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THE OFFICIAL INFORMATION ACT 1982:
THE FUNCTIONS AND DUTIES OF THE OMBUDSMAN AND THE MINISTER

RESEARCH PAPER FOR ADMINISTRATIVE LAW

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Wellington 1984

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1. INTRODUCTION

1.1 The Official Information Act 1982 ("the Act") came into force on 1 July, 1983.[1] One aspect of the Act which appears likely to have a considerable impact on Administrative Law is the functions and duties which are reposed in Cabinet Ministers and the Ombudsmen. My concern in this paper is not primarily with the substantive rules on the release of Official Information, although these are highly relevant to any consideration of the roles of Ministers and the Ombudsman and some discussion of substantive rules is included in this paper where appropriate. My first concern is, however, process and procedure - more specifically with the role of two of the principal actors in the Official Information Act scenario: the Ombudsman and the Minister. Other actors, the officials and the courts, come on stage from time to time, but the spotlight remains principally on the Minister and the Ombudsman.

1.2 Prima facie the respective functions of the Minister and the Ombudsman are clearly set out in the Act: first the Department or Minister (or one of the other agencies mentioned in the Act) receiving a request has the duty to decide what is to be released under the Act;[2] second, if a complaint is made, the Ombudsman may review a decision of the Department or Minister;[3] third, the Minister concerned may "veto" the Omsbudsman's recommendation within 21 days.[4]

1.3 It can thus be seen that the Minister may in some cases become involved in stages one and three. In such a case a Minister may be said to be an "interested" party before he comes to exercise his "veto" power. The veto power of the Minister is one aspect of the Act which has also been criticised on political grounds. It appears likely that the Act will be amended to remove or replace this power - this is the policy of the new Labour Government. This paper is concerned primarily with the functions and duties of the Ombudsman and Minister as they have developed

so far. However, this examination of the position to date will help predict the likely results of probable amendments, and some consideration will be given to these later.

1.4 The functions of the Ombudsman[5] give rise to less difficulty. An interesting development resulting from the Act is that the Ombudsman appears to be involved under the Act in making decisions which have a more judicial appearance - questions of law and reference to decided legal cases have come into greater prominence. There has also been some criticism[6] that the Act brings the Ombudsman more often into conflict with Ministers and that, if great care is not taken, there is a danger of politicising the Ombudsman's office.

1.5 To examine more closely the role of the Ombudsman and the Minister, I propose to begin by looking at three areas in which dispute has arisen and to look at some of the cases that have come before the Ombudsmen (and in most cases the Minister) in these areas. The first area concerns cases where the Minister has become involved in stage one referred to above either because he has been consulted by the Department before deciding whether to release or because he has directed the Department not to release. In considering whether this is correct in terms of the Act, some interesting issues arise concerning the role of the Minister both under the Act and in general constitutional practice. The second group of cases concerns legal professional privilege. These cases illustrate the functions of the Ombudsman and this form of "privilege" is a subject on which the Courts have built up a considerable body of precedent. The third group of cases concerns the interpretation of the Act. These again highlight the Ombudsman's role since interpretation of a statute is another matter with which the courts are normally closely concerned.

Having looked at some specific examples of how the Minister and the Ombudsman exercise their functions under the Act, I then wish

to consider the roles of these two principal actors in detail. First there are matters of relevance to both Minister and Ombudsman, such as the common criteria applied under the Act and the extent to which motives for requesting information can be ignored when considering requests under the Act. Then there are matters pertaining to the Minister solely - the veto powers, and the political responsibilities. Similarly there are matters pertaining principally to the Ombudsman - the change in his role under the Act and the comparison with his role under the Ombudsmen Act. Finally, after considering the relationship of these two principal actors with the courts, I wish to consider the effect of probable amendments to the Act in the future.

1.6 This paper, therefore, deals principally with the way in which the roles of Ombudsman and Minister have developed so far under the Act. These give rise, among other things, to matters of constitutional relevance, such as the relationship between the Minister and the Department. I propose to consider first the specific examples and then move on to more general consideration.

2. THE MINISTER AND THE DEPARTMENT

2.1 This Section 2 looks at a group of three cases which bring into focus a specific aspect of the role of the Minister. These cases also illustrate some points about the role of the Ombudsman which I wish to consider later on in this paper. These cases concern the situation which arises when the Department, having formed a tentative view that it should release the information as requested, then consults the Minister who advises he opposes release. These cases raise important conceptual issues under the Act, namely the extent to which the Department should be divorced from its Minister in making decisions under the Act. In this context reference is made to constitutional questions and the relationship between a department and its Minister. From this a number of possible solutions can be posited. Ultimately, it appears that there has been a constitutional shift in the relationship of the Minister to his department. In practice a modern department of state can, and at times does, act independently and not just as the alter ego of the Minister. This does not mean however that in every case it is possible or practicable to divorce the Minister from his department when requests under the Act are being considered by the department.

2.2 School Computers Case

2.2.1 The respective roles of Minister and Department are brought into sharp relief in the reported instances where the Department, having formed a tentative view that it should release the information as requested, then consults the Minister who advises that he opposes release. The best known of these cases is the "Computers for Schools" case.[7] The case involved a request for two sets of documents. The request was denied as regards both sets and the requestor asked the Ombudsman to investigate. The first set of documents requested was a draft Cabinet paper. The Ombudsman was able to resolve this matter under Section 13 of the

Act ("reasonable assistance" to enquirer). The Department accepted this.

2.2.2 The second set of documents requested, was a report from the State Services Commission and the Department of Education advising (among other things) which computers would be most suitable in Secondary Schools. The principal reason advanced for not releasing this was that the information contained in the report included information provided by the various competing computer companies. These companies, it was said, expected the information to be kept confidential. Section 9(2)(b) of the Act was invoked in this regard. The Ombudsman rejected this argument. First of all, Section 9(2)(b) requires the information to be "supplied in confidence"[8] not just treated as confidential by the Department. Secondly the Ombudsman said: "Indeed, in a submission to the Minister, the Department had expressed doubt that publication would prejudice the supply of similar information in the future because the companies concerned, for commercial reasons, would always be anxious to supply information on their product.?"[9]

2.2.3 The important point however is that the Department had consulted the Minister and changed its decision as a result. The Ombudsman commented:[10]

> "My investigation disclosed that when initially considering whether to release the report, the Department had expressed the view to the Minister of Education that the spirit of the Official Information Act required the release of the evaluation report. The Minister, however, had ordered that the report not be released. In my report to the Director-General, I pointed out that where - having been asked to investigate and review a refusal to supply information - I found that either no reason had been given for a decision to withhold information, or that the reasons given were not good reasons in terms of the Act, and where I had accordingly proceeded to recommend that the information be made available, Section 32 afforded the Minister an opportunity at that point to direct the Department not to observe my recommendation.

> While I was not suggesting that consultation with the Minister at an earlier stage was in any sense inappropriate, the purpose of my observation was to underline my belief that the approach I had outlined was the one contemplated by the Legislature."

I think emphasis should be given to the second sentence of this extract: the Minister "ordered" the Department not to release the information sought. Presumably the request was initially made to the Department, not the Minister, and presumably the information was held by the Department. Section 15 of the Act clearly requires the Department in such circumstances to decide whether or not to release. Has the Minister the right to order otherwise?

2.2.4 The second interesting aspect of this case is that, after the Ombudsman had recommended release of the report, the Minister exercised his "veto" under the Act. The ground relied on was stated simply as "the competitive commercial activities of those companies who supplied information to the Department".[11] This is a clear reference to Section 8(1) of the Act although it is unclear whether he relied on sub-clauses (a), (b) or (c). The Minister continued: "It is my opinion that this material was supplied in confidence and I believe that the making available of the information could prejudice the supply of similar information."[12] This directly conflicts with the Departmental advice and the Ombudsman's conclusion on this point. The Minister, cited no factual basis for his conclusions, and the point does not appear to have been reasoned at length. This is unfortunate since both Sections 9(2)(b) and 8(1)(c) require the information to be "supplied in confidence". No one seems to have bothered to ask the Companies whether they thought they were supplying information in confidence.

2.2.5 It is interesting too, to note the contrast between the comments made by the Ombudsman on this case and those of the Minister. The ombudsman's consideration of the case covers more than four pages. The Minister in his veto statement states his "grounds"

[which he is required to state in terms of Section 32(4)(b)] in three sentences - none of them particularly lengthy. The Minister states no factual basis for his decision but simply asserts a personal opinion. He refers to "competitive commercial activities" and "the public interest" without mentioning the sections of the Act from which those phrases are taken and without considering the context in which the words appear. The question of whether such an incomplete statement is sufficient to comply with the requirement of Section 32(4)(b) that the "grounds for the direction of decision" be stated, is a question which arises for discussion later.

2.2.6 Finally the Minister said in his veto statement: "This decision is not based on any advice."[13] Section 32(4)(c) requires the Minister to disclose "the source and purport of any advice on which the direction or decision is based". So far, most vetoes have been based on Departmental advice. Unfortunately one could easily conclude that the Minister's final sentence reflects an autocratic attitude to the whole issue. The question of the character of the Ministerial veto also arises for consideration later.

2.3 Two Other Cases

2.3.1 The problem of a conflict between the Departmental view and that of the Minister arose in two other cases. First there is the case concerning the Education Department's Notes to the Estimates.[14] This was a request for the notes prepared to assist the Minister in Parliamentary debate. Section 9(2)(f)(iv) of the Act ("confidentiality of advice tendered to Ministers of the Crown and officials") was relied on in withholding the information. The Ombudsman again found "While the Department favoured release of the Notes, the Minister wished them to be withheld until after the Estimates had been debated in Parliament."[15] The Ombudsman referred to a cabinet directive that

such notes should be withheld only "in a rare case".[16] The Minister withdrew his objection.

2.3.2 Just to illustrate that this is not a problem unique to the Department of Education and its previous Minister, the other such case I will mention involves the Reserve Bank.[17] Its Minister was the then Prime Minister and Minister of Finance. The case concerned a request for correspondence between the Prime Minister and the Reserve Bank and for information about Kiwi Savings Stock. Again the Minister was consulted before the decision was finally reached. However in this instance the Bank and its solicitors had already formed a view that "the correspondence fell comfortably within Section 9(2)(g) of the Act".[18] The Minister simply confirmed the initial view: "The Governor's letter was returned to the Bank with a notation by the Prime Minister 'I do not think it should be released.'"[19]

2.3.3 The Ombudsman accepted that this was not the same approach as had been taken in the two Education Department cases mentioned above. He said:[20]

> "I agreed that it was not inappropriate for the Governor to consult the Minister. I also accepted that the Directors, while taking account of his view, acted properly in setting that view on one side when making their decision on the request. That, in my view, accords with the intention of the Act."

The Ombudsman gave further emphasis to the need for impartiality on the Minister's part:

> "If consultation with a Minister were carried to the point where he was asked whether he would direct that any recommendation by an Ombudsman should not be implemented, that in my opinion would be improper. If, on the other hand, the organisation was influenced in its decision primarily by a Minister's wish to have the information withheld, that would also, for the reasons set out above, be unacceptable."[21]

2.3.4 In terms of the Act, the Ombudsman's approach appears correct. The department received the request and it must make a decision. However, in practice, the situation is not so simple. First, the Department is not a monolithic entity. It consists of a large number of people. Their views will often differ among themselves. Ultimately each case will be decided by one person. In more difficult cases this will often be the permanent head. In that event, what is the distinction between the case being referred upwards to the permanent head and the case being referred to the Minister. The Minister, after all, unlike the public servants is elected and is ultimately responsible to the electorate and to Parliament. When any really contentious decisions is to be made, it is the Minister who should say "the buck stops here". This may be even more so where the information requested was prepared by or for the Minister or for Cabinet. In practical terms, the circumstances must dictate the extent to which the Minister is involved in the original decision. These circumstances include not only who the request was sent to and who holds the information, but also its origin, the purpose for its collection and the degree of sensitivity or controversy involved. An official who rushes to see the Minister about every minor request of a routine nature is a nuisance; an official who blithely releases economic intellligence without any consultation is a menace.

2.3.5 The point however is not just that some Departments or Ministers had had difficulties in knowing what was their proper role under the new Act. The problems also illustrate a conceptual difficulty inherent in the Act. To what extent can the Department be separated from its Minister? There is also the practical problem of cases in which the information is held by the Minister solely or the request for information is addressed to the Minister. Under Section 15 of the Act it appears that the Minister should then make the initial decision on release of the information. In those circumstances the approach espoused by the Ombudsman becomes irrelevant and we are left with the problem of

the Ombudsman reviewing a Minister's decision, knowing that the same Minister will be able to veto the Ombudsman's recommendation.

2.3.6 On another view it could be said that the Act potentially drives a wedge between the Minister and Department. If the Departmental officer resolves to release information, but (for whatever reason) the officer is made aware of Ministerial opposition to release in this instance or the officer receives a Ministerial directive not to release, then the official is caught on the horns of a dilemma. If he releases the information he will incur the Minister's displeasure. That is not, of course, the end of the world. But it may make things awkward for the official in the meantime. If he does not release, it may be in some instances that he is acting contrary to the Act and could, conceivably, be subject to judicial action to force him to act in accordance with the Act. For many the former may appear the safer or more comfortable course of action.

2.4 The Department's Relationship With Its Minister

2.4.1 While it is, of course, possible to exaggerate unnecessarily the extent to which the cases referred to above indicate a likely source of discord for the future, it should be said that there is an inherent awkwardness with a situation which gives the Ombudsman power to review a Minister's decision, but subjects the Ombudsman's recommendation to the Minister's veto. It is, of course, obvious that a Minister's initial decision under Section 15 must be reviewable by the Ombudsman. If this were not so, unscrupulous officials might be tempted to use Ministerial decisions as a device to avoid the Ombudsman's scrutiny. On the other hand, the "Danks Committee"[22] which drew up the original proposals on which the Act was based, recognised it was making a marked departure from previous practice in giving the Ombudsman power to review Minister's decisions and commented:[23]

> "101. This proposed change is not inconsistent with the principles underlying the office of the Ombudsmen. The Ombudsman (Parliamentary Commissioner for Administration) in the United Kingdom has power to investigate and report in respect of ministerial decisions.
>
> "102. The proposal is also compatible with the principal of ministerial responsibility. Procedure would be informal rather than formal. As at present the Ombudsmen would not have powers of decision; they would investigate, and, if appropriate, recommend a different decision or practice. Ministers, subject to public and parliamentary scrutiny, a scrutiny enhanced by the Ombudsmen's investigations and reports, would in general still decide."

2.4.2 Undoubtedly the procedure contemplated as normal by the Act is that mentioned by the Ombudsman in the cases referred to above. That, however, does not mean that different procedures may not be appropriate in some circumstances. The right of a Minister to direct or control a department varies from one department to another. Originally most Departments of State were established under the Royal Prerogative,[24] but in New Zealand most Departments now operate under a specific statute. The position of the individual public servant in a department established under the Prerogative was fairly straightforward:

> "Where functions entrusted to a Minister or to a Department are performed by an official employed in the Ministry or Department, there is in law no delegation because constitutionally the official's act or decision is that of the Minister."[25]

2.4.3 The most common situation in New Zealand today is for the Departmental statute to establish the Department and to acknowledge the existence of its Minister. The Department operates "under the control of" the Minister who may give the permanent head or the Department directions as to how the Department shall operate and the Minister may delegate functions to the permanent head or other officials.[26] At the other extreme are the "Quangos" and trading departments whose Minister

is mentioned in their Act but has little in the way of functions or control specified in the Act.[27] In these cases the Minister's functions are often limited to complaints procedures and sometimes financial control. There are also however some anomolous cases in which the respective functions of Minister and Department are more confused.

2.4.4 One such case appears in the Land Act which by Section 4 establishes the Department of Lands and Survey and then states:

> "(2) The Department shall consist of -
>
> (a) The Minister of Lands:
>
> (b) The Director-General of Lands: ...
>
> (f) Such Commissioners, Chief Surveyors, surveyors, clerks ...."

A similar case appears in the Public Works Act 1981 which by Section 5 establishes the Department under the control of the Minister as usual, but then states in Section 5(7):

> "The Minister shall be charged with the execution of Government Works and may, for the purpose of enabling the Ministry to carry out any of its functions and powers, give to the Commissioner of Works such directions as it thinks fit."

2.4.5 The question which now arises is whether it is possible to divorce the Minister from the Department in the way the Act and the Ombudsman appear to require. If (as is stated to be the case under the prerogative[28]) the action of the official is constitutionally the action of the Minister, does it make any difference whether the official has sought the guidance of or directions of the Minister? Moreover, if the Departmental Act states that the Department is to operate under the control of its Minister, is there not a Statutory authority for the very procedure so roundly condemned by the Ombudsman - acting on Ministerial instructions not to release the information.

2.4.6 One Departmental statute which goes further than the others is the Maori Affairs Act 1953, Section 4 of which lists, among other things, as one of the functions of the Department that it shall give effect under the direction of the Minister to provisions of that Act and other Acts. In this case at least, the Minister's authority to give directions about Official Information matters appears clear.

2.5 Some Possible Solutions

2.5.1 Officials should not consult the Minister before deciding on release of information - or, at least, they should not do so so often. The Ombudsman advocates the view that the official may consult the Minister but must not allow the Minister's view to overrule the conclusion reached by the official. It can also be argued that for an Official to defer to Ministerial advice or directions constitutes an invalid delegation of powers. The decision under the Act is to be made by the Department. The New Zealand cases on delegation of statutory authority do not treat every delegation as invalid.[29] However there is clear authority that a delegation is invalid if it has the effect of avoiding the procedure specifically set down for making the particular type of decision in question.[30] While the act of the official is that of the Minister, the converse is not necessarily true.

2.5.2 While the Minister may control the Department, the Department must still act independently in exercising a duty imposed on it by a particular statute. Authority for this is the case of Social Security Commission v. MacFarlane.[31] In that case the Minister had given the Commission directions as to its exercise of its discretionary authority under a specific statute.[32] The Statute required the Commission to act under the "general direction and control" of the Minister. The Judge said:

> "In my view, the words 'general direction and control,' considered in their context, have a meaning which falls short of direction in the sense of dictation. Where a statute contains detailed provisions as to its application I consider clear language is necessary to show that Parliament intended that a drastic alteration can be made by Ministerial direction."[33]

2.5.3 A similar case is Elston v. State Services Commission (No. 3).[34] The Commission wished to suspend workers it believed would not carry out their usual duties. Section 10(1) of the State Services Act 1962 required that the Commission act "independently". The workers alleged the Commission had acted on the directions of the Minister and not independently. The judge did not agree there was sufficient evidence to prove this. He said:

> "Argument was addressed to me as to the meaning of the word 'independently'. In my view, the Commission does not have to act with the complete and utter independence that a Judge must possess. It is unreal to suggest otherwise. Mr Mathieson was right in submitting that 'independently' in this context did not mean to act in complete isolation from and without consultation with. Because of the thin line between policy and individual rights, the word must mean in the context of Section 10(1) 'not depending on."[35]

From the MacFarlane and Elston cases, two points emerge. First, the statute must be specific in requiring a governmental agency to act independently of its Minister. Second, consultation with the Minister is not improper, provided the agency or official ultimately makes the decision without being bound by the ministerial "advice". The exact requirements of acting "independently" will, it appears, vary according to the context of the statute in question. However, the courts do accept (in conformity with the rule that general statutory words do not overrule the provisions of a statute dealing with a specific matter) that a statute may require an agency to act independently; this specific provision is treated as an exception to the

general provision in the departmental Act that the department is under the control of the Minister.

2.5.4 On that basis and in the context of the Official Information Act, it is, I think, clear that the Department statutes in most cases do not authorise the Minister to control the Department's decisions under Section 15 of the Act. This is, of course, even more so, in the case of quangos and such like whose Ministers do not have general powers of control and direction. However the situation is less clear where the Minister is effectively an officer of the Department.[36] In those unusual cases, it could be argued that the Minister can make the decision in the Department's name. However, the better view appears to be that the Official Information Act in its specific provisions is not affected by the general words of the departmental Acts.

2.5.5 The Ombudsman has already commented[37] that since the Minister can in effect veto the Ombudsman's decision, it is wrong that the Minister should get what I would call "two bites of the cherry". On the other hand it can be argued that if the Minister cannot control what information is released by the Department, then his veto power is of little use. In other words, if the Department decides to release information as requested and despite the views of the Minister to the contrary, then there will be no review by the Ombudsman and no opportunity for the Minister to exercise his veto. The answer to this is, I suppose, that the Minister's veto is not intended as an overriding power to be exercised arbitrarily or at the Minister's whim. The veto, like all other decisions taken under the Act, should be exercised after considering the detailed criteria in the Act and bearing in mind the public interest. Nonetheless, there is still a Departmental tendency in some cases to say: "When in doubt, don't release it."

2.6 Constitutional Developments

2.6.1 This section of the paper can, I think, be best concluded by considering briefly the constitutional point at issue. The extent to which the relationship between Minister and Department has changed, is well illustrated in the following comment:

> "The older pattern of relationships between ministers and public servants has lost much of its coherence. One minister stresses the privacy of the advice which it is his responsibility to adopt or reject. Another minister distances himself from his department, noting that, on a particular matter, the department's view was allowed to prevail; but now he is asking the same question again, and will reconsider his position when he has the department's response. Cabinet and Parliamentary committees cut in upon the private line between a minister and his department. A party leader in opposition is sufficiently uncertain of the prevailing mores to announce that, in government, his party will require the resignation of any permanent head who is unable to go along with its policies. Probably in New Zealand we have already gone too far ever to reinstate the simple doctrine that a minister and his department are one."[38]

2.6.2 The decisions taken so far under the Act reveal, I believe, this new constitutional development. The relationship between Minister and Department is changing. The old assumption that the Minister is the Department is no longer entirely accurate. A large modern Government Department can often become a very separate entity. The Act, in tacitly accepting this situation, opened up this development for possible scrutiny. The Courts appear to have accepted this change. In this light, the conflict (or, more correctly, disagreement) between Minister and Department appears to be less dramatic - it may indeed be a healthy thing.

3. PRIVILEGE CLAIMS

3.1 This Section 3 looks at another group of cases - those involving a claim to legal professional privilege under Section 9(2)(h) of the Act. These cases highlight the role of the Ombudsman under the Act and indicate some ways in which his functions have shifted as a result of the Act. Again three cases from the Ombudsman's Case Notes will be considered. The law relating to Legal Professional Privilege will also be discussed, together with the relevance to one of these cases of law on Copyright. From these matters it becomes clear, I believe, that the Ombudsman is now involved to a greater extent than previously in considering matters of law. In this area the Ombudsman's role begins to overlap with that of the courts in deciding the extent of legal privilege and the circumstances in which it will apply.

3.2 The very existence of legal professional privilege as a ground for withholding information has drawn some criticism. A senior surgeon has commented:[39]

> "...I must say I find it intriguing that our law-makers continually give considerable regard to the maintenance of legal professional privilege. Maybe it's a reflection of the number of lawyers in Parliament; in any case, they have indeed done so in the Official Information Act. On the other hand, however, doctors and other health professionals, working under similar ethical rules of confidentiality, receive no such protection, and to my knowledge never have."

One answer to that might be that such legislative provisions are simply the result of the Courts' inveterate habit of assuming that statutes are not intended to derogate from the common law rules on legal professional privilege. The courts traditionally have read down the provisions of any statute which might conflict with legal privilege.[40] Perhaps some in other professions might comment that this is a relection of the number of judges who are lawyers.

3.3 The Cases Considered by the Ombudsman

3.3.1 The Ombudsman accepted that legal professional privilege applied in a case where a request was made for a copy of a draft bill, called the "Competition Bill."[41] The draft bill had never been introduced into Parliament and had, in effect, been abandoned. The Ombudsman found that "The requisite relationship of solicitor and client exists between Parliamentary Counsel and the Government. As legal professional privilege is regarded by the Courts as extending to salaried legal advisers of Government Departments, the argument that the withholding of the information in question was necessary to maintain legal professional privilege was established by the Secretary."[42]

The Ombudsman further concluded that there was no countervailing public interest to override the privilege since the Bill could be changed at any time or abandoned and once introduced into parliament would be subject to parliamentary privilege. This was a case, of course, where Section 9(2)(g) of the Act ("free and frank expression of opinions") could also have applied, but this point was not considered by the Ombudsman as he had already accepted that the privilege applied to the whole bill.

3.3.2 On the other hand, legal privilege has not been accepted by the Ombudsman in two cases. One case involved an assessor's report to the Earthquake and War Damage Commission.[43] The Commission argued that the privilege applied as the report was obtained, among other reasons, in the expectation that litigation might eventuate over the claim made on it. The Ombudsman in considering the claim to privilege, laid emphasis on the word necessary in Section 9(2) - a point to which I shall return later.

On the privilege issue the Ombudsman referred to two legal authorities. The first was an extract from Cross on Evidence[44] which laid emphasis on the point that the information must be communicated to the lawyer "for the purpose of obtaining advice

upon pending or contemplated litigation.[45] The second authority was an unreported judgment, then just recently delivered.[46] In that case Wallace J. had ruled that the assessor's report was protected even though the reference to legal advisers was not the principal reason for obtaining the report. However the Ombudsman also quoted the judge's comments that: "I would agree that where there is no or little or only incidental thought of litigation, assessors' reports will not be privileged under the appreciable purpose test."[47] The Ombudsman concluded that advice concerning possible litigation was not an appreciable purpose.

3.3.3 The other case where a claim to privilege was rejected by the Ombudsman involved an index of decisions of the Transport Licensing Appeal Authority. The index was compiled by staff of the N.Z. Railways Corporation for internal use. The Corporation was not prepared to release it to the requester. The attitude of the Corporation, in the circumstances, was understandable. The Corporation can forgiven for regarding the requester in the same light as counsel in Court proceedings who, in order to avoid having to do his own case research, asked for an Order for discovery to make the other side's research available to him. However, the index is, of course, official information and the Ombudsman again referred to Cross on Evidence[48] to emphasise that privilege only attaches to communications between solicitor and client. In this instance, the Ombudsman could not see how the index could be the result of communications with the legal staff of the Corporation as opposed to communications between the various members of the legal staff.

3.4 The Law Regarding Legal Professional Privilege

3.4.1 Since these last two decisions of the Ombudsman seem to me to involve substantially legal questions, it is useful to consider

in more depth the law relating to legal privilege. In Halsbury's Laws of England it is summarised as follows:[49]

> "Confidential communications passing between a client and his legal adviser and made for the purpose of obtaining or giving legal advice are in general, privileged from disclosure... Confidential communications other than those passing between a client and his legal adviser are not privileged from disclosure."

3.4.2 One of the best judgments in this area is that of Lord Denning MR in Alfred Crompton v. Customs & Excise Commissioners where he considered the position of salaried legal advisers":[50]

> "....Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. ... In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer.... They are regarded by the law as in every respect in the same position as those who practise on their own account. ... I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege; and I have never known it questioned. ... I speak, of course, of their communications in the capacity of legal advisers. It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege. ..."

3.4.3 The privilege also extends to a solicitor who has ceased to practise[51] and to an attorney's clerk[52] - so a qualified legal clerk, who does not hold a current practising certificate but is employed in a legal section, could claim privilege. But the communications must be referrable to the relationship of solicitor and client.[53]

3.4.4 The question of the extent to which litigation must be anticipated was also considered by Lord Denning.[54] He said:

> "I ask myself: can the commissioners properly claim legal professional privilege for these internal documents? I think they can. It is true that the documents were not obtained solely or merely or principally for their solicitor. They were obtained primarily in order to enable the commissioners to form their own opinion of the justice of the company's claim to deductions. But, at the same time, they were obtained as material to place before the solicitor if it came to a fight, as the commissioners anticipated that it might..... The case seems to me very much like a case where the head office of a company is concerned with the way a branch manager is handling its moneys, and instructs its accounts department to look into it, realising that, if the investigation should disclose irregularities, the matter will be placed in the hands of their solicitor. In such a case the internal memoranda passing between the accounts department and the other departments in the course of the investigations is privileged....."[55]

There is a fairly strong parallel between the situation posited by Lord Denning and that in the Earthquake and War Damage Commission case referred to earlier.

3.4.5 However the question of the application of legal professional privilege it reports obtained for a dual purpose was reconsidered more recently by the House of Lords in Waugh v. British Railways Board.[56] Lord Simon referred to two conflicting principles:

> "Historically, the second principle, that a litigant must bring forward his own evidence to support his case, and cannot call on his adversary to make or aid it, was fundamental to the outlook of the courts of common law. The first principle, that the opponent might be compelled to disclose relevant evidence in his possession, was the doctrine of Chancery, a court whose conscience would be affronted by forensic success contrary to justice obtained merely through the silent non-co-operation of the defendant, and which therefore had some inclination to limited inquisitorial procedures. The conflict between the Chancery and the courts of common law was, here as elsewhere, ultimately resolved by compromise and accommodation."[57]

The House of Lords in Waugh overruled many earlier cases and ruled that a document is privileged only if communication with legal advisers is the "dominant purpose" for bringing the document into existence. The New Zealand Court of Appeal had earlier applied the "appreciable purpose" test.[58] Whether the test of "dominant purpose" or "appreciable purpose" is applied, the decision must be the same in the Earthquake and War Damage Commission case - the report was not privileged. However, it is clear from Lord Denning's comments that this is an issue on which even very experienced judges have disagreed in the past.

3.4.6 Legal privilege has been further extended to cover not only anticipated litigation, but also anticipated administrative investigation. In West-Walker,[59] North J. said of legal privilege:

> "The Solicitor-General claimed that this rule was only a rule of evidence and, therefore, had no application to enquiries made by executive officers pursuant to statutory authority. I do not agree. It finds expression, it is true, in Court proceedings, but it would be wrong, I think, to regard the rule as being of limited application. It is more than a contractual obligation. It rests, in my opinion, on the wider ground of public policy and, therefore, applies generally unless the terms of a particular statute either expressly or by necessary implication remove the protection."

Of course, investigations by the Ombudsman could be covered by this rule. Presumably, communications between a department and its legal advisers made in contemplation of an investigation by the Ombudsman under the Act are privileged! More important, however, is the need to recognise that legal privilege potentially has a very wide ambit.[60] For this reason there seems to be some tendency for departments to tend to rely on privilege under Section 9(2)(h) rather than other provisions such as Section 9(2)(g) which may be more appropriate. That certainly seems to be a point which arises from both the "Competition Bill" and the "Railways Index" cases. The reasoning seems to be that

the Ombudsman is more likely to accept a claim to legal privilege, the ground rules for which are laid out in the court decisions, rather than the more nebulous appeals to "constitutional conventions" or "free and frank expressions of opinion" which are more difficult to substantiate.

3.4.7 Claims to legal privilege are also open to abuse. It would be unfortunate if one result of the Act is to further expand the "when in doubt, send it to 'legal'" syndrome. The point is that officials who believe they have genuine grounds for withholding information should state those grounds rather than sheltering behind legal privilege.

3.5 Privilege and the Ombudsman

3.5.1 Looking back at the three cases concerning privilege, investigated by the Ombudsman, these cases can be examined in the light of the court decisions referred to. It is clear from the cases that legal professional privilege does extend to cases such as the "Competition Bill" case. It might have been more interesting if the case had been considered under Section 9(2)(f) and (g) in the Ombudsman's case note, since the real reason the Deaprtment wished to avoid disclosure was (I suspect) its desire to preserve the confidentiality of its advice to the Government. One could also question whether withholding the whole bill was "necessary" to maintain legal professional privilege - the Ombudsman did not consider the possibility of releasing part only of the bill. The Ombudsman's recommendation in the "Earthquake & War Damage Commission" case accords with the English and New Zealand authorities.

3.5.2 I am less happy with the "Railways Index". In strict law the Ombudsman is no doubt correct. The index is official information and is not the result of a communication with legal advisers. However the index was prepared in anticipation of proceedings

before a tribunal and for no other purpose. Given the broad and liberal approach of the Courts to privilege claims, it is possible that a Court could accept a claim for privilege in the circumstances. Clearly the index was prepared by the solicitors for the benefit of their client and in anticipation that the client would require the information in future proceedings. There is already authority for the proposition that the enquiries made by a solicitor on behalf of a client may be privileged[61] - in other words the information was not actually communicated by the client to the solicitor, but obtained by the solicitor for the clients benefit.

3.5.3 The rationale for legal privilege was well explained in the US case Mead Data,[62] where the court held that the government was:

> "dealing with its attorneys as would any private party seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counsellors ..."

If the reason for privilege is that the public interest requires that each party to a legal dispute should have "full and frank communications" and thus be able to present his case to the best advantage, then the Railways, like any other person, has a right (indeed a need) to deal with its solicitors in confidence. Similarly, if one refers to the second principle mentioned by Lord Simon,[63] one could ask: should the litigant not bring forward his own research into the earlier cases and not call on his adversary to make or aid it.

3.5.4 Whether that need to deal in confidence should extend to the results of the legal adviser's research into the legal authorities, is another matter. Certainly none of the case law I have found would suggest the privilege should extend that far. Equally there are no cases I can find which would suggest it will not extent that far.

The question of the application of the Copyright Act 1962 in this case was not considered by the Ombudsman. While not wishing to enter into a detailed consideration of Copyright law, some points can be made from reference to the Copyright Act. The index would be classed as a "literary work" which "includes any written table or compilation" (Section 2).The index is therefore protected (Section 9) and "reproducing the work in any material form" constitutes an infringement (Section 7(3)(a)). There is protection for "fair dealing" but this largely covers "research or private study" and "criticism or review" (Section 20).

3.5.5 However, the Official Information Act, being an Act which specifically deals with the question of release of information, must, I think, be taken to apply in preference to the general provisions of the Copyright Act. Certainly Section 52(3)(b) of the Official Information Act cannot be taken to mean that the Official Information Act is to be read subject to the general Acts such as the Copyright Act.

If the Copyright Act does not prevail, a further difficulty arises. If the information has already been published, can the information still be requested under the Official Information Act? Presumably so, although the Department could charge for it so that there would be no advantage to using the Act. So, if a Department thinks that information of this type may be requested, it may be better for it to publish the information for all to obtain - at a reasonable price.

3.5.6 My comments in this subsection 3.5 are not intended as a criticism of the Chief Ombudsman. Some of these cases involve what must, on any view, be regarded as "nice" questions of law. Rather, my point is that the Ombudsman under the Official Information Act is drawn more into making recommendations touching matters of law. In doing so, he is necessarily required to approach his task in much the same manner as a judge would do. Unfortunately the Ombudsman does not always have all the

advantages and resources of the judges. This is a difficulty which has not arisen in other jurisdictions such as the United States which give a stronger role to the courts in deciding on access to information. The question of the extent to which the Act makes it possible, and in some cases desirable, to apply for judicial review of the Ombudsman's recommendations arises later in this paper.

4. INTERPRETATION OF THE ACT

4.1 The Danks Committee specifically designed the Act to set general guidelines rather than inflexible rules. On the subject of exemptions contained in overseas legislation, the committee said:

> "These exemptions tend to be drafted in broad terms which leave open questions of interpretation, or they go into excessive detail which sometimes appears to reflect defensive attitudes."[64]

Interpretation of the Act thus becomes an important function. This Section 4 therefore looks at two examples - two instances in which the Ombudsman has aroused controversy by the manner in which he has interpreted those parts of the Act which are drafted in broad terms.

4.2 Beyond Reasonable Doubt

4.2.1 The first of these instances is the Ombudsman's statement that for information to be withheld under Section 9 of the Act, there must be "proof beyond reasonable doubt". This is at first sight surprising since that standard of proof is normally confined to criminal proceedings. Official Information is essentially a civil matter and one would have expected the civil standard of proof on the balance of probabilities to be applied.

4.2.2 The Ombudsman is not alone in concluding that the burden of proof is on the department wishing to withhold information. Mr David Baragwanath Q.C. is of the view that:

> "The scheme of Sections 6, 7, 8 and 9(2), particularly when read with Section 5, places the burden of proof upon the Crown in each case. This burden must be applied by department, Ombudsman and Minister; if not applied there is a reviewable error of law. Only where the Section 9(2) onus is satisfied does the burden pass on application (sic) of Section 9(1)."[65]

4.2.3 However the Ombudsman goes further than this in setting the standard of proof at the level of beyond reasonable doubt. To do this, the Ombudsman looks to the word "necessary" in the opening words of Section 9(2) which are:

> "Subject to Sections 6, 7, 8(1), 10 and 18 of this Act, this section applies if, and only if, the withholding of the information is necessary to ...."

Some emphasis could justifiably be placed also on the words "if, and only if".

4.2.4 The Ombudsman's reasoning is then stated as follows:-

> "For 'necessity' to be established, the unavoidable consequence of disclosure would have to be failure to achieve one of Section 9(2)(h), (j) or (k). Proof that a consequence would follow disclosure must approach that of beyond reasonable doubt if it is to be regarded as unavoidable. That strict proof is required follows from the hierarchy in the protection provisions in Par I of the Act: 'Can reasonably be expected" (Section 8); 'is likely to' (Sections 6 - 7); and 'is necessary to' (Section 9)."[66]

The Ombudsman referred to dictionary definitions of the word "necessary" which refer to the idea of inevitability and continued:

> "Just as more, and more cogent, evidence is required to establish beyond reasonable doubt that A committed murder than that he exceeded a speed limit, so too more, and more cogent, evidence is required to establish on the balance of probabilities that a consequence is unavoidable than that it is likely. In practice this amounts to much the same as that proof should be proven beyond reasonable doubt."[67]

4.2.5 Some commentators have criticised this conclusion.[68] The Ombudsman appears to move from accepting that proof on the balance of probabilities is appropriate and, by arguing that more cogent evidence is required, moves to the conclusion that proof

beyond reasonable doubt is required. With all due respect, I think the Ombudsman has confused three things: the factual requirements; the burden of proof; and the standard of proof.

4.2.6 Perhaps the matter can be better understood if three questions are asked: What? Who? and How? These may be answered as follows:

(a) What? (the facts which must be proved) - that withholding the information in question is necessary to maintain legal professional privilege.

(b) Who? (the burden of proof) - the department/ Minister/Quango which believes it should withhold the information must provide the proof.

(c) How? (the standard of proof) - on the balance of probabilities.

4.2.7 Put like that, it is, I think, clear that the Ombudsman's contention that the need for more cogent evidence means proof beyond reasonable doubt has confused the issues. Moreover, the standard of proof remains the same for all criminal charges, including murder and exceeding the speed limit. The standard of proof beyond reasonable doubt applies in both those cases. Reference may also be made to case of K. v. F. which held (among other things) that the appropriate common law standard of proof is only displaced by very clear statutory language.[69]

4.3 The Constitutional Conventions

4.3.1 Section 9(2)(f) breaks new ground by referring, for the first time in a New Zealand statute, to the constitutional conven-

tions. Four specific conventions are mentioned. Obviously, since the reference to these conventions as a part of a statutory requirement marks a new departure, some initial difficulties in interpretation are to be expected.

4.3.2 There are three basic considerations:-

(a) Each convention is "unwritten" in the sense that it has not previously been referred to in any enactment. The exact extent of the application of the convention is not always certain.

(b) The act refers to the conventions "for the time being". The conventions can be, and have been, changed. It may be difficult to know if the convention has been changed. The only way of knowing is to look at the practise of those involved. The Ombudsman commented: "As to the confidentiality of advice, I believe the Ombudsman Act 1975 has already been responsible for some modification of this convention."[70]

(c) Constitutional conventions are from time to time broken. For example the convention on ministerial responsibility has not been observed on occasion: a minister may claim to be "responsible" but not to blame. As the Ombudsman observed: "The nature of a constitutional convention is such that it can be departed from without necessarily impairing its effectiveness".[71]

4.3.3 In one case[72] there was a difference of opinion between the Ombudsman and the Reserve Bank as to the exact extent of the convention referred to in Section 9(2)(f)(iv) of the Act: "The Confidentiality of advice tendered by Ministers of the Crown and

Officials". The difference of opinion was recorded by the Ombudsman as follows:

> "The Bank informed me, without providing any evidence to support its view, that it considered there was an unwritten constitutional convention in New Zealand that Ministerial advisers do not make public the advice tendered to Ministers. The Directors of the Bank also considered a convention existed that advice to a Minister should remain confidential unless the Minister chooses to release it.
>
> I was unable to accept the proposition that any such convention, however it was defined, required that all advice in all circumstances when tendered by offocials to Ministers, was confidential."[73]

4.3.4 Since the Act specifically refers to this convention, it is clear the convention exists, or at least is to be deemed to exist for the purposes of the Act. The Ombudsman's point, however, is that the convention does not cover <u>all</u> such advice. Just which advice and what circumstances, are covered by the convention? This is a matter which will require further consideration. No doubt, in time further cases will arise, giving the Ombudsman and officials the opportunity to come to some understanding of what information is covered by the convention. Such an understanding can best be reached between someone acting informally, as the Ombudsman does and the Public Service. Involving the courts in such matters could well make it more difficult to reach some understanding. But in the long run, a judicial ruling would be more authoritative.

4.3.5 Another case considered by the Ombudsman in which the question of the constitutional conventions was raised, concerned a request for forward estimates of unemployment provided by the Department of Labour. The Department decided to withhold the forecasts under Section 9(2)(f)(iii) which refers to the convention protecting "the political neutrality of officials". The Ombudsman did not believe that release of the forecasts would have such a drastic effect and commented:

> "The Official Information Act, in any event, allows the withholding of information only if that is 'necessary to maintain' the constitutional conventions on which reliance is placed. It does not use the phrase "constitute a breach" and cannot be interpreted to mean that there is to be no disclosure of information if a convention would be breached. A practical test might therefore be to ask whether disclosure of the information in this instance would go to the heart of a particular convention. This was not established by the Secretary."[74]

The Ombudsman is here emphasising the words "necessary to" in Section 9(2) by contrast with the words "would be likely" (Sections 6 and 7) and "could reasonably be expected" (Section 8).

4.3.6 The then Acting Minister of Labour disagreed with the Ombudsman and exercised his power of veto. Paragraph 2 of his veto reads as follows:[75]

> "The grounds for the direction are that pursuant to Section 9 of the Official Information Act, and notwithstanding the opinion of the Chief Ombudsman, the release of the information sought would undermine the constitutional conventions as to the neutrality of officials and the confidentiality of their advice. It would also undermine the free and frank expression of opinion between Ministers and officials and the protection of officials from improper pressure or harassment."

4.3.7 The Minister then went in to itemise several matters indicating his reasons for his conclusions. It should however be noted that the veto directive neatly sidesteps the Ombudsman's arguments based on the word "necessary" and his observation that the act does not refer to a "breach" of the convention. The minister simply says the release of the information would "undermine" the convention - does he believe it would go "to the heart" of the convention or not? The Minister does not say whether he accepts the Ombudsman's interpretation of the Act.

4.3.8 On the other hand, there do remain good reasons for keeping confidential the advice given on some occasions. The Danks Committee in its comment on its draft of what ultimately became Section (2)(g), included the following quote:

> "'It is useful to recall that the Constitution of the United States was itself written in a closed meeting in Philadelphia; press and outsiders were excluded, and the participants sworn to secrecy. Historians are agreed that if the convention's work had been made public contemporaneously, it is unlikely that the compromises forged in private sessions could have been achieved, or even that their state governments would have allowed the delegates to write a new constitution.' A. Westin, Privacy and Freedom (1967), p. 46."[76]

5. A COMPARISON OF THE ROLES OF THE MINISTER AND THE OMBUDSMAN

5.1 This section of the paper examines some of the functions and duties that are common to both the Minister and the Ombudsman. Both must apply the criteria contained in the Act. If they do not do so, each may be the subject of an application for judicial review - although to date only one such application has been made in connection with the Act. Consideration can also be given to the extent to which the Minister, in the exercise of the veto under the Act, can be said to be in effect a court of appeal from the Ombudsman's recommendation. In practice, to date, Ministers have not exhibited many of the attributes of an appellate court.

Following on from the requirement that both Minister and Ombudsman observe the criteria of the Act in making decisions, this section examines the extent to which motives and reasons for requesting information may be relevant. Strictly speaking they are not relevant under the Act, but they may become important in some instances - for example when conditions are imposed on release of information.

5.2 Minister and Ombudsmen Alike

5.2.1 As has been said previously the actions of Minister, Ombudsman and department alike are all ultimately subject to the same constraints. All must apply carefully the various criteria set out in the Act. Neither the Ombudsman's recommendation nor the Minister's veto is exercisable merely at will; each must exercise his powers in terms of the legislation. Moreover, as has been noted in Section 4.2 of this paper, there is a clear hierarchy in Sections 6 to 9 of the Act - a greater degree of interference with the interests to be protected is required by some sections than by others. Also Section 9 protects the interests mentioned in Section 9(2) only to the extent there is no countervailing public interest under Section 9(1).

5.2.2 As has been noted above, the Act imposes a specific "public duty" (Section 32) in some instances. While there is as such no right of appeal to the Courts from a decision under the act, there may be as Mr Baragwanath noted above "a reviewable error of law".[77] In other words the normal rules of administrative law apply, and if the Ombudsman or the Minister has erred in law his decision may be reviewed by the courts. This is an important control on the Ombudsman and Minister in ensuring that the criteria laid down by the Act are adhered to.

5.2.3 The first reference on the Ombudsman's Case Notes to an application being made to the High Court was in the case of a request for the police briefs of evidence in a District Court hearing.[78] The police declined the request but the Ombudsman on investigation recommended that the briefs be released. The Ombudsman reports that the police applied to the High Court for "judicial review".[79]

5.2.4 This, of course, is a matter which is of considerable importance - the Ombudsman received a number of similar requests from solicitors for those facing criminal charges. It is a matter on which a clear ruling by the Courts would be helpful so that prosecution and defence alike know where they stand for the future. It was therefore an obvious case in which to apply to the High Court so that guidelines can be settled. Judicial review, as such, would appear to have been inappropriate in this case. However the case is, I believe, a good example of instances where judicial review (where available) may have advantages in giving certainty where clear rules are desired. For this reason judicial review of ministerial vetoes and the Ombudsman's recommendations may be considered desirable in some cases.

5.3 A Court of Appeal?

5.3.1 As mentioned above, the Minister's veto powers in many ways have the characteristics of a decision on appeal in the Court system. In the Reserve Bank case [80] previously mentioned, the Ombudsman said:

> "Under Section 32 of the Act the Minister responsible for the organisation is the final arbiter (subject to possible review of his decision by the Courts) as to whether information should be made available. However, the existence of the special procedure set out in that section seems to me to preclude reliance at any earlier stage on a Minister's view as a ground for withholding information. The organisation concerned is obliged, in my opinion, to justify its decision by reference to specific provisions of the Act. Any other course would be an abrogation of the organisation's responsibilities under the Act."[81]

5.3.2 However it would be a mistake to regard the Ombudsman simply as a lower court and the Minister as an appellate court. For one thing, the public have come to regard the Ombudsman as an independent arbiter in government matters - the Minister is seen as an involved (and not always unbiased) participant.[82] Moreover neither Ombudsman nor Minister is necessarily bound by a system of precedent.

5.3.3 Most importantly however, it should be noted that at least one Minister, unlike appeal courts in general, apparently considered himself not to be in any way confined to the facts or issues raised before the Ombudsman. I refer to what was perhaps the most unusual Ministerial veto issued to date, namely that in the School Computers case.[83] As mentioned earlier the Minister specifically stated that his decision was not based on any advice (a Court of Appeal which does not hear submissions from either side?). The veto ruling is also interesting in this case because the Minister relied on different grounds from those considered by the Ombudsman and the Department.

5.3.4 It is therefore necessary to beware of placing too much emphasis on the appellate nature of the Minister's role. In many ways the veto as exercised to date resembles more closely the Presidential veto under the US Constitution - it in no way assumes that the exerciser of the veto has not previously been closely involved in the debate or that he may have come to a decision based on quite different considerations. Whether this is correct and whether the veto has in each case been properly or validly exercised is a matter I wish to come to later.

5.4 Motives for Request

5.4.1 Finally it should be noted that both Minister and Ombudsman must, in applying the criteria contained in the Act, look at each issue on the basis of the information requested and not have regard to the motives of the requester. The judgment is made about the item of information not the requester. The reason for the request and the use the information is to be put to are usually irrelevant and therefore not stated.

In some ways this is unfortunate, as those reading reports of decisions such as the Ombudsman's Case Notes must sometimes wonder why the information is wanted. However, the matter goes beyond mere idle curiosity. If it is known that the information is wanted for quite innocent purposes, the decision maker must surely be more willing to release the information.

5.4.2 Sometimes, of course, the requesters motives or identity is known. The fact that the requester in the "Stud Book" case[84] was a journalist, for instance. In other occasions the identity of the requester is only let slip at the end of a report. Thus in a case[85] concerning a request for a list of temporary employees, it is only at the end of the Ombudsman's report that he mentions the requester is a Union. I, at least, regarded the case in a different light once I discovered that fact. There is

surely a stronger case for giving the Union a list of workers so that it can invite them to join the Union, than there would be (for instance) in the case of a mail-order firm simply wanting names for addressing "junk mail".

In that case however the Ombudsman correctly observed that:

> "The Act does not concern itself with the identity of an applicant (provided he or she is authorised by the Act to request information), or with the reasons on which the applicant is or may be basing a request for information. While there are circumstances in which those reasons could be relevant to my consideration of the grounds on which a department has declined a request, they were not relevant in this case."[86]

5.4.3 One instance in which motives become relevant is Section 9(2)(k) which aims to prevent use of official information "for improper gain or improper advantage". There the use to which the information will be put becomes relevant. However this subsection is only applicable in a limited range of circumstances and the Ombudsman in his decisions thus far has been careful not to give this clause a very wide application. Similarly, under Section 9(1) the motive for the request or the use to which the information will be put, may be relevant in deciding whether there is some overriding public interest which requires release in a specific case.

5.4.4 Motives are also relevant in cases where conditions are imposed on the release of information. The Act does not actually say that conditions may be imposed but Section 28(1)(c) does permit the Ombudsman to review a decision which "imposes conditions on the use, communication or publication of information. ..." It can be argued that this section either:

(a) Tacitly permits conditions to be imposed, or

(b) Applies only to the situation where, although the Act does not require release of the information, the department has decided it could nevertheless release the information in this instance provided conditions are imposed on its use or republication, or

(c) Is designed to permit the Ombudsman to review a decision imposing conditions where the review is merely a convenient way for the Ombudsman to determine that conditions have been imposed and for him to inform the department concerned that it has no power to impose conditions.

It appears to have been accepted in practice that there is a power to impose conditions. Mr Ian Miller of the State Services Commission said:

> "The view that has been developed on the use of conditions for releasing information is that where the organisation can justfy withholding that piece of information in terms of one of the reasons given in the Act, but where there seems to be some countervailing argument in favour of releasing it to a particular individual or organisation, then it would be proper to do so subject to conditions. The example that will be familiar to many people here is that of a researcher coming to a department. That person would be asked to sign a declaration that they wouldn't disclose the information beyond the immediate requirements of the research."[87]

A public service solicitor went further, saying:

> "We don't accept the commission's view about conditions. We think it's too narrow. We have applied conditions in one situation where we don't think we would have grounds for withholding, and that is in relation to the disclosure of witnesses' names. We may be prosecuting an offender and the ofender's solicitor wants to have access to our prosecution file. In particular, the lawyer wants to know who our witnesses are going to be. We have said that we will give access to the prosecution

> file and give the names of the witnesses we are going to call, on condition that when and if those witnesses are interviewed by the defence solicitor one of our senior officers is present. Initially, when we laid down that rule we also included a requirement that if the solicitor took any statement he should give a copy of that to us. This was objected to by solicitors in Auckland so we have dropped that part of it, but so far we have had no strong objection to the principal condition."[88]

5.4.5 Assuming that the section does assume a power to impose conditions, the question of motive or use of information does become relevant. The proper interpretation of Section 28(1)(c) is a matter which has yet to be settled. The point of Section 5.4 of this paper, however, is that background and context can never be divorced totally from any decision under the Act. As was said in the case of medical information:

> "I am not suggesting that simple medical information should be kept from the patient by using whatever means exists under the Act. But I am suggesting that such information must be provided in a way that ensures the recipient understands its proper meaning."[89]

5.4.6 On the other hand, there is as noted before, a need to observe the criteria provided by the Act and not to rely on instinct. As Mr Baragwanath commented:

> "One informed observer has expressed the opinion -
>
> > '... that many decisions as to whether or not to release information are based on sheer perception and then justified by resort to whatever section in the Act seems to provide the greatest support for a conclusion which has already been reached'.
> >
> > Practices of this kind, if not exposed and resisted, acquire a spurious legitimacy."[90]

Nor is this a uniquely New Zealand phenomenon, a commentator on the Australian experience says:

> "Prior to the Act's introduction certain senior officials were saying the government of the day did not understand the consequences of such legislation. These officials seemed to see it as their role to protect the government from itself. Now this arrogant attitude is expressed when it comes to deciding the application of particular exemptions. The application of exemptions is approached on the basis of what the applicant is perceived to want the information for, and not on whether the harm the exemption is intended to prevent can reasonably be expected to occur."

No doubt this Australian view concerns what is mainly a temporary problem which will slowly dissolve as the new Act is more widely accepted. Certainly there is no evidence to suggest such a view is widely held in New Zealand.

6. THE MINISTER

6.1 I now turn to look at the Minister's role on its own. Like the Ombudsman, the Minister appears to have a quasi-judicial function in deciding whether or not to veto a recommendation. There are three cases which illustrate this quite well. Reference must also be made again to the School Computers case. The question must be asked whether each of these vetoes complies entirely with the requirements of the Act and of natural justice. There has been some criticism of the fact that the Act gives the ministers a veto power. Minister's use of the veto may have been influenced by an unjustified fear of the effect the Act might have. However, it must be remembered that ultimately it is the Minister who takes political responsibility - he is elected, the Ombudsman and public servants are not. Is an entrenched public official in a better position to make judgements than a Minister answerable to the electorate? It must also be remembered that the Minister does not act at will in this area, but is subject to judicial cntrol if he oversteps the mark.

6.2 Quasi-Judicial Nature of the Veto

6.2.1 Comment has already been made on the more judicial or quasi-judicial character of the functions of the Ombudsman under the Act. The same is also true to some extent of the Minister. Because, in exercising his veto power, the Minister must consider the recommendation of the Ombudsman before deciding whether or not to veto it, and because any such decision must be made on the basis of the criteria given in the Act, the Minister is necessarily involved in an exercise of a quasi-judicial nature. This is nothing new. Ministers have many powers under statute to make and amend regulations and the like and to make decisions in individual cases. In doing so Ministers tend to rely on departmental advice. The same is true of decisions under the Act

- with some exceptions ministerial vetos are usually stated to be based on specific departmental advice.

6.2.2 A typical example of the type of ministerial veto statement which is most common, is that given in "National Alphabetical Electoral Listing" case.[92] The veto was issued jointly by the then Postmaster-General and the then Minister of Justice. They listed three grounds: first that the Act was subject to the provisions of the Electoral Act 1956 which governed distribution of electoral rolls; second that the information on the rolls is personal information; third that the request required production of information not otherwise publicly available. Like most veto statements, this one was fairly brief. Whereas the Ombudsman's recommendations often run to many pages and contain in-depth consideration of issues and legal authorities, the veto statements seldom exceed one page in length and are often little more than bald assertions of fact or conclusion with only cursory references to the relevant section of the Act.

6.2.3 By way of contrast, in the Reserve Bank case referred to previously, the then Prime Minister issued a two page statement indicating that he did not propose to veto the Ombudsman's recommendation but also criticising the Ombudsman's recommendation. The statement, by contrast to the "officialese" in which most veto statements are written, is couched in Sir Robert Muldoon's own inimitable style. He first quotes from an address he made in Parliament, the second paragraph of which reads:

> "I do not know which officer of the Reserve Bank wrote the comment in the Reserve Bank Bulletin that was reported in last Saturday's "Evening Post" under the heading "R. B. Gives Warning" but I have already told the Governor of the Reserve Bank that the officer would be better employed in getting out some of the reports that I have been waiting for than in writing that fatuous nonsense."[93]

Sir Robert eventually concluded:

> "While on this occasion I am prepared to agree to the decision of the Ombudsman being carried out, it nevertheless, as the Reserve Bank Directors pointed out, breaches the principle of confidentiality of advice, however the Ombudsman may choose to argue it; and whereas as leader of the Government which introduced and passed the Official Information Act 1982 I would be reluctant to override a decision of the Ombudsman as provided for in the Act, I consider that as a general rule the confidentiality of departmental advice is more important than the curiosity of journalists, and on a future occasion my decision is likely to be different."[94]

6.2.4 While Ministerial vetoes to date have not been subject to challenge on purely legal grounds (there has of course been criticism on political grounds), it is worth considering whether the vetoes do in fact comply with the requirements of Section 32(4) of the Act. Section 32(4)(b) requires the Minister to state the "grounds" for the veto. The current edition of the Oxford Concise Dictionary gives one of the definitions of grounds as "Base, foundation, motive, valid reason". As I have mentioned above, most vetoes to date have been conspicuous by the almost total absence of reasoning. Usually, the veto simply paraphrases briefly the terms of the Act, with sometimes mention being made of unsupported assumptions of fact. The veto statements are invariably short and lacking in detailed argument. I would submit that each veto statement should:

(a) Specifically state which sections of the Act are relied upon;

(b) set out any matters of fact which are relevant;

(c) explain the reasoning which lead to the veto being applied.

6.2.5 If the veto statement does not set out these matters as far as they are relevant, it can be said that the Minister has not

stated "the grounds" for the veto. Judicial review is, of course, available to require a Minister to comply with Section 32(4)(b) and to specify the grounds. Moreover, there will always be the power to apply to the court for judicial review on the ground that the veto statement discloses an "error of law on the face of the record" or that the decision was one which the Minister could not reasonably have reached in the circumstances. The very brevity of some veto statements can be seen as an attempt not to set out the Minister's reasoning in sufficient detail so that it will be very difficult to claim before the courts that there is an error of law, for example.

6.2.6 A very recent example appears in the New Zealand Gazette of 14 June 1984. The then Minister of Trade and Industry, Mr Templeton, issued a veto to the Development Finance Corporation. The request had been for "a general outline of the Corporation's proposal to set up an investment bank". The veto consists of four relatively short paragraphs. The first paragraph sets out what was requested and directs it is not to be made available. The second summarises the Ombudsman's view under Section 9(2)(g)(i) and then asserts a contrary opinion, simply repeating verbatim most of the words of the section. The third paragraph is longer. This sets out the background and at least summarises the reasoning leading to the Minister's veto. Some attempt is made to state why the Minister believes the words of the section apply to this case - this is what the "grounds" of a decision are. However, there is still an apparent belief that the words of the relevant section need only be repeated like some ritual formula.

6.2.7 What I think Ministers must learn to do is to take time to set out the "grounds" at length so that it can be seen that the Minister has understood the law correctly and that the decision is reasonably made in the circumstances. Since the Act by Section 34 clearly recognises that judicial review may be obtained, the obvious reason for providing in Section 32(4)(b)

that "grounds" must be stated is to ensure that the courts can review matters such as errors of law or unreasoinable decisions. This is only possible if the grounds of the veto are set out in full. If this is not done then the requester must have the right to ask the courts to compel the Minister to set out his reasons more fully.

6.2.8 The final paragraph of Mr Templeton's veto simply reads: "4. This direction is not based on any advice". The question of the duty to consider the views of interested parties arises later in this paper. However, it is strange that here, as in the School Computers case, the Minister has disclaimed the receipt of any advice. Surely the veto must be less likely to be challenged on legal grounds if based on detailed advice as to the law and the facts pertinent to the issue. Perhaps this simply illustrates that some Ministers have not yet realised that the veto cannot be exercised simply at will, and that there are external constraints on the use of the veto.

6.2.9 It is also worth giving consideration again at this point to the Minister's veto in the School Computers case. The Minister there issued his veto on different grounds from those on which the department and the Ombudsman based their conclusions. It could be argued that natural justice requires that the Minister at least permit the requester and the department to give their views of the new grounds raised by the Minister. The requirements of natural justice vary according to the nature of the case,[95] but it is clear that the requester at least must have a right to advance his case in the face of a new and previously unexpected line of argument.

6.3 Publicised Criticism of the Veto

6.3.1 The Ministerial veto powers are one aspect of the Act which has come in for some criticism. Mr Baragwanath has said:[96]

> "The Ombudsman is Parliament's officer and the public watchdog. For him to be overruled by a member of the Executive whose accountability is the major purpose of the Act is a matter of grave public concern."

Mr Baragwanath's comments have also made the front page of the newspapers. One such newspaper report commences:

> "Cost is deterring people from challenging ministerial veto of release of information under the Official Information Act, Auckland Queen's counsel David Baragwanath said yesterday."[97]

6.3.2 The Deputy Prime Minister, Mr Palmer, is also on record as criticising the use of Ministerial veto under the Act. The possibility of the new Government amending the Act will be discussed later. Prior to entering politics Mr Palmer wrote a book called "Unbridled Power". In it he criticised the Danks Committee (which was then still working on its report) as unlikely to produce a radical reform.[98] Mr Palmer in his book suggested a "code of practice". The Danks Committee in its report and draft Bill went much further than the code of practice would have. Mr Palmer has since criticised the ministerial veto powers contained in the Act, which he now appears to believe did not go far enough in giving rights to obtain information. He can therefore be expected to push for a more radical amendment to the Act to replace the ministerial veto.

6.4 Some Reasons for Ministerial Caution

6.4.1 By way of reply to this public criticism of the apparent abuse of the ministerial veto, it can be said that the Act is still new and it should not be expected that attitudes and prejudices will disappear immediately. As the Danks Committee said:

> "We are also of the view that the principle should be applied progressively and with proper account being taken of practical considerations. An attempt

> at a sudden and definitive reform could easily fail."[99]

6.4.2 It should also be borne in mind that prior to the Act coming into force, there were some apprehensions that the floodgates were about to be opened and officials deluged in requests for information. This fear was reinforced by observers of the American experience. One New Zealand permanent head commented of the US situation:[100]

> "In a visit to the FDA in April of this year, I took the opportunity to discuss the freedom of information legislation and practise. I learned that the budget for these activites has reached $4m per annum. I also learned that all the FDA's work in this field was to be undertaken by existing staff, which sounds familiar. However, this proved to be impossible (which may also sound familiar), and now each bureau in the FDA has a staff of two or three to carry out this work. They deal mainly with the administrative procedures, being able to process only a minority of requests themselves, most of which have to be referred to professional or technical staff.
>
> I believe this is a picture of the abuse of freedom of information, and trust we may be spared such a result in this country."

6.4.3 Given such apprehension, it was with some relief that most departments discovered that the Danks Committee had not secretly been saying "Apres moi, le deluge." Perhaps closer to the New Zealand situation was the Australian experience:

> "The dire predictions of floods of FOI requests did not eventuate. The Immigration and Ethnic Affairs Department, for example, which predicted more than 100,000 requests per year had received at the end of seven months a total of 448 requests. It must also be said, however, that a number of the requests received by many agencies have been far from routine."[101]

6.4.4 By and large, departments have not perceived any drastic increase in workloads as a result of the Act. The main exceptions are the

Treasury, which has had to take on some extra temporary staff,[102] and the Education Department, which has had a flood of requests for examination papers.

6.5 The Political Argument

6.5.1 Finally on the subject of the Minister's role, it should be said that one reason that the Act was able to be framed in such broad terms, is that some control was still left with the Minister. If the members of the executive branch of government had not felt that sufficient powers of control were still reposed in them, they might not have been willing to support the Act or they might have attempted to have it "watered down".

6.5.2 The Danks Committee accepted that Parliamentary control of Ministers in the sense of the ability to dismiss Ministers for mistakes made, has little practical significance in the present New Zealand parliamentary system. However the committee believed that:

> "2.10 A Minister is and remains answerable in a way no one else can be. He is elected to Parliament under a system where the party having the greatest number of seats in Parliament habitually forms the Government - it is unreal to suggest that New Zealand voters simply elect members and not Governments - and must submit himself to re-election every three years. Judges and Ombudsmen are neither elected by nor are they accountable to the people.
>
> "2.11 A Minister is liable to be questioned in Parliament about the administration of his department and he must respond to criticism. In short, he must defend himself in a public forum."[103]

6.6 Judicial Control

6.6.1 As mentioned previously, there is also the further control of the minister by the judiciary. This control is, of course, limited to matters which can be considered on judicial review. While the powers of the Minister (and for that matter those of the officials and of the Ombudsman) are not to be exercised arbitrarily but in accordance with the terms of the Act, nevertheless the courts have consistently shrunk from attempting to substitute their own views for those of the executive - at least in regard to matters within the competence of the executive.

The Danks Committee referred to legal authority on this point.[104] There are three main grounds on which the decision of the Minister might be challenged:

(1) The Minister has not observed the criteria in the Act, or has not followed the procedure laid down.

(2) The Minister has erred in law - i.e. has misunderstood the Act.

(3) The Minister has acted on an improper motive - he has allowed himself to be influenced by matters which the Act does not accept as relevant.

6.6.2 This last point is of some interest and is worthy of note. One of the leading cases in this area is Padfield v. Minister of Agriculture.[105] The Minister had a power to set up a committee to investigate a specific complaint. He refused to do so when requested and gave as one of his grounds that the committee might make recommendations which he would not be prepared to comply with. The House of Lords ruled that this was improper. The Minister in considering an improper motive had not exercised his discretion properly. His decision was therefore invalid.

6.6.3 It is clear therefore that matters such as the potential political embarrassment of the Minister cannot be taken into account by the Minister. The problem, as always in cases such as Padfield is that not all ministers are so obliging as to admit frankly the true reasons for making a decision. It is always open to a minister, having based his decision on spurious motives, to make no mention of such motives and to justify the decision on other grounds which are acceptable. It is for this reason that a full and adequate statement by the Minister of the grounds for the veto is necessary. To some extent the problem can be overcome by use of the "discovery" process in court.[106] The Official Information Act has also helped to open up this process.[107] Despite that however, the attitudes of ministers, like all other actors in this scenario, are all important. As the Danks Committee said:

> "The will to change must inform the working of the system if it is to promote the evolution of attitutdes and practice. This applies to all concerned - ministers, parliamentarians, officials, public interest groups, and the public media. But the initiative rests primarily with ministers and the public media."[108]

7. THE OMBUDSMAN

7.1 I now turn to look at the Ombudsman's role. Because the decisions under the Act have required him to consider and decide on the basis of legal authorities, and to rule on the application of the constitutional conventions, the Ombudsman has been drawn into decisions of a judicial character. This may afect the status of the Ombudsman. The Act now means the Ombudsman is more likely to be the subject of judicial review, although I would suggest the courts will use their powers sparingly. Finally, it is interesting to note some contrasts with the Ombudsman Act - these may indicate the manner in which the Ombudsman's role is likely to develop as a result of the Official Information Act. In this regard, I would mention jurisdiction over local authorities, the need to notify a person before making adverse comment about that person, and the cases concerning the interests of third parties.

7.2 Comparison with the Ombudsmen Act

7.2.1 As stated the Act has resulted in an expansion of the Ombudsman's functions. This is partly a result of the fact that the Act is intended to create legal rights to information. It is also in part the result of the fact that Section 32 of the Act creates a public duty to observe the Ombudsman's recommendation unless a Ministerial veto is issued.

7.2.2 It should be noted that by contrast with the Official Information Act, the Ombudsmen Act 1975 creates no duty to observe the Ombudsman's recommendations. The Ombudsmen Act relies on the threat of publicity (principally reports to Parliament and the Prime Minister).[109] Also it should be noted the Ombudsmen Act prohibits judicial review of the Ombudsman's activities - except on the grounds of lack of jurisdiction.[110] Until the advent of the Official Information Act the main point of contact between

the Ombudsman and the Courts arose under Section 13(9) of the Ombudsmen Act which permitted the Ombudsman to apply for a Declaratory Judgment as to his right to investigate a matter. In practise most instances in other countries (such as Canada and Australia) where the extent of the Ombudsman's authority has been called into question, have resulted from the Ombudsman's applying to the Court to determine whether he has authority to investigate a particular matter.[111]

7.2.3 While there is a new dimension to the Ombudsman's role under the Official Information Act, nevertheless much of what the Ombudsman does under the new Act is a continuation of his role under the Ombudsmen Act. The Chief Ombudsman has said that he has always investigated complaints of a like nature to those arising under the Official Information Act.[112] Many of the Ombudsman's recommendations under the Act do simply involve him in this familiar role in investigating the administrative actions and decisions and making his recommendations as to their correctness.

7.2.4 That does not, however, deny the new characteristics of the Ombudsman's role. Throughout his Casenotes on the Act, there is regular reference to legal authorities. For instance, in a case concerning personal information held by the Rural Bank,[113] the Ombudsman was faced with a claim that the Act did not apply to information supplied before the commencement of the Act. The Ombudsman in rejecting this claim, became involved in questions of statutory interpretation and referred to legal texts on the subject.[114] Other such cases involved medical reports obtained by the War Pensions Board.[115] It was argued that the War Pensions Regulations (Regulation 3(5)) prohibited release of the reports. The validity of the regulations then came into question. The Ombudsman found that by one reading the regulations were valid but did not prevent release, whereas by another reading, the regulations prohibited release but were invalid. He determined in favour of the former interpretation. In doing so he referred to three legal principles:

(1) An absurd or unjust meaning should be avoided if another meaning is possible.

(2) Exceptions in the Act to the principles of availability of information, must be read narrowly.

(3) If, of two possible interpretations, one would lead to the provision being held invalid, then the other is to be preferred.

7.3 The Constitutional Conventions

7.3.1 The other interesting new role the Ombudsman is given by the Act is that of arbiter of the Constitutional Conventions - or at least the four conventions mentioned in Section 9(2)(f) and the conventions protecting expression of opinion to the extent they are embodied in Section 9(2)(g). This role he, of course, shares with Ministers and to some extent the officials. To date, however, the most detailed consideration given to exactly what the conventions are and what they provide for has come from the Ombudsman. Since by definition the conventions have not generally been justiciable, the courts have seldom been called upon to consider in greater depth the conventions. Eventually the courts may be asked to consider the constitutional conventions as a result of an application for judicial review arising under the Act. In the meantime, however, we must rely on the Ombudsman's ruling on the conventions.

7.3.2 The Chief Ombudsman's views on these conventions are perhaps best set out in the following comment:

> "Now, I don't know whether anyone can tell me what the constitutional convention is; I don't know whether anyone has addressed themselves to it. The immediate answer would probably be that we have a Westminster-type system of government, and these conventions are inherent in it. But what are the essentials of a Westminster-type government? I

> could tell you, because I took the trouble to look them up. It seems to me that we are going to have to look closely at the extent to which what we understand in general and vague terms to be constitutional conventions are in fact operating constitutional conventions now. It may be that the virginity of some of them has been impaired, for example, by the operations of my office over the past twenty years, because I have never been confronted with the proposition that because it would breach a constitutional convention I may not make available to a complainant the nature of advice given to a minister."[116]

7.4 Judicial Review

7.4.1 The Act clearly contemplates that a recommendation of the Ombudsman may be the subject for an application for judicial review. Given the nature of the public duties which may arise under the Act and that matters of law have been prominent in a number of decisions under the Act, some governmental agencies may consider it desirable that applications for judicial review be used as a means of resolving some issues. An application to the court in many cases will have the advantage of giving a definitive ruling on questions that are likely to arise regularly.

7.4.2 Of course, the Ombudsman has previously been subject to some degree of judicial control. The relationship between the courts and the Ombudsman is summed up in the following comment:

> "And yet... the growing willingness of the Courts to reassert and widen their traditional authority to control public power has been widely - if not unanimously - welcomed: the insistence on procedural fairness, on allowing litigants access to official information relevant to their litigation, on the unlawful use of discretions by Ministers and local authorities and on lawmakers and tribunals staying within the law. Why should the Ombudsmen be seen differently? It is not really suggested they should be... But there are several important features of the law relating to the Ombudsmen that suggest judicial caution. One is that they can, in the end 'do

> no more than recommend or comment'. A second is that they are control agencies rather than themselves the direct melders of public power. A third is that the statutes confer the powers in broad non-technical terms, with flexible procedures to match."[117]

The first of these features does not always apply under the Official Information Act: the Ombudsman's view may become binding if no veto is issued. The other two of these features however do apply and for these reasons it must be clear that the courts will exercise the power to review the Ombudsman's "recommendations" sparingly.

7.4.3 As noted previously, there has until now been little room for judicial review of the Ombudsman's recommendations. Nor were there likely to be many occasions on which a judicial review would be desired given the non-binding character of the Ombudsman's recommendations. In theory one would have expected the more common situtation under the Official Information Act to be that a requester would seek judicial review of a minister's veto. Despite the questionable manner in which the veto has been exercised in some cases (averted to previously) there have been no applications for judicial review of a veto - perhaps because the requester thinks the expense is not worthwhile, or in some cases are not aware of the possibilities for review. The only application for review so far was that commenced by the police in the briefs of evidence case. "Quangos" and Government Departments are less likely to be detered by cost and may consider an application for judicial review more readily, than private requesters. If, however, judicial review of the Ombudsman's recommendations becomes more common, this may affect the Ombudsman's status. If judicial review of his recommendations is regarded by the public in general as simply another form of appeal to a higher court, then the Ombudsman will come to be regarded as simply another judicial officer - of inferior status to High Court judges. Care needs to be taken to ensure that the unique character and standing of the Ombudsman is preserved.

7.5 Comparisons Between the Ombudsman and the Courts

7.5.1 Another difficulty arising for the Ombudsman in his expanded role is that, while many of the issues which he may face have similarities to those decided by courts, he does not have all the advantages enjoyed by the courts. When a case comes before a court, each party will usually have counsel to represent that party's interests. Counsel will be able to research the relevant legal authorities, and present the facts and the law in a coherent fashion. When the Ombudsman reviews a decision to withhold information, he will often have only the departmental case put before him. Many requesters will not have the resources to research and present their case to the best advantage. Legal aid is not available for requests under the Official Information Act. The Ombudsman, therefore, may well, in an attempt to achieve a balance, lean heavily against the department. Judges have over the years learnt to deal as fairly as they can with cases where one party is not legally represented. The Ombudsman will also need to develop this skill.

7.5.2 I have also mentioned in regard to the cases on legal professional privilege, that the Ombudsman's view of the law on privilege must be consistent with the views expressed by the courts. The Ombudsman for much of his researches of legal matters must rely on the resources of his office, which is under some pressure as a result of the Act.[118]

7.6 Local Government

7.6.1 There are some further interesting contrasts between the Official Information Act and the Ombudsmen Act. Each has a schedule setting out the institutions to which the Act is to apply. Different criteria were believed to be applicable to Official Information and accordingly the schedule to the Act differs in some instances from the Schedule to the Ombudsmen Act. Most

notably however, local government is generally exempt from the Official Information Act. The Danks Committee explained:

> "Among the factors suggesting the exclusion of an organisation are that it is more concerned with local government than with central government, has large areas of autonomy from central government in its composition, the source of its funds and the fixing of priorities, their use, the making of its decisions and the carrying out of its functions. ... Accordingly the schedule does not include bodies with essentially local functions (many of them are already subject to the Public Bodies Meetings Act 1962) or tribunals, including tribunals concerned with the registration and discipline of members of a profession or occupational group."[119]

7.6.2 It is to be remembered that the Ombudsman originally did not have any jurisdiction over local government. This was a later extension of his functions. Possibly the Official Information Act may be extended into this area also, once the principles and practise of the new Act have become settled. Certainly, I can see no reason in principle why local bodies should not have the principles of open government applied to them. As noted previously, the Ombudsmen Act has allowed the Ombudsman to make public information previously kept confidential by central government - the same is doubtless true of local government.

7.7 Third Parties

7.7.1 Further interesting comparisons can be made between the two Acts. Section 22(7) of the Ombudsmen Act requires the Ombudsman to give a right of hearing before making public any recommendation which contains criticism of any individual. This is of course a reflection of the long-recognised principle of natural justice: audi alteram partem. The Official Information Act does not contain such a provision. However by virtue of Section 29 of the act, Section 22(7) of the Ombudsmen Act appears to apply to investigations under the Official Information Act. So the Ombudsman is still required, before making a recommendation under

the Official Information Act in which criticism is made of a person, to give that person a right to "put his case".

7.7.2 Secondly, the Ombudsmen Act prohibits judicial review of the Ombudsmen's recommendations. The Official Information Act tacitly accepts that there is a right to judicial review of decisions. Since Section 32 creates a public duty to observe an Ombudsman's "recommendation" unless vetoed, a recommendation must be treated as a decision for this purpose. Those aggrieved by an adverse comment in the Ombudsman's recommendation can apply to the High Court in appropriate cases.

7.7.3 There are other instances in which a "third party" may wish to have his objections to release of information considered by the Ombudsman. Again the Official Information Act by Section 29 brings in the provisions of the Ombudsman Act to give these parties rights to be heard by the Ombudsman. In addition the right to judicial review may be relied on. The Danks Committee believed this would be sufficient to cover such cases as what is known as "reverse freedom of information" (a party arguing against release) or an individual wishing to prevent release in order to protect his privacy.[120] The committee did not wish to make the process more formal as it said:

> "It is known to be the Ombudsmen's practice to consult any third parties who might appear to be affected before making any recommendation, and this practice would doubtless extend to applications arising under the information legislation. Departments and organisations might also be expected to consult where appropriate. A statutory scheme however would tend to be complex and rigid and raise questions of the validity of decisions to disclose information."[121]

7.7.4 Some of the cases covered in the Ombudsman's Case Notes involve these situations. The "Stud Book" case has been mentioned before.[122] There the third parties were some thousands of public servants, some of whom might be expected to object to personal details such as date of birth and salary being made

public. In the circumstances their interests could only be represented by the Public Service Association. Thus we had the interesting situation of an organisation which had previously welcomed the new Act, arguing against release of information at a time when the Act had not long been in force.

7.7.5 Another such case arose from a request for a copy of the report of an internal enquiry into the "That's Country" affair in TVNZ.[123] In considering the issues of personal privacy involved the Ombudsman was scrupulous not to mention those involved. Thus he refers to the following categories:

> "(a) A named person's activity which was of the same nature as that already publicised;
>
> (b) A named person's activity in a different area from that which had been publicised but of the same nature as that publicised about others.
>
> (c) An unpublished person's evidence which related to a publicised person's activity in a publicised area."[124]

And so on through to category (e). The Ombudsman later expands on category (b), referring to the participants as X, Y and Z. None of this makes the report easy to read or understand. However it does illustrate the Ombudsman's commitment to preservation of personal privacy. He ultimately recommended release of information in categories (a) and (b) above and withholding (c) to (e); however he at no stage named those involved even in (a) and (b).

7.7.6 A third case involved the Rural Bank.[125] The Bank had been advised that a sharemilker's contract had been terminated. The sharemilker requested the identity of the informant and the information supplied by the informant. This type of case is an important one. It is a situation which can and will arise in a number of departments such as Social Welfare and the Housing Corporation. On the one hand there is the need of the Department to know if recipients of assistance from the State are abusing

the system by obtaining assistance they are not entitled to. These Departments see a need to assure informants that the advice is treated "in confidence", otherwise neighbours and others most likely to have this information will probably not supply the information. On the other hand there is the right of the individual to know who is damaging that person's reputation. This is particularly so if the informant is biased or untruthful.

7.7.7 In terms of the Act the Ombudsman first faced the question of whether the request was for personal information or not. If it was not, then Section 9(2)(b) permitted the withholding of the information. If it was personal information, then Section 27(1)(c) permitted the withholding of the information only if it was "evaluative material". The Ombudsman ruled it was personal information and was not evaluative material. He recommended that the Bank reconsider its decision accordingly. In that case the rights of the third party (the informant) were not considered very carefully. In part, this must result from the terms of the Act which does clearly favour release of personal information to the person concerned. However, the views of the informant might surely have been considered. Was the informant even aware that disclosure of his information had been requested?

7.7.8 A similar thing happened in the "Computers in Schools" Case. The suppliers of the information were not given any opportunity to put their viewpoint or even to say whether the information was supplied in confidence as far as they knew. It seems to me that the Ombudsman has not fulfilled the expectations of the Danks Committee in this regard. The procedure required by Section 22(7) of the Ombudsmen Act is not of much assistance in such a case. That subsection only requires the Ombudsman to give a person a hearing before making a comment "adverse" to that person.

7.7.9 In the cases under discussion, there was no adverse "comment". However the informant was nonetheless likely to be adversely affected by the Ombudsman's recommendations. The procedure for

judicial review may be of some assistance in such cases. However the applicability of the rules of natural justice are not fixed and rigid - the requirements of natural justice will vary according to the nature of the case.[126] Whether the rule "audi alteram partem" should apply to every investigation by the Ombudsman under the Official Information Act, remains to be seen. Also it must be remembered that different people will have different views as to what the requirements of natural justice are. The same can be said of natural justice as was said of the idea of natural law - "like a harlot the concept of natural law is at the disposal of everyone".[127]

8. THE COURTS AND THE ACT

8.1 I now come to consider the place of the courts in reference to the roles of Minister and Ombudsman under the Act. The courts, of course, may have a very specific role in enforcing (if it is ever necessary) the rights to personal information under the Act. Here, however, I am interested in the way in which the courts may control the actions of the Ombudsman and the Minister. For this reason the possibility of judicial review is of prime interest. Again, this gives rise to the question of third party rights. There is also the question of whether a defective decision under the Act may be cured by reconsideration, for example, by the Ombudsman. Finally, however, it must be said that there are conclusive reasons for relying on the Ombudsman, rather than the courts, to determine disputes under the Act. Therefore, while the courts have a role to play, it is largely confined to the matters that may arise on judicial review. It is not the role of the courts to act as a general appeal authority under the Act. However, in some areas, such as third party questions, the attitude of the courts may prove important in the future.

8.2 Judicial Review

8.2.1 As previously mentioned the Act clearly contemplates judicial review of decisions under the Act. The Act did not need to specify that judicial review may arise in respect of decisions taken under the Act, since the courts will always assume that there is such a power unless a statute clearly states otherwise. However Section 34 of the Act provides that applications for judicial review and the like may only be made after the Ombudsman has investigated the matter. It is possible, but by no means certain that the courts would have required this in any event.[128]

8.2.2 As noted previously judicial review does not imply an open right of appeal to the courts or that a judge may substitute has opinion for that of the Ombudsman. Rather the courts will confine themselves to matters such "error of law on the face of the record" and whether the decision made was one which could not possibly have been made given the criteria set out in the Act. As the Danks Committee said:

> "In the result, the executive (and the Ombudsmen on review) will have a discretion in the sense of freedom to judge that in terms of the criteria a request for a document can justifiably be refused. The courts will decline to substitute their own judgment for that of officials, Ministers or Ombudsmen. Nonetheless, as courts have often insisted, a discretion of this kind is not arbitrary. An official will not be free to decline a request for access except on the grounds stated."[129]

8.3 Third Party Rights Revisited

8.3.1 Again the point covered in Section 7.7 of this paper arises. While the maxim "audi alteram partem" and Section 22(7) of the Ombudsmen Act may provide some assistance, it is far from clear whether the courts will be able to, or will think it right to, require that the views of third parties who may be affected should be considered by the Ombudsman, the Minister or the officials. The courts have been assiduous in requiring a right of hearing to be given in cases where an employee is to be dismissed. But do the same requirements exist in the case of an individual who might wish to argue against information supplied by him being released?[130] The extent of the potential harm is usually much less, but conceivably in some cases real harm to an informant's business or reputation could result from release of the identity or business methods of the informant.

8.3.2 The informant who wishes to argue that the information he has provided should not be released may have a good case under

Sections 9(2)(a) or (b) - that is to say that withholding the information is necessary to protect his privacy or that of others, or to protect information supplied in confidence. Equally the informant may be able to appeal to Part IV of the Act by claiming that some of the information is personal to him.

8.3.3 There is also, of course the contrary argument, that information supplied since the passage of the Act must have been supplied in the knowledge that the information might be released under the Act. Very clear and specific evidence is needed therefore to show that the information was supplied in confidence. All these issues can be and are considered by the Ombudsman in considering such cases. Unfortunately, to date, those third parties who might have been able to support the consideration given to such factors by further factual evidence or more detailed submissions have not been able to do so. Instead, the Ombudsman can only refer to the case put by the department, which should properly take an independant stance in such cases. The department, like the Ombudsman at the second stage, must make a balanced judgement on whether the information should be released and not attempt simply to advance the case of the supplier of the information.

8.3.4 I have already mentioned some of the instances in which the rights of third parties could have been relevant. These include the "School Computers" case, the Rural Banks request from a sharemilker and the "That's Country" affair. The other group of cases which may well arise, concern medical reports. Here is one doctor's comment:

> "The situation could arise, however, when the doctor is imprudent enough to be rather more frank than perhaps he or she ought to be in describing one or two of the patient's shortcomings. Whether or not the information the doctor provides is true is not the point, but with the advent of this Act it would be wise for a doctor in such circumstances to avoid including gratuitous comment. I well remember a senior colleague, now long dead, giving me a bit of advice when I began practice some years ago. He said: 'If you're reporting to anybody about one of

> your own patients, if you cannot say something nice, then don't say anything at all'. That is very wise counsel."[131]

So once again, there is always the problem that if the Act is not seen to be working as expected, some of those involved simply will not generate the information they might have.

8.4 Can Reconsideration Cure Defective Decisions

8.4.1 The other possibility is that if there has been any defect in the original decision (such as a failure to consider or receive the submissions of a party who might be affected) the defect may be cured by adopting the correct procedure on any appeal. This might be the case where the irregularity was that of the department. The Ombudsman might be able to cure the defect. The same however could not be true of the Minister. As previously noted in Section 5.2, the Minister's veto power is not essentially another form of appeal. If a person is dissatisfied with the manner in which the Ombudsman exercised his jurisdiction, any irregularity cannot be said to be cured by the fact that the Minister did not decide to veto the Ombudsman's decision.

8.4.2 Even the Ombudsman's action in adopting a correct procedure in an attempt to cure a defect in the departments' actions may not be sufficient, however. The Courts are not always prepared to accept such subsequent remedial action.[132] As Lord Reid said in Ridge v. Baldwin:

> "Finally, there is the question whether by appealing to the Secretary of State the appellant is in some way prevented from now asserting the nullity of the respondents' decision. A person may be prevented from asserting the truth by estoppel, but it is not seriously argued that that doctrine applies here. Then it is said that the appellant elected to go to the Secretary of State and thereby waived his right to come to the court. That appears to me to be an attempt to set up what is in effect estoppel where the essential elements for estoppel are not

> present. There are many cases where two remedies are open to an aggrieved person, but there is no general rule that by going to some other tribunal he puts it out of his power thereafter to assert his rights in court; and there was no express waiver because in appealing to the Secretary of State the appellant reserved his right to maintain that the decision was a nullity."[133]

8.5 The Ombudsman or the Court

8.5.1 The sometimes technical legal nature of the issues raised by many of the cases considered by the Ombudsman has, as already stated, made it likely (and in some cases desirable) that the procedure for judicial review will be used to clarify the legal issues involved. The factor which may promote a desire for judicial review in appropriate cases is the need for officials to have clear and recognised guidelines. Officials, it is said, when faced by a request for information would prefer to be able to make a decision on the basis of clear rules.[134] The courts, because of the rules of precedent, may be able to establish some set rules in interpreting the Act.

8.5.2 The Danks Committee leaned heavily away from a rigid set of rules. The Act was to be a flexible and growing organism. Thus the committee said:

> "Under our proposals the judgments to be made about access have at least three significant characteristics: they are to be made by reference to broad criteria which are to be weighed against the basic presumption of availability; they are to be made by reference to the particular circumstances of the area of administration in question; and they are to be made from time to time by reference to any relevant changes in circumstances."[135]

The Ombudsman has adopted this approach. In the Rural Bank case he said:

> "In forming that opinion, in this particular case, I took account of the General Manager's concern at the

> wider implications that could arise from it. However, my opinion was confined, as it must be, to the circumstances of this particular case. It did not establish a general principle about disclosing the identity of an informant. Equally, it was not appropriate for the Corporation to assert as a general principle with application to all requests, that the identity of an informant should not be made available. Each request for such information must be considered in the light of the Official Information Act."[136]

8.5.3 I have commented earlier that officials and others may in some areas hope to obtain the sense of security provided by clear legal rulings and may therefore apply to the courts. However, given the flexibility of approach required by the Act, it is clear that it will not normally be appropriate for decisions under the act to be taken by the courts. Indeed they would decline to do so except in cases where the rules applicable on judicial review apply. While I have made some play in this paper of the quasi-judicial role of the Ombudsman under the Act, the processes envisaged by the Act are clearly more suited to the Ombudsman than to the Courts. The Act sets out broad criteria for the availability of information and the protection of important interests; it does not protect classes of documents or specific types of subject matter.

8.5.4 In the case of official information (as opposed to personal information dealt with in Part IV of the Act) the absence in many cases of blanket protections or hard and fast rules may make it inappropriate to give the courts the final decision making power. That does not mean that the courts cannot be of considerable assistance in interpreting the Act, in giving guidance to the Ombudsman as to the extent of his authority under the Act and in advising on matters of law such as legal professional privilege and even the Constitutional conventions. The Ombudsmen Act contains provision for the Ombudsman to seek the opinion of the High Court in determining whether he has jurisdiction in individual cases.[137] It occurs to me that it would be convenient for the Ombudsman, or any minister or

requester, to ask for the court's opinion on any such legal matter. This could be done by way of case stated. The procedure for judicial review is available for such cases generally. However, I would suggest that a case stated procedure could be more direct and less expensive.

8.5.5 To date, the courts have not played a large role in the development of the Act. It is suggested they could usefully play a greater role in future. However it must be said that there are distinct advantages to leaving the main power to review decisions to the Ombudsman. His procedure is informal. Those affected do not need legal representation (although, as mentioned, that may sometimes be a disadvantage). Most importantly the cost of review by the Ombudsman is much less than would be the case if review by the courts became the rule. This appears to be the major distinguishing factor between the New Zealand experience and the United States experience.

9. FUTURE CHANGES

9.1 I have already considered in this paper some of the future changes which may be expected if the Act continues in its present form. However, I now wish to consider, rather briefly, what may happen if the Act is amended. It may seem strange, a little over a year since the Act came into force, to talk of amendments, but the Labour Party, prior to the recent election did suggest that it would amend the Act to remove the Ministerial veto. The exact effect of this would depend on the manner in which this is done. The suggestion appears to be that the courts, rather than the Minister, should have the final word on release of official informtion.

9.2 At one extreme the amendment could effectively give the courts the same wide-ranging power to consider all the matters which Act makes relevant and to substitute the courts opinion on all matters for that of the officials and the Ombudsman. This could involve the courts having to consider whether there is any countervailing public interest in favour of releasing information under Section 9(1). Similarly, the courts would have to consider, for the purposes of Sections 6 and 7, whether release of the information would prejudice security or harm the economy and such like matters. This runs quite contrary to the trend in judicial thinking as evidenced in the closely analogous area of public interest immunity. The courts will not always accept the claim by the executive that certain documents must be withheld in the public interest - the courts do check the documents to ascertain whether the public interest really requires this. However, in matters such as security the courts are far less willing to attempt to substitute their own views for those of the executive.

9.3 At the other extreme there is the possibility that the Act as amended could effectively make the Ombudsman's recommendation binding. If there is no veto power, then the recommendation

creates a "public duty" in all cases. The only way to attempt to have the Ombudsman overruled would be to apply for a judicial review. As noted above, the courts do not have complete power to reconsider a decision on judicial review. As a result of judicial activism, the scope of judicial review is wide, but the courts do not attempt to substitute their views - particularly in matters of discretion. Judicial review must be based on some specific ground such as error of law on the record, or a perverse finding of fact or a failure to follow the requirements of the Act.

One result of such a change would be to place greater emphasis than ever on the Ombudsman's role. If he has the final say in most cases, the public perception of his office must change. The Ombudsman may be seen as simply another administrative tribunal. If that is so, there may be pressure to provide for a form of appeal from the Ombudsman's recommendations, which could be extended to cover recommendations under the Ombudsmen Act. This would involve matters of policy and the like which, I think, should remain the province of the executive.

9.4 Of course, it is possible that the Act as amended could take some middle course. There could be an independent commissioner or tribunal to reconsider the Ombudsman's recommenation. Any system of justice must recognise that an individual arbitrator may occasionally err. That is why in most systems some form of appellate body is established. There are of course objections to this in the case of the Ombudsman. He should not be seen as another form of judge who can be overruled by a higher court. Under the Ombudsmen Act this does not arise since the recommendations are not binding.

There are other precedents for establishing a separate Commissioner. The Danks Committee, in its comments on Part IV of the draft bill referred to the precedent set by the Wanganui Computer Centre Act 1976.[138] The Wanganui Computer Centre Privacy

Commissioner fulfills functions similar to those of the Ombudsman under the Official Information Act. There has also been criticism that the Ombudsman's role under the Act involves him in more contentious cases where confrontation with the executive is likely to lead to the "politicisation" of the Ombudsman's office.[139] If that is so, and personally I doubt it, then the answer could be to establish a separate Commissioner to exercise the powers presently given to the Ombudsman under the Act.

9.5 There are, of course, many other possible solutions. For instance there could be an Official Information Commissioner whose decision can be reviewed by the Ombudsman. I think both the present political realities and the general climate of public opinion (to the extent there is any public opinion on such matters) make it inevitable that the ministerial veto must be abolished. I suggest it is desirable that the Ombudsman's recommendation should not be final as that would do considerable violence to the Ombudsman's role as it has previously been developed. There might be some merit in accepting the High Court as the review authority. The courts have shown an increasing capacity to handle discretionary powers. Ultimately however it is not desirable for the courts to be drawn too heavily into an area such as this which involves policy and (at times) politics and requires to be handled with a high degree of flexibility and informality.

9.6 So I suppose we could do what we always do when faced by an administrative prblem with quasi-judicial ramifications - we compromise and set up an "independent" tribunal. As always, I suppose, the chairman would be a judge or at least a lawyer and one member would have close links with the executive. Section 32 would then provide that there is a public duty to observe the Ombudsman's recommenation unless within 21 days the Department or Minister or requester has lodged a notice of objection with the Official Information Tribunal.

9.7 It is interesting to note that the Australian Commonwealth statute, the Freedom of Information Act 1982, refers to two tribunals. There is the Document Review Tribunal established by Section 71. The principal jurisdiction to review decision however lies with the Administrative Appeals Tribunal under Part IV of that Act. The statute does give an enlarged role to the Ombudsman but his role is still largely in mediation and conciliation. The intervention of the Ombudsman however leaves the Administrative Appeals Tribunal free to deal principally with the more intractible cases which the Ombudsman could not get agreement on.

9.8 It seems to me that there are real advantages to giving the final decision-making power to a tribunal rather than to a court. If the tribunal includes a judge as chairman, it will be able to give rulings on matters of law with some degree of authority. The tribunal, by its rulings, can give a degree of certainty in areas where this is needed, while still retaining a greater degree of flexibility in matters such as weighing-up the public interest [under Section 9(1)]. The traditional argument in favour of a tribunal, as opposed to a court, in areas such as this, is that it can be more flexible and less formal than a court. If the tribunal includes a member drawn from the executive branch of government, then there will be seen to be a sufficient input from the politicians, without the final control being seen to rest completely with the government as is the case with the Minister's veto. I would suggest a tribunal could deal with these matters more quickly and with less cost than a court.

9.9 Whether the legislature finally adopts one of these three courses, or some other possibility remains to be seen. Whatever the outcome, it seems the Act will in future further change the nature of the Ombudsman or of the courts. The amended Act may bring the courts more into the political arena, or it may bring the Ombudsman more into the political arena (by making him the final decision maker) or it may downgrade the Ombudsman's role by

making him subject to a higher tribunal or appeal authority. The tenor of the Labour government thinking would seem to suggest that the courts rather than some other appellate body is considered most suitable to act as final decision maker. If that is the case then I would submit that careful thought needs to be given to the extent of the courts' authority. The normal rules for judicial review are simply not wide enough. The courts would need to reconsider the Ombudsman's recommendation on the merits of the case. The amending provisions would also need to make it clear to what extent the courts are expected to substitute their own views on matters such as the public interest, security and economic affairs. Given Mr Palmer's proposals for a Bill of Rights (also discussed during the recent election campaign) it seems that the courts will become involved to some extent in matters of policy in any event. From what has been said in this paper, it is, I think, clear that any such change will substantially alter the role of the Ombudsman (in making him far more subject to judicial control) and will also bring our courts far more into issues of conflict in the public arena. That, however, is, I believe, preferable to completely reversing previous conceptions of the Ombudsman's role by making him the final arbiter on official information, subject only to the controls of judicial review.

10. CONCLUSION

10.1 This paper has, I believe, shown that so far in the operation of the Official Information Act there have been three discernable trends. First the authority of the Minister has been visibly reduced. Much has been made of the veto powers of the Minister and their apparent abuse. However the fact remains that the Minister can only exercise his veto in accordance with the criteria contained in the Act and there are some judicial as well as political controls on the minister's actions. The flurry of vetos which rose up last year appears to have died down. Certainly the new Labour government, having in opposition criticised the use of the ministerial veto, will feel constrained to make only the most sparing use of the veto power - if it resorts to the power at all.

10.2 The second new trend I have mentioned is the change or expansion of the role of the Ombudsman. The Ombudsman is now involved in considering matters of law to a greater extent and to some extent has a more judicial role.

One consequence may however be a greater likelihood that the Ombudsman will be subject to judicial review, which was not previously the case. One result of this may be for the Ombudsman to consider and reason his recommendations at greater length and with more reference being made to legal issues.

10.3 The third trend is that the courts are likely to become more involved in these issues than previously. The Danks Committee saw convincing reasons for not making the courts the ultimate decision makers.[140] Whether the courts become involved by way of judicial review or otherwise, their influence seems to me inevitable. There are three reasons for believing this development likely:-

(a) The control device represented by the ministerial veto appears to be likely to be used less often now.

(b) The Ombudsman appears to be taking a determined stand and is recommending release of information even in quite arguable cases.[141]

(c) Some departments have not taken full cognisance of the changes achieved by the Act and are still attempting to withhold information wherever possible.[142]

Whether the role of the courts will become of major significance however depends on what amendments are made to the Act.

10.4 In any event these considerations, lead to the conclusion that the functions and duties of Ministers and of the Ombudsman have changed as a result of the Official Information Act and may be expected to go through further major changes in the near future.

FOOTNOTES

1. Section 1(2) Official Information Act. Part VI (dealing with the Information Authority) and Section 1 came into force earlier.

2. Section 15

3. Section 28

4. Section 32

5. The Act refers to "an Ombudsman". So far the decisions under the Act have been taken by the Chief Ombudsman. For ease of reference I shall refer simply to "the Ombudsman".

6. Public Lecture given at Victoria University of Wellington on 5 June 1984 by Dr R. Williams, former Chairman of the State Services Commission.

7. The Ombudsman's case notes (the "O.C.N."), p.80. This, the 5th Compendium of Case Notes issued by the Ombudsman's office, deals solely with requests under the Official Information Act.

8. Ibid. p.83 (emphasis is in the original).

9. Ibid.

10. Ibid. p.84 (emphasis is in the original)

11. Ibid. p.86

12. Ibid.

13. Ibid.

14. Ibid. p.102

15 Ibid.

16. Cabinet Office Memo. CO(83) 12 of 1 June 1983

17. Ombudsman's Case Notes, p.52

18. Ibid. p.54

19. Ibid.

20. Ibid. p.56

21. Ibid. p.57

22. The Committee on Official Information

23. General Report of the Committee on Official Information, p.30

24. In England many Departments arose simply as part of the Royal Household - see Halsbury's Laws of England (4th Edition), Vol. 8, p.711, para. 1155

25. Halsbury, op cit. - p.713, para. 1155

26. Typical of this approach are:

    The Ministry of Energy Act 1977 - ss. 3-9
    Department of Social Welfare Act 1971 - ss. 3-11
    Public FInance Act 1977 (The Treasury)
    Agriculture and Fisheries Act 1953
    Health Act 1956
    Labour Department Act - ss. 3-9

27. For example the Public Trust Office Act 1957 and the Broadcasting Act 1976

28. Halsbury loc. cit.

29. See for instance the contrasting cases of:

Mackay v. Adams [1926] NZLR 518
Geraghty v. Porter [1917] NZLR 554
A delegation of a small part (as opposed to the whole) of the powers granted to a Minister is acceptable - Hookings v. Director of Civil Aviation [1957] NZLR 929

30. Staples v. Mayor of Wellington (1900) 18 NZLR 857

31. [1979] 2 NZLR 34

32. Family Benefits (Home Ownership) Act 1964

33. Social Security Commission v. MacFarlane [1979] 2 NZLR 34 at p.42 (line 10) per White J.

34. [1979] 1 NZLR 218

35. Ibid. at 239 per Barker J.

36. For example the Lands and Survey Department and the Ministry of Works and Development noted previously. The situation in the case of the Department of Maori Affairs as noted above is also anomalous.

37. See for example notes 20 and 21 above.

38. "Themes of Constitutional Development" by Prof R.Q. Quentin-Baxter [1984] NZLJ 203 at 205

39. Jeremy Hopkins: "The Practitioners Requirements" in R.J. Gregory (editor) The Official Information Act: A Beginning, p.96 at p.100

40. e.g. West-Walker v. Commissioner of Inland Revenue [1954] NZLR 191

41. The Ombudsman's Case Notes, p.97

42. Ibid. p.98

43. Ibid. p.110

44. Cross on Evidence (3rd N.Z. edition) p.265

45. Ibid.

46. Robinson v. State Insurance General Manager (Whangarei A.36/81; 16.9.1982)

47. O.C.N. 113

48. Op cit. pp.266-268

49. Halsbury's Laws of England (4th ed.) Vol. 17, p.166, para. 237

50. Alfred Crompton v. Customs and Excise Commissioners [1972] 2 All E.R. at 376 (f-h)

51. Calley v. Richards 52 E.R. 406

52. Taylor v. Forster (1825) 2 C&P. 195

53. Minter v. Priest [1930] A.C. 558

54. Alfred Crompton supra

55. Ibid. p.378 and 379

56. [1979] 2 All E.R. 1169

57. Ibid. at 1177

58. Konia v. Morley [1976] 1 NZLR 455

59. West-Walker v. C.I.R. (note 40 above), p.219

60. See e.g. Rosenberg v. Jaine [1983] NZLR 1

61. Marriott v. Anchor Reversionary Co. Ltd (1861) 66 E.R. 425

62. Mead Data Central Inc. v. U.S. Department of the Airforce 566 F. 2d 242 (1977)

63. See quote from Waugh v. British Railways above.

64. General Report of the Committee on Official Information, p.21

65. D. Baragwanath Q.C.: "Notes for Seminar on Official Information Act 1982" - (Auckland District Law Society), p.14

66. O.C.N. p.111

67. Ibid. p.112

68. For example Dr Williams (in his public lecture referred to in note 6 above) commented that as a probability theorist (his specialist area of mathematics) he could not agree with the Ombudsman on this point.

69. K. v. F. [1983] Butterworths Current Law, p.189. This case involved paternity proceedings. The Common Law standard in this, as in some matrimonial matters is "beyond reasonable doubt". Vautier J. held that s.5 of the Status of Children Act 1969 does not abrogate that rule. Cross on Evidence (3rd NZ edition) at pp 111-113 notes there are degrees of probability within both the civil and criminal standards but there is still a real difference between two. The Courts traditionally applied the "beyond reasonable doubt" standard in some matrimonial cases, because matters such as adultery and paternity were believed to contain elements analogous to a criminal allegation.

70. O.C.N. 58. It can be argued the words "for the time being" refer to the convention as it existed at the time the Act was passed. However the Ombudsman appears to treat the words as meaning "from time to time".

71. Ibid. p.59

72. Case No. 42, O.C.N. 52, 58

73. Ibid. at p.58

74. O.C.N. 38

75. Ibid. 41

76. Supplementary Report of the Committee on Official Information pp.66-67

77. See note 57 above

78. Case No. 4 Ombudsman's Case Notes 12

79. Ibid. p.26

There are two strange aspects to this case. First the Police argued the information was protected by ss. 6(c) and 9(2)(k). The Ombudsman said this case was a request for personal information to which section 9 does not apply. But he considered in detail the application of section 6, which does not apply to personal information either. Second, the Police sought "judicial review".

If this is personal information, the Ombudsman does not have power to review under Part V. His only power to review is under the Ombudsman Act which prohibits judicial review of his recommendation in such case. The only person with a right to go

to court was the requester who had a right to the information if it was personal information in terms of section 24 of the Official Information Act. Presumably, therefore, the Police application was for judicial review to establish that the information in question was (as the Police originally contended) not personal information. At the time of writing the case has yet to be heard.

80. Case No. 42, O.C.N. 52

81. Ibid. 57

82. Devotees of the T.V. programme "Yes Minister" can be forgiven for believing that the relationship of Minister and Permanent Head of Department is an ongoing play involving a naive "goody" (the Minister) and a cunning "baddy" (the Permanent Head) with the Ombudsman waiting in the wings as a potential deus ex machina.

83. O.C.N. 85

84. Ibid. 131 (case concerning the Public Service Classification List)

85. Case No. 7 O.C.N. 87

86. Ibid. p.89

87. Gregory op. cit. p.133

88. Ibid. per Jeff Connell, Ministry of Transport

89. Jeremy Hopkins, op cit. p.101

90. W.D. Baragwanath Q.C.: "The Official Information Act - A real change in direction?" - paper delivered to the 1984 New Zealand Law Conference (the identity of the observer is not stated by Mr Baragwanath)

91. B. Candler: "The Australian Freedom of Information Act: A Personal View" in Gregory op. cit. 16 at p.23

92. O.C.N. 49

93. Ibid. 67

94. Ibid. 68

95. Ridge v. Baldwin [1964] A.C. 40 at 65 per Lord Reid

96. W.D. Baragwanath Q.C. op cit. p.67

97. Evening Post 19.4.84

98. G. Palmer: Unbridled Power p.164

99. General Report (supra) p.6

100. Dr Maxwell Collins: "A Study in the Social Services: Health" in R.J. Gregory op cit. p.88 at 92

101. Brian Chander op cit. p.22

102. Source: a former public service lawyer presently employed on a temporary basis by Treasury to deal with official information requests

103. Supplementary Report (supra) p.10

104. General Report (supra) p.12. The cases referred to are:
Takaro Properties v. Rowling [1975] 2 NZLR 62
Fiordland Venison Ltd v. Minister of Agriculture and Fisheries [1978] 2 NZLR 341
Daganayasi v. Minister of Immigration [1980] 2 NZLR 130

105. [1968] A.C. 997

106. The modern view of "public interest immunity" adopted by the courts, will permit even documents of a fairly sensitive nature to be disclosed for the purposes (inter alia) of the courts review of administrative acts - c.f. Elston v. State Services Commission (No. 1) [1979] 1 NZLR 193.

107. e.g. Fletcher Timber Ltd v. Attorney-General (C.A. 120/83 - 18 April 1984)

108. General Report (supra) p.38

109. Section 22(4) Ombudsmen Act 1975

110. Section 25 Ombudsmen Act 1975

111. K.J. Keith: "Judicial Control of the Ombudsman" (1982) 12 V.U.W.L.R. 299

112. Reported in "The Ombudsman and Information" by D.J. SHelton (1982) 12 V.U.W.L.R. 233

113. Case No. 10, O.C.N. 27

114. Maxwell on the Interpretation of Statutes (11th ed.) - see O.C.N. 29

115. O.C.N. 120

116. G. Laking: "Observations by the Chief Ombudsman" in R.J. Gregory op cit. 136, 137

117. The Ombudsman's office has requested extra staff to help in the short term

118. K.J. Keith op cit. p.322 - the words in quotation marks within the main quote are taken from City Realties v. Securities Commission (unreported C.A. 179/82; 11 June 1982)

119. Supplementary Report (supra) p.105

120. Ibid. p.12

121. Ibid. p.71

122. See note 84 above

123. Case 50, O.C.N. p.70

124. Ibid. p.74

125. Case No. 10, O.C.N. 27

126. See for example:
Wiseman v. Borneman [1969] 3 All E.R. 275, and
R. v. Huntingdon D.C. [1984] 1 All E.R. 61

127. Attributed to Scandinavian jurist Alf Ross by Senator Gareth Evans: "Discrimination legislation" [1984] NZLJ 214

128. In general the courts may decline the remedies available on judicial review where an alternative remedy may be more convenient. And see, for example, Halsbury (4th ed.) Vol. 1, p.136 - "In accordance with the general rule that where a statute creates an obligation and enforces its performance in a specified manner, the performance cannot be enforced in any other manner, the remedy by mandamus will not be available when a specific remedy is given by the Act..."

129. Supplementary Report (supra) p.11, para. 2.18

130. An example of the determination of the Courts to control powers to dismiss is Ridge v. Baldwin [1964] A.C. 40. The situation of the Ombudsman with regard to judicial review is similar to that of a Royal Commission. The Australian Courts have ruled that as a Royal Commission usually only reports and recommends, and as it cannot make binding decisions, the Courts do not normally have power to review. However where a Commission's findings may affect legal rights (as where the findings are a prerequisite to proposed executive action) there is a power to review - R v Collins ex parte ACTU - Solo Enterprises Pty Ltd [1976] ALJR 471, 473; Bretthigham-Moore v. St Leondards Municipality (1969) 121 CLR 509. The New Zealand Courts have reviewed a Royal Commission's findings where they have reflected on personal reputations - Re Erebus Royal Commission (No. 2) [1981] 1 NZLR, 618

131. Jeremy Hopkins op cit. p.100

132. Furnell v. Whangarei High Schools Board [1973] A.C. 660

133. Supra at p.80/81

134. Dr Williams Lecture, supra

135. General Report (supra) p.22, para. 65

136. O.C.N. p.32

137. Section 13(9) Ombudsmen Act. In Australia and Canada, the Courts have more experience in reviewing the Ombudsman's decisions. However, as noted, the Ombudsman ultimately can only "recommend". Where this is the case the courts are less likely to intervene - see K.J. KEITH op. cit.

138. Supplementary Report (supra) p.78

139. Dr Williams' public lecture referred to earlier

140. Supplementary Report (supra) pp. 8 and 9

141. For example the privilege cases discussed

142. This at least is the Chief Ombudsman's view as mentioned in the article referred to in note 116 above, at p.135 where he suggests there might be a departmental manual entitled "A Thousand and One Ways to Seek Comfort from Sections 6 to 9 in Order to Avoid Looking at Sections 4 and 5". On the other hand the Information Authority in its 1984 Annual report to Parliament commented that "... the signs are that officials are willing to commit themselves to fulfilling the spirit and intent of the legislation".