

Behind the Official Information Act: Politics, Power and Procedure

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Introduction: the shift from secrecy to information management

When the Official Information Act was passed 15 years ago, its impact was immediate and fundamental. Many politicians and public servants who had long nestled in the security of the Official Secrets Act reeled with shock as the presumption of access to official information was turned on its head. But this revolution was made by leading public servants and politicians themselves, including my own predecessor as Secretary of the Cabinet, Patrick Millen.

Believing that “knowledge is power”, many feared that the increased availability of information would lead to a corresponding loss of power and ability to govern effectively. Since the passing of the Act, however, the meaning of the phrase “knowledge is power” has become rather more sophisticated. There are still occasions where it is appropriate (and, indeed, important) to withhold information, for example, by invoking the free and frank expression of opinion provisions of the Act (s 9(2)(g)). There are times when it is genuinely beneficial to allow Ministers and officials to consider policy options (particularly in the early stages of advice) well away from the glare of publicity and the pressure of interest groups. However, in many circumstances, public servants have grown to appreciate that sharing knowledge means better government, a better decision-making process, and a better informed public. Governments, too, have adapted to the new regime. Indeed, virtually all written work in the government these days is prepared on the assumption that it will be made public in due course. The idea of maintaining secrecy over ordinary official information, especially after decisions have been made, already seems old-fashioned and a little quaint. Instead, the focus in the current open style of government is on managing the dissemination of official information.

I do not mean that information is managed in a sinister way, like propaganda. What I mean is that when politically sensitive information has been requested and should properly be released under the Act, the government will wish to consider carefully how to release it, who releases it and when. For those of you who may find this concept surprising, I hope you will not take it amiss if I quote what I often say to new public servants in the Cabinet Office: “they’re elected and we’re appointed”. In other words politicians are legitimately and properly driven by what is acceptable to the electorate, and must constantly explain and manage their relations with that electorate. This is just as essential an element of good government, as is governing according to the law. The procedures and protocols that have developed from these political concerns, and how they interrelate with existing laws, conventions and administrative practices, are the practical consequences of the Official Information Act.

How official information is released

When the government is obliged to release information under the Act, it may, quite legitimately, seek to manage the process for the release of the information. For example, where a document on, say, a health issue has been requested by a reporter, especially one that contains material of general interest, the government may release the information to the whole press gallery. The Act has given a new dimension to the job of government press secretaries! The task of officials, also, is to work with these political constraints and to accept them as proper.

To take another example, just after the election, the media requested some Cabinet Office circulars on the administrative arrangements for the caretaker government. The Prime Minister decided that they should properly be released under the Act and, having made that decision, sent the circulars to the other party leaders just before giving them to the media. This type of courtesy is very important in maintaining political relationships.

One further point to make about how official information is released is the fact that the information is printed onto paper that has the words "Released under the Official Information Act" stamped right across it. It reminds me of a story, which is possibly apocryphal but is nonetheless amusing, about Russian and Chinese agents in America during the Cold War. Apparently these agents often obtained official information on subjects of interest through perfectly legitimate means, and then stamped each page with "Top Secret" before sending the documents, in triumph, back to home base.

Who releases official information

There are administrative protocols as to who releases what information. Usually the "author" releases, in consultation with others affected by the release. Again, these protocols are essential to maintain effective relationships within governments. For example, when Cabinet papers are requested of the Cabinet Office on, say, an education funding issue, the request would be transferred to the lead portfolio Minister—the Minister of Education. That Minister handles the release of the information, having consulted fully with other Ministers with related portfolios (in this case probably the Treasury Ministers).

When official information is released

Judging the best time to release information can be crucial politically. Developments in this area, I believe, support my theme that there is a beneficial interaction between the Official Information Act and political processes.

Where the government is developing a politically sensitive policy, it will now try to structure and manage an overall process for developing the issue. Consultation stages, discussions with industry working groups, and in some cases separate task forces are becoming increasingly common. This dissemination of information to interested recipients throughout the policy process can contribute significantly both to the quality and to public acceptance of government policy. There are several reasons for this. At a basic level, public interest groups have the opportunity to accustom themselves to proposals over a period of time. But more importantly than that, their inclusion in the

process often produces an outcome more acceptable to them, and more shaped to their needs.

Timing the release of information may also be vital from a management perspective when reacting to a difficult political situation that has arisen. The Act has had the desirable effect of encouraging Ministers to consider releasing the relevant documents about a sensitive issue before receiving an Official Information Act request.

The context of central government

So far I have given fairly straightforward examples of how political constraints may influence the way in which official information is released. However, things get a little more complicated in the context of central government, which is a complex mixture of legal obligations, political and practical necessities and established conventions. The addition of the Official Information Act to this brew has had a tremendous effect, and it continues to affect central government processes as they develop. I'll give you some examples.

Existing parliamentary channels of information

In Parliament there are some established channels of information that are quite separate from the Official Information Act. Select committee questioning and parliamentary questions are a couple of examples of this.

Politicians can therefore choose the most suitable channel of information. For example, they may request a briefing from a Minister on an issue, instead of going through the Official Information Act. This may provide a fuller and more direct level of communication on the subject. Or they may combine the traditional parliamentary channels with the powers of the Official Information Act—a mix of Official Information Act requests, parliamentary questions, and select committee examination of public servants.

The way in which Parliament uses its information powers is, in my view, evolving as a result of the Official Information Act: first because official information is now made available at such a phenomenal rate, and second because the new generation of parties and politicians are more inclined to challenge existing conventions and to demand fuller information.

Releasing documents of previous opposition administrations

Another example of the meeting point between the law and the politics of information which the Cabinet Office administers is the convention on the release of Cabinet papers of a previous opposition administration.

Strictly speaking, the decision whether to release such information rests with the department that receives the request. But convention requires that the Cabinet Office consult with the Leader of the Opposition about the release. While this is unlikely to alter the outcome, it is an important matter of courtesy, and is certainly appreciated by the Opposition.

There has been an interesting side-effect as this convention has developed. My impression is that it has significantly reduced the incidence of politicians removing documents

from the system on leaving office. Now that politicians know on the one hand that they will have access to their documents, and on the other that they will be consulted in the future when they are released, they are more relaxed about leaving them in the system.

Unfortunately, this useful convention may not be workable in the future. For what constitutes a previous opposition administration in the MMP era? The prospect of shifting combinations of parties—possibly mid-term—makes the idea of consulting with previous opposition administrations in the future a bit of a nightmare.

It may be that, as time goes on, politicians will become accustomed to the idea of their Cabinet papers and minutes being released as a matter of routine, and will not value prior consultation to the same extent. However, I think it is true to say that most politicians are not yet that relaxed.

Providing information to political parties during the coalition negotiations

A further recent example of the complex balance of legal obligations, political constraints and conventions arose during the government formation period. During this time public service information and analysis was made available to political parties involved in coalition negotiations. This idea obviously made sense. But the process required some careful thought.

Expecting the negotiating parties to rely on the Official Information Act was a possibility but it was rejected at an early stage as being too cumbersome and slow. Also, it would potentially have brought a variety of Ministers into the process when a greater level of confidentiality was desirable. So we devised a new route of information.

Political parties involved in negotiations to form a government who needed access to factual information from government departments were invited by the Prime Minister to approach the State Services Commissioner with their questions. The questions and answers were channelled through the State Services Commissioner, to ensure the impartiality of the advice provided, and protect the neutrality of the public service. This process was worked out well in advance of the election, and agreed to by the government.

We also recognised early on that whatever the public service gave to the political parties during this process in terms of advice or analysis would be subject to the Official Information Act. We made sure that this point was explicitly flagged in the guidelines.

Various conventional relationships also had to go into the equation. How were public servants to provide information in a sufficiently confidential fashion while taking account of their primary duty to serve their Ministers? The answer was a skeleton weekly report to the Prime Minister, and a self-denying ordinance by Ministers, who refrained from enquiring as to their departments' activities in this sphere. We were also concerned about the fact that the context was highly political, and was therefore by definition a risky situation for the public service. We drew on the accepted protocols that apply where public servants are asked to cost political party policies. This led to a fairly constrained process, clear articulation of assumptions throughout, clarifying with requesters when we were uncertain what was being asked, and a strong central quality assurance process before answers were sent off.

Given the difficulties and risks involved in the process, I'm pleased with the outcome. The political parties found the information and analysis provided by the public service during the coalition talks helpful. The neutrality of the public service remained intact. And just last week the information was gathered together in its entirety and provided to the public by the State Services Commission. Only a fraction of the total information was withheld on the basis of the Official Information Act. This is a perfect example of the interplay between the political process and the Act, evolving in the context of MMP.

Post-election briefings

The post-election briefing process provides another interesting example of the mix of law, politics, convention and administrative practice. It is clearly an evolving area. It brings together several strands: the changing relationship between public servants and Ministers under the State Sector Act, the changing nature and status of official information, and the changes to the government formation process under MMP. The question to be considered before the next election is whether there is anything in the traditional practice of preparing post-election briefings for the incoming Minister, and this Minister only, which is worth protecting as we develop new procedures for the new environment. In 1996, post-election briefings were released to the new Ministers after they were appointed in December, and were subsequently (and quite quickly) publicly released. Issues to consider in the new environment include whether the briefing information held by departments for the incoming Minister should be made available earlier, and to a wider political and public audience.

Conclusion

New Zealand has come a very long way since the birth of the Official Information Act. I was reminded of this recently when reading English author Peter Hennessy's latest book *The Hidden Wiring*. Much of the information that he breathlessly discloses in the book (having learned it from informal conversations and unnamed sources) is the sort of thing that in New Zealand is published and available for purchase at Bennetts Government Bookshop. Indeed, the Cabinet Office Manual is a shining example in this regard.

At the beginning of this address I mentioned that public servants now expect virtually all written work to be released eventually. In my view this has improved the quality of policy work being done in the New Zealand public service. There is nothing like the prospect of outside academic or interest group scrutiny to make you write accurately and neutrally. But I have had some difficulties in persuading my British civil servant colleagues of this!

The main point that I have made and illustrated today, and which I wish to leave you with, is that the Official Information Act must be viewed in its constitutional context. It is part of a larger picture consisting of law, convention, administrative practice and practical politics. Information is basic: its dissemination affects the relationships between the players in our constitution. Even 15 years on, the ripples from the passage of the Official Information Act are still being felt, and providing challenges to administrative practices across all areas of government.