

FREEDOM OF INFORMATION

An Evaluation of the Recommendations of the Committee on Official Information

T. G. SIMEONIDIS*

INTRODUCTION

The Committee on Official Information (the "Danks Committee") was set up by the government in July, 1978. Its terms of reference were both general and specific. The basic task was "to contribute to the larger aim of freedom of information by considering the extent to which official information can be readily available to the public", whilst the two specific assignments involved redefinition of the current system of protecting information by "classification", and amendment of the Official Secrets Act 1951. The committee reported to the government on 19 December 1980.

In its report the committee recognised that:

In practice, though not yet law, the onus of proof is shifting from those who want information disclosed to those who want it withheld. The assumption on which both the Government and interested groups are now tending to work is that official information should be made available to the public, unless there are good reasons to withhold it in the interests of the community at large. (p. 5).

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

After study of the issues involved, the committee considered that:

... the system based on the Official Secrets Act should be replaced by a new set of arrangements. The Government should ... reaffirm its responsibility to keep the public informed of its activities and to make official information available unless there is good reason to withhold it. Grounds for withholding information from the public should be set out clearly, along with the basic principle. (pp. 5-6).

The central recommendations of the committee are the focus of this paper. The recommendations, very briefly, entail:

(a) Repeal of the Official Secrets Act 1951.

*N.Z. Forest Service, Wellington

Paper submitted for publication December 1981, prior to passage of the Official Information Act.

- (b) Provision of a legislative base in a new Official Information Act, which enshrines the central principle and sets out the grounds for withholding information.
- (c) Setting up an information unit within the State Services Commission, which would be given management responsibility to promote a more effective flow of information.
- (d) Enlarging the present powers of the Ombudsmen to investigate and make recommendations on individual complaints of denial of access to information.
- (e) Creation of an independent Information Authority, to act as the instrument for the systematic enlargement of the range and scope of information available to the public.
- (f) Statutory provision in the Official Information Act requiring the availability of the principles and criteria on which administrative decisions affecting the individual are based and, with limited exceptions, the reasons for these decisions; and, in the field of individual privacy, the provision of a new basis for the proper collection, use, and protection of personal information, together with provision for proper access to it, by those to whom it relates.

The implications of the report of the Committee on Official Information and the subsequent Official Information Bill are manifold. This analysis will address the question of whether the individual should have the right to information. It will also evaluate the likely effect of the proposals (for greater disclosure) on policy-making and relations between senior civil servants and their ministers.

SHOULD THE INDIVIDUAL HAVE A RIGHT TO INFORMATION?

A major reason for the individual having a right to information is to permit him to better play the part required of him in the democratic system, including the evaluation of policies and electoral platforms. A better knowledge of government policies and electoral platforms permits the individual to contribute substantively to government decision-making and to stimulate the development of more responsive party policies. On numerous occasions major issues will arise which have not been foreshadowed in the government's electoral platform, but which nevertheless require it to take decisions. In such situations the government clearly cannot claim that any particular policy stance it assumes

has the full, or even majority support of the electorate. In a democratic society, the electorate at large must have the right to information and to provide an input into governmental decision-making. The people who are affected by policy decisions or those who can usefully contribute to the process of decision, must have the right to participate in decision-making. Thus decisions can be claimed, and seen, to be made in the wider public interest. This view is supported by the Danks Committee (p. 14).

... the critical and at times difficult choices that governments have to make for our society will be better resolved if the community is well informed. In this way also political decisions would have a stronger claim to be made in the name of the community ..."

and is supported by the Minister of Justice (McLay, 1981):

I firmly believe that it is in the interests of both the Government—Parliament, the Executive and the bureaucracy—and the general public that there be a freer flow of information between the two. Improved communication can only improve the standard of democracy and the level of participation in, and understanding of the people who live in a democracy.

The basic tenet of a democratic society is that as the government is elected by the people it should be accountable to the people. A means to greater accountability is the lifting of the present system of discretionary secrecy maintained by the government, by making the right of public access to information available to all citizens:

... access of citizens to official information is an essential factor in making sure that politicians and administrators are accountable for their actions. Secrecy is an impediment to accountability, when Parliament, press and public cannot properly follow and scrutinise the actions of Government or the advice given and options canvassed. Divisive suspicion of Government and its advisers is encouraged when decisions are made without a recognisably comprehensive public presentation of how they have been arrived at. (pp. 14-5).

It is argued, therefore, that access by citizens to official information is an essential factor in ensuring that politicians and administrators are accountable for their actions. However, while there are strong reasons for the individual having a right to information, there are also good reasons for withholding some information and for protecting it: for example, security, defence, international relations, protection of privacy of the individual and commercial confidences. Thus there will always be a valid need to recognise "exempted documents" which are not available to individual citizens, along with the substantial amount of govern-

ment information which should be available. This view supports, therefore, the approach of the committee, which recognises that there is a need for balance between the information which should be available to the individual, and that which should not, in accordance with the principle that information should be made available unless there is a good reason to withhold it.

THE LIKELY EFFECT OF PROPOSALS FOR GREATER DISCLOSURE ON POLICY-MAKING AND RELATIONS BETWEEN SENIOR CIVIL SERVANTS AND THEIR MINISTERS

What effect, if any, will the proposals for greater disclosure of information have on policy-making, and the relations between senior civil servants and their ministers. This is a crucial question, both in terms of the quality of decision-making that will ensue, and whether greater disclosure will influence the constitutional basis of the working relationship between ministers and officials. Before addressing this question it is useful to outline the two principal methods of providing for freedom of information as considered by the committee, and the argument for freedom of information legislation.

As a result of its deliberations, the committee concluded that "in the New Zealand context there are strong grounds for preferring a legislative base"—as opposed to the "code of practice" approach used in the United Kingdom—which "proposes a set of principles which could be endorsed by Ministers and which would provide for greater exercise of discretion by departments and agencies, with a firm steer towards openness". In dismissing the "code of practice" approach the committee:

... concluded that in New Zealand circumstances injunctions to officials would not work without a firm commitment by Government to back them. And we doubt whether any commitment which did not have the force of law would either be acceptable to the community as an earnest of Government intentions, or give officials a sufficient base to take substantial steps towards further opening up official information in their day-to-day operations. (p. 22).

In assessing the desirability, practicability, and suitability of alternative methods of achieving greater freedom of information, there can be little doubt that the committee's conclusion in favour of an Official Information Act was the correct one. This Act would embody the principle that information shall be made available unless there is good reason for withholding it.

A further element of the legislative base proposed by the committee was the removal of any unjustified legal barriers set around official information, particularly the Official Secrets Act 1951. This Act has become largely irrelevant to the broad mass of official information presently held by departments, and would clearly be an impediment to the operation of an Official Information Act. The repeal of the Official Secrets Act is therefore supported by this writer, as is the recommendation of a new system of security classifications with fewer and more circumscribed gradations. The present system of classification is used inconsistently across the government sector. It is ridiculous that much information which has long since lost its topicality, remains classified. Thus the legislative reform recommended by the committee is welcome.

The adoption of a legislative base for freedom of information is likely to have clear implications with respect to public policy-making. At present most policy-making is "incremental" in nature—it does not move in leaps and bounds—and is carried out by a process of "muddling through" by which policy-makers limit their search to incremental departures from existing policies because support is unlikely for more radical departures whose full consequences are unknown and unforeseeable.* This system of incremental policy-making is currently supported by a system of discretionary secrecy, a situation which makes administrative life more comfortable for public officials than would be the case if their actions were under continuing public scrutiny. It would be fair to recognise that some departments have already facilitated processes of public involvement and participation in policy-making—for example, the N.Z. Forest Service has had public seminars on the West Coast beech forests, and the West Taupo forests, as a result of which policies were developed and implemented. The same department publishes draft regional, State forest park and State forest management plans for public comment and input into forest planning. However, despite such processes of public involvement, consultation and public participation, criticisms have nevertheless been made in some cases, that the *bases* on which subsequent decisions and policies were made and adopted (*e.g.*, as in the decision to continue a level of logging in Whirinaki State Forest) were not made publicly available.

*"Muddling through" and incrementalism have been described by C. E. Lindblom in articles in *Public Administration Review*, Spring (1959), pp. 79-88; Nov./Dec. (1979), pp. 517-26.

The current system of discretionary secrecy undoubtedly suits many ministers and officials for several reasons: some information could give rise to criticism or embarrassment of the government and the officials concerned, and their policies; release of information could well give the public the opportunity to pre-empt governmental policy-making by putting forward viable alternative policies, or by cogently arguing against certain government policies or projects. Both situations would put some pressure on both ministers and their officials to improve their performance and make them more accountable for their actions.

Greater freedom of information could have two influences on policy-making:

1. The greater availability of information would mean that the reasons for ministerial and official decisions would become more publicly visible. Ministers and their officials would thus be less able to pursue policies of party-political expediency and/or individual self-interest. There would therefore be more incentive and opportunity for the government and its advisers to pursue policies in the wider public interest, in other words, to improve public policy-making. Adoption of such an approach would also be a useful means of generating political support and respectability for the Government of the day.

Officials with liberal views on, and training in participatory decision-making and the behavioural sciences could well take the initiative and attempt to harness public interest in official information and the activities of the government and its departments, in order to help improve policy-making. A participatory approach to policy-making is more likely to be accepted as being one which permits decisions to be made in the wider public interest, a view also held by the committee. Thus the move towards greater freedom of information is likely to be seen by some officials (and perhaps some ministers) as a great *opportunity* for tapping and harnessing the resources of a well-informed public as a means to improving public policy-making.

2. Conservatism is one of the Public Service norms identified by Polaschek (1958). It is still an operative norm some 24 years later. Thus it can be justifiably postulated that, despite the liberal changes likely to result if the committee's recommendations are adopted by the government, many senior officials (and indeed many ministers) will still retain their conservative outlooks with regard to the processes of decision-

and policy-making. Having become socialised in the present system by which decisions, and the bases for these decisions, are made behind a protective veil of anonymity, free from the scrutiny of public gaze, these officials and ministers may well view impending changes in freedom of information with some trepidation. Indeed, these people may well consider greater freedom of information to be an intrusion into their historical prerogative of discretionary secrecy, and a *hindrance* to policy-making. As a result of being placed in a situation where disclosure of official information could prove embarrassing or give rise to criticism, such officials may become increasingly wary of making decisions for which they will no doubt be seen as accountable by the public, and which will also drag them away from the convenience of their anonymity and put them directly into the public arena. These events will be particularly pronounced if the officials (and ministers) involved lack the ability to harness public interest for positive benefit all-round (as in 1. above). As a result one may expect that decision- and policy-making would become even more incremental, as policy-makers—wary of, or unable to actively involve the public—become chary of making decisions which are likely to stimulate public reaction or criticisms.

The two potential effects of greater freedom of information on policy-making, as outlined above, are both likely to eventuate, but to what degree it is difficult to predict. Perhaps it is for this reason that the committee only skirted around the issue of the effect its proposals would have on policy-making. Perhaps it more simplistically assumed that greater freedom of information *automatically* assures better policy-making—an attractive, but questionable premise. For this reason, the omission of a more detailed investigation into this particular issue is a shortcoming of the committee's report. However, on balance, this writer believes that moves toward greater freedom of information will be witnessed by an improvement in the quality of public policy-making. As Sir Guy Powles, the Chief Ombudsman at the time, said in his 1976 report to the Security Intelligence Service:

There is nothing like having to justify one's opinions and emotional reactions to other people to ensure that one thinks these through as fully as possible.

It appears that a major area of impact of the committee's proposals will be the relations between senior civil servants and their

ministers. The report suggests two areas of change bearing on the traditional relationship between a minister and his officials, which could prove to have constitutional implications, despite the committee's assertion to the contrary that:

. . . the convention of ministerial responsibility and the neutral public servant will remain the constitutional basis of the working relationship between Ministers and officials.

The two areas of change concern:

1. The allocation of responsibility for decisions; and
2. A "need for a new and sharper definition of areas of responsibility at senior levels, and the development of new and perhaps more explicit codes governing the relationship between Ministers and officials . . . (pp. 19-20).

The committee's disposition towards these potential changes seems clear: it believes that the trend towards the increasing public profile of officials will continue and should be further accommodated within a framework under which officials are made accountable for their parts in the decisions made. Unfortunately, these points are not fully developed in the report but simply identified as matters to be taken into careful account as the path of change evolves. There are a number of potential effects that adoption of the two areas of change noted above could have.

The sharing of responsibility for decisions between ministers and officials could well have profound constitutional consequences, especially with respect to the doctrine of ministerial responsibility under which a minister is not only responsible for his department, but is also responsible to Parliament for his department. The allocation and sharing of responsibility for decisions and the sharper definition of areas of responsibility at senior levels would have the effect of raising the public profile of officials, of forcing exposure of official opinion, and generally increasing the likelihood of perceived conflict within a department, between departments, and between officials and minister. Clearly, such events could signal the death knell of the doctrine of ministerial responsibility. The conflict generated by the greater public prominence of non-politically motivated officials could reach the point at which the integration of effective management and political control could be threatened, and if the relative roles and responsibilities of ministers and officials became the subject of public debate, mutual recriminations could all too often develop.

A desire to avoid this sort of situation could encourage governments to look for politically acceptable people at senior levels in the Public Service in order to achieve some measure of political compliance. Not only is it unlikely that such a politically-influenced Service would be able to recruit staff of ability and integrity, but also that such an approach would clearly change the relations between officials and their ministers from that presently existing. Thus the committee appears to insufficiently analyse the likely effects that adoption of its proposals could have on relations between ministers and officials. Adoption of the proposals will, in fact, either serve to weaken to the point of extinction the convention of ministerial responsibility, or to evolve a loose concept of ministerial responsibility, which accommodates a lesser degree of public service neutrality while still attempting to preserve harmony with the government policies of the day. Either of these outcomes would change the basis of the relationship, and the relationship itself, between ministers and officials.

REVIEW OF GOVERNMENT DECISIONS RELATING TO NON-DISCLOSURE OF OFFICIAL INFORMATION

The committee report outlines a procedure for the review of government decisions relating to the non-disclosure of official information. By this procedure, a complaint can be made to the Ombudsmen, who will investigate it and make recommendations on whether or not the information should be released. It is proposed that the powers of the Ombudsmen be modified beyond the present system, under which they can investigate and make recommendations only in respect of advice given to ministers, to include ministerial decisions concerning the release of official information. The committee states that, in making their recommendations, the Ombudsmen should not have the final powers of decision, and their opinions should not be subject to reconsideration by the courts, but that the ultimate residual power of veto over the release of information should remain with the responsible Minister. The committee asserts that:

... subject to the rule of law and its accountability to Parliament, a government must be able to make decisions in matters it judges of sufficient importance, whether of administration or of policy, and take responsibility for those decisions. (p. 31).

The committee advocates the protection of political rationality and responsibility by recommending that the ultimate decisions

on release of information should rest with the government. Presumably the government will bear the electoral costs (and benefits) of any decisions it makes in this area.

. . . the resulting political judgments are, in the end, for Ministers who are elected and accountable to Parliament rather than for the courts who are not elected and not accountable. (p. 31).

This view clearly indicates that the courts are not seen as having a central role in making decisions about the release of information, although they do already have a role in deciding whether official information is to be disclosed for the purpose of litigation before them or to parties to matters being decided by official bodies. The courts also decide whether there is an obligation under legislation to make information available, and adjudicate on proceedings brought under the Official Secrets Act.

The real question that needs to be answered here is, "will the channel for public grievance against non-disclosure be adequate in preventing ministerial excesses with regard to continued secrecy?" The Minister of Justice (*op. cit.*) recently stated that:

In the last resort, a judgment as to whether a certain piece of information ought to be released can involve a major and difficult assessment of the public interest. The Government, accountable as it is to the people (and subject of course to the rule of the law), should in an extreme case be able to determine what the public interest requires—and then answer for that decision.

The Minister also doubted that the courts would be useful for settling disputes:

We should not be mesmerised into thinking that the courts are always the best institution to decide every matter. This is particularly true in New Zealand where the courts, unlike, say, the United States, have no tradition of making judgments in matters of public policy—such as those that might be required in the interpretation of a written constitution.

The committee's proposed system would probably be adequate if a strongly-developed convention of ministerial responsibility existed in New Zealand. However, as stated earlier, this convention is all but dead in this country and cannot viably be seen as a sufficient check on excessive political secrecy or as an incentive to more openness. In New Zealand no ministers have resigned in the last 45 years (the last being Downie Stewart, in the 1930s, on a matter of principle) as a result of a breach of ministerial responsibility: they merely brace themselves for the conflict and "tough it out". Furthermore, the electoral consequences have not been such as to turn governments out of office. The evidence clearly points towards the fact that, even as a

result of a government accepting responsibility for its questionable decisions, it does not necessarily follow that the electorate will extract its ballot-box vengeance at the next election.

Sir Guy Powles, New Zealand's first Ombudsman (from 1962 to 1977) states quite clearly that the scope for ministers and officials to prevent the disclosure of inconvenient information will always remain high unless public access legislation is enacted, *which is enforceable by an external appeal system and backed by legal sanctions*:

The skill and resourcefulness of Ministers and civil servants in preventing the disclosure of inconvenient government information, even after the enactment of public access legislation, must not be underrated. Accordingly, public access legislation must be drafted in a form which gives civil servants the least possible discretion in deciding whether particular types of information may be disclosed . . . In order to be effective, public access legislation must contain rules which are clear and precise, and which are enforceable by an impartial and external appeal system backed by legal sanctions. In such an environment, it is likely that most civil servants and Ministers will attempt conscientiously to obey the requirements of the law.

Sir Guy suggests the Ombudsman should have power to review and determine all applications for information which have been refused. The Ombudsman's directions on whether information should or should not be disclosed, in full or in part, would be binding on all parties, including the Crown. An appeal from the Ombudsman's decision should lie to the High Court, and be by way of rehearing, thus enabling the court to conduct its own examinations, and make its own decisions on the merits of the case. Sir Guy also attacks the argument (implicitly held by the committee) that such an external appeal system backed by legal sanctions, will interfere with ministerial responsibility to Parliament:

Governments . . . are also likely to resort to the spurious argument that a right of appeal to the courts will interfere with ministerial responsibility to Parliament; yet such a right increases rather than interferes with ministerial responsibility, because it prevents Ministers from concealing information for personal or partisan advantage. A strong access law forces them to release more information about all the activities for which they are responsible, thus giving Parliament, and through it the public, a better basis for controlling the Government.

The views of New Zealand's first Ombudsman should not be lightly put aside. However, the approach advocated by him is not adopted by the committee. This writer believes that the reason

for this is that, as secrecy has become so embedded into the New Zealand political system, it is difficult to bring about a fundamental change of attitude and behaviour on the part of Ministers and officials. Any change that does occur (as is recommended by the committee) is likely to be of an incremental or evolutionary nature, one which does not seek a radical departure from existing policies and for which the full consequences are unknown and unforeseeable. For this reason, it appears that the committee restricted its deliberations to those alternatives that it considered could be politically acceptable. While the recommendations of the committee can be seen as incremental (or conservative), they do nevertheless progress significantly from the present situation of discretionary secrecy. However, a cynic could perhaps suggest, tongue-in-cheek, that the changes recommended by the committee would merely lead to an enlightened or more liberal form of discretionary secrecy rather than to more open government.

CONCLUSIONS

The reforms proposed by the Danks Committee are welcome. They are progressive and evolutionary, and take political realities into consideration. However, the reforms suggested leave some doubts as to whether the mechanisms of the process will satisfactorily deal with requests for information of a topical and generally more secretive nature (such as those on resource development), as opposed to the mass of trivial official information in which few people will be interested. It is here that the real challenge will lie and where the move towards more open government will either succeed or fail.

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