(2) The withholding of the information is necessary to maintain the effective conduct of public affairs through the free and frank expressions of opinion by officers of the Post Office, and there are no other considerations which render it desirable in the public interest to make that information available.

(3) The withholding of the information is necessary to enable the Crown and the Post Office to carry out, without prejudice or disadvantage its commercial activities, and there are no other considerations which render it desirable in the public interest to make that information available.

(4) Access to information relating to Government tenders is governed by the Public Finance Act 1977, the Government Stores Regulations 1960 and the Government Stores Board Instructions. I have been advised and have concluded that on a proper construction of these provisions and of the Official Information Act 1982 the former provisions govern the proper response to the ... request and that these provisions do not authorise compliance with the request that has been made.

3. The advice on which this direction is based has been received from the Crown Law Office as to legal issues and from the Director-General of the Post Office, as to factual issues. The purport of that advice is as set out above."

G. R. LAKING.

CASE NO. 216 et al

Sections 9 (2) (b), 27 (1) (c), 52 (3) (b)

SCHOOL CERTIFICATE EXAMINATION SCRIPTS—EDUCATION ACT 1964, EVALUATIVE MATERIAL

The Minister of Education and the Department of Education were asked to release marked School Certificate Examination scripts. All the requests were refused; sections 52 (3) (b), 9 (2) (b) and 27 (1) (c) were relied on.

Section 52 (3) (b) preserves the effect of provisions in other Acts and Regulations. The Department interpreted it to preserve the effect of rules made under the Education Act 1964. In my opinion s. 52 (3) (b) applies only to provisions of other enactments which themselves prohibit, restrict or regulate access to information, and the Education Act 1964 does not contain such a provision.

I formed the view that the information requested was personal information and that requests for it could not be refused under s. 9 (2) (b).

In respect of s. 27 (1) (c), I thought it doubtful that School Certificate was an "award" or "other benefit" under the provision. Other terms used in the section suggest that something more difficult to achieve was contemplated. The information requested could be divided into (i) the "script" that was supplied by the candidate, and (ii) the "marks and comments" that were supplied by the examiner. In my view, both categories of information were material prepared and submitted to the Department for the purpose of deciding the mark to be awarded to the candidate. However, the issue of confidentiality was not the same for each category. The release of the scripts to the candidates could not break any promise of confidentiality made to them. I was left in some doubt that there had

been an implied promise to markers that their marks and comments would be held in confidence. I was not convinced that a pattern of past conduct concerning requests for access to such information could, by itself, constitute such a promise. Even if the marks and markers' comments could be properly withheld, it was clear that there was a discretion to release the information under s. 27 (1). I noted the difficulty of separating the marks and comments from the scripts and formed the opinion that, if necessary, the discretion should have been exercised in favour of release.

The Minister and the Department feared that the administrative burden involved in the release of large numbers of scripts would be excessive. I did not regard it as my function to be the instrument of major change in the system for the conduct of the examinations, but considered that the terms of the Act required me to recommend the release of those marked scripts that had been requested.

The Department accepted my recommendation and released all the scripts that had been requested.

Requests

During February and March 1984, I received 12 requests to investigate and review decisions of the Minister of Education and the Department of Education not to make available marked 1983 School Certificate Examination scripts under the Official Information Act.

Background

In 1983, the Department had anticipated that it would receive requests for the return of marked School Certificate scripts and had sought legal advice. The decisions that I was asked to investigate and review were based on that advice.

All the requestors were either examinees during the 1983 School Certificate Examination or others acting on their behalf. Their prime motivation was to see where they had gone wrong and to learn from their mistakes: some considered that they had performed well below expectations and wished to know the reasons; others proposed to look at ways of improving future results. Another motive was a wish to check marking methods.

In commenting on the Department's reasons for its refusals, requestors pointed out that if the names of markers appeared on scripts they could be deleted before the scripts were released. Some requestors felt that such deletions should not be necessary because code numbers rather than names were used to identify markers. One requestor suggested that the actual reason for the refusal was a wish to prevent people from seeing the extent of scaling used in converting the marks on the scripts into the final marks awarded. It was also suggested that the non-return of the scripts was intended to stifle the debate over the effectiveness of the School Certificate Examination as a method of assessing children's educational progress. Another requestor commented that she could not accept that it would be contrary to the public interest to make the scripts available. She argued that release was clearly in the interests of the individual examinees. One requestor said that she would be happy if the scripts were returned with the marks and comments of markers deleted if that were deemed necessary.

Grounds for Decision to Deny Access

The Department and the Minister had relied on s. 52 (3) (b), s. 9 (2) (b) and s. 27 (1) (c) for their decisions to withhold the scripts.

The relevant part of s. 52 (3) (b) preserves the effect of provisions in other Acts and Regulations that prohibit or restrict or regulate the availability of official information. The Director-General argued that this section applies to s.196A of the Education Act 1964 which states that:

> "The Director-General may do all such things and enter into such arrangements and agreements as may be necessary for the holding of the School Certificate Examination; and the School Certificate Examination shall be conducted in such manner as the Director-General thinks fit".

This section empowers the Director-General to make rules relating to the holding and conduct of the School Certificate examination. One of the rules that had been made was that no scripts, comments or marks other than the final mark should be released. The Director-General concluded that disclosure of the marked examination scripts would be in breach of this rule.

Both s. 9 (2) (b) and s. 27 (1) (c) had been relied on, although if either section were applicable, the other could not be. Under the Act, a request for *official* information may be made under s. 12, while a request for *personal* information about a requestor is made under s. 24. Section 9 specifies some reasons for withholding *official* information while s. 27 sets out the only reasons for which a valid request for *personal* information may be refused. The Department had thought it necessary to consider both alternatives because the requestors had not specified whether their requests had been made under s. 12 or under s. 24.

In a standard letter that was sent to requestors, the Department had cited s. 9 (2) (b), saying:

> "that, since the marks and comments are supplied to us in confidence, returning marked scripts will be likely to prejudice the future supply of such marks and comments or, alternatively, that the public interest is best served if scripts are not returned."

The Department had also relied on s. 27 (1) (c), saying:

> "that the marks and comments on candidates' scripts which evaluated their performance in the examination were information supplied to the Department in confidence by the marker. There is either an express or an implied promise to the marker that these marks and comments will not be disclosed to anyone. Returning the scripts to candidates would breach this promise made to our markers."

In a report to me, the Director-General commented that two sets of information were supplied to the Department. One was the examination script as completed by the candidates before it was marked, which I have called the "script", and the other was the marks, comments, and ticks or crosses inserted by the examiner, which I have called the "marks and comments". The Director-General pointed out that marks and comments were often scattered throughout the marked examination script and that it might not be possible to separate them from the script. The Department was concerned with protecting the information supplied by the examiner because examiners had been given an undertaking that their marks and comments would be held in confidence. In many cases this would have been an implied promise, assumed by the examiner on the basis of the Department's past practice. Some examiners had apparently raised the question (for instance at examiners' panel meetings) and had been given an explicit assurance of anonymity. The Department saw the giving of such an undertaking as being necessary because the allocation of individual marks and interpretation of answers could be endlessly debated within the confines

of the candidates' schools and in public. The Department argued that such controversy was likely to make examiners of the required standard less willing to undertake the task.

The Director-General argued that s. 27 (2) (a) (iv) applied to School Certificate, because it referred to the awarding of "contracts, awards, scholarships, honours or other benefits". He took the view that School Certificate could either be regarded as an "award" or be classified under "other benefits" using the *ejusdem generis* rule, since "awards", "scholarships" and "honours" could all relate to academic achievements. In his opinion, the marks and comments supplied by the examiners were evaluative or opinion material compiled solely for the purpose of determining the eligibility of a candidate for the award of a pass mark in School Certificate.

The Director-General referred to ss. 16 and 17 which provide for alternative ways of making information available and for the making available of information with deletions. The Director-General concluded that there was no acceptable or practical alternative method of supplying all the information. Clearly, those requesting the scripts wished to evaluate the marks and comments of the examiner. The deletion of those marks and comments would appear to defeat the purpose of a request which was to enable the candidate to understand the deficiencies in the answers given.

Both the Minister and the Director-General drew my attention to the administrative burden that was likely to fall on the Department if a general release of scripts were required. The Minister told me that it would not be a simple administrative task. Over 300 000 marked scripts were kept in subject order under secure conditions in three spearate centres. The limited numbers of staff in each centre had duties which extended well beyond the care and custody of scripts. If, as one requestor had suggested, the scripts were to be returned to the examination sites, an inordinate amount of sorting work would be required which could not be started until the April/May period following recounts, when there were other work commitments. Because of the need to protect the privacy of candidates' scripts, an administrative establishment could be necessary at each of the 450 examination sites. When I discussed this question with the Director-General, he expressed the opinion that a decision to release the scripts could be followed by as many as 40 000 requests for scripts. At the least, requests for some 5 000–10 000 scripts that had received marks between 40 percent and 50 percent would be likely. The Department had so far received only about 100 requests for the return of the scripts but, in his opinion, this was because of public statements that access would not be permitted.

The Minister pointed out that the School Certificate Examination is an external examination intended to measure achievements in relation to national standards. Both the Minister and the Director-General said that the examination had not been designed as a teaching exercise, but rather as a means of assessing and providing an official record of candidates' standards of attainment in relation to their peers. The Minister considered that any queries relating to a candidate's knowledge in a particular subject could be dealt with by teachers through their knowledge of the candidate's strengths and weaknesses accumulated through internal examinations and normal class work. Teachers would be aided by the Chief Examiner's report and the question paper which should provide competent teachers with adequate means of assistance for pupils. I did not examine this point; the reasons why people seek information are not considerations that can be taken into account under the Act.

Opinions Formed

(A) *Section 52 (3) (b)*

Section 52 (3) (b) of the Official Information Act reads as follows:

> "Except as provided in sections 50 and 51 of this Act nothing in this Act derogates from:
>
> (b) Any provision which is contained in any other Act of Parliament or in any regulations within the meaning of the Regulations Act 1936 (made by Order in Council and in force immediately before the 1st day of July 1983) and which:
>
> (i) Imposes a prohibition or restriction in relation to the availability of official information; or
>
> (ii) Regulates the manner in which official information may be obtained or made available;"

I did not regard s. 196A of the Education Act as falling withing the scope of s. 52 (3) (b). Section 196A itself imposes no prohibition or restriction on access to the information in question. The interpretation adopted by the Minister and the Department would require an addition to the words of s. 52 (3) (b) to make it read: "Except as provided . . . nothing in this Act derogates from . . . [a]ny provision which is contained in any other Act . . . or in any regulations . . . *or rule or practice made pursuant thereto*". In my opinion, it was not acceptable to construe a statute in a way which required the insertion of words not in the enactment where there was a reasonable alternative construction which did not require those additions. It was reasonable to construe s. 52 (3) (b) as saying that the provisions of the enactment itself must prohibit, restrict or regulate access to information. Moreover, it would follow from the Director-General's argument that an administrator's rule or practice would prevail over the terms of a statute. I did not believe that a Court would accept such a construction. In my opinion, the Minister and the Department could not rely on s. 196A of the Education Act 1964 as a reason for withholding the marked scripts under s. 52 (3) (b).

(B) *Section 9 (2) (b)*

Section 9 (2) (b) could only be relied on by the Department and the Minister if the information requested were official information rather than personal information. The Director-General informed me that the Department would accept either classification of the information. I considered the nature of the scripts and formed the opinion that they were personal information. Most of the information to be found in a marked script was supplied by the requestor. The only additional items of information were the marks and comments. "Personal information" is defined in s. 2 as "any official information held about an identifiable person". The information comprising the marked examination scripts was: (a) official information (b) about an identifiable person (c) requested by that person and (d) held in a manner which was readily retrievable. Both the script and the marks and comments were information about the examinee in the context of the Official Information Act. Since, in my opinion, the requests should have been considered as requests for personal information under s. 24 of the Act, I did not consider the Department's reliance on s. 9 (2) (b).

(C) *Section 27 (1) (c)*

To justify the withholding of the information under this subsection, the

Minister and the Department needed to establish that the information sought was (1) evaluative material (2) compiled solely (3) for determining the qualifications of a person (4) for the awarding of a contract, award, scholarship, honour or other benefit, and that (5) disclosure of this particular information (6) would be in breach of an implied promise that the information or identity of the person supplying it would be held in confidence. I accepted that both the scripts and the marks and comments were material prepared and submitted to the Department for the purpose of evaluating, i.e., assessing the quality of the requestor's work and deciding whether that person had achieved a sufficient standard to be given a particular mark.

The Department argued that School Certificate could be regarded as an "award" or as coming within the category of "other benefits". It contended that under the *ejusdem generis* rule School Certificate could fall within either category since "awards", "scholarships" and "honours" could all relate to academic achievements. However, the passing of the School Certificate Examination did not seem to me to constitute an honour as defined by the Shorter Oxford English dictionary—"high respect, esteem or reverence, accorded to exalted worth or rank"; "something conferred or done as a token of respect or distinction". Furthermore, I did not consider that School Certificate could be regarded as a contract or scholarship. The word "award" is defined by the Shorter Oxford English dictionary as "a sentence or decision after examination, especially that of an arbitrator or umpire"; "that which is awarded or assigned as, payment, penalty". On the basis of that definition it could be argued that School Certificate was an award (or "other benefit" analogous with an award) but, in my view, the nature of the other terms used in s. 27 (2) (a) (iv) suggests that what was contemplated was something more difficult to achieve than School Certificate or something rarer or of a different quality.

In respect of establishing an implied promise to hold information in confidence, the situation for the script was different to that for the marks and comments. Any promise of confidentiality for the script would need to have been a promise given to the examinee. As the examinee was the person asking to see the script, release would not have breached any such promise of confidentiality. In relation to the marks and comments, the Department needed to establish that there was an implied promise that the information, or the identity of the person supplying the information, would be held in confidence. However, examiners were required to use a code number on the scripts and I could not see that further protection of the identity of the examiner was necessary.

I understood that, until the passing of the Official Information Act, the promise to the marker that his or her identity and marks and comments would remain confidential had always been implicit rather than explicit. Since there had never been any question of making such material known, all markers had worked on the implicit assumption that neither their names nor their work would be made public. I was doubtful whether a pattern of past conduct concerning requests for access to markings could, by itself, be sufficient to constitute an implied promise.

Furthermore, the terms of s. 27 (1) of the Act make it clear that the Department and Minister have a discretion in this area and are not obliged to refuse to make information available. Section 27 (1) reads as follows:

> "A Department or Minister of the Crown or organisation *may refuse* to disclose any personal information requested under s. 24 (1) of this Act if, and only if,—. . ." (Emphasis added).

(D) *General Conclusions*

I formed the opinion that the requestors had a legal right to the return of their scripts. However, I was left in some doubt about whether the marks and comments might have been properly withheld. Even if they could have been properly withheld, it was clear that the Minister and the Department had a *discretion* when making a decision under s. 27.

Section 16 allows for access to information in a variety of alternative ways and s. 17 allows for deletions. However, the separation of the markings from the scripts could be achieved only by manual alteration of every paper. The expenditure of a vast amount of time and effort would be necessary in order to take advantage of those provisions. Withholding the marks and comments made no sense in this situation and I formed the opinion that even if the Minister or the Department had the power to withhold the information under the Act, their discretion should have been exercised in favour of release. The provisions of s. 5 of the Act seemed to me to be relevant to the exercise of any such discretion and to tip the balance in favour of availability. That section reads as follows:

> "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."

It was necessary to consider the form of my recommendation, if any. I considered that the views of the Minister and the Director-General on the likely administrative burden which could fall on the Department if the scripts were released needed to be given great weight. However, this concern had been expressed to me in other similar situations and in my experience such fears were not always realised in practice. It seemed to me that I was obliged to recommend that the 134 requests already received by the Minister and the Department should be met. The repercussions of such a recommendation would obviously be monitored by the Department and if a flood of additional requests were provoked, administrative procedures for dealing with the situation in future years would need to be devised.

I did not regard it as my function to be the instrument of major change in the system of the conduct of examinations. However, I was obliged to apply the provisions of the Official Information Act as I understood them. A recommendation of the kind I was proposing under s. 22 (3) of the Ombudsmen Act (via s. 35 (2) of the Official Information Act) was not binding on either the Minister or the Department. I considered that if my recommendation were to be implemented, it would provide the means for testing the validity of the arguments which had been advanced. It would also allow time to devise a scheme which would enable the general release of examination scripts.

That scheme would require various adjustments to existing procedures. Some of the difficulties which were foreseen concerned the release of the marks and comments on the scripts. They could be met by providing a separate column for markers' notations that could be separated or detached from the scripts. I understand that this was also suggested by the Department's legal advisers. The timing of the release of scripts would need to allow for the completion of the recounting process. A detailed explanation of the Department's scaling procedures would also be necessary if the raw marks on the scripts were to be understood.

Recommendation

I recommended pursuant to s. 35 (2) of the Official Information Act and s. 22 (3) of the Ombudsmen Act 1975 that the marked 1983 School Certificate Examination scripts be returned to all the requestors who had made such requests to the Department and the Minister of Education.

On 15 August 1984, the Department announced that marked examination scripts would be returned to the 134 candidates who had sought them.

G. R. LAKING.

CASE NO. 335

Section 9 (2) (b) (ii)

NAME OF INFORMANT—REQUEST BY MINISTER RESPONSIBLE FOR ORGANISATION, SUPPLY OF INFORMATION

Information from a medical report on a Minister of the Crown had been revealed to the Broadcasting Corporation of New Zealand. The Minister of Broadcasting had made a request under the Act for the name of the Corporation's informant. The information had been withheld, under ss. 9 (2) (a), 9 (2) (b) (i) and 9 (2) (b) (ii), and the Minister asked me to review that decision. My review was not complete at the time of the General Election of July 1984, when the Minister was not re-elected. In response to my enquiry, he said that he wished to maintain his request as a private citizen.

In his original request for a review, the Minister said that, in his opinion, the case involved a balancing of the public interest in the dissemination of information with the public interests in: the detection and prevention of unauthorised disclosure of confidential official information; the maintenance of a trustworthy public service; and the maintenance of the Police as an effective law enforcement agency. The view of the Corporation was that the public interest would be best served by recognising the longstanding principle that journalists are entitled to protect their sources.

My investigation showed that a judgment of the Court of Appeal and the experience of journalists supported the view that there is a strong public interest in maintaining the confidentiality of journalists' sources, which requires disclosure of those sources only in order to ensure that justice is done. In this case, the Police knew the name of the informant so that, in my view, disclosure in the interests of justice was unnecessary. I formed the opinion that the information requested was properly withheld under s. 9 (2) (b) (ii). It was not necessary for me to consider the other reasons advanced by the Corporation for its decision.

Request

On 24 May 1984, I was asked to investigate and review a decision of the Broadcasting Corporation of New Zealand to withhold the name of the person who had informed Television New Zealand of the contents of a medical report on a Minister of the Crown.

Background

Television New Zealand News had broadcast an item about the health of a Minister. The item referred to a medical report prepared for the Police by a Wellington neurosurgeon and to the contents of that report. The Minister of Broadcasting asked the Broadcasting Corporation to disclose, under the Official Information Act, the name of the person who had made the information available to TVNZ News staff. The BCNZ withheld the name of the informant and the Minister asked me to review that decision. He made the request to me a matter of public record.