TOWARDS OPEN GOVERNMENT

COMMITTEE ON OFFICIAL INFORMATION

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SUPPLEMENTARY REPORT

Rt. Hon. R. D. Muldoon, C.H.,
Prime Minister,
Parliament Buildings,
Wellington.

Dear Prime Minister,

I have the honour to present the Supplementary Report of the Committee on Official Information.

On behalf of the Committee
Yours sincerely
ALAN DANKS.

Wellington,
20 July 1981.

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APPENDICES

Note: The general Report of the Committee on Official Information contains as Appendices 3 and 4 lists of authors of submissions to the Committee, and of those interviewed by the Committee. These details are not repeated in this report.

I. INTRODUCTION

1.01 Our General Report recognised that before the Government made final decisions on its recommendations certain matters would require further examination. This Supplementary Report embodies the results of that examination. It relates back to the parent text of the General Report and to the principles we expounded in that report. It should therefore be read in the light of what is there said and in particular of the principle we saw as central to our approach - that all official information should be available unless there is good reason to withhold it.

1.02 It is also appropriate to recall our conclusion in the General Report that the changes in substance and machinery we recommended call for a legislative foundation. In presenting the General Report to the Prime Minister our chairman envisaged that a draft Official Information Bill and associated legislative proposals would be part of our Supplementary Report. Such a Bill appears in this report with comments explaining the reasons for its suggested provisions and, we hope, exposing them to considered argument. We found valuable the method of elaborating our ideas in the form of a draft Bill, which is one commonly adopted by law reform committees. It caused us to refine and test our concepts against the concrete and specific language of a Bill.

1.03 Our draft Bill does not in any way bear the imprint of Government approval, and it has no more standing than other parts of our report.

1.04 In preparing this report we have taken account of overseas developments since our General Report. We mention especially the progress of the Canadian Bill through the legislature, the Freedom of Information Bill introduced as a Private Member's Bill in Britain in January 1981, the reintroduction in April 1981 of the Freedom of Information Bill in the Australian Parliament and the further contention to which its contents gave rise before its passing by the Senate in June, and the plans to review the United States Freedom of Information Act announced by the Reagan administration in May 1981. These developments have influenced our thinking and assisted us in formulating some provisions of our draft Bill. Overall, however, we have been confirmed in our view that, although New Zealand operates within what is called the Westminster system of government, its institutions and their ambience have a particularity that requires its own solution. This makes it difficult to align overseas proposals with our own, especially those put forward in the federal countries of Australia and Canada.

1.05 Public discussion of our General Report has focused principally on two issues, which have rightly been seen as of major importance. The first is the location of final decisions on access - should it lie generally with the executive government (as our General Report proposed), the Ombudsmen, or the courts? The second is the creation of an Information Authority, standing apart from the Ombudsmen but independent of the ordinary executive. Its primary roles would be recommending additional categories of information carrying access as of right, and overseeing progress within the administration towards more open attitudes and policies. We have not been persuaded that our recommendations on these two issues were mistaken, and two parts of this Supplementary Report examine in more detail the implications of our recommendations and elaborate supporting arguments.

1.06 We have also looked more deeply at the administrative machinery to make our proposals effective, and have described it more fully. In the course of that examination we have had to give a good deal of attention to certain practical aspects of any policy of greater access to official information. There may be reasons for not acting on a request for information quite independent of the general criteria for withholding it. They apply with equal force to information which everyone would agree can properly be made available. The part of this report on Administration enumerates these reasons for not granting an application - for instance that the information sought is not identified with sufficient particularity; that (in the case of a document) it does not exist or cannot be found; that the request is frivolous or vexatious; that to provide the information would require substantial collation or research. Practical restrictions of this kind are found in some overseas legislation. They are inescapable if a practical and effective system is to be achieved. We are adamant however that they should not be used as an excuse to withhold information that is awkward or embarrassing, or simply to serve administrative convenience, or for other irrelevant reasons. We believe that there will be fair dealing from departments in these matters. But in any event the provision for review by the Ombudsmen will provide an effective assurance in this regard.

1.07 One distinction between our proposals and the approach taken overseas lies in the concept of what constitutes official information. The term “information” is not used in other legislation, which is written in term of records - notably written documents, but also tapes and computer entries. This does not however accord with every day usage which we think it is generally preferable to follow. For the purpose of criminal sanctions moreover the concept of “information” rather than documents is necessarily used, and we seek a closer alignment of the two. We have therefore chosen to regard official information in the wider sense of knowledge held by departments and organisations in their official capacity. This has had a considerable effect on the detailed drafting of our Bill. Where there is a legal right of access, however, it will often be in terms of records.

1.08 Our terms of reference did not extend to information held by Parliament, the courts and judicial tribunals, or local government, and our Bill excludes these institutions altogether from its ambit. As we indicated in our General Report, we took as our starting point Parts I and II of the First Schedule to the Ombudsmen Act 1975 listing departments and organisations to which that Act applied. But the areas of government activity about which the citizen can reasonably expect to be informed go beyond those in which the Ombudsmen, with their particular concern about complaints by individuals about administration, are involved, and include a wide range of government and public agencies, often termed quangos. To identify the boundaries of this Act with those of the Ombudsmen's jurisdiction would impose an arbitrary discontinuity in the application of the principle of more open government which, at best, would lead to illogicalities, and at worst would provide a tempting cloak under which a substantial section of public activities could be hidden from public view. We believe that when central government delegates authority or functions to quangos their information is “official information”, and that when the functions or operations of such bodies, including those whose activities are principally commercial, involve in any significant degree an element of Government policy, the Bill should extend to them.

This element can be assessed in various ways: for instance dependence on central government funding; nationwide in contrast to local jurisdiction; a statutory requirement to take note of the policy of, or to heed directions from, central government; or capacity for central government to intervene in their affairs or to make executive appointments to them.

1.09 We recognise that our view implies a comprehensive coverage which is reflected in clause 2(l) and the First Schedule to the draft Bill; at the same time there may be marginal cases for inclusion to which these principles do not give a clear and unequivocal answer. In these cases Parliament will have to balance the competing arguments in the light of the particular circumstances. It may well be that the Information Authority, in considering the application of the Act to various categories of information, and in terms of its responsibility to review the functioning of the Act, will wish to recommend to Parliament changes in respect of these particular marginal cases.

1.10 The whole report calls attention to a paradox. We have noted that in country after country the pursuit of improved access to official information, avowedly positive in purpose, leads nevertheless to concentration on what information should be withheld or protected. Discussion develops a negative cast; attitudes become defensive. But the truth is that this is an inevitable consequence of countervailing forces implicit in information matters. Our report, of like necessity, pays attention to safeguards and has much to say about constraints on the availability of official information, ranging down to the practical considerations of access to official information on a day to day basis.

2. THE LOCATION OF FINAL DECISIONS ON ACCESS: THE ROLE OF THE COURTS AND THE OMBUDSMEN

2.01 Our General Report recommends against giving a general, ultimate power of decision on questions of access to official information either to the courts or to the Ombudsmen. In other words, it does not propose the creation of an enforceable right of access in the legal sense, and to this extent is to be contrasted with the legislation in Sweden and the United States and proposed in Canada and Australia.

2.02 We do propose giving individuals a right of access to certain specific categories of information and the operation of the Information Authority may be expected to progressively extend these categories. Of its nature, this right will be enforceable through the courts.

2.03 Our draft Bill reflects these recommendations. We recognise that the question where the final power should lie to release or withhold official information is likely to be one of the principal areas of contention in relation to any legislation that is introduced consequent on our report.

2.04 We believe that in the New Zealand context there are convincing reasons not to give the courts the ultimate authority in such a matter. The system we favour involves the weighing of broad considerations and the balancing of competing public interests against one another, and against individual interests. If the general power to determine finally whether there should be access to official information were given to the courts, they would have to rule on matters with strong political and policy implications. This is not a normal or traditional function of the courts in New Zealand, and the judges themselves have shown a reluctance to embrace it. In the United States the role of the courts in interpreting federal and state constitutions (including Bills of rights) has always been very different. In Australia and Canada also, though to a lesser extent, the courts have been involved in the sort of policy decisions that the interpretation of a written constitution and the judicial review of legislative Acts entails.

2.05 We do not think that an analogy can properly be drawn with the role of the courts in deciding disputes about what was referred to as Crown privilege and is now called public interest immunity, i.e. the claim, usually made by the Crown, that the public interest requires that information sought in litigation in a court must be kept confidential. There the proceedings are under the court's control; the issues raised by the litigation. are defined and specific and are known to the court; the information sought will usually be factual and relate to a specific decision or action affecting an individual, and will not be of a general policy or advisory type; the court can assess the value of the information sought to the making out of the litigant's case; it can weigh the significance of the proceedings; it can limit the release to the relevant part of the information; and it can impose controls on the use of any information released for the purposes of the case. (See also, e.g., Commerce Act 1975, sections 9(3) and 15(3)). By contrast a request for official information will generally arise in a much broader context; the issues to which it relates will not have been defined by the process of litigation; the specific value of the information cannot be so precisely assessed (indeed it may often be improper to weigh that); the information sought will frequently extend beyond the factual; and there will be no official control over the use of the

information by reference to the purpose for which it was sought. Finally, there is a major difference in scale. Only a handful of public immunity cases come to the courts each year; no doubt there will be many more requests under the official information legislation. This has consequences, amongst other things, for the argument concerning the candour of officials.

2.06 Moreover, it is important to note the limits which the courts themselves recognise in stating and applying their powers to order the disclosure of information in the face of a claim that public policy or the public interest requires the withholding of information. First of all, they have made it clear that when the information is being sought for proceedings in courts in other countries they will defer to the Government's opposition to disclosure: Rio *Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] A.C. 547 and *Gulf Oil Corporation v Gulf Canada Ltd* [1980] 2 S.C.R.39. The country should speak with one voice, the voice of the executive government. Parliaments in Australia, Canada, the United Kingdom and New Zealand have each taken action supporting such executive opposition to the disclosure of information relating to a range of international commercial activity. Secondly, the courts have indicated limits as well on their powers to require disclosure in litigation before them. It is not easy to determine these limits or to predict exactly how the courts will exercise their powers and discretions. Recent decisions of the Court of Appeal in *Tipene v Apperley* [1978] 1 N.Z.L.R. 761 and *Environmental Defence Society Inc. v South Pacific Aluminium Ltd, C A* 59/81, judgments of 24 and 26 June 1981, and the judgments referred to in those cases, show that the law is still being developed. The cases are generally favourable towards disclosure of Crown documents in legal proceedings and emphasise a positive role vested in the courts to balance the two competing interests: that of the courts having relevant evidence, and that of the state in keeping the particular information secret.

2.07 The courts temper that positive role by reference to the content and class of the documents sought. They once, for instance, indicated that they would not, in the face of a Minister's certificate resisting disclosure, order the discovery of Cabinet documents. That is no longer the law (although no court in New Zealand or the United Kingdom has yet ordered discovery in such a case, they have gone as far as inspecting the documents themselves). It probably still is the law, however, that the Minister's certificate in respect of highly sensitive diplomatic or defence papers or papers concerned with the safety of the realm would be regarded as virtually decisive: the courts are not in a position to pass judgment as to the prejudice to the public interest in such cases. And the cases suggest that the disclosure (and even the inspection for the purposes of disclosure) of Cabinet papers will be rare.

2.08 Those who favour depriving the executive government of the power to decide have tended to deny the concept of ministerial accountability to Parliament as a practical reality in recent times. However, we believe that in this context the criticism is fallacious.

2.09 It is quite true that the modern tradition in New Zealand (and perhaps to almost the same extent in Britain) is against a Minister's resignation for errors or maladministration in his department. It is also true that executive solidarity and collegiality, together with the effect of what for 50 years has been in effect a two-party system, ensures that no

motion of no confidence in a Minister can succeed in ordinary circumstances. If New Zealand moves away from a two-party system that might change. In any event, however, we do not see the consequences of accountability as being of the essence of the matter.

2.10 A Minister is and remains answerable in a way no one else can be. He is elected to Parliament under a system where the party having the greatest number of seats in Parliament habitually forms the Government - it is unreal to suggest that New Zealand voters simply elect members and not Governments - and must submit himself to re-election every three years. Judges and Ombudsmen are neither elected by nor are they accountable to the people.

2.11 A Minister is liable to be questioned in Parliament about the administration of his department and he must respond to criticism. In short, he must defend himself in a public forum. A Minister takes responsibility if not always, as in a well-known remark, blame.

2.12 It has become common in recent times to decry the executive and to reiterate the suggestion that its power has increased, is increasing, and ought to be diminished. Whether that be so or not, we stress the legitimacy of the executive function as an equal branch of our policy with the legislature and the judiciary. The government has a role to perform, and if it cannot perform that role properly and effectively it is the people and the country that will suffer. If the electors do not approve of a Minister's or Government's action, they can vote the Government out of office at the next election or show their displeasure in any earlier by-election. The knowledge of this is likely to make any Minister responsive to public concern and criticism. There is no equivalent sort of sanction against a court that makes an unwise decision or one that is injurious to the public good. The same applies to an Ombudsman. These institutions are rightly independent of the Government but with the effect that they cannot be made answerable for their individual decisions. Nor are they necessarily equipped to weigh competing policy considerations and form consistent judgments in that area.

2.13 Whatever the courts may do, a Minister is ultimately responsible for the administration of his portfolio. If the court made a mistake and the release of information did prove harmful to the public interest or the citizen, it would be the Minister and not the court who would have to pick up the pieces.

2.14 Contrary to some suggestions that have been made, we do not see our recommendation that the responsible Minister should have power to override the finding of an Ombudsman as in any way impairing the effectiveness of the review procedure we propose, or enabling the maintenance of some sort of “censorship”. We see no contradiction here. The Ombudsman could normally indicate the nature and subject-matter of a document without disclosing the contents, and it is only in the very limited areas of national security and law enforcement that he would not be free to do the former. Moreover, we draw attention to the fact chat under our proposals the finding of an Ombudsman will have a somewhat higher status than in the Ombudsmen Act itself, where his conclusions are merely recommendatory. In terms of our draft Bill his formal recommendations would be binding unless overidden by a Minister (but not by a public servant) in accordance with a formal procedure. Our draft Bill proposes (clause 31) that where a Minister declines to accept an Ombudsman's recommendation, the decision, the ground for it, and

(except where that ground is national security) the source and purport of any advice on which it was based should be published in the *Gazette.* With organisations not directly responsible to a particular Minister, we propose that the power to reject a recommendation should be vested in the Prime Minister. In practice, as happens at present, we would expect the great majority of complaints to be resolved by the process of departmental reconsideration and of discussion between a department and the Ombudsmen. Formal recommendations are not now often made, but in any event an Ombudsman's view carries and is known to carry a very high persuasive character. We believe that it would do so in the information area also. However, we are convinced that the executive government must in the public interest retain what we call a power of veto, although it would doubtless be invoked only in compelling circumstances.

2.15 Nor should the part to be played by the courts under our proposals be minimised. We have recommended that an Official Information Act should enact the principle that official information is to be available to the public except where there are good reasons to the contrary. Certain reasons will be conclusive, e.g., prejudice to defence, international relations, and law enforcement. Others are relative. They are criteria to be taken into account but not conclusive in deciding whether there is a good reason to withhold particular information, e.g., individual privacy, commercial confidentiality, protection of public health and safety, and the maintenance of the effective conduct of public affairs through the free expression of opinions between officers of the Government. They must be balanced against the general public interest.

2.16 These criteria are expressed in general terms. They will thus allow room for interpretation and permit flexibility. On the other hand, they are limited and specific. They are intended to be exhaustive; other grounds for withholding information will not be recognised, except for different kinds of reasons-for example, that the document is not identified with reasonable particularity; that the document does not exist or cannot be found; that the request is frivolous or vexatious.

2.17 The grounds that will or may constitute good reason for withholding information will be *legal* criteria. They will not simply be pieties. Departments and other agencies, Ministers and the Ombudsmen will be obliged to deal with requests for access in accordance with them. The individual will not, with exceptions as noted above, be able as of right to have access to a particular document but he will be entitled to have his request for that document determined in accordance with the presumption of access and the criteria applicable in the particular case.

2.18 In the result, the executive (and the Ombudsmen on review) will have a discretion in the sense of freedom to judge that in terms of the criteria a request for a document can justifiably be refused. The courts will decline to substitute their own judgment for that of officials, Ministers or Ombudsmen. Nonetheless, as courts have often insisted, a discretion of this kind is not arbitrary. An official will not be free to decline a request for access except on the grounds stated. At least if he is challenged, he will have to say on what basis access is denied. If he is acting within the statutory criteria, his conclusion will prevail as far as the courts are concerned unless it is one that could not reasonably be reached. It would not be enough for an official to say that the release of a document will

prejudice the substantial economic interests of New Zealand, or the health and safety of the public, if the release could not on any reasonable view have that effect.

2.19 As we have said, however, there are areas where the courts recognise that they are not qualified to pass judgment as to prejudice to the public interest. Defence, security and international relations are certainly among these areas.

2.20 Subject to that, the courts will ultimately determine whether executive decisions are made within the terms and principles of the Act, as indeed they do in respect of other executive decisions made under statutes. We mention as examples the decisions of the Court of Appeal holding ministerial decisions invalid in *Takaro Properties Ltd v Rowling* [1975] 2 N.Z.L.R. 62; *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 N.Z.L.R. 341, and *Daganayasi v Minister of Immigration* [1980]2 N.Z.L.R. 130.

2.21 Procedurally, an individual aggrieved by a refusal to give him access to an official document could apply to the High Court for judicial review under the Judicature Amendment Act 1972. This proposition is however complicated by our recommendation that the Ombudsmen should have power to review such decisions on complaint. Should the individual have an alternative? What of a third party (e.g. a commercial interest) wishing to argue *against* access, what in the United States is referred to as reverse freedom of information? There is some reason for supposing that the court might decline an application by an aggrieved individual to review a decision denying access on the basis that the law gives a right of recourse to the Ombudsmen, and that this procedure should be pursued. This uncertainty should be removed, and our draft Bill attempts to do so.

2.22 Different considerations apply where a third party objects to a document being disclosed, e.g. on grounds of invasion of *his* privacy or breach of commercial confidence. We do not propose that a third party should be able to resort to the Ombudsmen under our proposed legislation with a claim that access has improperly been given. Accordingly we do not wish to limit his right of recourse to the courts.

2.23 Our draft Bill proposes therefore (clause 33) that where under the Act a complaint lies to an Ombudsman against a refusal to disclose information, no application to the court for judicial review, declaration or other remedy may be made by or on behalf of the person aggrieved until an Ombudsman has received and determined that complaint.

2.24 Suppose, however, that a complaint of denial of information is duly made to an Ombudsman who decides not to uphold it. This would appear to be a “statutory power of decision” within the meaning of the judicature Amendment Act 1972 and would therefore be open to challenge on the ground that it was made “without jurisdiction”. Moreover, the privative provision of the Ombudsmen Act (section 25) is not now normally used in legislation. Our Bill does not contain it. The proceedings could therefore be reviewed also on grounds of “error of law on the face of the record”. (The two grounds for intervention overlap; we do not embark on a discussion of the complexities and uncertainties of the developing law on this issue.)

2.25 Although in the absence of special legislative provision, any veto by a Minister of an Ombudsman's finding would itself be subject to judicial review, we stress that in the ordinary course such an application for

review would be most unlikely to succeed. The courts allow Ministers almost complete freedom in what would obviously be a policy area; they will not enter upon the question whether an executive policy, or a policy decision, is wise or is in fact in the public interest. If, however, it was shown that the Minister had misdirected himself on a question of law or taken irrelevant matters into account his decision could be held invalid. This could occur for instance if he departed from the criteria laid down in the Act.

2.26 In short we do not share fears either that the Ombudsmen's power of review would be ineffective, or that public servants and the executive would be "above the law" in responding to requests for information. Our recommendations as we see them give full recognition to the rule of law, while preserving a proper degree of autonomy and freedom of decision for the Government.

Addendum by Professor Keith, Mr Cameron and Mr Iles

Access to Official Information by Litigants

2.27 Parties to litigation in the courts can usually obtain access, by the use of trial processes, to the documents and other information which are relevant to the issues in dispute in the case. The Government is in general subject to those processes. So, section 27(l) of the Crown Proceedings Act 1950 establishes, in accordance with the general principle underlying that Act, that, in relation to the discovery and production of documents and the answering of interrogatories, the Crown as a party to civil proceedings is in the same position as a private litigant.

2.28 This proposition is, however, subject to two important limitations. First, a proviso to section 27(l) provides that the proposition is "without prejudice to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure ... or the answering ... would be injurious to the public interest". This proviso is designed to preserve what was previously referred to as Crown privilege and is now referred to as public interest immunity. That body of law, adverted to in paragraphs 2.05-2.07 above, requires the court, in deciding whether to require the disclosure of evidence, to weigh the public interest in the administration of justice in having relevant evidence available, against the public interest in having that information kept confidential. As we have already indicated, the courts have increasingly asserted their role in weighing the factors and have narrowed the areas of immunity. They have done this within the scope of the legislative provision. We propose no change to that legislation. Recent legislative attempts to deal with it appear to us either to do no more than restate the broad competing interests that the courts must in any event weigh under the present law, or to introduce undesirable restrictions on the powers of the courts.

2.29 We do consider however that the second important limitation on the scope of the principle of disclosure set out in section 27(1) does require legislative change. That limitation arises from the definition of "civil proceedings" in section 2 of the Act. The definition excludes from the effect of the Act and accordingly from the obligation to make information available, proceedings "in relation to habeas corpus, mandamus, prohibition, or certiorari or proceedings by way of an application for review under Part I of the Judicature Amendment Act 1972 to the extent

that any relief sought in the application is in the nature of mandamus, prohibition, or certiorari". The Court of Appeal has very recently indicated that in some proceedings under the judicature Amendment Act 1972 discovery can be obtained under section 27(1): *Environmental Defence Society Inc v South Pacific Aluminium Ltd,* CA 59/81, judgment of 15 June 1981.

2.30 Notwithstanding that decision, it is clear that the Crown can claim a substantial immunity in an increasingly important area of litigation. We consider that this is undesirable. It means that the Crown can put to one side the whole recent and widely accepted development of the law of public interest immunity, for most major challenges to the exercise of governmental power turn on proceedings of the kind excluded or arguably excluded from the operation of the Act. This is so, for example, of the three Court of Appeal decisions referred to in paragraph 2.20 above. In practice the Government appears often to make the relevant material available. But it need not. The private individual should not have to be dependent on the goodwill of the other party to the litigation in making out his case. He is not so dependent in other areas of civil litigation against the Crown. The basic principle of the Crown Proceedings Act - that subject to the first limit already noted the Crown should in general be in the same position as other litigants so far as the discovery of documents is concerned - should be applied in its full extent. We accordingly propose an appropriate amendment to section 27 of the Crown Proceedings Act 1950 (see clause 72(l) of the draft Bill).

2.31 There is one further limitation on the obligation of the Government to make information available. Section 27(3) of that Act provides that, without prejudice to the proviso to section 27(l) referred to above, any rules made for the purposes of the section shall be such as to ensure that the existence of a document will not be disclosed if, "in the opinion of a Minister of the Crown, it would be injurious to the public interest to disclose the existence thereof". Such rules have been made.

2.32 We accept, as the draft Bill indicates in a related context (clauses 8 and 26) that, in some security areas, including crime prevention, the Government must be able to refuse to answer questions about the very existence of files or documents. We are however concerned about the width of the wording of the provision. Its purpose is essentially that of section 20 of the Ombudsmen Act 1975 and we accordingly propose a similar wording (clause 72(2) of the draft Bill).

3. THE INFORMATION AUTHORITY

INTRODUCTION

3.01 The scheme we have proposed in our General Report provides for the division of responsibilities among three institutions:

(1) The State Services and other public bodies, which must apply the legislation on a day to day basis, with the State Services Commission - through an information unit - having an advising and co-ordinating role.

(2) The Office of the Ombudsmen, whose function will be to deal with complaints by individuals aggrieved by a refusal to provide a specific piece of information.

(3) An Information Authority, with the principal functions of recommending regulations enlarging the categories of information to which access may be had as of right, and responsible to Parliament for keeping the operation of the Act under review.

3.02 We see these roles as essentially distinct, while recognising that they undoubtedly impinge on each other. Our concern has been to make the greatest practicable use of existing institutions and agencies. One approach would have been to give all three functions either to the State Services Commission or to the Ombudsmen. For different reasons we do not agree with either course, nor do we think it would be acceptable. Alternatively it would have been possible to confer all three functions on an enlarged Information Authority with an administrative division, what might be called a grievance division, and a judicial or regulatory division. This is open to the serious objection of creating a large and possibly unwieldy new organisation, which could give rise to a confusion of jurisdictional boundaries with the State Services Commission and the Ombudsmen in respect of what are really quite different functions. Instead we have proceeded in accordance with an administrative application of the proposition “entities ought not to be multiplied beyond necessity”.

FUNCTIONS

3.03 In our General Report we proposed the following functions for the Information Authority.

(1) A regulatory function: to receive submissions, and conduct hearings; to establish guidelines and criteria for administrative action; to define and review categories of information for the purposes of access and protection;

(2) A monitoring function: to keep under review the Official Information Act and other legislation and practice in the general information field and to recommend changes to the Government or other appropriate body, and to report to Parliament;

(3) In the field of personal information:

   (a) to keep under review, and make recommendations on, means and procedures by which individuals can find out what personal information relating to them is held by any department or organisation to which the Official Information Act applies, and can require incorrect information to be removed or corrected; and

(b) on the reference of the responsible Minister, to examine existing or proposed powers of such a department or organisation to require individuals to supply personal information about themselves or any other person, and to make recommendations on whether such powers are proper and reasonable; and

(c) to inquire into the use of personal information held in any such department or organisation by that or any other department or organisation for purposes other than the purpose for which the power to obtain the information was conferred, and to make recommendations on means and procedures to prevent any improper use of such information for other purposes.

(4) To review the protection accorded by existing special statutes: paragraph 90;

(5) To examine aspects of archival problems relating to declassification: paragraph 89;

(6) Tentatively, to examine the question of the fair and accurate presentation of information by the news media: page 7.

3.04 Of these we regard the first two as of primary importance. The second, the overseeing function, could possibly be performed by someone else, e.g., the Chief Ombudsman. We expressed the view in our General Report, and we again emphasise, that no existing institution or person could appropriately and adequately carry out the responsibility for "systematically enlarging the range of information that is available to the public". This function is central to the gradualist approach we have recommended.

3.05 There are two alternatives to this approach.

(1) To attempt to define in legislation exhaustively and in some detail what information must not be or need not be disclosed. This would be a difficult, invidious and certainly time-consuming task. It would tend to create a rigid system, whereas we consider that the rules should be capable of being moulded to an environment of changing attitudes and views. For us, or for another body, to suggest detailed *a priori* answers would be unlikely to succeed. It would call for the very sort of consultations, discussions and examinations over a substantial period that we see as the task of the Information Authority. We note that in Australia, which has tried to legislate on a once for all basis, there has been contention and delay.

(2) To leave matters entirely to the application of broad criteria (such as those we have ourselves proposed) and decide their application and interpretation on a case by case basis. We see substantial disadvantages in this. The clarification of difficult and marginal areas would depend on whether a person chose to complain about a representative decision in that area. In the short term at least it might be difficult to ensure consistency. And not least, key rulings might tend to be made in an atmosphere of controversy surrounding a currently vexed political issue; access to information would become incidental to the real argument.

3.06 Some of these reasons weighed with us in deciding not to recommend that what we have called the "regulatory" function should be given to the Ombudsmen. But there are other reasons, both of principle and practice.

In our opinion the quasi-judicial, quasi-legislative role we propose for the Information Authority, dealing with general categories and not individual cases (and often as we see it at the instance of departments or organisations), would be incompatible with the accepted status of the Ombudsmen as the citizen's watchdogs and representatives. Moreover, the sort of balancing between public interest and individual wishes called for by a rule-making role might adversely affect the public image of the Ombudsmen as the individual's "grievance men". On the practical side the regulatory function we propose for the Information Authority may well occupy an appreciable proportion of their time if it is to proceed at a pace which might satisfy public expectations, and sufficient to bring it near to completion within a reasonable period of years. This would certainly be difficult for the Ombudsmen except at the expense of their primary role of receiving complaints and making recommendations on administrative acts and decisions affecting the citizen.

3.07 Before examining in greater detail the composition, procedures and powers of the Information Authority we sound two cautions.

3.08 First, we stress that in our General Report we have aimed at making the procedures, the working and the operation of the apparatus we propose as simple and informal as the nature of the case allows. We believe that it should be such as to be readily understood and applied. There has already been some criticism (though we believe it to be misplaced) that it is unnecessarily elaborate. In our recommendations we have provided for the progressive expansion and clarification of areas of accessible information rather than for an immediate definitive code of exceptions to a general right of access. That gives a sufficient measure of flexibility and gradualism. We would be reluctant to see further refinements and qualifications superimposed on it.

3.09 Second, we repeat our conviction that the Information Authority should not simply select areas and categories of information for examination in response to the immediate pressure of enthusiasts or crusading groups. Dispassionate decisions are difficult in such an atmosphere. On the other hand the Authority should be required to address itself to practical issues and problems where there is a real call for greater information, or where a close balance of competing considerations (e.g., between individual privacy or commercial confidence on the one hand and the general public interest on the other) and the topicality of the subject-matter makes clarification desirable. Indeed we hope that the Authority's work may be able to anticipate areas of contention. We have it in mind that the initiative for a good deal of the Authority's regulatory work will come from departments and from organisations to which the Act applies.

COMPOSITION

3.10 In our General Report (paragraph 113) we envisaged that for the first few years the members of the Information Authority would be working on a full-time basis or something close to it. Legislation creating boards and tribunals does not customarily specify whether members should be appointed on a full-time or part-time basis, and our draft Bill does not touch on the point. We do not in fact regard the issue as a fundamental one. If Parliament and the Government wish for a more measured approach, or believe that the work likely to be generated at the beginning of the Act's operation need not take up the greater part of members' time,

they may well decide in favour of part-time appointments. We do no more than reiterate our judgment that the task the Authority must perform is a large one, and that the speed with which it is accomplished will depend on the time that the chairman in particular can give it.

3.11 We also suggested (paragraph 108) that the chairman of the Authority should have legal qualifications. We are convinced that in this quasi-legislative field an understanding of legal and constitutional principles is important. The chairman should also be manifestly above sectional interest (especially as the other members are to have a background and experience on the supply and demand side of information policies respectively) and should in the wider sense of the term be judicially minded. We recognise that a legalistic or an unduly technical approach would damage the Authority's work, but venture to hope that this would not necessarily be the result of having a chairman with legal qualifications. What really matters is the overall quality of the members of the Authority.

3.12 The Authority would appoint its own staff. Their number would be determined by the Minister of justice and their salaries and conditions of employment should be determined by agreement between the Authority and the State Services Commission, or in the absence of agreement, determined by the Minister of Justice. The Authority's staff would not as such be members of the public service but some of them might well be on secondment from that service.

INFORMATION CATEGORIES

3.13 There are various possible approaches to the task of extending the body of formally available information.

(a) The categorisation could be based on areas of interest, e.g., environmental studies or economic analyses.
(b) Alternatively, the basis could lie in types of documents, for instance option papers, consultants' reports, reports on safety tests.
(c) Again, an examination could be made on an organisation basis, e.g., documents held by the Ministry of Energy or by the Planning Division of the Ministry of Works and Development. We see a particular value in this approach in relation to information held by quasi-governmental organisations such as Air New Zealand or the Accident Compensation Corporation.

We do not think that any of these methods of approach are exclusive, and there are other general subject-matters which overlap these approaches. For example:

(d) What documents and information relating to import licence applications and decisions should be available to the public? (Where is the line to be drawn between commercial confidentiality and the interests of the wider commercial community and the public.)
(e) What information relating to public servants should be available to the public? (Where should the line be drawn between individual privacy, which encompasses the privacy of individuals as employees, and the proper interest of the public in knowing the qualifications and remuneration of persons paid from the public purse? In drawing that line, the Authority would take into account the fact that the community as well as the public servant has an interest in ensuring

that the citizen's normal expectation of privacy is not diminished for the public servant to the extent that able people are deterred from entering or remaining in the service.) This is one example of an area where a clear set of principles and rules could well be of practical value.

(f) What information ought to be available, either to the public or to persons having a special interest, concerning offenders detained in penal institutions? (The lines here are complex ones between the privacy of inmates, the community interest in rehabilitation, the safe custody of offenders, the safety of individuals, and more general public interests.)

3.14 These examples are of course no more than instances of categories that might be brought before the Information Authority. We are not saying that they are the most important, or should necessarily receive a high priority.

3.15 We do not suppose that the draft regulations recommended by the Information Authority will necessarily amount simply to a statement that a certain class of information shall be available to the public. They may for instance provide rules as to the approach to be adopted in marginal cases or for resolving conflicts between criteria. In other cases, a degree of detail and refinement may be called for. Thus the Authority might perhaps conclude that documents on a particular subject should be available with defined exceptions, that some documents within a class should be available to persons having an interest but not to the public at large, that some should be available after but not before a decision, and so on. If this seems an over-elaborate approach, we stress that the practical problems that arise in this area are not susceptible to simple answers. Our hope is that as Ministers, officials and the public become accustomed to a more open regime, restrictions and qualifications will less frequently be sought and less frequently imposed, and additional areas willingly opened up. That indeed is the essence of the approach we have taken.

3.16 Should the Authority be empowered specifically to issue guidelines as an alternative to regulations? There are attractions in such a concept but there are also objections of substance. One concerns the status of such guidelines. The Act will itself lay down criteria for withholding information and any guidelines issued by the Authority would have to operate within and be subject to these. Would they amount to no more than interpretations; and if so should an administrative authority be given power to exercise what is a traditional judicial function? Another problem is the extent to which guidelines would be binding on departments, and in particular on the Ombudsmen. If they were to bind the Ombudsmen that would seem to subordinate the Ombudsmen to the Authority. We do not think that would be appropriate, and it is far from our intention. If not, invidious difficulties would seem to arise for departments and organisations, caught between a guideline promulgated by the Authority and a possibly conflicting view taken by an Ombudsman. If departments in turn are not obliged to apply these guidelines, what is to be their status?

3.17 It does appear to us, however, that some of the advantages of guidelines without the problems could be achieved by empowering the Authority (as we have suggested in paragraph 3.15 above) to recommend the making of regulations laying down principles. They would indicate how certain questions should be resolved but would still require a degree

of discretion in their application to individual cases. They might state criteria for resolving competing policy considerations. Since they would have the force of law, conflict with the jurisdiction of the Ombudsmen would not arise.

PROCEDURES

3.18 Subject only to broad political and financial controls, the Information Authority should be master of its own business. Thus, if requests for opening up or clarifying additional areas of information are too numerous to be dealt with quickly, the Authority should be able to settle the priorities for itself. It should be receptive to outside requests; equally it should have regard to suggestions from government departments and organisations. The experience of the Ombudsmen may well indicate fields that need attention. In addition the Authority should be able to take up categories of its own motion.

3.19 Thus, arising either from its own knowledge or from representations made to it, the Information Authority would give notice of its intention to review the question of access to official information of a particular nature, e.g., reports on the testing of commercial products. Submissions should be called for and the Authority should be able to take account of the experience of the Chief Ombudsman and the State Services Commission. Private individuals or organisations would be entitled to make submissions; group representation should be permitted and encouraged. The Authority should have power to seek comments from government or public organisations, and should have power to subpoena witnesses and require the production of files and other papers. It should, we think, normally work in private, as do the Ombudsmen and the Securities Commission, but it could decide to hold any part of its proceedings in public.

3.20 There should be a power (but not an obligation) to hear persons who have made submissions. We do not envisage that there would be need for legal representation or for formal cross-examination, and generally we are concerned that the Authority should go about its business in a practical and informal fashion.

3.21 We have considered the possibility that the Information Authority should be able to recommend what might be called temporary orders that would have effect for a limited time or until further review. The idea is that their practicality could be seen and judged in the light of their own operation. This, it can be argued, could provide a trial period in which unsuspected problems or anomalies could be brought to light and the original decision modified without any actual rights of access being taken away. We do not favour this approach. There is always in the conduct of public affairs some danger that even carefully considered legislation or rules will not work as well as intended, or will create unforeseen problems. This is not usually seen as justifying “trial laws”. That concept does not appeal to us. The procedure described would import a large measure of uncertainty in its operation and status. There is a limit to the refinements of gradualism, and we recoil from adding yet another temporal and procedural dimension in the form of these provisional orders.

3.22 What we do favour is a procedure comparable with that required under section 70(3) of the Securities Act 1978, which is as follows:

"(3) Before making any recommendation for the purposes of subsection (1) or subsection (2) of this section, the Commission shall -

"(a) Do everything reasonably possible on its part to advise all persons and organisations, who in its opinion will be affected by any Order in Council made in accordance with the recommendation, of the proposed terms thereof; and give such persons and organisations a reasonable opportunity to make submissions thereon to the Commission; and

"(b) Give notice in the *Gazette*, not less than 14 days before making the recommendation, of its intention to make the recommendation and state briefly in the notice the matters to which the recommendation relates; and

"(c) Make copies of the recommendation available for inspection by any person who so requests before an Order in Council is made in accordance therewith:

"Provided that this subsection shall not apply in respect of any particular recommendation if the Commission considers that it is desirable in the public interest that the recommendation be made urgently:

"Provided also that failure to comply with this subsection shall in no way affect the validity of any Order in Council made under this section."

3.23 There are other precedents such as the reports of the Representation Commission under section 18 of the Electoral Act 1956 and the procedure for adopting and revising town planning schemes under the Town and Country Planning Act 1977.

3.24 We do not see any need in this field to copy the provision in the Securities Act for recommendations to be made without consultation in emergency cases. We therefore recommend that the Information Authority should in all cases be required to give notice and to circulate drafts of proposed regulations to departments and others likely to be affected. The dissemination of these drafts will provide a means by which the Authority can acquaint those likely to be affected with their tentative conclusions and obtain their reactions.

3.25 We stress that we do not imagine that the principles and rules enacted at the instance of the Information Authority will be immutable. If the rules applicable to a particular category of information cause serious problems there should be a ready means for their review. The Information Authority with the watching function we have proposed for it will be well placed to undertake this responsibility.

3.26 It is important as we see it that the Information Authority should take advantage of the knowledge possessed by the State Services Commission, the Ombudsmen, departments and organisations of any problems they encounter in the administration of the Act. This is one means by which the Authority can carry out its wider function of keeping the working of the Act under review. To take just one example, if an organisation or department believed that a particular decision on access to its information, although perhaps within the terms of the Act, could substantially impair some aspect of its operations, it could so advise

the Authority. The Authority, if it considered the concern justified, would doubtless draw attention to the issue in its annual report (or if need be in a special report) to Parliament and suggest that an amendment be considered. We believe that this power in the hands of an independent body will introduce a useful flexibility that would be absent from a hard and fast approach such as other countries have taken.

4. ADMINISTRATION

4.01 Our General Report (paragraph 92) reasoned that the process of opening up required a set of arrangements, or apparatus, which would:

- be capable of pursuing the principle that information is to be made available unless there is good reason to withhold it, and of reconciling the interests which require protection;
- get action under way very soon;
- provide an assurance of deliberate and programmed forward movement;
- be simple in structure and sparing in resource demands;
- be flexible and adaptable both in form and method.

We have recommended that an information unit be set up within the State Services Commission to have responsibility for effecting our proposals. It must be recognised that legislation which provides for more liberal release of information upon application from the public will have a considerable impact on existing administrative procedures, expenditures and the allocation of staff time. This part of the report examines the adjustments needed if departments and other organisations are to fulfil their obligations under the proposed legislation. In the process we indicate the roles of the various bodies in helping to improve communication between departments and organisations on the one hand and the public on the other.

4.02 Our discussion of administrative matters with permanent heads of government departments identified several factors which have confirmed the view that the progressive approach to the opening-up process would be the most appropriate.

- There is a large and growing volume of information available to the public. Initial administrative changes should therefore be mainly concerned with making the public aware of what information is already available and where to obtain it.
- There is already a trend towards openness. What is required is a more uniform and enhanced expression of this trend. Legislation will go some way to achieve this, but the encouragement of an attitude and practice of openness among officials will be a gradual process.
- It is impossible to predict how great the demand for information will be, but the impact is certain to vary from one department to another. Some may need to develop new, or expand existing, procedures to effect an increased flow of information. In others there may be no need for such changes. Only experience following the new legislation will indicate to departments and other organisations the extent and nature of the changes.
- Many departments and organisations already have well developed procedures for handling information enquiries and for canvassing options in public; some have developed skills in particular areas such as staff training, public relations and publicity. Relevant skills could usefully be brought together as a pool of advice for those organisations subjected to new demands on their resources. Careful disposition of existing experience and expertise should

lessen the need for the establishment of additional staff positions and help relate the supply of information to the demand from the public.

THE INFORMATION UNIT

4.03 The information unit could be set up before an Act was passed or took effect. It would itself have no statutory identity, but would consist of 3 or 4 staff within the State Services Commission. The unit's functions would be to stimulate change in public sector attitudes and practices, help set administrative changes in motion and overcome the practical problems of responding to information demands. These functions fit naturally in the State Services Commission and would in due course be absorbed into its usual review, training and management services functions.

4.04 Section 11 of the State Services Act 1962 provides, in certain conditions, for the extension of the advisory and review functions of the State Services Commission to organisations outside the public service. It would be within the spirit of these provisions if the Act expressly empowered the State Services Commission to assist and advise organisations covered by an Official Information Act.

4.05 The head of the information unit should be of sufficient seniority and experience to speak with some authority on the implications and means of implementing the legislation; other members of the unit could usefully combine experience in staff training, management services and public relations. While the unit would operate and be staffed as a section of the State Services Commission, it would maintain close contact with the Information Authority.

Identification, Production and Distribution of Basic Information Aids

4.06 The evidence of a number of groups and individuals who appeared before the Committee has demonstrated clearly that many people, particularly those outside Wellington, feel hampered in their desire to become more involved in public affairs by an inadequate understanding of the government machine, and even of what information is available and where to obtain it. This lack has also been apparent overseas, where Acts or Bills have required the preparation and publication of various directories and indexes to facilitate the public's approach to departments and agencies.

Directory

4.07 It is proposed in our General Report that the information unit co-ordinate the preparation of basic information aids. The first of these, a directory of government and other organisations covered by the Official Information Act, could be prepared in advance of legislation and distributed widely throughout New Zealand. The directory, which would be an expanded version of the handbook “Statutory Functions and Responsibilities of New Zealand Government Departments” first published by the State Services Commission in 1979, would contain information on:

- the organisation and responsibilities of each government institution, of such associated activities as advisory committees attached to those institutions, and of statutory and allied bodies.
- decision-making or other powers affecting members of the public.
- particulars of any arrangement which exists for consultation with or representations by the public.
- the principal publications of each department or organisation.
- the designation and address of the appropriate officer in each department or organisation to whom requests for information should be sent.

4.08 To ensure that the directory is widely available, it is recommended that members of Parliament, Post Offices (926 permanent and non-classified Offices) and libraries (163 local authority and 694 small community libraries) be used as outlets. The directory should be self-contained and should not impose extra duties on Post Office staff, who would hold the directories as part of their normal service and would not receive specific training in their use.

4.09 Changes in the way information is held are inevitable over the next decade. But it is important that these changes are made with the objects of freedom of information in mind. The development of electronic storage will have a significant impact on the practicalities of access to, and keeping of, information. After the directories have been in use for a period, it may therefore be necessary to review this method of holding primary information.

Departmental Lists

4.10 The directory discussed above would eventually contain, or be used in conjunction with, lists of categories of documents or material held in each institution. These detailed lists should be prepared in departments and organisations, and the information unit would advise on their preparation. The Information Authority, in accordance with its monitoring function, should comment from time to time on the lists. Some departments, as part of their submissions to the Committee, have already done a good deal of work on this which could be used by the information unit as a basis of advice to other departments and organisations.

Index to publications

4.11 In addition to departmental lists, there is the need, which has been emphasised to the Committee by librarians, for a complete and up-to-date index of government publications, including material which is not strictly departmental. The information unit should pursue with the Government Printer and the National Librarian the possibility of compiling such an index.

Depository Libraries

4.12 There is a considerable flow of official information published by the Government Printer, departments and agencies. This takes many forms: some is technical or caters for a specialised audience and therefore has a

ready-made distribution; other material, like the "Road Code", is designed for general dissemination. However, there is an output of printed matter (apart from Parliamentary material of various kinds) generated by the Government Printing Office as well as occasionally by some departments and agencies that constitutes official information which, it has been submitted by librarians, should be automatically supplied to both full and selective depository libraries throughout New Zealand. We suggest that the information unit, in collaboration with the Government Printer and the National Librarian, should examine all free and saleable material generated by departments and agencies as well as by the Government Printing Office with a view to establishing the range of such material that might be automatically received by depositories as a basic resource of official information for the community at large.

Booklet on Access Procedures

4.13 We discuss later in this section the procedure which might be involved in making a request for a particular piece of information. Details of this procedure, which would be helpful both to the enquirer and the recipient of the request, should be published in a guide booklet. The information unit, in consultation with the Information Authority, would prepare the booklet. Distribution would be handled by the information unit in the same way as the directory of government institutions. The access booklet would contain the text of salient parts of the Official Information Act, such as details of how to request documents (including sample letters), reasons for declining access to information, and review procedures.

Training Programmes

4.14 As part of the process of encouraging a positive response among officials, an immediate task for the information unit would be the institution of training programmes to:

- explain to state servants the purposes and principles of the legislation. Particular attention should be paid to those staff in key positions whose example in day-to-day decisions will be a vital part of the process;
- develop at all levels an awareness of what information is available and how and where to find it;
- discuss methods of promoting a more useful flow of information by inviting departments with particular expertise and experience (for instance, in the use of seminars to canvass options) to share their ideas;
- advise appropriate officers in the use of security classifications and related manuals;
- instruct counter staff (or others nominated to handle in the first instance requests for information) on internal rules regarding material protected from disclosure, and on helping applicants identify the material they seek;
- develop skills in the preparation and amplification of information releases, and help improve relationships with the media perhaps, among other things, by involving them in training courses;

- guide records officers in the new and important duties which they will be required to perform. Clearly many filing systems will need to be revised; assistance with such management tasks is already given by the State Services Commission.

4.15 The Training and Development Branch of the State Services Commission is the Commission's agency for advising departments on staff training and helping them train staff. Officers in the branch have oversight of all training schemes in the public service, instruct departmental training officers, develop training methods and aids, run courses for public servants at all levels, and publish training handbooks and other reference materials. The information unit should work closely with this division in its training and educative function.

Development of Procedures and Improvement of Administrative Systems

4.16 With the system adjusting itself gradually to the demands placed upon it, we see no need for new administrative structures. However it has become clear to us during interviews that records management requires modification in a number of organisations. Records systems are critically important to the better production of information material and the smooth introduction of new information policies. In order to enable filing and copying facilities to handle both an increased output of information and increased requests for information, these systems must be strengthened.

4.17 The important area of records management is at present receiving considerable attention in the State Services Commission and a definitive programme is being developed to improve paper record systems, introduce appropriate technological improvements and train records staff. We recommend that this work be given some priority.

4.18 The proposed Official Information Act need have no immediate effect on current practices regarding the disposition of records. The information unit will, however, need to keep itself well informed about proposed developments in records management, including the possible review of practices relating to the destruction and disposition of files.

4.19 It is envisaged that the information unit would have a monitoring role in the use of the revised security classifications. But heads of departments and other organisations must retain responsibility for the oversight of measures required for the introduction and supervision of the classification system within their organisations. (See also paragraph 4.29).

Review and Reporting

4.20 In the course of its work the information unit will become familiar with precedents created in the application of the legislation. The unit would no doubt make its experience and specific knowledge it had acquired available to the Information Authority. In the course of the unit's existence there will be reason to recommend to the Information Authority from time to time that certain statutes and provisions concerned with the release and protection of information be reviewed.

4.21 As an aid to the information unit's continuous review of administrative procedures we suggest that information collected in departments on numbers of requests approved and declined, fees

collected, costs and staff time required for administration of the Act be collated in the information unit and reported to the Information Authority.

4.22 This review and reporting function need not be a formal one. But there is need for a close working relationship between the two bodies. The information unit would assist, where resources permit, with any enquiry the Information Authority might wish to pursue.

DEPARTMENTS

4.23 While the information unit in the State Services Commission would provide advisory services, departments and other organisations would have responsibility for improving communication between themselves and the public, and for maintaining and expanding the procedures required to achieve this. Arrangements for dealing with information requests, for example, are unlikely to be uniform, because demands on departments will vary in style and content. It will be for heads of departments and other organisations to decide upon the administrative measures best suited to their needs. They should be requested to begin to examine their procedures immediately.

4.24 One basic point needs to be made clear at the outset. Responsibility for administering the proposed legislation rests primarily on the Government as such, rather than on its individual officers. The principle that official information should be made available to the public unless there is good reason to withhold it should guide officials at every level, as well as Ministers, and the decision whether any given information should be released or withheld should be based on it. This decision is, however, one for the Government to take, not the individual officer. Authority to decide will no doubt be delegated to permanent heads, who will in turn need to delegate it to officials at lower levels. As we have noted in our General Report, these may often be the people who have functional responsibility for the area in question. But whatever the level at which the actual decision is taken, it must be duly authorised, and the officer taking it will be accountable for his actions.

Procedural Matters

General Administration

4.25 The work initiated by the information unit discussed in paragraphs 4.03-4.22 will require development in departments and other organisations. Responsibilities should he clearly identified as should the delegated powers associated with them. Matters to be dealt with include improvement of records and copying facilities, implementation of in-house training programmes, the actual handling of requests for information (as well as the keeping of records on requests received) and output of information. Wherever departments decide to lodge these duties, they will need to designate experienced officers who can themselves respond fully to most requests, without interrupting the work of officers not charged with this work. The role of improving the flow of information need not be vested in a public affairs or information section; although those organisations which already have such establishments may decide they are the most appropriate locus for this activity.

Informal Administrative Law

4.26 We have recommended that the legislation make available to those who seek it personal information that has been obtained about themselves. Also within this category of information to be made available (with limited exceptions) would be the informal administrative law of precedents, principles and criteria applied by departments or by statutory officers in making decisions affecting individuals, together with the reasons for such decisions.

4.27 This recommendation, if effected in legislation, would have implications for departments and other organisations. Each would be required to review its internal system for the identifying, recording and indexing of its informal administrative law and for the regular up-dating of the material in the system so that, without this law having to be published or made available as a whole, individuals and organisations could secure information on any element of the law of concern to them except where it is legally protected from disclosure.

4.28 The objective would be that such law should be well documented and available from a single source. Some departments already make available, to those with a specific interest, pamphlets on the general tenor and main content of their informal administrative law. This practice would desirably be continued, and developed in those organisations which do not already produce such guidance material.

Security Classifications

4.29 As noted in our General Report, most departments classify documents only rarely. We would not wish our recommendations to lead those who do not at present mark documents to change their procedures. But permanent heads should develop guidelines as to what markings are to be used for operational effectiveness. They might then delegate responsibility for classification procedures to officers of appropriate seniority. These officers would initiate an internal review. of existing documents, determining in a general way how far they qualify for protection under the proposed Official Information Act. They would also be responsible for assisting with the review of and training in the use of security manuals and the relevant sections of departmental manuals.

Output of Information

4.30 The gradual approach chosen in making our recommendations will have its due influence on the output of information. This outflow should be related to demands from the public as well as to the positive requirements of participation, accountability and effective government. Departments and agencies should not unselectively pour out quantities of material which is unlikely to be read. Several permanent heads made the point at interview that they had often been disappointed and surprised by the lack of interest shown by the public and the media in information which is published. At the same time requests are frequently received for information which is already available in published form. A responsibility falls upon members of the public and the media to make use of existing publications when they are seeking information. Assessments of the public interest are not easy to make, but a continuous watch on requests should indicate to departments areas where they might be more forthcoming, as well as areas where further gathering and dissemination of information would not be fruitful.

4.31 Some institutions have public affairs structures for keeping the public informed of their activities because they believe it is in their interests to release information themselves, before people seek it. Others, for example the Ministry of Energy and the Forest Service, have found it helpful to arrange seminars as a method of getting information on topical issues to the public. The Department of Maori Affairs has noticed a marked decline in the amount of correspondence it has received since it developed machinery to deal with grievances at a local level, for instance through the use of advisory committees.

4.32 These are just three avenues that departments have found appropriate to their particular circumstances. “White” and “green” papers have been little used in New Zealand as means of communication, in contrast with British practice. But we are encouraged by the conviction of most permanent heads that such efforts made to improve communication with the public will be beneficial.

Requests for Information

4.33 We have suggested, in paragraphs 4.06-4.13, measures which we recommend be taken - without being contingent on any request having been made - to publicise as widely as possible what information is in fact available and where it can conveniently be found. Once a person has identified where a request for information should be directed, and the request has been received, the appropriate officer in the department or other organisation would respond. The circumstances of request and response require further examination.

Form of Requests

4.34 Requests for information should usually be made in writing to the organisation understood to hold the appropriate record or information. This should not, however, prevent or discourage Ministers or departments from providing information in response to personal application if it is convenient to do so. Much information is already supplied on this basis. If documents are sought, they should be described in detail sufficient to enable experienced employees in departments or agencies familiar with the subject area of the request to identify the record. However, where necessary, the designated officer should assist in reformulating the request. The actual identification of the information an applicant seeks may require further communication between the applicant and the officer handling the request.

Transfer of Requests

4.35 Where a department or agency receives a request for information which should more appropriately have been directed to another government institution, it should transfer the request to the appropriate department or agency and notify the applicant.

Decisions on Requests

4.36 While departments and other organisations would make their own arrangements about the delegation of authority to make decisions on requests for information, this authority should be vested in officers of sufficient seniority. (See also paragraph 4.24 above). Departments and

other organisations must be prepared to give reasons in terms of the Official Information Act for declining applications and to advise applicants of the methods of review open to them.

Grounds for declining requests

4.37 The criteria set out in Appendix 5 of our General Report, and (in a slightly altered form) in clauses 6 and 7 of our draft Bill, define the categories of information which must or may properly be withheld. There are however of necessity some reasons of a different kind that may justify a department declining to process a request for information. Such reasons may be termed procedural, and are to be found in much overseas freedom of information legislation.

4.38 The procedural grounds which we propose as a proper basis for declining a request are:

(1) that the information required is not defined sufficiently specifically for an experienced officer to identify it. This is subject to our view that officers should give all reasonable assistance to enquirers in helping them to identify what it is that they want;

(2) that the request is frivolous or vexatious, or is not made in good faith, or the information is trivial. There are analogous provisions in the Ombudsmen Act and the Race Relations Act. It seems plainly wrong that an unbalanced, mischievous or malicious individual should be able to inundate a department with time-wasting requests;

(3) in the case of a document, that it does not exist, or cannot after proper search be found. This is self-evident;

(4) that the information does not exist in a form in which it can be provided without substantial collation or research by the department. This is simply to say that a person requesting information is not entitled to ask a department to assemble or analyse data for him. As the Ontario Commission says: (Vol 2, page 234) “the right to information does not embrace a right to require the Government to conduct research on matters of interest to citizens in order to provide answers to their questions”;

(5) that the information requested is or will soon be publicly available.

Recourse to the Ombudsmen offers safeguards in all these matters.

Practicalities affecting requests

4.39 The granting of access to official information, even information which of its nature clearly need not be withheld, cannot be an absolute priority to which all other functions of administration must yield. Especially in times of financial and staff restraints on government activities, some limitation of the resources available for providing information to members of the public is inevitable.

4.40 It is evident that there is a price to pay for provision of more ready access to official information. A balance will in the end have to be struck between the need for readier access, which this Committee endorses, and the price of that access. Manpower resources (particularly at the senior levels where the essential decisions will have to be made) as well as financial considerations will need constant assessment before the correct

balance between the price and the need can be struck. This is not an argument of "administrative convenience", still less ought it to be used as an excuse for withholding information that is awkward or embarrassing.

4.41 We also refer to the discussion in Chapter 13 of the report of the Australian Senate Standing Committee on the Freedom of Information Bill concerning refusal of access on what that committee calls "administrative grounds":

> "... immense burdens could be imposed on an agency by categorical requests (that is, requests for all documents of a particular type or category, or all documents on a particular subject-matter). One United States case involved a request for 'all unpublished manuscript decisions' held by the Patents Office, which would have required searching through well over three and a half million files built up over more than a century. . . . we accept that agencies must on occasion be able to refuse requests which would impose extreme burdens on their operations. It is important, however, that the exemption be used sparingly and only when the agency concerned is subject to considerable interference with its operations."

We have preferred to avoid such general phrases as "unreasonably divert the resources of the agency", which although reflecting a real potential problem are wide and general. We think it should suffice that a request can be refused as frivolous or vexatious, or not made in good faith, or on the grounds that the information cannot be made available without substantial collation or research. If, contrary to our expectation, there is any tendency towards significant abuse we would favour amending the legislation along the lines of clause 23(1) of the Australian Bill.

Existing Information: Retrospection

4.42 Some overseas legislation exempts from its scope, or applies only with qualifications to, records which were already in existence at its commencement. For example, the Freedom of Information Bill reintroduced in April 1981 in the Australian Parliament, provides as follows (clause 11(2)):

> "A person is not entitled to obtain access under this Part to a document that became a document of an agency or an official document of a Minister before the date of commencement of this Part, except where access to the document by him is reasonably necessary to enable a proper understanding of a document of an agency or an official document of a Minister to which he has lawfully had access."

Similarly, under section 13(l) of the Danish Act of 1970 on Public Access to Documents in Administrative Files, the right of access does not extend to documents that were drawn up by an authority or in an authority's possession before that Act came into force. Wide exemptions of this sort are, we think, undesirable in principle and we believe that under the approach we are recommending - that is, not to create an immediate legal right of access in the generality of cases - it is not necessary. We therefore propose that the legislation should not contain any provision excluding information or documents that were held by a department or organisation before any specified date. It seems to us that this matter will resolve itself on a practical basis. Sometimes older information is less easy to find and it

may not be possible to locate it at all by proper search (see paragraph 4.38(3) above); or it may have been destroyed. In addition, past documents are perhaps more likely to mix material that is open to access with material that there is good reason for not disclosing. The result may in some cases be that the whole document has to be withheld. Again, the review of a formal security classification may cause delays in responding to a request for the document concerned. In other words, we suggest that the problem should be dealt with in a practical and case by case fashion. We do not see the undoubted difficulties as justifying a general exemption of existing information, an exemption that would necessarily for a significant period of time very considerably reduce the effect of the legislation.

Undue Delay

4.43 We realise that delay in answering requests for information may often be seen to indicate official reluctance to answer, or indifference, or both. But remedy in the shape of designated time limits is open to practical objections. The circumstances attending the making of a reply may vary greatly; an apparently simple question may require some time to elucidate; specialised knowledge may be needed and not always to hand for one reason or another. Departments must assign priorities in the use of their skills and resources. Further, maximum times for reply may come to be regarded as minimum times, and deadlines act to delay rather than expedite. And a time allowed that is over-generous in one case may be inadequate in another.

4.44 After due consideration we do not recommend the use of specified time limits. But departments should be active to encourage promptitude in replying, and the provision of clear and rapidly forthcoming explanations when circumstances warrant delay. Where the enquirer sees himself improperly denied of a response, he has recourse to the services of the Ombudsmen. Unreasonable delay may be the basis of such a complaint, and the Ombudsmen will be able to make a judgment in the light of all the circumstances of the case.

4.45 We recognise that there will often be good cause for delay in the provision of relevant information. Nevertheless we do not accept that this will in turn provide a sufficient ground for refusal to provide such information. We do not for example support the approach taken in a recent private member's Bill in the United Kingdom, the Freedom of Information Bill:

> " ... an application may be refused if compliance would interfere excessively with the business of the department or authority concerned, having regard to any difficulty that would exist in identifying, locating or collating documents containing relevant information . . ."

We suggest nevertheless that the public must recognise that the need to allow work of a higher priority to proceed, and the inevitability (as mentioned in paragraph 4.40) that senior officers will have to give attention to aspects of some requests for access, will in practice often make it difficult to ensure a quick response to requests.

4.46 It is possible too that the information sought will be plainly erroneous. The department may find that a requested document is either thoroughly mischievous or tendentious; it may be that it contains research

which is incomplete or which has failed to take into account other work on the subject. In such cases the papers would be misleading to the public ii they were released without an explanation or commentary to provide balance.

4.47 It is the Committee's view that there will be from time to time justification for delay in response to a request for information to allow other work to proceed or to permit other material to be prepared. In exceptional cases (involving a great deal of additional work) the department may wish to ask an enquirer to accept the need for delay in answering his request so that the project can be fitted into the priorities of the department's work programme.

4.48 We have recommended nevertheless that there should, in general, be a duty to respond to a request within a time that is reasonable in the circumstances and that unreasonable delay should be a basis for complaint to the Ombudsmen. This should be the guiding principle for departments. As in all administration however - in the public and the private sector - there must be opportunity for assessing priorities and for some flexibility of response.

Internal Review

4.49 A person who is not satisfied with the response to his application should, where applicable, first request that the decision be reviewed by a more senior officer. If this approach fails, he may decide to seek a review by the Ombudsmen.

Form of Response

4.50 It is to be expected that requests for information will be just that, and responses to them may take differing forms. Many requests may readily be made and answered orally. The supply of a copy of an existing document may meet others. Some queries may require more detailed attention, as in identification and search, or in the location of scattered material. In certain instances, however, it may be more practicable, for instance where the deletion of classified material would otherwise be involved, for the response to be communicated orally or by letter. Applicants themselves would not ordinarily be permitted to search through departmental files for documents.

4.51 We note in this context that under the Netherlands legislation of 1978, the Law on the Access to Administrative Information, Article 4, “the government body shall provide the information by:

a. giving a copy,

b. allowing cognizance to be taken of the contents of,

c. giving an excerpt or summary of the contents of,

d. furnishing oral information about the contents of the documents containing the desired information.

In choosing between the forms of information referred to in Article 4, the government body shall be guided by the preference of the enquirer, with this understanding, that the importance of smooth progress of work is taken into consideration and that the factual information contained in documents drawn up for internal consultation is couched in an unattributable form.”

Charging for Services

4.52 The services that a progressively liberalised system of responding to requests for information will call upon will involve additional costs. These will not be easy to gauge. Government agencies must already deal with a considerable volume of enquiries. Sometimes charges are made, particularly for documents. What additional activities our proposals might generate, their nature and content, their distribution across departments and institutions, and the level of resource costs likely to be involved, are all matters of conjecture.

4.53 It seems a fair presumption that, at least in some cases, the resources needed to answer a request for information justify charging for them. Doubtless many enquiries, as at present, will be capable of ready and convenient response. To levy fees or charges other than for copying at the 'easy' end of answering would be seen as obstructive, and would frustrate the openness we seek. But some enquiries will doubtless engage considerable time and attention when less obviously available answers are sought. Search, abstraction, collation and copying could combine into formidable workloads. Even if research or quasi-research activities are firmly ruled out (see paragraph 4.38(4)) and the simpler enquiries are allowed to be free, there is left a middle ground where charging will be warrantable.

4.54 It is not easy to stake out this ground in order to institute a charging system which will be seen to be fair and equitable in the varying circumstances which will apply, as a wide range of requests fall upon the differing capacities of one or another public agency.

4.55 The most readily identifiable costs are for time spent by staff in elucidating enquiries, searching for relevant material, abstracting and collating, and for copying. It is suggested that these two elements, time directly required to find answers, and copying, the most tangible forms of activity, should form the basis for charging.

4.56 If shorter enquiries are to be free, a level designating a point at which charging should apply needs to be established. We propose that projects involving more than 4 hours of staff time should attract an hourly charge for the additional period. Copying fees should relate to going rates.

4.57 It is recognised that this, or indeed any other system of charging, will involve some arbitrariness, and will require the information unit to monitor levels, issue guidelines and to modify practice in the light of experience and in pursuit of consistency.

4.58 An enquirer faced with the likelihood of incurring a charge should be made aware of this prospect at the outset, and, wherever possible, given an estimate of the sort of payment he might become liable for. Departments will need to be sensitive to the risk that they might be seen to be fending off troublesome enquiries by suggesting that heavy costs might arise. If an initial estimate is questioned, is should usually be possible for a second opinion to be obtained within the department concerned.

4.59 Any system of charging is likely to be challenged by those who see ability to pay as imposing an unreasonable constraint on a democratic entitlement. But a 'free' system of access would be a blank cheque for the use of public resources. Experience overseas of 'fishing expeditions' for information is not encouraging. And heavy charges should not be easy to

run up because organisations will not be required to carry out research. To deal with meritorious requests which give rise to a question of ability to pay, a discretionary right to waive charges should apply.

4.60 Finally it should be a basis of complaint to an Ombudsman that a particular fee or charge was excessive in the circumstances.

RESOURCES

4.61 We have kept in mind throughout our work the demand on resources which certain recommendations are likely to make, proposing a structure that would utilise to the maximum existing institutions and resources, and a programme which would expand progressively to meet new demands. Because many of the costs of implementing our proposals will be absorbed into existing arrangements, it would be difficult and perhaps misleading to itemise the costs of the proposed new legislation. Furthermore the lack of reliability of such forecasts, which has been demonstrated in the United States, has discouraged us from such an exercise. We have therefore sought to identify the areas where resources will be required. Extra staff will not be called for in all cases, as the following outline will show.

Information Authority

4.62 The Authority would be the only additional institution of the apparatus to be set up. Along with its proposed staff of up to 9 (a chairman and 2 members and an administrative staff of up to 6), accommodation and other normal setting-up costs would be involved.

Ombudsmen

4.63 The probable increase in the volume of work directed to the Ombudsmen may require a small increase in staff and associated costs.

Information Unit

4.64 The proposed information unit in the State Services Commission should in our view be able to operate with a staff of 3 or 4, but would no doubt call from time to time on the services of other divisions of the Commission (Training and Development, Management Services in particular). It would be placed within an existing institution - the State Services Commission - and its setting-up costs would not, therefore, be great.

Production of Basic Information Aids

4.65 The Government Printer has estimated that an initial printing of 4000 copies of the proposed directory would cost about $25,000. Staff time spent on preparation of this directory will be reduced considerably by the fact that much work has already been done on the publication “Statutory Functions and Responsibilities of New Zealand Government Departments” which would be the basis for the new publication.

4.66 The information unit would need to allow in its budget for publication of a guide booklet (see paragraph 4.13). This, together with other basic information aids (see paragraphs 4.06-4.13) will need to be drawn to the attention of the public, and funds assigned for this purpose.

Training

4.67 The Training and Development Branch of the State Services Commission and, to a lesser extent, training divisions of departments will need to allow for increased expenditure and staff time on training courses, especially in the first years of operation of the legislation. In time, however, we would expect information matters to be included in normal training courses and not to be conducted separately.

Records Management

4.68 The implementation of the programme currently being undertaken by the State Services Commission (see paragraph 4.17), and the recognition of particular needs in departments' records systems will demand some expenditure. These costs are difficult to identify in advance. But improvements in records management are seen by the State Services Commission as necessary in any event, and in the long run savings may be expected as a result.

Departments and Organisations

4.69 One of the main practical consequences for departments and organisations will be the diversion of staff from their normal duties to attend to information matters. We see no answer to this. Merely to recruit additional staff to handle information requests and dissemination will not necessarily be helpful; it is imperative that officers charged with these duties be experienced in the work of their organisations. Accepting that government has a responsibility to keep the public informed of its activities means reordering priorities (except, as we have said in paragraphs 4.37-4.41 where the diversion of resources to information matters causes an unreasonable disruption of other activities).

4.70 Those departments and organisations which experience heavy demands for information may need to recruit additional staff, but before such measures are taken we would expect the information unit to examine with them (in consultation with others which have experienced similar demands) the best ways to cope with their increased duties.

SUMMARY

4.71 These proposals have sought a system which will improve communication between the people and government and will not be unduly demanding in terms of resources. Workloads created as a result of the legislation are imponderable, but some of the new duties will be only temporary. It is therefore important that the administrative system be flexible enough to adjust to new or increased demands.

4.72 Departments and organisations will have responsibility for ensuring that their obligations under the legislation are fulfilled. They will, with advice and assistance from the information unit in the State Services Commission, work out their own methods for responding to access requests; they will retain responsibility for security classifications; they will be able to charge fees to partially defray direct expenses involved in the provision of information.

4.73 The information unit will ideally be set in motion before legislation is passed; and will work to encourage throughout the public sector an

attitude and practice of openness. The unit's work would eventually be absorbed into the usual review, training and management services functions of the State Services Commission.

4.74 It is impossible to predict how great the demand for information will be and, therefore, difficult to itemise the costs of the proposed new legislation. And, in any event, some of the positive outcomes of greater openness are not measurable in money terms.

5. SAFEGUARDS AGAINST IMPROPER RELEASE

SECURITY CLASSIFICATION

5.01 In the General Report we have recommended that grounds for withholding official information be set out in the Official Information Bill, along with the basic principle that information be made available unless there is good reason to withhold it. As we see it a firm set of criteria will be applied by Ministers and departments in adopting policies and making decisions about the availability of information. Some information will not be subject to release. It must be protected.

5.02 One of the ways of making sure that information which needs protection does in fact get it, is the system of security classification. Our terms of reference require us to pay particular attention to this, but it must be emphasised that security classifications operate in practice in respect of only a narrow range of information - primarily what is referred to as "national security". The fact is that security classification is only one of a number of informal and formal safeguards against the improper release of information. In other parts of this report we discuss sanctions, but for the most part we do not go into detail about the types of safeguard available.

5.03 The purpose of the classification system is to give special protection to information of particular sensitivity.[1] Classification means that special handling and storage provisions are observed. It also means that information is available only to designated people, that is, people whose trustworthiness to handle sensitive information has been checked.[2] Measures such as these can be reinforced by habit and practice, by work discipline, or by professional ethics within a group. And as a backstop there are a number of sanctions which can come into play, ranging from the informal (which might for example simply exclude an individual from certain sensitive areas or discussions), through administrative discipline (e.g., reprimand, demotion, or ultimately dismissal), to the criminal sanctions provided in law.

5.04 In considering the use of classifications it is important to bear in mind one point that we have made in the General Report: classification does not in itself constitute sufficient grounds for protection, or for the application of sanctions in the case of unauthorised disclosure. The tests of sensitivity and consequence must always apply. In the same way, the mere fact that a document is not classified will not mean in the future, any more than it does now, that it can properly be released.

[1] Aside from the areas of information which could properly attract security classification, there are of course other areas meriting protection for the sort of reasons indicated in the General Report (paragraph 74). Some departments currently use stamps or endorsement marks to indicate sensitivity or to limit availability of documents in these other areas, e.g., "Embargoed for release (date and time)", "Staff-in-confidence", or "Medical-in-confidence". These are not security classifications, but practical devices intended to serve as guidance to staff in handling certain information. They are not in themselves evidence that the content of the papers involved satisfies the criteria for protection set out in the Official Information Bill, but remain informal devices to assist internal administration in departments.

[2] As described and discussed by the former Chief Ombudsman, Sir Guy Powles, in Section B subsection 4 of his Report on the Security Intelligence Service (1976).

5.05 The classification system - the practice of marking documents “Top Secret”, “Secret”, “Confidential”, or “Restricted”[3] to reflect degrees of protection considered necessary - grew up in the context of defence and security interests in time of war. Its use in New Zealand has developed also as a consequence of the use of similar measures overseas by those countries with which we have been most closely involved in defence and security matters. It is however an administrative device and does not appear in legislation covering release of information - specifically the Official Secrets Act 1951. The system has historically been used for information which is important in terms of national security, defence, intelligence, and international relations. Outside this area classifications have been used generally for Cabinet papers and to a limited extent for certain specific topics such as the Budget and tariff changes. Otherwise, the great bulk of official information which can be described as sensitive does not usually bear classification marks.

5.06 The overall aim as set out in the General Report (paragraphs 84 and 86) has been to narrow the area to which classifications are applied, and we have approached our review task with that in mind. As we have already said in the General Report (paragraph 85), the “classification” of documents should in the Committee's view be applied in the sense of “security classification”, only to information which is of particular importance in terms of national security. The revised criteria which we propose for the use of classifications are confined to damage, of at least a substantial kind, to national security. It does not now seem appropriate that the prescription for “CONFIDENTIAL” should continue to provide generalised protection for information which might cause “administrative embarrassment, or difficulty”, or prejudice to “any governmental activity”; we propose limiting this grade of classification to the national security framework. The classification “RESTRICTED” has never been related to substantial national security concerns, and we think it can now be dispensed with.

5.07 It could be argued - though no permanent head we interviewed did in fact do so - that the classification system should be applied to all categories of information covered by the statutory reasons for withholding which we propose in the Official Information Bill. This would mean considerably extending the use of classifications, especially into the economic field, and that of law and order. We believe that this would be contrary to the broad purpose of limiting classification use. Furthermore, experience shows that such extensions of the system are not generally necessary. Sanctions of a formal or informal kind apply and will continue to apply without classification.

[3] Criteria for security classifications which have been in use since 1951 are:

TOP SECRET: Documents or information, the unauthorised disclosure of which would cause exceptionally grave damage to the nation.
SECRET: Documents or information, the unauthorised disclosure of which would endanger national security, cause serious injury to the interest or prestige of the nation, or any governmental activity thereof, or would be of great advantage to a foreign nation.
CONFIDENTIAL: Documents or information, the unauthorised disclosure of which, while not endangering the national security, would be prejudicial to the interests or prestige of the nation, any governmental activity, or would cause administrative embarrassment, or difficulty, or be of advantage to a foreign power.
RESTRICTED: Documents or information (other than that described above) which for security reasons should not be published or communicated to anyone except for official purposes.

5.08 Nevertheless we believe that it is necessary to maintain a system of classification. An important factor in our review of the existing provisions has been the need to maintain the valuable flow and protect the sources of information received from other governments and classified by them. We need, and in some circumstances have an international obligation, to maintain protection for this material. One of our objectives has been to ensure that any revised definitions and usages would remain compatible with the systems operated by our close allies.

5.09 The system of document classification remains of course only an administrative device, albeit a formalised one. Its purpose will continue to be to make sure that, when information needs to be withheld in the interests of national security, it is in fact withheld and properly protected. The marking of classifications on official material will help to do this by identifying what needs special care in handling, or restricted distribution.

5.10 We propose the following prescriptions for use of the three classifications envisaged for a revised system:

- The classification "TOP SECRET" would be applied to: Information the unauthorised disclosure of which is likely to damage national security in an exceptionally grave manner.
- The classification "SECRET" would be applied to: Information the unauthorised disclosure of which is likely to damage national security in a serious manner.
- And the classification "CONFIDENTIAL: PROTECTED" would be applied to: Information the unauthorised disclosure of which is likely to damage national security in a substantial manner.
- "National security" means the security, defence or international relations of New Zealand.

Classifications will in practice be applied to documents or other material which contain information falling within the above categories.

5.11 We propose that these prescriptions be promulgated by executive decision as they have been in the past. We do not see it as appropriate to enshrine them in legislative form: there need be no obligation in terms of domestic law[4] to classify, and no penalty for not doing so. In the Committee's opinion quite adequate safeguards can and should be provided by including in the legislation provisions for sanctions based on:

- the sensitivity of the information concerned, and
- the consequences of its disclosure.

5.12 What then is the relationship between the administrative device - classification - and the legislative sanction? It is that sanctions will apply whatever other precautions are taken by the Government; they will not depend on the classification system but will, on the other hand, underpin it. The fact is that the classification system has (in its source) always been independent in law from criminal sanctions; contrary to a common belief, the Official Secrets Act 1951 does not prescribe any classification system. The classification systems used in other countries are similarly independent.

[4] But see paragraph 5.08: there may be international obligations to do so.

5.13 We have already noted that use of the three grades of classification in the revised system would be optional, not mandatory. But we are concerned that their use should be appropriate also. There should be:

- clear lines of authority to classify (and declassify), and
- some central monitoring and supervisory capacity.

5.14 We are satisfied that initial decisions on whether a particular piece of information could if disclosed damage national security in an exceptionally grave manner, as opposed to a serious, or merely a substantial manner, would essentially be an executive function. In day-to-day practice, this function would be carried out under delegation by permanent heads, and under a further delegation, by their senior officers. There would be a place for "internal audit" of usage within departments and agencies, to check that the different grades of classification were in fact being properly and correctly applied.

5.15 As the system of classification is to be confined to the field of national security, the authority for its establishment and administration should lie with the head of the executive, the Prime Minister. We would expect that the actual institution of the system, as a protective administrative structure, would be authorised by Cabinet directive. And in practice we assume that responsibility for working out the arrangements and monitoring their application will be delegated to the permanent heads of the departments concerned in consultation with the State Services Commission. Permanent heads will accordingly be responsible for ensuring that directives for the proper use of the system are observed. The existing authority of the State Services Commission to review the efficiency of departmental activities could take in the operation of the classification system.

5.16 The problem of declassification is a particularly intractable one. We do not think that rapid and comprehensive solutions can be expected. There is a large volume of classified paper already languishing in records systems, and the resource implications of declassifying this (for eventual public access) are correspondingly large. The general thrust of our review exercise has been towards limiting the application of classifications, and in effect making it harder to classify rather than the reverse. Where the national security criteria are involved, the task of declassification cannot be treated as the routine application of standard rules; questions of content and consequence are applicable here also. On the other hand, it would clearly create impossible pressures on senior officers with the necessary delegated authority to classify, if they were required to look at every individual piece of paper or other material and decide whether or not classifications could be down-graded or removed altogether. So a system which provides for tackling the problem in segments would seem to offer the most useful approach.

5.17 We recommend therefore that with promulgation of the directives for the use of classifications, provision be included for systematic review of all classified papers and their sequential declassification as appropriate. In recognition of the particular problems involved, and in order to spread the resources impact of the Official Information Act, we suggest that these review provisions should apply only to documents and material originating from 1976 onwards, and that declassification of the remaining bulk of classified records should be treated as part of their processing for transfer to National Archives and eventual release there for public access.

This would not however deny the possibility which exists now, and will continue to exist, for officers of the necessary seniority to look at documents in the context of specific requests for information and declassify them on the spot where it would be appropriate and helpful to make them available to an enquirer.

5.18 The departments and agencies most concerned should consider the implications of this, but our preliminary view is that the first review of classifications might take place 10 years after they are first applied. Working from a 1976 baseline, this would as an administrative measure allow time (none too long given the amount of paper involved) for those few departments concerned to develop, with appropriate consultation, methods and procedures to meet their primary obligations under the Official Information Act (i.e., to make a range of current policy information more readily available), and to prepare their records systems for a first review of classifications falling due in, say 1986.

5.19 Parallel to this, though with a longer time frame, we suggest that representatives of the small group of departments sharing the problems of declassification for large quantities of World War II and later records should get together with National Archives staff in a "task force" exercise. The aim would be to identify categories of material and subject areas, and also the best ways of physically handling the papers, so as to speed up eventual declassification and ultimate release of documents at present 5 to 25 (and more) years old. The emphasis in reviewing this group of records would be on their ultimate availability as archives. The criteria in the Official Information Act would apply.

CONDUCT WITHIN THE PUBLIC SERVICE

5.20 In the preceding paragraphs of this part of the Report we make proposals about one of the ways in which a particularly sensitive part of official information is protected - the classification system which applies to information relating to national security. As we indicate there, that particular protective system does not stand alone: underpinning it are a range of formal and informal sanctions. Moreover, other information which is not protected by the classification system but which is not to be made available is also protected by such sanctions.

5.21 The particular sanction which is the subject of the most interest and discussion is prosecution for unauthorised release of information in breach of the Official Secrets Act 1951. In fact the sanctions in the Act are very rarely invoked in any formal way. Moreover, we propose in the General Report that that Act be repealed and criminal sanctions be applied much more narrowly (paragraph 83). We spell this proposal out more fully later in this section (paragraphs 5.36-5.60) and in the draft Bill with its commentary (clauses 50-57). We make these proposals in the knowledge that other sanctions, formal and informal, are of greater practical consequence in protecting that official information which must be protected.

5.22 The additional formal sanctions include, first, disciplinary proceedings which can be taken against public servants for breach of their official duty; secondly, civil proceedings by way of injunction and for damages which can be taken to enforce obligations of confidence arising under the common law and legislation; and thirdly, criminal proceedings for the breach of statutes requiring the protection of other particular information especially of a personal kind such as census and tax returns.

5.23 The informal sanctions lie, as the Franks Committee put it, "in the fact that a civil servant who is regarded as unreliable, or who tends to overstep the mark and to talk too freely, will not enjoy such a satisfactory career as colleagues with better judgment and greater discretion. He may fail to obtain promotion, or he may be given less important and attractive jobs. The great majority of civil servants wish to perform their duties conscientiously and to enjoy successful careers. These are powerful natural incentives to proper behaviour" (paragraph 58). That statement was made in the context of a system in which disclosure was the exception. Its detail would no doubt differ in the context of the proposed reversal of presumption. But the basic idea remains. It is a very strong one.

5.24 Lying behind formal and informal systems of sanctions are the professional and ethical standards which apply within the public service. Those standards reflect in turn the appointment, training and administrative processes of the public service. It is not, of course, for us to consider those processes in any general sense. One particular aspect of the appointment process - the declaration made by new public servants - is, however, relevant for reasons which will appear. And in this report we have already made proposals, which build on the General Report (paragraphs 93-97) about information processes within the public service (Part 4 - Administration). The fact that we do not give this topic any particular attention should not be seen as indicating that we think it unimportant. On the contrary, a well recruited, trained and administered public service with a proper sense of its obligations is a much greater force for the correct application of a policy concerning official information (including its protection, when required) than any criminal and other formal sanctions.

5.25 In this section we consider the declaration which is made by public servants on their appointment to the public service, and the disciplinary provisions in the State Services Act 1962 and the Public Service Regulations 1964 so far as they relate to the disclosure of information. In the next section we review the criminal sanctions protecting particular types of information, and the offences of improper disclosure which we propose would replace the provisions of the repealed Official Secrets Act 1951.

5.26 All public servants make a declaration on taking office. It is made with some formality under the Oaths and Declarations Act 1957. It ends with the words "I make this solemn declaration conscientiously believing the same to be true", and it is taken before a Justice of the Peace, a solicitor, or an authorised officer. It contains 5 substantive paragraphs. The first is positive:

"l. That I will truly and faithfully, according to the best of my skill and knowledge, perform the duties allotted to me in connection with the Public Service."

The second, third, and fifth are negative, being concerned with the obligation not to disclose official information:

"2. That I will not, whether during my employment in the Public Service or at any time thereafter, divulge or communicate or directly or indirectly disclose any information acquired by me in the course of my duties or otherwise in my capacity as a Public Servant to any

person whomsoever, otherwise than in the discharge of my duties or except by the direction or with the permission of the Minister administering a Department to which I may be attached.

"3. That I have read the underwritten extracts from the Public Service Regulations 1964:
" '42.(2) An employee shall not use for any purpose, other than for the discharge of his official duties, information gained by or conveyed to him through his connection with the Public Service.
" '(3) No information out of the strict course of official duty shall be given directly or indirectly, or otherwise used by an employee without the express direction or permission of the Minister.
" '(4) Communications to the press or other publicity media on matters affecting any Department of the Public Service shall be made only by the employee authorised to do so."

"5. That I have read the notice on the back hereof regarding the Official Secrets Act 1951."

The fourth paragraph consists of a reminder that "a breach of the said [Public Service] Regulations is punishable by dismissal or lesser penalty". (The notice about the Official Secrets Act 1951, in addition to summarising section 6 of the Act, sets out the penalties.)

5.27 The overall emphasis of these provisions is on the non-disclosure of information. This negative emphasis could, we think, militate against the change in presumption from secrecy to openness and against the consequent changes in attitudes which we seek. We also consider that the declaration should not emphasise, in the way that it now does, just one aspect of the multifarious range of duties of the public servant. And the reference to the Official Secrets Act 1951 will no longer be appropriate.

5.28 We accordingly propose the following form of declaration:

I..... of.....Public Servant, do solemnly and sincerely declare -

"1. That I will truly and faithfully, to the best of my skill and knowledge, and according to the law of New Zealand, perform my duties as a public servant.

"2. That I have read the Code of Conduct for public servants*, including its provisions concerning obedience to instructions, the performance of duties, the use and disclosure of information, and the acceptance of gifts.

"3. That I am aware that penalties, including dismissal, are laid down for breaches of a public servant's obligations.

"And I make this solemn declaration . . .

*As set out in the Public Service Regulations 1964, Part VII."

5.29 Changes are also required in the Public Service Regulations. The first results from the broader form of the declaration. It is currently provided for in subclause (1) of the regulation concerned with the non-disclosure of information (regulation 42). That context is no longer appropriate and we propose that the following provision be set out at the beginning of the Code of Conduct in the regulations.

"27A. Declaration - (1) Every officer, probationer, or temporary employee, upon taking employment in the public service, shall be required to complete a statutory declaration, in the form set out in the First Schedule to these regulations.

(2) Any wage worker or class of wage worker may also be required by the Commission to complete a similar declaration."

5.30 The substantive provisions of regulation 42 - which deals with the disclosure of information - have been set out in paragraph 5.26 above. They are to be read with the disciplinary provisions of the State Services Act 1962 and the other provisions of the Code of Conduct. The 23 separate provisions of the Code regulate a great range of matters: hours of work, absences, care of property, authority concerning the incurring of liability and the entering into contracts, obedience to instructions and the unsatisfactory performance of duties, as well as the provision of information. Section 56(a) of the State Services Act 1962 makes it an offence against the Act for an employee to fail to comply with the requirements of the Act, or of any regulation made under it, or of any official instruction. Section 56(g) creates a specific information offence: an employee commits an offence who otherwise than in the proper discharge of his duties (except with the approval of the Minister in charge of his department) directly or indirectly discloses or for private purposes uses any information acquired by him either in the course of his duties or in his capacity as an employee of the public service. Such offences can then be dealt with under the disciplinary procedures of the Act. These can result in a caution, a fine (not exceeding $400), transfer, salary reductions, or dismissal. The imposition of these penalties is subject to appeal, a process which sometimes leads to the revocation or substantial reduction of the penalty.

5.31 What changes need to be made to these provisions in the regulations and the Act? The substantive provisions of regulation 42, in brief, require public servants to -

(1) use information obtained in their employment only for the discharge of their public duties;

(2) provide or use information out of the strict course of official duty only with "the express direction or permission of the Minister"; and

(3) make no communication with the press on matters affecting the public service unless authorised.

These provisions were written in the light of the rule that information is not to be made available without authorisation. The presumption is to be reversed: information is to be made available unless there is good reason to withhold it. As with the declaration, any public service regulations in this area must reflect that basic change. They must, for example, take account of the likelihood of greater involvement of public servants in public debate about policy options and national choices before decisions are taken. That basic change does not, of course, mean that all public servants can release whatever official information they wish. Some information must be protected. Second, only those officials who are authorised to release information may do so. Third, the appropriate official must decide, in the first instance at least, whether the information is to be released or withheld. And, fourth, officials must not make improper use of official information for their own or others' benefit. How can those matters best be reflected in the Act and regulations?

5.32 We propose that regulation 42 be amended to read as follows:

> "42. (1) An employee shall use or disclose information acquired by him as an employee in the Public Service only in accordance with his official duty.

"(2) The Permanent Head in each Department shall issue instructions concerning the release and protection of official information.

"(3) Such instructions shall determine which employees or classes of employees have authority to make decisions about the release and protection of specified categories of information."

We also propose that section 56(g) of the State Services Act be amended to provide for a disciplinary offence if a public servant "improperly uses for private purposes any information acquired by him as an employee of the Public Service". (See clause 59 of the draft Bill).

5.33 The proposed regulation 42(1) would cover both the positive and negative elements relating to information. The second clause would place emphasis on the need for appropriate levels of authority. And section 56(g) would continue to make it clear that the misuse of information for personal gain is a disciplinary offence. (The corrupt use of official information will also be a criminal offence: clause 53 of the draft Bill).

5.34 Not all those employed in the government service are subject to the above provisions. The other relevant legislation includes the -

- Public Trust Office Act 1957, section 17;
- Statistics Act 1975, section 21;
- Post Office Act 1959, sections 58, 100, 109, 118, 211 and First Schedule, Post Office Staff Regulations 1951 (SR 1951/158, regulation 80);
- Government Railways (Staff) Regulations 1953 (Reprinted: SR 1973/108, regulation 116).

Some of that legislation is designed to protect the privacy of the individual, for example the clients of the Public Trust Office and those completing census returns. But in part the legislation also has a wider cast in relation to the general affairs of the department or agency, and in the draft Bill we propose amendments which conform to the basic change in presumption (clauses 60-65 of the draft Bill).

CRIMINAL SANCTIONS

5.35 In this, the final section of this part of the report, we first review the provisions of the Official Secrets Act 1951 and related provisions of the Crimes Act 1961 and make proposals for their replacement, and we secondly consider, in a preliminary way, the many provisions contained in other statutes making the release of the particular information subject to them a criminal offence.

The Official Secrets Act 1951 and Crimes Act 1961, section 78

5.36 The equivalent and often virtually identical provisions in the criminal law of other Commonwealth countries have been the subject of lengthy critical commentaries, both official and unofficial. Almost all agree that substantial reform is called for. Together with the recent Freedom of Information Bill introduced by a private member in the United Kingdom they substantially reduce the bulk of our task. So too, in one sense, does the very wide support for the proposals set out in the General Report that the Official Secrets Act be repealed and that the

scope of the criminal sanction be drastically narrowed. The task of constructing legislation which appropriately protects the national security through the criminal law remains a difficult one.

5.37 In this section of the report we are primarily concerned with the two principal substantive provisions of the 1951 Act - section 3 defining spying and section 6 defining the wrongful communication of information - and the related espionage provision in section 78 of the Crimes Act 1961. We also consider here, and in the comments on the relevant provisions of the draft Bill, related provisions concerning the wrongful retention of documents (section 5(2)) and certain procedural provisions (sections 13, 14, 15, and 16). We first indicate why we have not proposed the retention in any form of the remaining provisions of the 1951 Act: sections 4, 5(l), and 7 - 12.

5.38 Sections 4 and 7 establish evidential presumptions heavily favouring the prosecution. So a central element of some of the offences is "a purpose prejudicial to the safety or interests of the State". The fact of communication or attempted communication with a foreign agent is evidence of such purpose and of obtaining or attempting to obtain information useful to an enemy. Furthermore, such communication with an agent is deemed to have existed, unless the defendant proves the contrary, if he has visited the address of a foreign agent or if he has the name or address or any other information regarding the foreign agent. Should all meetings with a foreign diplomat (who is suspected of having an intelligence function) be stated by statute to be evidence of the principal components of spying - a crime punishable by 14 years imprisonment - and the onus placed on the accused to prove his innocence? Basic principle says no. These provisions amount to drastic departures from the principles of the criminal law. Moreover they appear to have had little or no practical effect on juries in the Commonwealth. The recent Canadian Report accordingly proposed their repeal.[5] So do we. (We discuss later the ways in which the various elements of the offences are to be established.)

5.39 Section 5(l) creates a great variety of offences relating to the unlawful use of uniforms, forgery of official documents, impersonation and false documents. Such matters are covered in part by the Crimes Act 1961. So far as we are aware there have never been any prosecutions under these provisions, which appear to have been taken into our law from the Official Secrets Act 1920 (U.K.) without account being taken of the existing provisions of our general criminal law. The Canadian Report, in proposing the repeal of the Canadian Official Secrets Act, did not propose the retention in any form of the equivalent provisions (recommendation 27).

5.40 Section 8 appears also to have been taken directly from the 1920 United Kingdom Act without any regard being given to our general criminal law. It makes it an offence to interfere with police or persons on guard at "prohibited places". The Defence Act 1971, section 67 and Police Offences Act 1927, section 77, deal adequately with those matters. Section 77 appears as clause 22 of the Summary Offences Bill 1981.

[5]Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *First Report, Security and Information,* October 9, 1979, paragraphs 79-82.

5.41 Section 9 makes it an offence, first, to harbour those offending or about to offend against the Act and, second, not to deliver information about such a person to a police officer. The first offence is, we consider, once again adequately covered by the general criminal law: Crimes Act 1961, sections 66 and 71. The second offence is not needed because the silent harbourer will already have committed the harbouring offence - or, as we would propose, would be a party, or an accessory after the fact, to the substantive offence, and liable accordingly. Moreover, it is contrary to general principle to impose an obligation to provide information of this kind - particularly when it tends to incriminate the person providing it.

5.42 Section 10 makes attempts and various preparatory acts an offence. Once again the general law is adequate: Crimes Act 1961, section 72.

5.43 Section 11 makes it an offence not to respond to requirements from the police (usually approved by the Attorney-General) to answer questions about offences or suspected offences under the Act. This power has been only very rarely used. We consider that it should be available only in respect of the most serious of offences if at all, for it does violate the general principle referred to in paragraph 5.41 above. In the United Kingdom it is limited to the spying section. The Canadian Act has no such provision. We doubt that it is likely to be of any real effect in serious espionage cases (in which the possible offenders may well be willing to take the consequences of their silence or be immune from legal process anyway). And we note that even in the case of treason - which is more likely to be a domestic offence than is espionage - the obligation is a narrower one than that included in section 11. We have accordingly not included it in our draft Bill.

5.44 The separate power of arrest without warrant conferred by section 12 of the Act is in essence conferred by the Crimes Act 1961, sections 31, 32, 35, and 315. It need not be re-enacted as a distinct power. Section 12 in part goes beyond these provisions in particular by conferring a power to arrest persons who are about to commit an offence against the Act. This power should not be retained since an arrest should in principle always lead (or be capable of leading) to a charge. There is no equivalent power in respect of other crimes.

5.45 We now turn to the principal substantive issues presented to us by sections 3, 6, and 5(2) of the Official Secrets Act 1951 - prohibiting spying, the wrongful communication of information, and the wrongful retention of information respectively - and section 78 of the Crimes Act 1961 - prohibiting the communication of secrets.

5.46 What is the appropriate role of the criminal law in dealing with the wrongful communication of official information? In the General Report, we proposed that the Official Secrets Act 1951 be repealed. In general only information concerning important national interests in defence, security, international relations, law and order, and the economy should be so protected and then only if disclosure would seriously prejudice those interests (paragraph 83). In the draft Bill we propose four separate offences relating to the wrongful use and release of information. In the case of one of them the above list of interests is not significant: that offence is the corrupt use of official information for personal gain. It has already been referred to (paragraphs 5.32 -5.33); the relevant provision, clause 53, is the subject of a comment, and it requires no further discussion here.

5.47 The other three offences are (a) espionage, (b) wrongful communication of, and related offences concerning, national security information, and (c) the wrongful communication of other important categories of information. The differences and relationships between the offences are in part indicated by the maximum penalties: imprisonment for 14 years, 3 years, and 3 months. They are better gauged by considering the various factual and mental elements which are incorporated into such offences of wrongful communication. The possible factual elements are as follows:

(1) communication, or certain acts preparatory to communication;

(2) to a foreign state or organisation, or some other person,

(3) of information the communication of which is likely to prejudice specified interests of the State.

The mental elements turn on the possibly relevant knowledge, intention or purpose of the alleged offender:

(4) intention or knowledge as to the communication,

(5) intention or knowledge as to the recipient,

(6) knowledge of the character of the information,

(7) a purpose prejudicial to the interests of the State.

5.48 The range of offences should incorporate an appropriate mixture of the above elements and, within (3) and (7), should protect, as appropriate, the various interests of the State. We have already identified the interests which are seen as requiring the strongest protection - in part in the provisions of clause 6 in the draft Bill and in part in our proposals for security classification (paragraphs 5.06-5.11 above and also paragraphs 35-38 of the General Report). The interests of vital importance - seen also in the present section 78 of the Crimes Act 1961, in the parallel provisions in the Canadian criminal law and in related provisions in section 20(1) of the Ombudsmen Act 1975 - are security, defence, and international relations.

5.49 The two principal offences of espionage and wrongful communication (leakage) - which are proposed for inclusion in the Crimes Act to emphasise their serious character - are limited to information in that national security area. But, of course, not all information in that area should be protected by the criminal law. Indeed much of it is already made public. It should be protected only if damage to important interests is likely to result.

5.50 Espionage has very close connections with treason: indeed it might be seen as the modern form of treason. The corresponding crime should have four principal characteristics:

(1) It should, as indicated, be restricted to protecting the most important interests of the State, those going to its very existence.

(2) The information should be such that its communication will be likely to damage those interests.

(3) The offence should involve not just knowledge (which might be accompanied by indifference as to consequence) but as well a purpose prejudicial to those vital interests. The existence of such a purpose makes proof of intention and knowledge of the kind indicated above in paragraph 5.47 (4)-(6) unnecessary.

(4) The tests of danger and purpose indicate, in our judgment, that the communication need not be only to other States. As the Canadian Report says, the threat from terrorist groups can be just as serious (paragraph 30).

The four characteristics are reflected in the proposed section 78(l) of the Crimes Act 1961 (clause 52 of the draft Bill).

5.51 All but the last of these elements require further discussion. Who determines what are the national security interests of the State? Would it be possible for a defendant to argue that his purposes were of the highest order; his motive was to protect the State from the "folly" of the defence and foreign policies adopted by the Government? (The present section 78, by using the word "intention" may allow that argument.) Or would it, on the contrary, be for the Government to say "L'Etat c'est moi" and conclusively determine an element of the offence? If so, would the Government's role extend as well to deciding that the particular release is also likely to damage that specified interest? Our short answers are that neither the defendant nor the Government should have powers as broad as those suggested by the questions and that neither would, under the proposed provisions, have such powers. On the one hand, the State must be able to protect what it sees as its vital interests in the face of a broad assertion of beneficial motive by the defendant. On the other, basic principles of the criminal process require that in general the prosecution must prove its case.

(a) *The interests of the State.* The phrase suggested for inclusion in the introductory words to the proposed section 78 of the Crimes Act is "for a purpose prejudicial to the security, defence, or international relations in New Zealand". The House of Lords has authoritatively interpreted essentially the same form of words in *Chandler v. D.P.P.* [1964] A.C. 763; [1962] 3 All E.R. 142. It distinguished between the defendants' direct or immediate purpose and their indirect or long term purposes or motives. The legislation was concerned only with the former. It was not possible for the defendants to argue, and to introduce evidence to the effect, that their actions would not in the broadest sense prejudice the interests of the State and were indeed beneficial. It was for the Crown alone, through its Ministers, to determine (in the circumstances of that case) the defence policy of the State and in particular its adherence to the NATO alliance. Such matters were not matters of fact nor even matters of opinion on limited technical matters, both of which were, in the normal course, for the jury. The disposition of Britain's armed forces was a political question on which anyone might consider his own opinion as good as that of anyone else. Such an issue was not for the court or the jury in a criminal case.

(b) *"A purpose prejudicial".* The same case makes it clear that the prosecution must establish that the defendant did in fact have the relevant purpose. But, as indicated, the "purpose" is not one that extends to broader questions of motive; it relates to the specific action being taken and to the direct purpose of the defendant.

(c) *The communication is "likely to prejudice" the listed interests.* The Official Secrets Act 1951 in effect allows the Government to make this determination: in general it is only if release is authorised by

the Government that information can lawfully be communicated in terms of section 6. We are proposing the reversal of that approach. Moreover, we are proposing a drastic narrowing of the range of information protected by the criminal law in terms both of the categories of information and of the potential damage to State interests. We have already noted that the law is and should remain that the executive must in general determine the foreign, defence and security policy of the State. If it could also determine that the particular release did the requisite damage, then the executive could by its own assertions and nothing else provide the necessary evidence of the major components of the offence. (All that would remain would be the proof of purpose - in the narrow sense indicated - and of communication.) That is contrary to principle. It is for the courts and not for the executive to find the facts on which defendants are convicted of criminal offences. That is also the view of the Canadian Report (paragraph 57). But is this matter appropriate for determination by a jury in the usual way? We think not. There are two reasons against the jury deciding such questions of likelihood of prejudice in this national security context. The first is the special character of the judgment which is to be made: we recall the view of the House of Lords in the *Chandler* case. The second point concerns the probably sensitive nature of the evidence bearing on the likelihood of prejudice: there would be major problems in presenting such information to the members of the jury. These would be lessened in the case of a single judge. What, it might be said, is the difference between the determination of the interests of the State - a matter which we say is often for the Government ((a) above) - and the determination of prejudice - a matter for the judge? The mere statement of the question does, we think, provide its answer. The former determination is of general substantive policy about the pursuit of New Zealand's interests, a matter for which the Government has and takes full responsibility. The latter is concerned with the impact of release in a particular case. And overall, to repeat, is our concern that the executive should not itself have the power, in effect, to convict a defendant of a very serious criminal offence punishable by up to 14 years imprisonment.

5.52 It follows that the fact that a document is classified by the executive in accordance with the scheme which we have already outlined (paragraphs 5.09-5.15) will not determine the question of the likelihood of damage or prejudice. No doubt the judge will, as appropriate, give weight to the classification. (We say “as appropriate” for the classification may be an old one which has not been reviewed; but if it is a recent classification, past cases in the related public interest immunity area suggest that the judges will give very substantial weight to the executive's view.) No doubt the fact of classification will sometimes be of significance in proving the knowledge of the defendant as to the character of the document. But, as we said in our General Report (paragraph 88), classification does not in itself constitute sufficient ground for the application of sanctions.

5.53 The preceding paragraphs are concerned with the most serious offence in our proposals: espionage. We now come to the second: leakage

(the proposed section 78(2)(a)). The two principal differences from espionage relate (1) to one of the factual elements - the recipient - and (2) to the mental element.

(1) The communication can be to any person at all - whether within New Zealand or not. (It must still be a communication which is likely to prejudice national security interests.) It is made explicit that the communication must be shown to be without authority. (That is inherent in the espionage offence with its requirement of a prejudicial purpose.) That follows from our basic approach, which is that information should be made available unless there is good reason to the contrary: the defendant should not have to prove he was acting with authority or in conformity with his duty.

(2) So far as the mental element is concerned, *knowledge* as to communication and as to likely prejudice is required: the further element of prejudicial *purpose* is restricted to the more serious offence of espionage. The prosecution will, of course, have to produce evidence for the court of that knowledge and, as discussed in paragraph 5.51(c), evidence for the judge as to the effect of the release. Again, the fact that the relevant document had a security classification might be evidence of knowledge and of prejudicial effect, but it will not be decisive of those issues, especially not of the second.

5.54 The two other offences related to leakage are in a sense of a preparatory or precautionary kind: it would be an offence to retain certain documents without authority or to refuse to comply with directions for the return of certain documents. These provisions replace parts of section 5(2) (a) and (b) of the 1951 Act. In many situations they would be covered by disciplinary rules, by the criminal law of theft or attempts, and by civil remedies (e.g., for restitution). But there might still, for instance, be situations in which documents are held; in breach of duty, by a former public servant or documents are found by a member of the public, and in which a possible release constitutes a serious threat to a national security interest, but where no other legal remedy is available. The provisions of the proposed section 78(2)(b) and (c) are designed to deal with those situations. It will be seen that each offence is narrowly defined:

(a) the information must relate to national security and the defendant must know that,
(b) its release must be likely to prejudice those security interests,
(c) the retention or refusal to return must be without proper authority, and
(d) in the case of unlawful retention (section 78(2)(b)) the defendant must have a prejudicial purpose and in the case of unlawful refusal to return (section 78(2)(c)) he must have wilfully failed to comply with the order for return.

5.55 The final offence provision - which we propose should be included in the Police Offences Act 1927 (or its replacement, a Summary Offences Act) - is designed to protect aspects of the remaining interests set out in clause 6 of the draft Bill. The proposed crimes, described above, are limited to national security information. But clause 6 also protects the maintenance of law and order, including the investigation and detection of offences, and the substantial economic interests of New Zealand. Overseas proposals generally provide for the protection of the first set of interests by

the criminal law, and we so provide in the suggested section 21A(1)(a) i (a) (i)-(iv) of the Police Offences Act 1927: clause 57 of the draft Bill. (The existing provisions in the police and penal institutions legislation are much too narrow in their application.)

5.56 There are difficulties in defining such offences. Some situations, especially those relating to particular law enforcement activities, are clear: the intentional disclosure of the name of a police agent in circumstances which threaten his life, for instance. But in other cases, particularly those falling within the scope of subparagraph (iii), drawing the line is difficult. Some aspects of police plans - allegations that they involve illegal methods, for instance - should properly be the subject of public debate. Other aspects of police plans - for instance for dealing with major offences or with terrorism - should be protected by the criminal law. How is that line to be drawn? One way would be to introduce, on the model found in the sections defining indecent shows and criminal defamation in the Crimes Act 1961, sections 124 and 214, a defence of public good. That defence was also proposed in the latest private member's Bill in the United Kingdom. There are, however, difficulties in having courts making assessments of such broad matters. The law might not have the precision which the criminal law should have. And it might be thought that the balancing of interests is better placed in the first instance in the hands of the prosecutor and the Attorney-General (see further paragraph 5.59).

5.57 The other interest proposed for protection - the substantial economic interests of New Zealand - also presents difficulties, and not just of definition. As we indicate in the General Report, some economic matters are of the greatest importance (paragraph 37). They call for the fullest measure of protection. (In some very serious cases they would, of course, come within the scope of the national security provisions proposed for the Crimes Act.) They should not be separated from the other vital matters included in clause 6. On the other hand, the very expression “substantial economic interests” - is a vague one not appropriate, some would say, as part of the definition of a criminal offence, while being an entirely appropriate matter to be assessed and weighed in the broader context of clauses 4 to 7 of the draft Bill under the processes followed by the Ombudsmen and Information Authority. Moreover, really serious cases, as already noted, might fall within the Crimes Act provisions. It might also be noted that the United Kingdom Government resiled from the proposal of the Franks Committee that certain economic information should be separately protected by the criminal law. The private member's Bill introduced this year similarly did not include economic matters specifically.

5.58 The definition of the offences in the proposed section 21A of the Police Offences Act (clause 57 of the draft Bill) contains within itself important safeguards:
(a) the defendant must have been acting without authority;
(b) he must know that he is communicating the information;
(c) he must know or have good reason to know of its damaging potential;
(d) the question of likely prejudice is for the court to decide;
(e) if the information is publicly available no offence is committed.
Once again safeguards are to be found in the judgment of the prosecutor and the Attorney-General.

5.59 We have provided that the Attorney-General must consent to the prosecutions brought in respect of all the proposed offences. This requirement has been brought forward from the Official Secrets Act 1951, section 14. It is to be found in a number of statutes, especially perhaps in areas relating to the communication of ideas and freedom of speech. We see the requirement as an important safeguard given the competing interests and the impossibility of drawing precise lines in the definitions. It also helps ensure consistency of prosecution policy. As is well established, the Attorney-General in deciding whether to consent to a prosecution, is to take account of all relevant aspects of the public interest. The only matter that he should not weigh, it has been authoritatively stated, is the repercussion of a given decision on his personal or his party's or government's political fortunes. While the Attorney-General acts independently in these matters, he can consult whom he wishes, and, in accordance with the formula included in the parallel provisions in the Crimes Act 1961, our Bill provides that he is to undertake such inquiries as he thinks fit.

Criminal Sanctions Protecting Particular Types of Information

5.60 There is a large number of specific statutory provisions requiring that certain official information be kept confidential. Appendix 4 sets out a list of most of these. We have not examined the provisions in detail and have received little information about their operation. We do, however, record one general conclusion based on submissions and on interviews, and we make one comment. We also explain why we have not proposed any immediate or sweeping action to repeal or modify these provisions. We then go on to note the questions which such provisions raise. We have already said that the compatibility of the protection they accord with the proposed legislation should be reviewed in due course (General Report paragraph 90) that would be a task for the Information Authority (see clause 37(2)(c) of the draft Bill).

5.61 The conclusion is that no departments would require additional specific criminal sanctions in the event of the general provisions in the Official Secrets Act 1951 being drastically narrowed. (Our findings about that Act set out in paragraphs 80-83 of the General Report might be recalled here.) The comment is that we would be concerned if the narrowing of those general prohibitions led to arguments for the creation of new specific offences. That would fly in the face of the general tenor of the proposals and would not be justified by any evidence or argument presented to us. We would also be concerned if overbroad and unjustifiable prohibitions which are found not to be compatible with our overall proposals stayed on the statute book.

5.62 We do not propose the wholesale repeal or amendment of this long list of prohibitory provisions for two broad reasons: one of substance, the other of process. The substantive point is that these provisions, at least in many cases, protect interests which sometimes justify the withholding of information, e.g., the protection of law and order, individual privacy, the protection of sources, and proper commercial confidences. This will appear from a reading of the legislation and from the following paragraph. The process point is that we do not consider that a simple overall view can be adopted and implemented. As generally in the wider field of official information, so too in the narrower one of criminal sanction, judgments have to be made taking account of the basic principles of openness and of

the balance of competing factors applying in the particular area of public administration. We are certainly not in a position to make all the specific determinations called for. We are not alone in this. We note that overseas proposals and legislation in general protect existing legislation, although sometimes with some limits and sometimes with provision for review by Parliament.

5.63 The provisions set out in the list of statutory- prohibitions (appendix 4) suggest a range of questions that might be considered in the review of the existing provisions which, it is proposed, the Information Authority should carry out.

(1) Is a specific statutory prohibition or restriction needed? We note that in some quite sensitive areas-such as constitutional and citizenship matters administered by the Department of Internal Affairs or the extensive operations of the Ministry of Works and Development - there are no specific provisions making wrongful disclosure an offence. It may be that some provisions in other departmental statutes have been carried forward without specific review. By contrast, some recent statutes provide examples of carefully thought through and debated confidentiality provisions.

(2) If a specific provision is needed, must its breach be an offence? It maybe that many of the provisions in the list are not backed by criminal sanction. (Our uncertainty results principally from the uncertain application of section 107 of the Crimes Act 1961 which provides for a general criminal penalty for the breach of statutory obligations.) Such a provision has an effect of its own force on those subject to it. It may also be capable of enforcement in civil proceedings. And it has behind it the other formal and informal sanctions mentioned earlier (paragraphs 5.22-5.24). It may be useful in answering this question and that under (1) above to have regard to the parallel situation - if there is one - in the private sector. So in that sector important commercial interests are protected by contract, civil action and discipline within the firm rather than by legislation and criminal prosecution. But is discipline in that case a more real sanction than in the public sector?

(3) What is the interest to be protected? Is it a sufficiently good reason to justify the additional protection of, first, a specific statutory provision and, second, a criminal sanction? Among those interests reflected in the list are (a) the concern for a continued flow of information from regulated and licensed industries, from informers, and from those, such as taxpayers, who may be the sole source of the relevant information; (b) the protection of privacy; (c) the protection of some trade secrets; and (d) the protection of defence interests and police and prison security. In some circumstances a wide executive power to require the citizen to provide information might be justified by strict limits, enforced by the criminal law, being placed on the use to which that information can be put.

(4) Should the prohibition be subject to waiver by the executive, usually the Minister? In some circumstances (e.g., census information) the interest protected is such that the protection has to be absolute. But, as the list shows, in many cases it has been thought appropriate to allow such relaxation. If so, how should that discretion be worded? (See also (7) below).

(5) What other limits are there on the prohibition? In some cases it will be appropriate to allow the individual involved to waive the prohibition. In some cases there can be disclosure "for the purposes of the Act". Will the effect of that always be clear? Is it always clear whether information can be disclosed elsewhere *within* the public service? Does the prohibition prevent court access to the information for the purposes of matters before it? Should information which is already in the public domain be caught? Sometimes such questions will be answered clearly by the statute, in others they have been the subject of litigation. Ideally the legislation should resolve these questions.

(6) Which individuals should be subject to the prohibition and any criminal sanction? If only public servants are to be or can be so subject, the need for the legislation might be more seriously questioned: they are already subject to the controls discussed earlier. But in some cases others might be involved in unlawful disclosure and might appropriately be subject to prosecution.

(7) How precisely is the protected information defined? How is any discretion to release it worded? As overseas reports and legislation suggest, a broad prohibition accompanied by a broad discretion is undesirable. It amounts, within the particular area of administration, to a system which involves secrecy with disclosure at the absolute discretion of the organisation. Our general approach leads us to oppose this system.

(8) How should any requirements of intention and knowledge be worded?

(9) What is the appropriate penalty?

6. DRAFT OFFICIAL INFORMATION BILL
(with comments)

ANALYSIS

NOTE ON REFERENCES

In the comments on the clauses of this Bill, -

"Australian Bill" is the Freedom of Information Bill 1981, as introduced. The Bill passed by the Senate, on 12 June 1981, with changes, has still to be passed by the House of Representatives:

"Australian Senate Report" is the 1979 Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978:

"Canadian Bill" is the Access to Information Bill 1980:

"Ontario Report" is the Report, "Public Government for Private People", of the Ontario Commission on Freedom of Information and Individual Privacy/1980.

A BILL INTITULED

An Act to make official information more freely available, to give individuals proper access to official information relating to them, to protect official information to the extent required by the public interest and the need to preserve the privacy of the individual, to establish procedures for the achievement of those purposes, and to repeal the Official Secrets Act 1951

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title and commencement - (1) This Act may be cited as the Official Information Act 1981.

(2) Except as provided in subsection (3) of this section, this Act shall come into force on the 1st day of July 1982.

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

2. Interpretation - (1) In this Act, unless the contest other wise requires, -

"Authority" means the Information Authority established under section 36 of this Act:

"Department" means a Government Department named in Part I of the First Schedule to the Ombudsmen Act 1975:

COMMENT:

For drafting reasons this Bill distinguishes between a Department and the Minister responsible for the Department.

"Document" means a document in any form; and includes -

(a) Any writing on any material:

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

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

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

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

COMMENT:

This definition, which is the same as that in section 48G of the Evidence Act 1908 (as inserted by section 2 of the Evidence Amendment Act 1980) and in section IA of the Commissions of Inquiry Act 1908 (as inserted by section 2 of the Commissions of Inquiry Amendment Act 1980), is intended to be as comprehensive as possible. Comparable definitions appear in clause 4 of the Australian Bill and in clause 3 of the Canadian Bill.

"Enactment" means any provision of any Act, regulation, rules, bylaws, Order in Council, or Proclamation; or of any notice given by a Minister of the Crown:

"Official information" -

(a) Means any information held by –

(i) A Department; or

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

(iii) An organisation; but

(b) Does not include any information solely related to the competitive commercial activities of any organisation named in the First Schedule to this Act:

COMMENT:

The Bill departs from other legislation in making "information" and not documents or records the subject-matter of access. However, where the Bill does create a legal right of *access directly (see clauses 19 to 22) or through regulations made upon the recommendation of the Information Authority under clause 41, that right will often relate to documents as defined above.*

There is no definition of "information" in the Act. The Shorter Oxford Dictionary defines it in this context as "that of which one is apprised or

told", in this case the Department, organisation, or Minister; the Concise Oxford Dictionary as a "thing told, knowledge, (desired) items of knowledge".

For the purposes of the Bill information includes not merely recorded data but knowledge of a fact or state of affairs by officers of the agency in their official capacity, e.g., when a particular report is to be presented. Note however that to constitute "official information" it must be "held" by the agency, or vicariously by one of its officers or employees.

It is not contemplated that official information should include the giving by officials of their opinions or interpretations; the Bill is not intended to change existing laws, conventions, or practices in relation thereto.

Information related solely to the competitive commercial activities of any organisation named in the First Schedule to the Bill is not within the definition. (This exclusion does not apply to Departments or organisations already subject to the Ombudsmen's jurisdiction.) This exclusion, which follows in substance the Australian Bill, does not apply to cases where there is also a public interest element, e.g., unprofitable services carried on for social reasons, especially at Government direction. In the absence of this exclusion commercial information would be protected (and is still protected) by clause 7(g).

The manner in which information (whether comprised in a document or not) may be supplied is dealt with in clauses 14 and 15.

"Ombudsmen" means the Ombudsmen holding office under the Ombudsmen Act 1975:
"Organisation" means -

(a) An organisation named in Part II of the First Schedule to the Ombudsmen Act 1975:
(b) An organisation named in the First Schedule to this Act:

COMMENT:

The basis on which organisations have been included in the First Schedule to the Bill is discussed in the comment on that Schedule.

"Personal information" means any official information held about an identifiable individual:

COMMENT:

This definition of personal information relates to Part IV and clause 38 of the Bill.

"Statutory officer" means a person -

(a) Holding or performing the duties of an office established by an enactment; or
(b) Performing duties expressly conferred on him by virtue of his office by an enactment.

COMMENT:

This definition relates to subclause (3) of this clause, and the two provisions make it clear that for the purposes of the Bill officers belonging to an agency but exercising functions conferred on them by statute (and thus exempt from departmental and Ministerial control in respect of their decisions under that

statute) are part of the agency. Such officers are of two classes, reflected in paragraphs (a) and (b) - where the office itself is established by statute, and where the holder of an office not so established is given express powers by statute. Examples are Medical Officers of Health, the Registrar of Companies, the Commissioner of Patents, and Inspectors of Factories.

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

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

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

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

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

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

COMMENT:

To avoid the need to enumerate a large mass of advisory and co-ordinating committees (standing and ad hoc), boards, etc., that have no corporate existence, and the danger of overlooking some, information held by such committees, boards, etc., is deemed by this subclause to be held by the agency in respect of which they are established. Among many examples may be cited the Board of Health, the Indigenous Forest Timber Advisory Development Committee, the various law reform committees, the Oil Pollution Advisory Committee, the Public Service Classification and Grading Committees, and the Advisory Committee on Women's Affairs.

(3) Information held by -

(a) Any officer or employee of any Department or organisation in his capacity as a statutory officer; or

(b) Any independent contractor engaged by any Department or Minister of the Crown or organisation in his capacity as such contractor, -

shall, for the purposes of this Act, be deemed to be held by the Department or Minister of the Crown or organisation.

COMMENT:

See comment on the definition of "Statutory officer" in clause 2(1).

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

(a) A Court; or

(b) A tribunal with judicial functions; or

(c) A Royal Commission; or

(d) A commission of inquiry or board of inquiry constituted under any enactment.

COMMENT:
The Committee regards the question of access to information held by Courts and judicial bodies (including commissions of inquiry) and local authorities to be outside its terms of reference and it has not given any consideration to it. See also paragraph 3 of the General Report.

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

PART I

PURPOSES AND CRITERIA

4. Purposes - The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament, -

(a) To increase progressively the availability of official information to the people of New Zealand in order -
(i) To enable their more effective participation in the making and administration of laws and policies; and
(ii) To promote the accountability of Ministers of the Crown and officials, -
and thereby to enhance respect for the law and to promote the good government of New Zealand:

(b) To provide proper access by individuals to official information relating to them:

(c) To protect official information to the extent consistent with the public interest and the preservation of the privacy of the individual.

COMMENT:
See General Report, paragraphs 20 to 32 and the draft clause in Appendix 5. Subparagraph (a) (ii) does not appear in that draft; the principle of accountability does however pervade the committee's recommendations and there seemed advantage in making explicit reference to it.

5. Principle of availability - The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

COMMENT*:*
See General Report, paragraphs 20 to 55 and the draft clause in Appendix 5.
It should be noted that the reasons for withholding information (set out in clauses 6 and 7) are framed in terms of prejudice to interests protected and not in terms either of subject-matter or classes of document. Thus, for example, information relating to the defence of New Zealand is not ipso facto protected; nor are Cabinet papers. The question in these cases will be whether disclosure would prejudice the defence of New Zealand or current constitutional conventions, as the case may be.

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

(a) The security, defence, or international relations of New Zealand; or

(b) The entrusting of information to the Government of New Zealand on a basis of confidence by -

(i) The government of any other country or any agency of such a government; or

(ii) Any international organisation or agency of an international organisation; or

(c) The maintenance of law and order, including the investigation and detection of offences; or

(d) The substantial economic interests of New Zealand.

COMMENT:

See General Report, paragraphs 23 to 38 and the draft clause in Appendix 5.

7. Other reasons for withholding information - Subject to sections 6 and 16 of this Act, good reason for withholding information may exist, for the purpose of section 5 of this Act, so far as the withholding of that information is not outweighed by other considerations justifying, in the public interest, the making available of that information, if, and only if, the withholding of that information is necessary to -

COMMENT:

The form of the introductory part of this clause has in the interests of clarity been altered somewhat from that in Appendix 5 of the General Report.

Since the clause provides that the enumerated interests being protected may constitute good reason for withholding (in contrast to clause 6) it seems desirable to state the countervailing interest against which they are to be balanced.

It has also been made clear as a matter of drafting, and consonant with the General Report's recommendation, that the stated reasons are to be exhaustive. Those reasons are set out in clause 6 (conclusive reasons for withholding information), clause 7 (this clause), and clause 16 (which defines the cases in which requests for information may be refused).

(a) Protect the privacy of the individual; or

COMMENT:

See General Report, paragraph 39.
It is intended that the privacy of the individual should also encompass the privacy of officers or employees of a Department or organisation and that there should not be access to their personal files or to information about them as employees or citizens. This is of course subject to any public interest that outweighs it.

(b) Protect information properly entrusted in confidence to any Minister of the Crown or to any Department or organisation, or by or on behalf of the Crown or of any Department or organisation to any person outside the service of the Crown or of the Department or organisation; or

COMMENT:

See General Report, paragraphs 43 to 46.

In this and some other paragraphs, the general expression "the Government", which appears in the draft clause in Appendix 5 of the General Report has been replaced by more precise language.

A great deal of information is in the normal course provided on an express or implied basis of confidence. It includes the broad area of commercial and industrial secrets. If this were to be generally accessible not only would the legitimate interests of the suppliers of the information be damaged, but information might be withheld or inaccurately provided and the conduct of public affairs impaired.

(c) Avoid prejudice to measures -

(i) Protecting the health or safety of the public; or

(ii) Preventing or mitigating material loss to members of the public; or

COMMENT:

See General Report, paragraph 42.
Subparagraph (i). The protection of the public health and safety will often call for disclosure, but some measures such as immediate measures to control an epidemic or disaster may be prejudiced by disclosure.

Subparagraph (ii). The premature disclosure, for instance, of measures contemplated to rescue or deal with the affairs of a financial institution in danger of collapse could itself precipitate that collapse and cause serious loss to the very class of persons that the measures were designed to protect.

(d) Maintain the principles and conventions of the constitution for the time being including those relating to the tendering of advice; or

COMMENT:

See General Report, paragraphs 47 to 51.
This exception is stated in general language because constitutional principles and conventions are not static and because detailed enumeration might well prove inadequate, and unnecessarily restrictive for the future. In part it overlaps paragraph (e).

It should be noted that Cabinet papers are not as a class automatically protected from disclosure. See General Report, paragraph 51. Many will of course fall within one of the general rubrics in clauses 6 and 7, including in particular this paragraph and paragraph (e).

(e) Maintain the effective conduct of public affairs through -

(i) The free and frank expression of opinions by or between or to Ministers of the Crown or officers and employees of any Department or organisation in the course of their duty; or

(ii) The protection of such Ministers, officers, and employees from improper pressure or harassment; or

COMMENT:

See General Report, paragraphs 47 to 51.
"It is useful to recall that the Constitution of the United States was itself written in a closed meeting in Philadelphia, press and outsiders were excluded, and the

participants sworn to secrecy. Historians are agreed that if the convention's work had been made public contemporaneously, it is unlikely that the compromises forged in private sessions could have been achieved, or even that their state governments would have allowed the delegates to write a new constitution." A. Westin, Privacy and Freedom (1967), p. 46.

Subparagraph (i). The phrase "by or between or to" is a slight expansion of that in Appendix 5 of the General Report, without, it is thought, substantially altering its effect. Essentially the subparagraph covers internal and interdepartmental minutes, reports and recommendations, and advice by public servants to Ministers and by Ministers to Cabinet and to the Governor-General. Again, such documents are not automatically protected from disclosure. Only if disclosure is likely to inhibit the free and frank expression of opinion and thereby adversely affect the conduct of public affairs may a reason for withholding them under this head exist. Even in that case, it must be weighed against other public interests.

Subparagraph (ii). This category does not appear in Appendix 5 of the General Report. The disclosure for instance of which officer made a particular decision (where the decision is a departmental one and not personal to the officer) might in some cases enable the person aggrieved by the decision to harass that officer or his family.

(f) Protect official information that is subject to solicitor-client privilege; or

COMMENT.

See General Report, paragraph 52.

Paragraph (f) has been widened from the draft in the General Report to follow other Commonwealth legislation and proposals by clearly protecting legal advice in relation to negotiations and claims or potential claims and not merely in relation to actual legal proceedings.

Paragraph (f) also attempts to approach the area of legal advice in such a way as to distinguish between advice and opinions given in relation to actual and potential legal proceedings, contractual relations, etc., (which should normally be protected) and those of the Crown Law Office or departmental legal officers that are of a general character, including opinions and statements on departmental practices, constitutional matters, and the like. In the Committee's view such general opinions ought to be publicly available. To that extent (and to that extent only) paragraph (f) will override the provisions of the Cabinet Rules for the Conduct of Crown Legal Business 1958 (S.R. 1958/105).

(g) Enable the Crown or any Department or organisation to carry out, without prejudice or disadvantage, its commercial activities; or

COMMENT:

See General Report, paragraphs 43 to 46.

This reason for withholding information proceeds from the premise that in carrying on a commercial undertaking or trading activity a Government or public organisation is entitled to the same protection vis a vis competitors or those who deal with it as a private business enjoys. Reference may be made to the definition of the term "official information" which exempts from the Bill's application information solely related to the competitive commercial activities of those organisations listed in the First Schedule to the Bill.

(h) Enable the Crown or any Department or organisation to carry on negotiations (including commercial and industrial negotiations); or

COMMENT*:*

See General Report, paragraph 52.

A specific reference to industrial negotiations has been added. This reference does not appear in the draft in Appendix 5 of the General Report.

(i) Prevent the improper disclosure or use of official information for gain or advantage.

COMMENT:

See clause 53, which proposes to add to the Crimes Act 1961 a new crime of corrupt use of official information. A similar provision was recommended by the Australian Committee on Public Duty and Private Interest in July 1979. Not all disclosure or use of official information for advantage or gain is objectionable; much information of this character is designed to assist individuals and businesses to their advantage. It seems impossible in a succinct statement to spell out precisely the circumstances in which the exception should apply: the word "improper" in general appears adequate.

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

COMMENT:

Cf. Australian Bill, clause 24; Ontario Report, Vol. 2, p. 302.

The clause extends to all interests protected by clause 6, including information the disclosure of which might damage the country's substantial economic interests.

In this respect it goes further than the overseas proposals. An example could be information pertaining to a possible change in the basis of calculating the exchange rate; merely to refuse to supply that information, while expressly or implicitly admitting its existence, might not be sufficient to avoid serious damage to the country's basic interests.

Such a provision theoretically puts a strong weapon in the hands of Government. The committee would expect the power to be used rarely outside such areas as plans to deal with terrorists, Police sources, and certain highly delicate international negotiations.

The Bill provides in clause 27(1) for a review by the Ombudsman of a notice given under this clause or the corresponding clause 26.

9. Exclusion of public interest immunity - (1) Subject to subsection (2) of this section, the rule of law which authorises or requires the withholding of any document or paper, or the refusal to answer any question, on the ground that the disclosure of the document or paper or

the answering of the question would be injurious to the public interest shall not apply in respect of -

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

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

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

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

(a) Section 30 of this Act; or

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

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

COMMENT:

In line with the Ombudsmen Act 1975, section 20(2), this clause prevents claims of public interest immunity (formerly as Crown privilege) in proceedings under the Bill before the Ombudsmen. It applies similarly to inquiries before the Information Authority and to Court proceedings for judicial review. However, it does not give litigants before the Courts any better right to obtain the production of documents than they may otherwise have. This is necessary to avoid Court proceedings being used as an indirect means of obtaining information that is protected by clauses 6 and 7.

PART II

REQUESTS FOR ACCESS TO OFFICIAL INFORMATION

10. Requests - (1) Any person may request a Department or Minister of the Crown or organisation to make available to him any specified official information.

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

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

COMMENT:

There is no requirement that the request be in writing. Many requests for information are at present made and responded to orally, and there seems no reason to do away with a convenient informality - see Supplementary Report, paragraph 4.34.

Unlike most overseas legislation the Bill provides no specific time limits for responding to a request, and instead proposes a general requirement that there be no "undue delay". The reasons for this approach are set out in the Supplementary Report, paragraphs 4.43 to 4.48. Delay in dealing with a request may be the subject of a complaint to the Ombudsman under clause 27.

Under subclause (2) the information must be "specified with due particularity". Cf. Australian Bill, clause 14(2). It is not envisaged that individuals should have a right to conduct "fishing expeditions" in the hope or expectation that material of interest or use will turn up, or to make vague or sweeping requests for a class of information. But see the comment on clause 11.

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

(a) Wishes to make a request in accordance with section 10 of this Act; or

(b) In making a request under section 10 of this Act, has not made that request in accordance with that section; or

(c) Has not made his request to the appropriate Department or Minister of the Crown or organisation, -

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

COMMENT:

See Supplementary Report, paragraph 4.34; Australian Bill, clause 14(3)(6).

This is the complement of clause 10(2) - the agency must give reasonable help to an applicant to define his request.

12. Transfer of requests –Where -

(a) A request in accordance with section 10 of this Act is made to a Department or Minister of the Crown or organisation; and

(b) The information to which the request relates -

(i) Is not held by the Department or Minister of the Crown or organisation but is believed by the person dealing with the request to be held by another Department or Minister of the Crown or organisation; or

(ii) Is believed by the person dealing with the request to be more closely connected with the functions of another Department or Minister of the Crown or organisation, -

the Department or Minister of the Crown or organisation to which the request is made shall promptly transfer the request to the other Department or Minister of the Crown or organisation and inform the person making the request accordingly.

COMMENT:

In addition to the duty cast on it by clause 11, the agency, rather than the applicant, will have the responsibility to take reasonable steps to bring his request to the notice of the most appropriate agency. See Australian Bill, clause 15.

13. Decisions on requests - (1) Subject to this Act, the Department or Minister of the Crown or organisation to whom a request is made in accordance with section 10 of this Act shall decide, without undue delay, whether the request is to be granted and, if it is to be granted, in what manner and for what charge (if any).

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

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

COMMENT:

Note the reference to "undue delay", as to which see the comments on clause 10. The question of charges is dealt with in the Supplementary Report, paragraphs 4.52 to 4.60. Cf. Australian Bill, clause 17(1), and Canadian Bill, clause 11.

The Bill does not contain any provisions relating to third party intervention, in relation either to initial requests or to review by the Ombudsman. Cf. Australian Bill, clauses 26 and 49; Canadian Bill, clause 29. These provisions are limited to trade secrets, commercially valuable information, and the like. The need for such a provision is diminished by the fact that the Bill does not establish a legal right of access to specific information in this area. Moreover, it could be argued that a duty to consult is as important in cases involving individual privacy as it is in cases involving commercial interests.

It is known to be the Ombudsmen's practice to consult any third parties who might appear to be affected before making any recommendation, and this practice would doubtless extend to applications arising under the information legislation. Departments and organisations might also be expected to consult where appropriate. A statutory scheme however would tend to be complex and rigid and raise questions of the validity of decisions to disclose information.

14. Documents - (1) Where the information requested by any person is comprised in a document, that information may be made available -

(a) By giving the person a reasonable opportunity to inspect the document; or
(b) By providing the person with a copy of the document; or
(c) In the case of a document that is an article or thing from which sounds or visual images are capable of being reproduced, by making arrangements for the person to hear or view those sounds or visual images; or
(d) In the case of a document by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form, by providing the person with a written transcript of the words recorded or contained in the document; or
(e) By giving an excerpt or summary of the contents; or
(f) By furnishing oral information about its contents.

(2) Subject to section 15 of this Act, in deciding the form in which information is to be made available, the Department or Minister of the Crown or organisation -
(a) Shall be guided by the preference of the person requesting the information; but
(b) Shall take into account the need for efficient administration.

(3) Where information is not provided in accordance with the applicant's preference, the Department or Minister of the Crown or organisation shall give to the applicant -
(a) The reason for not providing the information in accordance with that preference; and
(b) If the applicant so requests, the grounds in support of that reason.

COMMENT:

This clause is based on a provision of the Netherlands Law on the Access to Administrative Information 1978. Cf. Australian Bill, clause 19.

The preference of the person requesting the information is to prevail unless in terms of subclause (2) there are good reasons for providing the information in another form.

In relation to access to personal information held in computer data banks the Ontario Report said:
"In the ordinary case, access to data should be granted to the subject by enabling him to see and make a copy of the records that are available to him under these provisions. It is quite conceivable, however, that the information might be stored in such a fashion that it would be incomprehensible to the individual if it were simply reproduced in the same form. This would be the case, for example, where the data is stored in machine-readable computer language. In such situations, the information should be provided in a form which is comprehensible to the applicant." (Vol. 3, pp. 708-709).

No such provision appears in the Wanganui Computer Centre Act 1976, or in the Canadian or Australian Bills, and it appears unnecessary to state it. If information was not provided in a reasonably comprehensible form (bearing in mind the subject-matter) an Ombudsman would no doubt determine that the manner of granting the request was not satisfactory: see clause 27(1)(b):

15. Deletion of information from documents - (1) Where the information requested is comprised in a document and there is good reason for withholding some of the information contained in that document, the other information in that document may be made available by making a copy of that document available with such deletions or alterations as are necessary.
(2) Where a copy of a document is made available under subsection (1) of this section, the Department or Minister of the Crown or organisation shall give to the applicant -

(a) The reason for withholding the information; and
(b) If the applicant so requests, the grounds in support of that reason:

COMMENT:

This provision is permissive because the information that may properly be withheld may form so integral or large a part of a document that its deletion would be unsatisfactory or impracticable. Under clause 14 above, what is available might in that case be disclosed orally or by way of summary. See Australian Bill; clause 21.

16. Refusal of requests - A request made in accordance with section 10 of this Act may be refused only for one or more of the following reasons, namely:

(a) That, by virtue of section 6 or section 7 of this Act, there is good reason for withholding the information:
(b) That, by virtue of section 8 of this Act, the Department or Minister of the Crown or organisation does not confirm or deny the existence of the information requested:
(c) That the making available of the information requested would –
    (i) Be contrary to the provisions of a specified enactment; or
    (ii) Constitute contempt of Court or of Parliament:
(d) That the information sought is or will soon be publicly available:
(e) That the document alleged to contain the information requested does not exist or cannot be found:
(f) That the information requested cannot be made available without substantial collation or research:

(g) That the request is frivolous or vexatious or is not made in good faith, or that the information requested is trivial:

COMMENT:

See Supplementary Report, paragraphs 4:39 to 4:41: Cf. Australian Senate Report, chapter 13.

Section 17(2) (c) of the Ombudsmen Act 1975, which authorises an Ombudsman not to investigate a complaint if the complainant has not a sufficient personal interest, does not have a counterpart in respect of requests made under clause 10. Such a power appears inappropriate where access to information is to be generally available.

The application of the Bill to "information" and not merely documents or records calls for an expansion of the grounds for refusing requests, e.g., paragraph (f) above:

The proposition in paragraph (d) is based in part on the Canadian Bill, clause 27 (publication likely within 90 days). An exception for material available for purchase is made in the Australian Bill: clause 11(1). The reason for the exception is that an agency should not have to search its records for information that already is or is about to be publicly available. It is also a protection against requests for the content of a speech not yet delivered or a press release not yet made. It is not the intention to impair the practice of imposing a "time embargo" on material.

Paragraph (f): see Supplementary Report, paragraph 4:38. Reference may also be made to the Ontario Report, Vol. 2, p. 234:

Paragraph (g) is based on provisions in the Ombudsmen Act 1975, section 17(2), and the Human Rights Commission Act 1977, section 35(1).

The Bill applies to documents and information which are in existence at the time it comes into force as well as to subsequent information. See Supplementary Report, paragraph 4.42.

17. Reason for refusal to be given - Where a request made in accordance with section 10 of this Act is refused, the Department or Minister of the Crown or organisation shall give the reason for its refusal and, if the applicant requests, the grounds in support of that reason.

COMMENT:

The reason will be in terms of clause 6, clause 7, or clause 16.

PART III

PUBLICATION OF, AND ACCESS TO, CERTAIN DOCUMENTS AND INFORMATION

18. Publication setting out functions of Departments and organisations - (1) The State Services Commission shall cause to be published, within 12 months after the commencement of this section, a publication that includes in respect of each Department and each organisation, -

(a) A description of its structure, functions, and responsibilities including those of any of its statutory officers or advisory committees; and

(b) A description of all classes of records under its control; and
(c) A description of all manuals, and similar types of documents which contain policies, principles, rules, or guidelines in accordance with which decisions are made affecting any person or body of persons in his or its personal capacity; and
(d) A statement of any information that needs to be available to members of the public who wish to obtain official information from the Department or organisation, which statement shall include particulars of the officer or officers to whom requests for official information or particular classes of information should be sent.

(2) The State Services Commission shall in the year 1984, and in each subsequent year, bring the material contained in the publication published under subsection (1) of this section up-to-date either by publishing a new edition of that publication or by publishing supplementary material.

(3) Each Department and each organisation shall assist the State Services Commission to comply with subsections (1) and (2) of this section and shall supply to the State Services Commission such information as it requires for the purposes of those subsections.

(4) In complying with subsections (1) and (2) of this section, the State Services Commission shall have regard, among other things, to the need to assist members of the public to obtain official information and to exercise effectively their rights under this Act.

(5) Where there is, under section 6 of this Act, good reason for withholding any official information, nothing in this section requires the publication of that official information or of any information relating to any such official information.

COMMENT:

This clause requires the publication of a directory setting out details of the functions of various agencies (including advisory bodies attached to them) and other information to assist the public in knowing what official information is available and where to obtain it. See General Report, paragraph 70, and Supplementary Report, paragraphs 4.06 to 4.10 and 4.13. Cf. clause 7 of the Australian Bill, to which clause 18 is similar.

The information in this directory will include information relating to organisations named in the First Schedule to the Bill as well as to Government Departments and those organisations to which the Ombudsmen Act 1975 now applies.

19. Right of access to certain official information - (1) Every person has a right to and shall, on request made under this section, be given access to -

(a) The latest edition of the publication published under section 18 of this Act and to any published supplementary material bringing that edition up-to-date.
(b) Any category of official information that is declared by regulations made under this Act to be a category of official information in respect of which a right of access exists.

(2) The giving of access to any official information to which subsection (1) (b) of this section applies shall be subject to the provisions of any regulations made under this Act.

COMMENT.

This clause formally states the right of access to the information required to be published by clause 18 and to information which regulations made on the recommendation of the Information Authority have made available as of right (see clauses 37 and 41). In addition, clauses 20, 21, and 22 each confer a right of access to certain categories of information, and such a right may exist expressly or by implication under Acts of Parliament or regulations preserved by clause 49(2).

20. Right of access to internal rules affecting decisions - (1) Subject to section 6(a) to (c) and section 7(a) and (b) of this Act, every person has a right to and shall, on request made under this section, be given access to any document (including a manual) which is held by a Department or Minister of the Crown or organisation and which contains policies, principles, rules, or guidelines in accordance with which decisions are made affecting any person or body of persons in his or its personal capacity.

(2) Sections 10(2) and (3), 11 to 13, and 17 of this Act shall apply, with all necessary modifications, to a request made under subsection (1) of this section.

(3) Where, by virtue of any of the provisions of section 6(a) to (c) or section 7 (a) or (b) of this Act, there is good reason for withholding some of the information contained in a document to which subsection (1) of this section relates, the Department or Minister of the Crown or organisation shall, unless it is impracticable to do so, either -

(a) Make a copy of that document available with such deletions or alterations as are necessary; or

(b) Provide another document stating the substance and effect of the document except as it relates to the information withheld.

COMMENT:

See General Report, paragraphs 69 and 71; Supplementary Report, paragraphs 2:02, 4:26 to 4:28. Cf. Australian Bill, clause 8; Canadian Bill, clause 22; U.S. Freedom of Information Act, section 552(a); Ontario Report, Vol. 2, pp. 253 to 260.

This clause relates to what has been called "informal administrative law" or "internal law" - the body of rules and criteria which is applied by agencies and statutory officers in making decisions affecting the rights, privileges, or liabilities of individuals. It includes the principles and guidelines in accordance with which statutory or administrative discretions are exercised.

Some of this "law", like the case law built up by Courts and judicial tribunals, is based on precedents established in the course of making decisions. Some consists of departmental interpretations on points which have not been covered by judicial decisions. Some consists of policy decisions or directions issued by Ministers or senior officials. It may be contained in manuals, circulars, or desk or other files. In short, it covers material known to and used by officers or employees in making decisions affecting individual citizens.

The premise of clause 20 is that the individual has a right to know the law that does or may affect him personally, and that this applies as much to decisions made by administrative authorities as to those of tribunals and Courts. The Committee does not consider it enough that the individual affected should know after the event the reasons for a decision (although this also is necessary and is dealt with in clause 21). He should be able to ascertain in advance the principles and rules according to which his case will be decided. As the 1968 Report of the Ontario Royal Commission of Inquiry into Civil Rights said: "it is an unjustified encroachment on the rights of the individual to be bound by an unpublished law".

After quoting this, the Ontario Freedom of Information Report went on to say:
"Two compelling reasons underlie our concern to make the internal law of government institutions available to the public. First, the use of secret internal law means that decisions concerning the rights and liabilities of individuals are influenced by standards or policies of which the individuals are completely unaware. The application of these criteria may effectively determine the outcome of a particular decision-making process.

A failure to disclose secret law to persons affected is an affront to the basic principles of fairness and due process. Second, the publicity accorded to statutes and regulations ensures that those who are responsible for the enactment of legislation may be held politically accountable for the public policy which they seek to implement. A similar process of evaluation and accountability cannot occur with respect to documents which remain hidden from public view." (Vol. 2, p: 255).

A third reason is that if the internal law is known those affected will be better able to present information and representations relating to that law. The quality of the decision should, as a result, be better.

Over the years in New Zealand many decisions of this kind have been vested in or transferred to administrative tribunals, whose case law is generally accessible in this manner. Among many examples may be cited the Deportation Review Tribunal, the Indecent Publications Tribunal, the Planning Tribunal, the Social Security Appeal Authority, and the Taxation Review Authority. However, many continue to be made within governmental agencies.

Since this clause creates a legal right of access, an individual aggrieved by an agency's refusal to provide the information may seek redress in the Courts as an alternative to complaining to an Ombudsman.

Certain inherent limitations in this clause should be noted:
(1) Documents the disclosure of which may prejudice security, defence, international relations, or the maintenance of law and order may not be made available, and account is also to be taken of the interests of individual privacy and the protection of information supplied in confidence. Subclause (3) enables the deletion of such information (e.g., identifying particulars of persons granted benefits) from documents supplied under the clause.

(2) The clause requires this type of information to be made available on request. In this respect it does not go as far as clause 8 of the Australian Bill, which requires it to be available for inspection and purchase. Moreover, under that Bill (clause 9) failure to publish a rule, guideline, or practice prevents it from being invoked adversely to an individual who is not in fact aware of it. The Ontario recommendation is to the same effect.

(3) The clause does not require rules, etc., to be devised where there are none. If, for instance, a class of administrative decisions is in fact made solely on the circumstances of each case, and no policies, rules, interpretations, or practices exist, a statement to that effect would satisfy the requirements of the clause.

(4) Nor does the clause require the reasons underlying a policy or rule to be disclosed. What it seeks to do is simply to put the individual seeking information in the same situation as the official giving the decision. If, for example, a height requirement has been established as a qualification for a certain appointment, the statement of that requirement will in that context comply with clause 20. It will not be necessary for the agency under this clause (although the more general provisions of clauses 5 to 7 will of course apply) to justify the requirement or to expound the reasons that led to it.

(5) The clause in its terms applies only to decisions affecting a person or body of persons in his or its personal capacity. The words are taken from section 13 of the Ombudsmen Act 1975. Thus the clause will not extend to decisions determining matters affecting citizens or classes of citizens at large and indirectly.

21. Right of access by individual to reasons for decisions affecting him - (1) Subject to section 6(a) to (c) of this Act, every person or body of persons affected in his or its personal capacity by a decision made by a Department or Minister of the Crown or organisation has a right to and shall, on request made within a reasonable time of the making of the decision, be given a written statement of -

(a) The findings on material issues of fact; and
(b) A reference to the information on which the findings were based; and
(c) The reasons for the decision.

(2) Sections 10(3), 11 to 13, and 17 of this Act shall apply, with all necessary modifications, to a request made under subsection (1) of this section.

COMMENT:

See General Report, paragraph 71; Supplementary Report, paragraph 4:26. Cf. Tribunals and Inquiries Act 1971 (U.K.), section 12; Administrative Appeals Tribunal Act 1975 (Australia), section 28; Administrative Decisions (Judicial Review) Act 1977 (Australia), section 13. A provision to like effect is favoured by the Public and Administrative Law Reform Committee. Twelfth Report (1978), paragraphs 45 to 51. That report also indicates the reasons for such a requirement. They are, in brief, to show to the parties how their representations have been dealt with, to enable them to judge whether they should challenge the decision by appeal or some other means, to enhance the quality of the decision, and, if appropriate, to provide guidance for later exercises of the same power.

This clause, which generally follows the Australian provisions, complements clause 20 and gives individuals a right to have on request the reasons for decisions made affecting them in their personal capacity. Like clause 20 this clause does not apply in respect of decisions on policies or public issues, and unlike that clause it applies only to the person in respect of whom the decision has been made. And in contrast to other provisions of the Bill clause 21 does not relate primarily to documents already in existence, rather it creates a duty to provide reasons in writing. For this reason it is not subject to the same qualifications as, e.g., clause 20.

Thus there appears no need for a privacy restriction. Apart from express Acts of Parliament and regulations preserved by the savings clause (clause 49), the only grounds on which reasons may be withheld are that their disclosure would be likely to prejudice security, defence, or international relations or the maintenance of law and order. The Committee considers that such cases would be extremely rare. There are express provisions in the New Zealand Security Intelligence Service Act 1969 relating to certain security cases.

PART IV

RIGHT OF ACCESS TO PERSONAL INFORMATION

GENERAL NOTE:

The Committee's General Report, paragraphs 28 to 32 and 71, recommended that legislation should give an individual the legal right (with only necessary exceptions) to know what information is held by an agency relating to him and to seek correction of information he considers to be incorrect or misleading.

Such a right exists in Canada (Human Rights Act 1977, Part IV) and is continued in the Privacy Bill, introduced in 1980 at the same time as the Access to Information Bill. Its creation was recommended by the Australian Senate Committee (paragraphs 24:17 and 24:18). The Australian Bill did not provide for it but under clause 36(2) of that Bill the privacy exception does not apply to documents containing material relating only to the person requesting it, with certain qualifications relating to material of a medical or psychiatric nature. In New Zealand, the Wanganui Computer Centre Act 1976 provides a precedent.

This is an instance, in addition to those in Part III (clauses 19 to 21), where access will, subject to the statutory exceptions, be a legal right. A decision denying access or declining to make a correction would therefore be subject to review by the Courts. In addition to legal proceedings, however, the Bill (clause 34) recognises and extends the Ombudsmen's jurisdiction to investigate and make recommendations on a complaint of non-compliance. The special procedure following an investigation where such a complaint is upheld is set out in clause 34. It is inappropriate that an Ombudsman should be able to make what is in effect a binding recommendation on a question of legal right, or that such a recommendation could be vetoed by a Minister.

22. Right of access to personal information – (1) Subject to this Part of this Act and to section 49 of this Act, every individual has a right to and shall, on request, be given access to any personal information which -

(a) Is about him; and

(b) Is held in such a way that it can readily be retrieved or located.

(2) Sections 10(3), 11 to 15, and 17 of this Act shall apply, with all necessary modifications, to a request made under subsection (1) of this section.

(3) Nothing in this section shall require, or impose any responsibility on, any Department or Minister of the Crown or organisation to compile files or data banks of personal information.

COMMENT:

To give rise to a right of access the information concerning an individual must be held so as to be readily retrieved or located. It is not intended that, for instance, the provisions should apply to incidental references to an individual contained in a general file.

This approach follows that of the Ontario Report, which suggests that the record must be able to be located with reasonable diligence. The United States legislation requires that it be systematically stored; and the Canadian Privacy Bill 1980 following the Human Rights Act 1977 (Canada) also requires that the personal information in order to attract a right of access must be used for administrative purposes.

It will not be necessary that the individual should know or identify the particular information; one purpose of the provision is to enable him to ascertain whether any information is held and, if so, what.

Subclause (3) makes it clear that the provision should not be interpreted so as to require or impose any responsibility on an agency for the compilation of dossiers on individuals.

Powers to examine aspects of the collection and holding of personal information by Government agencies are conferred on the Information Authority by clause 38.

23. Precautions - (1) Where a request is made under section 22(l) of this Act, the Department or Minister of the Crown or organisation –

(a) Shall not give access to that information unless it or he is satisfied concerning the identity of the individual; and

(b) Shall ensure, by the adoption of appropriate procedures, that any information intended for an individual is received only by that individual in person.

(2) Regulations prescribing or providing for procedures to give effect to subsection (1) of this section may be made under section 45 of this Act only on the recommendation of the Information Authority.

COMMENT:

This follows the concept of the Wanganui Computer Centre Act 1976 provisions.

Regulations may well be required to provide consistent and detailed safeguards. Power to make such regulations is contained in clause 45, and subclause (2) makes it clear that they are to be made only on the recommendation of the Information Authority.

To minimise the danger that the right of access will be misused by others no provision is made for information to be given to an agent, e.g., a relative or a solicitor.

24. Correction of information - Every individual who is given access under section 22(l) of this Act to personal information may, by letter addressed to the Department or Minister of the Crown or organisation, -

(a) Request correction of the personal information where he believes that the information -

(i) Is inaccurate; or

(ii) Is incomplete and gives a misleading impression; and

(b) Require that a notation be attached to the information reflecting any correction requested but not made.

COMMENT:

An essential corollary of a right to know what information is held about oneself is a right to have inaccurate information corrected. However, as the Ontario Report points out (Vol. 3, p. 709), a right of correction cannot be absolute. An agency cannot be expected to alter its information just on the assertion of an individual, and it may be impracticable to make the investigation required to obtain the true facts. In that case, it should be sufficient to note on the record the individual's challenge to its correctness. This is the approach of the Canadian legislation, and the Senate has added comparable provisions to the Australian Bill

The US legislation provides for correction on the ground that the information is "not accurate, relevant, timely or complete". However, under the Canadian Privacy Bill 1980, clause 12(2), the right applies only where there is an "error or omission", and

the Australian Senate Report would restrict it to cases where the information is inaccurate, or is incomplete and would give a misleading impression. The draft Bill so provides:

25. Reasons for refusal of requests for personal information - A Department or Minister of the Crown or organisation may refuse to disclose any personal information requested under section 22(1) of this Act if, and only if, -

(a) The disclosure of that information would be likely to prejudice any of the interests protected by paragraphs (a) to (c) of section 6 of this Act; or

(b) The disclosure of that information would involve the unwarranted disclosure of the affairs of another individual; or

(c) The disclosure of that information or of information identifying the person who supplied it, being evaluative or opinion material compiled solely for the purpose of determining the suitability, eligibility, or qualifications of the individual for employment or for appointment to office or for the awarding of contracts, awards, scholarships, honours, or other benefits, would breach an express or implied promise -
    (i) Which was made to the person who supplied the information; and
    (ii) Which was to the effect that the information or the identity of that person or both would be held in confidence; or

(d) The disclosure of that information (being information that relates to the physical or mental health of the individual who requested it) would be likely to prejudice the physical or mental health of that individual; or

(e) The disclosure of that information (being information in respect of a person who has been convicted of an offence or is or has been detained in custody) would be likely to -
    (i) Prejudice the safe custody or the rehabilitation of that person; or
    (ii) Endanger the safety of any person; or

(f) The disclosure of that information would be likely to prejudice the maintenance of the principles and conventions of the constitution for the time being including those relating to the tendering of advice; or

(g) The information is subject to solicitor-client privilege; or

(h) The request is frivolous or vexatious or is not made in good faith, or the information requested is trivial.

COMMENT:

Grounds on which access to personal information may be refused are set out in the Canadian Human Rights Act 1977 and in revised form in clauses 18 to 29 of the Canadian Privacy Bill 1980. The Ontario Report also discusses them at Volume 3, pages 714 to 718 and in a summary at pages 721 to 722.

The Australian Senate Report (paragraph 24:17) would equate the exceptions to the right of personal access with those pertaining to access to information generally. The Bill broadly follows the categories of the Ontario Report. It does not, however, specifically exclude research and statistical records. Their inclusion in Ontario results

from the recommendation that records to which access is to be given should be limited to those used for "administrative purposes". The effect of this is unclear, and it could create uncertainty.

The grounds in this clause for declining access to personal information that are not also specific grounds for declining access to information generally are:

1. The protection of confidential references and similar personal evaluations. But see clause 7(b).
2. The protection of medical information the disclosure of which would not be in the interests of the health of the person seeking it. But see clause 7(a).
3. The protection of interests of safe custody of offenders and their rehabilitation, and the safety of others. But see clause 6(c).
Paragraph (h). For the reasons stated in the Supplementary Report, paragraph 4.38(2), it seems desirable to allow a request for personal information to be declined in these cases. An identical exception is made in section 17(2) (a) and (b) of the Ombudsmen Act 1975.

26. Information concerning existence of certain personal information - Where a request under section 20(1) of this Act relates to information to which section 6 of this Act applies, or would, if it existed, apply, the Department or Minister of the Crown or organisation dealing with the request may, if it or he is satisfied that the interest protected by that section would be likely to be prejudiced by the disclosure of the existence of such information, give notice in writing to the applicant that it or he neither confirms nor denies the existence of that information.

COMMENT:
Reference should be made to the comment on clause 8.

PART V

REVIEW OF DECISIONS

Decisions Under Part II, and sections 8 and 26, of this Act

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

(a) Refuses to make official information available to any person in response to a request made by that person in accordance with section 10 of this Act; or
(b) Decides, in accordance with section 14 or section 15 of this Act, in what manner or, in accordance with section 13 of this Act, for what charge a request made in accordance with section 10 of this Act is to be granted; or
(c) Gives a notice under section 8 or section 26 of this Act.

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

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

COMMENT:

Under the Bill, the power of the Ombudsmen to review decisions not to give access is central. It will extend not only to refusal on the substantive grounds set out in clauses 6 and 7 and on the "procedural" grounds set out in clause 16, but to complaints of undue delay or of the manner in which the request is met (see clauses 14 and 15) or the amount of any charge imposed (see clause 13). There will also be a right of review where a notice is given under clause 8 or clause 26 declining to confirm or deny the existence of the information.

An Ombudsman will not have a right to investigate of his own motion: subclause (2).

One important difference between an Ombudsman's jurisdiction under the Bill and under the Ombudsmen Act is that the Bill enables him to review decisions of Ministers of the Crown: see General Report, paragraph 100. Both the Australian and the Canadian Bills subject Ministerial decisions to their review procedures.

The Ombudsmen's jurisdiction under the Bill will also extend to the quasi-governmental organisations named in the First Schedule to the Bill.

28. Application of Ombudsmen Act 1975 - (1) Except as otherwise provided by this Act, the provisions of the Ombudsmen Act 1975 shall apply in respect of investigations and other proceedings carried out under this Part of this Act in respect of decisions under Part II or section 8 or section 26 of this Act as if they were investigations carried out under the Ombudsmen Act 1975.

(2) Nothing in section 25 of the Ombudsmen Act 1975 shall apply in respect of any proceeding or decision of an Ombudsman under this Part of this Act in respect of decisions under Part 11 or section 8 or section 26 of this Act.

COMMENT:

The ordinary procedure of the Ombudsmen on complaints made to them will apply to complaints of refusal of information except where the Bill makes special provision.

Section 25 of the Ombudsmen Act 1975 excludes the review of any proceedings of an Ombudsman by the Court except on grounds of lack of jurisdiction. Subclause (2) of this clause excludes that provision for cases under the Bill. Privative clauses of this nature are not now normally used in legislation in New Zealand. Proceedings of the Ombudsmen under this Part of the Bill would appear to be the exercise of a statutory power in terms of the Judicature Amendment Act 1972, and thus subject to judicial review for lack of jurisdiction or procedural error.

29. Procedure after investigation - (1) Where, after making an investigation of a complaint made under section 27 of this Act, an Ombudsman is of the opinion -

(a) That the request made in accordance with section 10 of this Act should not have been refused; or

(b) That the decision complained of is unreasonable or wrong or is otherwise a decision to which subsection (1) or subsection (2) of section 22 of the Ombudsmen Act 1975 applies, -

the Ombudsman shall, subject to subsection (3) of this section, -

(c) Report his opinion and his reasons therefor to the appropriate Department or Minister of the Crown or organisation; and

(d) Subject to section 30 of this Act, make such recommendations as he thinks fit; and

(e) Give to the complainant -
  (i) A copy of his recommendations (if any); and
  (ii) Such other information as he thinks proper.

(2) The Ombudsman shall also -

(a) In the case of an investigation relating to a Department or organisation named in Part I or Part II of the First Schedule to the Ombudsmen Act 1975, send a copy of his report and recommendations to the Minister concerned; and

(b) In the case of an organisation named in the First Schedule to this Act, send a copy of his report and recommendations to the Prime Minister.

(3) Notwithstanding anything in this section, an Ombudsman shall not, in any report made under this section, make any comment that is adverse to any person unless the person has been given an opportunity to be heard.

(4) Except as provided in subsection (1) of this section, nothing in section 22 of the Ombudsmen Act 1975 shall apply in respect of a decision that may be investigated and reviewed under section 27(1) of this Act.

Cf. Ombudsmen Act 1975, s.22

30. Disclosure of certain information not to be recommended - Where the Attorney-General certifies that the making available of any information would be likely to prejudice -

(a) The security, defence, or international relations of New Zealand; or

(b) The investigation or detection of offences -

an Ombudsman shall not recommend that the information be made available, but may recommend that the making available of the information be given further consideration by the appropriate Department or Minister of the Crown or organisation.

COMMENT:

Cf. Ombudsmen Act 1975, s. 20(1). Objections have been raised overseas to making an executive certificate conclusive in such cases, see for example the Australian Senate Report, paragraphs 5.10 to 5.15 and 16.36 and 16.37; but the provision to analogous effect in the Ombudsmen Act does not seem to have been criticised. It should be noted that the provision applies to a narrow range of cases.

The Bill provides that where a certificate is given that disclosure would be likely to prejudice security, defence, or international relations of New Zealand or the investigation of detection of offences, but not in other cases, the Ombudsmen may not recommend that the information be made available, but he may recommend reconsideration of the matter by the Minister or agency.

This provision is in addition to section 20(1) of the Ombudsmen Act, which is applied by clause 28. That provision, which is not known to have been invoked since the first Ombudsman legislation was passed in 1962, would have the effect of stopping any inquiry by an Ombudsman at the threshold.

However, on questions of access to information there might be a potential for its greater use in the absence of this clause, which gives an opportunity in the cases to which it applies for the executive, protecting national security or law-and-order interests, to intervene at a later stage. The Ombudsman may in such cases complete his investigation, and if he thinks justified request reconsideration by the Minister or agency concerned.

31. Recommendations made to Department or Minister of the Crown or organisation –

(1) Where a recommendation is made under section 29(l) of this Act to a Department or to an organisation named in Part I or Part II of the First Schedule to the Ombudsmen Act 1975, -

(a) A public duty to observe that recommendation shall be imposed on that Department or organisation from the commencement of the twenty-second day after the day on which that recommendation is made to the Department or organisation, unless, before that day, the Minister responsible for that Department or organisation otherwise directs in writing; and

(b) The public duty imposed by paragraph (a) of this subsection shall be imposed not only on the Department or organisation itself but also on -

(i) Every officer and employee of that Department or organisation to whom that recommendation is applicable; and

(ii) Every body within that Department or organisation to whom that recommendation is applicable; and

(iii) Every statutory officer to whom that recommendation is applicable.

(2) Where a recommendation is made under section 29(l) of this Act to a Minister of the Crown, a public duty to observe that recommendation shall be imposed on that Minister on the twenty-second day after the day on which that recommendation is made to that Minister unless, before that day, that Minister otherwise decides and records that decision in writing.

(3) Where a recommendation is made under section 29(1) of this Act to an organisation named in the First Schedule to this Act, -

(a) A public duty to observe that recommendation shall be imposed on that organisation on the twenty-second day after the day on which that recommendation is made to that organisation unless, before that day, the Prime Minister otherwise directs in writing; and

(b) The public duty imposed by paragraph (a) of this subsection shall be imposed not only on the organisation itself but also on –

(i) Its governing body (if any); and

(ii) Every officer, employee, and body within that organisation to whom that recommendation is applicable; and

(iii) Every statutory officer to whom that recommendation is applicable.

(4) As soon as practicable after a direction is given or a decision is made under any of the provisions of subsections (1) to (3) of this section, the Minister giving that direction or making that decision shall give to the Ombudsman who made the recommendation, and publish in the *Gazette* and lay before Parliament, -

(a) A copy of the direction or decision; and

(b) The grounds for the direction or decision; and

(c) Except where the direction is given or the decision is made on the grounds of the security of New Zealand, the source and purport of any advice on which the direction or decision is based.

COMMENT:

This clause is of major importance to the scheme proposed by the Committee.

It gives an Ombudsman's recommendation binding force after 21 days from the time it is made unless the Minister or, in the case of an organisation listed in the First

Schedule to the Bill, the Prime Minister gives a direction to the contrary within that period - see Supplementary Report, paragraph 2.14.

The public notice of the Minister's decision must give the ground and, except in security cases, the source and purport of any advice on which it was based.

There is a precedent in section 27(5B) of the Wanganui Computer Centre Act 1976 as inserted in 1980.

The clause creates a "public duty" to observe a recommendation. Such a duty is enforceable by a declaration or an order of mandamus (which may be sought on an application for judicial review) against a Minister, officer, or organisation. Mandamus does not lie against the Crown itself.

The location of what the Supplementary Report refers to as the power of veto is in the case of organisations listed in the First Schedule to the Bill a matter of difficulty. On the one hand these organisations are in greater or lesser degree autonomous of the Government. On the other hand the argument against vesting a final power of decision in the Courts or the Ombudsmen has been that the Executive is accountable to and through Parliament (see Supplementary Report, paragraph 2.04 et seq.) and that the elected Executive, subject to law, should be the ultimate judge of what the public interest requires in this area. These arguments are not valid where organisations are not directly subject to Ministerial control. Moreover, such organisations might not be responsive to the same political constraints as Departments against departing from an Ombudsman's recommendation except in the most extraordinary cases.

On balance, the Bill accordingly provides that any veto must be by the Executive Government and by the Prime Minister as the political head of the Executive.

32. Complainant to be informed of result of investigation - The Ombudsman who investigates a complaint made for the purposes of section 27(2) of this Act shall inform the complainant, in such manner and at such time as he thinks proper, of the result of the investigation.

33. Restriction on application for review - (1) This section applies in respect of every decision by which a Department or Minister of the Crown or organisation refuses to make official information available to any person in response to a request; made under section 10(1) of this Act.

(2) No application under section 4(1) of the Judicature Amendment Act 1972 for the review of any decision to which this section applies shall be made unless a complaint by the person whose request was refused has first been determined under this Part of this Act in respect of that decision.

(3) No proceedings in which a decision to which this section applies is sought to be challenged, quashed, or called in question in any Court shall be commenced unless a complaint by the person whose request was refused has first been determined under this Part of this Act in respect of that decision.

COMMENT:

See Supplementary Report, paragraphs 2.20 to 2.23.
The object of the clause is to require a person who is refused access to information on a request under clause 10 to exercise his right of complaint to the Ombudsmen before applying to the Court for review. This will not apply to decisions under Parts III or IV of the Bill, where the applicant alleges that he has a legal right to particular information. In that case, his right to complain to the Ombudsmen is in addition to his ordinary right to seek legal redress. See also comment on clauses 28 and 34.

Decisions Under Part III or Part IV of this Act

34. Application of Ombudsmen Act 1975 - (1) It shall be a function of the Ombudsmen to investigate, pursuant to the Ombudsmen Act 1975, any decision made under Part III or Part IV (except section 26) of this Act (including any such decision made by a Minister of the Crown or by an organisation named in the First Schedule to this Act).

(2) Where the Ombudsman, after making his investigation, forms an opinion of the kind described in subsection (1) or subsection (2) or subsection (3) of section 22 of the Ombudsmen Act 1975, he shall, subject to subsection (6) of this section, report his opinion to the appropriate Department or Minister of the Crown or organisation, and may make such recommendations as he thinks fit in accordance with section 22(3) of the Ombudsmen Act 1975.

(3) Where a report is made under subsection (2) of this section to a Minister of the Crown, the Ombudsman shall request the Minister of the Crown to notify the Ombudsman, within a specified time, of the steps (if any) that the Minister proposes to take to give effect to the Ombudsman's recommendations.

(4) If, within a reasonable time after the report is made under section 22(3) of the Ombudsmen Act 1975 (as applied by subsection (2) of this section), no action is taken which seems to an Ombudsman to be adequate and appropriate, the Ombudsman, in his discretion, after considering the comments (if any) made by or on behalf of any Department or Minister of the Crown or organisation affected, may send a copy of the report and recommendations to the Prime Minister, and may thereafter make such report to Parliament on the matter as he thinks fit.

(5) The Ombudsman shall attach to every report sent or made under subsection (4) of this section a copy of any comments made by or on behalf of the Department or Minister of the Crown or organisation affected.

(6) Notwithstanding anything in this section, an Ombudsman shall not, in any report made under this section, make any comment that is adverse to any person unless the person has first been given an opportunity to be heard.

COMMENT:

This clause lays down a special procedure for cases where the complainant alleges that he has been denied information to which he is entitled as of right. In such a case the Committee considers that he should be able to seek a review by the Ombudsman as an alternative to Court proceedings. However, the procedure adopted, in clause 31, whereby an Ombudsman's recommendation is to create a public duty to observe it subject to a direction by a Minister or the Prime Minister, is inappropriate where the issue is the existence or otherwise of a legal right. The Ombudsman's recommendation in such a case amounts to an interpretation of the law and as such it should neither be binding nor subject to Ministerial veto. The clause therefore requires the Minister to advise the Ombudsman within a specified time whether he is prepared to accept the Ombudsman's recommendation. If he is not, the issue can be resolved only by Court proceedings brought by the person seeking the information.

Saving

35. Saving in respect of Ombudsmen Act 1975 - Except as expressly provided in this Act, nothing in this Act shall derogate from or limit the functions of the Ombudsmen under the Ombudsmen Act 1975.

COMMENT:

The purpose of this clause is to make it quite clear that the integrity and jurisdiction of the Office of the Ombudsmen under the Ombudsmen Act 1975 are not affected or restricted in any way except so far as the provisions of that Act are expressly departed from in the Bill.

PART VI

INFORMATION AUTHORITY

36. Establishment of Information Authority - (1) There is hereby established an authority to be called the Information Authority.

(2) The Authority shall be a body corporate with perpetual succession and a common seal, and shall be capable of acquiring, holding, and disposing of real and personal property, of suing and being sued, and of doing and suffering all such acts and things as bodies corporate may do and suffer.

COMMENT:

See General Report, paragraphs 107 to 116; Supplementary Report, Part 3. Many of the detailed provisions of this Part of the Bill and of the Second Schedule are in line with those of other legislation setting up independent regulatory bodies, e.g., the Securities Commission, and do not appear to call for special comment.

37. Functions and powers of Authority - (1) The principal functions of the Authority shall be -

(a) To define and review categories of official information with a view to enlarging the categories of official information to which access is given as a matter of right.

(b) To recommend the making of regulations prescribing -

(i) Categories of official information to which access is given as a matter of right; and

(ii) Such conditions (if any) as it considers appropriate in relation to the giving of access to any category of official information.

(2) The Authority shall also have the following functions:

(a) To keep under review the working of this Act and the manner in which -

(i) Access is being given to official information; and

(ii) Official information is being supplied.

(b) To recommend to any Department or Minister of the Crown or organisation that that Department or Minister of the Crown or organisation make changes in the manner in which it or he gives access to, or supplies, official information or any category of official information.

(c) To review the protection accorded to official information by any Act with a view to seeing whether that protection is both reasonable and compatible with the purposes of this Act.

(d) To receive and invite representations from members of the public, and from Ministers of the Crown, Departments, and organisations, in relation to any matter affecting access to or the supply of official information.

(e) At the request of the Minister of justice, to inquire generally into and report on any matter, including any enactment or law, or any practice or procedure, affecting access to or the supply or presentation of official information.

(3) The Authority shall also have such other functions as are conferred on it by this Act or by any other enactment.

(4) The Authority shall have all such powers as are reasonably necessary or expedient to enable it to carry out its functions including power

(a) To take account of the relevant experience of the Ombudsmen and the State Services Commission.

(b) To consult with and to receive reports from Departments and organisations on the problems encountered by Departments and organisations in the administration of this Act.

(c) To publish information relating to the access to or the supply of official information.

(5) The provisions of the Second Schedule to this Act shall have effect in relation to the Authority and its proceedings.

(6) This section shall not empower the Authority to investigate a complaint by any person that he has been refused access to official information but the fact that a person has made such a complaint shall not limit or affect the power of the Authority to carry out the kind of inquiry permitted under this section or section 38 of this Act.

(7) Nothing in this section shall authorise the Authority to inquire into the operation of the Wanganui Computer Centre Act 1976 or of the Computer Centre established under section 3 of that Act.

COMMENT:

This clause and the following clause set out the Information Authority's functions and powers. Cf. General Report, p.7 and paragraphs 89 and 90; Supplementary Report, paragraph 3.03. The Authority's central function is to review categories of information and to recommend the making of regulations enlarging the information that is available as a legal right.

There is no specific provision in this clause authorising the Information Authority to examine the question of the presentation of information by the news media (General Report, p.7), but such an examination could be made under clause 37(2)(e) at the request of the Minister of Justice. This is not to say that the Authority could not make general comments on this topic in its reports to Parliament.

Subclause (6) makes it clear that it is not within the Authority's scope to investigate individual complaints. This will be the Ombudsmen's function. However, the Authority may look into a matter generally even though a particular complaint within that field has been made to the Ombudsmen.

38. Functions in respect of personal information - The Authority shall have the following functions in respect of personal information -

(a) To keep under review, and make recommendations on -

(i) The means and procedures by which individuals may find out what personal information relating to them is held by any Department or Minister of the Crown or organisation; and

(ii) The steps to be taken both by an individual and by a Department or Minister of the Crown or organisation where personal information relating to that individual and held by that Department or Minister of the Crown or organisation is believed by the individual to be incorrect.

(b) At the request of any Minister of the Crown, to examine any existing or proposed powers of a Department or Minister of the Crown or organisation to require individuals to supply information about themselves or any other person and to express its view on whether those powers are fair and reasonable.

(c) To inquire whether personal information held by any Department or Minister of the Crown or organisation is being used for purposes other than those for which it was acquired and, if it considers that any such information is being so used, to express its view on whether such use of the information is proper.

(d) To recommend means and procedures to prevent the improper use of the personal information held by any Department or Minister of the Crown or organisation.

39. Membership of Authority - (1) The Authority shall consist of 3 members, of whom -

(a) At least one shall be a person having an understanding of the requirements of the communications media; and

(b) At least one shall be a person having an understanding of the principles and processes of government and administration in New Zealand.

(2) Subject to clause 1 of the Second Schedule to this Act, every member shall be appointed by the Governor-General on the recommendation of the House of Representatives, and one member shall be so appointed as Chairman of the Authority.

COMMENT:

Subclause (1) tentatively provides for a body of three members. There is no requirement that the chairman or any member should have legal qualifications. See Supplementary Report, paragraph 3.11. Cf. General Report, paragraph 108. The Committee has recommended that the Authority should be an independent body responsible to Parliament, and the method of appointment prescribed for the Ombudsmen and the Wanganui Computer Centre Privacy Commissioner is accordingly followed in subclause (2).

40. Term of office of members of Authority - (1) Subject to the succeeding provisions of this section, every member of the Authority shall hold office for a term of 3 years, but may from time to time be reappointed.

(2) Any member of the Authority may resign his office at any time by written notice given to the Speaker of the House of Representatives, or to the Prime Minister if there is no Speaker or the Speaker is absent from New Zealand.

(3) Any member of the Authority may be removed from office at any time by the Governor-General upon an address from the House of Representatives for disability, bankruptcy, neglect of duty, or misconduct.

(4) Every member of the Authority, unless he sooner vacates his office under subsection (2) or subsection (3) of this section, shall continue in office until his successor comes into office.

(5) Notwithstanding that the term of office of a member of the Authority has expired or that a member of the Authority has resigned his office, he shall be deemed to continue to be a member of the Authority for the purposes of completing any inquiry, application, or matter in which he took part and which was commenced before the expiration of his term of office or before his resignation took effect, as the case may be.

(6) The functions and powers of the Authority shall not be affected by any vacancy in its membership.

COMMENT:

The provisions relating to *resignation and removal from office follow those of sections 6 to 8 of the Wanganui Computer Centre Act 1976 relating to the Privacy Commissioner.*

41. Regulations providing for access to information - (1) The Governor-General may from time to time, by Order in Council, make, in accordance with the recommendation of the Authority, regulations prescribing –

(a) Categories of official information to which access is given as a matter of right.

(b) Conditions in relation to the giving of access to any category of official information.

(2) Before making any recommendation for the purposes of subsection (1) of this section, the Authority shall -

(a) Do everything reasonably possible on its part to advise all persons, who in its opinion will be affected by any regulations made in accordance with the recommendation, of the proposed terms thereof and the reasons therefor; and give such persons a reasonable opportunity to make submissions thereon to the Authority; and

(b) Give notice in the *Gazette,* not less than 14 days before making the recommendation, of its intention to make the recommendation and state briefly in the notice the matters to which the recommendation relates; and

(c) Make copies of the recommendation available for inspection by any person who so requests before any regulations are made in accordance therewith.

(3) Failure to comply with subsection (2) of this section shall in no way affect the validity of any regulations made under this section.

(4) Regulations made under this section shall not narrow the categories of information that may be disclosed in accordance with provisions of this Act.

COMMENT:

See Supplementary Report, paragraphs 3.13 to 3.17 and General Report, paragraphs 110 to 112; cf. Securities Act 1978, section 70. Note in particular subclause (4) - regulations may, enlarge but not abridge access.

42. Annual report - (1) Without limiting the right of the Authority to report at any other time, but subject to subsection (2) of this section, the Authority shall in each year make a report to Parliament on the exercise of the Authority's functions under this Act.

(2) Nothing in subsection (1) of this section affects –
(a) Section 29(3) or section 34(6) of this Act; or
(b) Section 22(7) of the Ombudsmen Act 1975.

43. Offences - Every person commits an offence and is liable on summary conviction to a fine not exceeding $1,000 who -

(a) Having been summoned to appear before the Authority for the purposes of any matter, without sufficient cause refuses or wilfully neglects to appear before the Authority in pursuance of the summons, or to take an oath or make an affirmation as a witness, or to answer any question put to him concerning the matter, or to produce to the Authority any book or paper that he is required to produce; or
(b) Deceives or attempts to deceive or knowingly misleads the Authority on any evidence given or otherwise proffered to it, or
(c) Without sufficient cause, refuses or wilfully neglects to furnish to the Authority or to any person authorised in that behalf by the Authority, any information or particulars that he is required to furnish, or to produce to the Authority or to any such person, any document or thing that he is required to produce; or
(d) Wilfully makes any false statement to or misleads or attempts to mislead the Authority or any other person in the exercise of its or his powers under this Part of this Act; or
(e) Wilfully acts in contravention of an order made under clause 3(9) of the Second Schedule to this Act.

PART VII

MISCELLANEOUS PROVISIONS

44. Assistance of State Services Commission - The State Services Commission may, for the purpose of assisting any Department or organisation to act in accordance with this Act, furnish advice or assistance or both to the Department or organisation.

Cf. State Services Act 1962, s. 11

45. Regulations - The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes -

(a) Prescribing the procedure to be followed under this Act in respect of applications to and proceedings before the Authority:
(b) Prescribing forms of applications and other documents required for the purposes of this Act, or authorising any person to prescribe or approve such forms:
(c) Providing the procedure for the service of notices and documents under this Act:
(d) Prescribing charges or scales of charges for the purposes of this Act:
(e) Providing for such matters as are contemplated by or necessary for giving full effect to this Act and for its due administration.

46. Protection against certain actions - (1) Where any official information is made available in accordance with this Act, -

(a) No action for defamation, breach of confidence, or infringement of copyright shall lie against the Crown or any other person by reason of the making available of that information; and

(b) No action for defamation or breach of confidence in respect of any publication involved in, or resulting from, the making available of that information shall lie against the author of the information or any other person by reason of that author or other person having supplied the information to a Department or Minister of the Crown or organisation.

(2) The making available of, or the giving of access to, any official information in consequence of a request made under this Act shall not be taken, for the purposes of the law relating to defamation or breach of confidence, to constitute an authorisation or approval of the publication of the document or of its contents by the person to whom the information is made available or the access is given.

COMMENT:

This clause, which is similar to clause 56 of the Australian Bill, protects agencies from actions for breach of copyright, defamation, and breach of confidence for providing information in accordance with the legislation. The protection will not extend to anything done by someone receiving the information, e.g., publication of defamatory material in a newspaper. Cf. Canadian Bill, clause 12(2).

47. Consequential amendments to other enactments - The enactments specified in the Third Schedule to this Act are hereby amended in the manner indicated in that Schedule.

48. Repeal - The Official Secrets Act 1951 is hereby repealed.

49. Savings - (1) Nothing in this Act authorises or permits the making available of any official information if the making available of that information would constitute contempt of Court or of Parliament.

(2) Except as provided in sections 47 and 48 of this Act, nothing in this Act shall derogate from any provision of any other Act of Parliament or of any regulations made by Order in Council which -

(a) Authorises or requires official information to be made available; or

(b) Imposes a prohibition or restriction in relation to the availability of official information; or

(c) Regulates the manner in which official information may be obtained or made available.

PART VIII

AMENDMENTS TO OTHER ACTS

Crimes

50. Sections to be read with Crimes Act 1961 - (1) This section and the next 5 succeeding sections shall be read together with and deemed part of the Crimes Act 1961 * (in those sections referred to as the principal Act).

(2) This section and the next 5 succeeding sections shall come into force on the 1st day of July 1982.

*R.S. Vol. l, p. 635

Amendments: 1979, No. 5; 1979, No. 127; 1980, No. 63; 1980, No. 85

51. Interpretation - Section 2(1) of the principal Act is hereby amended by inserting, in its appropriate alphabetical order, the following definition:

"'Official information' has the meaning given to it by section 2 of the Official Information Act 1981:".

52. New sections substituted - (1) The principal Act is hereby amended by repealing section 78, and substituting the following sections:

"78. Wrongful communication of information - (1) Every one is liable to imprisonment for a term not exceeding 14 years who, being a person who owes allegiance to the Queen in right of New Zealand, within or outside New Zealand, for a purpose prejudicial to the security, defence, or international relations of New Zealand, -

"(a) Communicates information or delivers any object to a country or organisation outside New Zealand or to a person acting on behalf of any such country or organisation; or

"(b) With the intention of communicating information or delivering any object to a country or organisation outside New Zealand or to a person acting on behalf of any such country or organisation:

"(i) Collects or records any information; or

"(ii) Copies any document; or

"(iii) Obtains any object; or

"(iv) Makes any sketch, plan, model, or note; or

"(v) Takes any photograph; or

"(vi) Records any sound or image; or

"(vii) Delivers any object to any person, –

if the communication or delivery or intended communication or intended delivery under paragraph (a) or paragraph (b) of this subsection is likely to prejudice the security, defence, or international relations of New Zealand.

"(2) Every one is liable to imprisonment for a term not exceeding 3 years who, being a person who owes allegiance to the Queen in right of New Zealand, within or outside New Zealand, -

"(a) Knowingly or recklessly communicates any official information or delivers any object to any other person -

"(i) Knowing that the communication of the information or the delivery of the object is likely to prejudice the security, defence, or international relations of New Zealand; and

"(ii) Not having proper authority to effect the communication or delivery; or

"(b) For a purpose prejudicial to the security, defence, or international relations of New Zealand, knowingly retains or knowingly copies any official document -

"(i) Which he does not have proper authority to retain or copy; and

"(ii) Which he knows relates to the security, defence, or international relations of New Zealand; and

"(iii) Which would, by its unauthorised disclosure, be likely to prejudice the security, defence, or international relations of New Zealand; or

"(c) Wilfully fails to comply with any directions issued by a lawful authority for the return of a document -

"(i) Which he knows relates to the security, defence, or international relations of New Zealand; and

"(ii) Which would, by its unauthorised disclosure, be likely to prejudice the security, defence, or international relations of New Zealand.

"(3) No one shall be prosecuted for –

"(a) An offence against this section; or

"(b) The offence of conspiring to commit an offence against this section; or

"(c) The offence of attempting to commit an offence against this section, -

without the consent of the Attorney-General, who before giving consent may make such inquiries as he thinks fit:

"Provided that a person charged with any offence mentioned in this subsection may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody or on bail, notwithstanding that the consent of the Attorney-General to the commencement of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained.

"(4) It is a question of law -

"(a) In the case of an offence against subsection (1) or subsection (2) (a) of this section, whether the communication or intended communication or the delivery of the object was, at the time of the alleged offence, likely to have prejudiced the security, defence, or international relations of New Zealand; and

"(b) In the case of an offence against subsection (2) (b) or (c) of this section, whether the document would, by its unauthorised disclosure at the time of the alleged offence, have been likely to have prejudiced the security, defence, or international relations of New Zealand.

COMMENT:

This clause replaces section 78 of the Crimes Act 1961 (communicating secrets) and the relevant provisions of the Official Secrets Act 1951. It is discussed in the Supplementary Report, paragraphs 5.36 to 5.58. The scope of the crime is wider than the present section 78 in that there is no need to prove an "intent to prejudice" the safety, security, or defence of New Zealand; it is sufficient if the act is done for "a purpose prejudicial to" security, defence, or international relations. Section 3 of the Official Secrets Act 1951 has a similar formula. In terms of the decision of the House of Lords in Chandler v D.P.P. [1964] A.C. 763; [1962] 3 All E.R. 142, it is for the executive government to determine what measures and policies will serve the country's security, defence, or international relations. It should be noted however that subclause (1) of the proposed new section 78 relates only to communicating secrets and (in paragraph (b)) to certain acts that are preparatory thereto. In short, the provision is concerned with espionage, and the sort of conduct that led to the charge and conviction in Chandler's case (demonstration at an air base) would not be covered by it, although it might well constitute other offences.

The other principal element of the crime is that the communication is "likely to prejudice" the interests described.

As explained in the Supplementary Report, paragraph 5.51, the Bill proposes that the decision whether the interests protected are likely to be prejudiced be made "a question of law" and hence determined by the judge and not the jury. There are precedents for this approach in the Crimes Act, in particular section 124(3) (whether distribution of indecent matter might serve the public good), and section 169(2) (evidence of provocation).

Subclause (2) creates three lesser crimes, punishable by 3 years imprisonment.

The crime in paragraph (a) is that of knowingly and recklessly communicating information in the absence of proper authority, knowing that the communication is likely to prejudice security, defence, or international relations. A prejudicial purpose is not required. In accordance with the ordinary rule in criminal cases knowledge may be inferred by the Court or jury from all the circumstances.

Paragraphs (b) and (c) are concerned not with the handing over but with the copying or retention of security information.

The crimes in the new section 78 may be committed within or outside New Zealand by anyone owing allegiance to the Queen in right of New Zealand. The crime of espionage has affinities to treason and inciting mutiny, and for the sake of consistency an identical jurisdiction is conferred. The effect is that the crime may be committed outside New Zealand by a New Zealand citizen or a person holding office under the New Zealand Government. Inside New Zealand the crime may, by virtue of the doctrine of "local allegiance", be committed by any person other than a citizen of a state at war with New Zealand or (it would seem) a person with diplomatic immunity. The present section 78 has the same ambit.

A prosecution under the new section 78 (as under section 3 and other sections of the Official Secrets Act 1951) or for conspiring or attempting to commit such an offence, will require the consent of the Attorney-General: subclause (3). The corresponding provision of the Official Secrets Act 1951 does not extend to conspiracies to commit substantive offences or, in some cases, to attempts.

"78A. Search without warrant - (1) Where a commissioned officer of Police is satisfied that there is reasonable ground for believing -

"(a) That there is in any building, aircraft, ship, carriage, vehicle, box, receptacle, premises, or place -

"(i) Any thing upon or in respect of which an offence against section 78(l) of this Act has been or is suspected of having been committed; or

"(ii) Any thing which there is reasonable ground to believe will be evidence as to the commission of any such offence; or

"(iii) Any thing which there is reasonable ground to believe is intended to be used for the purpose of committing any such offence; and

(b) That the case is one of great emergency and that immediate action is necessary, -

he may by a written order signed by him give to any member of the Police the like authority that may be given by a search warrant issued under section 198 of the Summary Proceedings Act 1957, and the provisions of that section shall apply accordingly with all necessary modifications.

"(2) Every member of the Police exercising the authority conferred by an order made under subsection (1) of this section shall identify himself to any person in or on the building, aircraft, ship, carriage, vehicle, premises,

or place who questions his right to enter and search it, and shall also tell such person that the search is being made pursuant to that subsection. He shall also, if not in uniform and if so required, produce evidence that he is a member of the Police.

"(3) Any commissioned officer of Police who exercises the power conferred by subsection (1) of this section shall, within 3 days after the day on which he exercises the power, furnish to the Commissioner of Police a written report on the exercise of the power and the circumstances in which it came to be exercised."

(2) Section 69(1) of the principal Act is hereby amended by omitting the words "communicating secrets", and substituting the words "wrongful communication of information".

COMMENT:

This restates in relation to the new section 78(1) of the Crimes Act 1961 the substance of section 13(2) of the Official Secrets Act 1951 but relates it to section 198 of the Summary Proceedings Act 1957 which is the general authority for the issuing of search warrants. The present section 13(1) does not fit well with those provisions.

Subclauses (2) and (3) are new in this context, and are adapted from section 18(3) and (6) of the Misuse of Drugs Act 1975. That section confers a wider power to search without warrant than this clause (or section 13) confers.

53. Corrupt use of official information - (1) The principal Act is hereby amended by inserting, after section 105, the following section:

"105A. Every official is liable to imprisonment for a term not exceeding 7 years who, whether within New Zealand or elsewhere, corruptly uses any information, acquired by him in his official capacity, to obtain, directly or indirectly, an advantage or a pecuniary gain for himself or any other person."

(2) Section 106(1) of the principal Act is hereby amended by omitting the words "and 105", and substituting the words "105, and 105A".

COMMENT:

See comment on clause 7(i). The wording of the clause, and in particular its use of the term "corruptly", aligns with the immediately preceding sections of the Crimes Act 1961 relating to bribery, etc. The new section is necessary because of the repeal of the far-reaching section 6 of the Official Secrets Act 1951 and the fact that the wrongful use of official information for gain or advantage may not involve third persons.

Cf. Section 111 of the Criminal Code (Canada) - breach of trust by official. It has been held that breach of trust means abuse of a public trust and is not limited to trust property.

54. Power to clear Court and forbid report of proceedings - (1) The principal Act is hereby amended by repealing section 375, and substituting the following section:

"375. (1) Where on any trial the Court is of opinion that the interests of justice, or of public morality, or of the reputation of any victim of any alleged sexual crime or crime of extortion, or of the security, defence, or international relations of New Zealand so require, it may make any one or more of the following orders:

"(a) An order forbidding publication of any report or account of the whole or any part of the evidence adduced:

"(b) An order forbidding the publication of the name of any witness or witnesses, or any name or particulars likely to lead to his or their identification:

"(c) An order excluding all or any persons other than the prosecutor, the accused, any barrister or solicitor engaged in the proceedings, and any Court officer from the whole or any part of the proceedings:

"Provided that the power conferred by paragraph (c) of this subsection shall not, except where the interests of security, defence, or international relations so require, be exercised so as to exclude any barrister or solicitor or any accredited news media reporter.

"(2) Any order made under paragraph (a) or paragraph (b) of subsection (1) of this section -

"(a) May be made for a limited period or permanently; and

"(b) If it is made for a limited period, may be renewed for a further period or periods by the Court; and

"(c) If it is made permanently, may be reviewed by the Court at any time.

"(3) Notwithstanding that an order is made under subsection (1)(c) of this section, the announcement of the verdict and the passing of sentence shall in every case take place in public.

"(4) The breach of any order made under subsection (1) or subsection (2) of this section, or any evasion or attempted evasion of it, may be dealt with as contempt of Court.

"(5) Nothing in this section shall limit the power of the Court under section 46 of the Criminal Justice Act 1954 to prohibit the publication of any name."

(2) Section 19(3) of the Summary Proceedings Amendment Act 1976 is hereby consequentially repealed.

COMMENT:

This clause rewrites section 375 of the Crimes Act 1961 (relating to clearing the Court and directing the non-publication of evidence) so as to incorporate the general effect of section 15(3) of the Official Secrets Act 1951. The opportunity is taken to make a general provision for excluding the public or ordering that evidence not be published where the interests of national security require it, e.g., in prosecutions for treason, sabotage, or inciting to mutiny, rather than limit the provision to espionage. The Court already appears to have an inherent power to do this. It seems desirable that the grounds for excluding the public and not allowing evidence to be published should be codified and not left to the uncertainties of inherent bowers.

The clause also enables the Court to order the non publication of names or identifying particulars of witnesses in any case. There is a gap in section 375 in this respect. Again, it appears better to depend on specific legislation rather than on a possible inherent power.

Section 15(3) provides for the public to be excluded on security grounds but unlike section 375 makes no provision for non publication. The only way by which this can be achieved therefore is by excluding all members of the public from the trial. It therefore lacks the flexibility of section 375.

The power of the Court to exclude the public from the courtroom on security grounds (but not on others) will extend to news media reporters and barristers and solicitors not engaged in the proceedings. In respect of reporters, this continues the position under the Official Secrets Act 1951, but the Court will have a discretion whether to exclude them as well as other members of the public.

55. Summary jurisdiction - Part I of the First Schedule to the Summary Proceedings Act 1957 is hereby amended by inserting, in their appropriate numerical order, the following items:

"78 (2) Wrongfully communicating information, or retaining, copying, or refusing to return official documents

"105A Corrupt use of official information".

Police Offences

56. Sections to be read with Police Offences Act 1927 - (1) This section and the next succeeding section shall be read together with and deemed part of the Police Offences Act 1927* (in that section referred to as the principal Act).

(2) This section and the next succeeding section shall come into force on the 1st day of July 1982.

*Reprinted 1973, Vol. 2, p. 1577
Amendments: 1974, No. 134; 1976, No. 157

57. Unauthorised disclosure of certain official information - The principal Act is hereby amended by inserting, after section 21, the following heading and section:

"Official Information

"21A. (1) Every person commits an offence and is liable to imprisonment for a term not exceeding 3 months or to a fine not exceeding $5,000 who knowingly communicates any official information as defined in section 2 of the Official Information Act 1981 (not being official information that is publicly available) or delivers any object to any other person -

"(a) Knowing, or having good reason to know, that the communication of that information or the delivery of that object is likely to prejudice -

"(i) The lives or physical safety of persons engaged in or connected with law enforcement; or

"(ii) The maintenance of confidential sources of information in relation to the prevention or detection of offences; or

"(iii) The effectiveness of operational plans for the prevention or detection of offences either generally or in a particular case; or

"(iv) The safe custody of offenders or of persons charged with offences; or

"(v) The substantial economic interests of New Zealand; and

"(b) Not having proper authority to effect the communication or delivery.

"(2) No information shall be laid for an offence against this section without the consent of the Attorney-General, who before giving consent may make such inquiries as he thinks fit:

"Provided that a person alleged to have committed an offence against this section may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody or on bail, notwithstanding that the consent of the Attorney-General to the laying of an information for the offence has not been obtained, but no further or other proceeding shall be taken until that consent has been obtained."

COMMENT:

The proposed new section creates a summary offence covering communication of law enforcement and important economic information corresponding to, but in a more simplified form than, the new section 78 of the Crimes Act 1961 in the area of national security. If the clause is accepted, it will doubtless be incorporated in the Summary Offences Bill designed to replace the Police Offences Act 1927.

The clause attempts to identify the particular law enforcement interests that require to be protected by the sanction of an imprisonable offence. The widest is paragraph (a)(iii) which relates to the operational plans of the Police or other LAW enforcement agencies, e.g., Customs. Consideration was given to the provision of a defence of "public interest" either generally or to a charge arising under paragraph (a)(iii).

Such a defence exists under section 124 of the Crimes Act (distribution or exhibition of indecent objects) and section 214 (where justification is pleaded to a charge of criminal libel). An indirect analogy exists in respect of sedition (section 81), where seditious intention does not include an intention to point out errors and defects in the Government or the administration of justice. In the nature of things, however, such a defence could have little application to most of the paragraphs of the clause, and to introduce it in relation only to operational plans might suggest that such plans deserved a lesser degree of protection than, e.g., confidential sources of information. In cases where a genuine public issue might be involved, e.g., the alleged intention of a LAW enforcement agency to use illegal tactics or to discriminate in enforcement; the requirement of the Attorney-General's consent to prosecution should be a safeguard.

In relation to "substantial economic interests", such a defence could turn a criminal court into a forum for the debate of rival economic policies. Again, the need for the Attorney-General's consent is a safeguard.

State Services

58. Sections to be read with State Services Act 1962 - (1) This section and the next succeeding section shall be read together with and deemed part of the State Services Act 1962* (in those sections referred to as the principal Act).

(2) This section and the next succeeding section shall come into force on the 1st day of July 1982.

*Reprinted 1971, Vol. 4, p. 2533

Amendments: 1973, No. 15; 1973, No. 92; 1974, No. 122; 1978, No. 37

59. Offences with which employees may be charged - Section 56 of the principal Act is hereby amended by repealing paragraph (g), and substituting the following paragraph:

"(g) Improperly uses for private purposes any information acquired by him as an employee of the Public Service:"

Post Office

60. Sections to be read with Post Office Act 1959 - (1) This section and the next succeeding section shall be read together with and deemed part of the Post Office Act 1959* (in that section referred to as the principal Act).

(2) This section and the next succeeding section shall come into force on the 1st day of July 1982.

*Reprinted 1970, Vol. 3, p. 2155

Amendments: 1971, No. 120; 1972, No. 123; 1973, No. 2; 1973, No. 86; 1974, No. 64; 1975, No. 24; 1975, No. 98; 1977, No. 72; 1978, No. 24; 1980, No. 41

61. Declarations of secrecy - The First Schedule to the principal Act is hereby amended by revoking paragraph (c) of clause 5 of the form of declaration set out in that Schedule, and substituting the following paragraphs:

"(c) The name of any depositor in a Post Office Savings Bank Account or the name of the registered holder of any bonus bond, development bond, or registered security; or

"(d) The amount deposited in any such account or the number or value of bonus bonds, development bonds, or registered securities issued to or held by any person; or

"(e) The amount withdrawn from any such account or the amount paid to any person in respect of any bonus bond, development bond, or registered security."

Public Trust Office

62. Sections to be read with Public Trust Office Act 1957 - (1) This section and the next succeeding section shall be read together with and deemed part of the Public Trust Office Act 1957* (in that section referred to as the principal Act).

(2) This section and the next succeeding section shall come into force on the 1st day of July 1982.

*Reprinted 1976, Vol. 5, p. 4361

Amendments: 1977, No. 168; 1978, No. 10

63. Officers to make declaration of fidelity and secrecy - Section 17(1)(a) of the principal Act is hereby amended by omitting the words "to the business of the Public Trust Office or".

Statistics

64. Sections to be read with Statistics Act 1975 - (1) This section and the next succeeding section shall be read together with and deemed part of the Statistics Act 1975* (in that section referred to as the principal Act).

(2) This section and the next succeeding section shall come into force on the 1st day of July 1982.

*1975, No. 1

Amendment: 1978, No. 126

65. Declaration of secrecy - Section 21 of the principal Act is hereby amended by repealing subsection (1), and substituting the following subsection:

"(1) Every employee of the Department, before entering on his duties, shall take and subscribe a statutory declaration in the following form:

"'I. ....., solemnly and sincerely declare that I will faithfully and honestly fulfil my duties as an employee of the Department of Statistics in conformity with the requirements of the Statistics Act 1975 and of all regulations thereunder, and that I will, during my employment in that Department and thereafter, disclose any information acquired by me as an employee of the Department only in accordance with my official duty.'"

Ombudsmen

66. Sections to be read with Ombudsmen Act 1975 - (1) This section and the next 4 succeeding sections shall be read together with and deemed part of the Ombudsmen Act 1975* (in those sections referred to as the principal Act).

(2) This section and the next 4 succeeding sections shall come into force on the 1st day of July 1982.

* 1975, No. 9

67. Evidence- (1) Section 19(3) of the principal Act is hereby amended by omitting the words "Official Secrets Act 1951", and substituting the words "Official Information Act 1981".

(2) Section 19(7) of the principal Act is hereby amended by omitting the words "the Official Secrets Act 1951 or".

68. Ombudsmen and staff to maintain secrecy - Section 21(1) of the principal Act is hereby amended by omitting the words "Official Secrets Act 1951 to be persons holding office under Her Majesty", and substituting the words "sections 105 and 105A of the Crimes Act 1961 to be officials".

69. Proceedings privileged - Section 26(1) of the principal Act is hereby amended by omitting the words "the Official Secrets Act 1951", and substituting the words "section 78 or section 105A of the Crimes Act 1961".

70. Departments and organisations - (1) Part I of the First Schedule to the principal Act is hereby amended by inserting, after the item relating to the Export Guarantee Office, the following items:

"The Export Guarantee General Manager.

"The Government Insurance Commissioner."

(2) Part II of the First Schedule to the principal Act is hereby amended by repealing the item relating to the Pest Destruction Council, and substituting, in its appropriate alphabetical order, the following item:

"The Agricultural Pests Destruction Council".

Crown Proceedings

71. Sections to be read with Crown Proceedings Act 1950 - (1) This section and the next succeeding section shall be read together with and deemed part of the Crown Proceedings Act 1950* (in that section referred to as the principal Act).

(2) This section and the next succeeding section shall come into force on the 1st day of July 1982.

*R.S. Vol. 2, p. 23

72. Discovery - (1) Section 27(l) (a) of the principal Act is hereby amended by omitting the words "civil proceedings", and substituting the words "proceedings (other than criminal proceedings)".

(2) Section 27(3) of the principal Act is hereby amended by omitting the words ", in the opinion of a Minister of the Crown, it would be injurious to the public interest to disclose the existence thereof", and substituting the words "the Attorney-General certifies that the disclosure of the existence of that document would be likely to prejudice the security, defence, or international relations of New Zealand or the investigation or detection of offences".

COMMENT:

This clause amends the Crown Proceedings Act 1950 in accordance with the recommendations made in the Supplementary Report, paragraphs 2.27 to 2.32. The effect of subclause (1) will be to remove the special immunity of the Crown from liability to make disclosure (an immunity it does not enjoy in other civil proceedings) in proceedings for habeas corpus, mandamus, prohibition, or certiorari or for judicial review in like cases.

Subclause (2) aligns the Crown's right to refuse to disclose the existence of a document in legal proceedings with the provisions of clauses 8 and 26 of the Bill. At present it may be refused under section 27 of the Crown Proceedings Act 1950 wherever disclosure would in the opinion of a Minister be injurious to the public interest.

SCHEDULES

FIRST SCHEDULE

Section 2(l)

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

Abortion Supervisory Committee
Air New Zealand Limited
Alcoholic Liquor Advisory Council
Apple and Pear Prices Authority
Armed Forces Canteen Council
Bank of New Zealand
Broadcasting Corporation of New Zealand
Clean Air Council
Coal Mining Industries Welfare and Research Council
Commission for the Future
Dairy Products Prices Authority
Development Finance Corporation of New Zealand
Film Trade Board
Fruit Distributors Limited
Higher Salaries Commission
Hop Marketing Committee
Human Rights Commission
Industries Development Commission
Information Authority
Legal Aid Board
Liquid Fuels
Trust Board
Local Authorities Loans Board
Market Development Committee appointed under section 3 of the Me Export Control Amendment Act 1966
Maternal Deaths Assessment Committee
Meat Export Prices Committee
Meat Industry Authority
Medical Research Council of New Zealand
National Council of Adult Education
National Housing Commission
National Library of New Zealand
National Parks and Reserves Authority
National Research Advisory Council
Natural Gas Corporation of New Zealand
Nature Conservation Council
New Zealand Apple and Pear Marketing Board
New Zealand Citrus Marketing Authority
New Zealand Council for Educational Research
New Zealand Council for Postgraduate Medical Education
New Zealand Dairy Board
New Zealand Export-Import Corporation
New Zealand Film Commission
New Zealand Fishing Industry Board
New Zealand Gas Council
New Zealand Geographic Board
New Zealand Government Property Corporation
New Zealand Honey Marketing Authority

New Zealand Kiwifruit Authority
New Zealand Lottery Board
New Zealand Meat Producers Board
New Zealand Milk Board
New Zealand Planning Council
New Zealand Ports Authority
New Zealand Potato Board
New Zealand Poultry Board
New Zealand Racing Authority
New Zealand Security Intelligence Service
New Zealand Walkway Commission
New Zealand Wheat Board
New Zealand Wool Board
New Zealand Wool Testing Authority
Noxious Plants Council
Offshore Mining Limited
Overseas Investment Commission
Petroleum Corporation of New Zealand
Pork Industry Council
Pork Marketing Board
Public Debt Commission
Public Trust Office Investment Board
Queen Elizabeth the Second National Trust
Radiological Advisory Council
Raspberry Marketing Council
Raspberry Marketing Export Authority
Representation Commission
Reserve Bank of New Zealand
Rules Committee appointed under section 2 of the Judicature Amendment Act 1930
Rural Electrical Reticulation Council
Securities Commission
Shipping Corporation of New Zealand Limited
Testing Laboratory Registration Council
Tobacco Board
Totalisator Agency Board
Tourist Hotel Corporation of New Zealand
Universities Entrance Board
University Grants Committee
Urban Transport Council
Veterinary Services Council
Waikato Carbonisation Limited
War Pensions Boards
War Pensions Medical Research
Trust Board
Waterfront Industry Commission

COMMENT:

Paragraph 3 of the General Report defined "official information" as material held by Government departments and Government agencies. The category of agencies included, but was not intended to be limited to, all those organisations listed in Part II of the First Schedule to the Ombudsmen Act 1975.

This Schedule of additional organisations is based on a series of considerations, some positive, others negative. The principal positive criterion is that the organisation is

carrying out a governmental or public function. This turns in large part on the relationship between the organisation and the central government: whether the government appoints its members or controls its staffing, provides its funds, controls its finances, has a statutory power of direction, may obtain assistance or advice from the organisation, or has the power to take over its functions. Among the factors suggesting the exclusion of an organisation are that it is more concerned with local government than with central government, has large areas of autonomy from central government in its composition, the source of its funds and the fixing of priorities, their use, the making of its decisions and the carrying out of its functions. More broadly, another basis of exclusion is that the organisation is primarily concerned with regulating or assisting an area of industry or determining entry into a profession or occupation independent of government or is of a judicial character.

Accordingly, the Schedule does not include bodies with essentially local functions (many of them are already subject to the Public Bodies Meetings Act 1962) or tribunals, including tribunals concerned with the registration and discipline of members of a profession or occupational group. Tribunals have also been excluded on the basis that the statute creating them usually provides in detail for the disclosure of relevant information to the parties affected by their powers and for public access to their hearings; to the extent that such provision is not made the matter is best dealt with in the legislation relating to the particular tribunal or to tribunals as a group.

As indicated in the comment on clause 2(2), the Schedule does not include a large number of unincorporated bodies which are advisory to government. These are included within the scope of the Bill by virtue of clause 2(2) without the need for specific mention.

The listing of an organisation in the Schedule will not normally result in all its information becoming accessible. Whether a particular piece of information is made available will depend in the first place on whether it relates solely to the organisation's competitive commercial activities (see the definition of "official information" in clause 2(1)); second on the criteria and procedures set out in the Bill and applicable to all Government departments and organisations, and third on the decisions made under the legislation. Thus the Information Authority might recommend a regulation applicable only to a particular organisation. Protection of sensitive information will be achieved by these criteria and procedures and their application in practice rather than by the complete exclusion of the body from the legislation.

SECOND SCHEDULE

Section 37(5)

PROVISIONS RELATING TO INFORMATION AUTHORITY

1. Manner of appointments - (1) If any member of the Authority dies, or resigns his office, or is removed from office, the vacancy thereby created shall be filled in accordance with this clause.

(2) If any such vacancy occurs at any time while Parliament is in session, it shall be filled by appointment by the Governor-General on the recommendation of the House of Representatives:

Provided that if the vacancy occurs less than 2 months before the close of that session and no such recommendation is made in that session, the provisions of subclause (3) of this clause shall apply as if the vacancy had occurred while Parliament was not in session.

(3) If any such vacancy occurs at any time while Parliament is not in session, the following provisions shall apply:

(a) The Governor-General in Council may appoint a person to fill the vacancy, and the person so appointed shall, unless his office sooner becomes vacant, hold office until his appointment is confirmed by the House of Representatives:
(b) If the appointment is not so confirmed within 2 months after the commencement of the next ensuing session, the appointment shall lapse and there shall be deemed to be a further vacancy in the membership of the Authority.

2. Deputies off members - (1) In any case where any member of the Authority is incapacitated by illness, absence, or other sufficient cause from performing the duties of his office, the Governor-General may appoint a person to act in the place of that member during his incapacity.

(2) The provisions of clause 1 of this Schedule shall apply, with any necessary modifications, to the temporary appointment of a member under this clause as if the member were being appointed under that clause to fill a vacancy.

(3) Any person appointed under this clause shall, while he acts as such, be deemed to be a member of the Authority, and any person appointed in the place of the Chairman shall have all the powers of the Chairman.

(4) No appointment of a person under this clause and no acts done by him while acting as a member of the Authority, and no acts done by the Authority while any person is acting as such, shall in any proceedings be questioned on the ground that the occasion for his appointment had not arisen or had ceased.

3. Meetings of Authority - (1) Subject to this clause, the Chairman shall convene such meetings of the Authority as he thinks necessary for the efficient performance of the functions assigned to it.

(2) Meetings of the Authority shall be held at such places as the Authority or the Chairman from time to time appoints.

(3) The Chairman shall preside at all meetings of the Authority at which he is present.

(4) In the absence of the Chairman from any meeting the members present shall appoint one of their number to be the Chairman for the purposes of that meeting.

(5) At any meeting of the Authority, the quorum necessary for the transaction of business shall be 2 members.

(6) All questions arising at any meeting of the Authority shall be decided by a majority of votes of the members present and voting. The presiding member shall have a deliberative vote and, in the event of an equality of votes, shall also have a casting vote.

(7) The Authority may meet in private or in public, as the Authority from time to time decides.

(8) The Authority shall cause such notice as it thinks fit to be given of any public meeting of the Authority to persons likely to be affected thereby.

(9) The Authority may make an order prohibiting the publication (whether orally or in writing) of any report or description of any part of the proceedings or evidence in any matter before the Authority.

(10) Subject to the provisions of this Act and of any regulations made under this Act, the Authority may regulate its procedure in such manner as it thinks fit.

4. Assent to resolution without a meeting - A resolution in writing signed, or assented to by letter, telegram, cable, or telex message by all the members of the Authority shall be as valid and effectual as if it had been passed at a meeting of the Authority duly called and constituted.

5. Powers of investigation - (1) For the purposes of any investigation, review, inquiry, or other proceedings conducted by the Authority under this Act, the Authority or any person authorised by it in writing to do so may -

(a) Inspect and examine any document or thing and, for that purpose, may at any time enter upon any premises occupied by any Department or organisation:

(b) Require any person to produce for examination any document or thing in that person's possession or under that person's control, and to allow copies of or extracts from any such document to be made:

(c) Require any person to furnish, in a form approved by or acceptable to the Authority, any information or particulars that may be required by it, and any copies of or extracts from any such document as aforesaid.

(2) The Authority may, if it thinks fit, require that any written information or particulars or any copies or extracts furnished under this section shall be verified by statutory declaration or otherwise as the Authority may require.

(3) Before entering upon any premises pursuant to subclause (1) (a) of this clause, the Authority or the person authorised by it shall notify the Permanent Head of the Department or, as the case may require, the principal administrative officer of the organisation by which the premises are occupied.

(4) The Attorney-General may from time to time by notice to the Authority exclude the application of subclause (1) (a) of this clause to any specified premises or class of premises, if he is satisfied that the exercise of the power conferred by this section would be likely to prejudice the security, defence, or international relations of New Zealand.

6. Powers of Authority to take evidence - (1) At any meeting of the Authority it may receive in evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with the matter before it, whether or not the same would be otherwise admissible in a Court of law.

(2) The Authority may take evidence on oath and for that purpose a member of the Authority or an officer or employee thereof may administer an oath.

(3) A member of the Authority may by order under the seal of the Authority served on the person, summon any person to appear before the Authority to give evidence as to the matter before it, and require any witness to produce to the Authority all or any documents in his possession or control relative to the matter.

(4) The Authority may permit a person appearing as a witness before the Authority to give evidence by tendering and, if the Authority thinks fit, verifying by oath, a written statement.

(5) Witnesses' fees, allowances, and travelling expenses according to the scales for the time being prescribed by regulations made under the Summary Proceedings Act 1957 -

(a) Shall be paid by the Authority to any person who appears as a witness before the Authority pursuant to an order under subclause (3) of this clause; and

(b) May, if the Authority so decides, be paid by the Authority to any other person who appears as a witness before the Authority;- and those regulations, with all necessary modifications, shall apply accordingly.

(6) For the purposes of this subclause the Authority shall have the powers of a Court under any such regulations to fix or disallow, in whole or in part, or increase the amounts payable thereunder.

7. Protection of witnesses - (1) Subject to section 9 of this Act, every person shall have the same privileges in relation to -

(a) The giving of information to the Authority or to any person authorised under clause 5(l) of this Schedule; and

(b) The answering of questions put by the Authority or any such person; and

(c) The production of documents, and things to the Authority or any such person, -

as witnesses have in Courts of law.

(2) Except on the trial of any person for perjury within the meaning of the Crimes Act 1961 in respect of his sworn testimony, no statement made or answer given by that or any other person in the course of any inquiry by or any proceedings before the Authority or any person authorised under clause 5(1) of this Schedule shall be admissible in evidence against any person in any Court or at any inquiry or in any other proceedings, and no evidence in respect of proceedings before the Authority of any person authorised under clause 5(l) of this Schedule shall be given against any person.

(3) No person shall be liable to prosecution for an offence against any enactment, other than this Act, by reason of his compliance with any requirement of the Authority or any person authorised under clause 5(1) of this Schedule.

8. Disclosure of certain matters not to be required - Where the Attorney-General certifies that the giving of any information or the answering of any question or the production of any document or thing would be likely to prejudice -

(a) The security, defence, or international relations of New Zealand; or

(b) The investigation or detection of offences -

the Authority shall not require the information or answer to be given or, as the case may be, the document or thing to be produced.

9. Seal - The Authority shall have a seal which shall be judicially noticed in all Courts and for all purposes.

10. Employees of Authority - (1) Subject to the provisions of this clause, the Authority may from time to time appoint such officers and employees, including acting or temporary or casual officers and employees, as it thinks necessary for the efficient carrying out of its functions, powers, and duties under this Act or any other enactment.

(2) The number of officers and employees who may be appointed under subclause (1) of this clause, whether generally or in respect of any specified duties, shall from time to time be determined by the Minister of Justice.

(3) Officers and employees appointed under subclause (1) of this clause shall be employed on such terms and conditions of employment and shall be paid such salaries and allowances as the Authority from time to time determines in agreement with the State Services Commission, or as the Minister of justice from time to time determines in any case where the Authority and the State Services Commission fail to agree.

(4) Any determination under subclause (3) of this clause shall take effect on such date (whether the date thereof or any earlier or later date) as may be specified therein. If no date is so specified the determination shall take effect on the date thereof.

11. Employment of experts - (1) The Authority may appoint any person, who in its opinion possesses expert knowledge or is otherwise able to assist it in connection with the exercise of its functions, to make such inquiries or to conduct such research or to make such reports as may be necessary for the efficient carrying out of any functions of the Authority.

(2) The Authority shall pay persons appointed by it under this clause, for services rendered by them, fees and commission or either at such rates as it thinks fit, and may separately reimburse them for expenses reasonably incurred in rendering services for the Authority.

12. Remuneration, allowances, and expenses of members of Authority - (1) There shall be paid to the members of the Authority such remuneration by way of fees, salary, wages, or allowances as may from time to time be fixed, either generally or in respect of any particular member or members of the Authority, by the Higher Salaries Commission.

(2) Any decision under subclause (1) of this clause shall take effect on such date (whether the date thereof or any earlier or later date) as may be specified therein. If no such date is specified the decision shall take effect on the date thereof.

(3) The Authority is hereby declared to be a statutory Board within the meaning of the Fees and Travelling Allowances Act 1951.

(4) There shall be paid to the members of the Authority travelling allowances and travelling expenses, in accordance with the Fees and Travelling Allowances Act 1951, and the provisions of that Act shall apply accordingly.

13. Superannuation or retiring allowances - (1) For the purpose of providing a superannuation fund or retiring allowance for any of the officers or employees of the Authority or for any full-time members of the Authority, sums by way of subsidy may from time to time be paid into any scheme under the National Provident Fund Act 1950 containing provision for employer subsidy or into any other employer-subsidised scheme approved by the Minister of Finance for the purposes of this section.

(2) If the question whether or not any member of the Authority is a full-time member for the purposes of subclause (1) of this clause arises, that question shall be determined by the Minister of justice, whose decision shall be final.

(3) Notwithstanding anything in this Act, any person who immediately before becoming an officer or employee of the Authority or member of the Authority is a contributor to the Government Superannuation Fund under Part 11 of the Government Superannuation Fund Act 1956 shall be deemed to be, for the purposes of the Government Superannuation Fund Act 1956, employed in the Government service so long as he continues to be an officer or employee of the Authority or to hold office as a member of the Authority; and that Act shall apply to him in all respects as if his service as such an officer or employee or as such a member were Government service.

(4) Subject to the Government Superannuation Fund Act 1956, nothing in subclause (3) of this clause shall entitle any such person to become a contributor to the Government Superannuation Fund after he has once ceased to be a contributor.

(5) For the purposes of applying the Government Superannuation Fund Act 1956, in accordance with subclause (3) of this clause, to a person who is in the service of the Authority, whether as an officer or employee or as a member, and is a contributor to the Government Superannuation Fund, the term "controlling authority", in relation to any such person who is in the service of the Authority, means the Authority.

14. Application of certain Acts to members and staff of Authority - No person shall be deemed to be employed in the service of Her Majesty for the purposes of the State Services Act 1962 or the Government Superannuation Fund Act 1956 by reason of his appointment as a member of the Authority, or an officer or employee of the Authority, or a person appointed by the Authority under clause 11 of this Schedule.

15. Proceedings privileged - (1) No proceedings, civil or criminal, shall lie against the Authority for anything it may do or fail to do in the course of the exercise or intended exercise of its functions, unless it is shown that it acted in bad faith.

(2) No proceedings, civil or criminal, shall lie against any member of the Authority for anything he may do or say or fail to do or say in the course of the operation of the Authority, unless it is shown that he acted in bad faith.

(3) No member of the Authority, or officer or employee thereof, or person appointed under clause 11 of this Schedule, shall be required to give evidence in any Court, or in any proceedings of a judicial nature, in respect of anything coming to his knowledge in the course of the operations of the Authority.

(4) Anything said or any information supplied or any document produced by any person in the course of any proceedings before the Authority shall be privileged in the same manner as if the proceedings were proceedings in a Court.

(5) For the purposes of clause 5 of the First Schedule to the Defamation Act 1954, any report made by the Authority in the course of the exercise or intended exercise of its functions shall be deemed to be an official report made by a person holding an inquiry under the authority of the legislature of New Zealand.

16. Money to be appropriated by Parliament for purposes of this Act - All fees, salaries, allowances, and other expenditure payable or incurred under or in the administration of this Act shall be payable out of money to be appropriated by Parliament for the purpose.

17. Crown may provide services for Authority - The Crown, acting through any Department, may from time to time, at the request of the Authority, execute any work or enter into arrangements for the execution or provision by the Department for the Authority of any work or service, or for the supply to the Authority of any goods, stores, or equipment, on and subject to such terms and conditions as may be agreed.

THIRD SCHEDULE

Section 47

ENACTMENTS AMENDED

Title of Act	Amendment
1969, No. 24 - The New Zealand Security Intelligence Service Act 1969	By repealing the definition of the term "espionage" in section 2(2), and substituting the following definition: "'Espionage' means any offence against section 78 of the Crimes Act 1961:". By repealing subsection (2) of section 16, and substituting the following subsection: "(2) For the purposes of sections 105 and 105A of the Crimes Act 1961, the Commissioner shall be deemed to be an official."
1971, No. 150 - The Race Relations Act 1971 (Reprinted 1977, Vol. 4, p. 3590)	By omitting from paragraph (a) of section 16(4), and also from paragraph (b) of that section, the words "Official Secrets Act 1951", and substituting the words "Official Information Act 1981". By omitting from section 16(6) the words "the Official Secrets Act 1951 or". By omitting from section 20 the words "the Official Secrets Act 1951", and substituting the words "section 78 or section 105A of the Crimes Act 1961".
1976, No. 19 - The Wanganui Computer Centre Act 1976	By omitting from section 12 (1) the words "the Official Secrets Act 1951 to be persons holding office under Her Majesty", and substituting the words "sections 105 and 105A of the Crimes Act 1961 to be officials". By omitting from section 16A(4) (as inserted by section 3 of the Wanganui Computer Centre Amendment Act 1977) the words "Official Secrets Act 1951", and substituting the words "Official Information Act 1981". By omitting from section 16A(9) (as so inserted) the words "the Official Secrets Act 1951 or".

1977, No. 49 - The Human Rights Commission Act 1977	By omitting from section 73(4) the words "Official Secrets Act 1951", and substituting the words "Official Information Act 1981". By omitting from section 73(6) the words "the Official Secrets Act 1951 or". By omitting from section 76(1) the words "the Official Secrets Act 1951", and substituting the words "section 78 or section 105A of the Crimes Act 1961". By omitting from section 77(1) the words "the Official Secrets Act 1951 to be persons holding office under Her Majesty", and substituting the words "sections 105 and 105A of the Crimes Act 1961 to be officials".
1977, No. 110 - The Higher Salaries Commission Act 1977	By inserting in the Fourth Schedule (as substituted by section 3 of the Higher Salaries Amendment Act 1980), after the item "The members and associate members of the Industries Development Commission", the item "The members of the Information Authority".
1978, No. 53 – The Liquid Fuels Trust Act 1978	By omitting from section 17(l) the words "the Official Secrets Act 1951 to be persons holding office under Her Majesty", and substituting the words "sections 105 and 105A of the Crimes Act 1961 to be officials". By omitting from section 18 the words "the Official Secrets Act 1951", and substituting the words "section 78 or section 105A of the Crimes Act 1961".
1978, No. 103 - The Securities Act 1978	By omitting from section 24(1) the words "the Official Secrets Act 1951 to be persons holding office under Her Majesty", and substituting the words "sections 105 and 105A of the Crimes Act 1961 to be officials". By omitting from section 28(1) the words "the Official Secrets Act 1951", and substituting the words "section 78 or section 105A of the Crimes Act 1961".

APPENDICES

Appendix 1

Committee on Official Information

TERMS OF REFERENCE

1. The basic task of the Committee is to contribute to the larger aim of freedom of information by considering the extent to which official information can be made readily available to the public. With this end in view and having in mind the need to safeguard national security, the public interest and individual privacy, the Committee should, in particular:

(a) Review the criteria for applying the classifications now in use and, if necessary, recommend the redefinition of the categories of information which should be protected; and

(b) Examine the purpose and application of the Official Secrets Act 1951, in particular section 6, and any other relevant legislation, and recommend amending legislation.

2. In the light of the foregoing review the Committee should advance appropriate recommendations on changes in policies and procedures which would contribute to the aim of freedom of information.

28 July 1978

Appendix 2

Committee on Official Information

MEMBERSHIP

Details of the Committee's membership since its establishment in May 1978 are listed in the General Report.
This Supplementary Report has been prepared by:
Sir Alan Danks, K.B.E. (Chairman)
Professor K. J. Keith, Victoria University of Wellington
Mr B. J. Cameron (Deputy Secretary for Justice)
Mr W. B. Harland (Assistant Secretary of Foreign Affairs)
Mr W. Iles (Chief Parliamentary Counsel)
Mr D. B. G. McLean (Secretary of Defence)
Mr P. G. Millen (Secretary of the Cabinet)
Dr R. M. Williams, C.B., C.B.E. (Chairman, State Services Commission) now retired.

The Committee's Secretary throughout the preparation of this Supplementary Report was Miss C. J. Rowe.
The Committee was also assisted by Dr C. C. Aikman and Mrs D. Moss.

Appendix 3

COMPARATIVE LEGISLATIVE STUDY

Note

In part because overseas legislation sets out to create a legal right of access, the exceptions, particularly in other Commonwealth countries, are elaborate and detailed and this table provides merely a summary of them.

The information relating to Denmark and Sweden is taken from a publication, Disclosure of Official Information, Report on Overseas Practice HMSO 1979. Several other European countries have access legislation, but the broad pattern of exceptions is similar. In the Netherlands, for instance, the interests protected comprise internal personal views of Ministers and public servants; unity of the Crown and security of the State; confidential data relating to businesses and production processes; foreign relations; economic and financial interests of State; detection and prosecution of crime; government inspection, control and supervision; personal privacy and protection of results of medical and psychological examinations; preventing unfair advantage or disadvantage to persons concerned or third parties.

The prevention of breaches of security, defence and international relations and to the investigation and detection of crime is a universal basis of protection. Likewise, all the legislation excludes advice and internal departmental documents from disclosure to some degree or other. Individual privacy and business confidence are always exempt from disclosure. And most legislation protects expressly or by implication national economic interests.