

ALORA EDITH MAGGIE SKYE JOHNSON

**ON THE PRECIPICE? THE OPERATION OF THE OFFICIAL
INFORMATION ACT WITHIN GOVERNMENT AGENCIES
AND ASSESSING THE EFFICACY OF RESULTS-BASED
ACCOUNTABILITY REGIMES**

LAWS 522 Public Law: State Power and Accountability

Submitted for the LLB (Honours) Degree

FACULTY OF LAW



2016

Abstract

When the 1982 Official Information Act (OIA) became law in New Zealand it ushered in a new era of open, transparent governance which has since developed in a keystone of the nation's democracy. However, nearly 30 years later, the purposes of the Act and its constitutional role have come under threat as government agencies and Ministers alike increasingly utilise the Act improperly and illegally to further their political interests. This paper seeks to elucidate the contemporary state of official information law in New Zealand and expose the dire state of the Act's operation at present. In light of this state of affairs, this paper then turns to look at the new proposal and policy approach the Office of the Ombudsman announced in early 2016. The strategy the Ombudsman intends to utilise to address the current problems facing the Act is an example of a 'results-based accountability model', an approach of public sector management which has become relatively common over the past few decades. However, while these models can have notably positive effects on internal management and performance, when the Ombudsman's proposal is analysed against the theoretical framework of a successful results-based model it becomes apparent that there is a significant disparity. The Ombudsman's specific proposal is incapable of being implemented as a results-model should be and indeed the particular context of the OIA's operation in government agencies is largely incompatible with some of the fundamental aspects of such a regime. As such concerning position of official information in New Zealand will remain effectively unaddressed so long as the Ombudsman continue to pursue their current policy.

Keywords: Official Information Act 1982, Office of the Ombudsman, Public Sector accountability, Performance-based management, results-based accountability.

The total word count of this paper is approximately 14,580 words (excluding footnotes, headings and Bibliography).

TABLE OF CONTENTS

I	INTRODUCTION.....	4
II	A GROWING ACCOUNTABILITY GAP: THE CURRENT STATE OF OFFICIAL INFORMATION IN NEW ZEALAND.....	6
A	DIRTY POLITICS, OIA COMPLAINTS AND THE POLITICAL SUBVERSION OF THE ACT.....	8
B	REQUESTERS VIEWS OF THE OIA.....	10
C	OFFICIAL'S VIEWS OF THE OIA.....	12
D	CORRUPTION PERCEPTIONS AND A GOVERNMENT-WIDE LACK OF TRANSPARENCY.....	14
E	CHANGING THE NATURE OF GOVERNMENT THROUGH THE OIA.....	17
	(b) Founding the Official Information Act.....	18
	(b) The Act's constitutional role.....	20
F	OIA WATCHDOGS: THE ROLE OF THE OFFICE OF THE OMBUDSMAN.....	21
1	<i>An investigation into the practices of government agencies.....</i>	<i>22</i>
2	<i>New Ombudsman, new approach?.....</i>	<i>24</i>
II	A PERFORMANCE-BASED APPROACH TO MANAGEMENT AND ACCOUNTABILITY: ASSESSING THE EFFICACY OF THE OMBUDSMAN'S PROPOSAL.....	26
A	NEW PUBLIC MANAGEMENT IN NEW ZEALAND.....	27
B	ACCOUNTABILITY UNDER THE OIA.....	28
C	OBSTACLES TO IMPLEMENTING A PERFORMANCE-BASED MODEL.....	30
1	<i>Compromising on performance objectives.....</i>	<i>30</i>
2	<i>Evaluation and monitoring of results.....</i>	<i>31</i>
3	<i>Internal attitudes and political resistance.....</i>	<i>33</i>
4	<i>Training requirements.....</i>	<i>36</i>
D	ATTEMPTING TO INCENTIVISE DESIRABLE BEHAVIOUR AND PRACTICES THROUGH A RESULTS-BASED MODEL.....	38
1	<i>Procedural and resource-based flexibility.....</i>	<i>38</i>
2	<i>The necessity of strict guidelines for processing OIA requests.....</i>	<i>40</i>
3	<i>Intrinsic motivators and drawing on the public sector ethos.....</i>	<i>43</i>
E	THE ANTITHETICAL SIDE OF BEHAVIOURAL INFLUENCES IN A RESULTS-BASED MODEL.....	46
1	<i>Narrowing focuses and promoting short term policies.....</i>	<i>46</i>
2	<i>Gaming the path to performance achievement.....</i>	<i>47</i>
3	<i>Negative behavioural impacts and 'excessive' accountability.....</i>	<i>49</i>
IV	A RESULTS-BASED APPROACH TO THE OIA PUBLIC SECTOR: MAGIC PILL OR MIXED BAG?.....	50
A	THE CLEAR SPECIFICATION OF OBJECTIVES.....	50
B	AUTHORITY TO ACT.....	51
C	INCENTIVES TO PERFORM.....	51
D	PROVISION OF RELIABLE RESULTS INFORMATION.....	52
E	A SOLUTION TO THE CRISIS OF OFFICIAL INFORMATION?.....	52
V	CONCLUSION.....	55

I Introduction

In the past few years the use of Official Information in New Zealand has faced a storm of controversy, from the allegations of illegality in Nicky Hager's book *Dirty Politics*,¹ to a peak in complaints to the Office of the Ombudsman, public outrage over fees being charged for information requests,² external criticism of the government's approach to official information³ and the Prime Minister publically admitting to subverting the Official Information Act (OIA) for political purposes.⁴ These incidents paint a troubling picture of the state of freedom of information in New Zealand and in particular, the OIA's ability to preserve its function in contemporary politics as the guardian of transparent and accountable governance. Despite these developments, there remains a concerning reluctance from the government to acknowledge the extent of the current problems facing the Act's operation at present and consequently to take steps to address the public sector's habitual non-compliance with official information law.

Notwithstanding this, the appointment of Peter Boshier as the new Chief Ombudsman has presented an opportunity to substitute the Ombudsman's previously ambivalent attitude towards the OIA with a commanding and authoritative stance on compliance with the Act. Boshier announced, almost immediately, his Office's new strategy to address the public sector's concerning use of the OIA by gradually implementing a results-based accountability programme.⁵ Results-based approaches to accountability are the product of a century of behavioural and social sciences which (through studying how individuals and groups perform fundamental intellectual processes) have sought to identify the most

¹ Nicky Hager *Dirty Politics: How attack politics is poisoning New Zealand's political environment* (Craig Cotton Publishing, Wellington, 2014).

² "Charging for responses to OIA requests" (2015) Reserve Bank of New Zealand <www.rbnz.govt.nz> website. See also Sam Sachdeva "Official Information Act request charges for media in spotlight" *Dominium Post* (online ed, Wellington, 13 January 2016).

³ For example Stephen Price *Independent Reporting Mechanism (IRM): New Zealand Progress Report 2014–2015* (Open Government Partnership, February 2016).

⁴ Craig McCulloch "PM admits Government uses delaying tactics" (16 October 2014) Radio New Zealand <www.radionz.co.nz>

⁵ Lisa Owens "Lisa Owen interviews Chief Ombudsman Peter Boshier" (Podcast, 19 March 2016) The Nation <www.Newshub.co.nz>

effective means of overcoming shortfalls in performance. Behavioural considerations have increasingly become the keystone of effective accountability mechanisms,⁶ and in recent years performance-based approaches have frequently been adopted as the benchmark of successful accountability by proffering to utilise knowledge of psychological factors in a way which successfully incentivises desirable conduct in people whilst also reducing apathy and other such unproductive behaviours.⁷

Reflecting this trend, the Ombudsman's new proposal seeks to promote "improvements in agency performance and compliance with the spirit and letter of the law"⁸ through varying performance-based mechanisms, in particular by publishing data, statistics and OIA complaint information about agencies' compliance with, and performance under the OIA. The Ombudsman also intend to develop more proficient data-collecting models within agencies so this information can later be published in a formal League Table model⁹ which will facilitate comparisons between agencies and elucidate any areas of non-compliance.¹⁰

In this paper I will seek to assess the efficacy of the Ombudsman's proposal given the existing problems which need to be addressed and analyse more generally the appropriateness of a results-based approach in the particular context of government agencies and their use of the OIA. I will argue that despite the laudable ambitions of the Ombudsman, there is very limited scope for a results-based model, particularly in the form proposed, to be effective in addressing the extensive problems facing the OIA. I contend that the outcomes sought by the Ombudsman's model either do not go far enough or are unachievable by a performance-based model which is largely incompatible with the operation of the Act and as such unable to fix deep-set problems or alter public sector

⁶ Baruch Fischhoff and Cherie Chauvin *Intelligence Analysis: Behavioural and Social Scientific Foundations* (The National Academies Press, Washington, 2011) at vii.

⁷ Fischhoff, *Intelligence Analysis: Behavioural and Social Scientific Foundations*, above n 6 at 249.

⁸ Email from Antonia Di Maio (Principal Advisor at the Office of the Ombudsman) to Alora Johnson regarding the Ombudman's new strategy for the OIA (August 4, 2016).

⁹ "League tables to reveal OIA scrooges" (19 March 2016) Radio New Zealand <www.radionz.co.nz>.

¹⁰ Peter Boshier "The role of Ombudsman in monitoring integrity systems: a report of the first six months" (Speech by Chief Ombudsman Peter Boshier to Transparency International Leader's Integrity Forum, Auckland, 13 July 2016).

practices in any meaningful manner. In reality a growing divide exists between the obligations contained in the OIA and their implementation within government agencies, a chasm which neither a League Table nor any more general results-based model can successfully bridge.

I will address these issues in four substantive parts. Part II will detail the current situation of official information in New Zealand in light of current developments. This section will focus on illustrating the extent and scope of the problems facing the contemporary operation of the OIA in New Zealand and in particular its use by government agencies. In light of this context I will engage in an analysis of results-based accountability mechanisms in Part III. Using a foundational theoretical framework of performance-based efficacy, I will critique the Ombudsman's proposal and seek to draw out both the potential benefits and drawbacks of this specific model, with reference to the present-day legal, political and social context the OIA operates within. Part IV will tie together this analysis and argue that even if properly implemented, neither the Ombudsman's proposal nor any performance-based regime is sufficient to meaningfully address the current state of official information in New Zealand. In fact such a regime could conceivably erode both the functionality of the Act and the public's perception of state-sector accountability to an even greater extent. As such I conclude that from both a theoretical and practical perspective, this proposal will do little to aid in the redemption of the OIA from a tool of political subversion back to that of good governance.

II A growing accountability gap: The current state of official information in New Zealand

To understand the nature of the issues plaguing the Act it is necessary to first extricate the specific area from which these complications derive. Stephen Price, through his extensive research on the operation of official information laws in New Zealand, concluded that we have not one, but two Official Information Acts.¹¹ The first OIA is the set of rules which applies to the bulk of OIA request traffic: straightforward and uncontroversial applications for information. These requests are processed quickly, comprehensively and generally in

¹¹ Steven Price "The Official Information Act: Does it Work?" (2006) NZLJ 276, see also Steven Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?* (New Zealand Centre for Public Law, Victoria University of Wellington, Occasional Paper 17, November 2005).

full compliance with the provisions and purposes of the Act. In this regard the OIA operates as intended.¹² The second OIA, on the other hand, is the set of rules that apply to difficult or politically sensitive requests – often from journalists or opposition MPs. The procedures utilised by agencies when dealing with this particular category of requests is the primary source of concern and the main area in which the OIA fails to function properly. As such the operation of this ‘second OIA’ will be the principal focus of this paper.

Since its inception the OIA has encountered resistance in its application to requests for ‘sensitive’ information and has been criticised as such. The Law Commission reviewed the Act in both 1997 and 2012, identifying a range of problems but in particular a growing tension between requesters and government officials where ‘sensitive’ requests for information were processed, a tension which was having adverse impacts on perceptions of the Act.¹³ Scholars have also expressed concerns in relation to the manner in which the Act is used when controversial information is involved. In this sense there is significant continuity in the contemporary problems facing the OIA and their origin in this particular category of information. Yet the Ombudsman’s sudden desire to use agency performance as a means of increasing compliance with the Act represents a notably more proactive stance than their previous more reactive and review-based approach. The cause of this change is the increasing exposure of a deepening accountability lacuna existing within the public sector’s use of official information and the exacerbation of this tension between requesters and officials. Accusations (and evidence) has arisen of illegality, political subversion and even outright corruption and it is these developments which set the context for the Ombudsman’s recent shift in policy.

¹² Dame Beverley Wakem, *‘Not a Game of Hide and Seek’ Report on an investigation into the Practices adopted by central government agencies for the purpose of compliance with the Official Information Act 1982* (December 2015) at 3. Here Wakem notes her overall satisfaction as to the operation of the OIA within government agencies, stating that she “found that most of the time, agencies were compliant in the way they operated the OIA on a daily basis.”

¹³ Law Commission *Review of the Official Information Act 1982* (NZLC R40, Wellington, 1997) at 1. In this report the Commission identified a number of problems with the Act and its operation. The major of which were: the burden caused by large and broadly defined requests, tardiness in responding to requests, resistance by agencies outside the core state sector, and the absence of a coordinated approach to supervision, compliance, policy advice and education regarding the Act and other information issues.

A *Dirty Politics, OIA complaints and the political subversion of the Act*

“Sometimes we wait the 20 days because, in the end, Government might take the view that’s in our best interest to do that.”¹⁴

In 2014 Nicky Hager’s *Dirty Politics* was released revealing a plethora of accusations and evidence of corruption, abuses of power and serious violations of public sector neutrality within the government, many of which were related to the OIA.¹⁵ In particular, Hager presented evidence that the Security Intelligence Service (SIS) had purposefully released misleading information to the media in a response to an OIA request in 2011 about the then-leader of the opposition, Phil Goff, to damage his credibility.¹⁶ It was also claimed that staff in the Prime Minister’s Office co-ordinated this release of information with preferential disclosure of other information to *Whale Oil* blogger Cameron Slater to use favourably against the Government.¹⁷ These accusations were later subject to an inquiry by the Inspector-General of Intelligence and Security, who concurred that the SIS had indeed disclosed “incomplete”, “inaccurate”, and “misleading” information under the OIA in order to criticise a government minister, while also improperly denying other media information requests to give Slater preferential treatment.¹⁸

Dirty Politics, however, is merely the tip of the iceberg. Similar allegations have arisen across all sectors of public life, from the police who are facing allegations of covering up deceptive statistics on instructions to “let the OIA request just sit,”¹⁹ to a former high-

¹⁴ A statement made in late 2014 by John Key. See Craig McCulloch “PM admits Government uses delaying tactics” Radio New Zealand (online ed, New Zealand, 16 October 2014).

¹⁵ See generally Hager, *Dirty Politics*, above n 1.

¹⁶ Adam Bennett “Dirty Politics: John Key 'in denial' over SIS report” *The New Zealand Herald* (online ed, Auckland, 26 November 2014).

¹⁷ Slater has also been accused of receiving preferential treatment under the OIA from former Justice Minister Judith Collins -- now Minister of Corrections. See David Fisher “The OIA arms race” (May 2014) *The Speaker* <www.thepublicaddress.net>.

¹⁸ J Garden “An OIA a Day Keeps Dictators Away: Freedom of Information and the State’s Accountability” (2016) *The Equal Justice Project* <www.equaljusticeproject.co.nz>.

¹⁹ An internal police document has emerged that appears to show senior officers withholding embarrassing details about the “ghost crimes” controversy in which 700 burglaries vanished from official crime statistics. The report also contained allegations, in part about how crime statistics had been altered in one area of the Counties Manukau police district. “Burglary codes were changed to theft or any other minor offence to allow the area to achieve the best crime reduction stats for the district,” the letter read. See Bevan Hurley “Calls for 'ghost crimes' inquiry after police note revealed” *New Zealand Herald* (online ed, Auckland, 28

ranking Customs lawyer who claimed his organisation ignored OIA requests and buried information and could embarrass the Government over their dealings with Kim Dotcom on Ministerial instructions that it was politically preferable to “fight” it through the courts or Ombudsman than release the information.²⁰ Auckland District Health Board’s national organ donation service has been put on notice by the Ombudsman after it was caught deleting public records,²¹ and more recently the Ombudsman had to intervene after the government improperly withheld documents relating to their transactions and negotiations with Hamood Al Khalaf after allegations of government bribery over the ‘Saudi Sheep Deal’.²² In late 2015 the High Court also found that Trade Minister Tim Groser had unlawfully rejected OIA requests about the Trans-Pacific Partnership (TPP) negotiations after he was accused of flouting his legal obligations under the Act because they were “politically inconvenient.”²³

These examples reflect considerable and not-infrequent disregard for the OIA across many aspects of public life, a tendency to withhold politically sensitive or embarrassing information even in violation of legal obligations and the manipulation of the OIA to achieve political ends.²⁴ Not surprisingly this has bred what the Ombudsman have labelled as “a spiralling cycle of distrust and suspicion” from requesters that the Act is not

September 2014). See as well Eugene Bingham “Two-year search for 'ghost crimes' truth” *New Zealand Herald* (online ed, Auckland, 5 October 2014).

²⁰ The reason for this instruction was supposedly because the Ombudsman would “take years” to deal with any complaints by which time the information would not be of as much public interest. See Fisher “The OIA arms race,” above n 17.

²¹ M Johnson “DHB caught out deleting public records” *New Zealand Herald* (online ed, Auckland, 21 July 2014).

²² Opposition MPs speaking in Parliament have labeled the transactions with Khalaf as a “multimillion-dollar bribe” to facilitate a free trade agreement with Gulf States, and have called for Foreign Affairs Minister Murray McCully to be stood down from Cabinet over it. See Aimee Gulliver “Govt blocks Saudi sheep papers again” *Stuff* (16 June 2015) <www.stuff.co.nz>

²³ *Kelsey v The Minister of Trade* [2015] NZHC 2497. For Kelsey’s comments in regard to the conduct of Groser see Brent Edwards “TPP requests: Groser acted unlawfully” (13 October 2015) Radio New Zealand <www.radionz.co.nz>.

²⁴ In 1993, a Minister admitted publicly that “political gamesmanship” determines what information is released and when. “We’re in the business, after all, of getting ourselves re-elected, and would be pretty foolhardy not to be aware of potential hazards being released”: Stephen Harris “State Sector Corporatization Escapes Net of the Official Information Act” (1993) 40 *National Business Review* at 145 quoting then-Customs Minister Murray McCully.

complied with when a request for sensitive information is submitted.²⁵ Officials on the other hand see the release of information as both an administrative burden and source of political impairment. This has put enormous strain on the relationship between requesters and officials, a tension which poses a significant obstacle to any proposal, such as the Ombudsman's, which seeks to address agency non-compliance. The OIA cannot be effective if the people who use it and agencies who respond to it have no trust in the legitimacy and functionality of the Act.²⁶ Thus whether or not technical compliance with the letter of the law is increased by the Ombudsman's proposal, the key measure of success in any remedial-model will be its ability to pacify this relationship. However, given the grievances each party have towards one another, and to the Act itself, this is no simple task.

B Requesters views of the OIA

"It is ridiculously easy to circumvent the Act and to hide information from requesters and Ombudsmen alike... Of course, all potentially embarrassing information is routinely refused and time delays are simply de rigueur."²⁷

The distrust requesters have of the Act reflect a wide-range of experiences with varying agencies and in relation to differing types of information requests, nevertheless there are significant commonalities in the disparagements requesters have identified.²⁸ First, and perhaps the most recurring problem is what requesters consider to be a blatant disregard for the 20 day statutory period within which an OIA request must be responded to.²⁹ Requesters note that if the agency does not ignore or 'lose' the request altogether, they will often wait the entire 20 day period just to refuse it or restart the period numerous times after either seeking clarification on the request or transferring it to another agency.³⁰

²⁵ Wakem, *'Not a Game of Hide and Seek'*, above n 12, at 13.

²⁶ Wakem, *'Not a Game of Hide and Seek'*, above n 12, at 13

²⁷ As stated by former MP Michael Laws recently: Michael Laws "Ghosts more believable than 'official truths'" Sunday Star Times (online ed, Auckland, 29 February 2004).

²⁸ Nicola White *Free and Frank: Making the Official information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007) at 134-139 and 277.

²⁹ Official Information Act 1982, s 15.

³⁰ This is to such an extent that in December 2014, the Media Freedom Committee asked the Ombudsman to review the Government's "deliberate delaying tactics" which they considered was causing the Act to be used "as a mechanism to delay the release of information rather than facilitate it." See Benedict Collins

When requests do get noticed agencies have taken an increasingly restrictive approach to interpreting them – this includes treating oral requests as not invoking the Act, applying blanket withholding policies on certain types of information (such as legal advice) and sometimes offering a ‘trade-off’ for the immediate provision of limited information to avoid a more drawn-out process where the implied ‘threat’ is no disclosure.³¹ Where information is withheld, it is often perceived to be done so for improper reasons. The statutory exceptions to the Act’s presumption that information should be released are often misused, misapplied or used inconsistently depending on the information which is being requested.³² Furthermore, where a potential ground for withholding the information must be weighed against the public interest in release, this test is weighted excessively and improperly in favor of withholding the information.³³ Additionally, in some circumstances information is ‘not available’ only because it has been doctored or even destroyed.³⁴

Finally requesters note that when agencies charge for OIA requests, this can be done in an ad hoc fashion with levies which are often unreasonable or difficult to understand and appear to be a strategy by agencies to “charge requesters out the market.”³⁵ Indeed, even when the Ombudsman becomes involved agencies will ‘drag the chain’ during

“Media body takes aim at Govt OIA delay tactics” (17 December 2014) Radio New Zealand <www.radionz.co.nz>.

³¹ These come along the lines of: "you will have to put that request under the OIA, which will take time to process – or else I could just give you this particular information right now." As addressed in Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?*, above n 11 at 11.

³² As set out in the Official Information Act 1982, ss 6, 7 and 9.

³³ Official Information Act 1982, s 9(1) – “Where this section applies, good reason for withholding official information exists, for the purpose of section 5, 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.*” [emphasis added].

³⁴ See E J Poot "The Impact of the Official Information Act 1982 on the Policy Development Process" (MPP Research Paper, Victoria University of Wellington, 1997) at 40. In 1996, researcher Evan Voyce also talked off the record with officials and a senior public official told him of Ministers having Cabinet papers and even Cabinet minutes withdrawn, shredded or rewritten. Several other officials spoke of Ministers asking them to withdraw or shred advice or draft policy papers. Evan Voyce "The Provision of Free and Frank Advice to Government" (MPP Research Paper, Victoria University of Wellington, 1996) 30–33.

³⁵ White, *Free and Frank*, above n 28 at 278. Stephen Price also noted that it was “disturbing to see how often officials and ministers withheld information in apparent contravention of the OIA.” See Price “The Official Information Act: Does it Work?” above n 11 at 29.

investigations of complaints and do not respond to recommendations made by the Ombudsman in a timely manner.³⁶

Together these factors have influenced a perception by requesters that the government utilises a myriad of tactics to hinder or prevent the release of information which might be politically damaging, inconvenient or ill-timed. Indeed one requester commented that the request process was “some form of game in which the objective is to disclose as little as possible, irrespective of the merits of a request.”³⁷ This perspective was reinforced by Rick Snell, an Australian academic undertaking comparative studies regarding freedom of information processes in multiple jurisdictions.³⁸ Snell found that requests for politically sensitive information in New Zealand attracted the most attention from government information managers, thereby creating less chance that the information would be released, implicitly recognising the existence of information management within political affairs.³⁹

C Official’s views of the OIA

This concern and distrust requesters have about the government’s use of the OIA is not unreciprocated and officials and Ministers are similarly dissatisfied with the operation of the OIA – as Sir Geoffrey Palmer stated, the OIA “is about as popular with Ministers as pork in a synagogue.”⁴⁰ Their concerns are primarily in regard to how requesters use the Act, their motivations for demanding information and the Act’s often detrimental impact on internal government dynamics.⁴¹ Firstly, requests can often appear to be “fishing expeditions,”⁴² – that is where *all* information on a topic is requested and such requests

³⁶ White, *Free and Frank*, above n 28, at 74-75.

³⁷ Edward Adams and Andrew Ecclestone *Implementation of the Freedom of Information Act 2000: Study visit to Australia and New Zealand* (Department of Constitutional Affairs, 2003) at 14.

³⁸ Rick Snell of the University of Tasmania, has a long background in freedom of information law, and was the editor of the Freedom of Information Review for many years.

³⁹ Rick Snell “Using Comparative Studies to Improve Freedom of Information Analysis. Insights from Australia, Canada and New Zealand” (Conference Paper, 6th National and 2nd International Congress on the Right to Information, Mexico, 8–11 November 2005) at 33.

⁴⁰ Ian Davison “Self-interest drives the OIA” *New Zealand Herald* (online ed, Auckland, 6 February 2013).

⁴¹ White, *Free and Frank*, above n 28, at 74-75.

⁴² Rt Hon Sir Geoffrey Palmer, President of the Law Commission “A hard look at the New Zealand experience with the Official Information Act after 25 years” (Address to International Conference of Information Commissioners, Wellington, 27 November 2007) at 17.

are incredibly onerous to process.⁴³ The burden this imposes on agencies is frustrating and deepened by requesters who are vexatious or abusive and in some cases appear to be motivated primarily by a desire to harass the agency, particularly when the requester might have been dissatisfied with a previous response from the same organisation.⁴⁴

Officials are also concerned that the motivations behind a request are not innocent, but rather to seek a “gotcha moment” which will embarrass the government or to find information they can use to inconvenience an agency the requester dislikes.⁴⁵ As such, sometimes low-level, unimportant and flawed papers or out-dated and no longer accurate reports are used to cause headlines and create public debate the imprimatur of an authoritative agency.⁴⁶

In conjunction with these frustrations with requesters, the OIA can also pose a threat to the relationships of government officials with Ministers and other superiors.⁴⁷ The OIA causes responsibility over release decisions to be placed on officials, the effect of which is a growing feeling of resentment amongst Ministers and senior managers that they are someone else’s ‘fall guys’ – a feeling made stronger with every hard case and embarrassing disclosure.⁴⁸ Some officials have admitted that an honest response to a request could be detrimental to their relationship with superiors, the incentive therefore to limit the scope of requests or withhold the information to preserve these relationships is strong. A senior public sector official noted that “... the Minister prefers to withhold information except where unavoidable. Information is seen as creating problems not opportunities.”⁴⁹ This is especially so when the adverse political consequences of

⁴³ Such requests in some circumstances will take months to work through. There have been specific cases of requests engaging staff members full time for three weeks to respond to, and in other areas 350 hours additional to their ordinary work was required to service a request. See Law Commission *The Public’s Right to Know: Review of the Official Information Legislation* (NZLC R125, 2012) at 152.

⁴⁴ Paul Bellamy *Access to Official Information* (Parliamentary Library, Background Paper No. 27, May 2003) at 102.

⁴⁵ Bellamy, *Access to Official Information*, above n 44, at 103.

⁴⁶ White, *Free and Frank*, above n 28, at 77.

⁴⁷ Ecclestone, *Implementation of the Freedom of Information Act 2000: Study visit to Australia and New Zealand*, above n 37, at 5.

⁴⁸ Law Commission *The Public’s Right to Know*, above n 43, at 71.

⁴⁹ E J Poot “The Impact of the Official Information Act 1982 on the Policy Development Process” (MPP

disclosure are much stronger than any slow and often lenient repercussions from the Ombudsman if they find the withholding of information to be unjustifiable.⁵⁰

Increasingly therefore, the OIA has placed upon the public service a political imperative which it has not previously had to shoulder.⁵¹ Realistically public servants must consider the effect on Ministers and the agency itself when processing a request, leading to decisions inevitably and erroneously being made of a political nature.⁵² One journalist commented that the entire attitude of the public service towards the OIA could be distilled into two conflicting ideas: the desire to not embarrass Ministers or department and the need to uphold the law. The compromise of the two tending to be the release of information, but reluctantly and in a heavily restricted form.⁵³

There clearly is a deep-set tension between requesters and receivers which not only leaves both parties discontented with the Act's performance but also undermines its broader function as the facilitator of open government. This principle is a keystone of modern democracy and relies on the continuation of government transparency. When the Act fostering this transparency is undermined by improper and illegal use within the government, the consequences extend right to the foundation of New Zealand's democratic processes and international reviews of official information in New Zealand have revealed exactly this.⁵⁴

D Corruption perceptions and a government-wide lack of transparency

Transparency International's 2016 Corruption Perception Index (CPI) report saw New Zealand fall two spots in its international reputation for low levels of corruption.⁵⁵ The

Research Paper, Victoria University of Wellington, 1997) at 40.

⁵⁰ Wakem, *Not a game of hide and seek*, above n 12, 45.

⁵¹ Fisher, "The OIA arms race," above n 17.

⁵² Fisher, "The OIA arms race," above n 17; Law Commission *The Public's Right to Know*, above n 43, at 71.

⁵³ Fisher, "The OIA arms race," above n 17.

⁵⁴ White, *Free and Frank*, above n 28, at 11.

⁵⁵ B Edwards "Political roundup: The Government's problem with transparency" *New Zealand Herald* (online ed, 22 February 2016).

report pointed to the secrecy around the TPP agreement, Saudi Sheep Deal and Skycity Convention Centre debacle as the reason for New Zealand's slide in transparency rankings along with the "stonewalling of requests through the OIA" which had "fed an increased perception of corruption" according to the CPI's chair Suzanne Snively.⁵⁶ The report also accused the New Zealand government of "astonishing" complacency in relation to accusations of misconduct under the OIA, with Snively questioned why there is such an "adversarial defensiveness" from officials receiving OIA requests.⁵⁷

In conjunction with the fall in New Zealand's international transparency levels, another challenge to the Government's reputation for openness has come with the publication of a scathing independent report on the government's progress towards achieving its obligations as a member of the Open Government Partnership.⁵⁸ Official information expert, Stephen Price, was engaged by the Open Government Partnership's IRM (Independent Reporting Mechanism) to study the government's action plan, interview officials, interested observers, and present a report evaluating the government's performance and commitment to open governance.⁵⁹ The report published in February 2016 was not flattering and the government was criticised for failing to achieve its transparency goals across differing facets of public life.⁶⁰

The report makes a range of recommendations to improve the government's use of official information and notes an extensive range of problems in the way the public sector deals with official information including the form in which information is released,⁶¹ lack of

⁵⁶ Hamish Rutherford "NZ's anti-corruption record slipping" (27 January, 2016) Stuff <www.stuff.co.nz>.

⁵⁷ Rutherford "NZ's anti-corruption record slipping", above n 56.

⁵⁸ The Open Government Partnership, formally launched on September 20 2011, is a multilateral initiative that aims to secure concrete commitments from governments to promote transparency, fight corruption, and strengthen governance. To become a member of OGP, participating countries must endorse a high-level Open Government Declaration, deliver a country action plan developed with public consultation, and commit to independent reporting on their progress going forward. Currently there are 70 participating countries. See "Open Government Partnership" <www.opengovpartnership.org>

⁵⁹ Price *Independent Reporting Mechanism (IRM): New Zealand Progress Report 2014–2015*, above n 3.

⁶⁰ Edwards, "Political roundup: The Government's problem with transparency", above n 55.

⁶¹ Price found that official responses were almost invariably provided in PDF form, even when the requested information contained data sets and the requester explicitly requested the information be provided in Excel format. PDFs are not machine-readable, cannot be searched, and are difficult to reuse without time-consuming and costly data entry. In almost all cases the original data could have been provided in usable form, therefore appearing as an attempt to hinder requesters from easily using the information. Price *Independent Reporting Mechanism (IRM): New Zealand Progress Report 2014–2015*, above n 3, at 29.

coverage of the OIA to parliamentary bodies such as the Counsel Office, Parliamentary Service and Office of the Clerk,⁶² the OIA being incorrectly applied in relation to the TPP,⁶³ responses to OIA requests often being overly narrow or of a poor quality, a lack of transparency in regard to government finances and more generally a culture of fear which prevents groups dependent on government funding from speaking out against the government or releasing information it might find uncongenial.⁶⁴ Thus Price identifies an under-achievement of transparency not just arising from the OIA but manifesting in different ways across the entire government.

Therefore the current context the OIA operates within is undoubtedly complex, the problems which have come to light are manifold, existing across broad facets of public life and as such pose an enormous obstacle to any proposal, such as the Ombudsman's, which attempts to address these problems. Furthermore, much of the conduct suggests a purposeful and unapologetic submersion of the OIA beneath political interests and this non-compliance appears to be sustained and justified by a culture of apathy towards the Act which runs deep in the public sector ethos.⁶⁵ While these issues certainly derive from the 'problem-category' of controversial or sensitive information, it is apparent they have clouded the operation of the Act beyond this and indeed reflect destructively on the underlying principle of open government.⁶⁶ This means that the problems facing the Act go right to the primary purposes of the OIA and as such reflect on its fundamental constitutional role. It is for this reason the OIA demands immediate attention, not merely to promote accountability where the government does not adhere to its legal obligations, but because the OIA has played a fundamental role in moulding an (imperfect) but

⁶² Price *Independent Reporting Mechanism (IRM): New Zealand Progress Report 2014–2015*, above n 3, at 34.

⁶³ See as well the decision in *Kelsey v The Minister of Trade* [2015] NZHC 2497

⁶⁴ Price *Independent Reporting Mechanism (IRM): New Zealand Progress Report 2014–2015*, above n 3 at 27; The example Price points to in his report was a survey conducted by the New Zealand Association of Scientists in November 2014 among its members and Crown Research Institute scientists which revealed that almost 40 per cent of respondents felt they had been prevented from making a public comment or releasing information about a controversial issue by management policy or by fear of losing funding from the government. See *Survey on the Proposed Code of Public Engagement* (New Zealand Association of Scientists, November 2014).

⁶⁵ Snell "Using Comparative Studies to Improve Freedom of Information Analysis. Insights from Australia, Canada and New Zealand", above n 39, at 33.

⁶⁶ Price, *The Official Information Act 1982: A Window on Government or Curtains Drawn?*, above n 11.

remarkably more open approach to governance than existed prior to the Act. It is this wider constitutional role held by the OIA and its achievements thus far which are crucial to understanding the extent to the problems facing the Act and therefore the challenges lying before the Ombudsman and their proposal.

E Changing the nature of government through the OIA

As a reflection of New Zealand's colonial heritage, before the OIA there was a perception that official information belonged to “the Queen and her advisers” and under the Official Secrets Act 1951, and its predecessors, official information remained secret unless a decision was made to release it.⁶⁷ The movement to replace this presumption with ‘open government’ had its roots within the judiciary and its inherent jurisdiction to uphold the rule of law within the Executive.⁶⁸ Judicial review necessitates that the ‘secret’ information related to the action or omission under review is released to the court.⁶⁹ Through this process the judiciary began to wrestle away the government’s control of its records by taking an increasingly restrictive interpretation of the circumstances in which information could justifiably be withheld on public interest grounds.⁷⁰ These judicial developments were accompanied by a Royal Commission of Inquiry on State Services which declared that “government administration is the public’s business” and a direction from the State Services Commission that information should only be withheld from the public when there is a “good reason” for it.⁷¹ These developments made the suppression of information from the public increasingly difficult to justify and in 1977 the first

⁶⁷ Law Commission *Review of the Official Information Act 1982*, above n 13, at 144 and 147. This was of course subject to several exceptions – however, the underlying presumption was that of secrecy.

⁶⁸ White, *Free and Frank*, above n 28, at 12.

⁶⁹ White, *Free and Frank*, above n 28, at 12.

⁷⁰ The judiciary also achieved this by handing down several landmark decisions demanding more openness in the exercise of political power. *Corbett v Social Security Commission* [1962] NZLR 878 for example related to crown privilege (now public interest immunity). In this case the Court of Appeal stated that it was for the courts and to the Executive to decide whether a claim by the Crown for immunity from the release of information which was relevant to litigation should be upheld. The reasons the court gave were that because of the commercial operations of the state in the field of enterprises a decision made by the state in this regard could result in undue curtailment of people’s rights. Secondly that withholding information to ensure candor communication within government departments could be abused with far reaching consequences.

⁷¹ *The State Services in New Zealand: Report of the Royal Commission of Inquiry* (1962) at Ch 5 para 37.

Freedom of Information Bill was introduced to the House.⁷² Although it lapsed after the first reading, it exemplified how politicised the issue had become and consequently that a departure from the previous policy of secrecy was inescapable.⁷³

(b) Founding the Official Information Act

In May 1978 the seven member ‘Danks’ Committee on Official Information was established to review the regime under the 1951 Official Secrets Act.⁷⁴ Its primary recommendation in its subsequent report was to replace the Official Secrets Act and its supposition of secrecy with a presumption that all government information is available in the absence of a good reason for withholding it.⁷⁵ A further report followed containing a draft Official Information Bill based on the comparable Australian legislation which, without alteration, the National government successfully introduced to the House.⁷⁶ The OIA became law in December 1982 coming into force 1 July 1983.⁷⁷

The purposes of the OIA are as follows:⁷⁸

- a) to increase progressively the availability of official information to the people of New Zealand in order;
 - (ii) to enable their more effective participation in the making and administration of laws and policies; and
 - (iii) to promote the accountability of Ministers of the Crown and officials,—

⁷² White, *Free and Frank*, above n 28, at 12.

⁷³ New Zealand Legal Information Institute “Freedom of Information Bill 1977” (June 2010) New Zealand Historical Bills <www.nzlii.org>

⁷⁴ Ian Eagles, Micheal Taggart and Grant Liddell *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992) at 1.

⁷⁵ Committee on Official Information *Towards Open Government: General Report of the Committee on Official Information*. (August 1981).

⁷⁶ Being the Freedom of Information Act 1982.

⁷⁷ Eagles, *Freedom of Information in New Zealand*, above n 74, at 2.

⁷⁸ Official Information Act, s 4.

and thereby to enhance respect for the law and to promote the good government of New Zealand:

- b) to provide for proper access by each person to official information relating to that person:
- c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

The OIA has forced the principle of open government onto the ethos of public administration, with varying levels of success, firstly by taking a broad definition of ‘information’ and what data will be subject to the Act’s presumption of availability. The OIA extends to reports, spending data, statistics and also less obvious sources of information such as that contained in the head of a public servant⁷⁹ or informal means of communication such as text messages or a “folded note slipped from one palm to another.”⁸⁰

Secondly, the grounds for refusing any requests for this broad-based range of information are relatively restrictive.⁸¹ The conclusive grounds for withholding information set out in section 6 establish high thresholds including where information would prejudice New Zealand’s security or defence; adversely impact the international relations of the New Zealand Government; prejudice the maintenance of law; endanger the safety of any person; or seriously damaging the economy.⁸² Similarly although section 9 contains the less conclusive grounds for withholding information such as to protect privacy, trade secrets or legal professional privilege, it is still relatively difficult to overturn the

⁷⁹ Committee on Official Information *Towards open Government*, above n 75, at 15.

⁸⁰ Edwards “Political roundup: The Government's problem with transparency”, above n 55. The obvious exception to this is that the OIA does not extend to Parliament and all the related bodies such as the parliamentary service.

⁸¹ Official Information Act 1982, s 18.

⁸² Official Information Act 1982, s 6. The key distinction is between the conclusive reasons for withholding (set out in Section 6) and the other reasons for withholding, which are set out in Section 9. These are different legal standards, reflecting perhaps, the priority or sensitivity of different classes of information. Privacy falls into the latter category (Section 9(2)(a)). For privacy to be a good reason for information to be withheld, the privacy interest must outweigh any public interest that might exist in releasing that information. The reasons in Section 6 are good enough basis in themselves to justify withholding. There is no balancing test required.

presumption of disclosure as these grounds are only justifiable where they outweigh the public interest in making the information available.⁸³

(b) The Act's constitutional role

Thus despite Prime Minister Muldoon's scepticism that this "9 day wonder"⁸⁴ would alter the operation of government, the then Minister of Justice, Jim McLay, heralded the OIA as "one of the most significant constitutional innovations" in decades.⁸⁵ The latter is an apt description. The Act's lofty goal "to enhance respect for the law and to promote the good governance of New Zealand" has been successful to a notable extent.⁸⁶ As stated, many OIA requests relate to 'non-sensitive' information and are processed without concern and even when politically-charged information is in question the Act has proven its ability to expose objectionable government behaviour.⁸⁷ While "earth-shaking OIA revelations are rare" the Act has been used to successfully reveal politically sensitive information on numerous occasions.⁸⁸ Very recently, for example, the Security Intelligence Service released emails to the *Weekend Herald* showing agents referring to Kim Dotcom as a "fatty poo-opo" and joking that "he could be defeated by a small set of stairs".⁸⁹ Similarly, GPS location data released recently by the New Zealand Transport

⁸³ Official Information Act 1982, s 9. Many of these reasons revolve around the concept of "likely" prejudice. The Court of Appeal has held that this requires "a serious or real and substantial risk to a protected interest, a risk that might well eventuate". See *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 at 391, Cooke P.

⁸⁴ B Gilling *The Ombudsman in New Zealand* (Dunmore Press, Wellington, 1998) at 91.

⁸⁵ (23 July 1981) 439 NZPD 1908.

⁸⁶ Official Information Act 1982, s 4.

⁸⁷ Law Commission *Review of the Official Information Act 1982*, above n 13, at 3.

⁸⁸ Price, "The Official Information Act: Does it Work?", above n 11 at 29. Other noteworthy examples include: an anti-abortion group found via the OIA that the top five certifying consultants for abortions each received consultancy fees of more than \$100,000 in the past year; an OIA request revealed Treasury's reasons for opposing the government's painted apple moth airborne spraying programme: it has a 20-40 per cent chance of failure, it is likely to exceed its \$130 million budget, and the estimated economic benefit if it succeeds is only \$58 million and a newspaper's OIA request about the Defence Force's Orion aircraft revealed that they suffer equipment failures every second flight.

⁸⁹ David Fisher "SIS spies to Kim Dotcom: We're sorry for calling you fatty" *New Zealand Herald* (online ed, New Zealand, 30 May 2015).

Agency showed that senior managers in the department, which spends \$32m per year on road safety advertising, regularly travelled at up to 145km/h while on official business.⁹⁰

The OIA therefore has played a pivotal role in revolutionising the manner in which governments view and approach official information.⁹¹ The Act was established with laudable ambitions and in many cases it has met them with the provisions and underlying purposes of the Act proving their ability to in expose misconduct in many circumstances. Its fundamental purpose to “promote the good government of New Zealand” has become crucial to maintaining democratic practices and perceptions.⁹² As such, non-compliance with the OIA must be viewed not merely as a breach of the rule of law or as the government skirting its legal obligations, but as something which strikes right at the heart of good government and New Zealand democracy.

In considering how this discussion reflects on the Ombudsman’s proposal, this is not to say that addressing the problems with the OIA is an unachievable task, but rather to exemplify the depth and scope of the current concerns which must be targeted if the OIA is to operate as intended and fulfil its purposes. Any remedial regime must look beyond improving the mere mechanics of the request process and consider how the fundamental purposes of the Act and the wider principle of good, open government can be stimulated through the operation of the OIA. Clearly this is not something achievable by a single body or institution alone, but it must be questioned if the Ombudsman are the appropriate body to spark the type of discourse and subsequent action over these issues required to cause meaningful change.

F OIA Watchdogs: the role of the Office of the Ombudsman

⁹⁰ *New Zealand Transport Agency Annual Report for the Year Ended 30 June 2014* (October 2014) at 180; David Fisher “Revealed: Road safety staff broke speed limits thousands of times” *New Zealand Herald* (online ed, New Zealand, 12 August 2015).

⁹¹ The OIA has also influenced legislative developments like the 1987 Local Government Official Information and Meetings Act and the Public Finance Act 1989 and Fiscal Responsibility Act 1994 which have further expanded the scope of open government – the latter two ensuring that information about the economy and public administration is available to the public without recourse to the OIA.

⁹² Official Information Act 1982, s 4.

As independent Officers of Parliament the Ombudsman can investigate and review any decision to release or withhold information requested under the OIA and as such are often considered the OIA's 'watchdog.'⁹³ Yet the Ombudsman's previous strategies in identifying and dealing with OIA non-compliance has certainly not represented a decisive or uncompromising commitment to enforcing the Act – and not without opportunity. On 16 December 2014 the previous Chief Ombudsman Dame Beverly Wakem publically announced her Office's concern that negative perceptions between requesters and officials was contributing to a "spiralling cycle of distrust and suspicion" which was threatening to erode the integrity of New Zealand's democratic institutions.⁹⁴ In response the Office of the Ombudsman undertook a major formal investigation into the administering of the OIA within government agencies with the intention of identifying areas of vulnerability and making appropriate recommendations to address those areas.⁹⁵

1 An investigation into the practices of government agencies

The final report, '*Not a game of hide and seek*' was published at the end of 2015 and the report is focussed around five key areas of weakness which Wakem identified in the proper application of the Act:⁹⁶

- 1 Leadership and Culture;
- 2 Organisation structure, staffing and capability;
- 3 Internal policies, procedures and systems;
- 4 current practices; and
- 5 performance monitoring and learning.

Within these areas, the report identifies a plethora of fundamental problems which plague the OIA from the existence of bad practices within agencies to undesirable use of the Act by requesters. Her report presents a picture of under-trained, under-resourced staff who do not have a good understanding of the Act and are not pushed to use it proactively

⁹³ Law Commission *The Public's Right to Know*, above n 43.

⁹⁴ Wakem, '*Not a Game of Hide and Seek*', above n 12, at 13.

⁹⁵ Wakem, '*Not a Game of Hide and Seek*', above n 12, at 21-22.

⁹⁶ Wakem, '*Not a Game of Hide and Seek*', above n 12.

because of inconsistent and unclear internal cultures and direction from Ministers and Chief Executives. The ability of officials to deal properly with requests is also detrimentally effected by poor internal procedures, processing structures and record keeping which have caused an inconsistent and somewhat reluctant approach to dealing with requests under the OIA.⁹⁷ Despite this comprehensive identification of issues in the report, Wakem nevertheless comes to the surprising conclusion that in general the principles and purposes of the OIA remained sound, are working as intended and that she is “satisfied” with the operation of the OIA.⁹⁸

This is a difficult conclusion to swallow given the issues identified not only in Wakem’s report but in the varying other reviews of official information from scholars and international bodies like the CPI and Open Government IRM alike. As such it is disappointing the Ombudsman did not utilise this opportunity to condemn the unsatisfactory performance of the public sector and use the report as a platform for promoting meaningful discourse and to develop the necessary ‘hard-nosed’ strategy to remedy these issues. Furthermore, any acknowledgement of fault within in the public sector was undermined somewhat by Wakem shifting fault towards the general public, bloggers and media. A subsequent *Dominion Post* article was scathing of this approach stating that “her recent remarks make her look less like a champion of freedom than a friend of the powerful”⁹⁹ and that it was “extraordinary” to hear Wakem scolding journalists as "rottweilers on heat" and warning them not to annoy "innately conservative" officials who might then become "gun-shy".¹⁰⁰ “These statements are what you would expect from a bad-tempered bureaucrat, not an Ombudsman.”¹⁰¹ *The Herald* similarly

⁹⁷ Wakem, ‘*Not a Game of Hide and Seek*’, above n 12, at 2-12 -- see in general the Executive Summary.

⁹⁸ Wakem, ‘*Not a Game of Hide and Seek*’, above n 12, at 3.

⁹⁹ Editorial “Chief Ombudsman shows how not to be an information watchdog” *Dominion Post* (online ed, Wellington, 7 December, 2015).

¹⁰⁰ Vernon Small “Ombudsman barking up the wrong tree blaming some media as 'rottweilers'” *Dominion Post* (online ed, Wellington 2 December 2015); Jane Patterson “Ombudsman takes aim at 'fishing trip' OIA requests” (4 December, 2015) Radio New Zealand <www.radionz.co.nz>

¹⁰¹ Editorial “Chief Ombudsman shows how not to be an information watchdog”, above n 99.

admonished the Ombudsman's Office, calling into question its integrity and abilities given the tone of Wakem's report and uninspiring approach to the issues in question.¹⁰²

Given the watchdog function of the Ombudsman, this backlash to Wakem's report is not necessarily without cause, indeed a contributory factor to the escalating failures of the OIA is the Ombudsman's reluctance to assertively identify and therefore address the extent of the problems existing within the public sector. These concerns regarding the Ombudsman's watchdog function are further exemplified by the fact the Ombudsman is continuously underfunded resulting in a remarkably slow resolution rates for complaints due to a large backlog. In the year to June 2014, the watchdog received over 1,400 complaints and 1,338 during the 2015/16 year.¹⁰³ Just 23% of high-priority complaints were resolved within the target of six months, and only 44% of standard-priority complaints were resolved within a year.¹⁰⁴ This yawning gap in resolution timeframes is significant. While some documents can remain relevant for years, in many cases the news value of stories evaporates by the time the Ombudsman comes around to addressing requesters' concerns.¹⁰⁵

2 *New Ombudsman, new approach?*

Regardless of the contributing factors or reasons why, the Ombudsman have so far left much to be desired in their approach to protecting the Act's operation. This reality must be kept in mind when assessing the Ombudsman's new proposal and their ability and willingness to construct and implement a proposal in a manner yielding the desired outcomes. The concern over the Ombudsman's capabilities and their previous lacklustre approach to agency use of the Act has not been lost on the new Chief Ombudsman Peter

¹⁰² Editorial "Ombudsman badly needs health check" *New Zealand Herald* (online ed, Auckland, 10 December 2015).

¹⁰³ Peter Boshier "The Ombudsman and the Official Information Act: A Free and Frank Appraisal" (Chief Ombudsman's address to Lawyers in Government Conference, Wellington, 19 August 2016) at 3. See also Office of the Ombudsman *Annual Report 2013/2014* (14 October 2014) at 39.

¹⁰⁴ Office of the Ombudsman *Annual Report 2013/2014*, above n 103 at 39.

¹⁰⁵ For example, journalists claim that in the run-up to the 2014 election there was a total lack of OIA responses, as public servants wary of releasing damaging material resorted to their stalling tactics- Reports that had been requested a year earlier and ordered released by the Ombudsman were delayed until the election was over, and political and public interest had moved on. See Garden "An OIA a Day Keeps Dictators Away: Freedom of Information and the State's Accountability", above n 18.

Boshier, who began his term on 10 December 2015.¹⁰⁶ Boshier's initial approach to his appointment presented a promising awareness of both the problems facing the OIA and the disrepute his Office is tempting by its lack of action. Boshier promised to be a "fearless operator"¹⁰⁷ in his attempts to remedy the problems facing the OIA, acknowledging that the Ombudsman "haven't met objectives".¹⁰⁸

Reflective of this, Boshier announced his Office's plan over the next few years to eliminate the backlog of aged complaints and to deal with the vast majority of new complaints (70%) within three months and announced that the Ombudsman would be implementing a "League Table" system to address agency non-compliance.¹⁰⁹ This League Table model, similarly to other such regimes in place within the public sector,¹¹⁰ would force agencies to provide specific information and statistics relating to their performance and achievement of specified objectives. These results are then published in a Table model which allows the public to see first-hand where agencies are falling short of objectives, to what extent, and how their performance measures up to other agencies. As Boshier stated this would increase accountability from the public and provide agencies with the necessary information to address any gaps in their performance.¹¹¹ After

¹⁰⁶ Boshier is the former principle Family Court judge.n 2004 Judge Boshier was appointed as the Principal Family Court Judge of New Zealand and held that position until December 2012.

¹⁰⁷ Marty Sharpe "New chief ombudsman promises to be a fearless operator" *Dominium Post* (online ed, Wellington, 22 January 2016)

¹⁰⁸ Owens "Lisa Owen interviews Chief Ombudsman Peter Boshier" , above n 5. Boshier also stated his desire for the Ombudsman to re-consolidate its place as "a responsible, accessible and robust watchdog over the actions and decisions of those exercising executive power and organisation of excellence." See also Boshier "The Ombudsman and the Official Information Act: A Free and Frank Appraisal" , above n 103, at 8.

¹⁰⁹ Stephen Price in the IRM review of New Zealand's obligations within the Open Government Partnership recommended that the Ombudsman should make public statements to "name and shame" agencies when they fail to comply with the Official Information Act – see Price *Independent Reporting Mechanism (IRM): New Zealand Progress Report 2014–2015*, above n 3, at 48.

¹¹⁰ For example Prison performance tables, the Better Administrative and Support Services (BASS) model; shared services) and the Performance Improvement Framework (PIF). See Derek Gill and Susan Hitchiner "Achieving a Step Change the Holy Grail of Outcomes-based Management" (2011) 7 *Policy Quarterly* 28 at 28.

¹¹¹ Price *Independent Reporting Mechanism (IRM): New Zealand Progress Report 2014–2015*, above n 3, at 48.

announcing that the League Tables were expected to be released in July 2016,¹¹² correspondence with the Office of the Ombudsman nearly 4 months later indicates they have backtracked somewhat from this initial proposal.¹¹³

The Ombudsman's 'revised' proposal, as stated earlier, is now to publish OIA complaints and encourage agencies to release what data and statistics they do have about their OIA usage. A less strict, more general and more voluntary proposal than their initial strategy. The Ombudsman have justified this policy change by stating that there is no standardised model and methodology for the collection of data in agencies which would allow information to be presentable and comparable in a League Table format. Indeed, they intend to work with agencies to develop a common methodology and presumably once this is achieved then implement their original League Table proposal.¹¹⁴

Whether in a strict League Table format or through the more general publication of information, the underlying strategy is the same: that publishing information relating to agency performance and compliance with the OIA will result in positive changes to how the Act is utilised and regarded by agencies and the public alike.¹¹⁵ As such it is this proposition and the potential efficacy of this particular proposal that I will analyse in light of the current issues relating to the Act's use set out above. However, it should certainly be noted that even before the Ombudsman had begun to implement their new strategy towards the OIA, they back-pedalled to a less decisive and authoritative approach.

II A performance-based approach to management and accountability: Assessing the efficacy of the Ombudsman's proposal

The OIA is not working as intended. There can be no doubt of this fact. Although the problems facing it derive almost exclusively from the operation of the Act in relation to

¹¹² League tables to reveal OIA scrooges", above n 9. See also David Farrar "OIA league tables a good idea" (21 March, 2016) Radio New Zealand <www.radionz.co.nz>

¹¹³ Email from Antonia Di Maio (Principal Advisor at the Office of the Ombudsman), above n 8.

¹¹⁴ Email from Antonia Di Maio (Principal Advisor at the Office of the Ombudsman), above n 8.

¹¹⁵ Boshier "The Ombudsman and the Official Information Act: A Free and Frank Appraisal", above n 103 at 9.

‘sensitive’ information, the ramifications of this area of non-compliance extend to, and reflect upon, not only the Act in its entirety but the wider government, the fundamental principle of open governance and indeed on democracy itself. This context must be kept in mind when assessing the efficacy of the Ombudsman’s current proposal as it is necessary to consider not only the purposes of the Ombudsman’s proposal and the means by which they intend to achieve them, but the general suitability of this model to the specific nature of official information in government agencies and, most importantly, its ability to achieve meaningful change in light of the contemporary problems.

A *New public management in New Zealand*

The publication of data, statistics or complaints information (in a League Table form or not) which related to agencies’ performance and compliance with the OIA and is an example of what has become known as a results or performance-based approach – a relatively common feature of New Zealand’s public management system since the late 1980s when the ‘new’ public management policy swept the world and resulted in significant changes within the operation of the entire New Zealand public sector.¹¹⁶ Results-based management is about supporting better decision-making and performance through a shift in focus from the more traditional emphasis on compliance with established rules about the use of authority and resources (public administration)¹¹⁷ to a focus on results and with more discretion over the processes and resource-allocations which lead to those results (public management).¹¹⁸ Performance-based accountability models like Ombudsman’s proposal call for agencies to take responsibility not only for the procedures they follow in processing OIA requests but for the *results* of those procedures as well.

¹¹⁶ Anna-Luis Cook ‘*Managing for Outcomes*’ in *The New Zealand Public Management System* (New Zealand Treasury, Working Paper 04/15, September 2004)

¹¹⁷ Public administration is focussed on inputs— adherence to the established procedures for decision making and resource-allocation. This resulted in an “audit” mentality which lead to ordered ledger books and strict procedures but provided little information about whether programs and agencies actually had their intended impact. The logic behind these conventional accountability models was also usually punishment rather than improvement. Accountability meant exposing the malfeasance or nonfeasance of political officials and while these subjective elements of public accountability are certainly important, they do not provide sufficient information with which to assess public programs and the overall functioning and achievements of the public sector. See Anwar Shah *Public Sector Governance and Accountability Series: Performance Accountability and Combating Corruption* (Library of Congress Cataloguing-in-Publication Data, Washington, 2007) at 16 and 19.

¹¹⁸ Owen Hughes *Public Management and Administration An Introduction* (3rd ed, Palgrave Macmillian, New York, 2003) at 1-2.

An effective performance model has four essential and mutually reinforcing elements. These are:¹¹⁹

1. clear specification of objectives (desired performance);
2. authority to act (“freedom” to manage);
3. incentives to perform; and
4. provision of reliable information on results (actual performance).

Broadly, the logic behind these models is that they will enhance public sector performance and facilitate the achievement of objectives in two ways: firstly by generating more, and better quality, information about where goals are being met or performance is falling short, and secondly, providing the incentives for that information to be utilised to make effective changes primarily through greater accountability.¹²⁰ This accountability is key to the Ombudsman’s proposal, indeed their overall objective is to promote greater transparency and accountability in the operation of official information legislation and increase “performance and compliance with the spirit and letter of the law”.¹²¹ The successful promotion of public sector accountability is therefore key to the Ombudsman strategy to improve performance and compliance with the Act.

B Accountability under the OIA

Public accountability in this manner is the hallmark of modern democratic governance.¹²² If those in power could not be held accountable in public for their acts, omissions, decisions and policies, then democracy would remain a paper procedure.¹²³ However, although public accountability is a phrase often utilised in political rhetoric to convey an image of transparency and trustworthiness, its evocative powers also make it a rather

¹¹⁹ Association of Government Accountants *Performance Based Management* (Corporate Partner Advisory Group, Research Series Report No. 20, March 2009).

¹²⁰ Jonathan Ayto *The Core Elements of New Zealand’s public sector management model* (The Treasury, Public Services Issues Paper, July 2001) at 8.

¹²¹ Email from Antonia Di Maio (Principal Advisor at the Office of the Ombudsman), above n 8.

¹²² Mark Bovens “Public Management and Public Accountability” in E. Ferlie, L. Lynne & C. Pollitt (eds) *The Oxford Handbook of Public Management* (Oxford University Press, Oxford, 2004) 182 at 182.

¹²³ Bovens “Public Management and Public Accountability”, above n 122, at 182.

elusive concept. Bovens calls accountability a *hurrah-word* like ‘responsibility’ or ‘solidarity’ which cannot really be opposed in public life, nor easily defined.¹²⁴

Nevertheless, in the case of making agencies answerable for their use of the OIA, ‘Public Accountability’ can be divided in two. First ‘publicness’ of accountability means the ‘public’ agencies subject to obligations under the Act¹²⁵ as well as openness—that the account-giving is done in ‘public’ and is accessible to citizens. As such the central aspect of the Ombudsman’s proposal is that the complaints, data and statistics regarding agencies are proactively released to the public in a useful and understandable manner. Secondly, ‘accountability’ means the legal and reporting framework, organisational structures, strategies, procedures, and actions which ensure agencies are made responsible for this public account giving.¹²⁶ This means ensuring the public, Ombudsman and agencies themselves have the tools, knowledge and resources to assess the information released, and take the necessary action to address any shortfalls in performance which are identified.

The ability of the Ombudsman’s proposal to generate this kind of public accountability therefore depends on what information is released, in what form, and the extent to which that information can be effectively utilised by the relevant parties. This is, of course, what proponents of results-based models maintain that the regime can achieve effectively.¹²⁷ Thus it is necessary to look closely at the Ombudsman’s proposal against the requirements of a successful results-based model to assess whether the proposal is capable of achieving its objectives of greater accountability. What becomes apparent in this analysis however, is that there is a significant disparity between the theoretical requirements of an effective performance-based model and the specific proposal which has been put forward by the Ombudsman.

¹²⁴ Bovens “Public Management and Public Accountability”, above n 122, at 183.

¹²⁵ Bovens “Public Management and Public Accountability”, above n 122, at 183.

¹²⁶ Lyn Provost *Public Sector Accountability through Raising Concerns* (Controller and Auditor General, Report presented to the House of Representatives, March 2016) at 9.

¹²⁷ Jennifer Law *Do Outcomes Based Approaches to Service Delivery Work? Local Authority Outcome Agreements in Wales* (Report by Centre for Advanced Studies in Public Policy, University of South Wales, January 2013) at 13-14.

C Obstacles to implementing a performance-based model

A performance-based system requires creating a workable model that merges contextual factors, goals and relevant attitudes to create an environment within which the needs and desires of a wide range of stakeholders are efficiently and effectively realised.¹²⁸ Merely implementing a results-based model is a complicated task as establishing it relies on the existence of specific supplemental factors and supporting structures for the regime to draw upon and utilise in achievement of its purposes. It is in this regard that the Ombudsman's proposal faces its first challenges.

1 Compromising on performance objectives

To implement a results-based model requires creating a set of understandable and relatively unambiguous objectives which the model is centred on achieving. If the public are going to hold agencies accountable for their performance then they must have a set of benchmarks against which to assess this information.¹²⁹ Similarly for agencies, releasing data about their performance is of little use unless they can easily identify whether that data shows they are delivering to the desired standards and meeting expectations or not.¹³⁰

One of the first challenges facing the Ombudsman's proposal therefore is determining the objectives against which agencies performance can be measured and publically reviewed. What should these factors be and who should decide? The nature of official information means that there are individuals and groups with diverging interests in relation to the Act, from the government's desire to engage in free and frank discussion without excessive scrutiny, the public and media's fundamental right to have access to official information and the ability of agencies to fulfil their obligations without being excessively hindered by the OIA. When such diverse, and conflicting interests exist the process of identifying objectives will lead either to a shared understanding of goals and a more unified approach to achieving the objectives of the proposal, or it will exacerbate differences to such an extent that the whole process is threatened.¹³¹

¹²⁸ Cook 'Managing for Outcomes' in *The New Zealand Public Management System*, above n 116.

¹²⁹ J Vickers and G Yarrow *Privatisation: An Economic Analysis* (MIT Press, Cambridge, 1988) at 428.

¹³⁰ Hughes *Public Management and Administration: An Introduction*, above n 118 at 144.

¹³¹ Law, *Do Outcomes Based Approaches to Service Delivery Work?*, above n 127 at 16.

It is necessary therefore, that the objectives established as the benchmark of agency performance are the product of collaboration with all the interested parties and appropriately reflect and balance the array of different interests.¹³² As stated, if the ‘wrong’ indicators are chosen then perverse incentives may occur undermining any potential benefit provided by the outcomes in the first place.¹³³ The public are unlikely to see any validity in the process if they perceive agencies to be assessing themselves against their own standards of performance. Similarly, agencies may reject the process if the objectives unfairly represent the desires of the general public or media without emulating the opinions and concerns of those who actually processing the requests.

Thus a high level of consultation and compromise is necessary if the Ombudsman’s proposal is to have the desired effect on agency conduct and compliance with OIA. So far there has been no evidence of the Ombudsman carrying out any consultation with the public, media or front-line officials in regard to what these parties may consider to be appropriate measures of performance. More details are of course required, however, if the Ombudsman establish these objectives based primarily on what they perceive to be the appropriate benchmarks of performance without input from the relevant parties, there is a danger that this will undermine both the perceived legitimacy and practical utility of publishing the information and hinder both agencies and the public responding to it in the desired manner.

2 *Evaluation and monitoring of results*

A second factor potentially undermining the efficacy of the Ombudsman’s proposal is the inherent difficulty in actually measuring and evaluating agency performance, particularly in a comparative manner.¹³⁴ As discussed there is no common methodology or requirement for the collection of data about OIA requests¹³⁵ which means that even if it

¹³² Carolyn J. Heinrich “Outcomes-Based Performance Management in the Public Sector: Implications for Government Accountability and Effectiveness” (2002) 62 *Public Administration Review* 712 at 712.

¹³³ Law, *Do Outcomes Based Approaches to Service Delivery Work?*, above n 127, at 16.

¹³⁴ Shah, *Public Sector Governance and Accountability Series*, above n 117, at 29-3.

¹³⁵ Beyond what is required under the Public Records Act 2005

was clearly established exactly what information was required to best measure agencies' achievement of the established objectives, actually receiving that information from all the agencies, and in a form consistent enough for comparisons to be carried out is not currently possible.¹³⁶ Indeed this problem is the primary reason for the Ombudsman's departure from their initial League Table scheme to their current proposal to more generally publish OIA complaints, data and statistics.¹³⁷ While this backpedaling is probably a necessity, this 'data-collecting lacuna' in agencies still has consequences for the efficacy of the Ombudsman's proposal.

Firstly, a lack of common methodology means the information released by agencies will be inconsistent and as such, difficult to compare with both the established objectives and the performance of other agencies. The purpose of a results-based model is to allow for a clear and straightforward analysis of performance against the established objectives.¹³⁸ This allows agencies to know what works in terms of outcome achievement and what does not. Similarly, it permits the public to identify shortfalls in performance so they can ensure agencies are held accountable for these.¹³⁹ This is the process which leads to the greater 'public accountability', transparency and performance sought by the Ombudsman. However, this is hindered significantly if the information provided by agencies does not allow this to occur. Significant disparity in the nature of information being provided by agencies makes it very difficult to judge the extent to which the agencies are achieving the objectives and likewise makes direct comparisons between agency performances very challenging.

Furthermore, there are not only complexities in actually using the information provided by agencies, but accessing it as well. Poor record keeping and data collection in relation to OIA matters is a common feature within the public sector with Wakem identifying this

¹³⁶ Wakem, *'Not a Game of Hide and Seek'*, above n 12, at 12.

¹³⁷ Boshier "The Ombudsman and the Official Information Act: A Free and Frank Appraisal", above n 103, at 6.

¹³⁸ Heinrich "Outcomes-Based Performance Management in the Public Sector: Implications for Government Accountability and Effectiveness", above n 132, at 716.

¹³⁹ James E. Swiss "A Framework for Assessing Incentives in Results-Based Management" (2005) 65 *Public Administration Review* 592 at 593.

as a key area of vulnerability.¹⁴⁰ In the Ombudsman's recent report into the operation of the OIA in government agencies, Wakem found that frequent failures to keep a record of decisions regarding the release of information was making it difficult for other staff within agencies to locate similar, previous requests, ensure consistency of decision-making or justify departures from past responses.¹⁴¹ It was also inhibiting the ability of agencies to adequately explain the basis for the original decision to the Ombudsman if it was investigated.¹⁴² In general Wakem considered the record-keeping of agencies to be sporadic at best with some agencies recording neither the decision nor any consultation which occurred during the process – to the extent such practices were contrary to the requirements of the Public Records Act 2005.¹⁴³

These practices make it make it clear that the Ombudsman's desire for agencies to publish their data and statistics faces significant obstacles, firstly as in many cases the desired information simply does not exist. Secondly, what does exist is not necessarily in a form which will allow comparisons with other agencies or analysis against the established objectives. While the Ombudsman have stated they will work with agencies to develop a common methodology for data collection to remedy this record-keeping gap, in assessing their current proposal it is clear the current state of information within agencies will significantly hinder the ability of the public and agencies alike to make use of it.¹⁴⁴

3 *Internal attitudes and political resistance*

These obstacles to developing and implementing a functioning results-based system given the particular context of the OIA can also be easily exacerbated or even effectively ended by political opposition.¹⁴⁵ New approaches to accountability such as this often face resistance from administrators who are more comfortable with the system they know and

¹⁴⁰ Wakem's recommendations in relation to the information management of agencies in '*Not a Game of Hide and Seek*', above n 12, at 88.

¹⁴¹ Wakem, '*Not a Game of Hide and Seek*', above n 12, at 11-12.

¹⁴² Wakem, '*Not a Game of Hide and Seek*', above n 12, at 11-12.

¹⁴³ Wakem, '*Not a Game of Hide and Seek*', above n 12, at 11-12.

¹⁴⁴ And ideally allow their original League Table proposal to go ahead at some point in the future so a stricter approach to the information release by agencies can be implemented.

¹⁴⁵ Shah, *Public Sector Governance and Accountability Series*, above n 117, at 29-31.

prefer modification rather than a new model.¹⁴⁶ This poses a challenge to the efficacy of any proposal, especially when the supporting leadership from Ministers, senior public servants and those in influencing roles is critical to its success, as it is for the Ombudsman's proposal. Leaders within the public sphere must model, promote and support both the release of information and the subsequent behavioural changes required to address any identified performance-failings if the model is to be operational.¹⁴⁷

At a basic level, enthusiastic political support for the Ombudsman's proposal is relatively optimistic given the general political resistance the OIA faces at present. Any opposition to the Act is may deepen as the publication of OIA complaints and further agency data, if done properly, will inevitably expose shortfalls in agency performance which Ministers and officials will subsequently be held accountable for. Wakem's report has already identified a lack of support for the OIA in agencies. She pointed as well to the "mixed messages" agencies receive in relation to Ministerial expectations of compliance with the OIA and more generally with the promotion of openness, accountability and public engagement.¹⁴⁸ She found their internal attitudes concerning, citing the fact that releasing information is still seen as "reactive, operational task" rather than a "planned strategic intention" as it should be.¹⁴⁹ Further there was minimal evidence of any active promotion of the open government principle or proactive compliance with the Act, with over 50% of agency employees stating they were unsure whether their Minister was pro-disclosure with 67% saying the same about their Associate Minister.¹⁵⁰ Consistent with Wakem's findings, Sir Geoffrey Palmer has previously noted that in his experience the OIA is "as popular with ministers as pork in a synagogue."¹⁵¹ Therefore, any mechanism such as the Ombudsman's proposal, which has the effect of making the

¹⁴⁶ Shah, *Public Sector Governance and Accountability Series*, above n 117, at 30.

¹⁴⁷ Cook 'Managing for Outcomes' in *The New Zealand Public Management System*, above n 116, at 2.

¹⁴⁸ Wakem, 'Not a Game of Hide and Seek', above n 12 at 3

¹⁴⁹ Wakem, 'Not a Game of Hide and Seek', above n 12 at 3

¹⁵⁰ Wakem, 'Not a Game of Hide and Seek', above n 12, at 42.

¹⁵¹ Ian Davidson "Self-interest Drives OIA Review" *New Zealand Herald* (online ed, Auckland 6 February, 2013).

OIA even more ‘troublesome’ for Ministers and agencies than they already perceive it to be, is likely to face political resistance of some nature.

In saying that, it should be noted that opposition leader Andrew Little and Greens co-leader Metiria Turei have so far publically supported the Ombudsman’s proposal to have data and statistics made publically available and in particular the initial League Table proposal to manage that data.¹⁵² However, given it is the Government of the day and its Ministers who will primarily suffer the accountability repercussions of this regime rather than opposition parties, this support is not necessarily reflective of a deep commitment from Labour and Green to OIA compliance, especially as non-compliance has remained a consistent feature of governance under Labour and National administrations alike. Ending an engrained culture of OIA non-compliance which has endured within the public sector (with fluctuations) across multiple governments requires buy-in from all political parties as a fundamental value rather than their support for the Ombudsman’s proposal being grounded in the potential use of the information as a political tool for the opposition to wield against the government of the day in furtherance of their political agendas. While this would certainly be part of the accountability process, as a primary motivation it also deepens the perspective that the OIA can be used to support both individual and collective political purposes.

Thus while political resistance is not necessarily the death-sentence of an accountability regime, in the particular context of the OIA, promoting compliance with the Act within agencies and addressing the negative perceptions which exist in relation to it will require Ministers, senior management and middle management to promote compliance, the proactive disclosure of information and to model the behaviours and expectations required to give proper effect to the Act.¹⁵³ The proposal relies in large part on cooperation and active support from the government and given the current perceptions of the Act and the

¹⁵² “Labour joins Green backing of OIA tables” (20 March 2016) Radio New Zealand <www.radionz.co.nz>

¹⁵³ Bill Ryan “Better Public Services: A Window of Opportunity or curtains close?” (2012) 8 Policy Quarterly 16 at 23.

present lack of direction and action from Ministers in this regard, achieving this support may be difficult.

4 *Training requirements*

If the finer mechanisms of establishing and implementing the Ombudsman's proposal did not provide enough difficulties in and of themselves, the reality is that merely releasing information and having it assessed against the objectives is unlikely to have a notable impact on public sector accountability or OIA compliance.¹⁵⁴ Agencies must be both able and willing to modify their behaviors and processes based on that information. Being 'willing' relates to the incentives provided by a results-based model which motivate agencies to alter their practices and decision-making in the desirable manner.¹⁵⁵ Being 'able' on the other hand requires agencies to have the skills and resources to effectively utilise the knowledge gained when agency information is assessed against the established objectives.

The 'ability' of agencies to achieve this is somewhat questionable given the lack of appropriate training public sector officials have. This leaves many officials without the necessary capacity to understand the Act properly, let alone assess their performance and compliance with the OIA against established objectives. "Patchy" is the perspective requesters have of official's training of the OIA with some describing official's competence as "appalling".¹⁵⁶ The Ombudsman too have recognised a void in internal understandings as to how the OIA should be used both in relation to its general principles and the specific provisions of the Act as well. 60% of officials dealing with OIA requests believe they either had received no training at all, or that it had been at least four years since their last instruction.¹⁵⁷ Most (72%) said any training they had received was in the form of a general overview of the OIA and did not extend to any detailed guidance about

¹⁵⁴ Cook '*Managing for Outcomes*' in *The New Zealand Public Management System*, above n 116, at 5-6.

¹⁵⁵ Swiss "A Framework for Assessing Incentives in Results-Based Management", above n 139, at 593.

¹⁵⁶ White, *Free and Frank*, above n 28 at 166.

¹⁵⁷ Wakem, '*Not a Game of Hide and Seek*', above n 12, at 66. It should be noted that this lack of training is in spite of the Ombudsman's Policy and Professional Practice Advisory Group which can provide free training, workshops, materials, advisement on procedures, and reviewal of in-house training materials agencies may have developed for staff.

using specific provisions of the Act.¹⁵⁸ This lack of understanding has manifested itself in multiple ways including 30% of requesters failing to be informed of their legal appeal rights and 70% of all cases coming before the Ombudsman leading to a recommendation for further disclosure.¹⁵⁹

There is also frequent misapplication of the statutory exemptions and a consistent under-utilisation of the varying options available in the Act. For example, although agencies can manage large requests in numerous ways such as extending the time limit, consulting with the requester to refine the request, charging for the supply of the information requested or refusing the request on the basis of substantial collation and research,¹⁶⁰ most agencies resort only to extending the time limit, a choice which incidentally is one of the greatest sources of requester dissatisfaction.¹⁶¹ Given this notable lack of training simply in relation to how the Act operates, if officials are to have the capacity to compare their data and statistics against the established expectations of performance as well as respond to that information in a manner leading to improvement, then compulsory, comprehensive and on-going training is an absolute necessity.

The Ombudsman have announced they will supplement their push for the release of information by offering OIA training to agencies on request and revising their official information legislation guides for agencies to use.¹⁶² However, given the Ombudsman already offer training on request which is relatively infrequently utilised by agencies, it is difficult to see how this will address the problematic lack of understanding about the OIA existing within agencies.¹⁶³ Quite simply if the Act itself is not well understood, expecting

¹⁵⁸ Wakem, *'Not a Game of Hide and Seek'*, above n 12, at 66.

¹⁵⁹ Ecclestone, *Implementation of the Freedom of Information Act 2000: Study visit to Australia and New Zealand*, above n 40, at 9.

¹⁶⁰ Official Information Act 1982, s 18A, 14 and 15A.

¹⁶¹ Wakem, *Not a Game of Hide and Seek*, above n 12, at 101.

¹⁶² Boshier "The Ombudsman and the Official Information Act: A Free and Frank Appraisal", above n 103 at 9.

¹⁶³ In 2008/2009, the Office conducted only 20 training sessions. See Office of the Ombudsmen *2008/2009 Report of the Ombudsmen for the year ended 30 June 2009* (2009) at 36.

agencies to utilise the results-information produced under the Ombudsman's proposal as desired is somewhat unrealistic.

Thus from a practical perspective, the necessary foundation of a successful results-model do not currently exist. Such a regime requires clear objectives, consistent and comprehensive information to be supplied by agencies, the skills and knowledge to review that information and use it to shape future conduct, and of course political support and internal promotion of the necessary changes. In the particular context of the OIA, the problems arising in relation to each of these factors are significant and have the potential to significantly detrimentally impact on the efficacy of the Ombudsman's proposal and their ability to achieve their intended outcomes of increased compliance and accountability.

D Attempting to incentivise desirable behaviour and practices through a results-based model

Even if the Ombudsman could overcome these challenges and create an effective release and review system aided by appropriate training, there still remains a question over the 'willingness' of agencies to respond to the knowledge provided by this process. Proponents of results-based models argue that the regime is more proficient at incentivising managers and officials to respond to the information in a desirable manner than other accountability regimes, but the extent to which these incentives apply to government agencies and their use of the OIA is less clear cut.¹⁶⁴

1 Procedural and resource-based flexibility

One of the primary incentives promoted by a results focussed-system derives from the increased flexibility of procedure inherent in the model.¹⁶⁵ Traditional public management systems are often subject to rigorous democratic control and procedural requirements which have the effect of 'squeezing' the entrepreneurship out of managers and front-line workers, resulting in agencies becoming rule-obsessed bureaucracies.¹⁶⁶ As Mark Zegans

¹⁶⁴ Swiss "A Framework for Assessing Incentives in Results-Based Management", above n 139, at 593.

¹⁶⁵ Swiss "A Framework for Assessing Incentives in Results-Based Management", above n 139, at 593.

¹⁶⁶ Steve McKenna Lucia Garcia-Lorenzo and Todd Bridgman "Managing, managerial control and managerial identity in the post-bureaucratic world" (2010) 29 Journal of Management Development 128, at 134.

observed, these “rule-obsessed organizations turn the timid into cowards and the bold into outlaws.”¹⁶⁷

Within such procedural-based methods accountability is effectively decided from above because it is focussed on the adherence to rules which have been decided “top-down” by superiors.¹⁶⁸ Within these systems there is often little or no individual or organisational incentives to deviate from existing structures toward more efficient performance.¹⁶⁹ On the other hand, a performance-based approach uses a “bottom-up model” which, in shifting focus from prescribed procedures, allows officials to direct their attention towards the agency’s mission rather than focussing just on the rules.¹⁷⁰ This provides them with greater autonomy to use creative or innovative strategies to achieve results more effectively.¹⁷¹ Instead of asking "did you do what they told you to do?" performance-models simply ask "did it work?" This avoids the problems caused by the fact these established procedures from the top-down do not necessarily know what is most effective or efficient in the particular context of an agency.¹⁷² Allowing more flexibility for agencies to achieve results can therefore lead to better performance and often creates a more positive organisational climate as well-trained professionals value being able to use their judgment and experience to respond to situations rather than being constrained by detailed input regulation.¹⁷³

Achieving greater efficiency in the processing of OIA requests is certainly desirable. Most agencies (70%) are increasingly struggling with the volume and scope of requests they

¹⁶⁷ Bovens, “Public Management and Public Accountability”, above n 122 at 13.

¹⁶⁸ Bovens, “Public Management and Public Accountability”, above n 122 at 14.

¹⁶⁹ Donald P. Moynihan “Managing for Results in State Government: Evaluating a Decade of Reform” (2006) 66 *Public Administration Review* 77 at 79.

¹⁷⁰ Moynihan “Managing for Results in State Government: Evaluating a Decade of Reform”, above n 169, at 79.

¹⁷¹ Fischhoff, *Intelligence Analysis: Behavioural and Social Scientific Foundations*, above n 6, at 255.

¹⁷² Fischhoff, *Intelligence Analysis: Behavioural and Social Scientific Foundations*, above n 6, at 255.

¹⁷³ Lisabeth B. Schorr “The Case For Shifting To Results-Based Accountability” (ERIC Institute of Education Services, August 1994) at 2.

receive and Wakem's investigation revealed that 37% of interviewees considered under-resourcing and inability to process all the requests to be one of the biggest obstacles to meeting their obligations.¹⁷⁴ Over half of those interviewed also noted that their agency simply would not be able to cope with an increase in OIA requests with their current resources and procedures operating as they are.¹⁷⁵ Furthermore, Wakem's report identified the specific need for greater internal flexibility in order to accommodate both big and small requests appropriately as well as providing immediate responses to simple requests received on the telephone.¹⁷⁶ This flexibility may also lead to reduced expenditure of energy, political capital and funds on less efficient organisational structures as agencies have more flexibility to direct resources towards their results in a manner as they see fit.¹⁷⁷

The Ombudsman's proposal to shift accountability towards the output and performance of agencies can therefore, from a theoretical perspective, greatly incentivise agencies to increase their performance and compliance to achieve the established objectives.¹⁷⁸ The further consequences of which might also be the lessening of the current burden existing in relation to agency resourcing for OIA requests.

2 *The necessity of strict guidelines for processing OIA requests*

Yet the transition of theory into reality is significantly limited for the Ombudsman's proposal in this regard due to the particular nature of OIA use in agencies. To say "results matter more than procedure" or to focus accountability primarily on the former is often not realistic or appropriate given that the work carried out by the public sector is often governed, sometimes very comprehensively, by statute and/or regulations. When dealing with OIA requests for example there is a relatively strict statutory framework governing much of the request process from identifying the type of OIA request received (Part 2, 3 or 4 of the Act), distinguishing the request from those governed by the Privacy Act, to

¹⁷⁴ Wakem, *'Not a Game of Hide and Seek'*, above n 12 at 63-64.

¹⁷⁵ Wakem, *'Not a Game of Hide and Seek'*, above n 12 at 61.

¹⁷⁶ Wakem, *'Not a Game of Hide and Seek'*, above n 12 at 77.

¹⁷⁷ Schorr, "The Case For Shifting To Results-Based Accountability" above n 173, at 2.

¹⁷⁸ Schorr, "The Case For Shifting To Results-Based Accountability" above n 173, at 2.

logging the request against a standardised definition of information and either adhering to the statutory times limits on responding to that request or bringing it within the specific statutory provisions for extending the time-period or dealing with it urgently.¹⁷⁹ The manner, form and potential conditions of release, the grounds for justifying the withholding of information and the need for those grounds to be balanced against the public interest in some circumstances are also comprehensively defined and set out in the Act.¹⁸⁰

In addition to the OIA, there is also comprehensive procedural guidance provided by the Ombudsman's 'Practice guidelines,'¹⁸¹ Case Notes and Quarterly Reviews.¹⁸² The Ministry of Justice,¹⁸³ Cabinet Office¹⁸⁴ and State Services Commission¹⁸⁵ and of course the agencies themselves also provide advice and guidance in regard to proper procedure and how the considerations set out in the Act can be assessed and utilised in practice. Thus there is a relatively comprehensive procedural system in place governing the request process from start to finish.

While this proposal would add accountability for the results of agencies, it would not be accompanied by the relaxing or removal of the current procedural frameworks, as is usual when a results-based model is implemented. In a results-model accountability is 'shifted' from procedure towards results, removing some of the accountability from the former.¹⁸⁶ However, given the particular procedural needs of the OIA process a substantial shift is

¹⁷⁹ Wakem, '*Not a Game of Hide and Seek*', above n 12, at 73-74.

¹⁸⁰ Wakem, '*Not a Game of Hide and Seek*', above n 12, at 73-74.

¹⁸¹ "The OIA for Ministers and agencies: A guide to processing official information requests" (Office of the Ombudsman, June 2016)

¹⁸² See "Resources and Publications" (2016) Office of the Ombudsman <www.ombudsman.parliament.nz>

¹⁸³ Ministry of Justice "Charging Guidelines for Official Information Act 1982 Requests" (March 2002).

¹⁸⁴ "Cabinet Office Cabinet Manual" (Department of the Prime Minister and Cabinet, Wellington, 2008) ch 8.

¹⁸⁵ State Services Commission "Release of Official Information: Guidelines for Co-ordination" (October 2000, last updated 4 August 2002).

¹⁸⁶ Schorr "The Case For Shifting To Results-Based Accountability" above n 173, at 2.

not appropriate and therefore the Ombudsman's proposal will simply 'add' results-based accountability to the existing procedural accountability.

Additional accountability is not necessarily a bad thing, however the effect is that there will be very limited practical scope for front-line officials to throw aside any inefficient procedures to best achieve the desired results as proposed in a results-based model. Indeed any gaps, uncertainties and flexibility which does exist within the existing procedures has been cited as inherently problematic in reviews of the OIA by both the Law Commission¹⁸⁷ and the Ombudsman themselves.¹⁸⁸ The Law Commission in particular expressed concern over the current flexibility in procedures stating that any elements of a case-to-case system rather than the strict rules based approach was less resource efficient, created a greater scope for "game-playing" by agencies to buy time, increased the risk of agencies reaching idiosyncratic decisions and also resulted in significant and undesirable inconsistency both within and between agencies.¹⁸⁹

The Commission considered that this uncertainty and variability within the OIA system was something detrimentally affecting both agencies and requesters with the former often finding it genuinely difficult to know how to handle some requests which increased the instances of delayed responses and caused notable discrepancies within responses to OIA requests.¹⁹⁰ It was recommended by the Law Commission that even firmer and clearer procedural guidance was necessary, a very similar conclusion to that Nicola White reached in her thorough review of the OIA. White similarly considered that the inconsistency appearing in OIA responses was as a result of procedural uncertainty which

¹⁸⁷ Law Commission *Review of the Official Information Act 1982*, above n 13, at 15, 25 and 26. The Commission stated that "guidance should be the main tool to achieve greater certainty and consistency" and as such recommended the Ombudsmen's cases were more consistently and routinely published and firmer and more specific guidelines using those case examples were published to replace the Ombudsmen's existing Practice Guidelines.

¹⁸⁸ Wakem, '*Not a Game of Hide and Seek*', above n 12, at 77. See recommendation No. 15 – that "Agencies should review their OIA policies to ensure they provide accurate guidance and sufficient coverage so as to avoid any gaps or incorrect assumptions that could create vulnerabilities in compliance. They should consider seeking the assistance of the Office of the Ombudsman when doing so." Also recommendation No. 46 that the Office of the Ombudsman should provide updated OIA guidance to agencies, and continue to provide training and assistance to agencies in developing OIA policies and procedures.

¹⁸⁹ Law Commission *The Public's Right to Know*, above n 43, at 35-36.

¹⁹⁰ Law Commission *The Public's Right to Know*, above n 43, at 36.

contributed significantly to negative perceptions of the Act in the public and media.¹⁹¹ The Ombudsman have also explored this issue, with Wakem's report noting that many agency policies were "light in coverage"¹⁹² often limited to simply the Act itself or policies too agency-specific to result in even basic uniformity across different agencies.¹⁹³ She considered this lack of guidance as a key factor leaving agencies "vulnerable to challenges about the proper application of the relevant provisions of the OIA,"¹⁹⁴ in other words it was resulting in a failure to comply properly with the Act.

Thus implementing direct accountability for agency performance could be advantageous, however, in the particular context of the OIA this will not be a 'shift' of accountability away from procedure but rather an 'add-on.' This means there is very little scope for the Ombudsman's proposal to take advantage of one of the primary benefits associated with a performance-based accountability model.

3 *Intrinsic motivators and drawing on the public sector ethos*

The other incentives inherent in a results-based model are the intrinsic motivators.¹⁹⁵ These are the "psychological drives within an individual that are activated by simply doing the job" and are considered to be stimulated effectively in a results-based approach.¹⁹⁶ Intrinsic incentives are also particularly useful when applied to the public service as officials are generally considered to possess strong intrinsic incentives already – the 'public service ethos', and this can be capitalised on effectively by a results-based approach.¹⁹⁷ Focussing on performance increases worker participation as re-engineering

¹⁹¹ Law Commission *The Public's Right to Know*, above n 43, at 40 and see more generally Chapter Two; White, *Free and Frank*, above n 28 at 241.

¹⁹² Wakem, *'Not a Game of Hide and Seek'*, above n 12, at 77.

¹⁹³ Wakem, *'Not a Game of Hide and Seek'*, above n 12 at 76. Indeed Wakem notes that in many circumstances the procedures which do exist were not put in place by the agency but created by officials themselves with primary responsibility for overseeing the OIA – the reason for this is that when these individuals first took up their position they found they had minimal resources or policies to rely on. This not only shows the approach that agencies take in this regard, but also means the procedures which have been put in place in many agencies are not necessarily best practices.

¹⁹⁴ Wakem, *'Not a Game of Hide and Seek'*, above n 12, at 78.

¹⁹⁵ Swiss "A Framework for Assessing Incentives in Results-Based Management", above n 139, at 594

¹⁹⁶ Swiss "A Framework for Assessing Incentives in Results-Based Management", above n 139, at 594

¹⁹⁷ Law *Do Outcomes Based Approaches to Service Delivery Work?*, above n 127, at 34-35.

jobs towards a particular results psychologically invigorates any pre-existing intrinsic motivators as well as generating anticipatory emotional responses such as pride if the goal is accomplished or shame if it is not.¹⁹⁸ These feelings are motivational factors in and of themselves but are exacerbated in a results-based model where agency officials know they will be directly accountable for their performance when their data and statistics are released to the public, providing greater incentives to carefully consider the consequences and risks of actions and decisions.¹⁹⁹ If a person is only accountable for adherence to established processes there is little motivation to consider matters beyond those processes such as whether one action might produce a more desirable outcome than another.

The scope and nature of the audience privy to the success or failure of an agency can further incentivise performance. Many studies demonstrate the favourable effects of requiring people to justify their decisions to others as it produces norms which people, as inherently social beings, instinctively try to adhere to.²⁰⁰ An ingenious method of increasing tax compliance implemented by the British Behavioural Insights team exemplifies the power these norms have over behaviour.²⁰¹ In 2011 the team sent letters to more than 100,000 citizens noting their failure to make correct tax payments. There were several versions of this letter.²⁰² One stated that "paying tax means we all gain from vital public services such as the National Health Service, roads and schools."²⁰³ While the others had slightly varying versions of the following "Nine out of ten people in the UK pay their taxes on time. You are currently in the very small minority of people who

¹⁹⁸ P Stiles "The negative side of motivation: the role of shame" (University of Cambridge Working Paper Series 07/2008) at 5.

¹⁹⁹ Stiles "The negative side of motivation: the role of shame", above n 198, at 5.

²⁰⁰ Brian P. Gill, Jennifer S. Lerner and Paul Meosky "Reimagining Accountability in K-12 Education: A Behavioral Science Perspective" (2016) Behavioural Science and Policy (forthcoming) at 8.

²⁰¹ Michael Hallsworth "The Behavioralist As Tax Collector: Using Natural Field Experiments to Enhance Tax Compliance" (31 March, 2014) Social Science Network <www.ssrn.com> at 10-11.

²⁰² Hallsworth "The Behavioralist As Tax Collector: Using Natural Field Experiments to Enhance Tax Compliance", above n 201 at 10-11.

²⁰³ Hallsworth "The Behavioralist As Tax Collector: Using Natural Field Experiments to Enhance Tax Compliance" above n 201, at 10-11.

have not paid us yet.”²⁰⁴ The second statement was exceedingly more effective with those receiving it nearly four times more likely to pay their tax bill – the reason being a strong desire and therefore incentive to comply with the perceived norms of society.²⁰⁵

An analogous approach is reproduced in the Ombudsman’s proposal. When agency information is made publically available and particularly if it is presented in a form which allows inter-agency comparison as intended by the eventual League Table model) this will enable the creation of actual and perceived norms of performance against which agencies will be able to assess their relative position. Any agency falling short of the perceived norms of performance reflected in the data from other agencies will be greatly motivated to improve, at least, to the level of the other agencies so they are complying with the norms. The more successfully the Ombudsman can establish a norm of proactive release of information and strict compliance to the OIA, the stronger the intrinsic motivation will be for agencies to adhere to the norms and avoid being an ‘outlier’ to other agencies.

Reputation can also be an effective incentive. In a Welsh study of performance-based programs in the public sector, many interviewees raised the issue of reputation as a factor which incentivised greater performance, especially with the knowledge that the public would be aware of their performance relative to other agencies.²⁰⁶ A publically available set of results provided the motivation to raise their service’s profile. One manager commented that “it was helpful then to have this opportunity to include it [the comparison with other agencies] within the outcome-agreement to ensure that our profile was maintained at the right level”.²⁰⁷ Another said “as a relatively small service it’s very important to me that my service is making an impact [...] and that we’ve got a profile and that we’re seen to be delivering, and delivering something of value”.²⁰⁸ The opportunity the Ombudsman’s proposal provides for agencies to demonstrate where they are meeting

²⁰⁴ Hallsworth “The Behaviorist As Tax Collector: Using Natural Field Experiments to Enhance Tax Compliance” above n 201, at 10-11.

²⁰⁵ Hallsworth “The Behaviorist As Tax Collector: Using Natural Field Experiments to Enhance Tax Compliance” above n 201, at 14.

²⁰⁶ Law, *Do Outcomes Based Approaches to Service Delivery Work?*, above n 127, at 38.

²⁰⁷ Law, *Do Outcomes Based Approaches to Service Delivery Work?*, above n 127, at 38.

²⁰⁸ Law, *Do Outcomes Based Approaches to Service Delivery Work?*, above n 127, at 38.

their obligations under the OIA is therefore valuable and may provide an incentive for agencies to extend that compliance to OIA requests for sensitive information and as such improve their reputation in the public eye.

Nevertheless, while a results-based model aims to create and then encourage internal incentives, in the case of agencies using the OIA, these incentives already exist. Most public sector officials have a “genuine desire to ensure that they are compliant”²⁰⁹ with the Act, yet the OIA is still used incorrectly or illegally and this is because of other factors, as assessed above, like under-training, under-resourcing and concern over the potentially adverse effects on internal relationships (and promotion opportunities) if they release information which embarrasses the agency and/or presiding Minister. Thus any incentives for OIA compliance which are created or stimulated by the Ombudsman’s proposal must be significant enough to outweigh the conflicting political motivations officials have to withhold the information.

E The antithetical side of behavioural influences in a results-based model

Furthermore, while the results-based model is praised for its predominantly positive impact on behaviour and decision-making, like all structural frameworks, its potential to have perverse consequences is present as well and these are amplified by the particular context of the OIA.

1 Narrowing focuses and promoting short term policies

The first, and perhaps most common, disadvantageous consequence of performance measurement is ‘indicatorism’; the excessive reliance on indicators when making policy decisions.²¹⁰ If the established objectives against which agency performance will be assessed are to be useful and accessible, they must be capable of demonstrating changes over the short term. Objectives in general are necessarily somewhat narrow in their focus and this can lead to narrow planning and policy.

Ministers and officials can easily become preoccupied with aligning their existing activities under the measurable areas reflected by the objectives, for which they will face

²⁰⁹ Wakem, ‘*Not a Game of Hide and Seek*’, above n 12 at 13.

²¹⁰ Shah, *Public Sector Governance and Accountability Series*, above n 117, at 29.

direct accountability, and ignore other activities which do not produce the desirable results. In the complex world of official information and OIA requests, it can be very problematic to rely too much on achieving specific objectives results as an alternative to thorough knowledge and careful reflection on the causes and consequences of organisational performance.²¹¹ Furthermore, some of the most successful long-term programs do not necessarily show benefits in the short-term and have “sleeper effects”—that is, the investment of resources towards a particular objective may not produce benefits for years or even decades.²¹² Conversely, other programs successful in the short-term have effects that decay over time, and short-term success can become long-term failure.²¹³ Thus short term policies which create measureable results are not always desirable.

Additionally, objectives established by the Ombudsman cannot realistically reflect all the different facets of the OIA process which need to be addressed, and for which officials should be accountable for. The potential for un-measured areas to be neglected therefore is significant. For example the internal attitudes of agencies towards the Act is one of the fundamental problems facing compliance with the OIA yet an agency’s internal culture is very difficult to quantify and compare in a results-based model which may therefore preclude it from being a focus within agencies. Similarly, promoting a culture of open government generally is not something which can be addressed in the short term but a principle which must be reinforced and cultivated in a manner transcending beyond the government of the day and as such will demand long term strategies which may not yield the obvious short-term results sought by an results-based model.

2 *Gaming the path to performance achievement*

There is also a significant scholarly body of work exemplifying the ease at which results-based regimes can be corrupted or gamed. If organisations and managers in the public sector are judged by how well they respond to OIA requests and perform in accordance with identifiable objectives, research suggests that people will attempt to find the easiest

²¹¹ Shah, *Public Sector Governance and Accountability Series*, above n 117, at 29-31; Fischhoff, *Intelligence Analysis: Behavioural and Social Scientific Foundations*, above n 6, at 254.

²¹² Fischhoff, *Intelligence Analysis: Behavioural and Social Scientific Foundations*, above n 6, at 254.

²¹³ Fischhoff, *Intelligence Analysis: Behavioural and Social Scientific Foundations*, above n 6, at 254.

way to achieve their goals, even if this means using gaming strategies.²¹⁴ The ‘ratchet effect’, for example, occurs when a manager deliberately restricts performance below what is possible in order to guarantee incremental improvements in the following years - knowing it will be expected by the target setters.²¹⁵ Distortion or manipulation of results is also possible and includes evidence being fabricated or measurement factors being inflated by more generous scoring rules such as those which permit reclassifying errors as ‘almost right’ or ‘just off on timing’ as opposed to late.²¹⁶

Procedures can also be reformed to artificially produce the desired results, for example if the target is for patients seeing a doctor within 48 hours, one could achieve this quite simply with a policy preventing anyone making an appointment more than 48 hours in advance.²¹⁷ The demand for results therefore can equally lead to bad practices and the neglect of an agency’s wider mission.²¹⁸ Given the source of many of the OIA’s problems is already the current ‘gaming’ of the Act towards political purposes by Ministers and officials, the potential for any results which are released to be ‘gamed’ is certainly present.

This is exacerbated by the nature of the Ombudsman’s current proposal and the fact they have back-tracked from their original League Table scheme which would force agencies to provide particular data for the Table model. Putting that plan on the back-burner until a common methodology of data collection can be implemented in agencies means that the current proposal is merely to “encourage” and “promote” the release of agency information.²¹⁹ The result is that agencies will only be compelled to release data by the pressure exerted from the Ombudsman and public, leaving significant discretion to withhold information or present only partial or incomplete data to protect their interests. That the Ombudsman have back-peddled from their original League Table proposal is therefore particularly disappointing in this regard as the ‘voluntary’ nature of information

²¹⁴ Shah, *Public Sector Governance and Accountability Series*, above n 117, at 29-31.

²¹⁵ Fischhoff, *Intelligence Analysis: Behavioural and Social Scientific Foundations*, above n 6, at 254.

²¹⁶ Fischhoff, *Intelligence Analysis: Behavioural and Social Scientific Foundations*, above n 6, at 255.

²¹⁷ Fischhoff, *Intelligence Analysis: Behavioural and Social Scientific Foundations*, above n 6, at 254.

²¹⁸ Schorr, “The Case For Shifting To Results-Based Accountability” above n 173, at 2-3.

²¹⁹ Email from Antonia Di Maio (Principal Advisor at the Office of the Ombudsman), above n 8.

release in their current proposal is unlikely to reduce opportunities for agencies and Ministers to ‘game’ the Act undetected.

3 *Negative behavioural impacts and ‘excessive’ accountability*

While a results-based model can unite a workforce by utilising the emotional motivators associated with goal achievement as discussed above, the opposite result is also possible. Direct accountability for performance increases the risk and difficulty of each decision made in relation to an OIA request – something which can have negative flow-on effects.²²⁰ Stress burdens the decision-maker’s cognitive load, leaving less working memory free for complex and adaptive mental processes to such an extent that performance-based systems commonly fail to use strategies requiring substantial effort.²²¹ While shame or fear of failure is an incentive for some people, for others it encourages withdrawal from situations which require goal achievement in order to avoid the appearance of lacking in ability.²²²

These effects are already present in the public sectors use of the OIA. Officials are frequently placed in a difficult position between compliance with the Act and the political pressure to restrict sensitive or potentially embarrassing information. This creates the often impossible task of trying to please both the agency and Minister and the requester of information. It is this pressure which is often the cause of delays in the request process resulting from unnecessary consultation, inter-agency shuffling of requests, heavy redaction or filtering of information and the withholding of information altogether.²²³ To add the additional onus of direct accountability for the overall performance of agencies increases the stakes of every decision and can exacerbate the negative psychological influences on behaviour which are already prevalent when sensitive information is in issue. Excessive accountability is perceived to lead to punishment and as such is often not a productive motivator. To quote Behn:²²⁴

²²⁰ Gill, “Reimagining Accountability in K-12 Education: A Behavioural Science Perspective” above n 200, at 4.

²²¹ Gill, “Reimagining Accountability in K-12 Education: A Behavioural Science Perspective” above n 200, at 4.

²²² Stiles “The negative side of motivation: the role of shame” above n 198, at 5.

²²³ Eagles, *Freedom of Information in New Zealand* above n 74, at 339.

²²⁴ Robert Behn *Rethinking Democratic Accountability* (Brookings Institution Press, Washington, 2001) at 3.

They [*in the public sector*] recognize that if someone is holding them accountable, two things can happen: When they do something good, nothing happens. But when they screw up, all hell can break loose...[the public sector] have a clear understanding of what accountability means: Accountability means punishment.

IV A results-based approach to the OIA public sector: Magic pill or mixed bag?

What becomes apparent when the Ombudsman's current proposal is assessed against the theoretical framework of success associated with a results-based model is that there is a significant disparity between what the theoretical scholarship considers to be the necessary elements of a functioning model, and what the Ombudsman's proposal achieve within the particular context of the OIA.

As explored, an effective performance-based accountability model has four essential and mutually reinforcing elements. These are:²²⁵

1. clear specification of objectives (desired performance);
2. authority to act ("freedom" to manage);
3. incentives to perform; and
4. provision of reliable information on results (actual performance).

These elements will be most effective when supported and supplemented by a common methodology of inter-agency data collection, sufficient training and resources for officials to utilise the information most effectively and political support and 'buy-in' to the regime from all the relevant parties. When the Ombudsman's new proposal is considered alongside this model of a performance-based model, it becomes quite evident that quite simply, it falls short.

A The clear specification of objectives

The foundation of a results-based model is the establishment of clear objectives, in this case the standards against which the performance of agencies will be measured. These should reflect the diverging expectations of all interested parties including the

²²⁵ Association of Government Accountants *Performance Based Management*, above n 119.

government, general public and media. A failure to reflect these diverging interested and expectations can easily undermine the perceived validity of the model. As such, that it appears the Ombudsman have taken it upon themselves to determine the objectives without comprehensive consultation means that the objectives are unlikely to appropriately reflect the wider interests relating to OIA use and compliance, undermining the perceived legitimacy of the proposal from the parties whose interests have been excluded.

B Authority to Act

The first benefit of a results-based model in terms of increasing efficacy and efficiency of performance is the relative flexibility of processes which results when accountability is ‘shifted’ from procedure to performance. However, this ‘authority to act’ is fundamentally inapplicable in the particular context of the OIA because the request process is governed heavily by statute and regulatory regimes.²²⁶ Indeed the flexibility which does exist within agency practices have been a notable source of non-compliance and bad practices, leading to consensus within varying reviews of the OIA that greater rigidity of procedure is desirable within agencies.²²⁷

C Incentives to perform

The second primary benefit inherent in a results-model and the Ombudsman’s proposal is that the publication of data has the potential to incentivise better practices through the establishment of performance norms, the stimulation of the strong public-sector ethos and by providing the opportunity for an agency to increase their reputation. However, even in this regard the contrary is also possible. In order to be successful or impact on agency performance these incentives must outweigh the significant opposing motivators to withhold information for political reasons. Particularly in relation to sensitive information where the political consequences can be severe, this is unlikely to occur and as such

²²⁶ See “Resources and Publications” (2016) Office of the Ombudsman; Ministry of Justice “Charging Guidelines for Official Information Act 1982 Requests”; Cabinet Office Cabinet Manual”, above n 183-185.

²²⁷ Wakem, *‘Not a Game of Hide and Seek’*, above n 12; White, *Free and Frank*, above n 28.

undermines the effectiveness of these incentives as the processing of such requests is the primary area in which non-compliance occurs.

D Provision of reliable results information

Finally, the keystone of a results model -- the provision of reliable information, data and statistics of a particular nature to be assessed against the objectives -- also faces inherent problems in relation to the OIA. With no common methodology of internal data collection, and much to be desired in terms of the record-keeping which does occur, consistent, useful and easily comparable information is not readily accessible from agencies.²²⁸ This means that inter-agency comparisons and the assessment of individual agencies and their compliance with the established objectives is a fundamentally complex exercise.²²⁹ Furthermore, the current lacuna in agencies' understanding of the Act and training of officials make it less likely that agencies would have the capacity to best utilise this information even if it was available.²³⁰

E A solution to the crisis of official information?

A results-based approach therefore has many potential advantages and there is certainly a reason why it has become an increasingly common model within particular aspects of the public sector. However, the model is also complex, both in its form and in the behavioural science considerations which stand behind it. What the Ombudsman propose at present is more of a 'pseudo-performance' model than the real thing. Purporting to reap the benefits and advantages of a results-based approach while avoiding the necessary complexities of the model because they are either inapplicable in the particular context of the OIA or because the necessary foundations such as access to the relevant information from agencies and government support, are simply not present. As such the reality is that the Ombudsman's proposal is wholly inadequate to cause any notable or meaningful changes.²³¹

²²⁸ Law Commission *The Public's Right to Know*, above n 43, at 17.

²²⁹ Law Commission *The Public's Right to Know*, above n 43, at 152.

²³⁰ Law Commission *The Public's Right to Know*, above n 43, at 314-15.

²³¹ This is even more so given that there are many academics who have pronounced the 'death' of new public management and the use of performance-based models. The inadequacy of these models is emerging in the discourse as well with some scholars foreseeing the emergence of 'new public governance' to replace

A functioning results-model is indeed theoretically capable of transforming an agency from well-performing to high-performing in some respects, however it cannot be a Band-Aid for extensive structural, procedural and attitudinal problems such as those which exist in relation to the Act's operation in government agencies.²³² Furthermore, a results-model cannot simply be imposed on any facet of performance which requires improvement, like any management framework, specific foundational and supplemental factors must be present to facilitate and support the regime. In the case of the OIA, the necessary support within agencies and the wider government is just not present and in some regards, would be fundamentally incompatible with the operation of the OIA. The Ombudsman's proposal therefore seeks to apply a mismatched collection of laudable results-based ideas but is fatally hindered by a plethora of unaddressed practical limitations.

As such it is appropriate to not merely question the extent to which the Ombudsman's proposed results-based model will be effective, but whether a performance-based approach of *any* nature is suitable in the particular context of the OIA. I would argue that it is not. Regardless of its form, a results-based model is incompatible with specific aspects of the operation of the Act within agencies and to harmonise them would require significant, grass-roots, institutional changes. This is not to say a results-model would have no impact on the operation of the Act, however, like any accountability model there are both positive and detrimental effects and when the implementation and operation of a results-model is fundamentally encumbered by the context it is being applied to – the negative effects can outweigh any existing benefits. In a results-based system this includes 'indicatorism' and a disproportionate focus on short-term or narrow policies and the 'gaming' of information and results. These factors would further undermine the Act's perceived legitimacy and of course its constitutional contribution.²³³ This is of course the final point. Separately from the flaws of the Ombudsman's current model, or the wider issue of whether any results-based mechanism can be moulded to fit harmoniously with

this management approach or some other 'synthesis' of approach. For further in this regard see Gill "Achieving a Step Change the Holy Grail of Outcomes-based Management", above n 110 at 28-35.

²³² Burt Barnow and Carolyn J. Heinrich "One Standard Fits All: The Pros and Cons of Performance Standard Adjustments" (2010) 70 *Public Administration Review* 60-71.

²³³ Shah, *Public Sector Governance and Accountability Series*, above n 117, at 29-31.

the particular context of the OIA, a performance-based approach also cannot ‘fix’ the dangerous trajectory of freedom of information in New Zealand.

Where sensitive information is in issue, the proper operation of the OIA has become contingent on political motivations and interests.²³⁴ This is a relatively straightforward idea -- that OIA obligations and compliance can be set aside where the political consequences would be undesirable. However, OIA non-compliance is like virus, it does not exist in relation to just one OIA request, or within a single agency, nor does it contain itself to the category of sensitive information, or the OIA itself, but rather extends to the general relationship between state and citizen.²³⁵ Suspicion and distrust between the government and its people erodes the integrity of good government, open government and strikes right at the heart of New Zealand’s democracy.²³⁶ This is not something which can be addressed by the Ombudsman’s proposal.

Although I do not attempt to suggest what a solution would look like, by necessity a complex, multifaceted and broad-based strategy will be required and this is a task which cannot fall to the Ombudsman alone. As Rick Snell stated “the art of managing and sustaining the tensions between open government and other policies is a continual one rather than a reform that can be achieved by the simple stroke of a pen.”²³⁷ What *is* required from the Ombudsman however, is to take a decisive and uncompromising stance on agency non-compliance with the Act and set the tone for a government-wide strategy which recognises the place of the OIA within the bigger picture of democracy. The Ombudsman’s current proposal does not achieve his and as such there still remains nothing occurring in the foreseeable future that has the potential to meaningfully change

²³⁴ Price, *The Official Information Act 1982: A Window on Government or Curtains Drawn?*, above n 11.

²³⁵ Rutherford “NZ’s anti-corruption record slipping”, above n 56.

²³⁶ This does not only have an impact domestically on the perceptions that New Zealanders have on their government but impacts on the international reputation of New Zealand we all and its international obligations in terms of transparency and openness – as seen in New Zealand’s drop in the CPI rankings and the report from the Open Government (IRM) criticising New Zealand’s failure to adhere to its obligation as part of that as well.

²³⁷ Rick Snell “Using Comparative Studies to Improve Freedom of Information Analysis: Insights from Australia, Canada and New Zealand” above n 39 at 51.

the current state of affairs in regard to the OIA and slow the continuing degeneration of the Act into a tool of the political elites.

V Conclusion

Open government, transparency and the availability of official information has become a keystone of the modern democracy. In New Zealand the 1982 Official Information Act ushered in a new age of openness, fundamentally altering the relationship between state and citizen and providing society with the ability to participate in, and be informed of the government's decisions, perspectives and actions. Nevertheless, despite the laudable achievements of the OIA over the past 30 years, it currently stands on the precipice, facing continuous controversy, frustration and dissatisfaction from both requesters and the government itself. These concerns are centred on the government's failure to comply with the provisions and purposes of the Act, particularly when political interests are concerned and are frequently held to take precedent over the proper application of the law.

The concerning practices developing within the public sector have worsened notably in recent years, impacting not only on the perceived legitimacy and functionality of the Act's provisions, but its wider fundamental purposes and constitutional role. The failure of the OIA within agencies has brought into disrepute the very principle of open government, undermining its legitimacy across the government in its entirety. As a result, the need for greater accountability in this regard has become distinct and in early 2016 the new Chief Ombudsman, Peter Boshier, announced his Office's proposal to introduce a results-based model intending to increase agency transparency and compliance with official information legislation. This proposal intends to publish data, statistics and complaints information which reflects on agencies use and compliance with the OIA.²³⁸ The reporting and review process of a results-based model can both expose shortfalls in performance and provide agencies with the knowledge and incentives to address those shortfalls accordingly and therefore achieve the objectives sought by the Ombudsman.

However, while the intentions behind the Ombudsman's model are commendable, what becomes apparent when their particular proposal is assessed against the theoretical

²³⁸ Email from Antonia Di Maio (Principal Advisor at the Office of the Ombudsman), above n 8.

framework of a successful model it threefold. Firstly, that although the Ombudsman's proposal utilises the ideas of a results-based model it fails to consider the structural and supplementary factors necessary for it to operate properly, to such an extent that the model, in its current form, is largely unworkable. Secondly, that more generally a results-based approach is unsuited to the particular institutional and ideological framework that the OIA operates in, particularly as the intricacies of a performance-based mechanism is often directly contrary to the operational requirements of the Act. Finally, this analysis makes it apparent that in light of the extensive, broad-based problems plaguing the OIA at present, the Ombudsman's proposal cannot hope to make any meaningful change. The best the Ombudsman can do given its resources, capabilities and authority is to take a categorical and decisive stance against agency non-compliance and direct the development of a government-wide strategy to address this issue at its core. In-action or ineffective action cannot be an option, if public accountability and open government are truly the cornerstone of democracy then ensuring the purposes of the Official Information Act are upheld should be considered of paramount importance. As Peter Fenn stated, the "basic tenant of a healthy democracy is open dialogue and transparency" and in effect a strategy to preserve the OIA is exactly that: the preservation of democracy.²³⁹

²³⁹ Peter H. Fenn (born December 12, 1947) was a Democratic Party political strategist, consultant, television commentator and owner of Fenn Communications Group, a political and public affairs media firm based in Washington, DC in the United States and was a great proponent of free and open government, and the role of the media in that regard as well.

VI *Bibliography*

A *Legislation*

1 *New Zealand*

Fiscal Responsibility Act 1994

Local Government Official Information and Meetings Act 1987

Official Information Act 1982

Official Secrets Act (repealed) 1951

Public Finance Act 1989

Public Records Act 2005

2 *Australia*

The Freedom of Information Act 1982

B *Cases*

Commissioner of Police v Ombudsman [1988] 1 NZLR 385.

Corbett v Social Security Commission [1962] NZLR 878.

Kelsey v The Minister of Trade [2015] NZHC 2497.

C *Books and chapters in books*

Robert Behn *Rethinking Democratic Accountability* (Brookings Institution Press, Washington, 2001).

Mark Bovens “Public Management and Public Accountability” in E. Ferlie, L. Lynne & C. Pollitt (eds) *The Oxford Handbook of Public Management* (Oxford University Press, Oxford, 2004).

Ian Eagles, Micheal Taggart and Grant Liddell *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992).

Baruch Fischhoff and Cherie Chauvin *Intelligence Analysis: Behavioural and Social Scientific Foundations* (The National Academies Press, Washington, 2011).

B Gilling *The Ombudsman in New Zealand* (Dunmore Press, Wellington, 1998).

Nicky Hager *Dirty Politics: How attack politics is poisoning New Zealand’s political environment* (Craig Cotton Publishing, Wellington, 2014).

Owen Hughes *Public Management and Administration An Introduction* (3rd ed, Palgrave Macmillan, New York, 2003).

J Vickers and G Yarrow *Privatisation: An Economic Analysis* (MIT Press, Cambridge, 1988).

Nicola White *Free and Frank: Making the Official Information Act 1982 Work Better* (Institute of Policy Studies, Wellington, 2007).

D Journals articles

C Adams “Freedom of Information and Parliamentary Departments” (2014) 73 Australian Journal Of Public Administration 67-78.

Benjamin Ansley “Secret society” (1994) 143 Listener 26-28.

W. Baragwanath “The opening of the prison: the Report of the Committee on Official Information” (1981) 7 New Zealand Law Journal 141-145.

Burt Barnow and Carolyn J. Heinrich “One Standard Fits All: The Pros and Cons of Performance Standard Adjustments” (2010) 70 Public Administration Review 60-71.

P. J. Bartlett “Medicolegal: Disclosure of patient hospital records under Official Information Act” (1987) 100 New Zealand Medical Journal 590-592.

C Billington “New Zealand's Official Information Act: Still fit for purpose?” (2015) 38 Public Sector, 18-21.

S. F. Biswell “Building integrity: Assessing the pillars of New Zealand's national integrity system” (2014) 37 Public Sector, 5-9.

R. Buchanan “Cabinet, policy documents and freedom of information: the New Zealand experience” (1991) 31 Freedom of Information Review, 2-6.

Mai Chen “Changing shape of the public sector” (2001) New Zealand Law Journal, 201-206.

Mai Chen “New Zealand's Ombudsmen Legislation: The Need for Amendments after Almost 50 Years” (2010) 41 Victoria University of Wellington Law Review, 723-760.

Brian P. Gill, Jennifer S. Lerner and Paul Meosky “Reimagining Accountability in K-12 Education: A Behavioral Science Perspective” (2016) Behavioural Science and Policy (forthcoming).

Derek Gill and Susan Hitchiner “Achieving a Step Change the Holy Grail of Outcomes-based Management” (2011) 7 Policy Quarterly 28-35.

J Gregory "Access to scientific 'official information'" (1983) 40 *New Zealand Science Review*, 67-70.

Stephen Harris "State Sector Corporatisation Escapes Net of the Official Information Act" (1993) 40 *National Business Review* 145.

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

Carolyn J. Heinrich "Outcomes-Based Performance Management in the Public Sector: Implications for Government Accountability and Effectiveness" (2002) 62 *Public Administration Review* 712.

G Laking "The Official Information Act" (1983) 6 *Public Sector*, 3-4.

Steve McKenna Lucia Garcia-Lorenzo and Todd Bridgman "Managing, managerial control and managerial identity in the post-bureaucratic world" (2010) 29 *Journal of Management Development* 128-136.

Donald P. Moynihan "Managing for Results in State Government: Evaluating a Decade of Reform" (2006) 66 *Public Administration Review* 77.

M Paterson "The Media and Access to Government Held Information in a Democracy" (2008) 8 *Oxford University Commonwealth Law Journal*, 3-24.

Steven Price "The Official Information Act: Does it Work?" (2006) *NZLJ* 276.

Steven Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?* (New Zealand Centre for Public Law, Victoria University of Wellington, Occasional Paper 17, November 2005).

Bill Ryan "Better Public Services: A Window of Opportunity or curtains close?" (2012) 8 *Policy Quarterly* 16-25.

Rick Snell and Peter Sebrina "Information Flows: The Real Art of Information Management and Freedom of Information" (2007) 35 *Archives and Manuscripts* 55.

Rick Snell "The Kiwi Paradox – A Comparison of Freedom of Information in Australia and New Zealand" (2000) 28 *Federal Law Review* 575.

R Stubbs (2008) "Freedom of Information and Democracy in Australia and beyond" (2008) 43 *Australian Journal of Political Science*, 667-684.

James E. Swiss "A Framework for Assessing Incentives in Results-Based Management" (2005) 65 *Public Administration Review* 592.

M Taggart "Freedom of information and the university" (1988) 6 *Otago Law Review*, 638-663.

Nigel Waters “Freedom of information works for the media in New Zealand” (1998) 77 *Freedom of Information Review*, 66-67.

E Parliamentary and government materials

(23 July 1981) 439 NZPD 1908-1922.

Paul Bellamy *Access to Official Information* (Parliamentary Library, Background Paper No. 27, May 2003).

“Cabinet Office Cabinet Manual” (Department of the Prime Minister and Cabinet, Wellington, 2008).

Lyn Provost *Public Sector Accountability Through Raising Concerns* (Controller and Auditor General, Report presented to the House of Representatives, March 2016).

Ministry of Justice “Charging Guidelines for Official Information Act 1982 Requests” (March 2002).

New Zealand Legal Information Institute “Freedom of Information Bill 1977” (June 2010) New Zealand Historical Bills <www.nzlii.org>

State Services Commission “Release of Official Information: Guidelines for Co-ordination” (October 2000, last updated 4 August 2002).

“The OIA for Ministers and agencies: A guide to processing official information requests” (Office of the Ombudsman, June 2016).

F Reports

Edward Adams and Andrew Ecclestone *Implementation of the Freedom of Information Act 2000: Study visit to Australia and New Zealand* (London: Department of Constitutional Affairs, 2003).

Association of Government Accountants *Performance Based Management* (Corporate Partner Advisory Group, Research Series Report No. 20, March 2009).

Jonathan Ayto *The Core Elements of New Zealand’s public sector management model* (The Treasury, Public Services Issues Paper, July 2001).

G Cochrane and the New Zealand. Local Government Business Group. *Report of the Working Party on the Local Government Official Information and Meetings Act 1987* (September 1990).

Committee on Official Information *Towards Open Government: General Report of the Committee on Official Information*. (August 1981).

Jennifer Law *Do Outcomes Based Approaches to Service Delivery Work? Local Authority Outcome Agreements in Wales* (Report by Centre for Advanced Studies in Public Policy, University of South Wales, January 2013).

Law Commission *Review of the Official Information Act 1982* (NZLC R40, Wellington, 1997).

New Zealand Transport Agency Annual Report for the Year Ended 30 June 2014 (October 2014).

Office of the Ombudsmen *2008/2009 Report of the Ombudsmen for the year ended 30 June 2009* (October 2009).

Office of the Ombudsman *Annual Report 2013/2014* (14 October 2014).

Stephen Price *Independent Reporting Mechanism (IRM): New Zealand Progress Report 2014–2015* (Open Government Partnership, February 2016).

Lisabeth B. Schorr “The Case For Shifting To Results-Based Accountability” (ERIC Institute of Education Services, August 1994).

Rick Snell “Using Comparative Studies to Improve Freedom of Information Analysis. Insights from Australia, Canada and New Zealand” (Conference Paper, 6th National and 2nd International Congress on the Right to Information, Mexico, 8–11 November 2005) at 33.

Survey on the Proposed Code of Public Engagement (New Zealand Association of Scientists, November 2014).

The State Services in New Zealand: Report of the Royal Commission of Inquiry (1962).

Dame Beverley Wakem, ‘*Not a Game of Hide and Seek*’ *Report on an investigation into the Practices adopted by central government agencies for the purpose of compliance with the Official Information Act 1982* (December 2015).

G Dissertations and Papers

J Belgrave “The Official Information Act and the policy process” (Paper presented at the Legal Research Foundation and New Zealand Institute of Public Law Seminar on the Official Information Act, Wellington, 25 February 1997).

Michael Hallsworth “The Behaviorist As Tax Collector: Using Natural Field Experiments to Enhance Tax Compliance” (31 March, 2014) Social Science Network <www.ssrn.com>.

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

P Stiles “The negative side of motivation: the role of shame” University of Cambridge Working Paper Series 07/2008.

Evan Voyce "The Provision of Free and Frank Advice to Government" (MPP Research Paper, Victoria University of Wellington, 1996).

H Internet resources

“Charging for responses to OIA requests” (2015) Reserve Bank of New Zealand <www.rbnz.govt.nz>.

Benedict Collins “Media body takes aim at Govt OIA delay tactics” (17 December 2014) Radio New Zealand <www.radionz.co.nz>.

Brent Edwards “TPP requests: Groser acted unlawfully” (13 October 2015) Radio New Zealand <www.radionz.co.nz>.

David Farrar “OIA league tables a good idea” (21 March, 2016) Radio New Zealand <www.radionz.co.nz>.

David Fisher “The OIA arms race” (May 2014) The Speaker <www.thepublicaddress.net>.

J Garden “An OIA a Day Keeps Dictators Away: Freedom of Information and the State’s Accountability” (2016) The Equal Justice Project <www.equaljusticeproject.co.nz>.

Aimee Gulliver “Govt blocks Saudi sheep papers again” *Stuff* (16 June 2015) <www.stuff.co.nz>

“Labour joins Green backing of OIA tables” (20 March 2016) Radio New Zealand <www.radionz.co.nz>.

“League tables to reveal OIA scrooges” (19 March 2016) Radio New Zealand <www.radionz.co.nz>.

Craig McCulloch “PM admits Government uses delaying tactics” (16 October 2014) Radio New Zealand <www.radionz.co.nz>.

Lisa Owens “Lisa Owen interviews Chief Ombudsman Peter Boshier” (Podcast, 19 March 2016) The Nation, <www.Newshub.co.nz>

Jane Patterson “Ombudsman takes aim at 'fishing trip' OIA requests” (4 December, 2015) Radio New Zealand <www.radionz.co.nz>.

“Resources and Publications” (2016) Office of the Ombudsman <www.ombudsman.parliament.nz>.

Hamish Rutherford “NZ's anti-corruption record slipping” (27 January, 2016) *Stuff* <www.stuff.co.nz>.

Rick Snell “The Truth is out there: In Wellington not Canberra” (news blog, Sydney

Morning Herald, 11 January 2007).

I Other sources

Adam Bennett “Dirty Politics: John Key 'in denial' over SIS report” *The New Zealand Herald* (online ed, Auckland, 26 November 2014).

Eugene Bingham “Two-year search for 'ghost crimes' truth” *The New Zealand Herald* (online ed, Auckland, 5 October 2014).

Peter Boshier “The Ombudsman and the Official Information Act: A Free and Frank Appraisal” (Chief Ombudsman’s address to Lawyers in Government Conference, Wellington, 19 August 2016).

Peter Boshier “The role of Ombudsman in monitoring integrity systems: a report of the first six months” (Speech by Chief Ombudsman Peter Boshier to Transparency International Leader’s Integrity Forum, Auckland, 13 July 2016).

Ian Davidson “Self-interest Drives OIA Review” *New Zealand Herald* (online ed, Auckland 6 February, 2013).

Email from Antonia Di Maio (Principal Advisor at the Office of the Ombudsman) to Alora Johnson regarding the Ombudsman’s new strategy for improving the operation of the OIA (August 4, 2016).

Editorial “Chief Ombudsman shows how not to be an information watchdog” *Dominium Post* (online ed, Wellington, 7 December, 2015).

Editorial “Ombudsman badly needs health check” *New Zealand Herald* (online ed, Auckland, 10 December 2015).

B Edwards “Political roundup: The Government’s problem with transparency” *New Zealand Herald* (online ed, 22 February 2016).

David Fisher “Revealed: Road safety staff broke speed limits thousands of times” *New Zealand Herald* (online ed, New Zealand, 12 August 2015).

David Fisher “SIS spies to Kim Dotcom: We’re sorry for calling you fatty” *New Zealand Herald* (online ed, New Zealand, 30 May 2015).

Bevan Hurley “Calls for 'ghost crimes' inquiry after police note revealed” *The New Zealand Herald* (online ed, Auckland, 28 September 2014).

M Johnson “DHB caught out deleting public records” *New Zealand Herald* (online ed, Auckland, 21 July 2014).

Michael Laws "Ghosts more believable than 'official truths'" *Sunday Star Times* (online ed, Auckland, 29 February 2004).

Rt Hon Sir Geoffrey Palmer, President of the Law Commission “A hard look at the New Zealand experience with the Official Information Act after 25 years” (Address to International Conference of Information Commissioners, Wellington, 27 November 2007).

Sam Sachdeva “Official Information Act request charges for media in spotlight” *Dominium Post* (online ed, Wellington, 13 January 2016).

Anwar Shah *Public Sector Governance and Accountability Series: Performance Accountability and Combating Corruption* (Library of Congress Cataloguing-in-Publication Data, Washington, 2007).

Marty Sharpe “New chief ombudsman promises to be a fearless operator” *Dominium Post* (online ed, Wellington, 22 January 2016).

Vernon Small “Ombudsman barking up the wrong tree blaming some media as 'rottweilers'” *Dominium Post* (online ed, Wellington 2 December 2015).