DAVID E SHANKS

OPINION, ADVICE AND THE OFFICIAL INFORMATION ACT – AN UNCONVENTIONAL APPROACH?

LLM Research Paper

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CONTENTS

I ABSTRACT

This paper is concerned with the withholding grounds of the Official Information Act 1982 that are designed to provide certain protections for advice and opinions provided in the governmental context. The analysis of two specific provisions brings to light a number of issues that are of wider application to the OIA as a whole.

While the construction of the provisions examined is highly flexible and may be compared favourably with equivalent legislation in other jurisdictions in terms of the level of access to governmental information they afford, it is suggested that these advantages also have a cost in terms of the practical difficulties of application.

These difficulties are explored firstly in terms of analysis of the available reference material, primarily case notes and guidelines issued by the Ombudsman. Revised guidelines have recently been released by the Ombudsman, and these are analysed in terms of how much assistance they may provide to the holders of official information.

The issues arising in respect of the provisions are also considered in terms of evidence obtained in interviews with officials who use the provisions in practice and also the Chief Ombudsman.

Possible solutions are considered for the problems identified with the use of the provisions in practice, including legislative and administrative options. It is proposed that in the present context, an administrative solution is more suitable. In this regard it is suggested that a public sector specialist unit may be able to provide a range of administrative functions that will benefit compliance with these provisions, as well as with the OIA as a whole.

II INTRODUCTION

When the Official Information Act 1982 ("the OIA" or "the Act") was passed, New Zealand began a major transition from being a nation typically obsessed with secrecy, to becoming regarded as one of the most transparent countries in the world.[1]

One of the significant factors leading to New Zealand's 'freedom of information' legislation being regarded as exceptionally open is its treatment of sensitive advice and opinions provided in the governmental context.[2] Even the most enthusiastic proponents of 'maximal openness' in government generally concede that there needs to be some protection for certain functions of government in order to allow it to govern effectively and for decisions to be made out of the public gaze.[3]

This paper examines two specific withholding grounds contained in the OIA that are intended to provide protection for the sensitive processes of government; section 9(2)(f)(iv) and section 9(2)(g)(i) ("the provisions"). In order to obtain an understanding of the provisions and how they are applied in practice, they are analysed in terms of their construction and the interpretations applied by the Ombudsmen, as evidenced by the Ombudsmen's Case Notes and the guidelines they have issued. Revised guidelines have very recently been issued by the Ombudsmen, and these may be considered both in terms of what they reveal about the evolution of approach to the provisions, and also the level of assistance they may provide to those seeking to interpret and apply them.

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[1] J Belgrave, "The Official Information Act and the Policy Process" in Legal Research Foundation, *The Official Information Act Seminar Papers: General Overview of Official Information and the Official Information Act* (1997) at 29.

[2] See R Snell, "The Kiwi Paradox – A Comparison of Freedom of Information in Australia and New Zealand" *Federal Law Review* Vol 28 No.3 2000, 575 – 616 at 592 – 602.

[3] Luc Juillet & Gilles Paquet, *Information Policy and Governance,* (Report 1, Access to Information Review Task Force, Canada, June 2001) at 11 -12.

In order to obtain a better understanding of the use of the provisions, a number of officials who worked with them regularly were interviewed, providing a perspective on the practical difficulties that arise with their application. These problems are discussed in terms of compliance with the OIA, where compliance has been interpreted broadly as encompassing a range of 'administrative compliance' issues.[4]

The issues identified might be addressed using legislative or administrative methods, and both approaches are considered. There have been some proposals for amendment of the provisions, and these are assessed along with the possibility of having more prescriptive drafting, as is contained in the equivalent Australian legislation. However, there are a number of problems that arise, both legal and political, in pursuing a legislative solution.

Accordingly, an administrative solution is likely to provide a more practical and effective solution to the issues arising in relation to the use of the provisions (and, by extension, possibly to other issues arising with the withholding grounds contained in the OIA). Given the range of problems identified, any such solution will need to be of a comprehensive and wide ranging nature. Furthermore, in order to maximise the chances of success, any administrative changes will require the support of both officials and the Ombudsman. It is proposed that a dedicated public sector unit could provide the support and research roles that are required to both simplify the role of officials and to foster compliance with the OIA in this area.

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[4] The phrase 'Administrative compliance' is used here in its broadest sense; for example it may be suggested that in some cases release of information may be contrary to the public interest and to the objects of the Act, despite the fact the OIA itself does not contain any sanction for release of information (and in fact protects from civil or criminal proceedings the good faith release of information under it; s 48 OIA).

III THE OIA

A. The Introduction of freedom of information

Prior to the introduction of the OIA, the general approach to official information, and the advice and opinions that made up part of that official information, was to cloak it in secrecy. This was codified in the Official Secrets Act 1951. This enactment continued a tradition of secrecy that New Zealand had inherited from Britain along with many other aspects of the 'Westminster style' democratic system of government. Traditionally under such systems, governments were considered to hold a discretionary right to decide what documents or information should be released. The common law had also supported this approach, holding that "The counsels of the Crown are secret."[5]

A significant step in the path towards freedom of information in New Zealand occurred in 1978, when the Government established the 7 member Committee on Official Information, which became known as the 'Danks committee'.[6] The Danks committee had wide terms of reference to consider the Official Secrets Act 1951 and how greater freedom of official information could be attained.

The Danks Committee produced two comprehensive reports in 1980,[7] the second of which contained a draft Official Information Bill. This was immediately introduced into the House and referred to a special Parliamentary Select Committee, undergoing

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[5] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, Dixon J. There have been significant inroads into this view however, to the point where it has been commented that "[i]n short, the Queen's papers have become the people's" *Lange v Atkinson* [1998] 3 NZLR 424 at 463 (CA) Richardson P, Henry, Keith and Blanchard JJ.

[6] After its chairman, Sir Alan Danks.

[7] Committee on Official Information (hereafter Danks Committee), *Towards Open Government* (Volume 1, General Report, Wellington, 1980), and *Towards Open Government* (Volume 2, Supplementary Report, 1980).

a number of changes at that stage. [8] The OIA became law in December 1982 and came into force on 1 July 1983.

At its introduction, the OIA itself was subject to criticism for not going far enough in promoting freedom of information. Some of the reasons for withholding provided for in the Act seemed unnecessarily broad and ill-defined, prompting the then Prime Minister Robert Muldoon to refer to the Act as a "nine day wonder".[9] This view seems likely to have been related to the breadth of the provisions relating to the withholding of tendered advice and free and frank opinion.[10]

However, it seems typical that the provisions in a new freedom of information act that are intended to protect sensitive advice and opinion in government are often the centre of debate and controversy. This has recently been recognised in discussion on the equivalent provisions in the relatively recent UK freedom of information legislation.[11] The reasons for this seem to relate to the real difficulties arising in striking a balance between access and protection in this area.

Overall, however, and with the benefit of hindsight, it would seem that the members of the Danks Committee would need to make few apologies for their efforts in producing the basis for the OIA. Nearly twenty years on, the OIA has become an essential and enduring part of the landscape of government in New Zealand, and is

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[8] K Keith "The Official Information Act 1982" in R J Gregory (ed) *The OIA: A Beginning* (Government Bookshop, Wellington, 1984) 31, 33.

[9] See J Belgrave "The OIA and the Policy Process" in Legal Research Foundation, *The OIA Seminar papers: General Overview of Official Information and the OIA* (February 1997) at 24.

[10] J Belgrave "The OIA and the Policy Process" *in Legal Research Foundation, The OIA Seminar papers: General Overview of Official Information and the OIA* (February 1997) at 24.

[11] Freedom of Information Act 2000 (UK), s 28. In commenting on the draft legislation, the Select Committee on Public Administration observed that the area "has always been one of the especially difficult areas for Freedom of Information legislation"; Third Report of the Select Committee on Public Administration, *Open Government or Freedom of Information* (House of Commons, 28 July 1999).

compared very favourably to overseas freedom of information statutes.[12] In particular, the design of the Act is widely considered to be particularly effective.[13]

B. The Schema of the OIA

(i) Fundamental Principles

There are three fundamental purposes of the OIA, as set out in section 4:

1. To 'increase progressively the availability of official information to the people of New Zealand.'

2. To provide for proper access by each person to official information relating to that person; [14]

3. To protect official information to the extent consistent with the public interest and the preservation of personal privacy. [15]

It may also be noted in the present context that all of the above purposes are to be pursued "consistently with the principle of the Executive Governments responsibility to Parliament." [16]

It can be seen from purpose (1) above that the Act incorporates an evolutionary aspect – more official information is to be made available through time. The making available of official information is also linked with the concepts of allowing the

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[12] Grant Liddell, "The Official Information Act 1982 and the Legislature: A Proposal" in Legal Research Foundation, *The OIA Seminar papers: General Overview of Official Information and the OIA* (February 1997) at 5.

[13] See generally R Snell, "The Kiwi Paradox – A Comparison of Freedom of Information in Australia and New Zealand" *Federal Law Review* Vol 28 No.3 2000, 575 – 616.

[14] OIA s4(b).

[15] OIA s4(c).

[16] OIA s4. This does not provide an additional ground for withholding, however, it indicates that there is to be overall regard for the Executive processes of accountability.

public more effective participation in the making and administration of laws and policies, and also to promote the accountability of ministers and officials.[17]

If one puts to one side the references to personal information and privacy (such concerns having been to an extent subsequently displaced by the enactment of the Privacy Act 1993), the primary purposes of the OIA may be seen to be concerned with both increasing the availability of official information, but also protecting such information to the extent consistent with the public interest.[18]

A further fundamental concept in the Act is the 'principle of availability' contained in section 5. The presumption is that information is to be made available unless there are good reasons for withholding it. Taken together, sections 4 and 5 may be considered to be the 'heart' of the OIA.[19] Importantly, in the present context, where there are good reasons for withholding 'government process' information, then one of the purposes of the Act will be protection of that information (to the extent consistent with the public interest).

(ii) The Withholding Grounds

The OIA can be considered to be a code insofar as only the specified grounds contained within it can provide a basis for withholding any official information.[20] There are three broad categories of reasons for withholding official information in the Act, which may be characterised as 'conclusive', 'conditional' and 'administrative' grounds for withholding respectively.

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[17] OIA s4(a)(i) & (ii).

[18] However, the latter purpose seems to be very much the 'poor relation' in the eyes of successive Ombudsmen if the frequency of reference in the Ombudsmen's Case Notes is to provide a guide.

[19] I Eagles, M. Taggart, and G Liddell, *Freedom of Information in New Zealand* (Oxford University Press, Auckland 1992), 4.

[20] OIA s 18.

The 'conclusive' (or 'special') reasons for withholding information are contained in sections 6 and 7 of the Act. These are reasons relating to the maintenance of national security, maintenance of the law, and so on. Good reason exists if the making available of the information is simply 'likely' to prejudice or damage the protected interests.[21]

The 'conditional' reasons for withholding that we are primarily concerned with here are described as "other" grounds for withholding and are contained in section 9(2) of the Act.[22] In order to rely on one of these grounds the withholding must be "necessary" to protect one of the identified interests.[23] These reasons for withholding are subject to an overarching 'public interest' test, whereby the Ombudsmen may determine that the public interest dictates that the information should be released, even where it is agreed that one of the section 9 reasons for withholding applies.[24]

The 'administrative' withholding provisions are contained in section 18 of the OIA.[25] These are not subject to a 'public interest' test. A relevant example of these allows a request for information to be refused where that information "is or soon will be publicly available".[26]

An important point to be made in relation to the withholding grounds contained in the Act is that none of them constitute a 'class' of documents that are to be withheld. This type of approach was rejected by the Danks committee.[27] The important

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[21] For example under OIA s 6(e), a conclusive reason for withholding information exists if the release of the requested information is likely 'to damage seriously the economy of New Zealand by disclosing prematurely decisions to change or continue Government economic or financial policies'..

[22] OIA section 9(2)(f)(iv) and section 9(2)(g)(i).

[23] The test to be applied is 'reasonable' necessity as opposed to 'strict' necessity; *TVNZ v Ombudsman* [1992] 1 NZLR 106 at 117-118.

[24] OIA section 9(1). Including such a 'a public interest override' in this area is unusual in comparison with overseas freedom of information legislation.

[25] OIA s 18(c) – (h).

[26] OIA s 18(d). The interface between this subsection and the provisions under examination is discussed below.

[27] Danks Committee, *Towards Open Government* (Volume 1, General Report, Wellington, 1980), para 65.

considerations in assessing whether to withhold have been set out by the Ombudsman:

"whether certain information should be withheld under the Act is determined not simply by virtue of the nature of the information but in terms of whether its disclosure would prejudice an interest which the Act recognises as requiring protection." [28]

The Court of Appeal has noted that, even if a reason to withhold is made out, an organisation may still elect to release.[29] However, it may be seen from the foregoing discussion of the purposes of the Act that a release of information in such a circumstance could be argued to be contrary to the objects of the Act, particularly where such a release was contrary to the public interest.

(iii) Scope of Official Information

The Act covers an enormous amount of information. Ministers and more than 200 government departments and other organisations are subject to the OIA.[30] The vast majority of governmental organisations are covered by the Act, including most State Owned Enterprises ("SOE's"). [31]

The OIA is information based rather than document based. Commentators tend to agree that this feature of the OIA seems to make it a more effective freedom of information statute than the many overseas acts that emphasise the disclosure of documents over information.[32] For example, the Act allows for reasons for a

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[28] 10th Compendium of Case Notes of the Ombudsmen (Vol 2), 5. (Hereinafter Compendiums of Case Notes will be referred to as 'CCNO')

[29] *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 at 391 per Cooke P.

[30] Listed in the first schedule to the Ombudsmen Act 1975 and in the first schedule to the OIA.

[31] Although the Act is of limited application to some SOE's; see for e.g. Rural Banking Finance Corporation of NZ Act 1989 s 18.

[32] See G Liddell, "The Official Information Act 1982 and the Legislature: A Proposal" in Legal Research Foundation, *The Official Information Act Seminar Papers: General Overview of Official Information and the Official Information Act* (1997) at 6.

decision to be sought, even where those reasons do not already in exist in written or other form.[33] The Ombudsmen have made it clear that in their view information contained only in the heads of officials is official information that is subject to, and may be recovered under, the Act,[34] despite some earlier judicial disagreement on this point.[35] This makes for a potentially very powerful information gathering tool indeed.

(iv) Review Process

Where an agency withholds information on one or more of the grounds provided in the OIA, this is a decision that is subject to investigation and review by the Ombudsman.[36] The Ombudsman has wide powers to require disclosure of information in the course of an investigation.[37]

The Ombudsman's investigations are conducted in "an impartial and non-adversarial way". [38] The Ombudsman seeks to resolve the complaint during the course of the investigation, and forms a 'provisional view' which is referred to the parties for comment. If the provisional view is that the information at issue should be released, the agency involved will generally agree to release the information at that point. [39]

In the event that the agency does not agree to release the information, the Ombudsman may proceed to form a final view on the merits of the complaint. In the event that the concluded view is that the complaint is to be upheld, the Ombudsman

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[33] OIA s 23.
[34] New Zealand Ombudsman "Application of Official Information legislation to non-documentary information" (1998) 4(3) *Ombudsman Quarterly Review* at 1. See also Case No. W41571, CCNO12.
[35] *R v Harvey* (1991] 1 NZLR 242 at 246 per Thomas J.
[36] OIA s 28(1)(a). The decision to give the Ombudsmen the principle role in adjudicating upon information access disputes was something of a departure from overseas precedents; Philip A. Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 158.
[37] OIA s 29A and Ombudsman Act 1975 s 19. In practice these powers are seldom formally utilised, as agencies generally provide all information requested by the Ombudsman at the outset of an investigation.
[38] Ombudsmen's Practice Guidelines (September 2002) Part D chapter 1.
[39] Ombudsmen's Practice Guidelines (September 2002) Part D chapter 4, 5.

can then proceed to make recommendation(s) that the information at issue be released pursuant to the request.[40] Such a recommendation imposes a public duty to observe that recommendation 21 days after it is made, unless the Governor-General, by Order in Council, otherwise directs.[41] This is sometimes referred to as the 'cabinet veto', which has, to date, not been used. Although agencies can and do sometimes ignore recommendations that become binding, this is generally regarded as unacceptable practice.[42] Such agencies face having the duty to disclose enforced by a court of law.[43]

IV WITHHOLDING PROVISIONS PROTECTING EFFECTIVE GOVERNMENT

A. What Requires Protection?

The principal benefits of freedom of information relate to the power that it grants to the people to scrutinise public decision making. Such scrutiny may be anticipated to result in better, more robust decision making processes and higher levels of accountability. [44]

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[40] OIA s 30(1). In limited circumstances the power of the Ombudsman to make a recommendation may be subject to a 'veto', for example where the Prime Minister certifies that the release of the information would be likely to prejudice the security or defence of New Zealand.

[41] OIA s 32.

[42] The Law Commission has noted that such inaction would only be tolerable if the agency immediately commenced judicial review proceedings in respect of the recommendation; New Zealand Law Commission *Review of the Official Information Act 1982* (NZLC40, Wellington, 1997) para 364.

[43] The Law Commission has suggested in such cases the Solicitor General should act to enforce the public duty by seeking judicial review on his or her own initiative; New Zealand Law Commission *Review of the Official Information Act 1982* (NZLC40, Wellington, 1997) para 382.

[44] Philip A. Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 149.

However, even the most dedicated proponents of freedom of information generally acknowledge the importance of some level of protection of government processes. Freedom of information needs to ensure that excessive transparency does not "unreasonably hamper the ability of the state to operate effectively in the public interest."[45]

This was also an important consideration for the Danks Committee, who noted:

"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 process 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." [46]

The difficult task that confronted the Danks committee was to prepare draft provisions that sufficiently protected those advisory and decision making processes of government that required shielding from public scrutiny, without going so far as to provide a means for ministers and officials to conceal embarrassing or inconvenient information (which could in turn defeat the purposes of the Act). In the event, it was decided to draft the withholding grounds in this area in very broad, open-textured terms.[47]

In the event, the resulting provisions, section 9(2)(f) and section 9(2)(g), have come to hold an important place in the Act, as befitting provisions "intended by the Danks

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[45] Luc Juillet & Gilles Paquet, *Information Policy and Governance,* (Report 1, Access to Information Review Task Force, Canada, June 2001), 12.

[46] Danks Committee, *Towards Open Government* (Volume 1, General Report, Wellington, 1980), para 47.

[47] In the words of the Danks Committee, "We opted for a flexible process." Danks Committee, *Towards Open Government* (Volume 1, General Report, Wellington, 1980), para 65. As will be seen, this is an unusual approach in dealing with this type of sensitive information.

Committee to be the centrepiece of their withholding regime."[48] As will be seen, however, the construction of the provisions (and the interpretations adopted of them by successive Ombudsmen) mean that they are not free of problems in actual application.

B. The Provisions

Sections 9(2)(f)(iv) and 9(2)(g)(i) allow information to be withheld where necessary to:

> "(f) Maintain the constitutional conventions for the time being which protect –
>
> (iv) The confidentiality of advice tendered by Ministers of the Crown and officials; or
>
> (g) Maintain the effective conduct of public affairs through –
>
> (i) The free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any Department or organisation in the course of their duty;

These provisions are subject to section 9(1):

> (1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5 of this Act, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

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[48] I Eagles, M. Taggart, and G Liddell, *Freedom of Information in New Zealand* (Oxford University Press, Auckland 1992), 334.

These provisions are clearly extremely important in the overall context of the internal workings of government. The Ombudsmen have noted that in terms of sections 9(2)(f) and 9(2)(g) of the OIA they are the 'two particular withholding provisions which are relied on most frequently when considering requests for information of that nature'.[49]

However it should be noted that the Act contains other provisions designed to afford some protection in this area; in particular sections 9(2)(f)(i), (ii) and (iii) of the OIA provide certain protections for the confidentiality of communications by or with the sovereign; collective and individual ministerial responsibility and the political neutrality of officials, respectively. For our present purposes, these sections provide an important context for distinguishing the provisions.

C. Comparing the Provisions – What interest is to be maintained?

(i) "Maintaining Conventions"

Section 9(2)(f)(iv), (in common with the other section 9(2)(f) subsections), is notable for its appeal to constitutional conventions. In order to invoke the reason to withhold, the withholding must be "necessary" to "maintain the constitutional conventions" protecting the "confidentiality of advice tendered by ministers and officials".[50]

Accordingly, where an agency has relied on section 9(2)(f)(iv) to withhold information, the Ombudsman would seem entitled to require that agency to specify *what* convention maintaining the confidentiality of official advice is being maintained by the withholding. This has in fact been the approach taken by the

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[49] CCNO12, (Introduction, 2000), 3
[50] OIA section 9(2)(f)(iv)

Ombudsman.[51] Logically, if an agency is contending that it is necessary to withhold the information in order to maintain a convention, the agency should be expected to know what that convention is.

(ii) Identifying Conventions

However, this is far from being a straightforward task. Conventions have been described as 'the constitutional morality of the day'.[52] They are by their nature unwritten and subject to change through time.[53] It is not impossible to formulate conventions accurately, even for legal purposes.[54] However, as Joseph has noted "[t]he tests for identifying conventions are neither universally agreed nor, when agreed, easily applied. Some conventions are clear, and some not so clear."[55]

One approach to identifying conventions that achieved some acceptance is the threefold test devised by Sir Ivor Jennings; (1) Are there any precedents? (2) Did the actors in the precedents believe they were bound by a rule? (3) Is there a reason for the rule referable to the needs of constitutional government? [56] Accordingly, establishing a convention may be seen as involving an inquiry into past practice in accordance with a rule, confirming that the parties concerned believed they were acting in accordance with a rule, and consideration of whether the rule serves some constitutional purpose. [57]

Even applying this approach however, it may be expected that some conventions will be more elusive or resistant to formulation than others. The conventions at issue in section 9(2)(f)(iv) seem to fall squarely into the 'elusive' category.

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[51] See for example the 'Reserve Bank Letters' case discussed below; CCNO5 Case 42 (G R Laking).
[52] A.V. Dicey, *Introduction to the Law of the Constitution* (10th ed 1960) 422.
[53] Hence the reference in section 9(2)(f)(iv) to the conventions 'for the time being which protect'.
[54] See I Eagles, M. Taggart, and G Liddell, *Freedom of Information in New Zealand* (Oxford University Press, Auckland 1992), 337-338 for discussion on this point.
[55] Philip A. Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 275.
[56] Sir Ivor Jennings, *The Law and the Constitution* (5th ed, University of London Press, 1959) Chapter 3.
[57] Philip A. Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001), 276.

(iii) Attempts at Formulation

A typical early effort at formulating the convention at issue occurred in the "Reserve Bank Letters" case. [58] This case involved a request to the Reserve Bank for information on an exchange of letters between the Prime Minister and the Reserve Bank on Government monetary policies. When required by the Ombudsman to define the convention that was required to be protected, the Reserve Bank contended that the convention was simply that Ministerial advisers did not make public the advice tendered to ministers. It was further argued that a convention existed that advice to a minister should remain confidential unless the minister chose to release it.[59]

The Ombudsman rejected this formulation of the conventions at issue, noting that the Bank did not provide any evidence in support of them. The Ombudsman further noted that the suggestion that confidentiality was to be determined by the minister conflicted with the initial proposition that such advice was to be kept confidential.[60] The point was also made by the Ombudsman that "[t]he nature of a constitutional convention is such that it can be departed from without necessarily impairing its effectiveness" and that accordingly simply arguing that a release of information would be contrary to a convention; "[t]he test is whether disclosure of the information would go to the heart of that particular convention."[61]

The Ombudsman did go on to acknowledge that "there is a convention which protects the confidentiality of advice tendered to ministers" but did not provide any analysis of what that convention was.[62] In the event, some of the information at issue was found to have been properly withheld under section 9(2)(f)(iv), despite the

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[58] CCNO5 Case 42 (G R Laking).
[59] CCNO5 Case 42 (G R Laking) at 58.
[60] Case 42, above, 58.
[61] Case 42, above, 59.
[62] Case 42, above, 60-61.

withholder apparently having no accurate conception of what convention(s) they were protecting.

This approach continued to be applied in subsequent cases dealing with section 9(2)(f)(iv), and the Ombudsmen subsequently commented on the (somewhat remarkable) fact that no agency had ever successfully identified a convention to be maintained in terms of section 9(2)(f)(iv).[63] The overall approach seems to have been accurately summed up by a UK observer who noted:

"The Ombudsman wisely declines to offer any definition, instead he asks departments what they understand to be the constitutional conventions and then shoots holes in their definitions."[64]

The conundrum therefore presented by section 9(2)(f)(iv) is that the schema of the section requires the accurate formulation of a 'convention to be maintained', in circumstances where the Ombudsman is inclined to reject any such formulation as an attempt to identify a 'class' of information to be protected. It is not clear from consideration of the case notes as to how far agencies may have gone in endeavouring to formally establish a convention, by adducing evidence of precedent and belief on the part of actors that they were bound.[65] It would seem that regardless of any such efforts that might be made, the Ombudsmen would decline to confirm

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[63] CCNO9 1123/1196 (N Tollemache).

[64] R Hazell, *Report to the Cabinet Office (M.P.O) on the Operation of the Official Information Act in New Zealand* (March 1987) para 11.14 (As quoted in I Eagles, M. Taggart, and G Liddell, *Freedom of Information in New Zealand* (Oxford University Press, Auckland 1992), 336).

[65] Eagles, Taggart & Liddell observe that "[d]epartments and organisations have been reluctant to adduce particular evidence to support their general contentions about harm"; I Eagles, M. Taggart, and G Liddell, *Freedom of Information in New Zealand* (Oxford University Press, Auckland 1992), 336. However, the latest Annual Report discusses an investigation into the treatment of advice given by the Department of Prime Minister and Cabinet where extensive evidence was provided (including evidence from former Prime Minister's; *Report of the Ombudsmen for the Year ended 30 June 2002* (AJHR, A.3, 2002), 29-33.

the convention formulated, perhaps for concern that agencies would then take a 'class' approach and withhold all information subject to the convention.[66]

In the original practice guidelines issued by the Ombudsmen relating to the provisions little assistance can be found relating to this difficulty; the Ombudsmen simply acknowledged that defining the applicable convention was 'one of the most difficult areas' that a withholder looking to rely on the provision is required to address.[67] As will be seen in subsequent consideration of the recently revised Guidelines, this area has continued to develop, although difficulties remain.

(iv) "Maintaining the effective conduct of public affairs"

In contrast to the requirement in section 9(2)(f)(iv) to establish that the withholding of the information is necessary to maintain an (undefined) convention, section 9(2)(g)(i) allows information to be withheld where this is necessary to 'maintain the effective conduct of public affairs' (through the free and frank expression of opinions by or between or to Ministers, officials and others). [68]

Accordingly, there is comparatively little difficulty with identifying the interest that section 9(2)(g)(i) is designed to protect, compared with section 9(2)(f)(iv). From a withholder's point of view, section 9(2)(g)(i) could be seen as offering an advantage over section 9(2)(f)(iv), in that there is no need to identify a convention (and face rejection of the convention, however formulated, by the Ombudsman). The concept of the 'effective conduct of public affairs' is clearly a broad one, which does not carry with it the burden of establishing a course of conduct. Individual or unique instances might occur whereby withholding might be justified.

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[66] More recently the Ombudsmen have come close to defining a convention as is discussed below.
[67] Ombudsmen's Practice Guidelines – No 2 "Current Approach of Ombudsman to Section 9(2)(f)(iv) & Section 9(2)(g)(i) of the Official Information Act 1982" (1993) para 2.5 (now revised).
[68] OIA section 9(2)(g)(i).

Having said this, there may often be differences in perspective between agencies and the Ombudsmen as to when information may properly be withheld in order to protect the conduct of public affairs. The wide construction of the provision may often mean that it will be considered as a basis for withholding when an agency receives a request for 'embarrassing' information. Such information could be embarrassing to the agency (perhaps disclosing incompetence or prejudice), or involve revelations embarrassing to the government. In such a case an agency might consider that the release of such material would interfere with the proper conduct of public affairs (perhaps by diverting resources to deal with resulting publicity, complaints or proceedings).

The Ombudsmen have made it clear that this type of approach is incorrect.[69] It is not the case that the provision acts to protect particular 'embarrassing' opinions. On the contrary, given that the Act is designed to promote greater transparency and accountability, release of this type of material is consistent with these goals and with the 'proper conduct of public affairs'.[70]

However, so long as withholders maintain a broad and objective view of what constitutes the 'effective conduct of public affairs', this test would seem to be less problematic than the reference to 'conventions' in 9(2)(f)(iv).

D. The Scope of the Provisions – what information is protected

(i) Advice and Opinions provided by or to Whom?

Section 9(2)(f)(iv) applies to advice 'tendered by Ministers of the Crown and officials'. The further one departs from core government departments the more

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[69] This has been emphasised in the revised practice guidelines; *Ombudsmen's Practice Guidelines* (September 2002) Part E, 7.

[70] This was also clearly the view of the Danks Committee; Danks Committee, *Towards Open Government* (Volume 1, General Report, Wellington, 1980), para 47.

problematic the question of who is an 'official' becomes.[71] For present purposes, it is important to note that private sector advisors are not 'officials'.[72] The subsection accordingly would not on the face of it apply to the substantial amount of advice provided to ministers from private agencies or individuals in their personal capacity. However, the Ombudsmen have suggested that private sector advice may be brought within section 9(2)(f)(iv) if it is 'adopted' by a minister. [73] This approach has been criticised as wrong by Eagles, Taggart & Liddell.[74] However, relatively recent comments by Judge Anand Satyanand again seem to admit the possibility of adoption or incorporation of private sector advice so as to bring it within the ambit of the provision. [75] The precise mechanisms by which this might occur remain unclear.

The construction of section 9(2)(g)(i) poses fewer difficulties in this regard, as the provision can apply to "The free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers .. of any Department .. in the course of their duty." Free and frank opinions expressed by private sector advisors are accordingly captured by the provision, so long as they are made to Ministers or, (what appears to be in effect), 'officials'. This has been noted as conferring a useful degree of flexibility to the provision.[76]

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[71] Although it may be noted that issues can arise in relation to employees of SOE's – see discussion I Eagles, M. Taggart, and G Liddell, *Freedom of Information in New Zealand* (Oxford University Press, Auckland 1992), 362-363.

[72] I Eagles, M. Taggart, and G Liddell, *Freedom of Information in New Zealand* (Oxford University Press, Auckland 1992), 362.

[73] This possibility appears to have first been raised by the Ombudsman in CCNO9, Case 1101, 161 (J. F. Robertson), drawing on Australian authority.

[74] I Eagles, M. Taggart, and G Liddell, *Freedom of Information in New Zealand* (Oxford University Press, Auckland 1992), 366.

[75] CCNO12 Case W41576 (A Satyanand).

[76] See J Belgrave, "The Official Information Act and the Policy Process" in Legal Research Foundation, *The Official Information Act Seminar Papers: General Overview of Official Information and the Official Information Act* (1997) at 27.

(ii) Distinguishing between 'Tendered Advice' and 'Free and Frank Opinions'

Important questions arise in relation to the distinction between 'tendered advice' as protected by s9(2)(f)(iv) and 'free and frank opinions' as protected by section 9(2)(g)(i). In particular, is it the case that an item of information may be both 'tendered advice' and 'free and frank opinion' so that either or both provisions may be relied upon by a withholder? [77]

The view that both provisions might apply to the same information seems consistent with the very narrow definition offered by the Ombudsmen for 'tendered advice' in some early case notes; "to advise in this context means to offer opinions as to action".[78] On this formulation, advice might be considered to be a specialised subset of opinion.

The original Guidelines issued in respect of the provisions also acknowledged an 'overlap' in the two concepts, noting that opinions frequently become the basis upon which advice is given.[79] The suggestion accordingly seemed to be that opinions occur first, with 'advice' being a later, more evolved and 'worked up' species of opinion.[80]

This approach seems consistent with the requirement in section 9(2)(f)(iv) that advice be 'tendered'. As Eagles, Taggart and Liddell have commented, '[t]endered' suggests a certain diffidence in the giver as to the response of the recipient.' [81] The phrase imparts a notion of formality that would be absent in, for example, everyday communications between employees within a Department.

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[77] This is certainly often how they are employed in practice, as is discussed further below.
[78] For example in CCNO5 Case 42 (G R Laking) at 60.
[79] Ombudsmen's Practice Guidelines – No 2 "Current Approach of Ombudsman to Section 9(2)(f)(iv) & Section 9(2)(g)(i) of the Official Information Act 1982" (1993) para 3.5 (now revised).
[80] Ombudsmen's Practice Guidelines – No 2, above, para 3.6.
[81] I Eagles, M Taggart and G Liddell, *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992) at 361.

There is also no requirement that an opinion falling within section 9(2)(g)(i) be tendered. However, such an opinion is required to be 'free and frank'. The reference to 'free and frank expression of opinion' can be seen as a restatement of the 'candour' argument that underpinned claims of Crown privilege or public interest immunity.[82] Just as the courts have taken an increasingly restrictive approach to public interest immunity,[83] the Ombudsmen have also limited the scope of application of section 9(2)(g)(i).[84]

The Ombudsmen commonly observed in earlier Case Notes that section 9(2)(g)(i) protects only 'those especially frank opinions which only the assurance of complete confidentiality induces'. [85] In the 'Apple and Pear Marketing Board' case,[86] the Ombudsman was very critical of the argument by the Minister of Agriculture that *in general*, 'free and frank' expressions of opinions by both ministers and officials should be withheld in order to maintain the effective conduct of public affairs. It was noted that such free and frank expression of opinion is part of the everyday operation of Government, and that the prospect of disclosure should not affect that.[87] The Ombudsman went on to state that in his view the section only applied "..where the comments were free and frank plus something extra deriving from the nature of the subject matter or the context in which the opinions were expressed."[88]

The use of the words "free and frank plus something extra" seem to add an uninformative gloss to the plain wording of section 9(2)(g)(i). This point was subsequently raised with the Ombudsman who confirmed that such an approach (seeking blanket protection for 'free and frank' opinions) would amount to a "class"

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[82] See I Eagles, M Taggart and G Liddell, *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992) at 370.
[83] For example in *Brightwell v Accident Compensation Corporation* (1985) 1 NZLR 132.
[84] The Ombudsmen have referred to the more restrictive approach taken by the courts in this regard; for e.g. CCNO9 Case 1076 (J Robertson).
[85] See for example CCNO6 Case 23 75, 80 (GR Laking).
[86] CCNO9 Case 1076, 147 (J Robertson).
[87] CCNO9 Case 1076 (above) at 148.
[88] CCNO9 Case 1076 (above) at 148.

approach to withholding which is contrary to the scheme of the Act, and would preclude the public interest balancing tests woven into the withholding regime.[89] However, the Ombudsmen did acknowledge that the phrase "free and frank and something extra" could "convey the wrong impression", (although little corrective guidance was offered). [90]

Accordingly, it would seem that the Ombudsman accepts there may be a degree of overlap between 'tendered advice' and 'free and frank' opinion, although the degree of this is difficult to discern from the Case Notes. Certainly, it is considered that 'free and frank' opinions generally come before 'tendered advice' in the continuum, although what actually is 'free and frank' in this context is somewhat opaque. It is notable in this regard that the original Guidelines to an extent de-emphasised the importance of the distinction between the concepts of 'advice' and 'opinion'. The Ombudsmen noted therein that the test determining which provision properly applies to the information at issue may not necessarily turn on whether the information is "advice" or "opinion", but on consideration of what interest would be prejudiced by disclosure.[91] In other words, would release impact upon a pre-existing convention, or would it impair the maintenance of effective conduct of public affairs? [92]

(iii) Factual Material

A further question may be raised as to what extent either of the provisions encompass factual material. In early statements the Ombudsmen it was considered that to tender advice in the context of section 9(2)(f)(iv) meant "to offer opinions as

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[89] *Ombudsmen's Annual Report to 31 March 1990* (AJHR, A3, 1990) 22-23.

[90] It may not be entirely coincidental that the Ombudsmen subsequently issued the original "Practice Guidelines" on the issue of the application of the provisions, although these too provided little in the way of detail on this point.

[91] Ombudsmen's Practice Guidelines No 2 (above) para 3.6. Note that this seems to be something of a departure from the earlier emphasis on distinguishing advice and opinion, for example in CCNO5 Case 42 (G R Laking).

[92] Although given the difficulty of determining the conventions to be protected this is perhaps an unhelpful analysis from a withholder's perspective.

to action".[93] The corollary of this was that factual material was not seen by the Ombudsmen as constituting advice.[94] The argument flowed from this that "where facts can be segregated from advice they must be disclosed."[95]

However the original Guidelines departed from this view in commenting that 'advice', in addition to meaning "opinion given or offered as to action", could also mean "information given", noting in addition that such information could be purely factual information.[96] This constituted an interesting expansion of the scope of 'tendered advice', and the interpretation would seem to be an arguable one in terms of the wording of the provision.

The original Guidelines were silent as to whether 'free and frank opinions' could also be comprised of factual material only. Given that an 'overlap' between the provisions was acknowledged, this could be considered a possibility. However, in the overall context of section 9(2)(g)(i), the proposition that an 'especially' free and frank opinion could be given that comprised purely factual information would seem exceedingly unlikely.

IV REFERENCES FOR APPLICATION OF THE PROVISIONS

A. The Ombudsmen's Case Notes

In trying to come to understand and apply the provisions in practice, the Ombudsman's case notes provide an important source of information.[97] Given the

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[93] CCNO5 Case 42 (G R Laking) at 60.
[94] CCNO9 Case 1123/1196, 157, at 159 (N. Tollemache).
[95] I Eagles, M Taggart and G Liddell, *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992) at 361.
[96] Ombudsmen's Practice Guidelines No 2 (above) para 3.6.
[97] Since 5th Compendium was published in 1984, the Case Note Compendiums have included case notes on selected significant decisions made in relation to the Official Information Act.

rarity of review of the Ombudsman's decisions, the case notes can be considered to "represent the bulk of New Zealand jurisprudence on open government".[98] However, it is also true that the case notes have some real limitations as a reference for those trying to gain a full understanding of the Ombudsman's approach. This in turn may contribute to the issues officials face in applying the provisions.

The case notes represent administrative decisions which, as the Ombudsmen have been at pains to point out, do not amount to binding precedents.[99] Accordingly, conclusions arrived at by the Ombudsman in an early case note may not be duplicated in a current review, even if the information at issue is materially the same. This is understandable, particularly in the case of section 9(2)(f)(iv) where the scope of the provisions are recognised to be liable to change through time,[100] however it does mean that only cautious reliance may be placed upon the case notes.

It is also often difficult to divine an accurate impression of the specific information at issue in the case note. While in general terms the nature of the information is made clear, it is hard to determine what the Ombudsman means when he says for example "I considered that one especially frank expression of opinion in one report was covered by section 9(2)(g)(i)".[101] It is impossible to probe what characteristics set this expression of opinion apart without having the opportunity to read and compare it to those opinions not considered to be covered by the provision.[102]

It is significant in this context that the case notes are only summaries of the Ombudsman's decision. Investigations conducted by the Ombudsman may have a complex history of evidence and submissions being obtained from various parties,

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[98] I Eagles, M Taggart and G Liddell, *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992) at 18.
[99] See CCNO6 (Introduction) 5-6 (G.R. Laking)
[100] OIA section 9(2)(f)(iv)
[101] CCNO6 Case 23, 75 (G R Laking).
[102] It is also relevant that an Ombudsmen's investigation is subject to secrecy; Ombudsmen Act 1975 s 21.

and accordingly the summarised case note may not capture all of the subtleties of the investigation.

The case notes are selected by the Ombudsman for their significance or instructive value. They will not necessarily reflect actual trends in the use of the provisions or the decisions of the Ombudsman in any meaningful statistical sense. As an example of this, a numerical analysis of the case notes might lead a researcher to conclude that section 9(2)(g)(i) was more frequently relied upon than section 9(2)(f)(iv) – the latter was cited as a sole ground for withholding approximately one quarter as often as section 9(2)(g)(i) was relied upon alone. Section 9(2)(f)(iv) was also twice as likely to be raised as a ground for withholding in conjunction with section 9(2)(g)(i) than to be relied upon by itself. [103]

However, while this conclusion would seem valid on the basis of representation in the case notes, it is quite likely to be wrong in fact. Given the small percentage of actual investigations that eventually appear in the case notes, it is quite possible that a larger number of matters involving section 9(2)(f)(iv) are dealt with, but not deemed of sufficient interest to be noted. This was admitted as a distinct possibility by the Chief Ombudsman, Sir Brian Elwood, during the course of an interview with the author. [104]

(i) Case Notes Summary

It is perhaps ironic that the case notes can be opaque for lack of relevant information. It may also be difficult to determine if the approach taken in the case note will accurately reflect the Ombudsman's current thinking.[105] These issues clearly have implications for withholders trying to understand the provisions.

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[103] Based on analysis of case notes relating to the provisions from 1984 to 2000.

[104] Interview with Sir Brian Elwood, Chief Ombudsman, (the author, Wellington, 6 September 2002)

[105] Particularly in the present context where there has been an evolution in approach to the provisions.

The case notes also present a broader issue for the researcher trying to gain an overall view of how the provisions have been applied. As we have seen, statistical analysis of the Case Notes is problematic. Recent trends in freedom of information practices overseas rely heavily on statistical analysis in order to measure administrative compliance with freedom of information statutes, as well as overall effectiveness of the legislation.[106] Clearly, the case notes, being a small (and not necessarily representative) sample of the total cases investigated by the Ombudsmen do not provide a good basis for such analysis.[107]

B. The Revised Practice Guidelines

The Guidelines issued by the Ombudsman provide another important point of reference for those seeking to understand the OIA, and the Ombudsman's interpretation of it. A revised set of Guidelines have very recently been released by the Ombudsmen, covering all withholding grounds, including the ones we are concerned with ("the revised Guidelines"). [108]

The revised Guidelines do not represent a revolution over what has previously been available, but they are far more detailed and provide a good basis for further comparison. Withholders requiring to apply the provisions in practice would be well advised to give the Revised Guidelines very close attention, while bearing in mind that they are not intended to "detract from the need to take a case by case approach when considering requests." [109]

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[106] See for example Roberts, Alasdair "Limited Access: Assessing the Health of Canada's Freedom of Information Laws" (April 1998) *School of Policy Studies,* Queens University

[107] It should be noted that even if the Ombudsmen produced case notes on all investigations commenced – which is likely to be an administrative impossibility – this would only provide additional information on the matters subject to complaint.

[108] *Ombudsmen's Practice Guidelines* (September 2002)

[109] *Ombudsmen's Practice Guidelines* (September 2002) General Introduction, 1

(i) Considerations for Conventions

A 'Summary sheet' for section 9(2)(f)(iv) suggests that the holder is required to:

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

It is noted that "If you have identified the convention and its purpose, and consider that releasing the information will undermine that convention and can explain why, then section 9(2)(f)(iv) may apply." [110] A withholder should then consider whether public interest considerations favouring release outweigh the need to withhold. [111]

The Revised Guidelines accordingly place an obligation upon withholders to formulate the convention(s) at issue, and, if anything, require an even greater understanding of the conventions and their purposes than previously. However, the revised Guidelines are not forthcoming about the convention being relied upon, stating that "the wording of section 9(2)(f)(iv) suggests that in certain circumstances the convention allows advice tendered to Ministers to be kept confidential."

This comment may be seen as relatively unhelpful, given the difficulties in this area that have been discussed. It also might be noted that in discussions of the other subsections contained in section 9(2)(f) certain other conventions are discussed in some detail. In this regard it is noteworthy that the Ombudsman has, (in 'draft Revised Guidelines' contained in CCNO12), set out a fairly specific formulation of the convention at issue:

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[110] *Ombudsmen's Practice Guidelines* (September 2002) Part B, Chapter 4.5

[111] Further steps in considering this are set out; *Ombudsmen's Practice Guidelines* (September 2002) Part B, Chapter 4.5.

"Section 9(2)(f)(iv), in particular, reflects the convention that, in a Cabinet system of government, where advice has been tendered by officials or individual Ministers for consideration by Cabinet that advice may need to remain confidential to allow Cabinet to consider it in an effective and orderly manner."[112]

While the above formulation is laudably precise, it also appears unnecessarily narrow. There would seem to be nothing obvious in the construction of section 9(2)(f)(iv) that limits its application to advice tendered to Cabinet, and certainly previous Case Notes indicate that the provision may apply where advice has been tendered to a Minister only.[113] It would also appear to have the potential to 'block' further evolution of the conventions at issue, as allowed for under the construction of the provision. It may be for these reasons that the Ombudsmen have not incorporated this formulation in the revised Guidelines. However, this earlier statement does provide some important clues as to the underlying approach that may be being adopted by the Ombudsmen in assessing the proper withholding of information under this provision.

(ii) The overlap between Advice and Opinion

The revised Guidelines does not expressly refer to an 'overlap' between the provisions. It is however observed that the same information ("internal discussion papers") may be withheld as advice or opinion.[114] The overall construction and emphasis of the revised Guidelines implies an expectation that withholders will be able to identify that one or other of the provisions will apply in any given case,

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[112] CCNO12, 25

[113] This was the case, for example, in CCNO5 Case 42 (G R Laking)

[114] *Ombudsmen's Practice Guidelines* (September 2002) Part B, Chapter 4.5. This is consistent with previous case notes; for example CCNO10 Case W3808 again

rarely both.[115] The point is again reinforced that the question of the correct provision to apply is contingent upon what interest is to be protected.[116]

(iii) 'Untendered' Advice?

A significant comment is made in the revised Guidelines in relation to 'tendered advice' that in 'limited circumstances' section 9(2)(f)(iv) may apply where the information has not been tendered at the time of the request. The comment is made that "(t)his situation may occur where internal discussion papers are circulated within an agency or between agencies prior to the tendering of formal advice to a Minister."[117] Accordingly, it is allowed that section 9(2)(f)(iv) might provide good grounds for withholding the internal discussion papers if the withholder's concern is "that release of internal discussion papers will undermine the ability of Ministers to consider the advice that will be tendered in an effective and orderly manner".[118]

This is a realistic approach. If the aim is to 'maintain the constitutional convention' protecting 'the confidentiality of advice tendered.' then as a matter of logic it would seem that release of a draft undermining the confidentiality of advice *to be* tendered would not maintain the convention. It may often be the case that the release of a draft will interfere with a Minister's consideration of the final advice. As will be seen, this comment may go some way to addressing particular concerns of officials in this area.

(iv) 'The context of free and frank opinions'

The revised Guidelines suggest that the agency consult those who generated the information at issue and explore whether and why the release of the information

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[115] This seems to be an evolution from earlier case notes where the Ombudsman had no difficulty in finding that both provisions provided grounds for withholding; for example CCNO10 Case W3808 (J Robertson), 58

[116] *Ombudsmen's Practice Guidelines,* above

[117] *Ombudsmen's Practice Guidelines,* above

[118] *Ombudsmen's Practice Guidelines,* above

would "inhibit the expression of free and frank opinion by them in the future." [119] The revised Guidelines note that, while the opinion of the author of the effect on their behaviour of release of the information at issue will be a relevant consideration, it will not be determinative.[120]

Objective factors are also to be taken into account, and interestingly the revised Guidelines suggest that senior managers are expected to be less likely to be inhibited as a result of the release of information than junior employees; and similarly, policy advisers or departmental officials "are expected to be more robust about their opinions" than those from outside government.[121]

Even as a generalisation, this point seems arguable. Given the quite different implications of the release of the same 'free and frank' opinion made by a Chief Executive as against a junior employee (one may achieve headline status, with the other passing without notice), it may be seen that the 'inhibitive' effect of release could be greater upon the Chief Executive. Furthermore, given that the interest to be protected is the maintenance of the effective conduct of public affairs, it could be argued that even a slight impact upon a Chief Executive's willingness to express opinions freely and frankly could outweigh a more significant impact upon the junior employee.

Another consideration to be taken into account is the relationship between the author and intended recipient. The revised Guidelines note: "Is advice or opinion usually conveyed between these persons in a formal manner, or is it often expressed in an informal and frank fashion?" and also "If advice is usually conveyed informally, will

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[119] *Ombudsmen's Practice Guidelines* (September 2002), above

[120] The suggestion that the writer's opinion be sought may be contrasted with the proposition by Eagles, Taggart and Liddell that the writer's opinion would be unlikely to assist the argument; I Eagles, M Taggart and G Liddell, *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992) at 374.

[121] *Ombudsmen's Practice Guidelines* (September 2002) Part B, Chapter 4.6

release of the information at issue damage such an informal and frank relationship in the future?" [122]

This indicates that the Ombudsmen consider that informal relationships characterised by the giving of 'free and frank' opinion may be afforded some protection by section 9(2)(g)(i). However, again it is important to see this as a general proposition only. An illustration of this is contained in the latest Ombudsman's Annual Report, which contains comment on an investigation into the approach taken by the Department of Prime Minister and Cabinet to information requests. After considering evidence (including statements from two former Prime Ministers), the Ombudsmen accepted that the relationship between the Policy Advisory Group and the Prime Minister of the day had a number of characteristics that might 'heighten the need for confidentiality'.[123] However, this did not "negate the need for a case-by-case assessment of whether there is good reason in terms of the Official Information Act to withhold specific information." [124] There is to be no exemption for a 'class' of information.

Overall the revised Guidelines reinforce the proposition that section 9(2)(g)(i) may often be useful where information has been given in a particularly blunt fashion, noting it can be "the manner in which the information is expressed that requires protection, rather than the information itself". In such cases, the revised Guidelines suggest that "a summary of the content of the information can often be released without harm". [125]

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[122] *Ombudsmen's Practice Guidelines* (September 2002) Part B, Chapter 4.6

[123] *Report of the Ombudsmen for the Year ended 30 June 2002* (AJHR, A.3, 2002), 31-32. These characteristics included the personal nature of the relationship, reliant upon trust; the fact that it often required free and frank expression of opinions in assessments of the views of other departments and even Ministers; memoranda written under time pressure.

[124] *Report of the Ombudsmen for the Year ended 30 June 2002* (AJHR, A.3, 2002), 30. The Headlines generated by these comments underline the charged political context of these types of decision– see "Secrecy rebuke for PM's officials" (20 September 2002) *The Dominion,* Wellington,1.

[125] *Ombudsmen's Practice Guidelines* (September 2002) Part B, Chapter 4.6.

(v) Factual Material under the Revised Guidelines

In relation to factual material when discussing section 9(2)(f)(iv) and 'tendered advice', the revised Guidelines preserve the status quo by maintaining a broad view of the scope of 'advice' (as advice may be "purely factual in nature" or simply provide options), but also caution that 'advice' comprising factual material is less likely to require protection than more conventional forms.[126]

In discussion of section 9(2)(g)(i) the revised Guidelines confirm that an agency should consider whether the information at issue contains free and frank expressions of opinion. [127] However, there is a suggestion that some information might be withheld even when it does not contain such expressions: "If the information at issue comprises free and frank expressions of opinion, then it is more likely that disclosure would inhibit such free and frank expression in future similar circumstances." (emphasis added).[128]

Accordingly, the revised Guidelines would seem to admit the possibility that factual material could be withheld pursuant to this provision in appropriate circumstances. It is hard to conceive of how this might occur, although it may be that the Ombudsmen have encountered just such an argument. However, in this regard the revised Guidelines further emphasise the possibility of separating and releasing information of a background or factual nature. Indeed (and as was also pointed out to the author by the Ombudsman at interview), it may often be the case that this provision is relied upon to edit a relatively small portion of a document, that portion containing the 'blunt advice'. [129]

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[126] *Ombudsmen's Practice Guidelines* (September 2002) Part B, Chapter 4.5.
[127] *Ombudsmen's Practice Guidelines* (September 2002) Part B, Chapter 4.6.
[128] *Ombudsmen's Practice Guidelines* (September 2002) above, Chapter 4.6.
[129] Interview with Sir Brian Elwood, Chief Ombudsman, (the author, Wellington, 6 September 2002).

(vi) Release when Decision Made

There are implications for the application of section 9(2)(f)(iv) where a decision has been made; the revised Guidelines include the comment that "[o]nce a decision is made, there may be no need for ongoing protection of the advice on which that decision was based." It is further noted that the release of information after the decision is made can serve to explain to the public the rationales behind the decision, and is consistent with the purposes of the Act.[130]

Accordingly, it would seem that there is a likelihood that once a decision is made, the information at issue may be released. This approach has also been taken in previous case notes.[131] However, the converse is not true. In Part E of the revised Guidelines, 'common misconceptions' are commented upon. Two 'common misconceptions' raised in relation to section 9(2)(f)(iv) are that "Ministers and Cabinet have a right to "undisturbed consideration" of advice" (emphasis in original); and that "advice may be withheld until a decision is made by Ministers or Cabinet." The revised Guidelines confirm that no such right or presumption exists. In each case the withholding agency is obliged to provide reasons why release will interfere with the decision making process.

(vii) Release in the Public Interest

In the event that all the above tests are met, the agency is then required to consider section 9(1) of the OIA and whether the need to withhold is "outweighed by other considerations which render it desirable, in the public interest, to make that information available." The revised Guidelines set out a 3 step process in considering this, which includes taking into account whether release of the information will promote the accountability of ministers or officials, (which could occur where release revealed factors taken (or not taken) into account by ministers

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[130] *Ombudsmen's Practice Guidelines* (September 2002) Part B, Chapter 4.5. This is consistent with previous case notes addressing this point; see for example CCNO10, Case W2159 (J Roberts), 44.

[131] See for example CCNO11, case W36084 (A. Satyanand)

or officials in coming to a decision). Overall, however it is accepted that in deciding whether the public interest outweighs the interest in maintaining the convention protected by the provisions "..each case needs to be considered carefully on its own merits and taking into account the surrounding circumstances." [132]

Assessing whether the 'public interest override' applies once one or other of the provisions have been made out could prove to be a delicate task in many cases. The process of establishing that section 9(2)(g)(i) applies would in particular appear to already incorporate some consideration of the public interest.

This might in turn partly explain why the public interest override appears to be seldom applied where one or other of the provisions have been made out; this appears to have occurred only once or twice in the entire case notes.

(viii) The Revised Guidelines Conclusion

The revised Guidelines provide a far more detailed exposition of those matters that the Ombudsmen consider relevant in the application of the provisions than has ever been available previously. Despite this, it is notable that many of the difficulties identified in the earlier analysis persist. In particular, issues may persist with the identification of the convention(s) protected under section 9(2)(f)(iv) (although certainly additional clues are available regarding these).

Perhaps most usefully, the revised Guidelines also complete a shift in emphasis from consideration of what 'especially free and frank' opinions may be protected under section 9(2)(g)(i) to focus upon what effects the release of 'free and frank' opinions might be expected to have – although again, it is difficult to discern what thresholds apply here.

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[132] *Ombudsmen's Practice Guidelines* (September 2002) Part B, Chapter 4.5 and 4.6.

Overall, the revised Guidelines make it clear that the provisions require an extremely complex and demanding analysis. From what are in structure very simple, open textured provisions, the Ombudsman have drawn a very intricate and interwoven set of considerations. From the point of view of a withholder surveying the various steps and matters to be considered, there can be little doubt that the overall process may appear daunting and uncertain.

V THE PROVISIONS IN PRACTICE

A. Questions of Compliance

In discussing the issues that arise with the use of the provisions in practice, it is useful to consider these in terms of compliance with both the provisions of the OIA and its objectives. In the context of freedom of information legislation (and particularly with reference to withholding provisions), failure to release information on faulty grounds clearly may be seen as non-compliance.[133] Further forms of non-compliance may involve 'protective' measures such as delay or reliance upon verbal advice.[134]

In the absence of detailed statistical information on the use of the provisions, one of the few ways in which it is possible to explore their use is to talk to officials who make use of them. In order to obtain a better view of the issues arising in practice, the author interviewed the Chief Ombudsman, together with five professionals who worked with the OIA closely in their professional life.[135] Some of those spoken to had cause to consider the provisions on virtually a daily basis. While this was not a

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[133] A review of the Case Notes relevant to the provisions indicate that in more than half of the cases at least part of the decision to withhold is overturned on investigation by the Ombudsmen.

[134] The latest Ombudsmen's Report records 'notable delays' on the part of some holders; *Report of the Ombudsmen for the Year ended 30 June 2002* (AJHR, A.3, 2002), 27.

[135] See Interview Details appended to the paper. Those interviewed will not be identified (other than the Chief Ombudsman) and will be referred to collectively as "officials".

formal survey, these discussions were invaluable in clarifying the main issues that officials grappled with in utilising the provisions in practice.

At the time of the discussions, the Ombudsman's revised Guidelines had not been released. As will be seen, however, while those Guidelines will undoubtedly have an impact in this area, many of the more significant issues are likely to remain.

(i) Complexity of Analysis

Several officials spoken to noted that the provisions required very sophisticated or complicated chains of argument (particularly in view of the approaches taken to them by successive Ombudsmen). This is perhaps unsurprising in light of the difficulties of application already outlined. There are some evident compliance issues likely to arise from this, including:

(a) That the complexity of application could lead to incorrect application. In compliance terms, the provisions could be invoked mistakenly to withhold information, or alternatively opinions and advice that ought to be protected by the provisions could be released.

(b) Complexity of analysis could also lead to different practices or approaches being adopted towards the provisions in different parts of government.

(c) The provisions might not be used to protect information that should be protected, due to perceived difficulties in maintaining the necessary arguments in the face of an Ombudsman's investigation.

In relation to section 9(2)(f)(iv), it was commonly observed by officials that the requirement to identify the convention to be protected was the most difficult task facing the decision maker. Again, this may be unsurprising, given the early

approach taken by the Ombudsman to this task as discussed. The Ombudsman too has acknowledged the difficulties facing officials here.[136] However, the revised Guidelines confirm that there is a heavy onus on withholders to formulate and understand the conventions at issue, while providing little in the way of clear guidance on the issue.

Similarly, in relation to section 9(2)(g)(i), several officials felt that the analysis required was a difficult one, particularly in the areas of establishing the view that the withholding was necessary to 'maintain the effective conduct of public affairs', and also in divining what, in the Ombudsmen's view, was a 'free and frank opinion' warranting protection. The revised Guidelines may provide some assistance here, with further emphasis being placed on the *effect* of release, rather than establishing that the opinion is 'especially free and frank'. However, it might also be considered that in introducing a number of additional specific factors to be taken into account (such as the seniority of the author of the opinion), the reasoning process required has become even more involved.

This issue also should be considered in light of the current environment that requests in this area are made in. The Ombudsmen have noted that requests have become far more encompassing; while initially requests made under the Act tended to focus on specific documents, more recently requests have become far more encompassing, often requiring documents together with all drafts, communications and other materials associated with the principal documents. [137] It also is important to note that a considerable number of requests for information in this area are generated by

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[136] As has already been noted, the Ombudsmen have acknowledged this task as difficult; *Ombudsmen's Practice Guidelines* – No 2 "Current Approach of Ombudsman to Section 9(2)(f)(iv) & Section 9(2)(g)(i) of the Official Information Act 1982" (1993) para 2.5 (now revised).

[137] This has lead the Ombudsmen to note that while the OIA does not expressly preclude 'fishing expeditions', s 18(f) of the Act may on occasion be invoked where information cannot be made available without substantial collation and research; *Ombudsmen's Practice Guidelines* (September 2002) Part B, Chapter 2.4.

Opposition Research Units, a use of the Act that was not initially anticipated.[138] The combined effect of these factors is that agencies are often being required to apply the very involved tests required by the provisions on a case by case basis to very large numbers of documents, while under time pressure and often in a highly politically charged context.

A further complicating factor in terms of application of the provisions (and in particular, section 9(2)(f)(iv)) is the advent of MMP; the Revised Guidelines point out that MMP "has created a new context in which section 9(2)(f)(iv) must operate".[139] It seems that principles of application of the provisions have been developing, and may continue to develop, in response to MMP. For example, the Revised Guidelines have observed in this context that "premature release of information before full consultation has between coalition partners occurred may prejudice the ability of those partners to reach agreement", noting that such a case might require protection under section 9(2)(f)(iv).[140] However it is further observed that where the opposing views of the coalition partners have been the subject of public debate there may be no prejudice in releasing the information at issue.[141]

Against this changing background, even some of the senior and experienced officials interviewed acknowledged the scope for mistakes in application of the provisions. Many decisions will be made on the use of the provisions by officers who are not so experienced. Some anecdotal evidence was provided during interviews that different sections of government may be applying quite different approaches to the provisions. It was also observed that even amongst the senior officials spoken to, those officials commonly dealing with the executive considered section 9(2)(f)(iv) relatively straightforward to apply and section 9(2)(g)(i) difficult, whereas those more concerned with 'operational' matters tended to take the reverse view.

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[138] See Philip A. Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001), 160.
[139] *Ombudsmen's Practice Guidelines* (September 2002) Part B, Chapter 4.5.
[140] *Ombudsmen's Practice Guidelines* (September 2002) above.
[141] *Ombudsmen's Practice Guidelines* (September 2002) above.

(ii) Use of the Provisions as Alternates

As has been discussed, there is a potential issue that arises in terms of selecting the appropriate provision to apply in a given case, and the extent to which they overlap. This was discussed with a number of interviewees.

In terms of coming to a decision as to which (if either) of the provisions properly applied, it was commonly appreciated that section 9(2)(f)(iv) was more appropriately invoked in relation to advice tendered in an executive context (to Cabinet), and that in contrast section 9(2)(g)(i) was more concerned with lower level, 'operational' opinions. In other words, the 'executive' vs 'government' division (emphasised in the 12th Compendium of Case Notes) appeared to be reflected in the wider understanding of how the provisions were applied amongst those who use them regularly.

Despite this, on discussions with officials it appeared to be not uncommon practice to cite both provisions in justifying a decision to withhold a given item of information. [142] It seems in such a case officials would place most emphasis on arguing the grounds of the provision that appeared most appropriate, but the other subsection would also be used as a backup (and in case it turned out that the Ombudsman considered the alternative more relevant). As has been noted above, there is some evidence that this has been a common practice from the introduction of the Act.[143]

However, the Chief Ombudsman made it clear to the author on this point that it was generally not appropriate for officials to tend to rely on both provisions as alternates,

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[142] It may be assumed in such cases both provisions will be cited to the requester as grounds for refusal, as well as on a subsequent investigation by the Ombudsmen.

[143] The Law Commission has also observed "[t]he very limited recorded separate use of section 9(2)(f)(iv)"; Law Commission *Protecting Effective Government and Administration* (Draft 23 Wellington, 1993), 21 (this comment appears to be reliant upon the case notes recorded).

and that in many instances there is a clear distinction between expressions of opinion and the provision of advice.[144] Accordingly, there would seem to be a compliance issue arising here in that officials may be relying on 'alternate' grounds for withholding unnecessarily. They may be forgiven for doing so, for as we have seen the provisions are on their face difficult to keep separate conceptually, and the material available until very recently has not assisted greatly in this regard. Nonetheless, the reliance on 'redundant' withholding grounds has the potential to confuse requesters and delay subsequent investigations by the Ombudsman.

The resort to 'alternate' withholding grounds by officials might also indicate a deeper compliance issue, in that such an approach provides a clue that officials may tend to be more focused upon the withholding of the particular information to hand, rather than upon the respective interests to be protected. As has been emphasised in the revised Guidelines, the Ombudsmen's view is that the correct basis for determining which provision to apply is upon consideration of which interest is to be protected. Nonetheless, if an official is considering a request for an item of information that has the potential to cause considerable embarrassment or negative impacts upon the decision making process, it may often be the case that the main concern is that the item be withheld, rather than the details of how precisely it is withheld.

(iii) The Implications on Behaviour

A consequence of the levels of uncertainty about when the provisions might act to protect certain advice and opinion is that this might affect behaviour, or the 'culture' in the public sector concerning the treatment of this type of information. This can result in approaches being taken to certain 'sensitive' opinion or advice designed to avoid the potential for subsequent release. An obvious example, and one noted as a

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[144] Interview with Sir Brian Elwood, Chief Ombudsman, (the author, Wellington, 6 September 2002).

real concern by some officials spoken to, is the provision of advice and/or opinions in verbal form.

The Ombudsmen have taken the position that verbal (and other unwritten) information can be subject to the OIA.[145] However, review of the Case Notes indicates that requests for such information are infrequent.[146] Accordingly, there is potential for certain items of important and sensitive advice or opinion to be provided verbally.[147]

The compliance issues arising from such an approach are two-fold; firstly, some information that should be available in terms of the OIA may be effectively put beyond its reach. Secondly, the provision of oral advice where written advice should be provided has implications for the clarity, reliability and ability to refer back to that advice. Therefore such an approach may impact on the overall effective conduct of public affairs.

When the issue of verbal advice was put to the Chief Ombudsman, he acknowledged that "that is a very real risk based on misunderstanding and therefore unnecessary fear". From the Ombudsman's point of view, a sensible approach has been taken to the provisions that ensures that the interests involved receive the required protection, without going so far as to create a 'climate of secrecy for decision making'.[148]

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[145] Ombudsmen's Quarterly Review "Application of Official Information legislation to non-documentary information" (4/3, Wellington, September 1998), 1.

[146] An exception may be found in CCNO12 Case W41571 (Sir Brian Elwood).

[147] This has been raised as a particular concern; see Matthew S. R. Palmer, "Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement?" (Institute for International Research conference, Wellington, 4 April 2001), 15.

[148] Interview with Sir Brian Elwood, Chief Ombudsman, (the author, Wellington, 6 September 2002).

However, the reservations on the part of officials seem to persist. Discussions with officials indicated that uncertainty about the likelihood of being able to successfully rely on the provisions (or other withholding grounds) may permeate through to written advice and opinion also. In other words, it is not the case that documents comprising advice or opinion are prepared in the expectation that they will be protected by disclosure by one or other of the provisions.[149] This was noted by one interviewee as having lead to a 'culture' within the public service that sees virtually all official information as liable to release under the OIA. As a result, most instances of appeal to the provisions are almost of an 'accidental' nature. This has implications both for the quality of argument that can be raised in appealing to the provisions, and raises further questions about how effective the provisions are in protecting the interests they are designed to protect.

There may also be 'cultural' issues affecting whether arguments are pursued in support of withholding information, particularly in relation to section 9(2)(g)(i). One official spoken to pointed out that the train of argument needed to support withholding under that section involved itself very 'free and frank' arguments; the person who produced the opinion in question needs in effect to say that they would have been inhibited in producing the opinion if they had known that it would be subsequently made public. Further, they need to go on to contend that they would be reluctant in future to produce similar opinions if the one at issue is released, and that this would have negative impacts upon the future conduct of public affairs.[150] It was commented that civil servants were often reluctant to argue that they could not do their jobs properly if their opinions were to be made public.

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[149] The exception to this may be advice tendered to Cabinet where there persists an expectation that the advice will be able to be withheld pursuant to section 9(2)(f)(iv) while under consideration by Cabinet.

[150] It may be noted that the revised Practice Guidelines indicate that this type of argument may be required; *Ombudsmen's Practice Guidelines* (September 2002) Part B, Chapter 4.6.

The results of this could include information being released (perhaps in the face of a complaint to the Ombudsmen), simply because of a reluctance to advance the necessary arguments. This attitude could also mean that the occurrence of the sort of 'blunt' advice considered important by the Dank's committee might become even less frequent (at least in written form). Without more detailed evidence, it is impossible to assess the implications for this on the overall effectiveness of communications in the conduct of public affairs.

This particular issue may only be underscored with the introduction of the revised Guidelines, particularly where the opinion has been produced by a senior official, given the expectation that senior public sector managers are be expected to continue to express free and frank opinions in the future, despite any disclosure.[151]

(iv) The Question of Timing

Timing is a crucial consideration when dealing with information, which can be regarded as a 'perishable commodity'. There are a number of ways in which timing issues may impact on compliance with the OIA as a whole.[152] In terms of the provisions under consideration, the major compliance issues involving timing would appear to arise where there was deliberate resort to the provisions in order to delay responses to information requests. Alternatively, mistaken reliance upon the provisions could thwart the purpose of an information request, even if it was ultimately released following investigation by the Ombudsman. [153]

While the possibility of abuse of the provisions in order to achieve delay was not directly canvassed in discussions with officials, it is evident that in cases where a

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[151] *Ombudsmen's Practice Guidelines* (September 2002) above.

[152] Delays and deemed refusals are the second largest category of complaints after refusals; see New Zealand Law Commission *Review of the Official Information Act 1982* (NZLC40, Wellington, 1997) para 153.

[153] The Ombudsmen's investigation may be a lengthy process; the recent investigation of complaints regarding DPMC was reported to have taken over a year; see "Secrecy rebuke for PM's officials" (20 September 2002) *The Dominion,* Wellington, 1.

delay was desirable, the generality of the provisions (both in the wording of the provisions and the range of government information they could apply to) could lead them to being misused for this purpose. The prospect of this form of abuse of the withholding provisions is often commented upon by observers and in the media.[154]

Again, there is little hard evidence to draw any conclusions from in terms of how significant a problem such misuse might be. When asked about potential misuse of the provisions by officials, the Chief Ombudsman noted that it was "[v]ery hard to be absolute" in commenting on this, as the Ombudsmen only dealt with that proportion of OIA refusals actually referred for investigation.[155] However, in commenting further on compliance, Sir Brian placed some emphasis on timing issues:

"I think there is a pretty good compliance once we become involved. I think there are probably too many occasions upon which we do have to become involved. On the other hand there are many situations where there's a very fine judgement call particularly in relation to the public interest and often it is a matter of timing, when should the information be released. I think a creditable Ombudsman process helps sort out those difficult questions." [156]

The fact that questions of timing could pose 'difficult questions' was a point also noted by some officials. In particular, issues were said to arise where a decision had been made on 'advice', at which point it was felt that the Ombudsman might often expect that the advice would be able to be released. As we have seen in discussion

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[154] See for example Alastair Morrison, "The Games People Play: Journalism and the Official Information Act" in Legal Research Foundation, *The Official Information Act Seminar Papers: General Overview of Official Information and the Official Information Act* (1997), 30. Interview with Sir Brian Elwood, Chief Ombudsman, (the author, Wellington, 6 September 2002).

[155] Interview with Sir Brian Elwood, Chief Ombudsman, (the author, Wellington, 6 September 2002).

[156] Interview with Sir Brian Elwood, Chief Ombudsman, (the author, Wellington, 6 September 2002).

of the revised Guidelines, this has recently been raised as a general proposition.[157] However, on such decisions the devil lies in the detail as the Chief Ombudsman seems to acknowledge. It may be, for example, that a decision is made on the item of advice at issue, but that this decision forms part of a larger policy-making process that is continuing and requires protection to proceed 'in an effective and orderly manner.'

It is also a reality that we live in an age of 'spin' and that there is an ever increasing imperative to manage the release of significant policy decisions. The OIA contains some provision for the withholding of information that *"is or will soon be publicly available."*[158] Some officials spoken to perceived possibilities for 'gaps' to occur in the withholding regime, between where certain advice might be protected under section 9(2)(f)(iv), for example, and where it might be considered to 'soon be publicly available.' It is hard to assess how significant an issue this may be. It might be anticipated that the Ombudsman would say the question of whether any further protection was afforded would entirely depend on whether this was necessary in order to protect the convention concerned. To determine whether this is so or not depends on the circumstances of the particular case, and of necessity involves "a very fine judgment call".

(v) Draft and Factual Material

A potential problem relating to draft advice was raised in a number of interviews. This is a particular issue in light of the fact that very broad information requests are becoming increasingly common. As we have seen, on a strict interpretation of the subsection, such drafts may not be considered to be 'tendered' to cabinet (indeed, cabinet can safely be assumed not to have seen them). Accordingly, the concern exists that drafts might not be subject to any protection under section 9(2)(f)(iv), yet their disclosure might in some cases be expected to interfere with the executive

[157] And also in the case notes; see CCNO11, Case W36084 (A. Satyanand).
[158] Section 18(d) OIA

decision making process just as much as, if not more so than, disclosure of the principal advice.

In compliance terms, the concern might be expressed as whether the conventions to be maintained by section 9(2)(f)(iv) may be eroded through the use of widely formulated information requests, achieving a 'back door' access to decision making processes requiring protection.

To an extent these concerns may be allayed by the recent Guidelines. The Ombudsman has made in clear in those Guidelines that the information at issue need not *itself* have been 'tendered', and that the provision may 'in limited circumstances' cover internal discussion papers relating to papers yet to be tendered to a Minister or Cabinet.[159] This would appear to be a valid approach, as the protection of the convention(s) relating to "the confidentiality of advice tendered" could, in some cases, require the protection of drafts (and associated information). Again, this analysis is in each case likely to involve careful consideration of the information at issue and all relevant circumstances.

(vi) Conclusions on the Provisions in Practice

It is evident that officials have a number of significant concerns and issues in relation to the ambit and proper application of the provisions. In summary, difficulties noted included:

1. The reasoning processes required to utilise the provisions are excessively complex and uncertain – in particular, the formulation of the 'convention' in section 9(2)(f)(iv);

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[159] *Ombudsmen's Practice Guidelines* (September 2002) Part B, Chapter 4.5.

2. Uncertainty about the ambit of the provisions means that protective behaviours such as the combined use of the provisions, the giving of opinion and advice verbally and delay tactics can and do occur.
3. That in the public sector the predominant 'culture' anticipates public release for virtually all information, further rendering resort to the provisions problematic;
4. That issues relating to the timing of release of advice and opinions are insufficiently clear;
5. That questions relating to the protection afforded drafts and factual information are also insufficiently clear;

As we have also seen, each of these issues has at least the potential to significantly impact upon compliance with the OIA; either by having the effect that information is withheld (or not released in a timely manner) without good reason, or alternatively by insufficiently protecting the conduct of public affairs.

The revised Guidelines were released after the interviews were conducted with officials, and it seems likely that they may have a positive effect on some of the concerns raised, particularly in providing some clarification of the Ombudsmen's approach in distinguishing the scope of application of each provision, for example. It is also clear from the Guidelines that draft and other documentation can be brought within the protection of section 9(2)(f)(iv) in appropriate circumstances.[160]

However, it is likely that many issues will remain, and some may even be exacerbated by the contents of the revised Guidelines.[161] It may be expected that the compliance issues will continue to arise so long as officials are unsure of the

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[160] It is perhaps unfortunate that there is little data available which would permit analysis of the scope of the issues now, and that would allow comparison once the revised Guidelines had entered into general awareness within the public sector.

[161] The expectation on senior officials to be 'frank' despite the likelihood of disclosure of such opinion being an example.

scope of the provisions, and accordingly either withhold information wrongly, or adopt other 'protective' measures such as providing oral advice and opinion.

VI ADDRESSING THE PROBLEMS; AMENDMENT OR ADMINISTRATION?

As we have seen, there appear to be a number of significant issues with the provisions that have the potential to seriously affect their proper operation. Overall, these problems seem to arise from a complex of interrelated matters involving the construction of the provisions themselves, as well as the approaches taken to them by both the Ombudsmen and the officials who use them. There are difficulties also in relation to accurately discerning the scope and extent of these compliance issues.

In considering what options for resolving these problems, two broad categories of solution may be considered; legislative or administrative. Each of these will be considered in turn.

A. The Options for Legislative Reform

(i) A Categorical Approach

One possible (if radical) approach to addressing some of the issues that have been identified with the provisions could be to replace the broad, purposive construction of the provisions with more prescriptive, 'categorical' sections.

Such an approach has been taken in drafting legislation in this area in other jurisdictions, including Australia and Canada.[162] As an approximate equivalent of

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[162] See sections 21 and 69 Access to Information Act 1985 (Canada) and sections 35 and 36 Freedom of Information Act 1982 (Australia).

section 9(2)(f)(iv), section 34(1) of the Australian Freedom of Information Act 1982 ("FoI" Act) renders each of the following documents exempt from the ambit of the Act:

- a document brought into existence for the purpose of submission to the Cabinet which has been, or is proposed by a minister to be submitted to Cabinet;
- an official record of Cabinet;
- a copy or an extract from a document covered above; and
- a document, the discussion 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 disclosed.[163]

It is significant that the FoI Act is a document-based statute, in contrast to the OIA's emphasis on information. Importantly, the above section sets out classes of documents that are exempt from the statute, rather than providing grounds for withholding. No 'public interest' test applies. Interestingly, the exemption does not apply to documents that contain purely factual material unless release of that material would involve disclosure of any unpublished deliberation or decision of Cabinet.[164]

A public interest test does however apply in the Australian equivalent to section 9(2)(g)(i), which can be found in s 36(1) of the FoI Act which exempts documents the disclosure of which:

(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

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[163] Freedom of Information Act 1982 section 34(1).
[164] Freedom of Information Act 1982 (Australia) section 34(1A).

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.

The type of prescriptive (but, in some ways, much more encompassing) approach taken to protecting 'government process' information might be argued as conferring some distinct advantages in the present context. The Australian approach does not require officials to identify conventions or to tease out the distinctions between 'free and frank opinion' and 'tendered advice'.[165] Certainly, such an approach will be far easier for officials to apply (and, in all likelihood, the Ombudsmen also).

The Australian legislation also provides for a relatively simple process to 'veto' further review of a decision to withhold information; the Freedom of Information Act allows for a minister (or delegated officer) to provide a certificate 'establishing conclusively' that disclosure of the document would be contrary to the public interest. This is comparable to the 'ministerial veto' that used to exist in the OIA.[166]

However, overseas experience indicates that the 'category' approach taken in this area is fraught with its own problems when it comes to compliance issues.[167] While the categorical approach would undoubtedly provide more robust and easy to apply protection to governmental advice and opinions, it would almost certainly tip the balance back too far towards governmental secrecy. This was certainly the conclusion of the Law Commission when it (briefly) considered this approach. The Law Commission concluded that a redraft along 'categorical' lines could well impose significant restrictions on information where if anything the current trend is

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[165] Nor do the equivalent Canadian provisions.
[166] Replaced in 1987 by the 'cabinet veto'; s 18 Official Information Amendment Act 1987.
[167] Sir Brian Elwood described some of these drawbacks in a recent address given for the New Zealand Centre for Public Law at Victoria University (Wellington, 25 July 2002).

for greater availability and transparency.[168] A 'categorical' approach lacks the flexibility of the existing provisions, and therefore would need to cover wide classes of information in order to ensure adequate protection was provided in all eventualities. The likely end result would be far more information would be withheld.

Perhaps most importantly, it must be recognised that a 'class' or 'category' approach would be a incongruous concept to insert into the existing purpose-based scheme of the Act. The 'class' approach was considered and rejected by the Danks committee, and has become anathema to the Ombudsman, as has been noted many times.[169] In truth, it is highly unlikely that any such redraft could be made to 'work' either structurally in terms of the OIA, or politically.

(ii) Legislative Simplification

If a 'categorical' approach is not suitable, perhaps the overall 'purposive' approach of the provisions could be retained but simplified by combining them into one section. This was a possibility suggested in an early draft of the Law Commission report; the fact that there had been very limited separate use of section 9(2)(f)(iv) was considered to support this idea.[170]

Again, the attraction of combining the provisions is that this would seem to provide an opportunity to simplify the tasks of both withholders and the investigating Ombudsman. The advantage of a 'combined' provision would be that the problematic distinctions such as between 'advice' and 'opinion' could be disposed of. A combined provision could also place an overall emphasis on the impact upon

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[168] Law Commission "Review of the Official Information Act 1982" Report 40 Wellington New Zealand 1997 paragraph 224.
[169] Most recently commented upon in connection with the DPMC investigation; *Report of the Ombudsmen for the Year ended 30 June 2002* (AJHR, A.3, 2002), 30.
[170] Law Commission "Official Information: Recommendations for legislative and Practical Development" (Draft /23 Wellington New Zealand 1993) paragraph 69.

the conduct of public affairs, doing away entirely with the requirement on both withholders and Ombudsmen to divine unspecified 'conventions' protecting the confidentiality of advice. It may be argued that such an approach would more accurately reflect the primary concerns of both withholders and the Ombudsman.

Possibly the simplest approach to such a combined provision would be to collapse the provisions together, so that good reason for withholding official information would exist if the withholding was necessary to:

"(fg) Maintain the effective conduct of public affairs through –

(i) The free and frank expression of opinions **or the provision of advice** by or between or to Ministers of the Crown or members of an organisation or officers and employees of any Department or organisation in the course of their duty;" [171]

However, if greater ease of use and certainty of operation is the goal, a redraft of this kind may well fail. There seems little doubt that such an approach is liable to generate further uncertainty of application in at least the short term. This seems particularly likely in light of the most recent Guidelines offered by the Ombudsman on the existing provisions. As we have seen above, the 'executive' versus 'general government' distinction is acknowledged by officials, and seems supported in the context of the provisions wording and construction. [172] This distinction would presumably be lost or muddled by the reduction of the provisions to a single subsection of the kind suggested.

It also seems clear that such a 'combined' withholding ground has at least the potential to increase (possibly greatly) the amount and type of information withheld

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[171] It is interesting to note that this formulation has a number of similarities with Freedom of Information Act 1982 (Australia) s 36 discussed above.

[172] This distinction is also found in most 'class' based overseas freedom of information legislation.

under the OIA. As we have seen, the Ombudsman has put in considerable efforts in forging the distinctions between the provisions, and collapsing them together is liable to have unpredictable effects – in the example above, there is no requirement that advice be 'tendered' for example, and with no 'executive' context for section 9(2)(f)(iv), the scope for withholding 'advice' may be greatly expanded. [173]

In effect, the cost of legislative simplification might well be increased scope for withholding information. It may be partly for this reason that in the draft paper the Law Commission ultimately did not recommend the unification of the provisions.

(iii) Specific Protection for 'Active Consideration'

Another option for amendment of the provisions was suggested recently by Matthew Palmer.[174] After noting the difficulties apparent with the inappropriate reliance on oral advice, Professor Palmer suggested that the Act could be amended in that "..it should be made clearer in the Act that there may be good reason to withhold advice or exchanges of views between officials and Ministers (and between Ministers themselves) if it relates to an issue currently under active consideration. This would have to be drafted carefully in order to avoid it being abused." [175]

This proposition might go some way towards addressing the difficult 'timing' issues with release that have been discussed. On the other hand, there must be a question as to how much effect such an amendment would have on the behaviour of officials

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[173] Although the notion of 'free and frank advice' is not entirely new; this phrase was used in the course of the public interest immunity arguments in *Environmental Defence Society Inc v South Pacific Aluminium Ltd (no 2)* [1981] 1 NZLR 153 (CA).

[174] Matthew S. R. Palmer, "Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement?" (Institute for International Research conference, Wellington, 4 April 2001).

[175] Matthew S. R. Palmer, "Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement?" above, 15. It may also be noted that the (then) Secretary for Justice suggested that "at least in the initial phase of MMP, the protection of the deliberative phase of the policy process may require special care"; J Belgrave, "The Official Information Act and the Policy Process" in Legal Research Foundation, *The Official Information Act Seminar Papers: General Overview of Official Information and the Official Information Act* (1997) at 31.

or ministers. Many of the officials dealing with questions in this area seem to appreciate that the fact that the matter at hand is still 'under active consideration' is a major factor taken into account by the Ombudsman in determining whether section 9(2)(f)(iv) has properly been invoked. This has also been made quite clear in the revised guidelines.

A second difficulty is that the Ombudsman would be likely to oppose such an amendment as constituting a 'class' approach (albeit a limited one). Evidence for this can be found in the revised guidelines, which under the 'common misconceptions' section contains an emphatic rejection of a general 'under consideration' class approach.[176]

B. Conclusions on Amendment

While the Law Commission conceded that the provisions were 'less than perfect', ultimately in its final recommendations it saw no need for amendment.[177] This conclusion seems to reflect a recognition that the provisions seem to be 'working' in as much as they provide the Ombudsmen with tools allowing them to ensure that the bulk of official information falling into 'advice' or 'opinion' categories is released. On the other hand, where the release of information could provide a genuine hazard to the processes of government, they can provide effective grounds for withholding.

The concern on the part of the Law Commission seems to have been that this is a very sensitive and finely balanced area, where any 'tinkering' could cause more harm than good in that legislative changes "may well generate new contentions of no

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[176] *Ombudsmen's Practice Guidelines* (September 2002) Part E, Chapter 6.
[177] Law Commission "Review of the Official Information Act 1982" Report 40 Wellington New Zealand 1997 paragraphs E34 and 247.

real merit and of a legalistic type, giving rise to cost and delay both to agencies and to individual requesters of information." [178]

In discussions with officials, this too was a common view. Despite the difficulties that the provisions present officials with, very few of those spoken to believed that these difficulties could be addressed or substantially ameliorated by legislative amendment.

Some officials were also quick to point out that the practical prospect of amendment in this area was remote. The Ombudsman was unlikely to support amendment in this area, and indeed has given every indication of being fully satisfied with the provisions as they stand. Any political interest seeking to press for amendment in this area would be liable to fall under suspicion of having ulterior motives in seeking to withhold more information than under the present construction.

C. Administrative Approaches

(i) Education and Guidelines

In rejecting substantive legislative amendment as an appropriate option for the provisions, the Law Commission went on to conclude "[w]e consider the answer to problems with the provisions lies in a renewed effort to make them work through the issue of guidelines, case notes and other explanatory material." [179]

As we have already seen, there has been much work carried out by the Ombudsman in this regard, notably with the recent release of the revised Guidelines. However, it should be evident that while these Guidelines represent a significant step in furthering understanding of the Ombudsman's approach to these provisions, they are

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[178] Law Commission "Review of the Official Information Act 1982" Report 40 Wellington New Zealand 1997 paragraph 248.

[179] Law Commission "Review of the Official Information Act 1982" above, para 248.

unlikely to provide a complete answer to the problems that arise. Similarly, while the case notes provide an important resource, for reasons discussed they fall short of being an ideal reference for those seeking a clear understanding of the provisions.

A difficulty underlying the Law Commission's analysis is the fact that it did not have available to it data that would provide a strong evidential basis for assessing exactly how significant the problems arising in relation to the provisions were.[180] This is a difficulty that the present paper also shares; the anecdotal evidence obtained can provide no more than an indication of the true scope of the issues.

Accordingly, it may be concluded that a comprehensive solution to the problems arising would involve both a facility to measure and assess the importance of the compliance issues identified, to identify other problems that may not be immediately apparent, and to provide educative and analytical solutions to those problems. Such a 'package solution' may not be out of reach.

(ii) The Prospect of an Information Unit

For the first five years of operation of the OIA, the introduction of the Act was fostered by the New Zealand Information Authority ('the Authority'), a body that held both regulatory and monitoring roles in relation to a wide variety of freedom of information issues.[181] The Authority successfully undertook "a massive programme of work" but was discontinued in July 1988, with the oversight of the Act being transferred to an Information Unit within the Department of Justice.[182] The Information Unit was in turn disbanded in 1995.

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[180] This is largely because, as has been noted, statistical evidence in this area is very hard to obtain.
[181] Danks Committee, *Towards Open Government* (Volume 2, Supplementary Report, Wellington, 1980), para 3.03.
[182] See R Snell, "The Kiwi Paradox – A Comparison of Freedom of Information in Australia and New Zealand" *Federal Law Review* Vol 28 No.3 2000, 575 – 616 at 601.

With the passing of the Information Authority, much of the role of education about the OIA has been taken on by the Ombudsman. There are however difficulties in the Ombudsmen adopting such a role; not only might the Ombudsman be expected to be far too busy to devote considerable time to pursuing general educative ends in relation to the Act, there is a clear tension in the Ombudsman having this role while being the main adjudicator on it.[183]

In the absence of a body dedicated to compliance, education and systematic review of issues relating to official information, the Law Commission argued that there was scope for the Ministry of Justice to take responsibility for these functions.[184] The Law Commission decided against the resurrection of the Authority as a stand alone body, but recommended further review of this possibility.[185]

It may be that such a review is overdue. The Chief Ombudsman expressed the view to the author that in his opinion, the public sector should "take up responsibility for the advocacy or educative role." [186] In terms of how that might be done, Sir Brian noted:

"..I think the responsibility should be with the State Services Commission and that it should have a unit that is designed to foster the understanding of the Official Information Act for the whole of the public sector. It seems to fit comfortably within the concept of the State Services Commission. The Commission has access to the public service and a small unit could achieve what is required to ensure that

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[183] See Law Commission "Review of the Official Information Act 1982" Report 40 Wellington New Zealand 1997 para 45`

[184] See Law Commission "Review of the Official Information Act 1982" above, para 48.

[185] See Law Commission "Review of the Official Information Act 1982" above, para 49.

[186] The suggestion that the State Services Commission could take a leading role in education of agencies has been raised previously by the Ombudsmen; *Report of the Ombudsmen for the Year ended 30 June 2002* (AJHR, A.3, 2002), 21.

the public service is aware of its responsibilities and aware of how the Act operates in practice."[187]

This type of solution was also raised with the author by an official during an interview, although it was suggested that a unit could have a significant advisory role, as well as an educative function. It would seem that the creation of such a Unit would be supported by officials working within this (and other) areas of the OIA, not least because such a unit might be expected to 'free and frank' or 'blunt' advice on the use of the provisions that the Ombudsman might be hindered from giving due to their adjudicative function.

It is suggested that in order to address the range of issues identified in the present paper, the role of such a unit could be expanded even further to encompass monitoring and audit functions. Being incorporated into the State Services Commission (and thus centrally located in the public sector) such a unit might be expected to quickly gather the information and expertise necessary to provide useful assistance to officials in the areas they find most difficult,[188] and could also identify existing and developing compliance issues. The unit would also be in a position to promote the purpose-based ideals of the OIA, and to dissuade officials from simply seeking reasons to withhold a particular item of information. It might also be expected that such a unit may also be able to play an important role in ensuring greater consistency of approach, and accordingly better levels of compliance, throughout the public sector.

Perhaps most importantly, such a Unit could be placed in an advantageous position to accumulate data on the use of the provisions and other aspects of the Act in order

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[187] Interview with Sir Brian Elwood, Chief Ombudsman, (the author, Wellington, 6 September 2002).

[188] In the present context perhaps assistance could be given in identification of the conventions at issue in section 9(2)(f)(iv), or to provide education on the importance of reliance upon the correct provision.

to assist with monitoring and audit functions. A renewed Information Unit would be able to act as a centralised repository for information from throughout the public sector on requests received, responses and the outcomes of reviews (if undertaken). This information could provide the basis for robust compliance analysis of the kind being effectively conducted in Canada.[189] Even 'difficult' compliance areas such as the level of oral advice might be able to be explored by use of surveys and other methods. If found to be significant issues (as indicated by anecdotal evidence), then appropriate educative programs could be undertaken in order to address the problem.[190]

VII CONCLUSION

The superficially simple construction of the provisions conceals the extremely wide-ranging considerations that must be taken into account to apply them correctly. It may be seen that their open-textured and adaptable form is both a great strength and a weakness.

It is a strength, because they can be applied so as to ensure only that information *necessary* to protect the sensitive processes of government is withheld, and they have continued to be useful and applicable even where there has been significant changes in those processes themselves, such as with the introduction of MMP and coalition government.

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[189] Although in part these approaches are responses to more serious problems such as significant occurrences of deliberate or malicious non-compliance; see Alasdair Roberts "Limited Access: Assessing the Health of Canada's Freedom of Information Laws" (April, 1998) *School of Policy Studies*, Queens University at 10 -13.

[190] Calls have recently been made for a similar (though independent) monitoring and auditing body as that proposed to be adopted in Australia; see Rick Snell "Administrative compliance – evaluating the effectiveness of freedom of information" (2001) 93 *Freedom of Information Review* 26 at 30.

It is a weakness, because those required to employ them are faced with what are complicated and difficult to discern analyses, in a context where such analysis may be required to be conducted on a page by page (or sentence by sentence) basis, for a request that may comprise thousands of pages of material.

There is some evidence that practical difficulties are arising for officials which may in turn be significantly effecting compliance with the OIA in this area, and that mistakes are likely to occur in both the inappropriate withholding of material, as well as perhaps the release of material that is contrary to the conventions and interests that are intended to be protected. The true scope of the problem is hard to ascertain, as hard data on such compliance issues (particularly the latter) is scarce.

The proper solution does not appear to be a legislative one; certainly the adoption of overseas 'categorical' precedents would import their own significant problems and overall would be likely to represent a step backwards for freedom of information in this country. Similarly, attempting to improve the application of the provisions by making small changes are liable to have unpredictable or even adverse effects, given the considerable weight of administrative decision making that presently support the provisions.

Accordingly, the issues seem to be best addressed administratively. There has been significant recent work in this area with the release of the revised guidelines. However, while helpful, this is unlikely to provide a complete or even substantial solution to the problems noted. The history of the OIA itself shows that to be successful, changes in the area of freedom of information need to be supported by officials, as well as by the Ombudsmen and the public generally. Great progress could be made in improving compliance in this area by a dedicated public sector official information unit. Such a unit would be in a position to foster consistency of approach throughout the public sector, undertake more detailed analysis and

education, and gather further information about the compliance issues arising with these and other withholding provisions contained in the Act.

Even with the introduction of such a unit, it may be expected that the provisions will still require tough questions to be answered. However, the work of such a unit would serve to ensure that those questions had the best chance of being answered correctly.

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APPENDIX – NOTES ON INTERVIEWS

The author is indebted to those who gave up their valuable time in order to discuss the issues arising in this paper.

Those spoken to worked at or very close the core of government. They included a Chief Legal Advisor and Privacy Officer in core government departments, as well as an Advisor from Crown Law. While there has been some emphasis in this paper on compliance issues, the integrity and professionalism of the interviewees in relation to their obligations under the OIA was beyond doubt.

The author would also specifically like to thank the Chief Ombudsman, Sir Brian Elwood for providing the benefit of his wealth of experience in this area.

All interviews were conducted between 14 August and 6 September 2002, in Wellington.