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Speaker of the House of Representatives

Paper delivered at the
5th International Conference of Information Commissioners

Openness and transparency in Government

Beverley, David, Mel, Ombudsmen, Information Commissioners, investigating officers and colleagues

It gives me enormous pleasure to be here today to open the 5th International Conference of Information Commissioners.

In a year when we are celebrating the 25th anniversary of the establishment of the Official Information Act (OIA) in New Zealand, it is timely to gather together and reflect on the opportunities and challenges of maintaining openness and transparency in government.

Good governance is about creating safe and just societies. When this is achieved citizens grow up embracing the values which underpin a democratic society. They become the best defenders of those values and advocates for good governance.

Over the next few days you will debate and discuss your roles in defending these values, and in building a sense of expectation and commitment in favour of honesty, openness, respect, and accountability in government. There has probably never been a more important time to talk about and reinforce these principles – they are under attack in many places. But if society is to thrive, then the ability of citizens to access information which will help them to participate fully in that society is critical.

Twenty-five years ago, New Zealand enacted the OIA, encapsulating in statute the principle of freedom of information better than most similar pieces of legislation.¹ The focus of the Act was information and the rights it created relating to how to access information. In essence the Act was designed to promote democracy through democratic decision-making that was transparent and accountable. Such decision-making is unlikely unless members of the public have access to the information on which decisions are made. The OIA gives us all that access and the opportunity to participate in the decisions that affect us all.

Six months go, in a speech to another legal conference, I raised what I see as an anomaly, namely, the exemption of Parliament from the coverage of the OIA. The handful of reporters who reported my speech could hardly contain their excitement at the prospect of being able to find out just how much taxpayers spend on Members' taxis, travel, accommodation, and phone calls. The Dominion Post² helpfully ran a list of questions it said you can't ask Members! The wider and more important issues barely got a mention.

With the exception of Michael Cullen, Peter Dunne and Rodney Hide, my colleagues were largely silent. Who could blame them? In the court of public opinion they had already been judged and found to be greedy. The media in New Zealand has little interest beyond the sensational, so Members of Parliament are right to be wary of any change. Any change to the coverage of the OIA then must have the trust and confidence of those whom it most affects.

But in Britain, The Independent³ newspaper reported the speech. Why, you may ask? Britain, which included Parliament within the Freedom of Information Act 2000 and which came into force in 2005, was poised to go against the tide with a Private Member's Bill to amend the Act before the House of Commons. The Bill failed to find a sponsor in the House of Lords, so it appears to have stalled and is generally assumed to be dead⁴.

¹ Grant Liddell, *The Official Information Act 1982 and the Legislature: A Proposal (1997)*
Legal Research Foundation Seminar

² 6 May 2007

³ 18 May 2007

⁴ The Constitution Unit, UCL Department of Political Science

It is a fair question to ask why, here in New Zealand, Parliament was exempted when the OIA was enacted and why it remains exempt today. It appears that at the time of the Danks Committee consideration of the issue of access to official information, the emphasis was on constraining the exercise of executive power⁵. Parliament was not considered to be part of the problem in this respect.

New Zealand was not alone in excluding Parliament from the jurisdiction of freedom of information legislation. Most Westminster-style Parliaments were not subject to such legislation. For example, Australia, Canada and the US Congress, are not covered by freedom of information legislation. In 1999 there was a Commonwealth Law Ministers Conference that considered the issue and recommended Parliaments should be covered.⁶ Freedom of information legislation that extends to Parliaments is now enacted in India, South Africa, Ireland, the West Indies and of course the UK.

The debate surrounding the enactment of the United Kingdom legislation - both the original Act and the Amendment Bill - provide a useful summary of the type of issues that arise when freedom of information legislation is extended to Parliaments.⁷ The primary concern of the Government was to ensure that parliamentary privilege was preserved.

The rationale behind this constitutional concept is that Parliament must operate independently on behalf of the public. While few would challenge this fundamental constitutional notion, the question is how far does such a concept reach? Does it extend beyond the formal Parliamentary business in the Chamber, committees, and in questions, motions and other 'proceedings of Parliament', to include matters of administration such as finance, security, personnel and such matters?

In the New Zealand context, matters of parliamentary privilege and 'proceedings of parliaments' are laid down in the *Standing Orders of the House of Representatives*,

⁵ Dave McGee, *Parliamentary Applications for FOI*, The Parliamentarian 2006/Issue Two 147

⁶ Dr the Hon Lenny Saith, *Parliamentary Applications for FOI*, The Parliamentarian, 2006/Issue Two 147: *Enacting and Implementing FOI*, The Parliamentarian, 2006/Issue Three 211

⁷ The *Freedom of Information (amendment) Bill*, Bill 62 of 2006-7, Parliament and Constitution Centre, House of Commons Library, Research Paper 07/18 21 February 2007

which are interpreted in *Speakers Rulings*.⁸ Standing Orders have been amended from time to time to ensure there is a more open approach to proceedings. For example, Standing Orders incorporated the principle of natural justice when the Bill of Rights Act was enacted. This principle has extended to members of the public the right to respond to allegations made against them in the House or a select committee. This right is exercised on a regular basis by members of the public. More recently Standing Orders were amended to include the declaration and registration of Members of Parliaments' pecuniary interests as a check against abuse of power or conflict of interest allegations.

It may be argued that the combination of the Official Information Act, the Fiscal Responsibility Act and Standing Orders have created a regime of considerable freedom of information. These regulatory regimes operate within a culture of inclusion of the public in the proceedings of Parliament. There is also a practice within the Clerk's Office to observe the principles of the OIA and release information sought. As far as the proceedings of Parliament are concerned, there is little if anything that is not accessible to the public.

One area of concern that was identified was that the extension of the Official Information Act to Parliament may actually constrain access to information. All Parliamentary information is available to the public unless the House, by order, or a committee unanimously determines otherwise. Such orders are uncommon, and the normal process is that requests for access to parliamentary information are actioned without recourse to any tests such as the public interest test. It has happened, for example, that information declined for release by a Minister, was obtained without restriction from Parliament when the information was put before a select committee, and thereby held as part of the select committee records.⁹

It would not be impossible however to ensure any freedom of information legislation did not have the perverse effect of restricting information that is already available. In fact in the area of proceedings of parliament, I foresee very little objection to a suitably worded amendment to the Official Information Act. A question may be what would be the added value if the OIA did extend to Parliament. In this context I think the recent publication

⁸ See David McGee, *Parliamentary Practice in New Zealand*, 3rd Edition for a detailed discussion of these matters.

⁹ See McGee, pp 437-439.

of Nicola White, *Free and Frank: Making the Official Information Act 1982 work better* provides a very useful analysis of some of the risks associated with coverage of the OIA for those of us who are committed to open access to information that informs public decision making.

While there are few problems extending coverage of the IOA to parliamentary proceedings, subjecting the administration of parliament to the same scrutiny of the OIA is a matter of real concern for some Members. While in principle I personally find it anomalous that the administration of Parliament is not subject to the OIA, I have come to have a greater understanding of the concerns of Members since I was elected Speaker. As a Minister I was well accustomed to the scrutiny of the OIA, not only for decisions I made as Minister but who I called on my phone, where I travelled, whom I met, when and where. As a Minister there is no privacy in the New Zealand context. I can understand however some of the concerns of those Members who have never experienced that scrutiny of their affairs.

Members appear to have two primary concerns. The first is that the information released to the public be accurate because of the consequences for the Members if it is not. This concern is real. Members have been stood down from Ministerial positions because they acted on advice from parliamentary service officials. Even though in this instance the Auditor-General found the Members had acted reasonably on taking the advice and were subsequently reinstated, the political cost was high.¹⁰ While I accept the legitimacy of the concerns, I still believe a process could be devised to check the information. It is interesting to note that a similar concern was raised about pecuniary interests of Members of Parliament being made public. To date there appears to have been no problem with that information being in the public arena. The real issue is basically one of trust. Can Members have confidence in the accuracy of the information and can they trust it will be reported correctly?

It should be noted in this context that recently a list of Members' entitlements and the administrative process applied to access them has been posted on the website. This is the first time this information has been made public. There was little media interest and the

¹⁰ Report of the Controller and Auditor-General, *Members of Parliament: Accommodation Allowances for Living in Wellington* Interim Report March 2001 and Final Report, July 2001.

one article on the publication of the information was critical of Members. I suspect the media is only interested in individuals. I do think however that in reality there is now little information that is not accessible when it comes to Members' entitlements and how tax payers' money is expended by Members in the course of them fulfilling their duties as Members of Parliament. The Parliamentary Service also applies the principles of the OIA when information is sought by the public. When I checked very few requests for information have been received by the service, compared with other public agencies.

There is another concern however that may have more substance and that is the privacy of the communication between Members and their constituents, which was the essence of the Private Member's Bill before the House of Commons. It is important not to restrict the freedom of the public to communicate with their Members and for them to respond. Freedom of speech is a fundamental constitutional principle of our Parliamentary democracy. It needs to be vigilantly protected. Again however it would not seem impossible to work through a process where privacy was protected and the public interest was taken into account in any specific disclosure of information. The issue is again one of trust in the whole process.

In the context of the extension of the OIA to Parliament it is reasonable to revisit the justification for the exclusion of the Ombudsman Office and Auditor-General from the scrutiny of the Act. The Commissioner of the Environment is covered by the OIA so it is a legitimate question why the other two Officers are exempt. There is a real issue of who guards the guardians but such an issue is beyond the scope of my introduction and welcome to you. It is a tribute to both offices that I receive few complaints but I have wondered at the lack of independent oversight when some complaints have been made to the Speaker.

Apart from the issue of coverage of Parliament under the OIA, thanks to the Danks Committee and the OIA, the Government is now much more open than it was in 1982. A culture change has taken place and I think we can credit the Danks Committee and the OIA itself for that. There are other more subtle reasons – for example the OIA replaced the Official Secrets Act which had underpinned a culture of secrecy that effectively barred all access to official information.¹¹ The enactment of the OIA required

¹¹ *Open-and-shut legislation? The Official Information Act* John Belgrave, Chief Ombudsman, 21 July 2006

government agencies to change their mindset from the ‘official secrets’ presumption that information should be withheld unless the requester could demonstrate good reason for disclosure to the ‘open government’ presumption that information should generally be made available on request unless there was good reason for withholding it.

A huge range of information is released or made available as a matter of course. New technology makes it so much easier to simultaneously load lengthy reports onto websites. Gone are the days of queuing at the Government bookshop to buy your own copy. An interesting spin-off from this is that the media are not nearly as interested in material freely available and accessible on the website as they are in the same report if they have to formally request it. I’m not forecasting the death of the conspiracy theorist, because there is a view that if something is up on the website there is nothing to hide.

I was interested to note in my first scan of Nicola White’s excellent and just released book on making the OIA work better¹² that she floats whether it is time to consider pre-emptive release systems, resulting in pre-emptive categorisation and release of much more government information. This had already been flagged in Ombudsmen Quarterly Review¹³. One advantage of proactive release cited was a large volume of information that might otherwise have had to be collated and duplicated for individual requests which would already be publicly available and require no further administrative effort.

While there is no obligation in New Zealand to consider proactive release, conventional wisdom suggests that agencies that do not do so risk ignoring best practice and setting themselves and their staff up for unnecessary stress and compliance costs. The real question however is when the release is made. Often requests come during a decision-making process and a premature public release would seriously affect the policy making process that relies on free and frank advice. What is also required is a better recognition of the evolution of government decision-making that is more consultative and participatory than in the past.

In conclusion may I finally observe that there is a culture of openness and transparency within our system of public decision-making in New Zealand. Of course there is always

¹² *Free and Frank Making the Official Information Act 1982 work better*

¹³ Volume 13 Issue 1 March 2007

room for improvement and I am sure this conference will contribute to this important debate. I just want to end by endorsing the concluding statement of Nicola White in her book. She observed:

The New Zealand OIA has contributed enormously to democratic effectiveness in its first 25 years of life. As times have changed, so has the way in which the Act works. At present, the cynicism surrounding the day-to-day administration of the Act in the political field is having a slow and steady corrosive effect. It is corroding trust in government. I believe that trust matters, and that this corrosion cannot be ignored. I hope that the proposals in this book stimulate debate on how we address the problems with how the Act now operates, without sacrificing its undoubted strengths.

May I wish you all the best for a very stimulating debate.
