a Council) would not be capable of achieving the behavioural and attitudinal changes needed to create value and increase inclusion, trust and appropriate control.

C. Review of policy and legislative settings for information sharing

12. Information management policy settings, accountabilities and practices are fragmented and inconsistent across government. The Department of Internal Affairs (DIA), in collaboration with the Ministry of Justice and others, has been conducting a review of these practices and settings to ensure they are cohesive and fit for purpose in a modern, digital context (action 6.4 from the Government ICT Strategy and Action Plan, 2014 update). This work, known as the "Information Management Review" is consistent with a recommendation from the Data Futures Forum to "get the rules of the game right" for data use and re-use (EGI min (15) 1/2).
13. Initially the IM Review related to extracting maximum value from information held in the public sector. **Redacted*** The IM Review found that the majority of barriers to getting best value from information in the public sector were non-legislative in nature (resourcing, infrastructure, capability, culture). The next steps in the IM review will be overseen by the Information Group, set up under the GCIO's ICT Partnership Framework, to ensure the work is taken forward in the context of system-wide work on data and information.

*Information withheld under Section 9(2)(f)(iv) of the Official Information Act 1982 in order to maintain the convention which protects the confidentiality of advice tendered by or between or to Ministers or officials.

14. Redacted*

D. Expanding the Open Government Information and Data Programme

15. Building on its work to support the release and re-use of government-held non-personal and unrestricted data and information, the Open Government Information and Data Programme has been expanded to:

- work with government agencies managing contracts for services, and the service providers, to allow valuable data to be unlocked for innovative re-use;
- expand its engagement with the community sector to encourage better use of open government data for their work in our communities; and
- work with the private sector, in particular entrepreneurs and start-ups, to stimulate the growth of new products and services using open data.

16. The expanded programme is currently funded to June 2016 from a combination of baseline funding through Land Information New Zealand (LINZ) and club funding via other agencies represented on the governance groups. Redacted*

Other government activities

17. The Data Futures actions were designed to leverage and reinforce other government activities that focus on enabling greater data-driven innovation and decision-making. These efforts include (for example):

- work under the ICT functional leadership umbrella to build enabling policy and technical infrastructure for data use and re-use;
- work led by the Ministry for Business Innovation and Employment to create more economic, social and environmental value from the digital economy and better use of ICT across sectors;
- greater data-sharing in the social sector to underpin decision making and front-line services, including through the social investment framework and the development of agreed foundations for data integration.

ESTABLISHING A DATA FUTURES PARTNERSHIP

The Why – Potential for more data-driven value

18. Recent research has confirmed the Forum's view that increased data-driven innovation and decision-making can deliver significant economic and social value for New Zealand. Schiff et al. have estimated that data use delivered \$2.4 billion to gross value added in 2014, with potential for this to rise to \$4.8 billion per annum if New Zealand businesses were to adopt data-driven innovation at the same rate as Australian firms.²

² Schiff et al (2015) "Data-driven innovation in New Zealand"; Sapere/Covec.

www.innovationpartnership.co.nz/wp-content/uploads/2015/04/Data_Innovation_Report_WEB.pdf

*Information withheld under Section 9(2)(f)(iv) of the Official Information Act 1982 in order to maintain the convention which protects the confidentiality of advice tendered by or between or to Ministers or officials.

19. There is a lot of enthusiasm for and interest in data-driven innovation across sectors, evidenced in engagement with practitioners and experts. However, no organisation is charged with taking a system-wide view or balancing the four principles of value, inclusion, trust and control, to address systemic issues and drive value for all New Zealand. Key issues continuing to limit data sharing and reuse in New Zealand are (Table 1 refers):

Table 1 Issues limiting trusted data sharing and reuse

<p>Potential for much greater data-sharing Public and private sector organisations have rich data but are unwilling or feel unable to share – because of fears of negative reactions or because acceptable boundaries for sharing and reuse may be unclear.</p>	<p>Potential for more data re-use and innovation to create economic and social value People and organisations are not using data as much as they could to create value – because of lack of understanding of the value and types of data, lack of access to data, or practical barriers such as lack of data standards or analytics capability.</p>
<p>The data-use ecosystem is hard to navigate Data practices and relationships are complex and emerging, and the existing institutions and frameworks are not designed for the emerging environment. There is no clear, authoritative guidance for the people and organisations sharing and using data.</p>	<p>Tenuous trust Public trust in the data-use ecosystem is tenuous, and once lost, trust can be hard to restore. Maintaining trust is vital to ongoing data innovation, including government’s reuse of data to drive investment decisions and target services.</p>

The What – A Data Futures Partnership to strengthen the data-use environment

20. To address these issues and to have enduring impact across the data-use environment, a collective, cross-sectoral and solution-focussed effort is needed. We propose establishing a core Working Group to bring together a Data Futures Partnership of around 40 influential credible individuals with a range of views and experiences to drive behavioural change across the data use environment based on the four principles. The Proposal is summarised in the Appendix.
21. The Partnership will provide a forum where different voices can come together to identify and resolve issues, build trust and increase awareness of what can be achieved, strengthen the enabling environment for trusted data-use, and increase the value generated. Critical success factors for the Data Futures Partnership are that it be:
- Independent from government - able to advise independently and take rapid action;
 - Cross sectoral and inclusive - represent a range of views and support widespread engagement across citizens, Māori, government, businesses, NGOs, and academia;
 - Able to take a whole system view - balancing the four principles across different parts of the data-use environment while avoiding duplication and mixed messages;
 - Focused on real impact - a clear shared agenda with measurable goals, driving collective change, leveraging off existing initiatives, resources and generosity
 - Open - a transparent and visible process where a range of views can be heard;
 - Adaptive and agile – able to try different things, reflect, and adjust; and
 - A learning entity - improve continuously and share learning with stakeholders.

22. The Partnership will undertake the following interdependent and mutually reinforcing activities (indicative actions for each are shown in the Appendix):
- i. **Progress catalyst projects** – innovative cross-sectoral data-use projects that address real world problems using a range of data types, allow progress on system-wide issues and inform and stimulate higher impact data use projects. Catalyst projects would deliver different kinds of value (not just commercial value). To get projects underway, the Partnership will leverage and strengthen existing connections, providing a modest amount of funding, with others providing additional resources.
 - ii. **Champion data use innovation** – promotional and brokering activities to link solution seekers with innovators, stimulate more activity, and build a trusted innovation culture.
 - iii. **Facilitate an inclusive social licence** – broker a New Zealand view on appropriate data-use via an engagement campaign to raise awareness about the social and economic value of data use, draw out New Zealanders' views, and develop guidance for trusted and ethical data-use. The Partnership will provide an independent and inclusive forum for discussing the value and the boundaries of acceptable data use, providing input to policy and legislative processes. Government agencies who are seeking new ways to create value from data are supportive of a coordinated and future focussed social licence conversation.
 - iv. **Identify key problems and opportunities for the system** - provide advice with a system-wide approach and future focus, based on research, analysis and the shared experience of the Partnership, acting as a sounding board and forum for trusted and independent cross-sector guidance.
 - v. **Find solutions** - trouble shoot via investigations into difficult problems, initiating rapid action to remove barriers and implementing solutions to foster confidence in the data-use environment.
23. Through these activities the Partnership would lift aspirations and champion change, actively partnering with all sectors to build trusted data-driven value outside and inside government. It would drive cross-sectoral effort, bringing an outside-in perspective to inform the government agenda for trusted data sharing and reuse.
24. The Partnership needs to be cognisant to government priorities. Active engagement with the government agencies driving data sharing and reuse will ensure that resources are targeted and activities are mutually reinforcing, while existing accountabilities remain. Key government partners include the Open Government Information and Data programme, the Government Chief Information Officer, the Privacy Commissioner and the Ministry of Justice.

The How – A core Working Group works with Ministers and the wider Partnership

25. We propose Cabinet agree to establish a Working Group of four to six people charged with building an influential Data Futures Partnership that will undertake the five roles and meet the critical success factors listed above, with support from a secretariat at Statistics NZ. The Working Group will report to the lead Ministers of Finance, Statistics and Justice and engage regularly with the Ministers of Land Information and Internal Affairs.
26. We further propose to develop a Terms of Reference that set out the goals, ways of working, action plan, reporting requirements, and indicators of success for the Working Group. We propose that the three lead Ministers would develop the Terms of Reference

and recommend appointments to that Working Group, in accordance with Cabinet requirements and State Services Commission guidance.

27. The Working Group will enlist the Partnership and develop an effective work programme balancing value and trust in consultation with lead Ministers and Partnership members.
28. Partnership members will be selected based on their enthusiasm for and track record of delivering trusted cross-sector data innovation. The Working Group and Partnership will have strong private and NGO sector participation (ideally 75% of membership).
29. The Working Group will be the decision-making component of the Partnership, accountable to lead Ministers for delivery of the action plan included in Terms of Reference, but working closely with the Partnership members to ensure robust advice and coordinated effort. It is expected that the Partnership would establish sub-groups to work on specific projects.

Risks – What could go wrong?

30. There are risks that the Partnership could become a “talk fest” dominated by a narrow interest group and that Partnership activities fail to balance value with inclusion, trust and control. Careful selection of the members of the Working Group and Partnership, regular engagement with Ministers, and a clear Terms of Reference will help to mitigate these risks.
31. The Partnership will work with other government agencies so that the Partnership’s public conversations are in step with government’s public debates and legislative reform proposals e.g. on personal information and the Privacy Act.
32. To ensure that there is no risk to official statistics, the Partnership will remain at arm’s-length from Statistics NZ, with the Working Group formally responsible to the lead Ministers. Statistics NZ will administer funds to progress the work programme, and will maintain its existing strict rules on access to confidential data.

Consultation

33. This paper was prepared by Statistics NZ in close consultation with Treasury, the Ministry of Justice, DIA and LINZ. These agencies together with Inland Revenue, the Ministries of Business Innovation and Employment and Social Development also contributed to the development of the underlying Business Case for the Partnership. Treasury supports the Business Case.
34. The proposal was developed using a collaborative co-design process that involved experts and data practitioners from across different sectors. Two workshops were held to explore the case for an independent data body, its success factors and potential form. Separate workshops with data innovators explored ways to get more catalyst data-use projects going. Input at these workshops has been critical to this proposal.
35. The proposal also builds on the work of the NZ Data Futures Forum, which actively engaged with business, NGOs, the research community, Māori, interested members of the public, and government. Forum Members were consulted on aspects of this paper and remain very willing to participate.
36. The following agencies were also consulted in the preparation of this paper: MSD, Health, Education, MBIE, MFAT, MCH, Transport, MPI, MWA, MfE, Corrections, DoC, Defence, Police, TPK, IR, Privacy Commissioner, Ombudsmen, SSC, Superu, Productivity Commission, Human Rights Commission, Customs, Crown Law, Callaghan Innovation, ACC, Chief Science Advisor, GCSB, CERA and Reserve Bank. DPMC was informed.

37. Feedback has been highly supportive of the Partnership. Several agencies reinforced the importance of: avoiding public sector duplication; effective stakeholder engagement; and realism about how much can be generated from a modest resource base. These risks are addressed in the Business Case. Statistics NZ will engage with other agencies in finalising the draft Terms of Reference and Action Plan to ensure risks are mitigated.

38. **Redacted***

39. The Privacy Commissioner strongly supports the four data-use principles of value, trust, inclusion and control. Less than a third of New Zealanders report feeling in control of how government uses their information. To help address this, and in accordance with his statutory role to regulate handling of personal information, the Commissioner will be working closely with the Data Futures Partnership to build a robust data-use ecosystem.

Financial Implications

40. The base resourcing required to set up and drive the Data Futures Partnership is estimated at an average of \$1.6 million per annum from 2015/16, initially for two years (Table 2 refers).

41. The total cost would be higher as it is envisaged that government and non-government partners would contribute resource both in kind and directly as they participate in Partnership activities. Most Partners are expected to volunteer, with a limited amount of compensation available to ensure all sectors can participate, e.g. for NGOs or consumers.

Table 2: Base Resourcing for the Data Futures Partnership

\$ million	2015/16 part year	2016/17	2017/18	2018/19 & outyears	Total
Core Working Group	0.327	Redacted*			
Secretariat (backbone support)	0.464				
Regular meeting expenses	0.110				
Public engagement expenses	0.382				
Commissioned deep dive research	0.080				
Catalyst project and prize funding	0.085				
Post-implementation evaluation	0.000				
Total operating expenses	1.447				
Additional resources required on top of current tagged contingency	0.447				

42. Lower cost options have been considered in the business case, but are unlikely to deliver the desired impacts since there would be fewer resources available for engagement, research and support. A smaller budget would reduce the reach and depth of the social licence conversation and may also make it harder to mobilise a Partnership by sending an equivocal signal on the government's commitment to the work.

43. A tagged contingency of \$1 million per annum ongoing was agreed for this work in Budget 2015. For 2015/16, the additional \$0.447 million has been agreed through a club funding arrangement among Data Futures lead agencies. This arrangement will be actioned through Fiscally Neutral Adjustments in the October Baseline Update. **Redacted***

*Information withheld under Section 9(2)(f)(iv) of the Official Information Act 1982 in order to maintain the convention which protects the confidentiality of advice tendered by or between or to Ministers or officials.

44. At this stage, Cabinet is asked to approve a new appropriation within Vote Statistics for the supporting the Partnership and the drawdown of the tagged contingency.
45. The Ministers of Finance, Statistics and Justice, in consultation with the Ministers of Internal Affairs and Land Information, propose to report to the Cabinet Economic Growth and Infrastructure Committee (EGI):
 - a. on progress with the Partnership against first stage indicators of success within six months of establishment of the Working Group,
 - b. with an in-depth review on progress and the success of the initiative, **Redacted***, within two years of the Working Group being set up (CAB Min (15) 12/2(29) refers).

Legislative Implications, Regulatory Impact Analysis and Human Rights, Privacy, Gender Implications and Disability Perspectives

46. There are no specific legislative or regulatory implications of this proposal. The Data Futures Partnership may recommend changes to legislation, in which case they would work with the appropriate regulators.
47. The proposals in this paper are consistent with the Bill of Rights 1990, the Human Rights Act 1993, and the Privacy Act 1993 and have no specific gender or disability implications.

Publicity

48. The Ministers of Finance, Statistics and Justice propose to announce the formation of the Data Futures Partnership and signal the process for appointing members to the core Working Group. This announcement will focus on the potential value the Partnership could add, and will include the proactive release of this paper, with appropriate redactions.
49. The announcement of the core Working Group members will take place after the appointment process (ideally within two months of Cabinet's policy decisions). A formal launch of the wider Data Futures Partnership, once enlisted, could also signal the start of the social licence conversation and other first step projects for the Partnership.
50. All communications will build on the existing, trusted brand of the Data Futures Forum. In particular, the social licence conversation will continue the inclusive dialogue initiated by the Forum, broadening the reach to support consensus building.

RECOMMENDATIONS

The Ministers of Finance and Statistics recommend that the Committee:

1. **Note** that in 2014 an independent advisory group, the New Zealand Data Futures Forum, engaged with stakeholders across the data-use environment and produced a suite of papers exploring the opportunities and risks of the data revolution and proposing principles and actions to enable New Zealand to safely harness the power of data;

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2. **Note** that in February 2015 [EGI Min (15) 1/2] Cabinet endorsed the principles of value, trust, inclusion and control proposed by the Data Futures Forum and directed Statistics NZ to:
 - a. prepare a business case for an independent Data Council that will lead and promote a high-value, trusted data-use environment, and
 - b. develop options for championing and progressing catalyst data-use projects to innovate, solve real world problems and build strategic data assets for New Zealand;
3. **Note** that feedback from data practitioners and experts from across sectors indicated that collective and cross-sector effort was needed to build a data-use environment based on the principles of value, trust, inclusion and control, and that, rather than a council, a partnership approach would be most effective at getting catalyst data-use projects underway, and building a high-value, high-trust data-use environment;
4. **Note** that work of the Data Futures Partnership will complement and inform other initiatives led by government agencies, including:
 - **Redacted***
 - The Open Government Information and Data programme, and
 - Greater data sharing in the social sector to underpin decision making and enhance front-line services;

A Data Futures Partnership

5. **Note** that trust is a key foundation for data-use and innovation, which can create value for all New Zealand through supporting better decisions and innovation by public and private organisations;
 6. **Note** that, while there are many players within the current data-use environment in New Zealand, no organisation is charged with taking a system-wide view or balancing the four principles of value, inclusion, trust and control;
- Actions for establishment*
7. **Agree** to establish a small, agile and independent Working Group charged with building an influential, cross-sectoral Data Futures Partnership that will perform the following activities:
 - i. Progress catalyst data-use projects;
 - ii. Champion data-use innovation;
 - iii. Promote an inclusive social licence;
 - iv. Identify key problems facing the data-use system; and
 - v. Find solutions to systemic problems limiting trusted data-use;
 8. **Invite** the Ministers of Finance, Statistics and Justice, in consultation with the Ministers of Land Information and Internal Affairs, to develop a Terms of Reference for the Working Group, and to recommend appointments to the core Working Group in accordance with Cabinet requirements and State Services Commission guidance;
 9. **Direct** Statistics NZ to provide secretariat support for the Working Group and Partnership;

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Funding and accountability

10. **Note** the base resourcing required to set up and drive the Data Futures Partnership is set out in the following table on budgeted expenses and funding sought by source:

\$ million	2015/16 part year	2016/17	2017/18	2018/19 & outyears	Total
Total expenses	1.447	Redacted*			
Funding from 2015 Budget contingency	1.000	1.000	1.000	1.000	4.000
Additional resources required on top of current tagged contingency	0.447	Redacted*			

11. **Agree** to establish the following new appropriation:

Vote	Appropriation Minister	Title	Type	Scope
Statistics	Minister of Statistics	Data Futures Partnership	Departmental Output Expense	This appropriation is limited to enabling the activities of the Data Futures Partnership.

12. **Approve** the following changes to appropriations to give effect to the policy decision in recommendation 7 above, with a corresponding impact on the operating balance:

	\$m – increase/(decrease)				
Vote Statistics Minister of Statistics	2015/16	2016/17	2017/18	2018/19	2019/20 & outyears
Departmental Output Expense: Data Futures Partnership (funded by revenue Crown)	1.000	1.000	1.000	1.000	1.000

13. **Agree** that the proposed change to appropriations for 2015/16 above be included in the 2015/16 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;
14. **Agree** that the expenses incurred under recommendation 12 above be a charge against the Data Futures Partnership tagged contingency, established as part of Budget 2015;
15. **Note** that:

- Data Futures lead agencies have agreed in principle to contribute a further \$0.447 million (“club funding”) for 2015/16 only, with fiscally neutral transfers to be confirmed through the 2015/16 October Baseline Update, and
- Redacted***

16. **Invite** the Ministers of Finance, Statistics and Justice, in consultation with the Ministers of Internal Affairs and Land Information, to report to the Cabinet Economic Growth and Infrastructure Committee (EGI):

- on progress with the Partnership against first stage indicators of success, within six months of the establishment of the Working Group, and
- with an in-depth review on progress and the success of the initiative, **Redacted***, within two years of the establishment of the Working Group;

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Communications

22. **Note** that the Ministers of Finance, Statistics and Justice will announce the establishment of a Data Futures Partnership, signal the process for appointing members of the Working Group, and proactively release this paper, with appropriate redactions.

Hon Bill English
Minister of Finance

____/____/____

Hon Craig Foss
Minister of Statistics

____/____/____

Data Futures Partnership Proposal

Why does New Zealand need this?

Rapid growth of data creates opportunities and challenges. There are huge economic, social, environmental opportunities if we can treat data as a national strategic asset. A robust data use eco system will position New Zealand as a world leader in the trusted and inclusive use of data.

Key gaps in the system

Identified by Stakeholders

- An inclusive public conversation
- A system-wide view
- Deep dives on real problems
- A NZ ethical focus
- A champion for innovation
- Collaboration and co-design

Creating value requires a strong foundation of trust

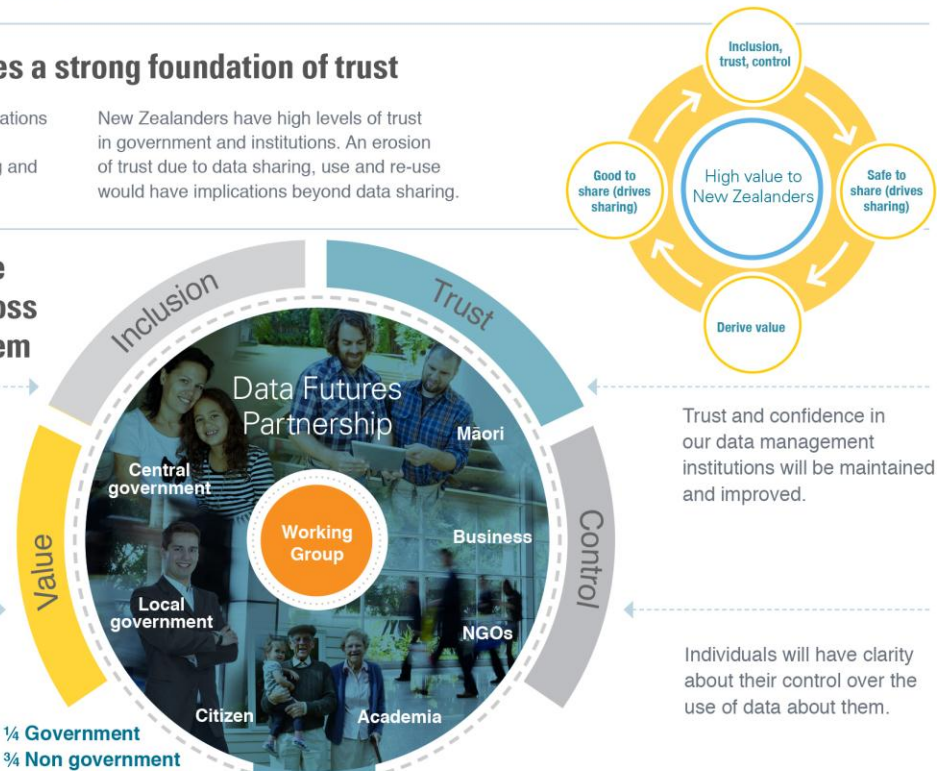
Without trust, individuals and organisations are unwilling to share data. A clear social licence for data sharing and re-use enables data innovation.

New Zealanders have high levels of trust in government and institutions. An erosion of trust due to data sharing, use and re-use would have implications beyond data sharing.

A partnership to make a positive impact across the data-use ecosystem

All parts of NZ society should have the opportunity to benefit from data use.

NZ will be making better use of data to drive economic and social value and create a competitive advantage.



Trust and confidence in our data management institutions will be maintained and improved.

Individuals will have clarity about their control over the use of data about them.

The Partnership

A cross sector group of influential individuals, working as a collective voice to make a positive impact across the data use ecosystem.

A dedicated Working Group will drive the overall programme of work and core deliverables for the Partnership.

A secretariat based at Statistics NZ will support the work program.

Deliverables



Indicative Action Plan

Catalyst projects	Champion innovative data use	Facilitate social licence	Identify problems and opportunities	Find solutions
Data use projects that address real world problems. <ul style="list-style-type: none">• Innovative data use projects that involve the public and private sector, address real world problems, allow progress on system-wide issues, as well as inform and stimulate future higher impact data use projects.• Initiation of a large number of catalyst projects.• Improved connections between data innovators, resources, information and funding.	Brokering and stimulating increased data sharing and use. <ul style="list-style-type: none">• Building relationships with critical players in the data use ecosystem, including leaders of data-rich private sector organisations, to create connections resulting in more data sharing projects• Helping private sector businesses, non-profits, social enterprises and iwi navigate data sources, services, initiatives and connect with key people across both central and local government• Activities to promote data driven innovation, sharing positive stories and encouraging connection and learning through specific examples of data driven innovation• A Data Futures Partnership presence, including website, social media.	Public awareness and engagement programme to inform an ethical framework. <ul style="list-style-type: none">• An engagement campaign to raise awareness about the social and economic value of data, draw out New Zealanders' views on data use, and develop guidance for trusted and ethical data-use in New Zealand.• An assessment report on the level of social licence for trusted data use in New Zealand, and the range of attitudes of citizens and organisations.• Providing guidance and information for trusted and ethical data sharing and use to different sectors and New Zealanders.• A deep-dive on effective ethics arrangements for data-use.	Advice and reports recommending priority actions. <ul style="list-style-type: none">• Provide advice with a system-wide approach and future focus, acting as a sounding board and forum for trusted, independent, cross-sector guidance on data issues, reports on the data-use ecosystem based on research, analysis and the shared experience of the Partnership.• Free and frank advice to lead Ministers• Research to support advice and next steps, including deep-dives on specific issues• Sounding board for particular issues brought to the Partnership.	Troubleshooting activities and broader initiatives to improve the data driven innovation ecosystem. <ul style="list-style-type: none">• Trouble shoot via investigations into difficult problems and rapid solutions to remove barriers.• Lead, mentor and encourage projects that address specific issues.• Deep dives to provide the basis for action in specific areas.
Results <ul style="list-style-type: none">• An effective approach for the initiation, evaluating and learning from catalyst projects.• 30 - 60 catalyst projects underway or completed.• Body of practical learning, expertise and experience on data-use projects.	<ul style="list-style-type: none">• Easier navigation of the data use ecosystem by a wide variety of organisations• Speeches, statements, targeted visits to highlight data innovation in New Zealand.• Body of practical learning, expertise and experience on data innovation	<ul style="list-style-type: none">• High engagement from the public resulting in increased awareness and buy-in regarding data use and sharing• A report assessing the level of social licence for trusted data use in New Zealand, including implications for government• A set of guidelines for trusted and ethical data use• A report on ways to build the social licence for data use	<ul style="list-style-type: none">• An overarching report at the end of two years identifying key challenges and priorities for the future and benchmarking New Zealand's data-use ecosystem• Annual benchmarking reports• Sounding board services operating• A stronger evidence base on core issues for the system, including ethics	<ul style="list-style-type: none">• Clear goals and actions for change• Resolution of 3-5 wicked data-use ecosystem problems limiting trusted data-use by government and non-government



Cabinet Economic Growth and Infrastructure Committee

EGI Min (15) 17/2

Copy No:

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

A New Zealand Data Futures Partnership

Portfolios: Finance / Statistics

On 29 July 2015, the Cabinet Economic Growth and Infrastructure Committee (EGI):

Background

- 1 **noted** that in 2014, the New Zealand Data Futures Forum engaged with stakeholders across the data-use environment and produced a suite of papers exploring the opportunities and risks of the data revolution and proposing principles and actions to enable New Zealand to safely harness the power of data;
- 2 **noted** that in February 2015, EGI endorsed the principles of value, trust, inclusion and control proposed by the Data Futures Forum, and directed Statistics New Zealand to:
 - 2.1 prepare a business case for an independent Data Council that will lead and promote a high-value, trusted data-use environment;
 - 2.2 develop options for championing and progressing catalyst data-use projects to innovate, solve real world problems and build strategic data assets for New Zealand;

[EGI Min (15) 1/2]

A Data Futures Partnership

- 3 **noted** that feedback from data practitioners and experts from across sectors indicated that collective and cross-sector effort was needed to build a data-use environment based on the principles of value, trust, inclusion and control, and that, rather than a council, a partnership approach would be most effective at getting catalyst data-use projects underway, and building a high-value, high-trust data-use environment;
- 4 **noted** that the work of the Data Futures Partnership will complement and inform other initiatives led by government agencies, including:
 - 4.1 **Redacted***
 - 4.2 the Open Government Information and Data Programme;
 - 4.3 greater data sharing in the social sector to underpin decision making and enhance front-line services;

*Information withheld under Section 9(2)(f)(iv) of the Official Information Act 1982 in order to maintain the convention which protects the confidentiality of advice tendered by or between or to Ministers or officials.

- 5 **noted** that trust is a key foundation for data-use and innovation, which can create value for all New Zealand through supporting better decisions and innovation by public and private organisations;
- 6 **noted** that, while there are many players within the current data-use environment in New Zealand, no organisation is charged with taking a system-wide view or balancing the four principles of value, inclusion, trust and control;

Actions for establishment

- 7 **agreed** to establish a small, agile and independent Working Group charged with building an influential, cross-sectoral Data Futures Partnership that will perform the following activities:
- 7.1 progress catalyst data-use projects;
 - 7.2 champion data-use innovation;
 - 7.3 promote an inclusive social licence;
 - 7.4 identify key problems facing the data-use system;
 - 7.5 find solutions to systemic problems limiting trusted data-use;
- 8 **invited** the Minister of Finance, the Minister of Justice and the Minister of Statistics (the Ministers), in consultation with the Minister for Land Information and the Minister of Internal Affairs, to develop a Terms of Reference for the Working Group, and to recommend appointments to the core Working Group in accordance with Cabinet's requirements and the State Services Commission's guidance;
- 9 **directed** Statistics New Zealand to provide secretariat support for the Working Group and Partnership;

Funding and accountability

- 10 **noted** that the base resourcing required to set up and drive the Data Futures Partnership is set out in the following table on budgeted expenses and funding sought by source:

\$ million	2015/16 part year	2016/17	2017/18	2018/19 & outyears	Total
Total expenses	1.447	Redacted*			
Funding from 2015 Budget contingency	1.000	1.000	1.000	1.000	4.000
Additional resources required on top of current tagged contingency	0.447	Redacted*			

- 11 **agreed** to establish the following new appropriation within Vote Statistics:

Vote	Appropriation Minister	Title	Type	Scope
Statistics	Minister of Statistics	Data Futures Partnership	Departmental Output Expense	This appropriation is limited to enabling the activities of the Data Futures Partnership.

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- 12 **approved** the following changes to appropriations to give effect to the policy decision in paragraph 7 above, with a corresponding impact on the operating balance:

	\$m – increase/(decrease)				
Vote Statistics Minister of Statistics	2015/16	2016/17	2017/18	2018/19	2019/20 & outyears
Departmental Output Expense: Data Futures Partnership (funded by revenue Crown)	1.000	1.000	1.000	1.000	1.000

- 13 **agreed** that the change to appropriations for 2015/16 above be included in the 2015/16 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;
- 14 **agreed** that the expenses incurred under paragraph 12 above be a charge against the Data Futures Partnership tagged contingency, established as part of Budget 2015;
- 15 **noted** that:
- 15.1 Data Futures lead agencies have agreed in principle to contribute a further \$0.447 million (club funding) for 2015/16 only, with fiscally neutral transfers to be confirmed through the 2015/16 October Baseline Update;
- 15.2 **Redacted***
- 16 **invited** the Ministers, in consultation with the Minister for Land Information and the Minister of Internal Affairs, to report to EGI:
- 16.1 on progress with the Partnership against first stage indicators of success, within six months of the establishment of the Working Group;
- 16.2 with an in-depth review on progress and the success of the initiative, **Redacted***, within two years of the establishment of the Working Group;

Communications

- 17 **noted** that the Ministers will announce the establishment of a Data Futures Partnership, signal the process for appointing members of the Working Group, and proactively release the paper under EGI (15) 158, with any appropriate redactions.

*Information withheld under Section 9(2)(f)(iv) of the Official Information Act 1982 in order to maintain the convention which protects the confidentiality of advice tendered by or between or to Ministers or officials.

PART 2C FREE AND FRANK EXPRESSIONS OF OPINION

In this Guideline

- ❖ When does section 9(2)(g)(i) apply?
- ❖ Summary Sheet

Corresponding provision in LGOIMA

Section 9(2)(g)(i) OIA = Section 7(2)(f)(i) LGOIMA

When does section 9(2)(g)(i)¹ apply?

Section 9(2)(g)(i) provides good reason to withhold information if, and only if:

- ❖ the withholding of the information requested is necessary to “*maintain the effective conduct of public affairs through... [t]he 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*”; and
- ❖ the need to withhold information to protect that interest is not “*outweighed by other considerations which render it desirable, in the public interest, to make that information available*”.

It is usually relevant where concerns about releasing the information relate to the ability of Ministers, officials or others to:

- (a) **generate** opinions in the future – such opinions are frequently the basis upon which advice is given; and
- (b) **express** such opinions in a free and frank manner in the future – the way in which information is expressed can be an important means of communicating the significance of issues.

In general terms, the purpose of this section is to avoid prejudice to the generation and expression of free and frank opinions which are necessary for good government. The ability of Ministers, officials and other advisers to Government to express their opinions on relevant issues in a free and frank manner is an essential ingredient of the climate necessary for the effective conduct of public affairs.

In the words of the Danks Committee:²

“Only if disclosure is likely to inhibit the free and frank expression of opinion and thereby adversely affect the conduct of public affairs may a reason for withholding [the information] under this head exist”.

The application of this section, however, is not limited to information produced within the government sector. If the elements of this section are established, it can apply where members of the public have conveyed their opinions to an organisation which is covered by the Act. This is because the section also applies to the expression of opinions “to” Ministers of the Crown, members of an organisation, or officers and employees of any Department or organisation in the course of their duty.

Is it necessary to withhold the information in order to “*maintain the effective conduct of public affairs through the free and frank expression of opinions*”?

In considering whether s.9(2)(g)(i) applies, it is not enough for the holders of the information to merely assert that disclosure would inhibit free and frank expression of opinions necessary for the effective conduct of public affairs. Three fundamental questions must be answered.

- (1) How would disclosure of the information at issue inhibit the free and frank expression of opinions in future?

¹ Section 7(2)(f)(i) LGOIMA

² Supplementary Report, page 67

- (2) How would the inhibition of such free and frank expression of opinions prejudice the effective conduct of public affairs?
- (3) Why is this predicted prejudice so likely to occur that it is necessary to withhold the information in the circumstances of the particular case?

Free and frank expression of opinions

Section 9(2)(g)(i) requires consideration to be given to the effect upon *future* generation of free and frank expressions of opinion if the information requested is released. It is therefore necessary to look to the effect of the release of the information at issue in order to determine whether that section applies.

Will release of the information:

- ❖ Inhibit future free and frank expressions of opinion?
- ❖ Mean that in the future opinions will be expressed in a different way, and will not be expressed in such a free and frank manner?
- ❖ Mean that similar free and frank expressions of opinion are not recorded adequately in the future?

If an organisation considers that release of the information will have any of these effects, it must be able to explain why that is so.

Some issues to consider:

- ❖ Consider the *overall process* of which the information forms part – for example, whether it is part of a considered consultative process of the early stage of developing policy options. If the information at issue forms part of an early stage of policy development, it can be expected that it is more of a free and frank nature.
- ❖ Consider the nature and content of the information.

What does it actually disclose?

Is there any factual information which could be made available?

Does the information contain free and frank expressions of opinion?

Can the withheld information be described as “*opinion*”, and is that “*opinion*” expressed in a free and frank manner?

Often information of a background or factual nature can be separated from that which contains expressions of opinion.

If the information at issue comprises free and frank expressions of opinion, then it is more likely that disclosure would inhibit such free and frank expression in future similar circumstances.

- ❖ Consult the person(s) who generated the information which is the subject of the request. Why would release of the information inhibit the expression of free and frank opinion by them in the future?

The seniority of the author is relevant to this issue. In general, if the free and frank opinions under consideration are those of senior managers, they would be expected by virtue of their position to continue to express their opinions freely and frankly in the future. However, junior employees might be more likely to be inhibited if their free and frank opinions were released. Professional policy advisers, that is, departmental officials, are expected to be more robust about their opinions than third parties from outside government who volunteer their opinion.

- ❖ If the information is contained in a memorandum or some other form of communication, consider the nature of the *relationship* between the author of the information at issue and the intended recipient of that information.

Is advice or opinion usually conveyed between these persons in a formal manner, or is it often expressed in an informal and frank fashion?

If advice is usually conveyed informally, will release of the information at issue damage such an informal and frank relationship in the future?

- ❖ Is it the content of the information which causes concern or the way in which it has been expressed? Sometimes opinions are expressed in a particularly informal or blunt fashion in order to emphasise an important point. If this is the case, would release of this information cause the author to reconsider the way that such opinions are expressed in the future?

If it is the manner in which the information is expressed that requires protection, rather than the information itself, a summary of the content of the information can often be released without harm.

If the information-holder considers that release of the information will inhibit the future expression of free and frank opinions, and can explain why, section 9(2)(g)(i) may be relevant.

Effective conduct of Public Affairs

Ultimately, this particular section is designed to protect the effective conduct of public affairs. In order for it to apply, there must be sufficient basis to consider that the free and frank expressions of opinion which would be inhibited by the release of information are themselves necessary for the effective conduct of public affairs.

If the generation of such opinions is not necessary, there will be no reason to withhold them under this section.

Some issues to consider:

- ❖ Will decisions be taken without the advantage of having received such free and frank expressions of opinion?

Are such opinions necessary in order to produce robust and good quality advice?

- ❖ Alternatively, will there be a failure to record adequately the reasoning behind decisions?

In this regard, the Danks Committee observed that:³

“If the attempt to open processes of Government inhibits the offering of blunt advice or effective consultation and arguments, the net result will be that the quality of the decisions will suffer, as will the quality of the record. The processes of Government could become less open and, perhaps, more arbitrary.”

- ❖ In circumstances where it is argued that disclosure will result in opinions being expressed orally rather than being documented in writing, the issue is whether the opinions need to be documented in writing for the effective conduct of public affairs. In some contexts the usefulness of free and frank expression of opinions may well be undermined if they are not recorded in writing. However, in other contexts it may not matter for the effective conduct of public affairs whether the opinions are expressed orally or in writing. Each case will need to be considered on its merits.

Why is the predicted prejudice so likely to occur that it is necessary to withhold the information?

The agency must demonstrate that the predicted prejudice or harm is so likely to occur that it is necessary to withhold the information in order to prevent that harm or prejudice arising. A mere possibility that prejudice could occur is not sufficient to meet the requirement under section 9 that the withholding of the information is *necessary*.

If the agency considers that:

- (a) releasing the information requested will inhibit the generation or expression of free and frank opinions in the future; and
- (b) such free and frank expressions of opinion are necessary to maintain the effective conduct of public affairs;

then section 9(2)(g)(i) may apply to the information.

However, before section 9(2)(g)(i) provides “*good reason*” for withholding information, the agency must go on to consider whether the interest in withholding the information is outweighed by other considerations which render it desirable in the public interest, to make that information available.

If s.9(2)(g)(i) applies, then the agency must assess whether the need to withhold the information is “*outweighed by other considerations which render it desirable, in the public interest, to make that information available*”

In order to make this assessment, an agency will need to take the following steps:

- (i) Identify any considerations that may favour disclosure of the information in the public interest.

In the context of section 9(2)(g)(i), the following questions may help to identify such considerations:

³ General Report, page 19

- ❖ Is the content of the information such that its release will promote the accountability of ministers or officials?

For example, does it relate to the expenditure of public money or will it reveal the factors taken (or not taken) into account in a decision-making process?

- ❖ Would release of this information promote the ability of the public to effectively participate in the making and administration of laws and policies?

Enabling the public to effectively participate in the making and administration of laws and policies is one of the purposes of the OIA.⁴ Releasing background information, or information which sets out options under consideration, will often enable the public to participate in the policy-making process.

- (ii) Consider whether disclosure of the actual information requested would in fact promote those considerations. While there may be a public interest in release of some information about the particular situation, this may not necessarily be met by release of the specific information requested.
- (iii) Finally, consider whether, in the circumstances of the particular case, the considerations favouring disclosure outweigh, in the public interest, the need to withhold the information.

The need to withhold information in order to protect the interests set out in section 9(2)(g)(i) needs to be weighed against legitimate public interest considerations favouring disclosure. There is no predetermined formula for deciding which interest will be stronger in a particular case. Rather, each case needs to be considered carefully on its own merits, taking into account the specific context.

Issues to consider when identifying and assessing the strength of public interest considerations are discussed further in Part 2D.

⁴ Section 4(a)(i) of the OIA. Similarly, section 4(a)(i) of LGOIMA provides that one of the purposes of that Act is to enable more effective participation by the public in the actions and decisions of local authorities

Summary Sheet
Section 9(2)(g)(i) OIA and Section 7(2)(f)(i) LGOIMA

Free and Frank Expressions of Opinion

Always proceed on the basis that the information requested “*shall be made available unless there is good reason for withholding it*”.

1. Does the information contain free and frank expression of opinion?
2. What will be the effect of release of the information? Will it:
 - ❖ Inhibit future free and frank expressions of opinion? Or
 - ❖ Mean that such free and frank expressions of opinion are not recorded adequately in the future?

Why? What is it about this particular information or the circumstances in which it has been generated that makes you think that its release will have this effect?
3. Will these consequences prejudice the effective conduct of public affairs? Why? Will such consequences:
 - ❖ Mean that decisions are taken without the advantage of having received such opinion?
 - ❖ Lead to a failure to record adequately the reasoning behind policy decisions?
4. Is the predicted prejudice so likely to occur that it is “*necessary*” to withhold the information at issue? Why?

If you cannot answer “yes” to questions 1, 2, 3 and 4 above, the section does not apply.

If you have answered “yes” to questions 1, 2, 3 and 4, and can explain why, you should consider whether there are any public interest considerations favouring release which outweigh the need to withhold.

5. Identify any considerations favouring disclosure of the information. The following considerations are often relevant in the context of information withheld under section 9(2)(g)(i):
 - ❖ Is the content of the information such that its release will promote the accountability of ministers or officials? For example, does it relate to the expenditure of public money or does it reveal the factors taken (or not taken) into account in a decision-making process?
 - ❖ Would the release of this information promote the ability of the public to effectively participate in the making and administration of laws and policies?

6. In light of such considerations, is there a public interest in disclosure of the specific information requested?
7. Consider whether, in the circumstances of the particular case, the public interest in disclosure of the information, in whole or in part, outweighs the need to withhold the information.

If so, release sufficient information to meet the public interest in disclosure.

If not, advise the requester of the decision to withhold.



IPANZ Free and Frank Policy Advice Seminar – 12 August 2015

‘FREE, FRANK AND OTHER F-WORDS: LEARNING THE POLICY ROAD CODE’

[Speech notes. Andrew Kibblewhite, Head of the Policy Profession](#)

Thank you IPANZ for the opportunity to be here – and to talk about free and frank advice.

Late last year I was asked by Iain Rennie to take on the role of Head of the Policy Profession. Supporting me in that role is a small team in DPMC – The Policy Project – focused on the challenge of lifting the policy game across government. That challenge includes enhancing the provision of free and frank advice.

It’s a collective effort by the whole policy community. I’m pleased to say that the Policy Leaders Network – the group of Deputy Secretaries with policy responsibilities from across the Public Service - have embraced the challenge. They are working together to shape our future policy system and I want to acknowledge that effort.

My role as Head of the Policy Profession is one of a number of new, system wide roles that have been established as part of the Better Public Services reforms. It is very complementary to the core role of DPMC, which is to advise the Prime Minister and to support the effective functioning of executive government.

So – on to the topic of this session.

You will have all heard commentators – some may be in this room - argue that there has been a reduction in free and frank advice.

I don’t particularly agree with this position. My own observations from the last 20 years or so since I first became a policy manager - and that spans a range of governments of all political colours - is that there has always been mixed performance when it comes to officials delivering free and frank advice to ministers.

Today I don’t want to dwell on whether there has been a reduction or not. Rather, I will argue that we can and should do better. I’ll propose how we might go about that.

Firstly I want to put free and frank in the context of good policy advice generally. I'm going to use some other F-words to describe what I think great policy advice looks like.

Secondly I want to look at the infrastructure for ensuring free, frank - and other F-words - advice to ministers. We have a range of rules and processes in place: legislation, codes of conduct etc. But the difference between knowing the rules and being skilled in the art of providing free and frank policy advice is akin to the difference between learning the road code and being able to drive a car.

We'll take a look under the bonnet of free and frank and talk about how we become good drivers - defensive drivers even - and how we know who to go to and what to do when there's a problem in the engine or the road rules aren't clear.

And to finish up, I'll share a few scenarios that I hope we can discuss in Question and Answer time – situations where the traffic lights are out or the direction of travel isn't quite clear.

Free, Frank and other F-words

So what does great policy advice look like? Let's take a look at free, frank and some other F-words and unpick what they mean.

Free – I heard someone recently note that some public servants mistakenly confused free and frank advice with free speech. As a public servant you are entitled to an opinion but it is not your job to share that with anyone, anywhere. The free part of free and frank means that you offer your best advice freely to decision makers, without withholding any key evidence or information.

Frank – it goes without saying that you should be open and honest with ministers. It is not your job to pull the punches or second guess what they might or might not have an appetite for. But I stress, frank doesn't mean foolish. Like any relationship, there are smarter ways of saying things – giving the hard truth in the most constructive and palatable way possible.

Full - Great advice brings all the available evidence and multiple perspectives together to provide comprehensive insight into real-world problems. Great policy is much more than the collection of facts or data – it is advice that helps Ministers navigate the messy, complex world we live in. That means giving ministers the full range of options on how they might best achieve the outcomes they are seeking.

Focused – Great advice is focused on what matters, on the outcomes a government is trying to achieve, and the people it is trying to achieve them for: vulnerable families needing support, businesses needing simpler and more effective regulatory frameworks that don't impose unnecessary compliance costs. Policy options should be built around the needs of citizens.

Without favour – it is essential that advice should be politically neutral and not beholden to interest groups or particular sectors of society or the economy. This is of course one area where the context for the provision of policy advice is more complex. We need to understand how stakeholders are likely to react to any policy change – and factor that into our advice.

We need a better understanding of citizens' lives and how they experience public services. That requires new methods of engagement and involving users in the design and delivery of policy.

We have some useful examples, such as how the Auckland City Mission used ethnography in their Family 100 Research Project, and how MBIE co-designed a skills maintenance scheme with Licensed Building Practitioners. The latter example produced a scheme that should improve compliance – a more effective regulatory outcome - while reducing the pain points for the sector being regulated.

I'm hoping that the Policy Project can help build and share knowledge of the tools and methods through which policy professionals can engage directly with citizens. A lot of that already goes on – we need to share what works, in what context and at what stage of the policy cycle. We also need to invest in building relationships that can be drawn on to help shape, reshape and even co-design policies.

We need empathy with citizens and groups of users - but we also need to be mindful of potential capture. It is a facilitation, brokerage and synthesising role. Sometimes there will be conflicts when the views of stakeholders clash – but it is our job to present those conflicts in a way that enables and supports ministers to make the final decisions.

Fearless – Policy advice needs to be fearless, frightening even. It needs to be bold in striving for new and different ways of doing things, and not to hold back from presenting 'scary' options to ministers. Anything that is new, by definition, doesn't come with a whole lot of evidence of past experience. And that carries risks. But we need to be confident to take those risks or we will not be innovative.

Sometimes innovation means taking an approach or policy from one sector and applying it to another. The investment approach came out of actuarial experience in the insurance industry, while alliance contracting – which is being used in parts of the health sector – came from the construction industry. Innovation is as much, if not more, about ‘adopt and adapt’ than it is about pure invention.

Fallible – perhaps an unexpected F word in this context. I should stress I am not saying I want policies to fail. But I do want the advice and the underpinning evidence and assumptions to be clear and testable so we can face up to failure if that is our predicament. Our intervention logic should be explicit and we should be constantly testing whether we are making progress or not.

If we don’t state up front what we think will happen - and how we will know if it has or hasn’t – it makes it much harder for us to judge success. And worse, if we don’t evaluate, we can’t learn from success or failure. We won’t build our knowledge of what works.

Future – policy advice should also keep an eye on the future. I have participated recently in a few sessions with the Deputy Secretaries’ Policy Leaders Network, trying to grapple with the big policy challenges coming our way and whether we are well placed as a policy community to respond.

Our advice needs to be resilient in the face of shifting contexts or trends – it should be adaptable. We shouldn’t focus on the urgent at the expense of the important, or close off future options that might negatively affect the generations that come after us.

All of these F-words need to be part of the equation in developing policy advice. But the key to how great policy advice lands, is the relationship between policy advisors and Ministers.

In the inner sanctum of the policy profession, trust is key. Ministers’ trust in their public service policy advisors is built on a mutual understanding of roles, on the professionalism, integrity and impartiality of the advisors and finally but essentially on the quality of the advice given.

Trust

Trust creates the space for free and frank advice. Where the relationship between Ministers and advisors is high trust and respectful, there is and always has been room for

candid and challenging views to be aired. Where relationships are weaker, a much less constructive exchange occurs.

Officials can build that trust by listening hard, playing with a straight bat and exercising appropriate judgement in how they record their interactions with Ministers. Ministers can help build that trust by being open about their thinking – and the constraints and opportunities as they see them.

In giving free and frank advice, we must never lose sight of our role as public servants. Ours is to advise; Ministers to decide. And Ministers deciding not to agree with officials' advice at times is a natural and appropriate thing. As a young Treasury analyst one of the enduring truths I had drummed into me about my job was my role was to advise fearlessly and implement enthusiastically, regardless of whether my advice was accepted or not.

I get frustrated when I hear people say policy advisors should not proactively help Ministers shape the agenda. The best policy advisors do exactly that. They tend to earn that opportunity over time by demonstrating an understanding of what the Minister is trying to achieve and presenting good ideas.

Earning the trust and confidence of ministers is definitely something that builds over time. It comes with experience. The good thing is that by the time you get close to that political administrative interface, you should have developed a good nose for what is right and wrong and where the boundaries lie. I say 'should have' - but I recognise that isn't always the case and that we need rules and guidance to signal what to do and when.

The rules

Like the road code, I'm fairly confident we have the right infrastructure in place around the operating rules for free and frank advice. Indeed we have just strengthened them. The State Sector Act makes it clear that free and frank advice is required regardless of whether it is requested. The 2013 amendment to the Act, supported by both sides of the House, elevated free and frank from a convention, to a legislative obligation.

Section 32 of the Act charges chief executives with ensuring "the capability and capacity to offer free and frank advice to successive governments". The expectation is that we need to be responsive to current ministers and their objectives, as well as transparently investing in capability to be able to advise future ministers and governments that might have a different policy agenda.

As public servants we have an obligation to think about the long term as well as the present, potentially undertaking research and analysis on issues that are not priorities today, but could bite us in the future if we don't start thinking about them now. That is our stewardship responsibility.

For example we owe the foundations of our public management model to the foresight of people in the Treasury who produced 'Government Management' in the 1980s. Work that wasn't requested but helped an incoming government implement arguably the most comprehensive public sector reform in New Zealand's recent history, reforms that made chief executives responsible and accountable for running their departments.

Clearly there is room for tension here. No department could get away with neglecting the needs of the Minister today on the basis that the 5 year work programme is more important. We need to undertake this stewardship role in full view of the Minister of the day and be prepared to discuss the trade-offs we are making.

The State Services Commission's Standards of Integrity and Conduct and related guidance – check out the State Services Commission website – together with the Cabinet Manual provides comprehensive guidance on how public servants should act vis-à-vis ministers, colleagues and the other stakeholders they come into contact with in their work.

The Cabinet Manual puts the relationship between ministers and officials in its constitutional setting, and includes specific guidance in areas like the 'no surprises' principle, appropriate communication between ministers and officials and free and frank advice.

Open and transparent government shapes the environment in which free and frank advice is offered and received. While the default option is transparency and even proactive release of official information (and I note we are acknowledged internationally for this) – the Official Information Act has specific provisions to protect and enable free and frank advice. Section 9(2)(g)(i) of the Official Information Act allows for non-release of information when release could threaten the provision of free and frank expression of opinions between ministers and officials.

The Ombudsman's website has useful guidance as to when, why, and under what circumstances official information can be withheld. I know that Dame Beverly Wakem

and her team are concerned that some departments and Ministerial staff might not be as skilled as they should be in that domain

Transparency International – which rates New Zealand highly overall – has also expressed concerns about compliance with the Official Information Act. In response to the Law Commission’s review of OIA practice Cabinet directed the Ministry of Justice to lead a cross-public sector Official Information Forum to encourage consistent approaches to the OIA. That Forum has developed a range of public sector guidance materials which you should all access. The material complements guidance provided by the Office of the Ombudsman.

Taken together, this guidance material can help us operate in the spirit of openness but also leaves space for robust (and sometimes private) debate between ministers and senior officials. Uncertainty about what can and can’t be withheld has not helped the discourse between Ministers and officials. So I encourage you all to get to know this guidance well.

In short, I think we have an appropriate ‘road code’ in place, or at least a workable one – the issue is learning to use it. The most recent SSC Integrity and Conduct survey (2013) found that over 80% of public servants were familiar with their agency’s code of conduct, but less than a quarter were familiar with the Ombudsman’s OIA guidelines, and even less with SSC’s political neutrality guidelines and the Cabinet Manual.

How do we become familiar enough with the rules and guidance so they shape how we work in our capacity as government officials and policy advisors? That gets us to training and culture. Like learning to drive a car we learn as we go and we get more proficient with experience. Every new entry to the Public Service should be given adequate training in how to behave. Policy managers need to take their ‘driving instructor’ roles seriously.

Departments should facilitate opportunities for analysts, advisors and others to debate how you should act in a given scenario. This could take the form of ‘brown bag’ sessions, messages from senior management recounting times where things were done well and where there was room for improvement – we learn from these examples. The more relevant and real the story, the greater the learning.

Learning to be a policy advisor is something of an apprenticeship. So chief executives and other senior leaders need to set expectations and explicitly model what great practice looks like. One of the most powerful places for this learning to occur is in ministerial

briefing sessions - where less experienced officials get to see senior leaders interacting skilfully with ministers.

I thought I would finish with a few scenarios that we could debate and share how we would act – and I encourage the experts here from the Ombudsman’s office, SSC and others to chip in with their expert advice – be free, frank and fearless! I hope you don’t find me wanting....

Scenario 1. “Don’t tell me” - A minister indicates that he or she is not interested in further advice on a particular issue and requests that you refrain from offering it. But – you know that the issue is an important one and is key to achieving some other results that you consider will help meet an outcome the government is seeking to achieve. **What do you do?**

Scenario 2. “The pre-baked solution” - A minister requests advice to support their pet project and they “know exactly how it should be done”. The minister asks you to write a Cabinet paper based solely on that option. But you know that you are duty bound to analyse the evidence, to test whether there are better ways of achieving that outcome. **What do you do?**

Scenario 3. “The cone of silence” - You are in a meeting with your minister and the minister requests that the advice and the conversation isn’t recorded. **What do you do?**

Here’s what I would do.

Scenario 1. “Don’t tell me” - I would respectfully tell the minister that I believe the issue is important for the following reasons (which I will have rehearsed well) and that it should be dealt with. If my argument does not fly, I would acknowledge that I have heard the request to not provide further advice, make an appropriate record of that reality and move on.

I might continue to keep a watching brief on the area and potentially raise it again, if the context or minister changed. But as a general rule of thumb it’s ‘3 strikes and you’re out’ – there is no point flogging a dead horse.

Scenario 2. “The pre-baked solution” - I would respectfully try to draw out what outcome the Minister is trying to achieve and why he or she has settled on the pre-baked solution on offer. And I would be absolutely open to the possibility that the Minister

might be right. Almost by definition ministers are more in touch than public servants with the aspirations and challenges of citizens.

Having said that I would take my responsibility to provide advice seriously and test the proposal against alternatives. I would expect the Minister to consider that advice and be confident enough to make and own a call. Once the call is made I would write the Cabinet paper as per the Minister's decision and direction – a Cabinet paper is the Minister's paper. I would include other options and their relative costs, benefits and likelihood to succeed, in any Regulatory Impact Statement (which is the department's part of the paper).

Scenario 3. “The cone of silence” – This is a tricky one – judgement and nuance are essential. We need to be able to have robust and early conversations with ministers on policy issues – in fact I think we should have more – and we need to be mindful of the trust placed in us when ministers are sharing perspectives, particularly in the formative stage.

Ministers would be rightly concerned at having to justify down the track an official's record of what might have been an open-ended and speculative conversation.

On the other hand there are obligations under the Public Records Act to maintain full and accurate records in accordance with normal business practices. So what is my obligation here? I think it is to document the key outcomes and decisions from the conversation that I judge to be crucial for institutional knowledge, probably via a short file note or email. I typically would not identify who said what to whom or create a verbatim record.

To step beyond these bounds could have a chilling effect on the conversation, breach trust and likely mean I was not included in future conversations.

Conclusion

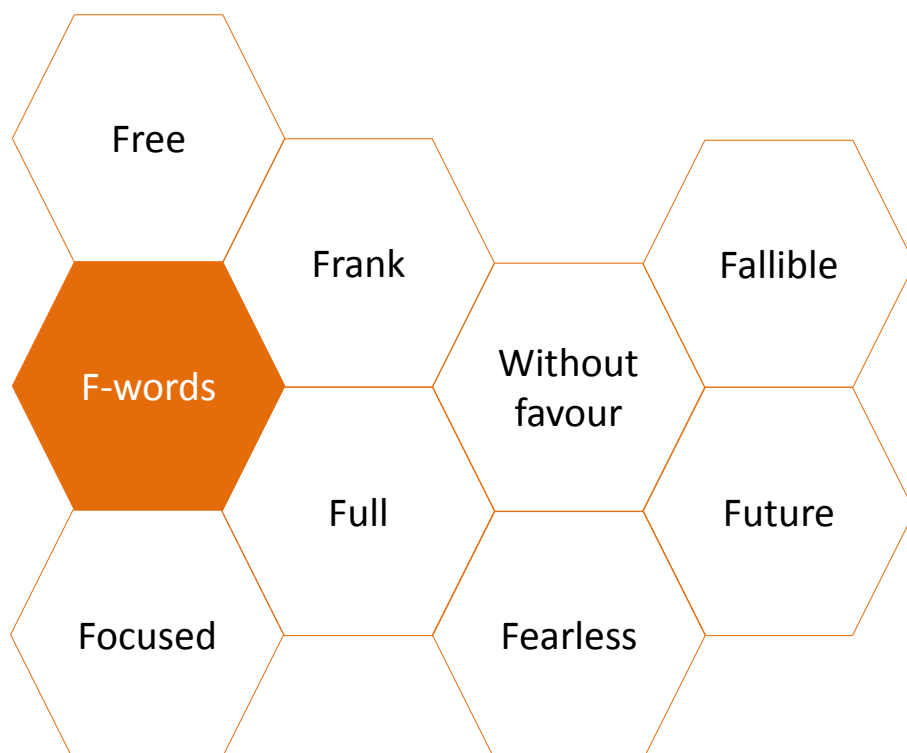
As I said at the outset, I don't see an obvious erosion of free and frank advice or buy into the view that there was once a golden age – not in my time as a public servant anyway. But I do see good and bad practice and I do think we collectively need to do better.

My view is that we have the fundamental infrastructure in place – the State Sector Act, the Official Information Act, the Cabinet Office manual and SSC's Standards of Integrity and Conduct. But what counts is being able to put that guidance into practice.

Senior leaders have to set and reiterate clear expectations and act as exemplars. Events like this one today provide an opportunity for you in the audience to go back and see if there are adequate policies and processes in your departments for people to learn, develop and gain experience in the art of providing free and frank advice. Often it is about judgment, and that comes with time. It flourishes in a culture where these things are talked about and shown to be important. And where there is someone to go to for guidance and counsel.

The provision of free and frank advice is the hallmark of a well-functioning impartial public service. Going back to the driving analogy - I want us all to know the road code from back to front, know what to do when the street light are out, when there is a bump in the road or when someone's coming the other way on the wrong side. We shouldn't have to think about F-words in that situation – they should come naturally to us.

Thank you.



Abstract

This article explores what happens when the much-discussed doctrine of transparency as a key to good governance meets the widely observed behavioural tendency of blame-avoidance in politics and public administration. It begins by discussing transparency as an idea and distinguishing different strains of the doctrine, proceeds to discuss blame-avoidance and to identify three common types of blame-avoidance strategy, and then explores what can happen when a widely advocated governance doctrine meets a commonly observed type of behaviour. The article identifies ways in which that conjunction can produce nil effects, side-effects and reverse-effects in the pursuit of transparency. It concludes that the tension between the pursuit of transparency and the avoidance of blame is at the heart of some commonly observed problems in public management, and suggests that something other than the 'bureaucratic' strain of transparency may be called for when those problems are serious.

Key words

Blame-avoidance, bureaucracy, open government, organizational behaviour, risk, transparency

WHAT HAPPENS WHEN TRANSPARENCY MEETS BLAME-AVOIDANCE?

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**LEXIS NEXIS
INFORMATION LAW CONFERENCE**

IMPRESSIONS FROM A NEWCOMER

**David McGee QC
Ombudsman**

**WELLINGTON
MAY 2008**

On my first day in my new job, sitting down to an almost clear desk, I found a package. It was a complimentary copy of Nicola White's new book *Free and Frank*. Instead of reading it at once, I put it to one side and have only recently turned to it, with the benefit of some familiarity with the matters Nicola discusses. I am sure that, from my point of view, I have drawn more from reading her work with a few months' delay than I would if I had read it immediately.

Delay

One of the dissatisfactions that surfaces in *Free and Frank* is the problem of delay. This is perceived to be a particular problem among those users of the OIA with deadlines to meet – politicians, political aides, journalists. Politics, in particular, and coverage of it, is a fast-moving pursuit, more so, I would surmise, than when the OIA was born. Are the time-limits built-into the Act still appropriate? Are they, in any case, observed? Is the process of resolving disputes as to release of information too protracted?

It is as well to remind ourselves first that these things are relative.

I have recently seen a report of consideration being given to a priority system by the Canadian Information Commissioner (himself, I may observe, a former Clerk of the House). With what is described as a massive backlog of cases, many unresolved for more than a year, he is contemplating abandoning a "first-come-first-served" approach in favour of what is described as a "triage" approach that will enable some complainants to jump the queue. Favoured complaints are likely to be: those from parliamentarians, complaints involving matters of broad public interest, and those involving legal action.¹ The OIA, of course, has a provision for information to be requested urgently, and a failure to comply with this unreasonably is subject to review by an Ombudsman. But, for all our problems of delay, the situation in Canada, which apparently requires such drastic prioritisation of complaints at the review level, makes it sound as if we are not quite so bad off as it may seem.

¹ "Information watchdog is tackling government secrecy, but he's not saying how", *The Canadian Press*, 12 May 2008.

Nevertheless, delay is obviously a matter of some concern.

The Ombudsmen have therefore recently resolved to address matters of delay more seriously than has been the case in the past.

For a number of years, the Ombudsmen's practice in cases of delay has been to concentrate on the substantive information that the requester has sought and to help to broker a response to that request, rather than to worry unduly about strict compliance with the OIA's timeframes. This approach has been pragmatic and sensible. Compliance or non-compliance with the OIA is not a game with points being awarded or deducted. An OIA request is assumed to be directed at obtaining the information sought. Where an Ombudsman has been appealed to, the Ombudsman has concentrated on ensuring that the request is responded to rather than conducting a post-mortem over timeframe compliance.

Consequently, the practice has been only to take note and censure "exceptional delays". The Ombudsmen annual report in 1994, for instance, singles out two delays of, respectively, three months and 47 working days before responding, for remark and censure. Other complaints involving delay were dealt with informally and are not identified.²

That informal approach to delay has a great deal to commend it. It is light-handed and unbureaucratic. It concentrates on fixing the underlying issue – provision of the information sought – rather than allocating blame. However, the fact that delay is seen as a perennial OIA problem suggests that the approach deserves re-examination.

The Ombudsmen have therefore decided that in response to the problem of delay, a greater concentration on it at the review stage is warranted. There is, for example, some anecdotal evidence that the fact that what one might call "standard" delay (failure to respond to a request within 20 working days) is not remarked on by the Ombudsmen, has itself had the unhealthy effect of causing agencies to think that they do not need to meet that deadline and that responding promptly when prompted by the Ombudsmen, is sufficient. In a sense the

² *Report of the Ombudsmen for the year ended 30 June 1994*, A3, pp 27-29.

Ombudsmen's practice may even have contributed to delay becoming institutionalised. How significant this factor may be in the overall concern with delay is impossible to say. It is unlikely to be a primary cause. However, the Ombudsmen have decided that they should take note of failure to provide a response to a request as required by the OIA, even where it is clear that, by the time complaint is made to an Ombudsman, the request is being seriously attended to by the agency concerned.

Responses

I should add, as most of you will be aware, that the obligation under the OIA on receiving a request is confined to making and conveying a decision on that request (to respond) as soon as reasonably practicable after it is made and, in any case, within 20 working days. (Subject to making a decision to transfer the request or to extend the time for responding.) Failure to respond within this time is deemed to be a refusal of the information (s 28(4)).

The obligation that I have been talking about is thus not an obligation to *provide* the requested information. It is to *respond* with a decision on that request. The legislation contains the mechanism for transferring a request to a more suitable agency or for extending the time allowed to respond where a large quantity of information needs to be assessed or searched or consultations with other interested parties will be necessary and, in either case, this cannot reasonably be done within the original time limit (ss 14 and 15A). Experience in the Ombudsmen's office is that these provisions (especially the extension provision) are not consistently utilised even where they may be justified. Failure to utilise them can needlessly turn a request that would otherwise be met in time, into a deemed refusal of the information. The Ombudsmen will encourage agencies to utilise the provisions of the OIA to allow them the time they need to respond to an information request intelligently. At the same time, by doing so the requester is informed of what is going on (indeed that something is going on) within the agency in response to the request. This in itself may relieve a source of frustration on the part of requesters who are simply not aware that the request is in fact being processed.

The Ombudsmen will thus aim to hold agencies to their obligation to make a decision, at the latest, in accordance with the maxima prescribed in the OIA.

Having made a decision, a second obligation arises. This is to fulfil it as soon as reasonably practicable. Of course, often (and perhaps ideally) these obligations are fulfilled simultaneously. The letter responding to the request also contains or encloses the requested information. But this is not strictly required by the OIA.

Where the information is to be provided after responding to the request, the obligation is to provide that information without undue delay (s 28(5)). What is undue delay will depend upon the circumstances of the case. It cannot be definitively defined in advance. But the Ombudsmen will be intent on ensuring that agencies do fulfil with promptitude their promises to provide information.

They will also be concerned to ensure that agencies do not renege on their promises.

The decision that is made within 20 working days (or an extended period) to provide information is a binding commitment. It is not to be regarded as a provisional decision on release made merely in order to comply with the letter of the law and something that is subject to second-thoughts by the agency in the period between responding to the request and fulfilling it. If information is not to be released this must be signalled clearly and particularly in the release decision. If that were not the case the release decision would not be a decision at all; the process at that point would be a charade. So it is important that in making the initial decision on release, agencies do so seriously.

This is not to say that the Ombudsmen will hold agencies to any particular *grounds* stated in that initial decision for withholding information. If, in the decision it is clearly indicated that certain requested information is to be withheld and the grounds indicated therein for withholding are found subsequently not to apply but other grounds would justify withholding the information, the decision to withhold will be upheld. Ombudsmen review the “refusal” to make information available. The justification for such a refusal may become clearer during the course of the review. That will not render the initial decision bad.

Effect of the new practice

What the effect of taking note of deemed refusals will be is impossible to say at this point.

If there are any systemic delays within particular agencies, this new approach will contribute to identifying these and to having them addressed. Requesters will, it is hoped, be kept properly informed of the appraisals of their request. It is not the intention to catch agencies out and humiliate them. At the moment the fact that a deemed refusal has been found will be made known to the requester and the agency when the Ombudsmen writes to them. It is not proposed by the Ombudsmen to give further publicity to deemed refusals at this stage. Whether at some stage in the future (for instance in the next financial year) statistics or identifying information on deemed refusals is published has not yet been determined. Amongst other things, it will depend on how robust or representative we consider that the statistics we have are.

Whether this “kick-start” has any significant effect in reducing concern with delay, it is, of course, too early to tell. But, at least, by the Ombudsmen noting failures to respond to requests, a better picture of compliance with the OIA should emerge, as compared with simply writing-off non-compliance as not important enough to notice.

Noticing deemed refusals is certainly not a complete answer to problems of delay. But it may make a contribution.

Requests

I have been dealing so far with the obligations of agencies to respond to requests for official information.

It is appropriate to have some regard to the concomitant obligations of requesters.

In the main the requester's obligation is to specify the request with due particularity (s 12(2)). While this obligation has received little attention in the past, it is only fair to insist that it be complied with if agencies are to be held to the strict terms of the OIA in making their responses. A request that does not specify with due particularity the information requested will not be a request for which time starts to run under the OIA. In a complaint of delay, the Ombudsmen will be open to the argument that, because of the unspecified nature of the request, no valid request has been made.

The OIA contemplates this consequence by imposing a duty on agencies to give reasonable assistance to requesters to put their requests in order (s 13). Going a little further than the OIA requires, the Ombudsmen have encouraged agencies to engage with requesters so as to clarify or possibly refine them. It may be, for example, that a request is perfectly clear on its face but is extremely wide or that it is clear to the agency that it misses the mark at which it can be inferred that the requester was aiming. Agencies have been urged to communicate informally with requesters in these circumstances. The requester may agree to limit or withdraw the request, or a staged fulfilment of it may be arranged. Laudable and desirable as these engagements with requesters are, however, agencies must always bear in mind that if a valid request has been received the obligation to respond to it formally according to the statutory timeframe has arisen. If, because of such discussions this is not done, the deemed refusal will not thereby be excused, though its seriousness may be mitigated.

As much dialogue as is practicable for agencies (that are not after all in business solely to answer OIA requests) is therefore to be encouraged. But the statutory framework of an obligation to respond still obtains.

Advice/opinion

Some of the most difficult and contestable decisions on withholding information arise around the provisions of the OIA that give prima facie good grounds for withholding because of the confidentiality of advice and the free and frank expression of opinion (ss 9(2)(f)(iv) and 9(2)(g)(i)). In particular, these grounds are at the forefront of relations between Ministers and departmental officials.

Withholding information on the grounds of the confidentiality of advice is included as one of four classes of “constitutional conventions” which the withholding is expressed to be available for the purpose of maintaining. Something that may be attributable to Sir Kenneth Keith’s membership of the Danks Committee. The reference to the constitutional conventions as operating “for the time being” is an explicit recognition that conventions change over time and that the application of this ground for withholding must take account of this. Indeed, conventions do not just change over time, they may cease to exist. Certainly our concept of the “collective” responsibility of Ministers is different today after 10 years’ experience of MMP as compared to how it was understood in 1982 when the OIA was enacted.

The question has been raised as to whether this provision is too vague to give good guidance on the taking of decisions under the OIA, and whether the link with conventions should be jettisoned in favour of a more specific statement of the values being protected here. (However, it is worth noting that the provision as enacted is more specific than the original phraseology recommended by Danks and included in the bill as introduced. This did not mention the collective or individual responsibility of Ministers expressly, for example.) But it is likely that any rephrasing would pose its own problems in its application.

What these provisions (advice and opinion) seem to me to be aiming at is what might be termed “good governance”. (Referred to in s 9 (2)(g) as “the effective conduct of public affairs”.)

Good governance

The OIA and the principles of freedom of access to information are themselves part of a move to good governance. Essentially, they contribute to this by democratising the process. Of course, we lived in a democracy before 1982. But the OIA has significantly changed the degree to which the citizenry can effectively participate in decision-making and can hold those in positions of responsibility to account. By improving effective participation it has also encouraged the expectation that an opportunity will be provided for that participation to take place. Although purely facilitative, it has contributed to a climate of expectation fostered

through other means (such as judicial review) that more consultative processes will be followed in government and opportunities afforded for a participatory democracy to flourish.

But “good governance” implies a moderated approach. Better decisions are hazarded to result from greater public participation. Certainly, they should result in greater buy-in from society. But the OIA was prescient in tempering this democratisation by allowing some processes to be carried out without being over-exposed to scrutiny. The OIA does not provide a front-seat at Cabinet meetings. Again, a judgment was made that such tempering will ultimately result in better decisions. For example, an opportunity should be provided for thinking outside the square and officials encouraged to be candid in expressing themselves, without the early exposure of such ideas torpedoing them or officials feeling that they must avoid public criticism or ridicule and modify their contributions accordingly. It was recognised that in government some space must be given for inchoate thinking to be developed. Thus a principle of “reflection”, tempering the general move to democratisation ushered in by the OIA, was endorsed as part of the reform.

It may be that not enough attention has been paid to this aspect of the OIA. Nicola White quotes concern being expressed about the capacity for people in government “to think laterally and to float new and unexpected ideas to see if they were rubbish or potentially fantastic” without prematurely exposing or embarrassing themselves.³ If anything, the pressures of public life have intensified since 1982 making those aspects of the OIA’s promotion of good governance even more important to maintain.

These provisions seem to me to be very close to a general question of where the public interest lies in disclosure. Technically “public interest” in OIA terms is made a specific test of release (s 9(1)). This involves considering whether, in the circumstances of the case, the public interest in good governance (promoted by the advice and opinion provisions, amongst others) is outweighed in a particular case by other factors. In principle, this should be exceptional because the

³ *Free and Frank*, p 100.

concept of the public interest is, as I have suggested, inherent in the withholding grounds themselves.

Thus a tension or balancing exercise arises between democratisation and reflection – that, while better decisions will result from each of these principles, the best decisions are ultimately likely to result from a judicious blend of the two. This tension lies at the heart of the two withholding grounds under consideration here and is reflected in the competing purposes of the OIA itself (s 4). Obviously one cannot describe definitively how to blend them. But I would like to discuss two factors relevant (though not exclusively so) to this exercise and how they reflect on it. The two factors are context and time.

Context

It is possible to assert, it seems to me, that the context in which advice or opinion is generated may itself establish that an advice/opinion withholding ground exists. This, of course, is not conclusive because the “public interest” as expressed in the OIA requires a further balancing test of the particular circumstances before a conclusion on release or withholding can be made. But if the context can establish the ground itself in a number of cases then this can shorten the process of consideration. One will not need to consider anew each time whether a prima facie withholding ground exists. In fact the OIA itself explicitly accords contextual protection in some respects. For example, by including the maintenance of legal professional privilege as a ground for withholding (s 9(2)(h)) it establishes a context in which a type of information, prima facie, justifies withholding.

Ombudsmen’s decisions on the advice/opinion grounds do identify a number of contexts that will on their face justify withholding.

Thus the Ombudsmen have upheld the withholding of draft replies to parliamentary questions prepared by officials.⁴ What is important is what the Minister who is answering the question takes responsibility for in delivering the reply in the House or by approving a written reply to the member who asked the question. Release of draft replies would tend to concentrate attention on how

⁴ *Ombudsmen Quarterly Review*, September 2002.

officials would have answered the question. Parliamentary questions are an exchange between elected politicians (officials may be questioned in other ways in parliamentary proceedings). To release drafts would undermine this and might tempt Ministers to leave officials out of the equation already by not seeking their assistance. This would be to the ultimate detriment of the process. Consequently, draft replies as advice are normally protected from disclosure. This was a decision of the Ombudsmen that I agreed with at the time when I was Clerk of the House. It is a decision I agree with now.

There is no full list of the contexts that the Ombudsmen have accepted as establishing good grounds for withholding, but work is under way in the Ombudsmen's office to bring such decisions together for publication. Other contexts will no doubt be identified in the future.

As long as these contexts continue to provide withholding grounds (and, of course, circumstances could change bringing their continued applicability into question), review of a decision to withhold can concentrate on whether, in the particular circumstances, the need to withhold was outweighed by other factors impelling release. That is, the review process can be more confined and thus expedited.

Timing

The *timing* of release seems to me also to be an important factor in determining whether withholding is justified on advice/opinion grounds.

I do not see the advice/opinion grounds as ever giving perpetual protection from release. Even in the case of information falling into a context that protects it, it is likely that that context will cease to have relevance given a sufficient lapse of time. (Though this may be a considerable period of time in some cases so as not to undermine the context protection.) What is a suitable period of time will vary with the context. It may be able to determine this in advance so that it is known when such information will no longer be entitled to protection.

But most advice/opinion withholding will not arise in an identified context and will fall for assessment for release in its own terms. In those circumstances the point which the policy or other matter to which the advice/opinion relates has reached will be significant. If the good governance interest in promoting reflection is to be given expression, advice/opinion relating to policies or proposals still under development within government will warrant a higher degree of protection than policies or proposals at a more advanced stage. Of course, there *is* an interest in advice/opinion being widely known prior to a decision being taken. This is undeniable. But that interest is often likely to be outweighed by the need to maintain confidentiality at that stage if the “space” to be created for measured decision-making is to be afforded. Consequently, at an early stage in the process a decision to withhold such information is more likely to be sustained. Conversely, the interest promoted by these withholding grounds is less strong, once a decision has been taken by government, even though the proposal has not yet been implemented or endorsed (for example, a law change is still before Parliament). The “democratic” interest, as opposed to the “reflective” interest may come to preponderate at some point after the decision is taken.

A factor which impinges on when exactly this is, is one raised quite often but which may be rejected as a general objection to release. This is that if advice/opinion is released at all, officials will be inhibited in the future from making candid contributions to government by way of the future advice they give or the opinions they express. I do not accept this as a general proposition. The OIA and the greater openness that it has brought to governmental decision-making has operated for a quarter of a century. Public servants are no longer the largely anonymous figures they were before the State Sector Act was enacted in 1988. Two generations of public servants have never known the more restrictive conventions operating before the 1980s. Those still practising who entered government service before then can be assumed to be sufficiently senior and experienced to have accommodated themselves to the more open environment. While some early or creative work may warrant ongoing protection from release to give encouragement to uninhibited thinking (as discussed above) and informal exchanges among officials themselves deserve special consideration, I do not accept that as a general rule public servants are such a self-effacing class that

they will not give and express candid advice and opinions to Ministers except with an assurance of long-term, across the board, confidentiality for their contributions.

I do accept, however, that there are circumstances in which even though a decision may have been taken within government, the policy or proposal may still be the subject of intense political debate and that it may be undesirable for public servants to have their views cited in that political debate while it is under way. Releasing their advice/opinion at such a time could expose them to that. I think therefore that officials when they give advice or express opinions can expect that that advice or opinion will not lightly be released so as to enter into contention in such circumstances. This is not wholly a question of inhibiting officials. It is undesirable in itself for officials' views to become part of political contention. It might undermine the perception of their political neutrality, for instance, if public servants' views were to be used in parliamentary debates (s 9(2)(f)(iii)). While there is something in this, it cannot be pushed too far. A system that prevented critics having access to government information, while leaving it open to Ministers to use officials' views as they saw fit, would not be satisfactory, for instance. A judgment as to the tenor of political debate at the time needs to be made, rather than relying on any absolute rule.

It can be said, however, that the further away one gets from a government decision after it has been made the less need there is for protection and the greater the case there is for openness, especially if one accepts that the OIA provisions that I have been discussing do not provide absolute protections, only relative ones.

Freedom of information

Finally, I want to reflect on the Ombudsmen's role in respect of freedom of information generally.

One thing that did strike me with the publication of *Free and Frank* and the discussion that it provoked, was the almost nostalgic reflection on the Information Authority. When it ceased to exist in 1988 I recruited its director as Deputy Clerk. For some 20 years afterwards I hardly ever heard it mentioned (except by her, of

course). But recently it has been recalled, and fondly recalled, as an opportunity missed.

It strikes me that what the OIA – freedom of information – lacks, and what it is now being realised that the Information Authority could have been, is a champion. The absence of one is being seen as unfortunate. It is recognised that the lack of a body such as the Authority has meant that freedom of information as an idea has not progressed quite as strongly as it might if it had been promoted by a body with that role.

As Nicola White points out, the one constant, centrally involved agency in the freedom of information field, is the Ombudsmen's office. Could the Ombudsmen be a champion for the OIA and supply the gap left by the Information Authority?

I think there is a major contribution that the Ombudsmen's office has made and can continue to make, but I do not think that it can fully supply the gap left by the Authority.

In essence, this is because of the prominence of the Ombudsmen's adjudicatory role. One can contrast the Ombudsmen for instance, with the Privacy Commissioner who also has a role in considering complaints yet really does play a championing role, at least in the data protection area (and possibly, when the Law Commission has finished its review, in privacy generally). The Privacy Commissioner's functions on complaints are but a comparatively small element in the role of the office. Much more prominent is the Privacy Commissioner's policy role: stimulating consideration of privacy issues, advocating for good practice, commenting on policies and legislation. In general being a leader in that field.

I do not think Ombudsmen could do that in respect of freedom of information. For a start, reviewing official information decisions is only half of their brief. The other, original, half is complaints of maladministration itself. This is well-integrated with the OIA work, but it is distinct and should remain distinct. Does the OIA therefore need a separate Information Commissioner?

This is a big question and not one that I have thought through. But even an Information Commissioner would be primarily an adjudicator and it is that role that makes it difficult for the Ombudsmen/Information Commissioner to be out front on freedom of information in the way that the Privacy Commissioner can be on privacy. Complaints are our business - complaints of maladministration; complaints of unjustifiable withholding of information. Some body has to do this work. The Ombudsmen provide an inexpensive and accessible means for doing it. That means adjudicating within the letter and spirit of the legislation. There should be an ethos of freedom of information to this as that comes directly from the OIA itself (s 5). But it still means deciding between competing views and maintaining (one hopes) the confidence of requesters and agencies. An Ombudsman with an agenda would not just find it difficult to maintain the confidence of the parties. I do not see how such a role would enable an Ombudsman to approach issues objectively in the first place.

Consequently, a freedom of information champion would have to be situated elsewhere.

This does not mean that the Ombudsmen have no contribution to make apart from adjudicating on complaints. I have found my almost total concentration on adjudication in the last six months an essential and valuable learning experience. One needs to learn the cases if one wishes to do the job well. But it is not the only thing that I want to do.

What then, can the Ombudsmen contribute?

The Ombudsmen have contributed and will continue to contribute to development and study of the jurisprudence of the OIA. Publication of case notes, a quarterly review newsletter and other reports contribute to this. The Ombudsmen and staff of the office can participate in conferences such as this and submit articles on aspects of the OIA, in general being part of the community that explores the meaning of the legislation for practical and intellectual fulfilment.

The Ombudsmen can at least play a part with other bodies, such as the State Services Commission and Local Government New Zealand, in helping to improve

systems for handling official information: looking for means to promote proactive release of information, helping to train staff and devising internal office systems for dealing with requests, for example. However, in making their contributions in these areas, Ombudsmen must be careful not to become part of the system of administration themselves. Distance must be preserved.

The Ombudsmen too can contribute their views on policy proposals impinging on the OIA - whether on proposals relating to the Act itself or to other legislation with implications for that Act. This must be done in a sensitive way as coming from an Officer of Parliament, but it can be done both within the government machine and, if need be, directly to Parliament. If necessary, it can be done forcefully.

To play these extra roles, the Ombudsmen's office must be resourced and organised accordingly. Adjudicating on complaints will always be the basic stuff of the office, but it does not need to be and should not be its entire focus. The office is positioning itself, I believe, to make this wider contribution.

PART 2C CONSTITUTIONAL CONVENTIONS

In this Guideline

- ❖ Section 9(2)(f) - Introduction
- ❖ The general approach to section 9(2)(f)¹
- ❖ When does section 9(2)(f)(i) apply?
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¹ There is no equivalent to this section in LGOIMA

Section 9(2)(f) – Introduction

Section 9(2)(f) of the OIA applies if, and only if, it is “*necessary*” to withhold the information requested in order to:

“Maintain the constitutional conventions for the time being which protect –

- (i) The confidentiality of communications by or between 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.”*

Each of the interests which are the subject of this protection are discussed separately on the following pages.

The general approach to section 9(2)(f)

At a general level, all of the paragraphs of section 9(2)(f) should be approached in the same way when consideration is being given to whether or not they apply to particular information.

Organisations should ask the following questions:

- (i) What is the relevant constitutional convention?
- (ii) What is the purpose of that constitutional convention?
- (iii) Is it necessary to withhold the information requested in order to “*maintain*” that convention? That is, will release of the information undermine the interests which the convention seeks to protect?

In the case of each of the subparagraphs (i) to (iv), there will also be technical requirements that must be met before it can be considered to apply in any particular case.

Even if one of the subparagraphs of section 9(2)(f) applies in a particular case, consideration must still be given to the issue of whether there are any countervailing considerations favouring release, in the public interest, which outweigh the need to withhold.

What is the relevant convention?

Dicey has described constitutional conventions as “*customs, practices, maxims or precepts which are not enforced or recognised by the courts*”, and commented that they comprise “*constitutional or political ethics*”.²

Section 9(2)(f) does not define the nature of the conventions which it protects – rather, it describes the interests which the various conventions are designed to protect. The conventions are not themselves defined as constitutional conventions evolve over time. This is recognised in the wording of section 9(2)(f), which refers to constitutional conventions “*for the time being*”.

Sir Ivor Jennings has coined a three-part test for determining the existence of a convention. He suggests that the following questions should be asked:³

- (a) Are there any precedents?
- (b) Did the actors in the precedents believe they were bound by a rule?
- (c) Is there any reason for the rule referable to the needs of constitutional government?

To the extent that there is ambiguity about the scope of the various conventions referred to in section 9(2)(f), Jennings’ test is a helpful means of identifying the convention being relied upon and the reasons why it might be necessary to withhold the information requested.

² Dicey *Introduction to the Law of the Constitution* (10th edition, Macmillan & Co Ltd, New York, 1962) 417

³ Sir Ivor Jennings *The Law and the Constitution* (5th ed, University of London Press, 1959) chapter III

What is the purpose of the convention? Is it necessary to withhold the information in order to maintain the convention?

The last part of Jennings' test looks to the purpose of the convention – Professor Philip Joseph has commented in his book *Constitutional and Administrative Law in New Zealand* that:⁴

“No convention could be asserted if the rule thought to be binding served no constitutional purpose or if it frustrated rather than served constitutional ends. Each of Jennings’ criteria must be satisfied.”

In order to determine whether it is necessary to withhold the information requested to “maintain” the convention identified, it is essential that an organisation:

- (a) identify the underlying purpose of the convention; and
- (b) ask whether it is necessary to withhold the requested information in order to maintain that convention.

Before an agency can conclude that withholding is necessary to maintain the convention, it must be able to identify how release of the requested information will undermine the convention.

An important point to remember is that constitutional conventions can be breached without actually lapsing – their maintenance, therefore, does not depend upon absolute compliance in every case. Eagles, Taggart and Liddell have observed that:⁵

“The requirement that both the conventions and the effective conduct of public affairs be ‘maintained’ is not a legal license to withhold every time the former are breached, or the latter is made more difficult. This can, perhaps, be more clearly seen in relation to section 9(2)(f). ...[I]t is in the very nature of a constitutional convention that it can be departed from ‘without necessarily impairing its effectiveness’.”

⁴ (2nd ed, Brookers, Wellington, 2001) 276

⁵ *Freedom of Information in New Zealand* (Auckland, Oxford University Press, 1992) 335

When does section 9(2)(f)(i) apply?

Section 9(2)(f)(i) provides good reason for withholding the information if, and only if:

- ❖ the withholding of the information is necessary to “[m]aintain the constitutional conventions for the time being which protect ... [t]he confidentiality of communications by or with the Sovereign or her representative”, and
- ❖ the need to withhold is not “outweighed by other considerations which render it desirable, in the public interest, to make that information available”.⁶

Is it necessary to withhold the information to maintain the constitutional convention which protects “[t]he confidentiality of communications by or with the Sovereign or her representative”?

When answering this question, an agency should address the following issues:

- (i) What is the convention being relied upon?

Eagles, Taggart and Liddell have described the origins of the convention which protects the confidentiality of communications by or with the Sovereign or her representative in the following manner:⁷

“The notion that the ‘counsels of the Crown are secret’ long pre-dates the idea that the executive government should be responsible to representative institutions. In its original form it was a personal obligation imposed on the King’s servants and advisers, an obligation which found concrete expression in the oath of secrecy taken by privy councillors (an oath which in New Zealand has been given statutory expression). More latterly, instead of a personal and usually absolute obligation, the protection of royal and vice-regal confidences is justified by reference to the need to preserve the constitutional position of the Queen or Governor-General by limiting the visible involvement of either in matters of political controversy.”

The information encompassed by this convention is very broad in scope. The following points should be noted:

- ❖ the convention covers all “communications”, not merely advice; and
 - ❖ the communication need only be written by or directed to the Sovereign or her representative – it is not limited to communications between the Sovereign and Ministers or officials.
- (ii) What is the purpose of the convention? Is it necessary to withhold the information in order to maintain the convention?

As noted above, Eagles, Taggart and Liddell have observed that:⁸

“... the protection of royal and vice-regal confidences is justified by reference to the need to preserve the constitutional position of the

⁶ Section 9(1) OIA

⁷ Above n5, 364

⁸ Above n5, 364

Queen or Governor-General by limiting the visible involvement of either in matters of political controversy”.

When considering whether it is “*necessary*” to withhold the information in order to “*maintain*” the convention, an organisation should consider:

- (a) the purpose of the convention; and
- (b) whether release of the information requested will undermine the convention.

Not every breach of a constitutional convention will impair its effectiveness. Section 9(2)(f)(i) will only apply if it is “*necessary*” to withhold the information in order to “*maintain*” this convention.

Assess whether the need to withhold is “*outweighed by other considerations which render it desirable, in the public interest, to make that information available*”

In order to make this assessment, an agency will need to take the following steps:

- (i) Identify any considerations that may favour disclosure of the information in the public interest.
- (ii) Consider whether disclosure of the actual information requested would in fact promote those considerations. While there may be a public interest in release of some information about the particular situation, this may not necessarily be met by release of the specific information requested.
- (iii) Finally, consider whether, in the circumstances of the particular case, the considerations favouring disclosure outweigh, in the public interest, the need to withhold the information under section 9(2)(f)(i).

The interest in maintaining the convention protected by section 9(2)(f)(i) needs to be weighed against the legitimate public interest considerations favouring release that have been identified. There is no predetermined formula for deciding which interest is stronger in a particular case. Rather, each case needs to be considered carefully on its own merits and taking into account the surrounding circumstances.

Issues to consider when identifying and assessing the strength of public interest considerations are discussed further in Part 2D.

When does section 9(2)(f)(ii) apply?

Section 9(2)(f)(ii) provides good reason to withhold information if, and only if:

- ❖ the withholding of the information is necessary to “[m]aintain the constitutional conventions for the time being which protect ... [c]ollective and individual ministerial responsibility”; and
- ❖ the need to withhold is not “outweighed by other considerations which render it desirable, in the public interest, to make that information available”.

In the experience of the Ombudsmen, this withholding ground has arisen very rarely. It arises more often in the context of collective than individual ministerial responsibility, which is reflected in the guidance set out below.

Is it necessary to withhold the information to maintain the constitutional convention which protects “[c]ollective and individual ministerial responsibility”?

When making this assessment, an agency should consider the following issues:

- (i) What is the convention being relied upon?
 - (a) “*Collective ministerial responsibility*” is the constitutional convention which protects the ability of Cabinet to present a united front once a Cabinet decision has been made, regardless of the personal views of individual Ministers. This convention allows Ministers to debate issues freely and frankly within Cabinet without fear that their differences will be aired in public.

The *Cabinet Manual 2001* describes collective responsibility in the following manner:⁹

*“Acceptance of ministerial office requires acceptance of collective responsibility. Issues are often debated vigorously and within the confidential setting of Cabinet meetings, although consensus is usually reached and votes are rarely taken. **Once Cabinet makes a decision, then** (except as provided in paragraph 3.23) **Ministers must support it**, regardless of their personal views and whether or not they were at the meeting concerned.”* [Emphasis added]

Paragraph 3.23 provides for an “*agreement to disagree*” process within a Coalition Government, which may allow a different party position to be maintained by Ministers, regardless of their position during the decision-making process. This is effectively an exception to the convention of collective responsibility, which has arisen as a result of MMP Government.

Joseph has commented upon the adaptation of the convention of collective responsibility under MMP:¹⁰

“Under MMP, collective ministerial responsibility has narrowed to collective Cabinet responsibility. Until a policy has been placed

⁹ Paragraph 3.21

¹⁰ [2000] NZ Law Review 305

on the Cabinet agenda and adopted by Cabinet, Cabinet Ministers are free to engage in 'branding' exercises. Alliance Ministers Matt Robson and Laila Harré continued to advocate employer-paid parental leave and an increase in the youth minimum wage, despite their coalition partner's concern for flagging business confidence. Helen Clark publicly ruled out her government adopting the Alliance proposals without reverberation of collective responsibility. Neither issue had been before Cabinet and there was no need to resort to the party distinction clause."

- (b) The convention of "*individual ministerial responsibility*" holds Ministers accountable to Parliament for their personal actions and for the acts or omissions of their Departments. It requires them to explain how such acts or omissions occurred, and advise both Parliament and the public how they will be corrected and any damage minimised.¹¹ In very limited circumstances, a Minister may be required to accept personal responsibility and resign; this will usually only occur where the Minister's own conduct is at issue.
- (ii) What is the purpose of the convention?
- (a) "*Collective ministerial responsibility*" serves two closely related purposes.
- It:
- ❖ allows Cabinet to present a united front once a decision has been made, even if the merits of the decision were debated within Cabinet; and
 - ❖ allows issues to be debated freely and frankly within Cabinet without fear that individual opinions will be disclosed.
- (b) The purpose of "*individual ministerial responsibility*" is to ensure that Ministers are politically accountable to Parliament, and ultimately the public.
- (iii) Is it necessary to withhold the requested information in order to maintain the conventions?
- (a) When considering whether it is necessary to withhold the requested information in order to maintain the convention which protects "*collective ministerial responsibility*", an agency should consider the following factors:
 - ❖ Has a decision been made by Cabinet?

If not, then there is no decision in respect of which Cabinet must present a united front. As noted above, the *Cabinet Office Manual* describes the convention as applying once Cabinet makes a decision.

Joseph has also argued that since the advent of MMP, Ministers are free to air their individual or party views publicly, prior to an issue

¹¹ Joseph, above n 4, 287

being placed upon Cabinet's agenda and a Cabinet decision being made. The convention of collective responsibility does not constrain the publication of such views.

- ❖ If a decision has been made by Cabinet, would disclosure of the requested information reveal diverging views of individual Ministers?

In order for release of the information to breach collective responsibility, the information must reveal the personal views of individual Ministers, which diverge from the Cabinet decision.

The disclosure of views expressed by agencies in the course of providing advice to the relevant Ministers is not a breach of collective responsibility.

- ❖ Even if a decision has been made and the information reveals the diverging views of Ministers, is it necessary to withhold the information in order to maintain the convention? It is important to remember that a convention can be breached without actually lapsing.

- (b) In order for it to be considered necessary to withhold the requested information in order to maintain the constitutional convention which protects "*individual ministerial responsibility*", an agency must have reason to believe that releasing the information will undermine the accountability of the relevant Minister to Parliament.

Assess whether the need to withhold is "*outweighed by other considerations which render it desirable, in the public interest, to make that information available*"

In order to make this assessment, an agency will need to take the following steps:

- (i) Identify any considerations that may favour disclosure of the information in the public interest.
- (ii) Consider whether disclosure of the actual information requested would in fact promote those considerations. While there may be a public interest in release of some information about the particular situation, this may not necessarily be met by release of the specific information requested.
- (iii) Finally, consider whether, in the circumstances of the particular case, the considerations favouring disclosure outweigh, in the public interest, the need to withhold the information under section 9(2)(f)(ii).

The interest in maintaining the conventions protected by section 9(2)(f)(ii) needs to be weighed against the legitimate public interest considerations favouring release that have been identified. There is no predetermined formula for deciding which interest is stronger in a particular case. Rather, each case needs to be considered carefully on its own merits and taking into account the surrounding circumstances.

Issues to consider when identifying and assessing the strength of public interest considerations are discussed further in Part 2D.

When does section 9(2)(f)(iii) apply?

Section 9(2)(f)(iii) provides good reason for withholding information if, and only if:

- ❖ the withholding of the information is necessary to “[m]aintain the constitutional conventions for the time being which protect ... [t]he political neutrality of officials”; and
- ❖ the need to withhold is not “outweighed by other considerations which render it desirable, in the public interest, to make that information available.”¹²

Is it necessary to withhold the information to maintain the constitutional convention which protects “[t]he political neutrality of officials”?

When making this assessment, an agency should consider the following issues:

- (i) What is the convention being relied upon?

The “*Public Service Code of Conduct*”, published by the State Services Commission, describes the convention of political neutrality in the following manner:

“Public servants are required to serve the Government of the day. They must act to ensure not only that their department maintains the confidence of its Ministers, but also to ensure that it is able to establish the same professional and impartial relationship with future Ministers. This convention of political neutrality is designed to ensure the Public Service can provide strong support for the good government of New Zealand over the long term.”

Public servants have a long-established role in assisting with development as well as implementation of policy. This role may be performed in different ways and at different levels from department to department. Public servants are responsible for providing honest, impartial, and comprehensive advice to Ministers, and for alerting Ministers to the possible consequences of following particular policies, whether or not such advice accords with Ministers’ views.”

- (ii) What is the purpose of the convention?

The purpose of the convention of political neutrality is to ensure that public servants serve the Government of the day in an impartial and loyal manner in order to “*provide strong support for the good government of New Zealand over the long term*”.

- (iii) Is it necessary to withhold the information at issue in order to maintain that convention?

In making this assessment, an agency should consider whether releasing the requested information would undermine the convention protecting the political neutrality of officials. In this regard, it should note that:

¹² Section 9(1) OIA

- ❖ the fact that Ministers and their officials have taken a different view of a particular issue does not mean that publication of those views will mean that the officials will no longer be politically neutral;¹³ and
- ❖ depending upon the nature of the information requested, disclosure of the information may actually enhance or protect the convention of political neutrality.

Assess whether the need to withhold is “outweighed by other considerations which render it desirable, in the public interest, to make that information available”

In order to make this assessment, an agency will need to take the following steps:

- (i) Identify any considerations that may favour disclosure of the information in the public interest.
- (ii) Consider whether disclosure of the actual information requested would in fact promote those considerations. While there may be a public interest in release of some information about the particular situation, this may not necessarily be met by release of the specific information requested.
- (iii) Finally, consider whether, in the circumstances of the particular case, the considerations favouring disclosure outweigh, in the public interest, the need to withhold the information under section 9(2)(f)(iii).

The interest in maintaining the convention protected by section 9(2)(f)(iii) needs to be weighed against the legitimate public interest considerations favouring release that have been identified. There is no predetermined formula for deciding which interest is stronger in a particular case. Rather, each case needs to be considered carefully on its own merits and taking into account the surrounding circumstances.

Issues to consider when identifying and assessing the strength of public interest considerations are discussed further in Part 2D

¹³ Case Numbers 13 and 69, 5th Compendium of Case Notes of the Ombudsmen (Official Information Act 1982) 34, 38

When does section 9(2)(f)(iv) apply?

Section 9(2)(f)(iv) provides good reason to withhold information if, and only if:

- ❖ withholding the information is necessary to “[m]aintain the constitutional conventions for the time being which protect ... [t]he confidentiality of advice tendered by Ministers of the Crown and officials”, and
- ❖ the need to withhold is not “outweighed by other considerations which render it desirable, in the public interest, to make that information available”.¹⁴

In general terms, this section is often relevant where there is concern that release will prejudice the ability of decision-makers to **consider** advice. It will often arise where a decision-maker has an expectation that advice which has been tendered for consideration will remain confidential for a certain period of time. For this reason, if a request for such advice is received by an agency other than the decision-maker, consideration should be given to:

- (a) consulting the decision-maker in order to ascertain the precise nature of any concerns regarding release of the advice; or
- (b) transferring the request to the decision-maker.

Is it necessary to withhold the information to maintain the constitutional convention which protects “[t]he confidentiality of advice tendered by Ministers of the Crown and officials”?

When making this assessment, an agency should consider the following issues:

- (i) Is the information “advice” and has it been “tendered”?

Section 9(2)(f)(iv) will usually only be relevant if the information requested is of an advisory nature and has been tendered. Once these elements of the subsection have been satisfied, then the agency may move on to consider whether it is “necessary” to withhold the information in terms of the Act.

In certain limited circumstances this section may still be relevant even if information has not been “tendered” at the time of the request. This situation may occur where internal discussion papers are circulated within an agency or between agencies prior to the tendering of formal advice to a Minister. In these circumstances, the best way to assess the most appropriate withholding ground is to define as precisely as possible the reasons why the agency does not consider the information should be released:

- ❖ If the agency is concerned that release of internal discussion papers will inhibit the future production, circulation or retention of opinions, or have an impact upon the way it is expressed in the future, it should consider whether the interests protected by section 9(2)(g)(i) of the Act more accurately reflect its concerns.
- ❖ If, however, an agency is concerned that release of internal discussion papers will undermine the ability of Ministers to consider the advice that will be tendered in an effective and orderly manner, section 9(2)(f)(iv) of the Act may be an appropriate withholding ground.

¹⁴ Section 9(1) OIA

Such concerns might arise if release of the information means that a Minister is asked to publicly comment upon issues regarding which he or she has not been fully briefed. Section 9(2)(f)(iv) can only be relied upon in these circumstances if a direct connection can be established between the internal discussion papers and the advice to be tendered to Ministers, and the remaining elements of the section are made out.

(ii) What is the convention being relied upon?

The wording of section 9(2)(f)(iv) suggests that in certain circumstances the convention allows advice tendered to Ministers to be kept confidential. It is generally considered that such protection may be “*necessary*” in order to enable the process of government to operate in an effective and orderly manner.

The Danks Committee has provided some guidance in this respect, explaining that:¹⁵

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

(iii) What is the purpose of the convention?

In general terms, the Danks Committee explained that the underlying purpose of the convention is to protect the ability of government to receive and deliberate upon advice in an effective and orderly manner – its ability to run the country effectively will sometimes depend upon confidentiality. That general purpose, however, may have a number of different practical manifestations. The Ombudsmen have recognised that various purposes of the convention include protecting the ability:

- ❖ of Ministers and Cabinet to consider advice, where release of the advice will prejudice the ability to decide what course of action to take;
- ❖ of Coalition partners to conduct negotiations regarding policy issues, where release of the advice may prejudice such negotiations;
- ❖ of a Minister to consider draft answers to Parliamentary questions, in order that he or she may decide precisely how to respond and take individual responsibility for the answer actually given.

These examples are not exhaustive – the convention may arise in other circumstances as well.

¹⁵ General Report para 47

- (iv) Is it necessary to withhold the requested information in order to maintain the convention?

In order to establish that it is “*necessary*” to withhold the information requested in order to “*maintain*” the convention protected by section 9(2)(f)(iv), there must be reason to believe that the release of this information would undermine that convention. An agency should consider the purposes of the convention, and identify whether the release would undermine those purposes. It is important to remember that not every breach of a convention will cause it to lapse.

In the context of section 9(2)(f)(iv), factors such as:

- ❖ the content of the advice;
- ❖ the context in which it was generated; and
- ❖ the stage reached in the policy-making process to which it relates;

are all relevant to this assessment. By identifying these factors, the information at issue can be placed in its proper context and the harm (if any) that will be caused by release can more easily be identified. The following bullet points provide examples of how these factors are relevant to an assessment of whether it is necessary to withhold particular information:

- ❖ Advice that is purely factual in nature or comprises bare options, as opposed to opinions offered or recommendations made as to future action, can often be disclosed without pre-empting the ability of Ministers or Cabinet to deliberate on the advice received and decide how to proceed. In other words, not all advice may need to be withheld, even though it is still under consideration. [*Content of the advice*]
- ❖ The advent of an MMP electoral system, with its tendency to cause the formation of coalition and/or minority governments, has created a new context in which section 9(2)(f)(iv) must operate. Premature release of information before full consultation has between coalition partners occurred may prejudice the ability of those partners to reach agreement, thus undermining the convention that section 9(2)(f)(iv) seeks to protect. [*Context in which advice generated, stage reached in policy-making process*]
- ❖ Alternatively, coalition partners may have publicly debated their opposing views regarding a particular policy. In such cases it may be difficult to see how release of policy advice will prejudice the ability to reach an agreed government position. [*Context in which advice generated, stage reached in policy-making process*]
- ❖ Once a decision has been made, there may be no need for ongoing protection of the advice on which that decision was based. In some circumstances, release of relevant information can have the positive effect of explaining to the public the reasons why certain policies have been developed or modified or other actions taken. Such an approach is consistent with one of the purposes of the Act.¹⁶ [*Stage reached in policy-making process*]

¹⁶ Section 4(a)(ii) OIA

Assess whether the need to withhold is “outweighed by other considerations which render it desirable, in the public interest, to make that information available”

In order to make this assessment, an agency will need to take the following steps:

- (i) Identify any considerations that may favour disclosure of the information in the public interest. The following considerations often arise in the context of section 9(2)(f)(iv):

- ❖ Is the content of the information such that its release will promote the accountability of ministers or officials?

For example, will it reveal the factors taken (or not taken) into account in a decision-making process?

- ❖ Would release of this information promote the ability of the public to effectively participate in the making and administration of laws and policies?

Enabling the public to effectively participate in the making and administration of laws and policies is one of the purposes of the OIA.¹⁷

Releasing background information, or information which sets out options under consideration, will often enable the public to participate in the policy-making process.

- (ii) Consider whether disclosure of the actual information requested would in fact promote those considerations. While there may be a public interest in release of some information about the particular situation, this may not necessarily be met by release of the specific information requested.
- (iii) Finally, consider whether, in the circumstances of the particular case, the considerations favouring disclosure outweigh, in the public interest, the need to withhold the information under section 9(2)(f)(iv).

The interest in maintaining the convention protected by section 9(2)(f)(iv) needs to be weighed against the legitimate public interest considerations favouring release that have been identified. There is no predetermined formula for deciding which interest is stronger in a particular case. Rather, each case needs to be considered carefully on its own merits and taking into account the surrounding circumstances.

Issues to consider when identifying and assessing the strength of public interest considerations are discussed further in Part 2D.

¹⁷ Section 4(a)(i) of the OIA. Similarly, section 4(a)(i) of LGOIMA provides that one of the purposes of that Act is to enable more effective participation by the public in the actions and decisions of local authorities

Summary sheet – Section 9(2)(f)(i)

Maintaining the convention which protects the confidentiality of communications by or with the Sovereign or her representative

Always proceed on the basis that the information requested “*shall be made available unless there is good reason for withholding it*”.

1. Identify the convention being relied upon.
2. Identify the purpose of that convention and assess whether, in light of that purpose, it is necessary to withhold the requested information in order to maintain the convention.

If you have identified the convention and its purpose, and consider that releasing the information will undermine that convention and can explain why, then section 9(2)(f)(i) may apply. You should then move on to consider whether there are any public interest considerations, in terms of section 9(1), favouring release which outweigh the need to withhold.

3. Identify any considerations favouring disclosure of the information.
4. In light of such considerations, is there a public interest in disclosure of the information requested?
5. Consider whether, in the circumstances of the particular case, the public interest in disclosure of the information (in whole or in part), outweighs the need to withhold the information to maintain the convention.

If so, release sufficient information to satisfy the public interest in disclosure.

If not, advise the requester of the decision to withhold.

Summary Sheet – Section 9(2)(f)(ii)

Maintaining the Conventions which protect Collective and Individual Ministerial Responsibility

Always proceed on the basis that the information requested “*shall be made available unless there is good reason for withholding it*”.

1. Identify the convention being relied upon.
2. Identify the purpose of that convention and assess whether, in light of that purpose, it is necessary to withhold the requested information in order to maintain the convention.
3. With regard to collective ministerial responsibility, consider whether:
 - ❖ a decision has been made by Cabinet; and
 - ❖ whether disclosure of the requested information would reveal diverging views of individual Ministers.

With regard to individual ministerial responsibility, consider whether releasing the information will undermine the accountability of a particular Minister to Parliament.

If you have identified the convention and its purpose, and consider that releasing the information will undermine that convention and can explain why, then section 9(2)(f)(ii) may apply. You should then move on to consider whether there are any public interest considerations, in terms of section 9(1), favouring release which outweigh the need to withhold.

3. Identify any considerations favouring disclosure of the information.
4. In light of such considerations, is there a public interest in disclosure of the information requested?
5. Consider whether, in the circumstances of the particular case, the public interest in disclosure of the information (in whole or in part), outweighs the need to withhold the information to maintain the convention.

If so, release sufficient information to satisfy the public interest in disclosure.

If not, advise the requester of the decision to withhold.

Summary sheet – Section 9(2)(f)(iii)

Maintaining the Convention which protects the Political Neutrality of Officials

Always proceed on the basis that the information requested “*shall be made available unless there is good reason for withholding it*”.

1. Identify the convention being relied upon.
2. Identify the purpose of that convention and assess whether, in light of that purpose, it is necessary to withhold the requested information in order to maintain the convention. Would disclosure of the information undermine the convention protecting the political neutrality of officials?

If you have identified the convention and its purpose, and consider that releasing the information will undermine that convention and can explain why, then section 9(2)(f)(iii) may apply. You should then consider whether there are any public interest considerations, in terms of section 9(1), favouring release which outweigh the need to withhold.

3. Identify any considerations favouring disclosure of the information.
4. In light of such considerations, is there a public interest in disclosure of the information requested?
5. Consider whether, in the circumstances of the particular case, the public interest in disclosure of the information (in whole or in part), outweighs the need to withhold the information to maintain the convention.

If so, release sufficient information to satisfy the public interest in disclosure.

If not, advise the requester of the decision to withhold.

Summary sheet – Section 9(2)(f)(iv)

Maintaining the Convention which protects the Confidentiality of Advice tendered by or between or to Ministers or Officials

Always proceed on the basis that the information requested *“shall be made available unless there is good reason for withholding it”*.

1. Identify the convention being relied upon.
2. Identify the purpose of that convention. Is its purpose to:
 - ❖ enable Ministers and Cabinet to consider advice, where release would prejudice the ability to decide what course of action to take?
 - ❖ enable Coalition partners to conduct negotiations which would be prejudiced by the disclosure of the information requested?
 - ❖ enable a Minister to consider draft answers to Parliamentary questions, in order to take individual responsibility for the answer actually given?
3. Assess whether, in light of that purpose, it is necessary to withhold the requested information in order to maintain the convention. Consider here:
 - ❖ the nature and content of the advice – is it factual in nature or does it comprise bare options, as opposed to opinions offered or recommendations made?
 - ❖ whether, in the context of coalition government, release would undermine negotiations, or whether the coalition partners have already openly debated the policy issues; or
 - ❖ whether a decision has been made – is there any need for ongoing protection?

If you have identified the convention and its purpose, and consider that releasing the information will undermine that convention and can explain why, then section 9(2)(f)(iv) may apply. You should then consider whether there are any public interest considerations, in terms of section 9(1), favouring release which outweigh the need to withhold.

4. Identify any considerations favouring disclosure of the information. For example:
 - ❖ public participation in the policy and law-making process; or
 - ❖ accountability of Ministers and Cabinet for decisions made.
5. In light of such considerations, is there a public interest in disclosure of the information requested?
6. Consider whether, in the circumstances of the particular case, the public interest in disclosure of the information (in whole or in part), outweighs the need to withhold the information to maintain the convention.

If so, release sufficient information to satisfy the public interest in disclosure.

If not, advise the requester of the decision to withhold.

CONSTITUTIONAL REFLECTIONS ON FIFTY YEARS OF THE OMBUDSMEN IN NEW ZEALAND

Rt Hon Sir Geoffrey Palmer SC*

ABSTRACT

This paper explores the Ombudsmen after fifty years in New Zealand within the context of New Zealand's rather odd Constitution. It is odd because there is no upper house, no entrenched written constitution, no judicial review of legislative action, and many of the arrangements flow from constitutional conventions not law. New Zealand has a strong tradition of parliamentary supremacy. The New Zealand Constitution is highly fluid and elastic. It is like a living, breathing organism and it mutates. This may be thought to be a somewhat unstable foundation for the Ombudsmen but such has not proved to be the case. The institution of the Ombudsmen has become an established and settled part of the constitutional landscape in New Zealand.

The specific issues that arise from the paper include the following questions:

Has the performance matched the original vision and how would we know?

How does the institution fit in with Parliament?

Was it a good idea to add the Official Information Act functions to the office?

Was it useful to add the other functions?

Has the office been given adequate resources?

Is there a threat that the office is being crowded out with a proliferation of complaint agencies?

What changes should be made now?

What discussion of the Ombudsmen institution would be useful in the current constitutional review going on in New Zealand?

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INTRODUCTION

This paper explores the institution of the Ombudsmen in New Zealand after fifty years. It does so within the context of New Zealand's rather odd Constitution, the structure of which was described by the former Chief Ombudsman Sir George Laking as "fragile and sketchy."¹ The Constitution is odd because there is no upper house, no entrenched written constitution and no judicial review of legislative action in the sense that statutes cannot be struck down by the courts.² Many of New Zealand's constitutional arrangements flow from constitutional conventions or customs, not law. The New Zealand has a strong tradition of parliamentary supremacy.³ Despite the introduction of a system of proportional representation for parliamentary elections that has produced a tendency towards minority governments supported by confidence and supply agreements,⁴ New Zealand exhibits still many characteristics of a dominant executive government.⁵ The New Zealand Constitution is highly fluid and elastic. It is like a living, breathing organism and it mutates. This may be thought to be a somewhat unstable foundation for the Ombudsmen but such has not proved to be the case.

The institution of the Ombudsmen has become an established and settled part of the constitutional landscape in New Zealand.⁶ The office has survived, changed and

¹ Sir George Laking, "The Ombudsman in Transition" (1987) 17 VUWLR 307,316.

² Geoffrey Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992); Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004).

³ Michael Cullen "Parliament: Supremacy over Fundamental Norms?" (2005) 3 NZJPIL 1. Dr Cullen was at the time he published this article Deputy Prime Minister. For the Chief Justice's contrasting view see Dame Sian Elias "Sovereignty in the 21st Century: Another spin on the merry-go-round" (2003) 14 PLR 148.

⁴ Geoffrey Palmer "The Cabinet, the Prime Minister and the Constitution" (2006) 1 NZJPIL 1 contains an assessment of the effects of MMP upon the Constitution.

⁵ Geoffrey Palmer "The Bill of Rights after 21 Years: The New Zealand Constitutional Caravan Moves on?" (2012) 10 NZJPIL 19.

⁶ The best accounts of the office can be found in Larry B Hill *The Model Ombudsman-Institutionalizing New Zealand Democratic Experiment* (Princeton University Press, Princeton, 1976); Bryan Gilling *The Ombudsman in New Zealand* (Dunmore Press, Palmerston North, 1998); Mai Chen *The Public Law Toolbox* (LexisNexis Wellington 2012) 679-712, see also Mai Chen "New Zealand's Ombudsmen Legislation: The Need for Amendments after almost 50 years" (2010) 41 VUWLR 723 ; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington 2007) 363-375. For the parliamentary procedures and law for officers of Parliament in New Zealand of which the Ombudsman was the first see David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, Wellington 2005) 70-82. There are also a large number of articles in legal periodicals only some of which are cited in this article. The most useful are a series of articles that appeared in the Victoria University of Wellington Law Review on both the twentieth anniversary of the office and the twenty-fifth, see Volume 17 of the Review 1987 and Volume 12 in 1982.

mutated along with the government agencies over which it sits in watch. It is not going too far to say that the institution has been a resounding success and over a long period. New Zealanders should be grateful. Not all reforms work so well.

This paper is neither a comprehensive account of the performance of the office nor a policy critique of what has been accomplished. It is simply the thoughts of someone who has seen the office from a number of points of view-as a constitutional lawyer in the university, as a Member of Parliament and Minister, as a legal practitioner, as President of the Law Commission and an observer of the ever changing cavalcade of the Wellington policy making establishment. A lot has been written about the office of Ombudsmen in New Zealand, since it was the first to be adopted in a Westminster style of parliamentary democracy. No attempt will be made here to review the literature or generate any general theories.

When New Zealand's Sir Guy Powles took office as the first Ombudsman in the English speaking world he felt what he called "strangeness, isolation and challenge."⁷ He had no-one to talk things over with, no colleagues and he faced a public service that was suspicious. Sir Guy thought it took two years before the office was fully accepted by the public service. Upon taking the oath of office Sir Guy said "The Ombudsman is Parliament's man-put there for the protection of the individual, and if you protect the individual you protect society.... I shall look for reason, justice, sympathy and honour, and if I don't find them then I shall report accordingly."⁸ The function was described neatly in 1978 as "the formulator of administrative equity by the power of persuasion."⁹

While the office has Scandinavian origins, the New Zealand model seemed to cause an explosion of the institution around the world. Many of them were within common law jurisdictions where legal traditions were rather hostile to such developments. Lawyers in New Zealand regarded the new institution with a certain amount of amusement at the creation of such a strange office, Sir Guy observed. It took a long time for the legal profession in New Zealand to become accustomed to the idea that there were other ways of resolving disputes than those familiar to them in 1962.¹⁰ It is now accepted by

⁷ Sir Guy Powles "The New Zealand Ombudsman- the early days" (1982) 12 VUWLR 207.

⁸ Sir Guy Powles above n 7.

⁹ Quoted in Geoffrey Palmer *Unbridled Power?* (Oxford University Press, 1979) 123.

¹⁰ G R Laking "The Ombudsman and the Legal Profession" (1982) 12 VUWLR 217. He remarks at 222 "its early years were characterised by a monumental ignorance of its purpose and function and a lofty disdain of its existence on the part of all but a few members of the legal profession."

the legal profession members of which who use the office reasonably extensively on behalf of clients, by the public service and by the public.

In looking to see why the office has endured three features stand out. They are those isolated by Sir George Laking at the time of the he left office:¹¹

- (1) Its *independence* as a Parliamentary office not responsible to the Executive Government.
- (2) Its *flexibility* in the conduct of investigations and in recommending remedies most calculated to achieve substantial justice between the individual and the State.
- (3) Its credibility with the Executive Government and with the public.

An historian who wrote a book on the office published in 1998 said:¹²

New Zealand Ombudsmen have broadened their approach from concentrating on the investigation and redress of complaints against administration *to embrace the promotion of good public administration practice*. They seek to engender an attitude of positive compliance (rather than the negativity associated with fault-finding), *encouraging better systems and procedures within organisations*. Their reports and case notes comprise a body of “ombudsman law” which guides the work and attitudes of officials, *a valuable protection against future flawed decision making*. They have tried to be *responsive to the public’s needs by providing a process that is direct, informal, speedy and cheap*.

The statute under which the Ombudsmen work is showing its age and needs revision. But consonant with the modern requirements of public administration in New Zealand the Ombudsmen have analysed the outcomes and impacts they seek in their work. The major outcome is “enhanced public trust and confidence in a fair, responsive and

¹¹ *Report of the Chief Ombudsman on Leaving Office* [1984 - 85] AJHR A.3A 4-5.

¹² Bryan Gilling above n 6, 130.

accountable government.”¹³ The six intermediate outcomes that contribute to the overall one are:

- improved administrative and decision making practices in the state sector agencies
- increased transparency, accountability and public participation in government decision making
- potential serious wrongdoing brought to light and investigated by appropriate authorities
- people in detention treated humanely
- improved capability of state sector agencies in administrative decisions making and complaints handling processes and operation of official information legislation
- improved public awareness and access to Ombudsmen services.

It can be seen that the office has moved from lying in wait for the complaints to proactively trying to improve processes to avoid complaints being made. No doubt the sheer weight of the caseload coupled with the rapidity of its increase has made such steps inevitable. How far that development can go in converting a complaints agency into an institute for quality public administration must remain a matter for speculation. It would seem a more appropriate function for the State Services Commissioner.

The only general observation I will offer is that the success of the office depends upon the quality of the people who occupy the office. The quality has been high. That is why it has succeeded. From Sir Guy Powles, who served for more than 14 years, to Beverley Wakem and David McGee QC, they have been people of judgment and discernment who know when to push bureaucracy and when to let go. One Ombudsman, Sir Anand Satyanand became Governor-General. The office is, in constitutional terms, a check and a balance on the power of the bureaucracy to make decisions that affect people adversely and unfairly. It allows people to complain about the actions of government and local government and for judgments to be made by the Ombudsmen on that conduct in robust and common sense and terms. A key provision in the Ombudsmen Act 1975 is section 22 that sets out in downright direct terms the criteria the Ombudsmen are to apply to the their investigations:

¹³ Office of the Ombudsmen, *Report of the Ombudsmen for the year ended 30 June 2010* [2010], AJHR A3 16-17. This material is substantially repeated in the Office of the Ombudsmen, *Report for the year ended 30 June 2011* [2011] AJHR, A3, 16-19.

- (1) The provisions of this section shall apply in every case where, after making any investigation under this Act, an Ombudsman is of opinion that the decision, recommendation, act, or omission which was the subject matter of the investigation—
 - a) appears to have been contrary to law; or
 - b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
 - c) was based wholly or partly on a mistake of law or fact; or
 - d) was wrong.
 - e) The provisions of this section shall also apply in any case where an Ombudsman is of opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations,
- (2) or that, in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.
- (3) If in any case to which this section applies an Ombudsman is of opinion -
 - a) that the matter should be referred to the appropriate authority for further consideration; or
 - b) that the omission should be rectified; or
 - c) that the decision should be cancelled or varied; or
 - d) that any practice on which the decision, recommendation, act, or omission was based should be altered; or
 - e) that any law on which the decision, recommendation, act, or omission was based should be reconsidered; or
 - f) that reasons should have been given for the decision; or
 - g) that any other steps should be taken —

the Ombudsman shall report his opinion, and his reasons therefor, to the appropriate department or organisation, and may make such recommendations as he thinks fit. In any such case he may request the department or organisation to notify him, within a specified time, of the steps (if any) that it proposes to take to give effect to his recommendations. The Ombudsman shall also, in the case of an investigation relating to a department or organisation named or specified in [Parts 1](#) and [2](#) of Schedule 1, send a copy of his report or recommendations to the Minister concerned, and, in the case of an investigation relating to an organisation named or specified in [Part 3](#) of Schedule 1, send a copy of his report or recommendations to the mayor or chairperson of the organisation concerned.

- (4) If within a reasonable time after the report is made no action is taken which seems to an Ombudsman to be adequate and appropriate, the Ombudsman, in his discretion, after considering the comments (if any) made by or on behalf of any department or organisation affected, may send a copy of the report and recommendations to the Prime Minister, and may thereafter make such report to the House of Representatives on the matter as he thinks fit.
- (5) The Ombudsman shall attach to every report sent or made under subsection (4) a copy of any comments made by or on behalf of the department or organisation affected.
- (6) Subsections (4) and (5) shall not apply in the case of an investigation relating to an organisation named or specified in [Part 3](#) of Schedule 1.
- (7) Notwithstanding anything in this section, an Ombudsman shall not, in any report made under this Act, make any comment that is adverse to any person unless the person has been given an opportunity to be heard.

THE BEGINNING

I remember the beginning of the Office of Ombudsman in New Zealand. I was a law student. We had lectures about it and the office excited a lot of publicity then and during its first few years. Indeed, that publicity was much more in the early days than it is now. It has become part of the constitutional furniture now, but then it was regarded as an innovative constitutional novelty that was approached somewhat gingerly by the Parliament. There were in some quarters mutterings based on an apprehension that the Ombudsmen might undercut the position and authority of Members of Parliament and disturb the relationships between Ministers and public servants. In the early 1960s there was political concern about the balance of power between the citizen and the state.¹⁴ In the 1960 election Manifesto the National Party contained a policy for a Citizens' Appeal Authority. The Minister of Justice of the day was a notable reformer, the Hon Ralph Hanan. The Department of Justice provided advice on the Ombudsman institution in Scandinavia. The department had material on the institution in both Sweden and Denmark. It was the Danish model that was most influential with the Department and that legislation was used as the basis for the New Zealand proposals.¹⁵ The Ombudsman would not be deciding anything, he would investigate the complaints to get the facts, express his views in a report and attempt to persuade where he thought fit. Any sanction would lie in publicity for the report. The emphasis was to proceed administratively not judicially. The jurisdiction, as it was planned then and remains to this day, was whether the issues complained of was one "relating to a matter of administration."¹⁶

There were a number of quite difficult issues that had to be resolved. These included whether the decisions of Ministers should be within the scope of the scheme, whether military administration should be excluded, and whether areas covered by a Tribunal should be excluded. One of the biggest issues was the issue of Crown privilege, now known as public interest immunity, and how it could be restricted to avoid handicapping

¹⁴ Much of this section of the paper is drawn from a memoir by the Secretary of Justice of the time, Dr J L Robson *Sacred Cows and Rogue Elephants-Policy development in the New Zealand Justice Department* (Government Printing Office, Wellington 1987) 217-236.

¹⁵ Robson above n 14 at 217-218.

¹⁶ Ombudsmen Act 1975, section 13(1).

the new office.¹⁷ Justice wanted the decisions of ministers included within the ambit of the Ombudsmen and Crown privilege restricted. The Solicitor-General, as head of the Crown Law Office took an opposing view to Justice on three principal issues. Mr H R C Wild (later to be Chief Justice of New Zealand) thought the procedure should be judicial rather than administrative. So the principles of natural justice should apply and public servants should have the right to counsel and cross-examination. He also argued Crown privilege should not be restricted as the courts had not abused the doctrine. Decisions of Ministers should be excluded on the grounds that to include them would impair the doctrine of ministerial responsibility.

The Legislation Committee of Cabinet decided that Ministers should be excluded and that Crown privilege should be left untouched. But it accepted that the process should be administrative not judicial. And in truth given the way in which the office has approached decisions of ministers, it can almost always find a way to treat an issue as a matter of administration.

The bill received what Dr Robson, the Permanent head of the Department of Justice, described as a “lukewarm” reception when it was introduced in 1961. The Department of Justice thought that exclusion of Ministers and the absence of a provision restricting Crown privilege gave too much protection to the Executive. The policy issues were re-litigated at Cabinet and a statutory restriction of Crown privilege was approved. But the officials were split on the issue of Ministers. In the end it was referred to the Government caucus which approved the statutory restriction on Crown privilege but not the inclusion of ministers.

When the legislation was passed and the office up and running it received 760 complaints in its first year. Twenty-one per cent of those complaints were sustained. In the year ended 30 June 2010 the office received 8,488 complaints. In 1968 the jurisdiction of the office was extended to education boards and hospital boards. In 1975 quite extensive increases in jurisdiction were granted so that most governmental organisations were included. It was also extended to local government. Provision was also made for the appointment of more than one Ombudsman. Power was also granted

¹⁷ There was a very significant case on Crown Privilege, or public interest immunity as it is now called, decided by the New Zealand Court of Appeal around this time: *Corbett v Social Security Commission* [1962] NZLR 878(CA). This was a decision where the Crown refused to disclose certain documents concerning an application for social security benefit because they were within a class of documents that for the proper functioning of the public service it was necessary to keep confidential to ensure freedom and candour of communication within the public service. The Court held that it has the power to overrule a ministerial claim for privilege but they refused to do so in the particular circumstances.

for the Prime Minister, with the consent of the Chief Ombudsman, to refer any matter for investigation, except one concerning a judicial proceeding. That provision was first used for investigation over controversy concerning the Security Intelligence Service¹⁸

Sir Guy Powles was, in the words of Sir John Robson, “skilful and adroit in handling the media....he succeeded in projecting an image of a person who cared for people and who would expose injustice.”¹⁹ Sir Guy himself felt he had to tread a difficult balance on the publicity front “between oblivion and overexposure.”²⁰

Robson who was the official responsible for advising on the creation of the office judged him to be “an outstanding success, especially in areas where there was need for more sensitivity, fairness and humanity.”²¹ The fact that Sir Guy occupied the office for 14 years certainly helped the office to become firmly embedded in New Zealand’s system of government. The office being of a pioneering character attracted a good deal of international attention and a Fulbright Scholar student, later Professor Larry B Hill, wrote an excellent book about it, the tone of which can be gleaned from the title *The Model Ombudsman-Institutionalizing New Zealand’s Democratic Experiment*. New Zealand basked in the reflected glory of adopting a bold and successful constitutional innovation.

RELATIONS WITH THE PARLIAMENT

In New Zealand, as in other Westminster style democracies, elected members of Parliament conduct regular clinics with their constituents and take up issues with the responsible minister by correspondence.²² Sometimes the correspondence is prolonged. It receives priority in Departments and care is taken to ensure the issues have been properly dealt with. MPs see a lot of practical problems with government

¹⁸ Report of the Chief Ombudsman, *Security Intelligence Service 1976 [1976] AJHR A A* The role played in the Ombudsmen in New Zealand in advancing the concept of open government is insightfully portrayed in K J Keith “Open Government in New Zealand”(1987) 17 VUWLR 333. That article was part of a special volume of the Victoria University of Wellington Law Review in honour of Sir Guy Powles and I recall as Minister of Justice hosting a dinner at Parliament in his honour on 24 November 1986.

¹⁹ Robson above n 14 at 236.

²⁰ Powles above n 1 at 210.

²¹ Robson above n 14 at 236.

²² I once carried out an analysis of my constituency work as MP for Christchurch Central and published it- Geoffrey Palmer “The Growing Irrelevance of the Civil Courts” (1985) 5 Windsor Yearbook of Access to Justice 327. The issues that came to my office that were capable of being dealt with the legal system numbered almost fourteen per cent over four years. But my constituents never regarded the legal system as being a practical option in any way.

policies and administration and their effects upon individuals. At the time the Ombudsman was introduced in New Zealand the then Labour Opposition was not keen on the idea. The Ombudsmen are linked to Parliament in the sense that they are officers of Parliament, but in fact their tangible contacts with Parliament are not all that great—they probably have more contact with Ministers than MPs. The issue became controversial in Britain in that it was thought the Ombudsmen would come between the relationship between an MP and his or her constituent. MPs could regard the Ombudsman as a rival. Professor Hill's research published in 1976 did not show the Ombudsman figuring extensively in MPs' minds. His research showed that MPs were still heavily involved in grievance handling. He found that MPs handle a great many issues that are similar to those handled by the Ombudsmen. MPs told Professor Hill, over two fifths of them, that they never thought of the Ombudsman. Forty-six per cent admitted they paid little attention to the reports of the Ombudsman. Others read them carefully. But a total of 44 per cent of the MPs interviewed by Hill had on at least one occasion advised constituents to contact the Ombudsman. Most doubted that the office had any effect on Ministers.

About three-quarters of the MPs felt the Ombudsman had had no effect on political life. But none of the MPs said the Ombudsman had adversely affected them. Nearly half were confident that the existence of the office had made public servants more careful. The interaction between the Ombudsmen and Ministers was also examined by Professor Hill and I do not believe it has been examined systematically since then. He found Ministers as MPs were still "grievance men for their own constituents."²³ They took complaints seriously and did not seem to be apologists for their departments. None of the ministers he interviewed regarded their relationship with the Ombudsman in negative terms. But nearly one-third seemed to have no relationship with the Ombudsman. No Minister thought the office had any long term effect upon the relationship between the Minister and his Chief Executive.²⁴

It seems clear from Hill's research, and indeed my own experience much later as an MP, that the institution of Ombudsman has had little impact on the constituency work of MPs in New Zealand; they tend to be rather indifferent to the office, although they believe it does no harm and may improve the performance of the public service. They do not perceive the Ombudsman as a rival. This is somewhat surprising as it does

²³ *The Model Ombudsman* above n 6 at 299.

²⁴ *The Model Ombudsman* above n 6 at 305.

duplicate what MPs do to a degree. Three-quarters of Hill's interviewees felt the office had no effect on their parliamentary role. Remember, however the Ombudsman cannot investigate ministerial decisions. Yet this has not been such an obstacle to the office as it may seem. As Sir George Laking stated in 1987, it is a fallacy to think that a clear line can be drawn between matters of administration and questions of policy.²⁵ As he observed, the office was inevitably involved in cases that seemed to challenge ministerial decisions and were reluctant to decide between conflicting recommendations of the departmental advisers and the Ombudsman. The management of this sensitive interface must be regarded as one of the achievements of the office in New Zealand. Ministers in New Zealand today do not behave as if they are threatened by the Ombudsmen, in the Ombudsman Act jurisdiction. It is somewhat of a different story in the official information segment of the office's work.

Obviously, the policy worry at the beginning was that MPs and Ministers may be hobbled or restricted by the establishment of the office, otherwise it would not have been necessary to attach the institution to Parliament. Much was made and is still made of the fact that the Ombudsmen are officers of Parliament. The Ombudsman was created an officer of Parliament by statute. The effort was mainly to confer official or symbolic status, or so it seems to me. Many other complaints bodies that have been created since do not have this status. But in the case of the Ombudsmen the status ensures that the officers are more clearly seen to be independent of the Executive branch of government than a statutory officer would be. There is a Select Committee of Parliament with responsibility for oversight of the officers. It has important tasks involving budget setting and appointment. Officers of Parliament are appointed by the Governor-General but there was a practice of inter-party consultation and then a notice of motion endorsing the appointment.²⁶ Since the 1990s appointments have been agreed consensually by the Officers of Parliament Committee chaired by the Speaker of the House.

THE OFFICE NOW

The administrative and political world that Sir Guy Powles inhabited when he took office in 1962 and which he left fourteen years later is a world we have lost. New

²⁵ The Ombudsman in Transition above n1 at 309-310.

²⁶ *Parliamentary Practice in New Zealand* above n 6 at 70-82.

Zealand is now, so to speak another country. The Ombudsmen have had to adapt and change because of the massive alterations that have taken in government administration, government policies, departmental structures, and public attitudes to government and its decisions. It is a much more complicated world. That world generates many more complaints for the Ombudsmen from the public than used to be the case. The number of complaints has more than doubled in a decade. At times the weight upon the office has been unreasonably heavy. One such occasion were the problems experienced by the office dealing with the weight of complaints against the New Zealand Police resulting from the highly controversial Springbok tour of 1981. Sir George Laking, then Chief Ombudsman, was almost overwhelmed and this development led to the establishment of what is now the Independent Police Conduct Authority to deal with complaints against the conduct of the Police.

Indeed, New Zealand today has a plethora of agencies to which complaint can be made. One might get the impression from the statute book that New Zealanders are a nation of whingers, that is to say people who whine or grumble peevishly. Indeed, it does seem to me that people here have much less tolerance of public administration and are much less stoic about decisions that go against them than they were in earlier years. When the welfare state was introduced into New Zealand during the late 1930s with programmes for health, social security, and housing people were grateful. They tended not to complain about their new found advantages. The conventional techniques of Westminster style ministerial responsibility in Parliament were sufficient to contain this massive increase in state activity.

The opening up of the New Zealand economy in the late 1980s by floating the exchange rate, handing over monetary policy to the Reserve Bank, dismantling import licensing, and reducing tariffs changed things. So did the passage of the State-Owned Enterprises Act 1986 that subjected state owned businesses to a commercially based regime rather than one based on ministerial responsibility. All this led to a different configuration of state power. The Office of the Ombudsmen was directly involved in the policy changes. Sir George Laking remarked in 1987 "the contribution which the Ombudsman will be expected to make to the development of this new concept of accountability to Parliament and the public may well put the relevance and the effectiveness and effectiveness of the office to a new and severe test."²⁷ The office survived that test with flying colours. When a Parliamentary Select Committee reported

²⁷ The Ombudsman in Transition above n1 at 316.

in 1990 on the question of whether the jurisdiction of the Ombudsmen and the Official Information Act should extend to state-owned enterprises the question was answered with a resounding “Yes.”²⁸ It was argued that because these businesses pursued significant social and economic goals the public law protections should remain as they were enacted in 1986.

Because of the changes made to the public sector in the 1980s the market was more important, contracting out in the public sector became more common. The whole of the state sector was reorganised by the State Sector Act 1988. I am sure an analysis of the Ombudsmen’s case load during this period would show a changing diet of cases, although I have not have the leisure to conduct such an analysis.

The pattern of government regulation has expanded in the years since then and there has been quite a lot of discontent in the business community at the extent, method and effects of government regulation in a number of fields.²⁹ Regulatory decisions within government agencies and the activities of state-owned enterprises come within the purview of the office. Yet the main staples of the Ombudsmen part of the office seems to me much the same as it ever was as reflected in the analysis of major complaint areas in the last available report to Parliament³⁰:

The Department of Corrections provided 64% of the Ombudsmen jurisdiction workload in the latest report. This number is somewhat misleading because most such complaints are quickly resolved without extensive investigation. Significant numbers of cases arose in the following areas:

Ministry of Social Development that deals with social services and assistance 375

Department of Labour that deals with immigration 243

Inland Revenue 121

Ministry of Justice 56

Department of Internal Affairs 30

²⁸ *Report of the State-Owned Enterprises (Ombudsmen and Official Information Acts) Committee on the Review of the Effect of the Ombudsmen Act 1975 and the official Information Act 1982 on the Operation of State Enterprises* [1990] AJHR I 22A 6-8.

²⁹ Susy Frankel (ed) *Learning from the Past, Adapting for the Future-Regulatory Reform in New Zealand* (LexisNexis, Wellington 2011)

³⁰ Office of the Ombudsmen, *Report for the year ended 30 June 2011* above n13, 32

Perhaps some scholars have subjected the Ombudsmen's caseload to analysis over the years to work out what implications can be drawn from it for public administration, but I have seen no such studies. It does seem to me to be fertile field for research.

Another point that strikes me is that the Annual Report to Parliament is now much fuller of the management speak that seems to be the dominant fashion in New Zealand public administration and threatens to crowd out substance. There is a great deal of information in the annual report to Parliament about managing performance, human resource management, risk management and financial and asset management. The Office itself has itself become something of a bureaucracy with more than sixty employees. Yet the institution itself has never been subjected to an exterior review, as most government agencies are periodically. This must say something about the regard in which it is held. The office is necessarily in my view less inspirational than it was in early days and has a lower public profile. That is because it is no longer novel. The office formerly published a useful compendium of case notes that has been discontinued in recent years due to resource constraints. This was a great pity in my view. It makes it harder to learn from the experiences of the office. But the Office is now starting to publish findings on its website.

Perhaps the biggest change the Ombudsmen have had to face are their competitors within both the public and private sectors. The institution has so much attraction that private business organisations, the banks for example, have arranged to have Ombudsmen and the name has had to be protected by statute. But the number of complaint agencies within the public sector has mushroomed over the years:

- Independent Police Conduct Authority³¹
- Privacy Commissioner³²
- Human Rights Commission and the Race Relations Commissioner³³
- Parliamentary Commissioner for the Environment³⁴
- Health and Disability Commissioner³⁵
- Children's Commissioner³⁶

³¹ Independent Police Conduct Authority Act 1988.

³² Privacy Act 1993.

³³ Human Rights Act 1993.

³⁴ Environment Act 1986.

³⁵ Health and Disability Commissioner Act 1994.

³⁶ Children's Commissioner Act 2003.

- Mental Health Commissioner³⁷

The cumulative effect of these complaint agencies seems to me to reduce the scope for MPs to do their traditional constituency work for which they have been provided with electorate secretaries and offices at public expense since 1986 in order to facilitate that work. The office of the Ombudsmen as we saw earlier did not trench upon that function significantly, but it seems to me now that the range of complaints coverage is so wide that it is bound to have had an effect upon the Members of Parliament making representations to Ministers. True, such representations on policy continue still. But many of the detailed remedies for administrative wrongs now lie elsewhere, not in the hands of Parliament. Parliament has set up agencies to deal with them. There is, I suppose, no way of measuring in any empirical way whether all of this activity has resulted in a net benefit to the community. But the demand for bodies to register and investigate complaints from the public about various exercises of power over people is one of the most noticeable features of public administration in New Zealand over the last thirty years. Parliament has passed seven major statutes directing that this should occur since the Ombudsman statute started the trend in 1962.

³⁷ Mental Health Commission Amendment Act 2012.

ADDITIONAL RESPONSIBILITIES

The Office of the Ombudsmen has acquired fresh and additional responsibilities over the years. There is an issue whether that has caused the office to lose some focus on its Ombudsman Act responsibilities. The most important of those responsibilities was the work of dealing with complaints about access to official information under the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987, about which I shall have more to say later. But there are three other responsibilities:

- The Protected Disclosures Act 2000 under which the Ombudsmen provide advice and guidance to employees concerned about serious wrongdoing in organisations. The burdens flowing from this regime do not seem too great. On average the office has to deal with ten cases a year.
- The Crimes of Torture Act 1989 under which the Ombudsmen make recommendations to improve the conditions and treatment of detainees in prisons, immigration detention facilities, health and disability places of detention, child care and protection residences and youth justice facilities. The work here comprises visits to institutions and the production of reports upon them. The latest report shows there were 20 inspection visits with 103 recommendations made.

Disabilities - The office has also taken on responsibilities with “other independent mechanisms to monitor implementation of the³⁸ United Nations Convention on the Rights of Persons with Disabilities.” The new jurisdiction generated twenty complaints in the first year.³⁹

THE OFFICIAL INFORMATION JURISDICTION

When the Official Information Act was passed by the Parliament in 1982 the task of resolving disputes over access was given to the Ombudsmen. There was some debate about whether that would adversely affect the nature of the Office and change it. The

³⁸ Done at New York 13 December 2006, 2515 UNTS 3

³⁹ *Report for the year ended 30 June 2011* above n 13 48.

Danks Committee that recommended the policy contained in the Official Information Act did not want court decisions on access to information:⁴⁰

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

There can be no doubt that it was a significant step to make the Ombudsmen responsible for dealing with official information cases. The open-textured nature of the Act made the task a difficult one, but it was a task that was similar in some respects to the task performed within the ordinary jurisdiction of the office. It is important to note that the Ombudsman had always been able to access all the departmental information relevant to complaints with which he was dealing as provided by section 19 and 20 of the Act. Further, the office had profound knowledge about how the public service works. So the Ombudsmen were already located in the ballpark where the official information game was being played.

The Danks Committee also proposed that ministers could impose a veto on the release of information. Indeed, this proposal walked in lock-step with the manner in which the Ombudsmen functioned in their ordinary work. When I was Minister of Justice I favoured eliminating the ministerial veto.⁴¹ Ten had been made from the commencement of the Act up until the 1984 general election. The policy was opposed by the Ombudsmen on the grounds that it would have given the office power of decision and that was contrary to the character of the office. They said: “The abolition of the ministerial power of directive would result in the Ombudsman’s decision becoming a binding directive and thus a decision. Such a change would herald a major departure from the traditional characteristics of the Ombudsmen”⁴².

As Minister of Justice I was confronted with the choice of taking the Ombudsmen out of the Official Information Act if the veto were abolished and setting up an Information

⁴⁰ Committee on Official Information *Towards Open Government*, vol.2, (December 1980) 14.

⁴¹ An account of issue and how it was handled appears in Geoffrey Palmer *Unbridled Power-An Interpretation of New Zealand’s Constitution and Government* (2nd ed, Oxford University Press, Auckland 1987) 260-277.

⁴² *Report of the Ombudsmen for the year ended 31 March 1985*, [1984 -85] 1 AJHR A3 8.

Commissioner. Since the Act was new and the public had confidence in the Ombudsmen I decided to stay with them. So I devised a solution to circumscribe the ministerial veto by requiring it to be done by order-in-council, and that required a Cabinet decision, not merely the minister exercising the veto in the privacy of his office. Further, the right to judicial review was made explicit on the face of the statute. Since then no order-in-council containing a ministerial veto has been made. The law on this issue remains as it was enacted in 1987.

The Law Commission in a 2012 report completed a comprehensive and excellent review of the Official Information Act.⁴³ The Law Commission made 137 separate recommendations concerning reform of the Official Information Act. They cannot all be reviewed here. Essentially, however, the Law Commission recommended that the investigation of official information complaints should remain with the Ombudsmen.⁴⁴ It followed from that recommendation that the Commission also recommended that the veto of the Ombudsman's recommendation by order-in-council should be retained.⁴⁵ For local government official information applications the Commission recommended that a veto in those cases should be exercisable only by an order-in-council also. It also recommended new provisions to allow court action by a requester where an agency is under a public duty to release information. Indeed, the Commission makes numerous recommendations to tighten up the Act and aid its enforcement.

In particular, the Commission makes detailed recommendations to try and encourage the production of more guidelines to lessen the "at large" character of a case-by- case approach to decisions.⁴⁶ The aim is to produce more certainty than exists at present in the application of the Act. The clear intention is to produce something more in the nature of a system of precedent as an aid to predictability. The detailed recommendations made by the Commission illustrates how important it thought the issue is in improving the official information regime.

These recommendations are:

⁴³ NZLC R125, *The Public's Right to Know-Review of the Official Information Legislation* (Wellington, 2012). I should disclose that when I was President of the Law Commission I persuaded the then government to give the official information reference to the Commission and I worked on the reference with Professor John Burrows QC until my departure from the Commission in November 2010.

⁴⁴ *The Public's Right to Know* above n 43, R107

⁴⁵ *The Public's Right to Know* above n 43, R80,R81

⁴⁶ *The Public's Right to Know* above n 43 ,40

- a new provision expressly conferring on the Ombudsmen the function of publishing opinions and guidelines on the legislation
- significant case notes and opinions should be compiled and published in a readily accessible database. They should be indexed and made searchable
- the database should be accompanied by a regularly updated analytical commentary
- the guidelines should give specific examples drawn from previously decided cases and where appropriate state presumptions and principles deriving from them
- in preparing the Guidelines the Ombudsmen should consult with the oversight office.⁴⁷

This last point flows from another recommendation that an oversight office be established that would promote the purposes of the legislation, provide policy advice, review, statistical oversight, promotion of best practice, training oversight and oversight of requester guidance. These functions are developed by the Commission in a detailed manner.⁴⁸

The Commission's recommendations will certainly improve the Act. But the recommendations go so far as to suggest an alternative policy narrative. The elements of that narrative seem to me to be:

- give an independent decision-maker power to make binding decisions
- remove the veto altogether
- produce a certain and predictable set of guidelines that will reduce the uncertainty and smudginess of the present system
- locate the decision maker in a new Information Authority
- such a system would necessarily involve either appeal to the courts on a point of law or judicial review

Such a structure would allow the policy functions for the Information Authority as recommended by the Law commission to be combined under one roof so that what is learned in one arm of the office's activities could reinforce the activities in the other arm. The Ombudsmen would cease to have an official information jurisdiction There are

⁴⁷ *The Public's Right to Know* above n43 R1,R2,R3, R4, R5.

⁴⁸ *The Public's Right to Know* above n43 296-329.

reasons why the alternative policy narrative may have strength. First, New Zealand has had thirty years of experience with the official information legislation and we should be learning more from our own experience than we have learnt so far. A greater tendency towards bright lines rules would be of an advantage. It is obvious that circumstances alter cases, but there is a great deal within the government information system that is routine and this should be recognised. There are real and practical issues about clarity in the Act's application that must bedevil the relatively junior public servants who have to deal with requests and it poses the same problems for the requesters. Secondly, my experience has been that the Official Information Act is disliked by ministers and by some officials. Sometimes there was a reluctance to comply with it and tactics were adopted to delay the release of information in order to reduce political embarrassment. I do not think anything has changed in that regard over time. And as has already been observed these information cases can be a source of tension between the Ombudsmen and ministers. Third, after the experience New Zealand has had we know that lifting the veil on government secrecy was not the end of effective public administration, indeed the former State Services Commissioner said Dr Mark Prebble remarked in 2010 that the Official Information Act "is the best reform that's happened during my whole time in the public service; it has been good for every agency it's been applied in."⁴⁹ Fourth, the importance of transparency in the government decision-making process is an important and growing trend internationally. More robust measures towards this end are warranted in New Zealand in my view. The New Zealand legislation has been a success, but as the Law Commission review demonstrates there are problems that need to be addressed. I would like to see the information issue elevated and enjoy the focus of a new agency that can develop new approaches. My conclusion is that the time has come in New Zealand to push boat out a little further on official information.

The major argument against the alternative policy narrative lies in the increased involvement of the courts that would be likely to ensue. The non-litigious nature of the Official Information Act in New Zealand is certainly one of its strengths. Just how much litigation would result from the change discussed here is difficult to estimate. The incentives upon the government not to litigate may be quite powerful. The price for dispute settlement by the Ombudsmen has been a "fuzzy" jurisprudence. The issue is whether the trade off is remains worth it after thirty years.

⁴⁹ Quoted in *The Public's Right to Know* above n43 at 34.

An independent Information Authority could be set up and it could be entrusted with both the complaints function and the oversight function. The new model would be along the administrative lines the enacted by the Commonwealth of Australia in 2010 in the Australian Information Commissioner Act 2010. But I would not include the Privacy Commissioner within that office, as was done in Australia. The Privacy Commissioner in New Zealand was the subject of an extensive and separate review by the Law Commission.⁵⁰ The New Zealand Law Commission's view was "Removing the Ombudsmen as the complaints body would mean losing the institutional knowledge and awareness built up over more than 25 years of dealing with information complaints."⁵¹ I think there are many answers to that observation, the most obvious of which is to move the relevant people to the new agency.

Answering the question posed as to whether the information jurisdiction has been a distraction, I think it must have been but that is not obvious on the outside. Under the two pieces of legislation concerning official information there were a total of 1258 complaints recorded in the latest available annual report of which 256 concerned local government. During the year final opinions were issued in 366 cases and 302 cases were informally resolved. The annual report emphasises the importance of timeliness and analysed the problems encountered with delays. In New Zealand it is the Police who generate most OIA complaints, 16.2 per cent of total in 2010. Some of these involve difficult and sensitive issues.⁵²

CONCLUSION

The Ombudsmen in New Zealand are here to stay. Whatever future decisions are made on their involvement with the Official Information Act, the Ombudsmen have increased the quality of administrative justice in New Zealand. They enjoy the confidence of the public as far as one can tell. I do wonder what knowledge the public actually has concerning rich and varied avenues of complaint available to them now in contemporary New Zealand. Public awareness has a big impact on what use is made of the Ombudsmen and other complaints bodies.

The advent of the Ombudsmen does not appear to have adversely affected the role of Members of Parliament in New Zealand, although it would be useful to do some

⁵⁰ NZLC R123 *Review of the Privacy Act 1993* (Wellington, 2011).

⁵¹ *The Public's Right to Know*, above n43 at 305.

⁵² *Annual Report for the year ended June 2010* above n13 at 32-34.

empirical research about what MPs think these days about the plethora of complaints bodies that exist. It would also be useful to know how much of their time MPs spent on constituency work these days. My impression is that the pressure of other duties may have reduced that compared to the days when Parliament did not meet as much as it does now. What would be worthwhile empirical research among MPs would be to know what effects the introduction of List MPs wrought upon MPs' interest and engagement in constituency work. I have described the move in New Zealand to a mixed-member system of proportional representation that came into existence in 1996 as the most important constitutional change in a century because it reduced the power of the executive.⁵³ The government often has to go hunting for support to get its measures through Parliament. This change has broken the old two party duopoly. There are currently seven political parties represented in Parliament. But as far I can see this change has had no effect itself upon the institution of the Ombudsmen.

Nor does it seem that the Ombudsmen in their Ombudsmen Act role have caused any significant problems to ministers discharging their duties. Ministerial responsibility has been attenuated by a variety of developments in the organisation of government but the Ombudsmen have not been a factor in those developments.

I do know that from time to time the Ombudsmen office has had inadequate resources with which to carry out its functions and they are under strain now as indeed all government agencies are due to economic stringency. Doing more with less is the current mantra of New Zealand public administration and there are limits to how far that approach can go. But this feature is one that New Zealand shares with most governments around the world at this time.

The Ombudsmen in New Zealand are an important check and a balance upon the Executive New Zealand. That is their most important constitutional function. But securing fairness for people in dealing with government agencies is their most important human function. This is constitutional accountability of a practical sort from which people can see real benefits. One would have thought that was contribution enough and New Zealanders should be grateful that the institution has such a large measure of public acceptance and utility. How it will develop in the future is impossible to say, but I doubt that it will change much nor should it.

⁵³ Geoffrey Palmer "The New Zealand Constitution and the Power of the Courts" 15 *Transnational Law & Contemporary Problems* 551 (2006) 551, 553.