

TOWARDS OPEN GOVERNMENT

**COMMITTEE ON
OFFICIAL INFORMATION**

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GENERAL REPORT

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

Dear Prime Minister,

I have the honour to present the General Report of the Committee on Official Information which sets out the conclusions reached by the Committee on the questions raised in its terms of reference.

Certain aspects of our work require further development and a more detailed examination of them is in progress. A Supplementary Report together with a draft Official Information Bill and associated legislative proposals will therefore be presented in the early part of the coming year.

On behalf of the Committee
Yours sincerely
ALAN DANKS.

Wellington,
19 December 1980.

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THE ARGUMENT

The Committee on Official Information was set up by the Government “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”, and in particular to “examine the purpose and application of the Official Secrets Act 1951”.

The submissions received by the Committee show that the Government's aim is widely shared. There is a growing desire in various sections of the community for fuller information about the policies and activities of the Government. And there is a growing recognition by the Government itself of the need to take the public into its confidence, especially when making decisions that affect large numbers of people. These developments are partly due to the changing climate of opinion throughout the Western world, but they arise also from the changing role of government in New Zealand. For example, the large-scale development of natural resources is involving the Government even more deeply in the life of the people, and increasing the need for public understanding and co-operation.

The present arrangements for handling official information are not well adapted to the situation in New Zealand. The Official Secrets Act is based on the British Statute of 1911, and the system of security classifications is closely related to it. The Act assumes that official information is the property of government, and should not be disclosed without specific reason and authorisation. Those who want information must take the initiative and provide justification, and those who supply it must ask themselves whether they have authority and good reason to do so. Criminal sanctions are attached to “wrongful communication”.

The assumptions implicit in the Act are not in keeping with contemporary attitudes in New Zealand and in practice it is not strictly enforced. This difference between law and practice is in itself good reason why change is necessary. Nowadays it is generally accepted that the Government has a responsibility to keep the people informed of its activities and make clear the reasons for its decisions. The release and dissemination of information is recognised to be an inherent and essential part of its functions.

In practice though not yet in law, the onus of proof is shifting from those who want information disclosed to those who want it withheld. The assumption on which both the Government and interested groups are now tending to work is that official information should be made available to the public, unless there are good reasons to withhold it in the interests of the community at large. Such good reasons may include national security (both internal and external), public peace and order, economic stability (including industrial relations), commercial transactions, legal privilege (including client relationships), individual privacy, and the effective conduct of government business, as well as the need to ensure the continued availability of information for any of these purposes.

We believe that, if they are to be effective, rules for the handling of official information must be brought into line with current attitudes and practices. The law must be such that it commands respect.

We therefore consider that the system based on the Official Secrets Act should be replaced by a new set of arrangements. The Government should, in our view, reaffirm its responsibility to keep the public informed of its activities and to make official information available unless there is

good reason to withhold it. Grounds for withholding information from the public should be set out clearly, along with the basic principle.

We do not think that an administrative directive to heads of departments and agencies would meet the need in New Zealand. The changes we propose are of such constitutional importance that they deserve to be given the force of law; in this way the Government and Parliament will provide an assurance to the public that no administrative directive could give. Legislation will also be required to repeal the Official Secrets Act and to replace it with more appropriate measures of protection.

We therefore recommend that the proposals put forward below be incorporated in a new Official Information Act, which enshrines the central principle and sets out the grounds for withholding information.

We are also of the view that the principle should be applied progressively and with proper account being taken of practical considerations. An attempt at a sudden and definitive reform could easily fail.

The task of adjusting the formal arrangements for the protection and release of official information to the changing needs and attitudes of the community is likely to be a continuing one. We have identified three distinct but related tasks central to this adjustment:

- (a) *reviewing the practice* of Government departments and agencies to ensure that official information is in fact made readily available to the public wherever possible;
- (b) *hearing complaints* from the public about the withholding of official information, and resolving questions arising from these;
- (c) *identifying additional categories* of official information which can be made readily available to the public with minimal safeguards.

Our proposals are designed to use existing institutions as far as possible, and to take advantage of their experience and public standing. Thus we propose widening the present powers of the Ombudsmen to investigate and make recommendations on individual complaints of denial of access to information. To ensure that attitudes, practices, and systems in the State Services meet the new requirements we propose that a section of the State Services Commission be expressly charged with responsibility for encouraging and guiding Government departments and agencies. But the approach we recommend also requires a means of systematically enlarging the range and scope of information available to the public. We are satisfied that no existing institution or agency is appropriate to perform this broad policy-making function. It is foreign to the Ombudsmen's office, and it would be inconsistent with the spirit of our recommendations for the responsibility to be vested in any department of State. Equally it is outside the proper province of the courts, which are concerned in New Zealand with interpreting the law and judging disputes.

We therefore recommend that the progressive extension of the area of official information available to the public should be achieved by Order in Council under the proposed Official Information Act on the public recommendations of a new body of high standing which is independent of ministerial control. Accordingly we propose the establishment of an Information Authority with the composition, procedures, and powers set out in later paragraphs of this report.

In addition we believe that there should be some immediate enlargement of the area of available information. Change need not be left entirely to the future and to the machinery we envisage. An Official

Information Act should itself make additional categories of information available to the public. One such category should be what is sometimes referred to as informal administrative law - the principles and criteria on which administrative decisions affecting the individual are made, and (with limited exceptions) the reasons for these decisions.

The area of individuals' access to personal information about themselves is another instance, and one that merits special attention. We consider that explicit provision should now be made for individuals to have proper access to information concerning them held by Government departments and agencies. We believe there should be guidelines for official use and handling of such information.

The practical question of resources - both of people and money - is an important one. Our proposals, while they do entail a measure of new expenditure, are put forward on the basis that the sort of shifts of attitude and emphasis we are seeking cannot, and should not, be imposed overnight. Many skilled man-hours are already devoted to meeting parliamentary, individual, interest group, and media information requirements. It is difficult to look ahead and estimate how much more it would cost to induce the desired shifts. But we envisage a programmed course of action, pragmatic and flexible enough to be modified as the sequence progresses. We assume that identification of detailed costs will be taken into account in the process.

The essential purpose of the new system we propose is to improve communication between the people of New Zealand and their government. The effectiveness of the reforms recommended by the Committee will depend largely on the attitudes of those directly concerned - not only of Ministers and officials, but also individuals, interest groups, and the public media. A new approach will be required from Ministers and officials, to place greater emphasis on the positive information functions of the Government. By making intelligent and fair use of the official information that is made available, the interest groups and the media can in turn encourage ministers and officials to adopt a still more open approach, and thus speed up the process of change. Unfair or inept use of information may have the opposite effect. Balance is a goal that can seldom be fully achieved, but if it is not actively sought after the credibility of those involved may suffer. Bodies responsible for upholding the standards of the media may wish to reconsider their own procedures in the light of this report. The proposed Information Authority may also wish to address the problem at an early stage, to see what further action may be required in this area to improve communication between Government and people.

Greater freedom of information cannot be expected to end all differences of opinion within the community, or to resolve major political issues. If applied systematically, however, with due regard for the balance between divergent interests, the changes we propose should help to narrow differences of opinion, increase the effectiveness of policies adopted, and strengthen public confidence in our system of government.

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THE COMMITTEE'S TASKS

1. Our *terms of reference* (appendix 1) are both general and specific. The basic task is “to contribute to the larger aim of freedom of information by considering the extent to which official information can be made more readily available to the public”. Our two specific assignments involve redefinition of the current system of protecting information by “classification”, and amendment of the Official Secrets Act. In dealing with these questions we are to have regard both to that larger aim and to “the need to safeguard national security, the public interest and individual privacy”.
2. This General Report gives the substance of our proposals, and the bases from which they have been developed. The Supplementary Report to be submitted later will go into more detail and indicate how each of our recommendations might be put into practice.
3. For the purposes of our inquiry we have regarded “official information” as material held by Government departments and Government agencies. We have not extended our study to information generated and held by Parliament, the courts, administrative tribunals, and local government, but we would expect our proposals to affect in due course practices in those areas, and also in the private sector. We recognise that the term “government agencies” is not precise. While we consider that the term includes all the organisations named in Part II of the First Schedule to the Ombudsmen Act 1975, other agencies will be included for the purpose of the draft Bill to be appended to our Supplementary Report and we will examine in that report the position of independent statutory officers. We shall also take up there the question of the extent to which the new system might apply to documents created before its introduction.
4. We have followed closely the debate in Britain, Canada, and Australia since their experience of information problems arises in settings similar to our own. We have also studied the systems adopted in the United States and Sweden. Our aim has been, however, to find solutions relevant to New Zealand needs and circumstances. In seeking the way which might serve best to promote the aim of freer information flows in this country we have relied heavily on local sources - the studies prepared within our own organisation, and the written submissions we received, supplemented by dialogues with a representative selection of their authors.
5. We have kept in touch with public comment. In an effort to provide better understanding of some of the complex issues involved, we have circulated a series of newsletters to the media and to those who made submissions. These newsletters summarise progress of the Committee's work programme and discuss important areas of the background material made available to us both from New Zealand and overseas.
6. To test reactions from the community on the central issues, the Committee decided very early in its work to call for submissions from the public. Government departments and statutory agencies were also invited to comment on the issues they considered to be most important in terms of their responsibilities.
7. In response to its invitation the Committee received a total of 135 written submissions (appendix 3). Of these 69 could be classed as nonofficial, coming from professional bodies, local authorities, parliamentarians, individuals, companies, interest groups, and associations of

people with a common concern. A further 29 submissions came from Government agencies and statutory corporations, and 37 from Government departments. These submissions have been a major source of material for the Committee. They have been followed up by a series of 80 interviews (appendix 4), spread over a period of 16 months, to supplement and in some cases clarify our understanding of particular issues and how they affect the different interested parties.

8. The *non-official submissions* show an overwhelming interest in greater openness and freer flows of information. A majority of them do nevertheless recognise a need to protect some classes of officially held material. The highest priority for protection is given to personal information on individuals; national security and defence are given substantial support as areas meriting protection; others often mentioned are foreign affairs, police records, and commercial information. A number of submissions commented on what they saw as impediments to availability: the Official Secrets Act, of course, Public Service Regulations, and attitudes. The majority of the submissions that considered ways of achieving greater freedom saw this as calling for a legislated right of access, though a few mentioned guidelines or directives as appropriate. Another widely held view was that there should be a means for testing the need for secrecy where this is considered absolutely necessary: a provision for appeal where access is initially denied.

9. *Government departments and agencies* also recognised the need for more information to be publicly available. Some written submissions, in response to the Committee's specific request, emphasised areas seen as needing protection if government institutions were to be able to discharge what they saw as their proper functions. Submissions drew to our attention an array of statutes and provisions concerned with the release and protection of official information. These were listed over and above the Official Secrets Act, State Services Act, and Public Service Regulations which affect Crown servants. Permanent heads and others who appeared at interview indicated nevertheless their general support for greater openness of information.

10. All the reasons for protection cited in the non-official submissions were covered in those from government institutions, but once again special importance was given to protecting personal information on individuals. And attention was also drawn to the area of commercial information (including trade secrets). Not surprisingly, the official submissions spent more time than those from private organisations and individuals on the need to give a measure of protection to certain processes of government, particularly in the economic and financial field, and showed special concern that the ability of departments to put forward impartial advice to ministers should not be impaired. Some departmental submissions raised the likely resource demands which substantial public access to their records would create.

11. Our consultations have made us aware that *public attitudes towards freedom of information have divergent and mutually inconsistent bases*. There are pressures towards greater openness generated by the media, for example, or by interest groups, or within the parliamentary system. At the same time, there are concerns that run counter to the general movement: about individuals in respect of whom information is held officially, about protecting commercial viability, about maintaining sources of information, and about the ability of the Government to govern. We have heard representations of the views of

most of the main groups actively seeking access to official information at the present time. We could not conclude, however, that these are representative of the full spectrum of information needs in this country.

12. Access to official information is part of a wider general issue. It involves the whole interrelationship of government and the community, and the mutual advantage in communication and co-operation. The increasing complexity of official interventions undoubtedly contributes to community attitudes, and to the generalised concern about ability to influence government action that has, in turn, spurred debate on open government. It is clear that there is a widely perceived need to have more information about the actual operations of government; that the service to the general public in this area should be more forthcoming; and that it should reach the more remote parts of the country as well as urban centres. The focus of public concern with official information can however, be expected to shift from time to time. And the complex pressures which government has to reconcile as part of the governing process make it essential that there be a flexible means of responding to these shifts.

THE ESSENCE OF THE PROPOSALS

13. On the “specific assignments” in our terms of reference we propose -

- a *new system of security classifications*, with fewer and more circumscribed gradations;
- the *repeal of the Official Secrets Act 1951*. The matters dealt with in that Act, to the extent that they still need to be covered by legislation, as in the case of spying and the wrongful release of information which could seriously harm New Zealand's interests, should be the subject of appropriate amendments to the Crimes Act 1961, and perhaps other Acts, and of provisions in the Official Information Act we propose.

14. To promote the larger aim of making information more readily available to the public, we have developed a group of measures resting on a legislative base -

- an *Official Information Act* would set out purposes, principle, and criteria:
 - the purposes would call for the progressive increase in the availability of information, and for proper access by individuals to information relating to them, while conceding the required protection of some records;
 - the principle would be that information should be available unless there is good reason for withholding it;
 - the criteria would constitute the basic guide for all concerned with the release and protection of information, and access to it.
- *legislative and executive decisions* would set up the mechanisms for reforms needed to give effect to the above purposes:
 - an information unit within the State Services Commission would be given management responsibility to promote a more effective flow of information;
 - the Ombudsmen would have additional powers to deal with complaints about refusals to release information in accordance with the criteria established by the new Act;
 - an independent Information Authority would be the instrument for the progressive enlargement of the area of information. which is to be publicly available; not only through the issue of guidelines and the audit of progress, but also through recommendations, to be put into effect by government decisions through Orders in Council, identifying additional categories of material which should be released or accessible after due consideration of claims for exemption.
- the Official Information Act would make appropriate statutory provision for the availability of the principles and criteria on which administrative decisions affecting the individual are based and (with limited exceptions) the reasons for these decisions; and, in the field of individual privacy, it would provide a new basis for the proper collection, use, and protection of personal information, and provide for proper access to it by those to whom it relates. It would set out statutory principles, and provide for the issue of guidelines and the vesting of recommendatory powers in the Information Authority.

15. We were required to look at the classification system and the Official Secrets Act. These subjects, and the generality of the wider aim stated in the terms of reference, obliged us to consider not only the output of information and access to it, but also the privacy of personal information, the principles and mechanisms which were likely to be most effective here, and the desirable structure of legislation. We do not offer final answers on all issues, but each finds its place in our report.

THE PRESENT LAW

16. The principal inhibition in law on the handling of official information is the “catch-all” provision of section 6 of the Official Secrets Act 1951. Section 6 makes it an offence for an officer to communicate official information to any person “other than a person to whom he is authorised to communicate it or a person to whom it is in the interest of the State his duty to communicate it”. The Act goes on to provide severe penalties for unauthorised disclosure.

17. The Official Secrets Act is of course not the only statute which protects official information. The State Services Act 1962 and Public Service Regulations 1964 prescribe disciplinary action in the event of unauthorised disclosure. The Crimes Act 1961 contains a section about communicating secrets. And there are a large number of other statutes which prohibit disclosure. Some specify particular persons to whom disclosure is permitted, or particular circumstances in which it is permitted. They cover, broadly speaking, such information as:

- personal details provided by individuals (e.g., Inland Revenue Department Act 1974, Statistics Act 1975);
- information gained by inspectors of factories and business premises under industrial welfare legislation (e.g., Factories Act 1946, Equal Pay 1972);
- details of manufacture, sale and storage of products (e.g., Clean Air Act 1972, Food and Drug Act 1969);
- information gained during inspection of company records (e.g., Companies Act 1955);
- information provided to obtain a privilege or licence (e.g., Mining Act 1971).

18. The Official Secrets Act is nevertheless most often referred to because of its universal application and because officers newly appointed to the Public Service are required to sign a declaration that they are aware of the terms of section 6 and also of regulation 42 of the Public Service Regulations 1964, which is as follows:

“42. **Official information not to be given** - (1) ...

“(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.”

19. In all, the *law clearly establishes a rule that information should not be disclosed without authorisation*. Many Government departments proceed on the assumption that *there is in practice an implied authority to disclose a great deal*. But the nature of the information which is seen to be covered by such an authority has depended heavily on departmental and ministerial attitudes. The uneasy compromise and the conflicts inherent in this situation do not square with present day needs and attitudes of the New Zealand community.

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THE REASONS FOR OPENNESS

20. The case for more openness in government is compelling. It rests on the democratic principles of encouraging participation in public affairs and ensuring the accountability of those in office; it also derives from concern for the interests of individuals. A no less important consideration is that the Government requires public understanding and support to get its policies carried out. This can come only from an informed public. These are recognised arguments and are well represented in the literature on the subject. There is in addition a special feature of the New Zealand setting for these arguments to which we wish to draw attention.

21. New Zealand is a small country. The Government has a pervasive involvement in our every day national life. This involvement is not only felt, but is also sought, by New Zealanders, who have tended to view successive governments as their agents, and have expected them to act as such. The Government is a principal agency in deploying the resources required to undertake many large scale projects, and there is considerable pressure for it to sustain its role as a major developer, particularly as an alternative to overseas ownership and control. No less striking is the extent to which Government is involved in economic direction, regulation, and intervention. Along with the impact of the State budget and expenditures, there are important controls on, for example, wages, prices, the use of labour, transport, banking, and overseas investment. Our social support systems also rely heavily on central government. History and circumstances give New Zealanders special reason for wanting to know what their government is doing and why.

Participation

22. For many people the arguments for greater access to official information start with participation, on the principle that a better informed public is better able to play the part required of it in the democratic system - and to judge policies and electoral platforms. It is expected too that the critical and at times difficult choices that governments have to make for our society will be better resolved if the community is well informed. In this way also political decisions would have a stronger claim to be made in the name of the community. A number of structures and procedures have been set up in New Zealand in recent years which, it has been hoped, could work specifically to involve more groups in policy discussion before decisions are taken, and so to take public consideration of policy options a stage further than previously. The Securities Commission under the Securities Act 1978 is one example, and the procedures laid down in the Town and Country Planning Act 1977 another. These statutes demonstrate the growing acceptance by Parliament of the value and importance of the wider participation of individuals who are affected by regulatory and planning decisions or who, for other reasons, can usefully contribute to the process of decision.

Accountability

23. Another argument often stressed is that access of citizens to official information is an essential factor in making sure that politicians and administrators are accountable for their actions. Secrecy is an impediment to accountability, when Parliament, press, and public cannot properly follow and scrutinise the actions of government or the advice given and

options canvassed. Divisive suspicion of government and its advisors is encouraged when decisions are made without recognisably comprehensive public presentation of how they have been arrived at.

24. In the New Zealand context the pressure for accountability applies increasingly not only to the political executive on which it has traditionally focussed in the Westminster model of government, but also to the permanent administration. As the State becomes involved in more and more areas of community life public servants are being called on to make more decisions affecting individuals and corporations - in the granting of special benefits for example, or tax concessions, or the administration of the many other conditions, obligations, and liabilities that affect our work and personal activities. So we find that the public is wanting to know more about the background of and reasons for these decisions, and to know if the bureaucracy is faithfully reflecting the stated policies of government and the interests of people.

25. As the complexity of government administration has grown, it has become evident that it is no longer possible, even if it were desirable, for ministers to act as the sole information source for all aspects of their portfolios. There are in addition many independent statutory officers and bodies not accountable to ministers for their individual decisions. We see the development of what is referred to in the report of the Royal Commission on Australian Government Administration as "more frequent and systematic attempts to communicate directly with officials". Some departments and agencies consider such consultation to be an important and even essential part of their work. Two-way communication between officials and public is becoming a necessary procedure for effective administration of government policy. This shift has important implications for the Public Service and its stewardship of official information, not least in the allocation of responsibility for decisions. Clarification of the possible impact of greater openness on the relationship between ministers and senior officials is discussed later in this report. It has been an important factor in our choice of an evolutionary approach to the opening-up process.

Effective Government

26. Notwithstanding the need for participation and accountability, the Government's essential task is still to govern. If it is to do this effectively it has to win votes and secure public support, not least for the major development decisions in which it is involved and which may not necessarily be foreshadowed in election platforms. Better information flows would in these circumstances help towards more flexible development of policy. New Zealand society has been criticised as being too closed, too resistant to change. But preparation for change and flexible responses to it become more urgent as external and internal economic and social pressures bite. The role of improved information flows and discussion in this process is recognised by the Government. The 1980 Budget statement concludes by referring to major developments shaping up, and observes: "Change requires public understanding and agreement on what are often complex and difficult issues. The Government has worked, and will continue to work, to secure that understanding and agreement and to make these changes."

27. As the major force in national activity the Government needs to have its aims broadly supported, its decisions understood and accepted. It is not to be expected that every one of these decisions will be popular; but

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the Government depends ultimately on public co-operation with the changes its decisions impose upon people.

Concern with Individuals

28. Within the context of greater availability of information, frequent concern has been expressed that individual citizens should be able to ascertain the existence of, and have access to, information on their personal affairs that government has collected and holds. This concern has been shown principally but by no means solely in relation to information held in computer databanks.

29. Although we have not had evidence of any significant abuses, we appreciate this concern. The problem is a real one and it impinges on our terms of reference. Later in this report (para. 39) we refer to the legitimate use and importance of limiting the collection of this material. Apart from that, many decisions affecting individuals are influenced by information about their personal affairs which is gathered either voluntarily or compulsorily.

30. Where individuals institute legal proceedings, information of this nature ordinarily becomes available to them. Moreover by law or practice it is normally disclosed in proceedings before administrative tribunals, by way of appeal or otherwise. But recourse to courts or tribunals is not always available or appropriate. For instance, individuals may not wish to challenge a decision unless they know that it is in fact based on wrong information.

31. There is a strong body of opinion, which we share, that, with only the necessary exceptions, individuals affected should be able to know and if necessary have corrected what personal information is held by departments or agencies. A precedent, which shows Parliament's acceptance of the principle, is to be found in the Wanganui Computer Centre Act 1976.

32. We recognise a risk that in responding to the need set out here personal information may be aggregated into an extended system of dossiers. This should be avoided.

THE REASONS FOR PROTECTION

33. In no country where access to official information has become an issue has the case been made for complete openness. Few dispute that there are good reasons for withholding some information and for protecting it.

34. What are these reasons? They concern:

- the interests of the country as a whole;
- the interests of individuals and organisations; and
- the interests of effective government and administration.

The reasons are of varying force. In some cases they can be seen as having absolute effect, and as inherently defeating any request for disclosure. In other cases they may be only a factor to be weighed against the basic principle of availability. So a properly founded claim of prejudice to the defence of New Zealand would justify withholding. But it is by no means now the case - if it ever was - that the canvassing of options within government administration must always be protected by confidentiality. This distinction is reflected in the draft legislation - the clause giving the principle and criteria - set out in appendix 5.

Interests of the Country as a Whole.

35. One general area for which it is generally accepted that protection is needed, can be collectively described under a "national interests" heading. It includes such fields as *security, defence, and international relations*. We consider that the *maintenance of law and order and the substantial economic interests* of New Zealand also merit assurances of protection, so that government can operate in the best interests of the public as a whole.

36. In police operations and the general maintenance of law and order the requirements for effective action, protection of the due process of law, and upholding of basic individual rights combine in many instances to call for protection.

37. The nation's economic interests have always demanded that it should be possible to protect the processes of negotiation and fiscal regulation. The "intangible capital of economic organisation" is seriously open to damage if options are prematurely canvassed or predictions come to be self fulfilling. Internationally, economic affairs are equally susceptible to loss of confidence and actual damage if confidentiality is unable to protect negotiations with overseas governments or organisations.

38. It is also widely recognised that much of the information under these headings can be sensitive not so much for what it reveals as for the *need to protect its sources*. The then Chief Ombudsman, in his report on the Security Intelligence Service (1976, p. 20), reached the conclusion that information received by New Zealand from its friends is of major importance in the political, economic, and strategic policy making fields. It is in the national interest to continue to get as much of this information as possible. While a good deal of it is in the public domain, some is not. Much of the latter is provided on the clear understanding that it will be afforded in New Zealand substantially the same degree of security as it is afforded in the country of origin. These considerations have led us to propose that in the areas described in this section (and set out in the draft provision on criteria in appendix 5) protection from disclosure shall be

absolute if disclosure is likely to prejudice essential interests including the continued flow of information.

Interests of the Individual

39. Few would question the *need to safeguard and protect the privacy of individual citizens*, and their legal rights. Government amasses a great amount of detail about individuals, and it is important that this information should be:

- gathered only where the State has established a need for it;
- handled appropriately (that is, securely stored, and accessible only to those using it for authorised purposes);
- used only for the purposes for which it has been obtained, or suitable and approved extensions of these (in preparation of aggregated statistics, for example).

The present body of legislation does not deal consistently with these issues. Our recommendations provide for further study.

40. We do not consider that the interests of privacy will always require protection of information concerning individuals. Indeed there are many instances now where personal information is not only available in practice but is a matter of public record, as for example in birth, death, and marriage registers, and registers under the Land Transfer Act 1952.

41. In some cases the public interest, for instance in the health of the community, will require the disclosure of some personal information which is normally kept confidential. The sensitivity of the information also varies. An absolute rule cannot be stated.

Public Health and Safety

42. While at first thought public health and safety might seem to demand openness, decisions in this area could also involve a difficult balancing of interests. The Government has statutory powers to take action to protect public health and the financial interests of individuals. The premature disclosure of information about steps to be taken to contain an epidemic, for example, could in some circumstances undermine their effectiveness. Similarly the disclosure of action being taken to protect investors against loss from the pending collapse of a large financial institution could well frustrate its purpose. In some cases the relevant facts might not yet have been adequately tested. In this area we would not see an absolute directive for release or protection of information as being conducive to the public's best interests. A flexible approach would serve better.

Commercial Confidences

43. Much commercial information is gathered by government, some compulsorily and some voluntarily, for various purposes. As in other fields, confidentiality for such miscellaneous inputs of information will often be a necessary condition for their continuing and effective supply. No general rule about protection will fit; judgments will need to take account of the purposes for which the data is collected.

44. There is also the intercommunication between government and private business or outside organisations which arises from the needs of public regulation, or the desire to take advantage of concessions, incentives or the like. Import licensing is one case in point; wage negotiations another. Here the balance between the public's right to know

and the need for privacy imposed by the conditions of negotiation or trade cannot be subjected to a simple ruling; the merits of each case must be judged.

45. When government itself engages in business a first view might hold that the conventions of confidentiality which are accepted for private commerce should equally apply to publicly operated activities. Where the activity can be readily related to commercial practice, as in buying and selling, it seems reasonable that government should “do and suffer”, on behalf of its taxpayer-shareholders, no less confidentially than does the private sector.

46. But the matter cannot end there. Not all government business activity has the profit-seeking, competitive colour of private enterprise. *And where national matters of economic or social moment such as the pursuit of regional development or of fuller employment become objectives, taxpayers who are called upon to subsidise such quasi-commercial activities should be informed about strategies and costs.* Where commercial, social, and economic objectives become conjoined, as in the case of the Railways, it is impossible to find a comprehensive rule which will apply, and again judgments on the merits of each case will be called for.

Interests of Effective Government and Administration

47. The area which involves protection of “the interests of effective government and administration” raises some of the most difficult questions in our exercise. There is widespread interest in the activities of government. *The fact that the release of certain information may give rise to criticism or embarrassment of the government is not an adequate reason for withholding it from the public.* To run the country effectively the government of the day needs nevertheless to be able to take advice and to deliberate on it, in private, and without fear of premature disclosure. If the attempt to open processes of government inhibits the offering of blunt advice or effective consultation and arguments, the net result will be that the quality of decisions will suffer, as will the quality of the record. The processes of government could become less open and, perhaps, more arbitrary.

48. It has been argued in the freedom of information debate that as Ministers are accountable for their decisions, so should officials be obliged to reveal their part in and share the consequences of these decisions. The possible outcomes of this sort of development would need to be carefully weighed. The requirement of openness could be evaded, for example, by preparing and giving advice orally, or by maintaining parallel private filing systems; the record of how decisions are arrived at would be incomplete or inaccessible; public confidence would suffer, and if the relative roles and responsibilities of ministers and officials became the subject of public debate, mutual recriminations could all too often develop. The desire to avoid this sort of situation could incline governments to look for politically acceptable or compliant people at senior levels in the public service; such a service is not likely to be able to recruit and retain staff of ability and integrity.

49. These dangers are not such as to deter us from supporting greater openness. But they should be taken carefully into account in mapping out the critical path for change. A new and sharper definition of areas of responsibility at senior levels, and the development of new and perhaps more explicit codes governing the relationship between Ministers and

officials might be required. The importance of careful adjustments in this area does point yet again to an evolutionary approach to openness.

50. We therefore conclude that there should be *continuing protection as needs be for the free and frank exchange of views between Ministers and their colleagues, between Ministers and officials, or between other officers of the Government in the course of their duty*. Such protection would not always be needed, will certainly often need to be of only a short-term kind, and should not preclude sensible steps to involve public servants in public debate about policy options and national choices before decisions are taken. Nor should it prevent the release of information explaining the bases of decisions and policies after they have been adopted.

51. It is implicit in what we say that much of the business conducted within the Cabinet system does not need blanket protection as a special category of exempted information because it will be safeguarded by the above criterion or because the subject matter involves one or more of the various interests mentioned earlier. We note that the deliberations of the Executive Council are protected by the oath taken by Executive Councillors under the Oaths and Declarations Act 1957.

52. There are a number of its functions for which government needs to be able to conduct public business on the same basis as similar private sector operations. These include negotiations, legal proceedings, audit and personnel matters. There will often be a case nevertheless for release of general statistical or descriptive information.

53. In general then the conclusion emerges that it *is no longer acceptable to set out a sweeping rationale for the protection of official information* or to expect that the public will accept in the future that certain areas of government business are inviolate simply because government says so. It is necessary to be at once more specific and more careful about the issues involved in protecting information. The question is one of degree and of having a guiding principle and a means of establishing how much and what kind of protection is appropriate to the New Zealand political and social setting.

THE CHANGING PRESUMPTION

54. Against this background of countervailing interests, the *presumption of non-disclosure is no longer helpful, or indeed, valid*. The pressures have in fact been shifting towards greater openness over a period of years, and practice has become a good deal more flexible than the existing legislative framework might suggest.

55. In 1962 the Royal Commission of Inquiry on the State Services pointed out that “Government administration is the public's business, and the people are entitled to know more than they do of what is being done, and why”. The point was taken up by the State Services Commission, which said in a circular to permanent heads in 1964 “Too often information is only given if there is a good reason for doing so. The rule should be that information is only withheld if there is a good reason for doing so.” This amounted to a reversal of the basic presumption about the release of official information. Since then more information has been made available to the public. So far, however, the new presumption has not received legal recognition, and no change has been made in the Official Secrets Act. It is high time to bring the law, and the arrangements based on it, into line with public attitudes and with the frequent practice of Government itself. We accordingly propose that *the resumption henceforth should be that information is to be made available unless there is good reason to withhold it*.

Overseas Solutions

56. There are two principal methods of dealing with this situation which have been tried overseas in political systems akin to our own. They are the administrative or “code of practice” approach, and the single-stroke legislation of a right of access. We have studied both as they have operated in other countries and their relevance to New Zealand circumstances.

57. The “code of practice” approach has been preferred in the United Kingdom (some legislative proposals have come forward but firm government policy on legislation has yet to evolve). It proposes a set of principles which could be endorsed by ministers and which would provide for greater exercise of discretion by departments and agencies, with a firm steer towards openness. A number of administrative steps have been taken, including the 1977 “Information Directive” to permanent heads, designed to secure release of background material relating to policy studies and reports unless ministers declined this. The 1979 Green Paper “Open Government” explicitly supports an evolutionary approach along these lines.

58. The single-stroke solution by way of legislation conferring “right of access” has been preferred in the United States and proposals on this basis are now before the Parliaments of Canada and Australia. This approach is regarded by many as a *sine qua non* of freedom of information, and as a prerequisite to the citizen's right to know what is being done in his or her name. In all of the overseas cases where there is a legislated right of access, it is in fact qualified by itemised areas of protection to which the right does not apply. Some examples are set out in appendix 6. These exemptions tend to be drafted in broad terms which leave open questions of interpretation, or they go into extensive detail which sometimes appears to reflect defensive attitudes.

Inset 3

59. Broadly drafted exemptions, as in the United States Freedom of Information Act, depend on further interpretation if they are to be workable in practice. In the United States context, the courts, which do of course have long experience of interpreting a written Constitution and Bill of Rights, are given this responsibility. The Act has given rise to extensive litigation to establish how the exemptions are to be interpreted and applied.

60. Other overseas texts, like the Canadian and Australian Bills, follow the alternative of setting out in careful and lengthy detail the areas of information to be protected from general public access.

Towards a New Zealand Solution

61. From our study of the “code of practice” approach, we have concluded that in New Zealand circumstances injunctions to officials would not work without a firm commitment by government to back them. And we doubt whether any commitment which did not have the force of law would either be acceptable to the community as an earnest of government intentions, or give officials a sufficient base to take substantial steps towards further opening up official information in their day-to-day operations.

62. Our Committee has, therefore, concluded that in *the New Zealand context there are strong grounds for preferring a legislative base*. The principles and criteria governing decisions to release and withhold information should be stated in legislation. The process for making these decisions should in part take statutory form. Our proposals that certain information be available as a matter of course require legislation. These points are concerned with content; but there are other important general considerations.

63. One which poses great difficulties is the need for balance - balance between the presumption that greater openness should be sought, and the need for protection in certain sensitive areas. The elements in balance would undoubtedly change over a period of time: reasons for protection based on the experience of the 1970s might not hold up through the 1980s. A second major consideration is the great difficulty of simultaneously applying a single regime all at once to all areas of government activity.

64. These two difficulties can be examined in the context of the process of advice and opinion offered as a basis for government policy decisions. All overseas “right of access” legislation includes exemptions which cover the advisory function. In New Zealand however there is a general movement towards more public discussion of options and advice: some at least of the advisory process can be undertaken in public. If the final line were to be drawn now in respect of the whole range of government activities, on the basis of overseas precedent it would probably exclude most of the advisory process. The area of commercial activity is another in which there is an evolving interest in opening parts of decision-making - where for example, public interest becomes a substantial factor. Yet in comprehensively drafted overseas texts aspects of commercial information too are included in lists of exceptions.

65. Under our proposals the judgments to be made about access have at least three significant characteristics: they are to be made by reference to broad criteria which are to be weighed against the basic presumption of availability; they are to be made by reference to the particular circumstances of the area of administration in question; and they are to be made from time to time by reference to any relevant changes in

circumstances. Judgments cannot, in our view, be properly and satisfactorily made all at one time by legislation. We were faced early in our work with the choice of trying to design a once and for all static framework, with a complex set of exceptions, or a more flexible mechanism, operating by reference to principles and competing criteria that reflect a continuing shift away from the presumption of secrecy. We opted for a flexible process.

66. We discuss in the next section of this report the institutions and procedures which are seen as involved in this process. But it is convenient to note here one central feature of the process and to indicate why we do not consider that the courts should have the major role in resolving issues. The central feature is that the executive will have final power of decision: in its political form it will make the basic commitment; it will set up the new practices within the permanent administration; it will, having received the recommendation of the Ombudsmen, have the final power to resolve disputes about access to particular documents; and it will, having received a report from the Information Authority, make final decisions about the opening up of areas of information. We propose no change in the location of final responsibility. We do, however, propose profound changes in the processes leading to decisions about release. In general the Government will act following, and we expect in accordance with, the public advice of powerful independent bodies. The advice and action will be given and taken in the context of the general presumption of openness, and of the growing domain of rulings which widen access to official information.

67. It follows that we do not see the courts as having a central role in making decisions about the release of information. The criteria to be applied are very broadly stated and the resulting political judgments are, in the end, for ministers who are elected and accountable to Parliament rather than for the courts who are not elected and are not accountable. The judgments involve expert and developing knowledge of public administration in particular areas. They involve, as well, flexible procedures different from those used by the courts.

A PROCESS WITH A PURPOSE

68. We have been led to the conclusion that it would be more fruitful in the New Zealand context to set in motion a process of opening up which, on the basis of a presumption of openness, would contribute and be responsive to changing attitudes and circumstances. The essential elements of this process would be:

I ***A legislative base*** that would:

- provide a substantial advance on the present framework of policy and practice;
- commit government and administration to principles; remove unjustified barriers;
- set up mechanisms for the ongoing process.

II ***Mechanisms*** to:

- enlarge progressively the areas of information declared to be publicly available;
- establish a channel for the public to test individual decisions on availability;
- ensure that general progress towards the “larger aim” is appropriately monitored and reviewed.

THE LEGISLATIVE BASE

69. The simple provision of a legislative base would in itself take us substantially further than the present system. While there is already a great deal of information available for reference or on request, we consider it essential for all parties concerned to have a clear understanding of the framework within which decisions are to be taken. We propose accordingly that the legislation should, along with procedures for areas of doubt, *specify areas in which information can be assumed to be available as a matter of course.*

70. What we have in mind involves two aspects - a duty on the part of the Government to compile and provide certain information, and an ability on the individual's part to obtain certain other categories of information on request. As an example of the first there is information on the nature and functions of departments and other Government agencies, and directories setting out the nature and location of information held in such departments or agencies. We see this as an almost indispensable foundation for effective access by the public to information that is properly available. The individual seeking particular information needs to know where it can be found, and who to seek it from.

71. The second aspect would include access by individuals, with limited exceptions, to personal information that has been obtained about themselves. It would also include what has been called 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. Some exceptions are unavoidable in this category also, for example in the area of national security, or to allow time for new procedures to be instituted, but we believe that they need be very few. Subject to this we would expect the legislation to make such information available on request.

Principles

72. The political commitment which is at the heart of this exercise has already been acknowledged by the Government and Opposition parties alike. It remains to be codified into a form which provides a strong base for the necessary administrative action. To help underline the commitment of all parties concerned, we have considered the appropriate principles to be included in legislation.

73. A draft of the Title of an Official Information Act and a draft of a statement of principles and criteria appear as appendix 5. The draft provisions, which presuppose the repeal of the Official Secrets Act 1951 and the revision of the classification system, are directed at all those involved in the administration of the proposed law. They need little explanation beyond what we have already provided under the heading "Reasons for Openness" and "Reasons for Protection". The provisions are unusual in their assertion of the underlying rationale of the legislation. We think this assertion is important in the present case as emphasising the legislative commitment and as guiding those who are to apply the legislation.

74. The availability of official information is, subject to very limited exceptions, to be determined in accordance with the purposes of the Act (as set out in appendix 5) and in accordance with the *principle that information shall be made available unless there is good reason for*

withholding it. Such good reason is to be determined having regard to the need:

- “(a) To protect the privacy of the individual:
- (b) To protect information properly entrusted in confidence –
 - (i) To the Government or to any officer of the Government; or
 - (ii) By or on behalf of the Government to any person outside the Government:
- (c) To 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:
- (d) To maintain the principles and conventions of the constitution for the time being including those relating to the tendering of advice:
- (e) To maintain the effective conduct of public affairs through the free and frank expression of opinions between officers of the Government in the course of their duty:
- (f) To enable the Government to take and defend, without prejudice or disadvantage, legal proceedings:
- (g) To enable the Government to carry out, without prejudice or disadvantage, its trading activities:
- (h) To carry out negotiations (including commercial negotiations):
- (i) To prevent the improper disclosure or use of official information for gain or advantage.”

75. Good reason to withhold official information will in any event exist where it is decided that the making available of that information would be likely to prejudice:

- “(i) The security, defence, or international relations of New Zealand; or
- (ii) The entrusting of information to the Government of New Zealand by the government of any other country or any agency of such a government or any international organisation on a basis of confidence; or
- (iii) The maintenance of law and order, including the investigation and detection of offences; or
- (iv) The substantial economic interests of New Zealand.”

76. As an exception to the general principle, absolute protection, is given to “specifically protected information”. Information is within this category only where making it available would be contrary to any enactment or would constitute contempt of court or of Parliament.

77. One area of information calls for separate comment in the context of exceptions. It has been impressed upon us that the activities and responsibilities of scientists, many of whom are publicly employed, place them in a unique position with respect to their right to disclose. They argue that scientific knowledge is most effectively increased by the unrestricted flow of information. But this applies in the whole area of intellectual activity. Freedom of discussion is a vital part of that “discipline of dissent” which enables ideas to be replaced and modified.

78. Some scientists also argue that their particular knowledge justifies a decision of conscience to ignore other obligations. But most professions have accepted that a distinction has to be made between the situation in

which the over-riding objective is to extend the levels of knowledge, and that in which a service in the form of skilled professional advice which may be confidential is required by a client whether it be government or private citizen. It goes without saying that the wise client will want to permit the widest possible disclosure to ensure that the advice is well tested. But in the final analysis the client has the right to limit disclosure. We cannot accept that any group has a peculiar right to the exercise of conscience nor that membership of it overrides the obligation to accept that there are areas where the best interests of the community preclude disclosure.

Narrowing Protection

79. The next element of the legislative base we are proposing would be the *removal of any unjustified legal barriers* set around official information. Two specific areas were indicated in our terms of reference.

80. We have consulted extensively on the impact of the *Official Secrets Act 1951*. The Act in its present form is, to the great majority of those we interviewed or who forwarded written submissions, excessive in the protection it makes possible for the broad mass of official information. Most departmental heads believed that it played little or no part in the day-to-day decisions on release required of their officers. Nor did they consider it an essential part of the protection of information in their custody, where protection is in fact required.

81. The law is much too wide. It is not limited to the protection of important national interests. It does not conform with the principles of the criminal law. It does not command general respect.

82. *We recommend that the Act be repealed. The legislative backdrop to protection, including definition of areas to be protected, would then be included in an Official Information Act, the primary purpose of which would be to increase the availability of official information.*

83. ***We recommend also that criminal sanctions be applied much more narrowly.*** 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 these interests. One of these interests is the continued access of the Government to such information. Thus a high degree of protection will continue to be given to information received in confidence from other governments. Further, the new law would be clarified and narrowed by incorporating expressly the basic requirement that a defendant in a criminal prosecution have the relevant intention (for instance wilfully to disclose the information) and knowledge (for instance about the character of the information).

84. It does not follow from this narrowing of the application of the criminal sanctions that there should be no penalty for unauthorised disclosure of information not protected by such sanctions. Public servants will still be subject to the disciplinary provisions of the State Services Act and the regulations made under it, which will need consequential amendment. The principal safeguard will continue to be the professional integrity of the Public Service. The Supplementary Report and its attachments will spell out our proposals more fully.

85. In accordance with our terms of reference we have reviewed the criteria for applying the system of “classifications” and their use in Government departments. It is perhaps not generally appreciated that only a few departments operate the formal classification system on a wide

scale; most departments classify documents only rarely; much sensitive information is handled without any classification. It is an untidy situation. Briefly we have sought to ***narrow the scope of classification*** to cover information which merits particular degrees of protection because of its importance in terms of vital national security and other interests; in other words, “classifications” should be used only in the sense of “security classifications”.

86. Difficulties with the present system arise from a temptation, in that small number of departments which classify extensively, to classify too highly. There is also a lack of adequate and timely declassification. This arises from a persistent difficulty in instituting formal declassification procedures which do not make too great a call on resources, especially the time of senior personnel.

87. ***The revised classification system we are proposing, and which we recommend be reflected in legislation, seeks to reduce and clarify the areas of information to which the classifications “Top Secret”, “Secret and “Confidential: Protected” would properly be attached.*** Another important aspect will be to provide where practicable for a time limitation since at present the vast bulk of classifications remain in place long after the information they protect has become public.

88. As in the case of criminal sanctions, classifications rest partly on content of information and partly on presumed consequences of disclosure. An exercise of judgment is required on whether classification is warranted for any particular item. It is our view that classification does not in itself constitute sufficient grounds for protection, or for the application of sanctions in the case of unauthorised disclosure. In the same way, the fact that a document or other piece of information is not classified does not prove that it should therefore be available to the public.

89. We have not at this stage proceeded to detailed recommendations on declassification for archival purposes. In the context of our present exercise we accord higher priority to changes in the handling of current information. At some stage, however, the archives system will have to be given a substantial injection of resources if it is to be brought into line with the freer system of information we are aiming for. The Information Authority to be set up could include some aspects of the archival problem in its general review of existing areas of protection, in co-operation with National Archives, the universities and others with research requirements,

90. As we have already mentioned there are, aside from the Official Secrets Act, many other statutes which provide protection for specific areas of information as well as sanctions for unauthorised disclosure. It is not uncommon for protection clauses to be included in new enactments. One result the Committee would not wish to see arising from the changes recommended in this report, would be a rash of new protective measures. This would, we consider, seriously undermine the Government's intention and we hope it can be resisted. ***The compatibility of protection accorded by existing statutes with the proposals we are developing should be reviewed in due course.*** This review will be part of the work programme of the new machinery we are proposing.

91. We recognise, as did many of those who presented submissions, that there can be good reasons for protecting information which is not classified. Other methods of protection can be invoked. They will be developed by reference to the new statutory criteria which will depend in part on proper exercise of discretion by public servants in the normal course of their duties.

MECHANISMS FOR THE PROCESS

92. Our examination of these questions has led us to the belief that a set of arrangements, an apparatus, is called for. It will:

- be capable of pursuing the principle and reconciling the interests already discussed;
- get action underway 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.

Policy and Procedures Within the Administration

93. To stimulate change in public sector attitudes and practices we consider that the State Services Commission should be given specific management responsibilities to implement our proposals.

94. We accordingly propose the establishment of a small (three to four staff maximum) *information unit within the State Services Commission*. The unit would essentially:

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

95. The unit could be set up in advance of the legislation, to get our programmes moving promptly; its duties will be heaviest in its early years but there will be a continuing responsibility for this work within the management structure of the State Services Commission.

96. The co-ordinating unit aside, we have not at this stage set out to propose new administrative structures because in the main we do not see these as being necessary - or necessarily productive - in terms of the spirit of the legislation. ***Departments and agencies will have a responsibility to improve communication with the public*** and this will apply to all staff and functions as they are at present. Responsibility for administering the letter of the new provisions - on access for example - will need to have a specific locus in most bodies. In general, those officers who have immediate functional responsibility should deal at least in the first place with the information aspects of their work. We should expect departments themselves to work out with the State Services Commission the arrangements best suited to their needs.

97. It is not possible to know in advance what degree of additional pressures will be placed on each department; some may be little affected, others may have an influx of requests which may ebb or flow. Some requests may be capable of being met by the preparation of special material or a shift towards the use of more participatory techniques. Administrative procedures by which the legislation is translated into practice will be particularly important. The style of information provision we have in view - a forthcoming response combined with simple and

direct lines of access - will call for new methods. Staff training, for senior as well as junior staff, will have a significant role to play.

A Channel for Public Grievance

98. We have already made plain our view that *decisions about disclosure of information taken by departments and agencies must be subject to test by an independent arbiter*. The next element in the system we are proposing is therefore a mechanism for reviewing these decisions and for receiving and investigating complaints from the public.

99. *We propose that the Ombudsmen should deal with individual complaints* about the disclosure and non-disclosure of information, including those arising in respect of a wider range of Government agencies (see para. 3). In part this proposal involves no change. The Ombudsmen already can and do handle cases in the information field, in accordance with their well established procedures and with the mana that the office has acquired over two decades. Under our proposals they would begin with the principle that information is to be made available unless there is good reason to the contrary. They would weigh competing considerations against the principle. So, if national security were to be prejudiced by disclosure, they would find the complaint not to be sustained.

100. We do, however, propose one important modification to the present powers of the Ombudsmen. Under the present law they can investigate and make recommendations in respect of advice given to ministers, but not the actual ministerial decision. In the information field we consider that there are strong reasons for varying this. Ministers often make decisions about the disclosure of information, for instance in announcing and justifying government decisions. There are examples of information relating to a sensitive area of administration being released only through the minister's office. Again, information decisions may be taken without official advice. In neither case would the Ombudsmen at present have jurisdiction. But we believe there would be little point in undertaking reforms which do not provide for an unimpeded channel of review. The credibility of Government's commitment to more open government would suffer if it were not prepared to accept that the validity of ministerial decisions on disclosure be subject to the independent test which is already applied to its departments. *We recommend that Ministerial decisions concerning the release of official information should come within the Ombudsmen's purview.*

101. This proposed change is not inconsistent with the principles underlying the office of the Ombudsmen. The Ombudsman (Parliamentary Commissioner for Administration) in the United Kingdom has power to investigate and report in respect of ministerial decisions.

102. The proposal is also compatible with the principle of ministerial responsibility. Procedure would be informal rather than formal. As at present the Ombudsmen would not have powers of decision; they would investigate, and, if appropriate, recommend a different decision or practice. Ministers, subject to public and parliamentary scrutiny, a scrutiny enhanced by the Ombudsmen's investigations and reports, would in general still decide.

103. We do not propose any change in two central features of the powers and jurisdiction of the Ombudsmen - the recommendatory nature of their powers and the essential immunity of their processes from judicial

control. We do not think that they should have powers of decision, nor that their opinion should be subject to reconsideration by the courts.

104. There have, it is true, been suggestions that the Ombudsmen should have power to decide finally complaints of failure to release information. These rest on the attractive notion that the executive should not be judge in its own cause in deciding to release or withhold information. In our opinion this misconceives the nature of the Ombudsmen's office and more importantly the proper role of the executive in our polity. Subject to the rule of law and to its accountability to Parliament, a government must be able to make decisions in matters it judges of sufficient importance, whether of administration or of policy, and take responsibility for those decisions. To enable an Ombudsman to override the considered judgment of a Minister or of Cabinet would confer on him a far-reaching executive power and essentially alter the character of his office. It would appear to make the Ombudsmen the final arbiters in matters of major political importance. We believe that to talk of a government being "judge in its own cause" in this context is to confuse judicial and executive concepts.

105. The Office of the Ombudsmen will not in the system we propose offer the only means of dealing with disputes about the availability and withholding of information. The courts already have a role in deciding whether official information is to be disclosed for the purpose of litigation before them or to parties to matters being decided by official bodies. They also, in the end, decide whether there is an obligation under legislation to make information available; we expect that such obligations will become more common. And it is the courts which decide whether there has been a disclosure in breach of legislation making it an offence to disclose particular information.

106. We have already indicated in paragraphs 66 and 67 why we think that the courts should not have a more significant role in dealing with access complaints. These reasons relate to the recognised advantages of the Ombudsmen's jurisdiction, procedures, and powers. They have relevant specific and general experience; that experience develops by reference to a series of cases; their procedures and remedies are appropriate; and in the end their task is one of persuasion, persuasion of those who bear the political responsibility.

A Regulatory Body

107. The administrative and review mechanisms we see as needed in our new system can appropriately be provided within existing institutions. The main elements of the legislation as we have proposed them (para. 68) could not in our view be satisfied, however, without some *independent body of sufficient status to undertake continuing inquiry into and definition of categories of information, and formulation of rules* moderating conditions of access. Such a body would also prepare background material, criteria, and reports towards an "audit" of progress, stitch both monitoring and grievance experience back into the wider context, and narrow the fields for uncertainty and complaint. We could not see any other way of providing both a focus for public expectations of action and progress, and at the same time securing advice that would be seen to be independent of adversarial political pressures as well as the possibility of bureaucratic defensiveness or self-serving.

108. *We are accordingly recommending the establishment of an independent Information Authority* responsible to Parliament, to include

a chairman with legal qualifications; the other members, either two or four, would be appointed with due regard not only to their personal attributes but also to their knowledge of or experience in the requirements of the communications media and an appreciation of the constitutional principles and of the working of government. Neither the head of the unit in the State Services Commission nor the Ombudsmen would be members of the information Authority as such. It should nevertheless be required of the Authority that it consult with and receive reports from these officers.

109. The principal functions of the authority would be:

- a regulatory function in the information area: to receive submissions; to conduct hearings; to establish guidelines and criteria for administrative action; to define and review categories of information for the purposes of access and protection;
- 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;
- 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 request incorrect information to be removed or corrected;
 - (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;
 - (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.

110. The recommendations brought forward by the Authority under its regulatory function would, on the analogy of the Securities Commission, be submitted to Government for implementation by Order in Council. The recommendations would be published. Initially *the Authority's main task would be to enlarge systematically the area of information available to the public*; it would however, determine its own agenda and priorities for action, and might introduce matters for regulation as it sees fit.

111. There are several precedents for a body exercising this sort of power, but perhaps the most pertinent and one of the most recent is the Securities Commission established under the Securities Act 1978. This is an instance of how a small organisation, modestly staffed and working by consultation and with an understanding of the practical problems of different interests, can undertake a useful and acceptable task in our system.

112. We do not consider that the decisions of the Information Authority should themselves have the force of law, any more than do those of the Securities Commission. A subordinate body should not have significant law-making functions and, as we have said in relation to the Ombudsmen

(para. 104), Government should retain its ultimate power and responsibility. We have proposed that the Authority's recommendations should be made public. We likewise consider that if in any case the Government does not accept the Authority's recommendation, its reasons and any advice on which its decision was made should also be made public. There could be an exception to this in such areas as national security and foreign relations, although it seems unlikely that under the legislation we propose the Information Authority would wish to recommend that information affecting such matters be made available.

113. The initial workload facing the Authority suggests that it would need to accept a full schedule of duties for the first 2 or 3 years, if substantial progress is to be made in that time with the opening up process. After the inaugural period we would expect the Authority itself might wish to review its activities.

114. An integral and important element of our proposals is an agency outside the ordinary administration and the executive government to keep under review and report on progress in implementing a regime of freeing of information. Public confidence demands that the bureaucracy should not be seen to be the final judge of its own virtue in this matter. We believe that this overseeing role could best be performed by the Information Authority we are recommending, and we see it as one of the Authority's primary tasks. The Authority in turn might be required to report from time to time, and at least annually, to Parliament as the institution where ultimate responsibility should lie. While it is not within our terms of reference to raise matters of Parliamentary machinery, we see some analogy with the relationship which exists in the financial field between the Public Expenditure Committee of Parliament and the Controller and Auditor-General. However, the Authority should in addition make public statements in its own right. The analogy of the Ombudsmen is in point here.

115. It would not be appropriate for the Information Authority to perform the sort of detailed administrative functions listed for the information unit within the State Services Commission (para. 94). But in a general way the Authority should keep itself abreast of progress and developments in the public sector through the information unit.

116. It is for *Parliament* to decide how active and detailed a role it wishes to take in supervising the policy we propose. It may wish the Authority members to be appointed on its recommendations, as happens with Ombudsmen, and the Privacy Commissioner under the Wanganui Computer Centre Act, or it may prefer the more traditional precedent of the Controller and Auditor-General who is simply appointed by the Governor-General. Parliament may or may not think it appropriate to enlarge its association with the Information Authority by establishing a select committee. Whether or not this happens, the Authority should itself have the overseeing function we refer to in paragraph 114 along with its specific responsibility of developing and enlarging the territory of available information. As an independent body it would keep a watch on the operation of information policies and practices, acting on its own initiative or in response to representations.

THE PROCESS AT WORK

117. There are roughly three groups of official information:

- (a) that which is generally available;
- (b) that which, as a general rule, may not be disclosed (including information protected by the classification system and criminal sanctions); and
- (c) that large bulk of information for which neither full protection nor unqualified availability seems, for the time being, to be appropriate.

118. We have made a number of proposals which, if adopted, would have immediate effect in respect of the first and second groups. Our fundamental concern has been to propose ways to deal with, and to cut drastically into, information falling within the third group. Such information can become available in several ways: by once-and-for-all provisions allowing access to certain categories of information (with exemptions if necessary for some sensitive sub-categories); by a steady process of evolution towards freeing up the system; and finally by the definition and adaptation of working precepts to achieve a more open overall system. The processes of change could actually be prompted by ministers and officials, or through the work of the Ombudsmen in dealing with individual complaints about the release of specific pieces of information, or through the work of the Information Authority in proposing general rules for opening up areas of information.

119. Our proposals for the third group can, we think, be better understood if we give some indication of the ways we see them working towards the release of information in that group. The following discussion is not intended to be definitive. Our concern is not to evaluate recent changes in information practices. It is rather to point up some features relevant to the process: the kinds of administrative powers, the public and private interests affected, the information involved, and the possible ways of handling its release.

120. The area of government administration we choose to point up is one which was the subject of considerable attention in submissions and interviews: resource development and use. As we have already noted, the forms of government involvement are many and varied: as direct participant, as partner, as the granter of incentives and of licences, as regulator, as tax gatherer etc. The commercial interest also takes many and varied forms: sometimes a commercial concern will be seeking a concession or incentive, sometimes in a regulated industry it will require a licence, sometimes it will be subject, not on any initiative of its own, to regulations made in the public interest (for instance, in safety).

121. The information too is varied. It can, for example, be:

- facts relating to geology, forestry, energy, economics; “facts” that will often not be complete, fully tested, or agreed;
- trade secrets and other information of value to commercial competitors;
- possible options for elaboration and discussion within government;
- documents preparatory to relevant government decisions or to the negotiation of contracts.

122. The information will also come from a variety of sources. Some will be generated within the Public Service, some will be in the public domain,

some will be volunteered by commercial concerns, some will be provided under compulsion, in some cases with an understanding of confidentiality, in other cases not.

123. There are other matters that might be weighed in settling new arrangements for the disclosure of such information:

- where policy changes of a non-recurring and substantive nature are in prospect and these may embrace significant non-commercial values or criteria, the case for open argument of options, alternative listings, and the like is strong; such openness is not necessarily incompatible with conventional confidentiality affecting detailed operations, but at times a conflict of interests will doubtless ensue;
- the more generalised the information, the better the case for releasing it; there are analogies for this in private business and in other areas of official information;
- the closer the resemblance of the public commercial activity to that of competitive private business, the better the case for following precedents of commercial confidentiality.

124. Timing will also be a matter for consideration; arguments for the confidentiality of a negotiating position do not necessarily continue to apply after a negotiation is completed.

125. Some of those affected by, or interested in, such government decisions will want to have access to the information of the kind indicated; others will want that information protected. They might pursue their interest in at least two ways, by complaining to the Ombudsmen in respect of particular government's decisions relating to the release of individual pieces of information, or by participating in the proceedings of the Authority concerning the possibility of the opening up of a relevant general category of information.

126. An Ombudsman considering complaints about particular decisions concerning information would weigh against the statutory principle of availability any relevant protective criteria. He could no doubt draw on his knowledge of information processes and of the particular area of administration in question, and consider matters such as those indicated above. If he thought that the decision should be reviewed or altered or further justified he would then enter into discussion with, and, if need be, make a recommendation to, the appropriate Minister or responsible executive officer. The Minister would retain the final power of decision about the release of a particular document.

127. The role of the Information Authority is to be sharply contrasted with that of the Ombudsmen. It will be concerned with proposals for the release of general categories of information and not with particular pieces of information. There are several ways in which an area of administration might get on the Authority's agenda. The Authority, might decide to take up an area (for instance import licensing or social welfare records) in the light of the Ombudsmen's experience of particular complaints, or in response to the direct application of some interest group or on its own initiative - or the matter might be referred to it by a Minister or the information unit in the State Services Commission who could well see value in a dispassionate assessment of some difficult issue. We envisage that the Authority would not take up matters under the pressure of immediate public controversies but in circumstances which would allow for proposals to be settled in terms of relevant principles. It would have

the assistance of those affected and interested; they would have the opportunity to participate in the hearings and to present argument and evidence. The Authority would weigh against the principle of availability any competing protective criteria. It would consider such factors as those indicated above and the existing arrangements for release. It would then reach conclusions about what (if any) categories of information should be made available and the manner and timing of release. So it might, in the area of resource development and use, make proposals for:

- (a) the further release of relevant factual material;
- (b) the public elaboration of options for development and use;
- (c) the publication of proposed plans for the development and use of resources;
- (d) the publication, subject to appropriate safeguards, of contractual arrangements concerning development and use; or
- (e) the publication of periodic reports in certain cases.

Its proposals would take the form of public recommendations to the Government which would give effect to them, if it so decided, by way of Orders in Council.

128. We stress that this discussion is only suggestive. Our purpose is to do no more than sketch the procedures and indicate the matters that might be weighed and possible kinds of results.

COSTS

129. We have not found it possible to draw up any estimate of the comprehensive costs of opening up official information, but we have considered direct outlays. We estimate these will be less than \$500,000 per annum depending on specific decisions by the Government. A figure of this order would cover the new parts of the apparatus to be set up - the Information Authority and the information unit within the State Services Commission. Including members of the Authority, this will call for a total of about 15 people who will require accommodation and other services. The figure also includes provision for some publications such as a directory of government functions. In the first phase there will be some direct costs in departments, e.g., for the preparation of departmental manuals.

130. Spread over a longer period there will be other costs in departments such as those of reorganising records systems, improving or establishing lines of public inquiry and access, staff training, and for the actual time spent by staff on access requests. To a certain extent the action involved would be necessary with or without the change of approach we are proposing.

131. The fact is that the cost of supplying information is already considerable. Questions from members of Parliament and Parliamentary select committees, questions asked of ministers by members of the public, Ombudsmen inquiries, and replies to queries from the media make heavy demands on the time of skilled people. In addition to this there are positive information programmes initiated by departments. In proportion to the costs of these various activities the additions we propose will (for most departments) not be great. An additional penalty will be the delay in carrying out tasks from which skilled people are diverted. There will undoubtedly be some requests for access which will take up significant time and effort. Charges to offset costs may be necessary.

132. The question of costs is ultimately one of priorities. If it is accepted that the Government has responsibility to keep the public informed of its activities, it will no doubt be recognised also that this aspect of its work must be given priority over other demands.

133. Some of the positive outcomes of greater openness, such as better understanding of public policies, are not measurable in money terms. What price should be set on a better informed public, or a more outward looking Public Service? If greater openness enables Government to work more smoothly and effectively in the long run, a real gain in the efficient use of resources will be achieved.

TOWARDS OPEN GOVERNMENT

134. One message has emerged clearly from our inquiries and consultations. There is today a strong desire in the community for a freer flow of official information, and for definite and simple understanding of how far this information is to be made available. Public expectations of change continue to rise. Developments overseas can be expected to reinforce the movement. At this stage a decisive step forward is called for.

135. That step must in the first place involve a change in the presumption, from secrecy to openness. At the same time we recognise that there are legitimate reasons for withholding some official information. The new system we propose provides means of balancing these two considerations. It includes new procedures and changes in institutions. It also calls for changes in attitudes.

136. Reforms cannot easily be forced, and we recognise the importance of preserving the confidence of those involved at all levels. It must be faced that in the short run the people doing the work are not going to change, nor is much of the material they will be handling. While working practices are changing, the convention of ministerial responsibility and the neutral public servant will remain the constitutional basis of the working relationship between ministers and officials.

137. We see the proposed apparatus of reform as necessary and suited to the needs of the times. But no such structure can alone effect a new dispensation. The will to change must inform the working of the system if it is to promote the evolution of attitudes and practice. This applies to all concerned - ministers, parliamentarians, officials, public interest groups, and the public media. But the initiative rests primarily with ministers and the public media. Undue concern about the consequences of release or unwillingness to accept the need for withholding some information could only weaken the momentum for reform by impairing the growth of confidence in the ability of the system to produce impartial and balanced judgment.

138. The system we have proposed is designed specifically for New Zealand and its results will depend on the way the situation in this country develops. Our community is small, our affairs conducted within a comprehensibly human scale. The system we work in is well understood and able to absorb criticism because there is a national sense of its underlying integrity. Here, surely, lie grounds for hope that reform can be fruitful.

SUMMARY

1. The case for more openness in government is compelling. It rests on democratic participation in public affairs, on accountability, on a concern for the interests of individuals, and on the effectiveness of government (para. 20-32).
2. There are good reasons for withholding some official information. The reasons concern the interests of the country as a whole, of individuals and organisations, and of effective government and administration (para. 33-53).
3. The presumption henceforth should be that official information is to be made available unless there is good reason to withhold it (para. 54-55).
4. Legislation is needed. It should be suited to New Zealand's circumstances. It should state the principle of availability and the criteria for protection and should set up dynamic processes to give effect to that principle and those criteria (para. 61-62; 72-76).
5. The legislation should establish a flexible mechanism, capable of contributing and being responsive to changing attitudes and circumstances and leading to increased availability of information. It is important to note that responsibility would, in major respects, rest with the executive but that the executive would act following, and in general only in accordance with, the advice of independent bodies (para. 63-67).
6. The legislation should make certain information available as a matter of course (para. 69-71).
7. The Official Secrets Act 1951 should be repealed and replaced by provisions defining much more narrowly the offences relating to the wrongful communication of official information (para. 79-84).
8. The scope of the classification system should be narrowed and clarified (para. 85-89).
9. The compatibility of specific protections accorded by other statutes with our proposals should be reviewed (para. 90).
10. A small information unit within the State Services Commission should be established to stimulate change in public sector attitudes and practices (para. 93-95).
11. Departments and agencies would have a concurrent responsibility to improve communication with the public (para. 96-97).
12. Decisions about the disclosure of information should be subject to test by an independent arbiter. The Office of the Ombudsmen should, in accordance with its statute, deal with complaints about such disclosure. Decisions of ministers concerning the release of official information should be brought within the purview of the Ombudsmen (para. 98-106).
13. An independent body, the Information Authority, should be established with the task of undertaking a continuing inquiry into and definition of categories of information which should be made available. The Authority's recommendations, which would be made public, would have legal effect once the Government had implemented them by Order in Council (para. 107-115).
14. The Authority should also have monitoring functions and functions in the field of personal information (para. 109; 114-116).

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

The Committee was established in May 1978 with Sir Alan Danks as Chairman, Professor K. J. Keith, of the Faculty of Law at Victoria University of Wellington, as a member, and with other members to be drawn from the State Services Commission, the Prime Minister's Department, Department of Justice, and the Ministries of Defence and Foreign Affairs. The Chief Parliamentary Counsel was co-opted at an early stage.

This report has been prepared by:

Sir Alan Danks, K.B.E. (Chairman)
Prof. K. J. Keith.
Mr B. J. Cameron (Deputy Secretary for Justice).
Mr VV. 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.E. (Chairman, State Services Commission).

Other participants from Government departments over the period of the Committee's work have been:

Mr R. B. Atkins.
Mr B. M. Brown.
Mr F. H. Corner, C.M.G.
Mr E. A. Kennedy, O.B.E.
Mr G. S. Orr.
Mr J. F. Robertson.

Secretariat

Mr A. R. Perry was at the outset appointed executive secretary to the Committee. Others assisting at different times were Ms S. Grant-Taylor, Mrs W. Powley, Mr F. J. Steel, and Mrs A. Smith. In April 1980 Miss C. J. Rowe was appointed secretary, and Mr Perry continued to assist as a consultant.

The Committee is also grateful to Dr C. C. Aikman, Mrs D. Moss, and Mrs S. Pinfield who have assisted with background papers for the report and in its preparation.

Appendix 3

SUBMISSIONS: PRIVATE ORGANISATIONS AND PERSONS

Action for Environment.
All-Party Committee for Freedom of Information and Privacy.
Archives and Records Association of N.Z.
Auckland Community Arts Council.
Auckland District Law Society.
Dr Kevin Broughan.
Dr L. Cleveland.
Ecology Action (Otago) Inc.
Editors Committee, N.Z. Section, Commonwealth Press Union.
Energy Watch.
Environment and Conservation Organisations of N.Z. (ECO).
Federated Mountain Clubs of N.Z.
Fourth Estate Group.
Friends of the Earth.
Friends of the Earth (Wellington Branch).
Mr E. L. Gilchrist.
Glaxo Laboratories (N.Z.) Ltd.
Mr J. D. Green.
Greenpeace Foundation of N.Z.
Mrs A. R. Grigg.
IBM (N.Z.) Ltd.
International Commission of Jurists, N.Z. Section.
Ivon Watkins-Dow Ltd.
Kelvin Industries (1958) Ltd.
Messrs H. G. I. Love and D. R. Gilmour.
Mrs Marjorie Maslen.
National Council of Women in N.Z. Inc.
Native Forests Action Council.
N. Z. Association of Scientists.
N.Z. Association of Social Workers Inc.
N.Z. Catchment Authorities Association.
N.Z. Combined State Unions.
N.Z. Computer Society Inc.
N.Z. Council for Civil Liberties.
N.Z. Ecological Society.
N.Z. Federation of University Women.
N.Z. Federation of University Women (Hutt Valley Branch).
N.Z. Foundation for Peace Studies Inc.
N.Z. Institute of Food and Science Technology.
N.Z. Institute of International Affairs.
N.Z. Institute of Public Administration.
N.Z. Library Association Inc.
N.Z. Library Association (Auckland Branch).
N.Z. Manufacturers Federation.
N.Z. Public Service Association.
N.Z. Society of Genealogists (Southland Group).
Mr Peter Osborne.
PEN International N.Z. Centre.
Political Renewal Group.
Sir Guy Powles.

Press Gallery Journalists.
Mr Hugh Price.
Professorial Board, University of Canterbury.
Dr James Ramsay.
Rangitikei County Council.
Rohm Haas N.Z. Ltd.
Royal Society of N.Z. (Otago Branch).
Dr Ian Shearer, M.P.
Mr P. V. Sim.
Dr G. J. Struik.
Student Teachers Association of N.Z.
Dr O. R. W. Sutherland and U. E. Skold.
Mr R. Tattersfield.
Mr J. F. Tourelle.
United Nations Association of N.Z.
Marilyn Waring, M.P.
Whangarei City Librarian.
Workers Education Association (Auckland Branch).
Henry H. York and Co. Ltd.

SUBMISSIONS: GOVERNMENT DEPARTMENTS

Ministry of Agriculture and Fisheries.
Audit Department.
Crown Law Office.
Customs Department.
Ministry of Defence.
Department of Education.
Ministry of Energy.
Commission for the Environment.
Ministry of Foreign Affairs.
N.Z. Forest Service.
Government Life Insurance Office.
Government Printing Office.
Department of Health.
Housing Corporation of New Zealand.
Inland Revenue Department.
Department of Internal Affairs.
Department of Justice.
Department of Labour.
Department of Lands and Survey.
Legislative Department.
Department of Maori Affairs.
Police Department.
N.Z. Post Office.
Prime Minister's Department.
Public Trust Office.
N.Z. Government Railways.
Department of Scientific and Industrial Research.
Department of Social Welfare.
State Insurance Office.
State Services Commission.
Department of Statistics.
Tourist and Publicity Department.
Department of Trade and Industry.

Ministry of Transport.
The Treasury.
Valuation Department.
Ministry of Works and Development.

SUBMISSIONS: GOVERNMENT CORPORATIONS AND AGENCIES

Accident Compensation Commission.
Air New Zealand.
N.Z. Atomic Energy Committee.
Broadcasting Corporation of N.Z.
Cabinet Office.
Commerce Commission.
Consumers Institute of N.Z.
Environmental Council.
N.Z. Export Import Corporation.
Commission for the Future.
Government House.
Government Stores Board.
Higher Salaries Commission.
Human Rights Commission.
N.Z. Intelligence Council.
Local Government Commission.
National Archives.
National Library of N.Z.
National Research Advisory Council.
National Roads Board.
Nature Conservation Council.
Chief Ombudsman.
Petroleum Corporation of N.Z.
N.Z. Planning Council.
Race Relations Conciliator.
Reserve Bank of N.Z.
N.Z. Security Intelligence Service.
Tourist Hotel Corporation.
University Grants Committee.

Appendix 4

INTERVIEWS: PRIVATE ORGANISATIONS AND PERSONS

All-Party Committee for Freedom of Information and Privacy.
Archives and Records Association of N.Z.
Auckland District Law Society.
Dr L. Cleveland.
Editors Committee, N.Z. Section, Commonwealth Press Union.
Environment and Conservation Organisations of N.Z. (ECO).
Fourth Estate Group.
International Commission of Jurists, N.Z. Section.
Ivon Watkins Dow Ltd.
National Council of Women of N.Z. Inc.
N.Z. Association of Scientists.
N.Z. Combined State Unions.
N.Z. Computer Society Inc.
N.Z. Federation of University Women.
N.Z. Institute of International Affairs.
N.Z. Institute of Public Administration.
N.Z. Library Association Inc.
N.Z. Manufacturers Federation.
Sir Guy Powles.
Press Gallery Journalists.
Professorial Board, University of Canterbury.
Royal Society of N.Z. (Otago Branch).
Henry H. York and Co. Ltd.

INTERVIEWS: GOVERNMENT DEPARTMENTS

Ministry of Agriculture and Fisheries.
Audit Department.
Crown Law Office.
Customs Department.
Ministry of Defence.
Department of Education.
Ministry of Energy.
Commission for the Environment.
Ministry of Foreign Affairs.
N.Z. Forest Service.
Government Life Insurance Office.
Government Printing Office.
Department of Health.
Housing Corporation of N.Z.
Inland Revenue Department.
Department of Internal Affairs.
Department of Justice.
Department of Labour.
Department of Lands and Survey.
Legislative Department.
Department of Maori Affairs.
Police Department.
N.Z. Post Office.
Prime Minister's Department.
Public Trust Office.

N.Z. Government Railways.
Department of Scientific and Industrial Research.
Department of Social Welfare.
State Insurance Office. Department of Statistics.
Tourist and Publicity Department.
Department of Trade and Industry.
Ministry of Transport.
The Treasury.
Valuation Department.
Ministry of Works and Development.

INTERVIEWS: GOVERNMENT CORPORATIONS AND AGENCIES

Accident Compensation Commission.
Broadcasting Corporation of N.Z.
Commerce Commission.
Consumers Institute of N.Z.
Environmental Council.
Government Stores Board.
National Archives.
National Library of N.Z.
National Research Advisory Council.
Nature Conservation Council.
Chief Ombudsman.
Petroleum Corporation of N.Z.
N.Z. Planning Council.
Reserve Bank of N.Z.
N.Z. Security Intelligence Service.
University Grants Committee.

INTERVIEWS: MEMBERS OF PARLIAMENT

Government Members of Parliament.
Opposition Members of Parliament.
Mr B. Beetham, M.P.
Mr M. Minogue, M.P.
Marilyn Waring, M.P.

DRAFT PROVISIONS FOR AN OFFICIAL INFORMATION ACT

Title - 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 individual privacy, to establish procedures for the achievement of those purposes, and to repeal the Official Secrets Act 1951.

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 to enable their more effective participation in the making and administration of laws and policies, 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 concerning them;
- (c) To protect official information to the extent consistent with the public interest and the preservation of the privacy of the individual.

General criteria - (1) The question whether any official information (not being specifically protected information) is to be made available, where that question arises under this Act, shall be determined 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.

(2) In deciding for the purposes of subsection (1) of this section whether there is good reason for withholding information regard shall be had to the need -

- (a) To protect the privacy of the individual;
- (b) To protect information properly entrusted in confidence -
 - (i) To the Government or to any officer of the Government; or
 - (ii) By or on behalf of the Government to any person outside the Government;
- (c) To 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;
- (d) To maintain the principles and conventions of the constitution for the time being including those relating to the tendering of advice;
- (e) To maintain the effective conduct of public affairs through the free and frank expression of opinions between officers of the Government in the course of their duty;
- (f) To enable the Government to take and defend, without prejudice or disadvantage, legal proceedings;
- (g) To enable the Government to carry out, without prejudice or disadvantage, its trading activities;
- (h) To carry out negotiations (including commercial negotiations):

- (i) To prevent the improper disclosure or use of official information for gain or advantage.

(3) Notwithstanding subsection (2) of this section, it shall, for the purposes of subsection (1) of this section, be good reason for withholding information if the making available of that information would be likely to prejudice -

- (i) The security, defence, or international relations of New Zealand; or
- (ii) The entrusting of information to the Government of New Zealand by the government of any other country or any agency of such a government or any international organisation on a basis of confidence; or
- (iii) The maintenance of law and order, including the investigation and detection of offences; or
- (iv) The substantial economic interests of New Zealand.

(4) Nothing in this section shall derogate from any provision of this Act or of any other enactment 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.

Specifically protected information - Official information is specifically protected information for the purposes of this Act if the making available of that information would -

- (a) Be contrary to the provisions of any enactment; or
- (b) Constitute contempt of court or of Parliament.

SELECTED EXEMPTION PROVISIONS IN OVERSEAS LEGISLATION

A. Advisory Processes

1. United States

The Freedom of Information Act (5 United States Code, section 552 (b) (5)) exempts from the general obligation of disclosure:

“inter-agency or inea-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”

United States courts, in interpreting this provision, have held that the test is whether the production of the information would be injurious to the consultative functions of government. The provision's purpose is to ensure that federal agencies enjoy a free flow of ideas essential to making reasoned decisions and to encourage open and frank discussions on policy matters within the government. It follows, for instance, that documents setting out recommendations and internal deliberations leading to the formulation of government decisions and policy are exempt from disclosure.

2. Australia

The Freedom of Information Bill introduced into the Australian Parliament in 1978 contains a part setting out documents which are exempt from disclosure. The Part includes the following clauses:

“Cabinet documents

24. (1) A document is an exempt document if it is

- (a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted;
- (b) an official record of the Cabinet;
- (c) a document that is a copy of, or of a part of, a document referred to in paragraph (a) or (b);
or
- (d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.

(2) For the purposes of this Act, a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document is one of a kind referred to in a paragraph of sub-section (1) establishes conclusively that it is an exempt document of that kind.

(3) Where a document is a document referred to in paragraph (1) (d) by reason only of matter contained in a particular part or particular parts of the document, a certificate under sub-section (2) in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.

(4) Sub-section (1) does not apply to a document by reason of the fact that it was submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted if it was not brought into existence for the purpose of submission for consideration by the Cabinet.

(5) A reference in this section to the Cabinet shall be read as including a reference to a committee of the Cabinet.

Executive Council documents

25. (1) A document is an exempt document if it is -

- (a) a document that has been submitted to the Executive Council for its consideration or is proposed by a Minister to be so submitted;
- (b) an official record of the Executive Council;
- (c) a document that is a copy of, or of a part of, a document referred to in paragraph (a) or (b);
or
- (d) a document the disclosure of which would involve the disclosure of any deliberation or advice of the Executive Council, other than a document by which an act of the Governor-General, acting with the advice of the Executive Council, was officially published.

(2) For the purposes of this Act, a certificate signed by the Secretary to the Executive Council, or a person performing the duties of the Secretary, certifying that a document is one of a kind referred to in a paragraph of sub-section (1) establishes conclusively that it is an exempt document of that kind.

(3) Where a document is a document referred to in paragraph (1) (d) by reason only of matter contained in a particular part or particular parts of the document, a certificate under sub-section (2) in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.

(4) Sub-section (1) does not apply to a document by reason of the fact that it was submitted to the Executive Council for its consideration, or is proposed by a Minister to be so submitted, if it was not brought into existence for the purpose of submission for consideration by the Executive Council.

Internal working documents

26. (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act -

- (a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and
- (b) would be contrary to the public interest.

(2) In the case of a document of the kind referred to in sub-section 7 (1), the matter referred to in paragraph (1) (a) of this section does not include matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in sub-section 7 (1).

(3) This section does not apply to a document by reason only of purely factual material contained in the document.

(4) This section does not apply to -

- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports

- expressing the opinions of such experts on scientific or technical matters;
- (b) reports of a prescribed body or organisation established within an agency; or
- (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

(5) Where a decision is made under Part III that an applicant is not entitled to access to a document by reason of the application of this section, the notice under section 22 shall state the ground of public interest on which the decision is based.”

The Senate Standing Committee on Constitutional and Legal Affairs, in its report on the Bill, proposed several changes to these and related provisions to narrow them. The Government has not accepted the proposals.

3. Canada

The Access to Information Bill introduced into the Canadian Parliament in 1980 also includes clauses setting out exemptions. Among them are the following:

“Operations of Government

Memoranda to Cabinet, discussion papers and other Cabinet documents

21. (1) The head of a government institution shall refuse to disclose any record requested under this Act that falls within any of the following classes:

- (a) memoranda the purpose of which is to present proposals or recommendations to Council;
- (b) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions, before such decisions are made;
- (c) agendas of Council or records recording deliberations or decisions of Council;
- (d) records used for or reflecting consultations among Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) records the purpose of which is to brief Ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of consultations referred to in paragraph (d); and
- (f) draft legislation before its introduction in Parliament.

Records containing information about Cabinet records

(2) The head of a government institution shall refuse to disclose any record requested under this Act that contains information about the contents of any record within a class of records referred to in paragraphs (1) (a) to (f).

Limitation

(3) Subsections (1) and (2) do not apply in respect of any record within a class of records referred to in paragraphs (1) (a) to (f),

- (a) where disclosure of the record is authorised by the Prime Minister of Canada or a person delegated by the Prime Minister to so authorize or pursuant to guidelines established by the Prime Minister; or
- (b) where a request is made under this Act for access to the record, or to a record that contains information about the contents of the record, more than twenty years after the record came into existence.

Definition of "Council"

(4) For the purposes of this section, "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

Advice, etc.

22. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains

- (a) advice or recommendations developed by or for a government institution or a Minister of the Crown,
- (b) an account of consultations or deliberations involving officials or employees of a government institution, a Minister of the Crown or the staff of a Minister of the Crown,
- (c) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto, or
- (d) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation,

if the record came into existence less than twenty years prior to the request.

Exercise of a discretionary power or adjudicative function

(2) Subsection (1) does not apply in respect of a record that contains

- (a) an account of, or a statement of the reasons for, a decision made in the exercise of a discretionary power or in the exercise of an adjudicative function affecting the rights of a person; or
- (b) a report prepared by a consultant or adviser who was not, at the time the report was prepared, an officer or employee of a government institution."

B. Commercial Confidences

1. United States

The Freedom of Information Act (S 552 (b) (4)), exempts:

"trade secrets and commercial or financial information obtained from a person and privileged or confidential."

2. Australia

Among the exempted documents in the 1978 Bill are those relating to trade secrets, the economy, and those subject to confidence:

“Documents relating to trade secrets, etc.

32. (1) A document is an exempt document if its disclosure under this Act would disclose information concerning a person in respect of his business or professional affairs or concerning a business, commercial or financial undertaking, and -

- (a) the information relates to trade secrets or relates to other matter the disclosure of which under this Act would be reasonably likely to expose the person or undertaking unreasonably to disadvantage; or
- (b) the disclosure of the information under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of the Commonwealth or of an agency to obtain similar information in the future.

(2) The provisions of sub-section (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of information concerning that person in respect of his business or professional affairs or of information concerning a business, commercial or financial undertaking of which that person, or a person on whose behalf that person made the request, is the proprietor.

Documents affecting the national economy

33. A document is an exempt document if its disclosure under this Act would be contrary to the public interest by reason that it would be reasonably likely to have a substantial adverse effect on the national economy.

Documents containing material obtained in confidence

34. A document is an exempt document if its disclosure under this Act would constitute a breach of confidence.”

The Government has accepted in principle certain amendments to clause 32, proposed by the Senate Committee, to protect the interests of the supplier of the information.

The Senate Committee proposed the deletion of clauses 33 and 34. The Government has not accepted those proposals.

3. Canada

Among the exempted documents in the 1980 Bill are those relating to commercial matters:

“Third Party Information

Third party information

20. (1) Subject to subsections (2) and (3), the head of a government institution shall refuse to disclose any record requested under this Act that contains:

- (a) trade secrets of a third party;
- (b) financial, commercial, scientific or technical information that is confidential supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

- (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
- (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

Product or environmental testing

- (2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose any record that contains the results of product or environmental testing carried out by a government institution unless
 - (a) the testing was done as a service and for a fee; or
 - (b) the head of the institution believes, on reasonable grounds, that the results are misleading.

Release if a supplier consents

- (3) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.”