

# THE OFFICIAL INFORMATION ACT 1982: A WINDOW ON GOVERNMENT OR CURTAINS DRAWN?

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## I INTRODUCTION

Introducing the Official Information Bill to Parliament in 1981, the Minister of Justice called it "one of the most significant constitutional innovations to be made since the establishment of the office of the Ombudsmen in the early 1960s."<sup>1</sup> Its goals were lofty: to "increase progressively the availability of official information" in order to promote democratic participation, political accountability and good government.<sup>2</sup>

Yet to hear some of the criticisms of the Official Information Act 1982 (OIA) now, one could be forgiven for wondering whether it has been much of an improvement over the Official Secrets Act 1951, which made releasing official information an offence.<sup>3</sup> "Ministers and officials developed ways of routinely subverting the provisions of the Official Information Act", researcher Nicky Hager has written.<sup>4</sup> "Journalists complain processing of requests takes too long, and accuse bureaucrats of abusing the system, especially if the material sought is remotely embarrassing or controversial", wrote investigative journalist Amanda Cropp.<sup>5</sup> "It is ridiculously easy to circumvent the act and to hide information from requesters and Ombudsmen alike", wrote former MP Michael Laws recently: "Of course, all potentially embarrassing information is routinely refused and time delays are simply de rigueur."<sup>6</sup>

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1 Hon J K McLay (23 July 1981) 439 NZPD 1908.

2 Official Information Act 1982, s 4 and long title. Note that the Act also aims "to protect official information to the extent consistent with the public interest and the preservation of personal privacy": Official Information Act 1982, s 4(c) and long title.

3 Official Secrets Act 1951, s 6.

4 Nicky Hager "A Researcher's View of New Zealand's Official Information Act" in *International Symposium on Freedom of Information and Privacy* (Privacy Commissioner, Auckland, 2002) 62, 62.

5 Amanda Cropp *Digging Deeper: A New Zealand Guide to Investigative Reporting* (NZJTO, Wellington, 1997) 73.

6 Michael Laws "Ghosts more believable than 'official truths'" (29 February 2004) *Sunday Star-Times* Auckland. See also Aziz Choudry "Still Under Wraps: Official Information Laws Keep Free Trade Details Away From Prying Public Eyes" (24 February 2002) ZNet commentary <<http://www.zmag.org/sustainers/content/2002-02/24choudry.cfm>> (last accessed 14 October 2005): "For almost every request comes some reason to withhold the material, some new stalling tactic, a denial of a document's existence, or a hefty charge which effectively puts the information out of reach of anyone in a community organization or trade union."

The Ombudsmen's office has repeatedly chastised officials for their lack of understanding of the OIA and their tardy responses to requests.<sup>7</sup> The office's new OIA practice guidelines contain a damning list of 57 "misconceptions" about the OIA that persist more than 20 years after its enactment.<sup>8</sup>

A senior public sector official told a researcher that "... the Minister prefers to withhold information except where unavoidable. Information is seen as creating problems not opportunities."<sup>9</sup> Several people have charted methods employed by recalcitrant officials and ministers to circumvent the Act; providing oral instead of written advice;<sup>10</sup> "sitting on" requests instead of responding to them; providing spurious reasons for refusing information; even doctoring and shredding official papers.<sup>11</sup> Even the State

7 See for example *Report of the Ombudsmen for the year ended 30 June 1999* (1999) AJHR A3 12–13 [*Ombudsmen's Report 1999*], where the Ombudsmen noted that in 17 per cent of their investigations (190 cases) there was no good reason to withhold any information, and it was all released in the course of the investigation. See also *Report of the Ombudsmen for the year ended 30 June 2000* (2000) AJHR A3, 21 [*Ombudsmen's Report 2000*]; *Report of the Ombudsmen for the year ended 30 June 2001* (2001) AJHR A3, 15 [*Ombudsmen's Report 2001*]; *Report of the Ombudsmen for the year ended 30 June 2002* (2002) AJHR A3, 10 [*Ombudsmen's Report 2002*] and *Report of the Ombudsmen for the year ended 30 June 2003* (2003) AJHR A3, 18–19 [*Ombudsmen's Report 2003*]. "There is an absolutely fundamental need to improve knowledge about the workings of the official information legislation", commented Chief Ombudsman Sir Brian Elwood on his retirement in 2003. "The requirement is training and more training." *Report of the Chief Ombudsman Sir Brian Elwood on Leaving Office* (2003) AJHR A3A, para 8.6. These concerns were echoed by the Law Commission: *New Zealand Law Commission Review of the Official Information Act 1982* (NZLC R40, Wellington, 1997) paras 37–50.

8 For example: that information must be withheld if the person concerned does not consent to its release; if the information is misleading it can be withheld; any confidential information can be withheld; ministers have a right to undisturbed consideration of advice; drafts can be withheld; See Office of the Ombudsmen *Practice Guidelines – Official Information* (Wellington, 2002) Part E [*Practice Guidelines – Official Information*]. The guidelines were released in September 2002, but they are in large part a compilation and consolidation of the Ombudsmen's jurisprudence over the years contained in case notes, guidelines published with case notes, reports, and commentaries in annual reports and the *Ombudsmen's Quarterly Review*.

9 E J Poot "The Impact of the Official Information Act 1982 on the Policy Development Process" (MPP Research Paper, Victoria University of Wellington, 1997) 40.

10 This may be based on a misapprehension that the OIA applies only to documents: see John Pohl "Official Information Act and non-documentary information" [2002] NZLJ 373.

11 A public sector manager told researcher Edward Poot: "I have had ministers react to written advice by saying that 'this document doesn't exist.'" A senior legal official told him that ministers "quite often" manipulated the release of information. "I have heard ministers say 'these are the

Service Commission's official information guidance paper concedes that the OIA "is still understood imperfectly by some public servants" and that "the impulse to shelter behind secrecy has not entirely disappeared."<sup>12</sup> In 1992, Sir Geoffrey Palmer wrote that the OIA "is studied as to how it can be avoided, evaded or plain ignored."<sup>13</sup>

Can things be this bad? It is difficult to tell. Most agencies do not keep good statistics about OIA requests.<sup>14</sup> Since the demise of the Information Authority in 1988,<sup>15</sup> no agency

tactics. We'll sit on it. We'll sit on it to the last day; we'll sit on it after that." Poot, above n 9, 52, 57. In 1996, researcher Evan Voyce also talked off the record with officials. A senior public official told him of "ministers having Cabinet papers and even Cabinet minutes withdrawn, shredded or rewritten." Several other officials spoke of ministers asking them to withdraw or shred advice or draft policy papers: Evan Voyce "The Provision of Free and Frank Advice to Government" MPP Research Paper, Victoria University of Wellington, 1996) 30–33. In 1993, a Minister admitted publicly that "political gamesmanship" determines what information is released and when. "We're in the business, after all, of getting ourselves re-elected, and would be pretty foolhardy not to be aware of potential hazards being released": Stephen Harris "State Sector Corporatisation Escapes Net of the Official Information Act" (22 October 1993) *National Business Review*, 40, quoting then-Customs Minister Murray McCully. In 1997, the Ombudsmen criticised the Children, Young Persons and their Families Service for doctoring a released document: see *Report of the Ombudsmen for the year ended 30 June 1997*, AJHR A3, 38. In 2004, an official lost his job following an Ombudsman's criticism of his professionalism and credibility after he had failed to supply embarrassing documents in response to an Official Information Act request and subsequent investigation: *Report of Ombudsman, Mel Smith, upon the actions of the Department of Labour in regard to an official information complaint by Sarah Boyle of the office of the Leader of the Opposition*, Office of the Ombudsmen, 24 February 2004. [*Report of Ombudsman, Mel Smith, re Department of Labour*] see also Hager, above n 4, 62; Alastair Morrison "The Games People Play: Journalism and the Official Information Act" in Legal Research Foundation *The Official Information Act* (Legal Research Foundation Seminar Auckland, 1997) 30. For a more positive view of the effects of the OIA, see John Belgrave "The Official Information Act and the Policy Process" in Legal Research Foundation, above, 24.

- 12 State Services Commission *The Public Service and Official Information* (Principles, Conventions and Practice Guidance Series, Wellington, 1995) 4.
- 13 Sir Geoffrey Palmer "The New Public Law: Its Province and Function" (1992) 22 VUWLR 1, 17.
- 14 Dave Clemens "Requests made under the Official Information Act 1982: a survey at the agency level" (MLIS Research Paper, Victoria University of Wellington, 2001).
- 15 Official Information Act 1982, s 53. The Information Authority regulated freedom of information issues. When it was discontinued in 1988, the oversight of the OIA was transferred to an Information Unit within the Department of Justice. This was disbanded in 1995: see R Snell "The Kiwi Paradox – A Comparison of Freedom of Information in Australia and New Zealand" (2000) 28 F L Rev 575, 601.

has exercised responsibility for monitoring the daily business of the OIA. The Ombudsmen's office only investigates complaints. The Law Commission's 1997 review of the OIA did not include a ground-level survey of requests and responses.<sup>16</sup> One researcher has lamented the lack of raw data about the operation of the OIA: "Without data available to identify how requesters are faring in their interactions with agencies it is perhaps impossible to produce informed commentary or discussion about the general health of the Act."<sup>17</sup>

This paper sets out to address that gap. For this research, hundreds of OIA requests were examined<sup>18</sup> to see who is using the Act, what they are asking for, and whether the responses are timely and lawful. Is the OIA living up to its lofty ideals? Or has it been undermined by maladministration?

Part II of this paper explains the methodology followed for gathering data. Part III outlines the key provisions of the OIA. Parts IV and V summarise the views about the OIA of those who use it most frequently: requesters and officials. Part VI describes the limitations of the data. Parts VII and VIII present the data: the former deals with quantitative results; and the latter provides some more subjective comments on the data. Some conclusions follow in Part IX.

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16 New Zealand Law Commission, above n 7.

17 Clemens, above n 14, 33.

18 I was greatly assisted by the tireless efforts of Ryan Malone and Courtney McNatty, research assistants at the New Zealand Centre for Public Law, and the research was conducted under the auspices of a supervisory committee comprising Victoria University Faculty of law dean Matthew Palmer, Ombudsman Mel Smith, former Chen & Palmer partner Colin Keating, and senior law lecturer Caroline Morris (also of Victoria University faculty of law).

## **II METHODOLOGY**

The research was conducted in two phases: OIA requests and responses and roundtable discussions involving frequent users of the OIA.

### **A OIA Requests and Responses**

In November 2002, OIA requests were sent to all the national-level agencies subject to the OIA as listed in the Directory of Official Information,<sup>19</sup> seeking copies of their last ten responses to OIA requests during the last year, together with copies of the requests themselves. Copies of other OIA requests were sought as well to get a wider sense of OIA practice, but these were not included in the quantitative dataset in Part VII. This was to ensure that the primary dataset was compiled from genuinely random samples of the last ten requests from each agency. The other requests sought were: the last ten requests where information was withheld, the last five where the time limit for response was extended, and the last five in which a minister or minister's office was consulted before the response was prepared. (Obviously, there was some overlap: the last ten requests, for instance, usually included some where information was refused.) The letters also asked for copies of any advice that related to the requests. Key data – about users and recipients, response-times, and so forth – entered into a database from which quantitative data could be generated. Each request and response was then examined for the sort of data that is much more difficult to categorise: in particular, the type of information being requested and whether the law was being applied accurately. This yielded the more subjective qualitative data in Part VIII.

### **B Roundtables involving frequent users of the OIA**

Two informal, not-for-attribution roundtable discussions were organised.<sup>20</sup> The first involved people who make frequent requests under the OIA – mostly journalists. The second involved officials from agencies that frequently have to process those requests. The participants were asked about their experiences of the OIA, and their views of its strengths and weaknesses.

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19 Ministry of Justice *Directory of Official Information* (Wellington, 2001).

20 The roundtable methodology used here was inspired by a similar – but larger – exercise conducted by journalist and political commentator Colin James in 2001–2002 to gather information about the relationship between ministers and chief executives: see Colin James *The Tie that Binds: The Relationship Between Ministers and Chief Executives* (Institute of Policy Studies and the New Zealand Centre for Public Law, Wellington, 2002).

### III OIA BASIC STRUCTURE

The OIA is designed, as its long title suggests, "to make official information more freely available." It enshrines in law "the principle that [official] information shall be made available unless there is good reason for withholding it."<sup>21</sup> The Act's reach is great. Official information is very broadly defined,<sup>22</sup> and there are no classes of documents, such as Cabinet papers, that are outside the purview of the Act. Almost all government departments, Crown entities and state-owned enterprises are subject to the OIA.<sup>23</sup>

Rights of access are granted to everyone in New Zealand and New Zealanders overseas.<sup>24</sup> Making a request under the Act is as easy as picking up a telephone (though requests must be specified with "due particularity").<sup>25</sup> Agencies must respond to requests "as soon as reasonably practicable, and in any case not later than 20 working days" after receiving the request.<sup>26</sup> Agencies can transfer the request where the information is not held by them or is believed to be "more closely connected with the functions" of another agency.<sup>27</sup> They can also grant themselves a time extension if the volume of information to be searched is so huge that meeting the 20-working-day limit would unreasonably interfere with their operations or where the need to consult about the request means it cannot reasonably be met in 20 working days.<sup>28</sup> They can impose a "reasonable charge" for compiling the information.<sup>29</sup>

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21 Official Information Act 1982, s 5.

22 Official Information Act 1982, s 2 and see *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 402 (CA) where McMullin J defined information as "that which informs, instructs, tells or makes aware".

23 See Official Information Act 1982, s 2 and 1<sup>st</sup> sch; Ombudsmen Act 1975, 1<sup>st</sup> sch. Note that local authorities are covered by the Local Government Official Information and Meetings Act 1987, the provisions of which are very similar to those in the Official Information Act 1982.

24 Official Information Act 1982, s 12(1).

25 Official Information Act 1982, s 12(2).

26 Official Information Act 1982, s 15(1).

27 Official Information Act 1982, s 14(b).

28 Official Information Act 1982, s 15A.

29 Official Information Act 1982, s 15(2). The Ministry of Justice has produced charging guidelines: Ministry of Justice *Charging Guidelines for Official Information Act 1982 Requests* (Wellington, 2002).



Not all information needs to be released upon request. This is consistent with the third purpose of the Act: "To protect official information to the extent consistent with the public interest and the preservation of personal privacy."<sup>30</sup> For instance, requests can be refused for administrative reasons contained in section 18, the most important being that "the information requested cannot be made available without substantial collation or research."<sup>31</sup>

Officials can also withhold information if they can show that release would be likely to cause particular types of harm set out in the Act. Some types of harm (set out in sections 6 and 7) provide conclusive reasons for withholding information. These include the likelihood that release will "prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand" or would "prejudice the maintenance of the law" or "endanger the safety of any person."

Certain other types of harm, listed in section 9, provide prima facie reasons for withholding information. These prima facie reasons exist "if and only if" withholding the information is "necessary" to (among other things):

- protect the privacy of natural persons;
- avoid unreasonable commercial prejudice to particular parties;
- protect confidential information in certain circumstances;
- maintain effective government by protecting advice and opinions in certain circumstances;
- maintain legal professional privilege; or
- avoid harm to the government's negotiations or commercial activities.<sup>32</sup>

Many of these reasons revolve around the concept of "likely" prejudice. The Court of Appeal has held that this requires "a serious or real and substantial risk to a protected interest, a risk that might well eventuate."<sup>33</sup>

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30 Official Information Act 1982, s 4(c).

31 Official Information Act 1982, s 18(f). Since October 2003, however, requests cannot be refused under this ground unless officials first consider extending the time, fixing a charge or consulting with the requester about the form of the request: Official information Act 1982, ss 18A, 18B.

32 Official Information Act 1982, s 9(2).

Nevertheless, agencies must release the information if these prima facie reasons are "outweighed by other considerations which render it desirable, in the public interest, to make that information available."<sup>34</sup> The government can also release information at its discretion even if good reason to withhold it exists under the OIA. Withholding may be justified, but the OIA does not make it mandatory.

A requester who is dissatisfied with the agency's response (or lack of it) can seek a review by the Ombudsmen's office.<sup>35</sup> The Ombudsmen have power to investigate and can insist on examining the documents at issue to see whether the agency is applying the Act correctly.<sup>36</sup> Ultimately, the Ombudsmen may recommend the release of some or all of the information.<sup>37</sup> On review, an organisation invoking one of these exceptions "would be expected to bring forward material to support that proposition."<sup>38</sup>

These recommendations are binding unless the Governor-General, by Order in Council, overrides them<sup>39</sup> something that has never yet happened.

This, then, is the legal framework of the OIA. The next two sections of this paper examine, from different viewpoints, how the Act is perceived by those who deal with it frequently.

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33 *Commissioner of Police v Ombudsman*, above n 22, 391 Cooke P.

34 Official Information Act 1982, s 9(1). The Ombudsmen suggest that agencies making this assessment need to *identify* public interest considerations favouring disclosure and weigh them against the interests to be protected by withholding the information: *Practice Guidelines – Official Information*, above n 8, Part B ch 5.

35 Official Information Act 1982, s 28.

36 Ombudsmen Act 1975, s 19.

37 Official Information Act 1982, s 30.

38 *Commissioner of Police v Ombudsman*, n 22, 411 Casey J.

39 Official Information Act 1982, s 32.

#### *IV REQUESTERS' VIEWS*

This part of the paper draws mainly on the not-for-attribution roundtable discussion held with frequent OIA requesters, supplemented by my conversations with other OIA requesters over the years and a range of articles on these issues.

Generally speaking, the frequent requesters were deeply ambivalent about the OIA. A published comment by Hager captures this neatly: "I find it a powerful tool that allows access to a lot of important information. However, my experience has been that the Act also has major limitations."<sup>40</sup>

The requesters all had OIA success stories. But they were sceptical of officials' and ministers' motives and knowledge of the OIA. The requesters said many officials wrongly believe that OIA requests must be written down – or that the request must specifically mention the Act; if not, the officials believe they can choose whether or not to release the information. Sometimes officials offer requesters a trade-off, requesters said, along the following lines: "you will have to put that request under the OIA, which will take time to process – or else I could just give you this particular information right now."<sup>41</sup>

The requesters suspected that officials interpret requests as narrowly as possible, forcing them to make very sweeping requests. They had all experienced frustrating delays in the processing of requests, particularly when they sought controversial or sensitive material. They listed what they saw as common stalling tactics used by officials:

- transferring requests between agencies;
- seeking clarification of the request, then treating this as a new request with a fresh 20 working day time limit;
- insisting that they are "working on it" or "conducting consultations";
- claiming that the person processing the request is away or sick or that it is "on the minister's desk" awaiting final approval;
- waiting for weeks and then refusing the request;
- losing or simply ignoring requests;

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40 Hager, above n 4, 62.

41 See the evidence of "two-track" OIA processing in Part VI Limitations of the Data.

- dragging the chain when the Ombudsmen become involved; and
- brazenly not releasing information immediately even after agreeing to do so following an Ombudsmen's investigation.<sup>42</sup>

By the time the information finally arrived, it was often no longer newsworthy.<sup>43</sup> This, they thought, was often the point of the delays.

The requesters said officials and ministers select from a menu of illegitimate reasons to deny them information. Some have nothing to do with the OIA: "the information doesn't belong to us"; "it's now wrong, we've changed our view, so you can't have it"; "we've consulted X and they won't let us release it"; "we have no interest in taking part in your survey."

As well, seasoned requesters were, by and large, cynical about the use of the OIA's withholding clauses. As Hager has written, "[i]t often looks as though the officials decide what they would rather not release and then idly thumb through the Act looking for a few clauses to cite in justification."<sup>44</sup> In particular, requesters said the government uses these exceptions to withhold anything that can remotely be described as commercially sensitive, Budget-related, confidential, related to international trade or security, or official advice. The requesters reported enormous inconsistencies in the way the exceptions are administered. Some agencies tended to withhold whole documents rather than considering

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42 For an example of the last point, see Karl du Fresne "The right to know: a media viewpoint" (1996) *Archifacts* 185, 189.

43 See Mathew Dearnaley "Quest for truth like pulling teeth" (8 April 2000) *The New Zealand Herald* Auckland.

44 Hager, above n 4, 64. Poot, above n 9, found evidence of a practice of officials working out what they wanted or thought the Minister wanted to withhold, then trying to "come up with reasons" for withholding it. A policy manager told him that "there have been whole departments and certainly ministers and others who are quite cavalier about the Act. I had the experience of very, very senior people from departments, who should know better, trawling through line by line for several thousand pages of text and saying that they didn't want to release things. And they actually had no grounds under the Act and they weren't going to be able to. It seemed a huge waste of resources and there seemed to be a real belief that they could just override the Act ... I think ministers would generally prefer not to release things and they are always looking for grounds not to release. They interpret the law somewhat differently to our legal people and it's always in one direction." Poot, above n 9, 69. Along these lines, the research for this paper unearthed an SOE file note asking whether particular requested information "is sensitive such that we should find a ground or grounds upon which to withhold it."

whether parts could be released. Many agencies appeared to adopt blanket policies concerning legal advice, policy documents or documents supplied by third parties, rather than considering them case-by-case. Many deferred to the wishes of their ministers rather than taking the decisions themselves.<sup>45</sup> Requesters also complained that they were sometimes confronted with whopping charges that seemed designed to deter them from pursuing requests.

Former Radio New Zealand political editor Alastair Morrison is one of many to comment on a different matter: the government's increasing use of methods of managing information releases to minimise their detrimental impact.<sup>46</sup> The government waits until Christmas Eve before releasing the information, he says. It sends out a "public relations package" with the information. It buries the requested information in a mass of other material. It releases the information to all journalists together or to a friendly journalist first to deny the requester a scoop. (Some journalists suspect that some of the stacks of paper stamped "released under the Official Information Act" that land in their in-tray may not have ever been requested by anyone at all. It may be a clever ruse to get them to read the material or to release some information in the hope that no-one realises there's more.)

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45 In 2003, the Ombudsmen criticised Te Puni Kokiri for its policy of referring all OIA responses to the Minister for Maori Affairs for "information and clearance". Prompt consultations with the Minister may be appropriate on some requests, the Ombudsmen said, but this blanket deference to the Minister "cannot be justified in terms of the Act": *Ombudsmen's Report 2003*, above n 7, 19–20. The Ombudsmen have chastised officials for delaying the release of important information beyond the date of a general election on the sole ground that it "could adversely affect the Government's electoral prospects": see State Services Commission *State Servants, Political Parties and Elections: Guidance for the 2005 Election Period*, appendix 2 and page 4, where the State Services Commissioner warns officials not to "extend the timeframes specified in the OIA for the release of information on the basis of fallacious reasons, including the need to consult with Ministers ... The potential for released material to adversely affect the Government's electoral prospects is not a lawful reason for withholding it."

46 Alastair Morrison "The Games People Play: Journalism and the Official Information Act" in Legal Research Foundation, above n 11, 30; see also Karl du Fresne "The right to know: a media viewpoint" (1996) *Archifacts* 185; Bruce Ansley "Secret Society" (9 April 1994) *The Listener* Auckland 26; E.J. Poot "The impact of the Official Information Act 1982 on the policy development process" Master of Public Policy research paper, Victoria University of Wellington, 1997, Ch 4. For an officials' perspective on the same phenomena, see Marie Shroff "Behind the Official Information Act: Politics, Power and Procedure" in Legal Research Foundation, above n 11, 19.

Several requesters also suspected that information gets shredded sometimes or given back to its source to frustrate access. And when the information does arrive, they wondered whether it was really complete. A lawyer said he had never been provided with any e-mails in response to any of his many OIA requests and could not believe that no relevant ones existed.<sup>47</sup> The Law Commission has expressed concerns about this too, noting that even the Ombudsmen:<sup>48</sup>

may find it difficult to ascertain, for example, whether information supplied by an agency in accordance with requests is indeed all the relevant information held within the scope of the request, rather than simply enough to satisfy the requester on each occasion.

The news was not entirely bad. None of the requesters would want to go back to the days before the OIA. Karl du Fresne calls the OIA "a vital piece of legislation which has prised open many doors which previously had been firmly shut."<sup>49</sup> Some requesters were full of praise for many of the officials they deal with – particularly the officials who, from time to time, suggest quietly "why don't you ask for *this*?" or who battle to release information they think should not be withheld. Some agencies are much more open than others, the requesters said. As well, most requesters believed that problems with the OIA are more often due to poor training, resourcing or record-keeping than bad faith.

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47 The Ombudsmen have commented that "surprisingly" some officials believe that even work-related e-mails are not official information. "E-mails are NOT a special class of information to which different principles apply": (June 2003) 9-2 *Ombudsmen's Quarterly Review* 3.

48 New Zealand Law Commission, above n 7, para 41. The "lie-in-unison" memo incident is an example of the failure by a government department to provide embarrassing information, not merely to the requester, but also to the Ombudsmen to facilitate his investigation: *Report of Ombudsman, Mel Smith, re Department of Labour*, above n 11. See also *Report of the Ombudsmen for the year ended 30 June 2004*, AJHR A3, 29 where the Ombudsmen criticise the Ministry of Social Development for failing to identify all the information relevant to the OIA request at issue [*Ombudsmen's Report 2004*].

49 du Fresne, above n 43, 186.

## V OFFICIALS' VIEWS

This part of the paper is taken largely from the roundtable discussion with officials, but also draws on other conversations I have had with OIA officials and some other research on officials' views of the OIA.

The officials seemed as ambivalent about the OIA as the requesters, but for different reasons. They supported the concept of open government and the principles behind the OIA. In fact, some wished journalists would take *more* interest in the policy-making process. Many said that the possibility of their advice becoming public strengthened its quality. "There is nothing like the prospect of outside academic or interest group scrutiny to make you write accurately and neutrally",<sup>50</sup> commented Marie Shroff in 1997, when she was Cabinet Secretary.

However, officials also said the OIA is an enormous burden to administer. They criticised many requesters for not thinking hard about the precise information they wanted or for simply trying to get officials to do their research for them. Requesters were often vague and sometimes asked the organisations to form opinions (which the OIA does not require them to do.)

Requests, they said, were increasingly taking the form: "all documents relating to Y including emails (and deleted emails), minutes, briefings, memos, drafts, correspondence, reports, aides memoire, file notes, Cabinet and Cabinet committee papers." This could create days of work – sometimes weeks or months, they said.<sup>51</sup> First, the relevant information must be identified. It may be spread across different files, held by different staff members in different parts of the country. Relocations, high staff-turnovers, interdepartmental mergers, computerisation, restructuring and multiple recording, filing and archiving systems could add to the complexity of the task. The mushrooming use of e-mail for consultation and feedback on policy proposals and draft documents, for

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50 Shroff, above n 46, 23. For a study on the effects of the OIA on the policy process, positive and negative, see Poot, above n 9.

51 The Ombudsmen have also expressed concern at the increasing use of "widely framed requests which have the potential to push the official information legislation beyond its administrative limits ... there appears to have been little change in the attitude of certain requesters who make widely framed requests as a matter of course." See *Ombudsmen's Report 2001*, above n 7, 17–18.

example, quickly multiplies the numbers of relevant documents that may be relevant to a request.

Next, the agency has to take a view on whether release would damage any of the interests protected by the OIA. It is often difficult to delegate or centralise this task, because expertise is needed to evaluate which information may truly be damaging if released. People familiar with the documents and the issues may need to be consulted, as well as third parties who have privacy or confidentiality interests, legal advisors, and other agencies who may have contributed to the creation of the information. If there are political sensitivities, the minister is consulted. It is not uncommon for some key people in this chain to genuinely be sick or overseas.

After that, officials need to go through the relevant documents, copy them and painstakingly delete the information that needs to be protected. Finally, in many cases, the work needs to be checked.

The task, said the officials, is a thankless one. Some requesters are abusive, demanding and suspicious. They do not seem to realise that theirs is not the only OIA request in the pipeline, that OIA processing is not the most well-resourced or high-status government activity or that OIA requests are seldom the most important or pressing part of officials' workloads. In fact, the officials say they often release information that could properly have been withheld, because they do not have time to consider all the issues page by page, or because they want to avoid a battle with the requester.<sup>52</sup>

The officials pointed out that the OIA calls for some fine judgments to be made about the applicability of nebulous standards: the likelihood of harm, the public interest, the effect of disclosing advice.<sup>53</sup> OIA requests are often delegated to junior staff, they noted. Some admitted that they are not necessarily best-placed to evaluate issues such as likely commercial prejudice; they may have little time to consult large numbers of people about privacy or commercial interests; they may not want to be seen as stabbing their minister in

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52 The complexity and uncertainty of the scope of the OIA's exceptions sometimes induces officials to release documents which might be protected: David Shanks "Opinion, Advice and the Official Information Act – An Unconventional Approach?" (LLM Research Paper, Victoria University of Wellington, 1 October 2002), 46.

53 Shanks found that uncertainties in the scope of particular exceptions caused officials very real difficulties applying the OIA; that different officials took different approaches to them; and that some were invoked where their application was questionable: Shanks, above n 52, 42–52.



the back by releasing embarrassing material; and they may feel acutely that small statements in the media taken out of context from preliminary policy documents can do a lot of harm.

Researcher Edward Poot explored the nuances of this last point. Policy is a complex, iterative process, officials told him. "Options and issues released at an early stage may not be what they were later discerned to be", said one. Drafts are often put together to promote dialogue or explore ideas and are not designed to be definitive or painstakingly accurate. Journalists seldom provide this context, but often create a "sideshow" that interferes with rational decision-making processes. Increasingly, they are younger and more aggressive, seeking quick turnaround stories involving personalities, scandals or public money. "Provocative ideas can be really misinterpreted", one official told Poot. Worse still, politicians' requests are often politically motivated, "used more for political grandstanding than for improving policy development."<sup>54</sup> The increasing need for negotiation with coalition partners and other parties has also complicated the policy-development and decision-making processes.

So it is not surprising that many officials take a cautious approach to the release of information. Arguably, it is appropriate to adopt a careful approach to nebulous standards when there is an avenue of review available. Moreover, even when they recommend release, they can be overruled by ministers.<sup>55</sup> The Cabinet Manual says:<sup>56</sup>

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54 Poot, above n 9, 50–68. See also Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming our Political System* (McIndoe, Dunedin, 1992) 22–23.

55 At a recent symposium on the Official Information Act in an Election Year, one official asked "What do we do when a Minister says, after we've sent a response for sign-off, 'find a part of the Act that justifies withholding it'? I'm probably not the only person here who's had that experience." Poot found evidence of transfers to ministers where officials felt there were no grounds to withhold information but a Minister disagreed: E J Poot "The impact of the Official Information Act 1982 on the policy development process" (Master of Public Policy research paper, Victoria University of Wellington, 1997) 68–69.

56 Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) para 6.34. This advice is questionable. If the department transfers the request for this reason alone, it can hardly claim that it is doing so because it believes the information requested is "more closely connected with the functions" of the minister, which is the legal justification required for the transfer under section 14 of the OIA. Indeed, the OIA was amended in 1987 specifically to ensure that heads of government departments would make OIA decisions themselves rather than deferring to ministers. "[A] Minister cannot make the initial decision on a request properly made to the Minister's department. That avoids the possibility of prejudgment, and there have been examples of that. Of

If, after consultation, the Minister takes the view that the information should not be released but the department believes it should, then transfer of the request to the Minister is the only way in which the department can meet its constitutional duty to follow ministerial direction and the obligation to comply with the Official Information Act.

The officials said they do their best to meet the needs of the requesters and the dictates of the OIA. However, not all officials are as conscientious and knowledgeable about the OIA as the ones who attended the roundtable.

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course, the Minister can still be consulted by the department; the Bill makes that clear": Minister of Justice Geoffrey Palmer introducing the Official Information Amendment Bill (12 June 1986) 471 NZPD 2167. The Law Commission notes this change, but does not seem to see anything wrong with transferring a request in cases of disagreement: "In principle, the Minister *should* be seen as having the greater role and responsibility. If there is any doubt the legislation should be clarified": New Zealand Law Commission, above n 7, para 202. The State Services Commission seems to offer a better way out, suggesting that the chief executive seek the minister's agreement to put the question to an independent third party, such as the State Services Commissioner or the Crown Law Office: State Services Commission, above n 12, 13–14.

## VI LIMITATIONS OF THE DATA

To what extent does the data gathered under the first phase of this project bear out the criticisms of the requesters? Before that question is tackled, it is important to explain the limitations of the data. They are formidable. First, the data generally does not include oral requests for information. Every day, agencies receive dozens of oral requests for information. Generally, agencies simply answer them. Technically, these are usually requests under the OIA, but they are not put through the processes most agencies have set up for dealing with OIA requests. Usually, they are not recorded. There was ample evidence among the requests of this two-track OIA processing system. "I'm wondering what information we would be able to release to him without going through an OIA process?" wrote one official. "[A particular official's] preference was to treat this request as an OIA request ..." wrote another.<sup>57</sup> Such informal requests and responses were not captured by this data.

Secondly, the data is not truly a random sample of requests. A properly random sample of the most recent OIA requests at a particular date would largely comprise requests to high-OIA-volume agencies such as the Police and the Ministry of Health. In order to explore the impact of the OIA across a range of agencies, the primary dataset included no more than ten requests from any one agency. This affects all the data and needs to be borne in mind throughout.

Thirdly, 13 agencies (out of 136) still have not replied to my request. Two that did reply merely provided their own selection of "representative" requests instead of the last ten they had received. These were excluded from the quantitative data. Nor can we be absolutely sure that those who supplied requests did not, mistakenly or deliberately, omit some.

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<sup>57</sup> In some ways, this practice is to be encouraged. It provides a quick and informal response to simple questions. But it may present some dangers. Many officials seem to think that these unlogged, "unofficial" requests are not subject to the OIA. They do not consider the need to provide a complete response, an explanation for any information withheld or notification of the requester's right to complain to the Ombudsmen's office. The research even uncovered one instance where the State Services Commission failed to recognise a request for information as triggering the OIA and denied it twice before finally being pressed by the requester into logging it as an OIA and supplying the requested information. See also Ian Eagles, Michael Taggart and Grant Liddell *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992) 74.

Fourthly, the analysis of the data is rudimentary. The differences between the figures in some of the breakdowns may not be statistically significant.

Fifthly, because of the very small sample sizes from each agency, it seemed generally unfair to single out particular agencies for criticism, although in the qualitative analysis this was to some extent unavoidable.

Despite these significant caveats, the research provides a snapshot of the Act's operation across a wide range of agencies covered by the Act. Because of the limitations of the lens, the picture is blurry, but it is hoped that the general shapes and colours give some indication of the OIA in action.

## VII QUANTITATIVE DATA

The dataset assembled for this research covers 100 agencies:<sup>58</sup> 36 government departments,<sup>59</sup> 13 SOEs<sup>60</sup> and 51 assorted Crown entities. Some agencies had received fewer than 10 requests in the past year. The total number of requests in the last-ten-requests database is 694. The results follow.

### A Source of Requests<sup>61</sup>

Political (MPs, political staff, political research units)	23%
Private natural individuals	20%
Media	19%
Academic/research	10%
Public interest group/lobby group	10%
Lawyer	9%
Commercial (public or private company)	9%

### B Specificity of Requests

After examining all requests, 20 per cent were classed as "very wide". These were requests that asked for "all information" or "all documents" pertaining to a particular topic, often listing (non-exhaustively) the different types of documents that might be included, such as correspondence, briefing papers, cabinet documents, drafts and e-mails. These are sometimes called "fishing expeditions" when the requester is not looking for particular information, but simply trawling to find anything interesting. In this research, it

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58 One hundred and thirty six letters were sent to agencies subject to the OIA, as listed in the Directory of Official Information, see above n 19. Thirteen did not reply or replied but did not follow through their promises to supply information. Data from two other agencies was problematic as did not address the questions framed. Of the remaining 121 agencies, 21 had received no OIA requests in the past year.

59 More precisely, organisations listed in the Ombudsmen Act 1975, 1<sup>st</sup> sch, part, as at 2002, plus the Ministry of Youth Affairs, which seems to have been omitted.

60 More precisely, organisations listed in the First Schedule to the State-Owned Enterprises Act 1986, as at 2002.

61 Figures exclude the 11 per cent of requests in which requester's names were deleted.

was impossible to distinguish fishing expeditions from requests which were merely very wide.

On the other hand, just over one third (35 per cent) were specific – that is, narrowly targeted, asking for particular documents or pieces of information. The others fell somewhere in between.

Not surprisingly, the more specific the request was, the faster it was processed, but more surprisingly, the difference was not very great. Specific requests were processed about 1.5 working days, on average, faster than very wide requests. More importantly, perhaps, specific requests were more than 20 per cent more likely than wide ones to be answered without any information withheld under section 9 or section 6 (71 per cent to 48 per cent). Specific requests were also less likely than wide ones to be refused under section 18 (14 per cent to 24 per cent).

### ***C Processing Time***

The average processing time was just over 13 working days.<sup>62</sup> Removing the cases where extensions were made, the average drops to about 11.5 working days. About one-sixth of requests were answered within one day. The rest were spread very uniformly over the 20-working-day period, and then trickled in after that. One in eight was overdue without an extension. Still, more than half of these were less than a week late. Only about 3 per cent of responses overall were more than two weeks late.

For all that, four agencies (including two government departments) took longer than 20 working days *on average* to process their requests. About 40 per cent of agencies that

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62 Where no date received stamp was present, three working days were factored in for receipt of requests, and the data assumes that responses were posted the same day they were dated. Although the obligation under the OIA is to "decide" whether to supply the information within 20 working days (and notify the requester of that decision), this paper assumes that this "decision" is only reached at the time when a letter is received setting out which information is to be supplied and which to be withheld, and on what grounds. Almost invariably, any information to be released is enclosed with this letter. This is also that point at which a right to seek a review by the Ombudsmen against such a decision arises under section 28(1)(a) of the Act. Note that in the course of this research, two examples came to light of claims that extensions had been given although the relevant letter making the extension had not been supplied for this research. It may be that this happened in other cases too. Moreover, it is not unusual for requesters to informally agree to relax deadlines.

processed OIA requests had at least one request (from the sample of 10) overdue without an extension. One agency had five.<sup>63</sup>

**D Extensions**

About 5 per cent of requests were formally extended (though more than one quarter of the time, the agency did not comply with the extended deadline).

**E Average Processing Time for Different Types of Requesters (in Working Days)**

Political	10
Academic/research	11
Private individuals	11.5
Media	12.5
Lawyer	12.5
Commercial,	13
Public interest/lobby group	13

**F Average Processing Times by Each Type of Agency (in Working Days)**

SOEs	13.5
Government departments	12
Other Crown entities	11

**G Information Withheld or Refused**

Information was withheld under section 6 (protecting significant national interests) or section 9 (protecting less significant interests, such as privacy, and subject to a public interest balance) in 34 per cent of the requests that were processed (that is, not transferred

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<sup>63</sup> Although it seems unfair to name the offending organisations on the basis of such a small sample, it can do no harm to name those that performed well and their average response times (in working days): Electoral Commission (4.1); Ministry of Defence (4.7); Environmental Risk Management Act (ERMA) (5.8); Television New Zealand (TVNZ) (6.3); Ministry of Pacific Island Affairs (7.4), Department of the Prime Minister and Cabinet (7.4) and the Legal Services Agency (7.9).

or dropped by the requester). Information was refused under section 18 (for administrative reasons) in 9 per cent of the requests.<sup>64</sup>

On some occasions, information was refused under both section 18 and section 9 (or section 6), so these figures cannot simply be added together. Excluding the overlaps reveals that 41 per cent of requests were wholly or partly refused. (Overall, 18 per cent were wholly refused.)

***H Proportion Subject Only to Minor Deletions***

OIA responses made only slight or partial deletions 15 per cent of the time. Thus, a total of almost three-quarters of all requests (where information existed to be found) were fulfilled with minimal deletions or none at all. However, that minimal deletions sometimes relate to significant information, such as a pivotal piece of advice, the name of a consultant or a crucial piece of financial data.

***I Proportion of Cases in which the Public Interest Balance was Explicitly Conducted when Withholding Information under Section 9***

In 72 per cent of cases where section 9 was invoked to withhold information, it was not apparent on the face of the response letters that the organisation had considered public interest factors. Even when these were expressly referred to, it was extremely rare for the agency to go beyond a simple assertion that no public interest considerations outweighed the interest to be protected. It was almost never clear whether the agencies had actually identified and balanced particular public interest considerations.

***J Proportion of Cases in which Requesters were Told of their Right to Contact the Ombudsmen's Office to seek a Review After Information Withheld***

Requesters who were denied information were informed of their review rights in 71 per cent of responses. Mostly significantly, private individuals were told of their review rights in only 53 per cent of responses.

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<sup>64</sup> About half of the section 18 "refusals" were made under section 18(e) because information did not exist or could be found. If the information was not there, it seems unfair to call this a refusal. Thus, section 18(e) refusals have been excluded from this paper's analysis relating to withholding and refusing information. However, it is not certain that the officials invariably found everything there was to find.



***K Charges***

Charges were made or proposed about 4 per cent of the time.

***L Grounds Used Most Often for Refusing Requests***

The following table sets out the grounds invoked most often for withholding information, listing the frequency with they were invoked. Sometimes they were invoked to withhold a portion of the information. For instance, names or figures were sometimes deleted. Sometimes paragraphs or pages were deleted. Sometimes whole documents were withheld. The type of deletion was categorised as follows:

- All withheld – all information was withheld
- Much information withheld – whole documents or large sections of documents withheld
- Partial withhold – small amounts of information, such as paragraphs or sentences, were deleted
- Slight withhold – single names or figures were deleted.

**Table: Grounds Used Most Often for Refusing Requests**

<b>Section</b>	<b>Description</b>	<b>How often invoked</b>	<b>How often "much" or "all" information withheld on this basis</b>
9(2)(a)	Privacy of natural persons	14%	49%
9(2)(g)(i)	Free and frank expression of ministers and officials	10%	72%
9(2)(f)(iv)	Conventions protecting confidential advice	6%	83%
9(2)(b)(ii)	Unreasonable prejudice to supplier or subject of information	6%	57%
9(2)(h)	Legal professional privilege	5%	77%
9(2)(ba)(i)	Prejudice to supply of publicly important confidential information	4%	73%
18(d)	Already/soon to be publicly available	4%	88%
9(2)(b)(i)	Trade secret	4%	52%
18(f)	Excessive collation/research required	3%	94%
9(2)(i)	Prejudice to commercial activity	3%	80%
9(2)(ba)(ii)	Public interest to protect confidential information	3%	75%
6(a)	Security, defence, international relations	2%	57%

***M Rates of Section 9 Withholds in Response to Different Types of Requester***

Academic	23%
Private individual	29%
Commercial	31%
Political	32%
Public interest/lobby group	34%
Lawyer	37%
Media	43%

***N Rates of Section 9 Withholds Emanating from Different Types of Organisation***

Government departments	40%
Other Crown entities	29%
SOEs	26%

***O Summary***

Generally speaking, OIA responses were processed far more quickly than frequent OIA requesters might have predicted. Extensions were relatively rare, and 87 per cent of unextended requests were met on time.<sup>65</sup> There was little difference in processing time between different requesters or between different organisations (although SOEs were a little slower on average). Moreover, 59 per cent of requests proceeded without any deletions, and 74 per cent with at most only slight or partial deletions.<sup>66</sup> This is probably because much of the ordinary business of the OIA does not relate to information that is

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65 As discussed above, the real obligation is to respond to requests "as soon as reasonably practicable." It is not clear how often this is being met. Poot, above n 9, 47, 53, found evidence from his interviews with officials that the 20 day time limit had become a "de facto standard". However, this research suggests that if such a "de facto" standard exists, it is likely to relate only to difficult or sensitive requests.

66 This analysis cannot determine how often the information supplied is incomplete.

extremely sensitive. It is also because the vast bulk of requests (80 per cent) are reasonably well targeted.

Political requesters who these days are making more (and broader) requests than anyone else seem to get particularly good service. Their requests were processed faster than average and they faced a lower withhold rate. The media fared worse than average on both counts. Strikingly, media requesters are almost twice as likely to have information withheld than academic ones. It is possible that this relates to the nature of the information being requested.

The roundtable requesters accurately identified the most commonly used grounds for withholding information: those relating to privacy, confidentiality, commercial prejudice and policy advice. Information was withheld or refused in response to 41 per cent of requests, and of those 41 per cent, more often than not the deletions were substantial or the information was withheld entirely. In particular, the exceptions protecting the policy process, commercial activities and confidentiality were usually used to withhold large amounts of information rather than make small deletions. Where information was withheld under section 9, almost three-quarters of responses failed to expressly consider any public interest favouring release of the information and overall almost 30 per cent failed to advise requesters of their right to seek a review.

What sort of information were requesters asking for? Were the withholds legally justified under the OIA? The rest of the paper examines those questions.

### VIII QUALITATIVE DATA

When Robert Hazell visited Canada, Australia and New Zealand in the mid-1980s to assess our new official information law in action, he did not find it had changed things much: "It has not increased public participation in the processes of government; nor has it had any significant impact on government decision making." It had produced small improvements in decision-making, he said, mostly in case-work rather than policy work and "it has led to greater accountability, but again on a small scale: greater scrutiny of ministers' expenses rather than of their management of economic policy."<sup>67</sup>

That may have been true then. It may still be true that earth-shaking OIA revelations are rare, though recent OIA battles involving Treasury costings of Labour's interest-free student loan policy,<sup>68</sup> the embarrassing "lie-in-unison" memo from the New Zealand Immigration Service<sup>69</sup> and the documents relevant to allegations of a government cover-up of the illegal importation of genetically modified corn seed<sup>70</sup> may suggest the OIA is finding new teeth. But this research revealed that a good proportion of ordinary OIA requests are about holding decision-makers accountable, seeking a window on the processes of government and marshalling resources for research, political opposition or public critique. Dozens of requests were made for all manner of policy-related information: briefing papers on the Shared Parenting Bill, policy papers on sex offender tracking, papers on assisted human reproduction, information about child smacking law reform, public and private road partnerships, use of the whistleblower protection law and tax concessions for film production, to name but a few. Individuals and groups sought reasons (and sometimes minutes, correspondence and documents containing the decision criteria) for decisions that went against them: a student who missed out on a scholarship, for instance; a bus company that was not awarded a school bus contract; and a group who were turned down for environmental legal aid.

Consider, too, the following examples:

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67 Robert Hazell "Freedom of Information in Australia, Canada and New Zealand" (1989) 67 *Public Administration* 189, 210.

68 See for example John Armstrong "Figures let Key turn tables" (15 September 2005) *The New Zealand Herald*, Auckland.

69 *Report of Ombudsman, Mel Smith, re Department of Labour*, above n 11.

70 For a discussion of the OIA aspects of Corngate, see Steven Price "Proceed With Caution" (February 2003) *Metro* 62.

- A resident used the OIA to obtain data on road accidents in her area and information on how speed limits could be lowered, following the tragic road-accident death of a young girl;
- A manufacturers' lobby group believed some new water-heating regulations were poorly researched and wanted to challenge them, so used the OIA to obtain the cost-benefit analysis that they were based upon;
- An OIA request revealed that the Building Industry Authority had early knowledge of the leaky building problem;
- An anti-abortion group found via the OIA that the top five certifying consultants for abortions each received consultancy fees of more than \$100,000 in the past year;
- An OIA request revealed Treasury's reasons for opposing the government's painted apple moth airborne spraying programme: it had a 20–40 per cent chance of failure, it was likely to exceed its \$130 million budget and the estimated economic benefit if it succeeded was only \$58 million;
- A newspaper's OIA request about the Defence Force's Orion aircraft revealed that they suffered equipment failures every second flight;
- A private individual sought information on the notional economic value assigned to a human life for the purposes of allocating health resources – in order to bolster an argument that less money should be spent on meningitis vaccines and dietary supplement regulation and more on "our public health killing fields";
- Parents looking to challenge their child's expulsion from a particular school asked the Ministry of Education for data about the number of expulsions from that school in recent years compared with other schools in the area: the data revealed an enormous disparity;
- A Maori group obtained information about a mining company owned by a councillor that it thought was mining without a resource consent and in excess of its use rights;
- The Opposition asked the Department of the Prime Minister and Cabinet (DPMC) for papers relating to a request to the Australian government to refrain from commenting on New Zealand domestic politics. They received

an excerpt from minutes of a meeting between Australian and DPMC officials:

Picking up on this being an election year, [Mark] Prebble noted that the PM will be expecting some "restraint" from Australian Ministers in their public remarks about New Zealand. He added that the PM considered that New Zealand Ministers had behaved appropriately during the Australian federal elections.

This is the stuff of democracy. It demonstrates that useful – and even embarrassing – information is regularly released via the OIA. Moreover officials sometimes went further and provided information beyond that requested. Many tried to work with requesters to accommodate their needs, apparently spent long periods searching for and vetting information for release, provided detailed and careful explanations when information was denied and, where necessary, explored alternative ways of making information available (with deletions or via summaries,<sup>71</sup> for instance). A Department of Corrections official sought further information from one requester in order to better evaluate the public interest in release. A Ministry of Economic Development policy analyst went out of her way to compile a list of relevant documents, not all of which fell within the terms of the request, but which she considered might be of use to the requester. The New Zealand Security Intelligence Service (NZSIS) gave a full some response to a set of questions from a researcher concerning New Zealand's attitudes to terrorism before and after the September 11 terrorist attacks.

However, this was not always the case. It was disturbing to see how often officials and ministers withheld information in apparent contravention of the OIA.<sup>72</sup> Examining

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71 Summaries have the potential to be dangerous, however, as the following example demonstrates. A school principal requested copies of the minutes of a meeting between the Education Review Office (ERO) and a chair of a board of trustees. The ERO provided a summary instead. However, comparing the summary with the original minutes, it was evident that the summary omitted sensitive information and, without it, the summary probably gave a misleading impression of the meeting. For instance, it removed the chair's complaints that the principal "sidestepped the issues" and that he would not stop working on a computer to speak to the chairperson. Comments that parents did not complain because they were scared of repercussions became "discussed complaints procedure re parents".

72 Perhaps we should not be surprised about this. After all, the Ombudsmen's case notes catalogue frequent mistakes: the Minister for Ministerial Services refusing even to release the number of staff in the Prime Minister's office 12 CCNO 104; the Maori Affairs Minister refusing to release details of the appointees to various boards 11 CCNO 87; a hospital refusing to release records that eventually helped prove a person had been convicted on perjured evidence 11 CCNO 90; the

about 1000 OIA requests for this project revealed that when information was withheld, it was usually unclear whether the law was being applied correctly. Not infrequently, responses included references to wrong sections. Officials often made simple assertions that information was "confidential" or "commercially sensitive" without appearing to understand that these are not, in themselves, reasons for withholding information. Although officials are not required to refer to the public interest in their responses, they are required to consider it and there was usually no evidence that they had done so. Alarming often they issued refusals that appeared unlawful. One agency developed its own standard rule about the release of information, attempting to justify it on six different grounds (including the "principles of the Privacy Act") in different cases. It admitted in a covering letter that its "approach to answering OIA requests is in need of a thorough review."

A few times, agencies used OIA justifications for withholding information in response to Privacy Act requests.<sup>73</sup> One organisation refused to supply information it held simply because it was prepared by another organisation.

Without detailed knowledge of the information at issue in these requests and the various interests involved, it is difficult to offer definitive analysis of the refusals. It may be that some of them have since been subject to a complaint to the Ombudsmen (in fact, a

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Ministry of Health (wrongly citing six OIA withholding grounds) refusing to release information on government funding of the redevelopment of Wellington hospital 12 CCNO 130; the Prime Minister refusing to release the names of the "eminent New Zealanders" consulted over the Intelligence and Securities Bill (most consented to this release when contacted by the Ombudsmen) 11 CCNO 109; the Abortion Supervisory Committee asserting that drafts could not possibly be official information 12 CCNO 174. Over the last decade, the Ombudsmen received on average, 1259 OIA complaints per annum. The vast bulk of them (90 per cent) concerned refusals to provide information or delays deemed to be refusals. Overall, 58 per cent of complaints dealt with by the Ombudsmen in the last decade were resolved, formally or informally, in favour of further release of information: see *Reports of the Ombudsmen for the years ended 1995–2004*, AJHR A3. Note, however, that during the period of the Ombudsmen's investigation (which usually takes months), circumstances can change, so it does not follow that a resolution involving the release of further information at a later date necessarily means that the original decision was wrong.

73 In fact, the New Zealand Qualifications Authority (NZQA) even insisted on treating requests that were explicitly made under the Privacy Act 1993 as OIA requests, subject to the OIA's withholding grounds and charging regime (public requests under the Privacy Act 1993 are free: Privacy Act 1993, s 35(1)). The NZQA persisted with this policy even after a requester questioned it strongly. However, it has since amended its practices and cancelled some invoices.



few of the responses included correspondence with the Ombudsmen relating to particular complaints). However, most do not get referred to the Ombudsmen. Thus, the following section is, of necessity, impressionistic. However, many of the documents raise concerns on their face. Examples are set out below.<sup>74</sup>

#### ***A Specificity and Reading Down***

Some requests were extremely broad. For instance, one requester asked for:

All papers prepared, reports, letters, documents, Cabinet and Cabinet committee papers, memos, aide memoires, all other written records related to any papers, proposed publications or research that may look at closing the gaps issues, progress on reducing inequalities, or any similar work, in which the Ministry of Maori Development has been involved in the last year.

Not unreasonably, the Ministry wrote back and pointed out that this encompasses almost everything it does.

Such requesters were often rightly asked to clarify their requests. But so were some others whose requests were quite precise. When the Leader of the Opposition made a request for three specific documents mentioned by name and number, an internal agency memo concerning the request stated:

I would go back and say the reports cover a variety of topics and to help us deal with the request he should specify the topic he is interested in – I would argue that the request does not have due particularity – it will be a nightmare if this becomes the norm for seeking information – eg reports from 1 to 100.

In the event, the agency supplied the documents with deletions.

In some cases, wide requests were wrongly refused on the ground that they were too broad. A broad request may still be well specified.<sup>75</sup> The question is whether the information can be identified by the recipient. If a request is not properly specified, the agency has a duty under section 13 of the OIA to assist the requester to formulate the

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<sup>74</sup> All the agencies mentioned by name in the text below have been contacted for comment and, where appropriate, the discussion has incorporated any response received. Note that agencies were being asked to comment on refusals that took place in late 2002, which some found problematic.

<sup>75</sup> *Case W 3541* 10(2) OCN 17.

request with proper precision, rather than deny the request.<sup>76</sup> TVNZ appeared to contravene this section when it was asked for information about the production budget for its Commonwealth Games coverage. Television New Zealand (TVNZ) explained to the Ombudsman that it had refused the request under section 18(e) – information does not exist – because the request was not specific enough. However, TVNZ did not appear to have sought clarification from the requester and in fact told him it was withholding the information under section 9(2)(i) – prejudice to commercial activities. After intervention by an Ombudsman, the information was provided. On the other hand, in a few exemplary cases, officials sent lists of documents held and invited the requester to select from them.

Even where requests were admirably specific, however, there is evidence that on occasions they were read down. Parts of requests were sometimes – mistakenly or deliberately – overlooked. A requester who asked for interview notes was told "separate *formal* interview notes were not kept" (emphasis added). E-mails, drafts and file notes were seldom supplied, even when expressly requested.<sup>77</sup> New Zealand On Air found only five documents relevant to an extremely wide request, apparently from an MP, seeking:

All information (including reports, aide memoire, emails, internal discussion papers, memoranda, draft Cabinet and Cabinet Committee papers, correspondence and other relevant documents) held or prepared by NZ On Air in relation to the review of funding mechanisms, and including the options to either refine the current funding arrangements via new Zealand on Air; or a local content quota applied to broadcasters; or a broadcaster funding quota.

It seems that the documents supplied, which included a discussion paper and a submission to an officials group on broadcasting, were prepared without any correspondence, e-mails, minuted meetings or earlier drafts.

Two agencies wrongly asserted that drafts were not subject to the OIA. Often, the information provided looked suspiciously thin and sometimes further requests or

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<sup>76</sup> New Zealand Law Commission, above n 7, paras 60–63.

<sup>77</sup> Poot found evidence in his study of the OIA practice of government agencies that, generally, only "the 'official' documentary record is generally released in response to OIA requests." File notes, jottings on policy papers, e-mails, and the like were "seldom released": Poot, n 9, 51, 54, 56, 79. Oral and e-mail information constitute official information: see *Ombudsmen's Report 2004*, above n 48, 11, which also discusses the importance of recording, storing and retrieving such information.

Ombudsmen involvement would turn up further information within the scope of the original request.

Some requests were reinterpreted in ways that were more congenial to the agency. For instance, a lobby group made a very lengthy request for information about a proposed corrections facility. The request was, in places, specific – it asked for correspondence, advertisements, consents, notices and studies, among much else. However, it was told that the request lacked due particularity, but that:

We have not pursued this point. Rather, we have thought it more useful and consistent with the principles of the Official Information Act 1982 to interpret and respond to your request as one for general information relating to the sites considered for the establishment of the proposed Otago Region Corrections Facility.

The vast bulk of agencies overcame any temptation to redefine the request by quoting the request in full at the outset of the response.

### ***B Extensions and Transfers***

Where consultations or large searches are necessary the OIA permits agencies to grant themselves one extension of time by notifying the requester, within 20 working days, of the new date and the reasons for the extension.<sup>78</sup> These provisions were not always complied with. As we have seen, 13 per cent of requests were overdue without an extension.<sup>79</sup> When extensions were made, one-third were made after the 20 day period for granting extensions. A few agencies gave no reason and a few others specified no new deadline. There were five double extensions and one triple extension, which, according to

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78 See the discussion in Part III OIA Basic Structure.

79 This included one late response by the New Zealand Law Commission. It was asked for a copy of its report on liability for genetically modified organisms, which had been delivered to the minister a month earlier, but not yet made public. A New Zealand Law Commission file note dated the day of the request said "my preliminary advice is that I can see no grounds in the OIA for withholding the document." The report was eventually released five weeks later. The Commission explained, "we could not meet [the 20-working-day deadline] as the President of the Commission was overseas and the Commission was not meeting till [the day before the eventual release] to decide the matter. (It was the time of the General Election and GM was a hot topic.)" Neither of these justifications is a valid reason for not responding to the request within 20 working days and the second rather underscores the importance of a timely response to such requests. (In my own experience, however, the New Zealand Law Commission's response to requests has been exemplary.)

the Ombudsmen, are not authorised.<sup>80</sup> More than a quarter of the time, the agency failed to meet the extended deadline.

There were some egregious examples of delay. A journalist's OIA request lay unanswered for more than six months, after which the Ministry wrote and extended the time by 25 days. When the final response was made, the agency declined to provide most of the information on the grounds that it required substantial collation and research.

Transfers, as well, were a patchy affair. Very often, instead of transferring, the agency merely suggested that the requester contact another agency. Transfers sometimes occurred outside the 10-working-day time limit. In fact, transfers were frequently made without any stated reason, so it was unclear whether officials had turned their minds to the statutory requirement that the information be "more closely connected with the functions of another department". It was clear in many instances, and seemed likely in many others, that the transferring agencies themselves possessed documents relevant to the request. Sometimes, these would be supplied and the balance of the request would be transferred. Occasionally, the agency would note that it was enclosing the documents it possessed in the letter of transfer. In other cases, however, it was not clear that these documents were even considered for release after a transfer.

### ***C Information Soon to be Available***

Section 18(d) of the OIA allows agencies to refuse to supply information if it "is or will soon be publicly available". Many agencies relying on this ground for refusal seemed to do for reasons inconsistent with the Ombudsmen's interpretation of it. The Ombudsmen have said that this only applies to situations where it is "administratively impractical" for the information to be released – because it is at the printer's, for example. Their guidelines suggest that the delay in release ought generally to be short and certain.<sup>81</sup> But most often, this ground is used to deny requests for weeks or months, on the basis that the material is likely to be released at a particular later stage in the process – after it has been read by a minister, for instance, or reported on by the Auditor-General, or written up in an annual report, or presented to Court or approved by a board. The timing of the likely release is frequently not closely specified. In March 2002, one ministry declined to release

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80 *Practice Guidelines – Official Information*, above n 8, Part A, ch 3, 6. See also Eagles, Taggart and Liddell, above n 57, 81.

81 *Practice Guidelines – Official Information*, above n 8, Part B, ch 2, 7.

particular papers because they would be released "later in the year". By September, an internal memo noted: "the justification for using this section has grown weaker."

#### ***D Information Requiring Substantial Collation or Research***

Section 18(f) allows agencies to withhold information if it "cannot be made available without substantial collation or research." The Ombudsmen have emphasised that this is a "last resort" provision and only to be invoked after consideration has been given to having the request refined, extending the time frame, providing the information in a different form or charging for it.<sup>82</sup> The use of this provision was mixed. Some agencies provided information even when vast amounts of research and collation seemed to be involved. At the other end of the spectrum, some agencies seemed to use it as an excuse when providing the information was inconvenient or undesirable. Radio New Zealand, for example, refused to search for information about a particular interviewee who featured in a specified programme on an identified date because "someone would have to listen to nearly three hours of log tapes, something which is not envisaged as a responsibility of broadcasters under the Official Information Act." (Their refusal did not expressly invoke section 18(f)). In fact, OIA tasks *are* part of the function of the organisations that are subject to it.<sup>83</sup> In addition, by using a fast-forward button and targeting the part of the programme specified by the requester, the log tapes could surely have been scanned in half an hour. Radio New Zealand's response did not explain why the search would unduly tax its resources, or extend the timeframe or propose a charge, or invite the requester to listen to the tapes himself, except by purchasing them through Replay Radio for \$75. Radio New Zealand could perhaps have refused on the grounds that the information was already publicly available (that is, through purchase) but this is hardly in keeping with the spirit and intent of the OIA.

It was usually difficult to tell whether the section 18(f) was being properly applied, but most of time its use seemed justifiable. The requests were often very wide and the difficulties in compiling the information were obvious.

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82 *Practice Guidelines – Official Information*, above n 8, Part B, ch 2.4, 11; New Zealand Law Commission, above n 7, para 100. In fact, this is now the law: see Official Information Act 1982, ss18A, 18B. However, these provisions were not in force when the data for this paper was gathered.

83 See *Report of the Ombudsmen for the year ended 30 June 1990*, AJHR A3, 21; 10(1) *Ombudsmen Quarterly Review* (March 2004), 1 ("... the handling of OIA requests should be treated by their staff as core business.")

On the other hand, agencies hardly ever referred to the possibility of an extension, alternative forms of disclosure or imposing a charge before invoking section 18(f), as suggested in the Ombudsmen's guidelines,<sup>84</sup> and not uncommonly simply said that the information had been archived, or would require a manual search through files, as their justification for invoking the section.

### ***E Security and International Relations***

In one of the few times that section 6 of the OIA was invoked, the Minister of Sport, Fitness and Leisure used it to delete a lengthy passage from a letter he wrote to the Chair of the International Rugby Board. Section 6(a) allows such deletions where release of the information "would be likely to prejudice ... the international relations of the Government of New Zealand." Likelihood requires a "risk that might well eventuate."<sup>85</sup> The section protects "information which weakens the bargaining position of the New Zealand Government or which impedes negotiations in its relations with other States ..."<sup>86</sup> The Minister was writing to shore up support for New Zealand's crumbling efforts to co-host the Rugby World Cup. It must be doubtful whether section 6 was properly invoked here.

The NZSIS routinely refuses requests under section 6. Often, the reasoning behind this is that even apparently innocuous information can, when pieced together with information from other sources, become dangerous. Eagles, Taggart and Liddell remark that "the problem is real, if sometimes overstated."<sup>87</sup>

One requester, who had come across numerous public references to his or her father's possible collaboration with the KGB in the 1950s, sought information from the NZSIS. The NZSIS sent a neither-confirm-nor-deny response under section 10, on the grounds that disclosure of even the existence or absence of a file would be likely to prejudice the security interests protected under section 6 and because it was necessary to protect privacy.<sup>88</sup> This meant that even old newspaper clippings were withheld, on the ground that releasing them would reveal the existence of a file on the father.

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84 Eagles, Taggart and Liddell, above n 57, 126.

85 *Commissioner of Police v Ombudsman*, above n 23, 391 Cooke P.

86 Eagles, Taggart and Liddell, above n 57, 157.

87 Eagles, Taggart and Liddell, above n 57, 126.

88 The neither-confirm-nor-deny response should not have been used to protect the privacy interest: Official Information Act 1982, s 10.

Following a complaint to the Ombudsmen by another requester seeking similar material from the NZSIS, it was concluded that revealing the existence of the 50-year-old file would not be likely to prejudice New Zealand's security interests and that some of the information (including the newspaper clippings) could be released.<sup>89</sup> It is difficult to see why this conclusion required the intervention of the Ombudsmen.

In general, it is difficult to assess the validity of the claims to protection under section 6. Examples like those above raise suspicions that the government is not paying assiduous attention to the limited scope of the reasons for withholding information.

#### **F Privacy**

Information may be withheld where it is "necessary to protect the privacy of natural persons, including that of deceased natural persons."<sup>90</sup> The application of this provision was extremely inconsistent and, in some cases, alarmingly sloppy. In response to my OIA request, some agencies deleted the names of all requesters and officials – even managers;<sup>91</sup> some deleted some of them; some deleted none at all. Some agencies deleted names in some places, but left them (or other identifying details) in elsewhere. For instance, one deleted the requester's name but left the e-mail address visible. Another deleted a law firm's name but left in the firm's letterhead. For reasons that are difficult to fathom, the Land Transport Safety Authority (LTSA) saw the need to delete its own name from the following sentence: "The [LTSA] has a responsibility to ensure there is national consistency in the application of methods of setting speed limits."<sup>92</sup>

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89 The rest of the information was found to be properly withheld under section 6(b) (protecting the entrusting of confidential information to New Zealand by other governments and international organisations.) The NZSIS reviewed its archives policy as a result of these requests.

90 Official Information Act 1982, s 9(2)(a).

91 The Ombudsmen have indicated that in the interests of accountability, the names of public officials – and particularly senior public officials – ought usually to be released: "The public interest will not be well served by making an assumption, on the grounds of the privacy of the public official concerned, in favour of anonymous public officials" except as necessary to protect them from improper pressure or harassment: "Should the Names or Salaries of Public Officials be Made Available?" (September 1995) 1-3 *Ombudsmen Quarterly Review* 2 ["Should the Names or Salaries of Public Officials be Made Available"]. Occasionally, however, the Ombudsmen find that the deletion of the names of senior staff is justified.

92 To be fair to the LTSA, this was part of a very full response.

The section was also used by the Department of Corrections to withhold the cause of death in prison of a requester's father – she wanted to be able to assess whether her family had congenital health issues.<sup>93</sup> The Food Safety Authority used it to refuse to release the names of its expert consultants. One agency refused to release the salary of its chief executive.<sup>94</sup> Another refused to release stills of Peter Jackson's films or box office information on the grounds that it would violate his privacy.

Surely much of this information cannot lawfully be withheld.<sup>95</sup> However, since some agencies apparently believe it is necessary, they ought to do it properly. Surprisingly often, it was possible to read through the attempts made to hide or delete information. Sometimes, deeply personal information was revealed. Among the papers gathered for this research, the name of a three-year-old accused of sexual abuse in a child care centre was visible, as well as the name of his mother, and the names of the alleged victim and her mother. Also readable were the name and traffic conviction history list (including three drink-driving convictions) of another requester, and the name of a woman who applied unsuccessfully for a scholarship, together with her low scores on criteria such as support from her school and commitment to the community.

### ***G Commercial Information***

Commercially sensitive information can be withheld, but only if it falls under one of the categories in section 9 of the OIA. These protect against prejudice to the Crown's commercial activities<sup>96</sup>, or unreasonable commercial prejudice to those who provide or

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93 The issue, perhaps, relates more closely to whether public interest should have been applied to outweigh the privacy interest, so that the requester could at least have been told whether the death was congenital or non-congenital. There can be a public interest in the release of information that serves particular private interests: see Eagles, Taggart and Liddell, above n 57, 214. The Department of Corrections did, however, supply the police inquest officer's name.

94 "The salary of the chief executive or other head of a public sector organisation should be known, according greater weight to accountability than privacy": "Should the names or salaries of public officials be made available?", above n 91, 2. Surprisingly, papers disclosed for this research revealed advice from a well-known law firm to the agency that this salary information could be withheld as "private information (s9(2)(a)), confidential (s9(2)(ba)) and possibly commercially sensitive (s9(2)(b))."

95 The Ombudsmen often reject privacy claims. The Ombudsmen rejected section 9(2)(a) claims by officials and ministers in 26 out of 37 instances where they were raised in the 11<sup>th</sup> and 12<sup>th</sup> compendia of Ombudsmen's case notes.

96 Official Information Act 1982, s 9(2)(i).



are the subject of information.<sup>97</sup> Commercial activities, the Ombudsmen have frequently found, require a profit-motive.<sup>98</sup>

It was sometimes questionable whether these grounds were properly invoked. They were sometimes invoked by agencies, such as Radio New Zealand<sup>99</sup> and the funding agencies New Zealand on Air and the New Zealand Film Commission, ostensibly to protect their own commercial activities. In fact, they do not conduct commercial activities.

The New Zealand Defence Force (NZDF) used these provisions to delete information from correspondence about the disposal of the HMNZS Waikato. The ship was originally put out to tender, but the government decided to re-tender it for tourism or recreational purposes. It was eventually scuttled to make an artificial diving reef. When an OIA request was made, two years later, for information about how much money was foregone as a result of the decision to scuttle it instead of selling it, the NZDF refused to release the value of the top tenders in both rounds and the shortfall from adopting the second approach. Given that the Ombudsmen have made it clear that the release of total tender prices (as opposed to details of pricing and market strategy)<sup>100</sup> will not normally cause unreasonable commercial prejudice, this approach would seem difficult to justify. However, the NZDF argued that two similar frigates were due to decommission in the next three years and the release of the tender information might prejudicially affect their unique sale process (although it had not mentioned this to the requester). It would have been interesting to see how the Ombudsmen might have weighed the interests in accountability and the public interest against those of commercial prejudice if a complaint had been lodged.

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97 Official Information Act 1982, s 9(2)(b)(ii).

98 *Practice Guidelines – Official Information*, above n 8, Part B ch 4.2 9, 14.

99 Asked for listener survey data, Radio New Zealand withheld it because it was "commercially confidential", saying "we believe there are sound grounds for withholding at least part of that information under the provisions of the Official Information Act and RNZ has been supported in that opinion by the Ombudsmen's office." Dealing with a complaint about this response, an Ombudsman pointed out that the office had "serious doubt as to whether RNZ engages in commercial activities for the purposes of section 9(2)(i)", but later concluded that RNZ had a protectable "commercial position" under section 9(2)(b)(ii).

100 *Practice Guidelines – Official Information*, above n 8, Part B, ch 4.2, 12.

In other cases, it was simply not clear on the face of the responses that the law was being carefully applied. Agencies seldom included any detailed examination of whether any commercial prejudice that might result may be "unreasonable." In most cases, there was no evidence in the responses that the agency had checked with relevant third parties to establish what harm might be caused.

### ***H Confidentiality***

Information supplied in confidence may be withheld under the OIA, but only if its release would prejudice the supply of similar and publicly important information in the future or would otherwise harm the public interest.<sup>101</sup>

Very seldom did any agencies' OIA responses refer to the various elements required here. Instead, they often simply said, as one Crown-managed fund did when asked for information about its financial advisors, that their advice was provided on a "confidential basis", that their fees are "considered commercially sensitive" and that the request would be "referred to their investment advisors for permission to release."

Agencies occasionally used this exception to withhold contractual documents which were, as one agency put it, "confidential to the parties and were entered into on that basis." It was usually not clear who sought – or benefited from – the confidentiality or, more importantly, what harm might come of disclosure. Withholding contractual documents and even confidential settlements on this basis is questionable given that the courts have held that:<sup>102</sup>

There cannot be allowed to develop in this country a kind of commercial Alsatia beyond the reach of a statute. Confidentiality is not an absolute concept admitting of no exceptions ... It is an implied term of any contract between individuals that the promises of their contract will be subject to statutory obligations. At all times the applicant should have been aware of the provisions of the Act and in particular s7, which effectively excludes contracts on confidentiality preventing release of information.

There were many other questionable uses of this section. A typical example arose when the Ministry of Health was asked for a copy of the minutes of a Medical

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101 Official Information Act 1982, s 9(2)(ba).

102 *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180, 191 *per* Jeffries J, in relation to the local government equivalent of the OIA, the Local Government Official Information and Meetings Act 1987.

Assessments Advisory Committee meeting. The response: "This information is not available for release due to the commercially sensitive and/or confidential nature of those minutes." A more extreme example: the Ministry of Fisheries claimed the cloak of confidentiality for names and addresses of buyers and sellers of interests in fishing quota listed on a register which, under legislation, was a public document open for inspection.

### ***I Official Advice and Opinions***

Sections 9(2)(g)(i) and 9(2)(f)(iv) allow information to be withheld where necessary to "maintain the conduct of public affairs through the free and frank expression of opinions" or to "maintain constitutional conventions" protecting "the confidentiality of advice" tendered by ministers and officials. These have been interpreted to protect, essentially, the generation of candid opinions and the consideration of significant decisions from publicity that might destabilise public administration. They do not provide blanket permission to withhold advice – even until Ministers take decisions.<sup>103</sup> Yet, time and again, information was withheld because "it relates to matters still under consideration by the government" or was "yet to be confirmed" or because "there are further decisions to be made" or the agency was "still recording comments." As the Ombudsmen frequently point out, this frustrates the very purpose of the OIA to enable "more effective participation in the making and administration of laws and policies."<sup>104</sup> Popular participation is impossible if information is withheld until after the decision is taken.<sup>105</sup>

One of the rare OIA requests which did result in current advice being released illustrates the point. The Ministry of Education released advice recommending the amalgamation of a primary school and college against the wishes of the community. This rendered the advice democratically contestable before the final decision was taken.

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103 *Practice Guidelines – Official Information*, above n 8, Part E, 14.

104 Official Information Act 1982, s 4.

105 See also New Zealand Law Commission, above n 7, para 340, emphasising "the critical importance of the timely availability of information" and the comment of then-Chief Ombudsman Sir John Robertson: "... the public should be able to debate the issues involved and, through their representatives, whether Members of Parliament or special interest groups, put their views so that decision makers can take them into account when the decision is taken." See *Report of the Ombudsmen for the year ended 30 June 1993*, AJHR A3, 8. On the other hand, the increasing significance of coalition politics means that consultation and negotiation with minor parties is often necessary even after Cabinet decisions have been taken.

In a covering letter enclosing the copies of OIA requests and responses for this research, the head of a Crown entity wrote of a recent OIA request he himself made to a Ministry. The Ministry invoked the OIA sections relating to advice and opinions to withhold a particular document, but then inadvertently disclosed it. He wrote:

It was a note of very reasonable rebuke from the Minister to the Chief Executive. Disclosure may have been uncomfortable for the Chief Executive, but that is all ... I suspect s.9(2)(g) in particular, but s.9 generally, is used to hide behind.

Sometimes, material that was withheld under these grounds was able to be examined because it was later released. For instance, an unsuccessful applicant for an Enterprise Award sought information about the award scheme. The ministry listed several documents in its response, but denied access to them under section 9(2)(f)(iv) because they had not yet been to the minister. In fact, one contained a very informative section about the scheme: its purpose, the problems it was designed to remedy, statistics on spending on the awards and a mention of the lack of applications from start-up companies and environmental companies. This is the sort of background and factual information that the Ombudsmen frequently point out does not fall within the ambit of section 9(2)(f)(iv).<sup>106</sup> Release may have even had the positive spin-off of encouraging more applicants.

In another case, an organisation was "adamant" that a discussion paper on opportunities for partnership with local government on social housing issues should not be released. The government had decided not to release the paper and argued that releasing it would indicate that "all options are on the table, including the sale of local government social housing" and this "would not accurately reflect the government's position", the chief executive told the Ombudsman. The Ombudsman pointed out that it was prepared on the initiative of the officials, contained little actual advice and was "fundamentally nothing more than a policy proposal ... that the Minister decided not to follow." He ordered it released.

Another Ombudsman's investigation concerning the same organisation, also released for this research, illustrates what seems to be a common government misperception about the width of these exceptions. The chief executive wrote that his agency had deleted the opinions of employees "on the basis that employees of Government agencies should be able to express their opinions about issues without fear that these views will be publicly

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<sup>106</sup> *Practice Guidelines – Official Information*, above n 8, Part B, ch 4.5, 15.

released." The Ombudsmen criticised this blanket approach, saying that documents needed to be considered case-by-case, evaluating the precise requirements of the exemption and weighing potential harm and public interest in the circumstances.<sup>107</sup>

The best agencies considered individual documents and then made deletions only to the extent justified by a careful consideration of the grounds of withholding. This was, however, rare. It was much more common for entire documents, and even classes of documents, to be refused on 9(2)(f)(iv) and 9(2)(g)(i) grounds. For instance, one ministry used them to deny release of any of its documentation on child smacking reform. Another refused all its current documents on the decriminalisation of prostitution. The Ministry of Defence refused to release any parts of its Special Forces Review or its report on the key findings of the Maritime Forces Review, because they were "still in draft." The LTSA relied on section 9(2)(g)(i) to withhold an entire year's minutes of the National Road Safety Committee.

In response to a media request seeking "information relating to work on the issue of communicable diseases in prisons", the Department of Corrections refused to disclose anything on the rarely-invoked ground that release would jeopardise the maintenance of conventions relating to ministerial responsibility (section 9(2)(f)(ii)). Perhaps what was intended was section 9(2)(f)(iv), because the information was released three months later, once ministerial decisions on the matters covered in the papers had been made. The point here is that it is difficult to understand how either of these exceptions could protect all of the information held by the Department relating to communicable diseases in prisons.

Once again, officials routinely failed to articulate substantial consideration of the public interest, even on the fairly rare occasions when they mentioned it. For example, when asked for documents relating to the government's \$227 million land transport package, the Minister of Transport withheld parts of Cabinet papers under sections 9(2)(f)(iv) and 9(2)(g)(i) and added: "I have not identified any countervailing public interest in making the information available." This was probably intended to mean that the public interest did not *outweigh* the interest in withholding the information. Admittedly, it may be difficult to elaborate on the public interest considerations without effectively revealing the withheld information. Nevertheless, the use of such threadbare formulations

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<sup>107</sup> Once this investigation commenced, the organisation immediately agreed to release further information, but nevertheless sought to withhold some under section 9(2)(g)(i). This was upheld by the Ombudsmen.

(and the absence of even these in most responses) provides little confidence that ministers and officials have carefully identified and weighed the public interest factors telling in favour of disclosure. As Eagles, Taggart and Liddell say:<sup>108</sup>

A perusal of the Ombudsmen's case notes reveals that Departments and organisations will seldom even avert to the public interest until it is drawn to their attention by the Ombudsman and even then their exploration of the issues tends to be cursory.

### ***J Improper Use***

Agencies are permitted to withhold information under section 9(2)(k) where necessary to "prevent the disclosure or use of official information for improper gain or improper advantage." The Ombudsmen have stressed that this requires some element of "illegality or moral turpitude".<sup>109</sup> This section was rarely invoked, but when it was, it was usually difficult to see the justification for it. For instance, the LTSA denied a requester a list of New Zealand garages authorised to issue warrants of fitness, because he intended to use it commercially – an "improper" use under section 9(2)(k), according to the LTSA. TVNZ also used the "improper gain" provision (and others) to refuse access to the entirety of eight months of its board's minutes. New Zealand on Air used it to deny a requester financial information about a TV3 series called "Ghosts". The agencies did not explain what gain or advantage they expected to accrue or why it might have been "improper."

### ***K Legal advice***

Section 9(2)(h) protects information subject to legal professional privilege. The Ombudsmen say that, while a public interest balancing exercise must take place, public interest in release would have to be "particularly strong" to overcome the need to protect the privilege.<sup>110</sup> However, the norm was for legal advice to simply be withheld. There was little evidence that any balancing process took place at all. The New Zealand Police indicated that they withhold legal advice as a matter of course, without considering the circumstances of each case. It seemed that many other agencies took the same approach.

In addition, a 2002 OIA request turned up a document containing the following instruction:

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108 Eagles, Taggart and Liddell, n 58, 209

109 *Practice Guidelines – Official Information*, above, n 8, Part B, ch 4.9, 3

110 *Practice Guidelines – Official Information*, above n 8, Part B, ch 4.8, 4.

There is a standing direction from the Attorney-General to all Ministers that no legal advice is to be released and if there are to be exceptions to this direction the Attorney-General's office is to be consulted.<sup>111</sup>

This directive seems to put another extra-legal gloss on the withholding provisions in the OIA, which require any decision on release to be made by the chief executive of the department.<sup>112</sup>

It was not always clear that the information withheld technically fell within the ambit of the privilege and sometimes the privilege was asserted to protect whole documents that seemed merely to contain elements of legal advice. Legal professional privilege was even invoked to withhold information about how much legal advisors were paid for particular projects.

### **L Charges**

Agencies may charge a reasonable amount for the labour and materials involved in making the information available.<sup>113</sup> Agencies did not often propose charges for information; still more rarely did they impose them, though there were many instances where the cost of providing the information must have been significant. But when agencies did mention charges, they often breached the charging guidelines.<sup>114</sup> The guidelines say charges should normally be calculated in accordance with a specific formula;<sup>115</sup> should not include time spent "deciding whether or not access should be allowed or in what form"; should be estimated in advance for the requester; and should

111 This policy is reflected in a recent Cabinet Office circular directing all decisions to release government legal advice to be referred to the Attorney-General's office for approval, on the basis that the Attorney-General "has the right to obtain copies of all legal advice provided to the Crown (from whatever source), the right to determine whether to release that advice, as well as the right to instruct all lawyers acting for the Crown": Cabinet Office Circular "Legal Advice and Legal Professional Privilege" (15 April 2005) CO (05) 5.

112 Official Information Act 1982, s 15(4). See also Grant Liddell "The Official Information Act in an Election Year: Some Issues" (Symposium on the Official Information Act, Wellington, 2 June 2005) para 41.

113 Official Information Act 1982, s 15.

114 Ministry of Justice *Charging Guidelines for Official Information Act 1982 Requests* (Wellington, 2002) and *Practice Guidelines – Official Information*, above n 8, Part A, ch 4.

115 Currently 20 cents per photocopy above 20 copies and \$38 per half-hour exceeding one hour (unless unsalaried specialists must be hired to process the request).

take into account factors such as the public interest in the information and the financial resources of the requester.

The Transport Accident Investigation Commission apparently routinely charged \$140 (plus GST) an hour for its staff time spent processing OIA requests<sup>116</sup> – including requests from relatives of accident victims. Several agencies, including a ministry, included charges for time taken to "check legal status and authorise release" or for "considering the appropriateness of the release of the material" or for the material to be "reviewed by our legal advisors ... for its appropriateness".

Sometimes, agencies imposed charges without advance warning. "Because of the time involved in providing this information" a Ministry wrote, "it is necessary to charge you in accordance with the government guidelines ... the recoverable cost is \$76. An invoice is attached." Under the OIA, the charges are discretionary, not obligatory. Few agencies see the need to charge for one extra hour's work.

Charging practice varies so widely between agencies – and even within agencies – that it begins to look very unfair and arbitrary when charges are imposed. For instance, one agency proposed to charge a requester \$952 for access to the file containing information about the calculation of a land valuation and rental arrears that was in dispute with the requester. For every charge that was imposed, there were a dozen other requests processed by other agencies that were larger and took more time to process, which were met free of charge.

Occasionally, the initial response to a request was to send a copy of the charging guidelines without any estimate of the likely charge or consideration of waiver. Several agencies did this routinely ("it is our practice to charge for labour and material expended"). This seems to be designed to discourage the requester from pursuing the request and it generally worked. The Ombudsmen have chastised agencies, when setting charges, for failing "to take into account other relevant factors, such as the inability of the requester to pay the charge or the public interest in the release of the information."<sup>117</sup>

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116 But only 10 cents per photocopy. The Transport Accident Investigation Commission argued that its staff numbers were limited, they were specialists, their time was expensive and OIA requests drew them from their core business of investigating accidents. Many other agencies could make similar arguments.

117 *Practice Guidelines – Official Information*, above n 8, Part A, ch 4, 3.



There was no evidence of any agencies taking these factors into account, unless the factors were explicitly drawn to their attention.

## ***IX CONCLUSIONS***

The project has uncovered much that is encouraging: more, in fact, than the OIA's critics might have predicted. Many requesters sought and received information under the OIA that enabled them to better understand, critique and participate in the decisions affecting their lives. The majority of requests were apparently met in full. The vast majority were met on deadline. There is evidence that many officials applied the OIA conscientiously and did not withhold information without careful and reasoned consideration of the grounds in the OIA. Charging for information was very rare. Some officials even went out of their way to offer extra information. (Indeed, officials may well have released information that could properly have been withheld under the OIA, although, of course, while the OIA provides grounds for withholding information, it does not make such withholding compulsory.)

However, there is also much to be concerned about. About one OIA request in eight breached the 20-working-day statutory deadline, without providing an extension. Most often, when information was withheld, the responses provided little evidence that the law was being followed properly. Bland assertions of "confidentiality", "commercial sensitivity" and "privacy" abounded. In more than a quarter of cases, responses did not refer to the requester's right to complain to the Ombudsmen. In almost three-quarters of cases, officials and ministers failed to explicitly balance public interest considerations and, when they did, they rarely provided more than lip service to it. It is possible that behind these glib responses lay a careful, but unexpressed, consideration of the statutory grounds for withholding, but it is difficult to have confidence that this was so.

Many agencies seemed to wrongly regard policy advice as constituting a class of documents that need not ever be released and certainly not until the Minister has seen them. Whole documents were refused when deletions could have been made or summaries provided. Charges seem to have been employed on occasion to discourage people from pursuing requests. The various guidelines on the OIA seem to have been frequently flouted.

More than twenty years after the passage of the OIA, agencies have little excuse for these sorts of mistakes. Taken together, they seriously compromise the OIA's ability to fulfil its constitutional role of promoting accountability, participation and good government.

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