



4th
International Conference of
Information Commissioners
MANCHESTER 2006

Monday 22 May

Except where indicated, all text has been transcribed from recordings

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Opening remarks

Richard Thomas, UK Information Commissioner

Thank you very much Graham. May I repeat the welcome to the Fourth ICIC International Conference of Information Commissioners. With the theme of transparency, "IC-IC" does seem to be quite a good title!

I am really delighted to see so many fellow Commissioners or equivalents and their staff with us today. I think a sort of 80/20 principle applies here. We have 80% in common and perhaps 20% in differences in the way in which we do things and I am very confident we will explore the common features and the differences of approach over the next two days. We are still new boys in many ways with the British Act of 2000 which went live with cases coming from January 2005. We are still wearing our 'learner' face!

We have learnt that it is not always an easy job being a Commissioner. We have learnt that you do not always please all the people all the time (indeed with most decisions you are likely to cause a bit of upset in one quarter or

another!). But we are delighted as new-ish boys to be part of this community, and we are delighted to see so many big names from Freedom of Information here at our conference in Manchester from all over the world. We have an impressive turnout at the conference, with over 40 countries represented; clearly this is part of a worldwide trend.

Indeed, we have increasingly recognised that Freedom of Information/access to official information is a defining characteristic of a modern democracy. This fourth conference follows the third conference in Mexico last year. I was not able to attend myself, Graham Smith and Dawn Monaghan represented my office there and that was clearly a major and successful event. Many more people attended, particularly from Central and South America than we have here this year but, deliberately, this year's conference is a slightly more modest affair which has followed consultation with most of you over the past year as to what sort of conference you wanted.

The overwhelming message coming back from you was that you wanted to concentrate on the practicalities of being a Freedom of Information Commissioner and that you looked for immediate benefits from a conference of this nature. We therefore set out to clearly define the aims for the conference: first and foremost, to cater for the needs of Commissioners and their staff, but also to provide an opportunity for the wider FOI community to participate. Also, to produce tangible results, to ensure a worthwhile and enjoyable experience for all delegates. And you asked us in particular to focus on two key topics: strategies for changing cultures of secrecy and defining

and applying public interest considerations. And these themes will occur right through the conference.

To address these different aims we have structured the event so that Day 1, today, is only for Commissioners and their staff and then tomorrow, Day 2, will be a fuller conference, with participation from that wider FOI community. And indeed you may be progressing to London for the unofficial Day 3, because in London on Thursday is the so-called "FOI Live" Conference, which is primarily a UK event organised with the Department for Constitutional Affairs, my own office and University College London.

Graham Smith is going to be the Master of Ceremonies for much of this event but my very pleasant task to start the conference is to welcome our Keynote speaker, Lord Falconer. Lord Falconer is the Lord Chancellor for England and Wales and also the Secretary of State for Constitutional Affairs. Those of you who are constitutional experts will know that the role of the Lord Chancellor has been a somewhat controversial role over the years. I am not going to attempt to explain the role of the Lord Chancellor not least because it is going through rapid change at the moment and I know that Lord Falconer will confirm that going through rapid change of a constitutional nature in a country without a written constitution is an interesting experience! Most important of all though, Lord Falconer is the Minister in the Cabinet with responsibility for both Data Protection and Freedom of Information. And indeed when he was at the Home office, it was Lord Falconer who steered the Freedom of Information Bill through the House of Lords. So we see Lord

Falconer very much as a champion and a friend of Freedom of Information and I am sure he would say that it is not always an easy task being a Minister in a government with a new Freedom of Information Act with your colleagues not always entirely enthusiastic about the way in which the law is unfolding.

So of course you are most welcome at our conference and I know the delegates are delighted to have you here this morning. Thank you very much for coming from a very busy London-based schedule. We welcome you very much and may I now invite you to present the opening speech for this conference.



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Keynote speech

Lord Falconer of Thoroton (Lord Chancellor and Secretary of State for Constitutional Affairs)

(text supplied from paragraph 3)

Ladies and Gentlemen, Richard, Thank you very very much indeed for inviting me to this very, very important conference. Can I just start with two remarks? First of all could I thank Richard Thomas for the huge contribution he has made to Freedom of Information and Data Protection. He leads on both in the United Kingdom and as Richard referred to in his remarks it is never an easy role to introduce things which are new to a Government which is rooted in history and to a nation which is rooted in a lot of history. Richard has been brave, he has been sensible. He is a towering champion of Freedom of Information and Data Protection so I am delighted to have been invited by him here today.

Secondly, could I welcome you all to this conference. It is a great fillip for the United Kingdom that the Information Commissioner's conference is happening in England this year. You are all hugely welcome. I very much hope that you

enjoy the conference and I very much hope that you enjoy your stay in the United Kingdom

This is an important conference, on an important subject. The movement towards greater openness and access to information is now a global one, with over 50 countries around the world now adopting comprehensive Freedom of Information Acts:

- in Asia, nearly a dozen countries have either adopted access laws or are on the brink of doing so;
- South Africa enacted a wide reaching openness law in 2001 and many countries in southern and central Africa are following its lead;
- in Europe, the former Eastern Bloc countries have been quick in setting up open access regimes as they have embraced democracy. With the German Federal Freedom of Information Act coming into force from the beginning of this year, much of Europe is now covered by FOI.

And many countries have had long histories of access to information. The Nordic countries in particular - Sweden has had a Freedom of Press Act since 1766 and Denmark has an act going back as far as 1865 allowing losing parties in a court case to see all the administration files.

We in the UK have entered the field comparatively late. Despite being a manifesto commitment of the Labour Party since 1974, it was not until 2000 that this Government got the Freedom of Information Act on the statute books. In many ways, we have benefited from studying other access regimes when

drawing up our legislative framework and from monitoring the effects of implementation in different jurisdictions.

Today I want to look at different international experiences and how they have proved so valuable for the UK's planning for its own legislative regime.

And I would also like to reflect on our experiences in the first year of implementing FOI.

FOI regimes, wherever they may be, are usually established from common principles. Governments have been motivated by citizen empowerment; by the desire to drive more democratic engagement; by the need to fight corruption; and by the simple notion that openness is a public good. More recently, Freedom of Information has been introduced in many countries because it is seen as a standard part of the governance of a liberal democracy.

And the FOI regimes themselves often also share a number of core features such as a general right of access to information to documents or records, independent review, and exemptions for sensitive information impacting on such areas as defence, national security, personal privacy, law enforcement and commercial confidentiality. The essence of a Freedom of Information regime is that someone independent of government can make decisions and enforce the law. There must be enforceability if there is to be true FOI.

Jurisdictions - all jurisdictions - want to ensure that open government encourages good government. If the introduction of an access regime results in information simply not being recorded in order to avoid disclosure then the

benefits are negligible. Equally, Governments must still be able to govern - to discuss sensitive issues, to voice concerns as individual Ministers or officials and able, in our country, to abide by collective decision-making. FOI should not become the basis by which collective responsibility is destroyed.

Certainly, much of the debate here during the passage of the Freedom of Information bill focused on these issues: about providing the apparatus for as much disclosure as possible while ensuring the effective operation of good government.

A common feature of most access regimes are the prophets of doom who predict either Government grinding to a halt or the access regime simply acting as a means of codifying what people can't see, rather than what they can.

And, at the other extreme there are people who expect the introduction of access regimes to have an immediate, tangible, transforming effect on Government.

The reality, as each of us know, is more complex. Freedom of Information is not a quick fix. It is not a magic wand to raise trust in government overnight. It is part of a process that will change the culture of Government and public services and, over time, improve the quality of decision-making.

However, unless FOI is consciously and carefully maintained, and its purposes are understood by people making requests, and by public officials, FOI can be perceived as a bureaucratic hassle, without any short-term benefit. The public become cynical, and officials fail to see FOI as part of

public service and public communication. In some countries, regimes have been restricted.

Some campaigners began to mourn what they saw as the death of true Freedom of Information.

But of course, the rumours have been greatly exaggerated. There is undeniable and impressive evidence of progress - albeit uneven - towards greater openness in countless jurisdictions across the world. The factors that have tended to help in this are:

- an independent review mechanism that is accessible - in other words, cheap - for the appellant and easy to use;
- incorporating harm tests into exemptions which allow disclosure where it is in the public interest;
- and, lastly, the attitude of the Government and bureaucracy to FOI, are perhaps just as important determinants of openness as the actual legislation itself. The quality of training and guidance given to those operating the legislation is particularly important.

As a result of FOI regimes, citizens can access information of real value to them.

But what about our experience here in the UK in the first year of FOI?

Previous Governments and oppositions had talked about FOI for many years, but this Government did it. We did not forget about our promises when we got into government.

Our aim was two-fold:

- first, to empower citizens and provide them with the information about the decision and services that affect their lives;
- and, second, to improve the quality of decision-making by Government and public authorities.

In the UK, FOI means that there is a legal regime to shape decisions about what to release or what not to release. Disclosure is determined by reference to a legal framework with built-in rights of appeal, firstly to the Information Commissioner, and then to the Information Tribunal. These appeal mechanisms are accessible - they are not expensive or complicated processes

The UK FOI Act is a sophisticated and effective instrument.

It applies to 115,000 public bodies - from the English Tourist Board, to local primary schools; police forces to the British Museum. Public authorities from the largest Government department to individual National Health Service doctors' surgeries fall within the scope of this impressive Act.

Unlike some other jurisdictions the UK Act does not just refer to information created after implementation. The Act is fully retrospective, covering information of whatever date held by public authorities. From its introduction on 1 January 2005 any individual, from anywhere in the world, can submit requests to public bodies in the UK.

The rules are there; but the boundaries between disclosure and retention require subtle and complex judgements to be made. It does not prescribe solutions, but sets out the framework within which competing interests have to be tested. Inevitably, and rightly, in the UK the principles are set in statute. Implementation is on a case by case basis.

Reasonable people can - and will - disagree about whether information should be released in many cases. But disclosure for its own sake is not the measure of an access regime.

And nor should we judge the regime by the exceptional cases: the requests for trivial items of information about individual Ministers or the occasional high-profile non-disclosure will not make or break FOI.

What matters is the extent to which public authorities regularly and proportionately provide evidence to the public against which their performances and decision-making can be measured, and which will assist with the decisions the citizen has to make - the choice of school, the attitude to planning applications, the way to vote in the next local or general election. FOI must empower the citizen. And it must improve decision-making. I believe in this country it is doing both.

Freedom of Information demands extra of our public officials, it requires cultural change within Governments and among public officials - a shift in mindset from the 'need to know' to the 'right to know'. This inevitably means that FOI delivers evolutionary change. We should not expect one-off immediate change.

And to be judged as successful, an access regime must be fair and balanced. It must command the confidence of the public and command the confidence of public authorities that information that should be released will be released and information that should not will be withheld.

If the system is too restrictive, the public will feel that their expectations are being frustrated.

If information which should be withheld to protect the rights of the individual and to ensure the proper functioning of Government is forced into the public domain, the public authority will cease to make decisions in an orderly and properly documented fashion. The public will lose confidence in the authorities to protect sensitive information, and third parties - for example whistleblowers, or foreign Governments - won't trust them. Trust and confidence is dependent not upon wholesale openness, but upon regulated and balanced disclosures.

It is important to recognise that FOI requests take a variety of forms and come from a variety of sources - the citizen seeking empowering information, the commercial organisation seeking facts to help it bid successfully, the press to reveal wrong-doing, and also to find exclusives, and political opponents to score points. Apart from the vexatious request - such as "does the Lord Chancellor exist?" - our FOI regime is blind to both the identity and purpose of requests. It is rightly blind. The decision whether to disclose must be based on an objective application of the principles to the information requested, irrespective of who has asked, and for what reason. The information released must be evaluated against how it promotes empowerment, and how it improves good decision-making.

A successful FOI regime must find a way through this process and ensure that it does not become the pawn of the politically motivated, but instead forms part of the process of good government and public engagement.

And has the UK regime been successful? It is too early to make a definitive judgement.

What we do know is that FOI in the UK now means the general public are finding out more about the decisions that affect their lives - and are using this information to ensure public authorities do more to account for and explain their actions.

FOI is providing the public, academics and the media with new means of access to understand the decision-making process. Today I am pleased to launch the First Annual Report on the Operation of the Freedom of Information Act in Central Government. Just a brief review of the headlines from this report demonstrate how much we have achieved in the UK in the first full year of FOI.

In the first year of implementation in Australia there were just short of 6,000 requests for information.

In the UK nearly 40,000 requests were received by Central Government alone during 2005. I am proud of the work we did in the UK to raise awareness of the new legislation pre-implementation. 87% of these 40,000 requests were responded to within the time limit. This is not good enough, obviously I want to see 100% answered to time, but the figures improved progressively during the year, and compare favourably with experience in many other countries.

The UK has done well in terms of release rates. 66% of requests received in Year 1 were granted in full. A further 13% were answered in part, with only some of the information withheld under one or more of the exemptions in the Act. This compares well with other similar regimes.

During the last year we have seen new information never previously released.

- information about the salaries of senior government officials;
- information about potential sites ear-marked for nuclear waste storage in the 1980s;
- an early release under the new access legislation saw us publish the details of individual subsidies paid to farmers in England. Those of you from European countries will be aware of the farm subsidy scheme. Denmark and the UK were the first countries to release this information about the scheme. It was an important release and rightly received widespread credit from the media and academics.

And our disclosure has been used to encourage other Governments to release this information across Europe. The Dutch and a number of the Spanish regional authorities have now released information on their levels of subsidy. I am proud that the UK Freedom of Information legislation is driving forward the move to greater openness internationally.

People can also access information about their local communities in the UK as never before. Information about the performance of their local hospitals, their local environments, their local schools.

Local communities have seen information released about the removal of graffiti from public places. About the sale of council-owned sports fields. Or about the closure of bus lanes.

This first year has been a period of implementation, adjustment and improvement. I am proud of how well Central Government and the wider public sector have coped with the demands of the new rights to know. They have adapted to the new regime very well and for most it is now part of their ordinary functions.

But there is no room for complacency. FOI continues to provide many challenges.

The UK FOI Act rightly sets a very low bar for requestors. Unless it would cost more than £600 to find, locate and retrieve information, Government Departments must process all requests. The full cost is borne by the Department. This ensures free access to official information for the many, not the few.

As in other jurisdictions, Ministers in the UK committed to review the operation of the fees regime after a year. Contrary to press reports, there are no secret plans to introduce deterrent fees. But it is responsible for us to review the cost of providing access to information. We are in the process of doing that.

A recent Decision Notice, has shown that our Information Commissioner is sympathetic to the problems caused by vexatious requests and the need to maintain the balance between the rights of requestors and the ability of public authorities to perform their core functions. He determined a series of

persistent requests to be vexatious because the effect of the requests was of disproportionate inconvenience and expense to a particular authority.

I am pleased that our Commissioner has recognised that there is also a responsibility on applicants to use the legislation responsibly. A minority of requests received by UK public bodies have not always been well intentioned. Delving repeatedly for unknown information in the hope of finding out something interesting is not using the Act responsibly and wastes public resources.

Freedom of Information is a two-way street. The critical point is this: to ensure that the right balance is struck between responding to requests and ensuring effective governance and personal privacy is maintained. If the balance is struck then FOI can deliver a virtuous circle with sensible requests driving better decision-making. That must be our aim.

I am optimistic about the future of FOI, in the UK and around the world. What pleases me most is that the vast majority of requests for information really have been about issues that affect people's lives, and FOI is driving better government.

This, after all, is exactly what the legislation is all about.

Thank you very much for inviting me to speak to you today. I hope the rest of the conference is a great success



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'Regulator' versus 'Ombudsman' – what powers are needed for a successful regime? Should enforcers be covered by the regime?

Natasa Pirc Musar, Information Commissioner, republic of Slovenia

Thank you very much Graham and thank you very much to Richard especially, because he invited me to be the speaker here.

I think I will not be lying if I said that I'm the youngest Information Commissioner among you! I became Information Commissioner two years ago so I'm a rookie. I'm a greenhorn. My first Conference of the Information Commissioners was in Cancun and I was there listening to you with wide open ears and open mouth. Everything was new to me! And after that I started studying Freedom of Information like crazy and it grabbed me. I really love the job – I enjoy it and I believe in Freedom of Information!

Richard asked me to compare the functions of Ombudsman and Commissioner. It's actually quite hard to do a comparison but I will try to do

my best and I hope that I'm not going to be biased because I am the Information Commissioner. I have to be honest, I believe that the Information Commissioner system is better than the Ombudsman system, but I will try to be fair and explain what I mean.

We have three systems when we talk about the appeals on Freedom of Information legislation. The first system is that the first level bodies do decide enough that you have a higher agency within the same institution as an appeal body and then the court. This system is in my opinion the worst one you can have. It's slow and rarely happens that the appeal body will be the same institution and will decide different than the first level public official. This system you can find in Slovakia, Israel, Lithuania, and in Croatia.

The second system is Commissioner or Commissions. Some places you have Commissions, not just one Commissioner. And in two countries you have Data Protection authorities who are dealing with Freedom of Information as well. Those two countries are Estonia and Latvia. Urmas [Kukk] from Estonia is here and he can talk about his experience maybe later.

The third system is the Ombudsman system. This system is only possible where Freedom of Information is a constitutional right. A unique system in the world is in Ireland. Ireland does not have Freedom of Information as a constitutional right. In the Freedom of Information Act, the legislator actually decided that the Ombudsman can be the Information Commissioner as well so Emily O'Reilly from Ireland is both the Ombudsman *and* the Information

Commissioner which is quite an interesting combination. Germany is an interesting system as well. Freedom of Information is not a constitutional right in Germany and on the 1st January as you will already know, Germany got the Freedom of Information Act finally as one of the last countries within the European Union to get the Act. There are only three countries left, Cyprus, Malta and Luxembourg. And in Germany, the Information Commissioner is actually a kind of an Ombudsman. He doesn't have binding powers and it's actually quite an interesting system to follow how it will work in Germany.

Around the world – I hope I didn't leave anybody out from this chart – we can find a Commissioner or Commissions in Ireland, Mexico, Canada, Germany, UK, Serbia, Slovenia, France, Portugal, Belgium, India and Thailand. We can find Ombudsmen dealing with Freedom of Information in Sweden, Norway, Bosnia and Herzegovina, New Zealand. The European Union is actually an interesting system as well, as we could call it a kind of a confederation of European states. Spain and Hungary. Hungary again is an interesting system. They have so called a specialised Ombudsman who is dealing only with Freedom of Information and personal Data Protection.

And now I will talk through the Slovenian model which I of course know the most. We do have an Ombudsman and the Information Commissioner but the Ombudsman is not dealing with Freedom of Information because all the appeals go directly to the Information Commissioner but we will see the differences.

We are both an autonomous and independent state body. This is an essential thing for Freedom of Information being independent from the Government. The head of the body is elected in the Parliament. The budget is determined by the Parliament not by the Government for both. We can both file a constitutional court review if we find that some legislation is not harmonising with the Constitution. We do have both unrestricted access to all the documents even those labelled Top Secret. All the Top Secret documents within the country we can both go and have a look at. We can call anybody for a witness from the public officials to get through them with the procedure of the Freedom of Information. And we can get access to all the premises of state bodies to check whether, in a Freedom of Information case, the documents actually exist.

Now I will talk about the minuses of both. I have to be honest. I had problems to find minuses on the Information Commissioner side but I did find two. The first one is that the Information Commissioner can be sued by public bodies in Court. This is actually a kind of a schizophrenic situation when the country is suing the country, the state is suing the state. But on the other hand, I can tell you that this is also a plus not only a minus. If we can be sued at the Administrative Court of the Republic of Slovenia, our decisions have to be well legally argued and our decisions are from ten to fifteen pages long. They really look like verdicts from the Court. So we have to be really, really professional and try to achieve not to be sued in front of the Administrative Court.

I can tell you some statistics. In those two years since I became the Information Commissioner we solved 160 cases, 160 decisions have been issued. Only 15 of them were put in front of the Administrative Court, so this is less than 10% which is a high success rate.

The second minus of the Commissioner is that the Commissioner cannot start a procedure on its own initiative. We can only start a procedure when we get the appeal. The Ombudsman can start the procedure on its own initiative whenever there is a problem within Freedom of Information, like in Scandinavian countries, I know that this is the system.

The minuses of the Ombudsman are as follows: The Ombudsman is a toothless tiger. What does that mean? – that he doesn't have binding powers. For example in Slovenia, me personally as a Commissioner, I can penalise the public official if he doesn't listen to us. In three years, we didn't have to issue a single penalty. It was enough to say watch what you are doing – you will have problems with us if you don't obey the decision. But the penalty is there to be a kind of a watchdog. The problem with ombudsmen in countries in transition is that actually nobody listens to them. I *do* know that in Scandinavia, what the Ombudsman says, it's the law. It's really his word that counts. For example in Bosnia Herzegovina, Bosnia has the best Freedom of Information law in the world, with public interest test, with few exceptions. And the Ombudsman there is a kind of an appeal body. He can only give recommendations and advice and nobody listens to that man, nobody. First level bodies, state level bodies – they just don't care. They are ignorant and

the system just doesn't work. In spite of having the best law in the world, if you ask me.

The second minus of the Ombudsman is that he can deal only with the complaints of a "natural person". A Commissioner can deal with the complaints by "legal persons" as well, so the fundamental human right is actually extended to legal persons in our system. As I have already said the Ombudsman does not have binding powers, only opinions and recommendations. And within the Ombudsman system you have informal procedures.

If we look at the pluses of both institutions: first, Commissioners or Commissions - binding decisions, as I have already said, and penalties, wider jurisdiction. For example, Ombudsmen can deal only with local government bodies, with state bodies, courts included, with public office holders. The Commissioner in Slovenia can deal also with public agencies, with public funds and other entities of public law, and also with public service contractors like concession holders, notary publics for example – chambers are entitled to follow the Freedom of Information law in our country. Inspection competencies we have. This is extremely important in the case when a state body or a local body does not want to reveal the document. We can go there, not get an appointment before, we can just go, not tell them before. Go there, we can go into the premises, we can walk in and we can search through the computers, through the tables and try to find the document. We can deal with the case even when in progress that means courts - in our country we are

entitled to follow the Freedom of Information. For example, if someone is asking for a document which is a part of a huge docket within the process still going on at the court, we can go there, we can check and we have to use the harm test and the public interest test. So even the document when the court process is still going on can be revealed, if we find out that no harm can be done by revealing such a document. Ombudsmen can not deal with the cases in progress. In former procedure as I said before, it pushes us to be more professional and that our decisions are well legally argued.

Pluses of Ombudsmen: Ombudsmen can decide annual reports also give special reports to the parliament, so he can act more in a preventive kind of a way. He can start the procedure on its own initiative. He can give initiative to change the law or executive regulation. And he can actually suggest disciplinary proceedings for public officials which are not obeying the constitution fundamental human rights. Does it matter who has the appeal powers and how strong they are? The pragmatic answer will of course be yes and no. It depends on many things. The most important thing is the mentality of the people, of the citizens. Are they used to secrecy or do they have the guts to ask already.

I know they have a lot of problems in Poland, in Czech Republic, in the Ukraine. The people are not used to transparency – they are afraid to ask, they still think in some cases, their countries are still in a way policed countries. Mentality of public officials – this is the toughest thing to change it. Even in Slovenia, Slovenia is I think at the end of the transition being the best

among new European Union members. We are going to be the first one to join monetary union on the first of January next year. We are doing well, but I still think that we do have some problems with the past. And the mentality of the public officials in the past was that everything is secret, but if some high public officials or politicians are saying OK let's give the documents to the public, now the mentality *has* to be different. And it is changing. The mentality has to be everything *is* public, but exceptions. But exceptions are there to use, not misuse. I always say that. And then the level of democracy in the country is of course also very important and the length and the tradition of course play a huge role.

Does it matter how well Freedom of Information is implemented in the legal system of each country? The answer is definitely yes. It depends on it. It is extremely important that the country has Freedom of Information as a constitutional right, especially those countries which do not have harm test or a public interest test. I can tell you an example from Slovenia. Our Freedom of Information law was mobilised on 15th July 2005, so a year ago we got a public interest test in our law. Before that, we were actually quite lucky because Freedom of Information and, for example, personal data protection were both human rights and we were able to use the so-called proportionality test which is the heart of all the constitutional law. And now, while having the public interest test of course we can strike the right balance also between corporate secrecy and other exceptions which are not constitutional rights. And of course the next important thing is that the country *has* a Freedom of Information Act.

Number of Exceptions : This is the next step towards the transparency the country wants to achieve. The less exceptions you have, the better I think. In Slovenia, we have only eleven exceptions, and of course the public interest test. I mean, don't get mad at me, but I'm actually in love with the public interest test because I really do like it and I think that the public interest test is the heart of Freedom of Information legislation because it is the exception of the exceptions, and you can always use it at the end to reveal the document if the interest of the public prevails even over the harm when you find out that the harm can be done by revealing the document. The public interest test, only 25 countries in the world have it out of 66. I have the exact number, 66 countries in the world have Freedom of Information legislation.

And now I can show you the chart. It was made by Dave Banisar. I'm pretty sure that all of you know it he's a hard working guy, dealing with Freedom of Information for many, many, many years and the countries in green are the countries who have Freedom of Information legislation, 66 I said. The countries in yellow are the countries who have so called pending effort to get Freedom of Information. Russia, for example, is a very interesting case. For ten years they do have a written Freedom of Information Act already but President Putin has it in his drawer and he doesn't want to put in front of the Duma to adopt it. The black dot within Europe is Belarus. President Lukashenko does not want to hear about Freedom of Information. I think as long as he's going to be the President, Belarus is not going to be a transparent country. There is a small yellow dot on the south of Europe. This

is Montenegro, and there is a yellow dot beside Belarus – this is a Russian territory. And as I said before, Cyprus, Malta and Luxembourg- the only three European countries without Freedom of Information laws. The countries in white are the countries with no Freedom of Information laws and even no constitutional right of Freedom of Information.

Now if we look at this map, this is a Corruption Perception Index from 2005. Transparency International issued a huge analysis and they published it in October 2005. You can see that the countries that are here coloured in pink are the countries which are coloured in green on the other map. And I strongly believe that there is a correlation between transparency and corruption. More transparent the country, less corruption you have. Let's look at the Corruption Perception Index of 2005. At first ten places you can find surprise surprise, and I am not surprised, Scandinavian countries which have the longest tradition in Freedom of Information in the world. You can also find there Switzerland and Singapore. Those two countries are quite interesting. Singapore doesn't have a Freedom of Information law still, Switzerland got it in November 2004, but those countries they have different mentalities. And from the places from 11 up to 19 you can find UK, Germany, Hong Kong, Canada, Luxembourg, - the countries with long tradition of democracy which is also an essential part of transparency of each government. If we go further, under number 25, 27 and 31 are the new European Union members. Estonia and Malta are in front of Slovenia and you know I am not pleased with that. I want to be the best even here and I said to Urmas just a couple of months ago when we met in Budapest, actually it was a month ago, and I said to him,

you know you do have the Freedom of Information Law since 2000, it *has* to be the reason that you are in front of us because you got the law three years before us. And I think that in a couple of years, Slovenia has the law from 2003, so our law is only three years old and I hope and I will try to do my best that Slovenia is going to be higher on that scale of non-corruptive countries. You can see Italy on number 40. Italy is a member of the European Union for ages and they have huge problems with corruption and they don't have a good Freedom of Information law. You know the story now about corruption in the football team Juventus, OK it's not a public sector but it's a new corruption affair in Italy. If we go further, on number 47 you can find Greece. Greece is also a member of the European Union and it is quite a few numbers behind Slovenia and other countries.

If we look at the bottom of the scale, we can find non-developed countries, dictatorship countries. Number 150 is very interesting. This is Sudan. Sudan is the poorest country in the world. Three months ago, the President of Sudan bought a yacht for 30 million Euros in Slovenia, in Slovenian shipyards and I'm pretty sure that Sudan people just simply don't know about it. If Slovenian President would have bought a yacht for 30 million Euros it would be huge fuss in the country. Actually I can tell you an example. Slovenian police bought a boat for 1 million Euros to sail around 35km of our coast, We have a short coastline and the Slovenian public were saying why on earth do we need a million Euro boat for 35km of our coast? And it was a huge debate. But in Sudan, nothing happened. Fourteen days after Sudanese President bought a yacht in Slovenia, he bought another one in Czech

Republic for 25 million Euros as far as I know, to sail down the Nile River, and nothing happened. And I think that the bottom of this scale, the countries which have Freedom of Information laws can just simply not be there.

Though I think the Freedom of Information regime is not enough to fight corruption, but I think it can be a tool, I strongly believe in that. Just a week ago when I was surfing through the internet and I was surfing through the World Bank internet page I found this press release. "The World Bank President Paul Wolfowitz on April 11th said that the media and Freedom of Information is going to be the heart of his anti-corruption agenda". Tomorrow if you are going to talk with the NGO representatives you will easily find out that the World Bank is one of the most closed institutions, most non-transparent institutions in the world and I'm glad that Mr Wolfowitz actually said that the Freedom of Information is going to be put in front, that it's going to be the heart of his agenda to fight the corruption.

I will end here my presentation and I will say thank you for listening to me and if you do have any questions I am willing and more than happy to answer. Slovenia is a young county. We got our independence in 1991. Our first constitution was written in 1991 so we are greenhorns even in the field of democracy. But I can tell you that Freedom of Information now in our country works, and I strongly suggest, especially to the countries in transition to have the Information Commissioner with binding powers because public officials don't listen, and our public officials are not reluctant and ignorant. The problem in our country is that we don't know enough about the Freedom of

Information laws. Three years is not enough to develop all the skills to know everything about the law. We need court cases to build the precedence and that's why I think our role, the role of my office is very important because we are leading the way in Freedom of Information. I hope and I think we are successful, and I always say that it's not only on Natasa to implement the Freedom of Information – it's on all public officials. And it's on Government to have good Freedom of Information laws. Thank you.



4th
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Secrecy versus Security: Heightened Security - The Challenge for FOI Outcomes

John Belgrave, Chief Ombudsman of New Zealand

(text of speech provided)

INTRODUCTION

I very much appreciate the invitation to be asked to speak on this topic.

By way of background, the Ombudsmen in New Zealand, in addition to their jurisdiction of handling complaints about decisions of nearly all central and local government agencies, also review complaints against decisions of those agencies - including decisions of Ministers - not to release official information.

The title of the presentation suggested to me is intriguing, suggesting that secrecy is in tension with security, and not – as many might more naturally have surmised – openness. This reversal of the normal presumption is something I shall attempt to address in the course of this paper.

So that you might have an idea of the ground I shall be traversing in the rest of this paper its broad outline is as follows:

- a description of the New Zealand statutory framework on access to official information including that relating to security issues;
- reference to cases which show how the law has operated on a practical level;
- the lessons for New Zealand and other countries which are suggested from this experience; and
- consideration of the broader question of the weight to afford secrecy and openness in relation to security.

I will close with a suggestion that FOI review agencies should consider more active support for one another on these issues to tackle potential institutional shortcomings.

Background

In today's world of understandable heightened security concerns, the way in which these concerns are leading to a debate on secrecy rather than freedom of information provides challenges to us all. Indeed, one might ask whether more secrecy of information is an inevitable outcome of responses to acknowledged security issues, responses which now occupy an increasingly

important place on the policy agendas of some of the countries represented at this conference.

This is an important issue. It is particularly so when one seeks to establish if an indirect consequence of heightened security concerns is a general movement away from the openness of an FOI culture, towards what might be defined as a '*culture of secrecy*'.

Such a culture of secrecy in some jurisdictions, including that of New Zealand, generally has been overtaken by the abolition of Official Secrets type legislation when FOI legislation was introduced. Holders of official information in countries like New Zealand which have had FOI legislation for many years - in our case the Official Information Act (OIA) - have generally come to accept that official information should be made available unless there are good reasons for withholding such information. The grounds for withholding are generally similar, of course, in most FOI statutes, although specific provisions differ between jurisdictions.

I suspect that the prime focus of many of us is driven primarily by the type of requests to release information that take up most of our time. These are likely to involve ensuring that those parts of the law which impact on people on a more day-to-day basis, such as commercial confidentiality, personal privacy and the policy making process, deliver intended and relevant FOI outcomes.

However, if most of our resources are indeed devoted to handling what is often a large volume of *'routine but complex'* FOI requests, we might nevertheless ask ourselves whether we should now be examining more closely some of the events of recent years which point to the interplay between access to information and security becoming more significant. In this context, one question which might be asked is: *'Have governments responded to security concerns by perhaps giving greater attention to communal aspects of security, with less focus on the openness and transparency of information that are the hallmarks of FOI statutes world wide?'*

Following on from that question is the issue of whether there is any need for more recent security and terrorism-focussed legislation to propose exempting categories of information from the scope of FOI laws. Should security agencies not simply cite changed security concerns when making out a case for withholding information under existing access to information regimes?

New Zealand's experience of security as a withholding ground

I should like now to describe the New Zealand experience of national security issues in the context of the OIA, starting with a brief outline of our statutory framework before moving on to how this has operated in practice.

Statutory framework

New Zealand's FOI legislation grew out of the 1980 report of a committee of experts chaired by Sir Alan Danks, a former academic. The Committee included also Sir Kenneth Keith, then a law professor and now a judge on the International Court of Justice, the Cabinet Secretary, the Chief Parliamentary Counsel and senior officials. This high-powered Committee considered not just the form of New Zealand's proposed legislation, but also which organisations should fall within its scope.

The basic principles expounded by this Committee remain relevant today. My Office continues to rely on many of the principles the Committee developed in our approach to our consideration of appeals against refusals to release official information. Indeed these principles have been confirmed both by the Courts and by a 1990 report from a Select Committee of the New Zealand Parliament.

The Act itself is quite simple in concept. To quote the long title, it is

“An Act to make official information more freely available, to provide for proper access by each person to official information relating to that person, to protect official information to the extent consistent with the public interest and the preservation of personal privacy, to establish procedures for the achievement of those purposes, and to repeal the Official Secrets Act 1951”

The purpose of the Act follows, in section 4:

“The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—

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

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

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

Public authorities subject to the Act and the Ombudsmen, in reaching conclusions after investigating complaints that the law has not been complied

with, are required to determine matters so as to give effect to these purposes. As an observation, even after nearly 25 years since the enactment of the statute it is sometimes necessary to remind organisations that the Act promotes the release of official information rather than the withholding of it. The application of the grounds on which information may be withheld remain from time to time the subject of robust debate between my Office and holders of official information. This is notwithstanding the fact that a considerable amount of official information is now released as a matter of course without any reference to my Office at all.

After describing the purpose of the legislation, the Danks Committee had this to say about the schedule of organisations covered by the OIA:

“This Schedule of additional organisations is based on a series of considerations, some positive, others negative. The principal positive criterion is that the organisation is carrying out a governmental or public function. This turns in large part on the relationship between the organisation and the central government: whether the government appoints its members or controls its staffing, provides its funds, controls its finances, has a statutory power of direction, may obtain assistance or advice from the organisation, or has the power to take over its functions.”

Not surprisingly, from time-to-time certain bodies that fall into the category described above have sought to be excluded from the Act. For example, in 1990 submissions were made to a Select Committee of the New Zealand Parliament that was reviewing the application of the OIA to government-owned companies. Several of these companies suggested that they should be excluded from the coverage of the Act on '*commercial grounds*'. They argued that as they competed in the open market their operations were hindered by their being subjected to the statute.

The Select Committee declined to act on their submissions on the basis that the Act contained provisions that enable legitimate commercially sensitive information to be protected. To the best of my knowledge the Act has done just this. The important thing to remember is that the Select Committee appeared to confirm that organisations which fall clearly within the above definition are no different in their public accountability obligations from other government institutions.

Logically therefore, the Danks definition did not exclude from the scope of the New Zealand OIA either of the two New Zealand Security agencies - the New Zealand Security Intelligence Service (NZSIS) and the Government Communications Security Bureau (GCSB). This is in contrast to some other jurisdictions where agencies such as these are not subject to the requirements of the equivalent of the OIA, or the information that they generate and supply to others is exempted from disclosure as a category.

In passing the OIA, Parliament endorsed the criteria the Danks committee had drawn up regarding the scope of the Act, one result of which was that these organisations be subject to the law. Eagles, Taggart and Liddell have commented in their book on Freedom of Information in New Zealand that,

“It may, therefore, be presumed that our politicians felt that there was some information about the activities of the NZSIS which could safely be made public. Indeed, its inclusion in the First Schedule (to the Act) can be seen as a legislative affirmation of the principle that even the security services must be publicly accountable for their actions and that the machinery provided by the Act is an essential part of that accountability.”¹

This however might be stretching the point. In making the NZSIS, GCSB and other agencies with intelligence gathering functions subject to the OIA, Parliament may simply have been rebutting the Official Secrets logic that any information held by the security and intelligence agencies always needs to be withheld. Subjecting these agencies to the OIA regime is not so much accepting that *‘there was some information about the activities of the NZSIS which could safely be made public’* but rather reflecting that the question *‘does this information need to be withheld’* must always be asked. Even if the information is not released, the New Zealand public have the safeguard that the answer to the latter question can be the subject of independent scrutiny – in this case by the Ombudsman – against the test that Parliament has set.

¹ (E, T & L pp 149-50)

It is also important to reiterate at this early stage that the purposes of the OIA – which government agencies and my office are required to give effect to when taking decisions under the Act - are, in part, to *'promote the accountability of Ministers of the Crown and officials'*, thereby enhancing the respect for the law and promoting the good government of New Zealand.

The idea that openness under the OIA promotes accountability is fairly straightforward, but it is important in this context to recognise the benefits which the framers of the law saw as flowing from it: enhanced respect for the law and promotion of good government. One might draw the inference that too much secrecy therefore undermines respect for the law and does nothing for good government. This is an important consideration to bear in mind as we consider arguments for withholding information on grounds of security.

As I mentioned earlier, the OIA also abolished the Official Secrets Act 1951, a piece of legislation similar in drafting to the UK's 1911 Official Secrets Act.

Section 6 of the New Zealand Official Information Act

Section 6 of the OIA provides the grounds for withholding information relating to security, defence and international relations, amongst other matters.

Subsections (a) and (b) are relevant to security concerns:

“Good reason for withholding official information exists, for the purpose of section 5 of this Act, if the making available of that information would be likely—

- (a) To prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or*
- (b) To prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by—*
 - (i) The government of any other country or any agency of such a government; or*
 - (ii) Any international organisation;”*

The test for withholding official information under section 6(a) is that the information *‘would be likely to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand’*. The difficulty is to find a yardstick by which the Ombudsman may judge the mere assertion that the release of particular information *‘would be likely’* to prejudice security. The phrase, *‘would be likely’* has been defined by the NZ Court of Appeal in the OIA context in this way:

“It is obvious that the expression is capable of many shades of meaning conveying grades of probability. The context in which it is used - s 6 - deals with matters calling for a practical and

common-sense assessment of the prejudice to the various interests described. In many cases it will be almost impossible to predict the consequences with anything like the carefully balanced - almost mathematically calculated - level of assurance needed to satisfy the liberal test of "more probable than not". I think a more restricted approach is called for. It would be surprising if access to information was intended to be given in circumstances where its disclosure would create a real risk of prejudice to - for example - our national security or the right to a fair trial; or where such prejudice can be seen as something that might well happen. These latter meanings of "would be likely"...seem more in keeping with the maintenance of a proper balance of the interests contemplated by the Act, and they provide a common-sense test which can be more readily understood and applied." ²

I and my fellow Ombudsman are therefore enjoined to accept as the test for withholding the question of whether disclosure would ‘*create a real risk of prejudice*’ to security, defence or international relations.

Section 6(b), as we have seen, protects information ‘*entrusted*’ to the New Zealand government ‘*on a basis of confidence*’ by the government of another country, or any of its agencies or by any international organisation. It is important to recognise here the effect on the ability of a government to be

² *Commissioner of Police v. Ombudsman* [1988] 1NZLR.385 (CA) per Casey J. p.411

open despite the treaties it has signed. As Professor Alasdair Roberts has described in several articles, bilateral agreements between two countries on exchange of security related information can *'trump'* the requirements of access to information laws, by insisting that shared classified information cannot be disclosed to those outside government without the consent of the originating government.

Given that small countries such as New Zealand are likely to be net recipients of intelligence and security related information from other countries, this factor is likely to be more significant perhaps for us than might be the case in larger countries with significant intelligence gathering resources of their own.

It is important to note also that the New Zealand OIA describes these grounds for withholding information as *'conclusive'*. If it is established that good reason exists under section 6 for withholding the information sought, this is sufficient in itself, and the restriction cannot be overridden by other aspects of the wider public interest. This is in contrast to section 9, which sets out the other grounds for withholding official information which require a countervailing public interest test to be applied. Once a section 6 ground for withholding is made out, that is the end of the matter. An Ombudsman on review is not empowered to recommend disclosure of such information on public interest grounds. This is, I suggest, a realisation on the part of the legislators that the maintenance of national security for example is of particular importance.

I note however that some other countries do subject some similar grounds for withholding to a public interest balancing test, which enables the review agency to recommend – or even order - that the information in question be disclosed. One question for us to consider in New Zealand is whether the lack of a public interest balancing test in the OIA for withholding information on section 6 grounds is still appropriate, nearly 25 years after the law was enacted, or if the development of freedom of information laws elsewhere has shown that we should look at this again.

Limits to Ombudsman's powers

There are three potential checks on an Ombudsman's ability to investigate or recommend the disclosure of information.

First, under section 20(1) of the Ombudsman Act, the Attorney General can effectively block an Ombudsman's investigation through the issuing of a certificate, preventing him or her from exercising their powers to require information from the government if it might prejudice the security, defence, or international relations of New Zealand. This section of the Act has never been used.

Second, the Prime Minister can prevent an Ombudsman from making a recommendation that information be made available under section 31 of the OIA, if he or she certifies that it would be likely to prejudice *'the security or*

defence of New Zealand or the international relations of the Government of New Zealand'. It is important to note that this power under the OIA is only available to the Prime Minister prior to a formal recommendation being made.

However, given the practice of successive New Zealand Ombudsmen to inform departments of their '*provisional view*', before any final view and recommendations, scope clearly exists for the Prime Minister to exercise this power. This power has only been used once in the history of the OIA. When, however, the power is exercised, the Ombudsman is still under a duty to report the outcome of the investigation to the complainant, which would mean, at least, that they would be aware that the Prime Minister had issued the certificate and might trigger Parliamentary and/or media scrutiny.

Third, and of more general application to the whole of the jurisdiction under the OIA, the Governor-General, through an Order in Council (which must be laid before Parliament) can direct that the public duty to comply with a recommendation - which normally comes into force 21 days after a recommendation is made by the Ombudsman - shall not come into force. This is colloquially known as the Collective Cabinet veto, and it too has never been used.

Cases under the Official Information Act

I turn now to some of the issues that arise in a jurisdiction such as New Zealand in addressing the application of the OIA when requests relating to national security arise, and some of the matters my Office has to consider in this part of its jurisdiction.

First it should be noted that, in my view anyway, security agencies in New Zealand do attempt to conform to the spirit of the OIA. I understand these agencies at one time relied quite heavily on the '*neither confirm nor deny*' provisions in section 10 of the Act. However this has changed in recent years, especially in cases where it has been highly improbable that they held **no** information on a particular topic, and yet they were still claiming to be performing their functions efficiently. This on its own is a welcome development, but it does not necessarily make decisions by the review agency any easier where information requested is withheld under section 6(a).

The international environment faced by countries like New Zealand illustrates some of the problems that I suspect many of us face in this increasingly difficult area. New Zealand, as a small, isolated, but nevertheless developed country is dependent critically on other countries for economic, security, defence and other intelligence. For example, when I was a junior diplomat in London some forty years ago, a lot of my time was spent in Whitehall seeking what the New Zealand government saw as important economic intelligence where New Zealand relied very much on the goodwill of the British Government to provide it. Others in our High Commission at the time related

to other agencies including security agencies for security information. This pattern continues, although today I suspect it is more focussed.

From time to time New Zealand was also able to contribute its own perspective on common issues, a practice which I understand still continues. However one principle remains; New Zealand as a small country tends to rely more on others to provide information than we ourselves are able to provide to them.

When one translates this to FOI and matters of national security a similar manifestation is evident, although I doubt if, in principle, the New Zealand experience is all that unique. Refusals to release information by the NZSIS that have come to my office on review illustrate the point and tend to indicate that for countries in the same dependent position as New Zealand, issues relating to the release of security related information are likely to very quickly get mixed in with questions of potential harm to international relations.

Some cases relevant to the issue

1. USS Buchanan

The first case which illustrates this deals with the decision not to disclose details of some conversations between New Zealand and United States military officers, even though they took place 20 years ago.

In 1998, my predecessor reported that a complaint had been investigated concerning a request to the Ministry of Foreign Affairs by a researcher for all the documents held on the Ministry's files relating to the proposed visit to New Zealand in 1985 of the US Navy ship the USS Buchanan. The Ministry of Foreign Affairs released some of the information but withheld the balance in reliance upon section 6(a) and section 6(b)(i) of the OIA.

The review of a decision to withhold information in reliance upon section 6 requires an independent opinion to be formed as to whether the threshold necessary to justify that decision has been met, having regard to the particular circumstances of the case. In other words, would release of the information at issue be likely to prejudice one of the interests identified in section 6.

In this case, the Ministry's concern was that release of the information *'would be likely'* to prejudice New Zealand's international relations. The information related to a period in New Zealand's bilateral relationship with the United States of America which had been difficult. The Ministry advised that the issue of port visits by United States warships remained sensitive.

After considering the Ministry's explanation and reading the information at issue, the view was formed that there was some further information which could be made available without prejudice to the interests the Ministry was seeking to protect. However, the balance of the information needed to be withheld to avoid prejudice to those interests. In reaching this view, regard was had to the fact that there are certain conventions of international

diplomacy, in particular the convention that information communicated informally by another State through diplomatic channels will be kept in confidence. If these conventions are not observed by New Zealand, it would be likely that the international relations of the Government and the entrusting of information to it by another State would be prejudiced.

The information in question was withheld under section 6(a) and section 6(b)(i). A like case for related information was investigated by the Office in the last year and a similar conclusion reached. This case serves to highlight that the degree to which the question of whether information like this may be released may be heavily dependent on how happy the other country involved would be to see the information disclosed, and not whether the information itself is intrinsically harmful.

2. Individuals of interest to Security Agencies

The question of the context within which information can come to be held by the New Zealand security agencies is also relevant when considering cases that come to my Office sometimes concerning requests for information about individuals in whom the NZSIS has a specific interest. This is not a frequent occurrence, but it happens often enough to illustrate the point.

The NZSIS and, I suspect from reading Professor Roberts' articles, similar agencies elsewhere, often refuse to release information supplied by other intelligence agencies. This is not always because of its content but because

release - in the view of the agency - would prejudice future supply of similar information. On occasion, it is admitted by the agency that although such information is open source, it came from a sister organisation. Of course, in such cases requesters, provided they know where to look, can access this open source themselves. But the principle of the maintenance of relationships between agencies remains.

This illustrates a key problem for FOI review agencies when investigating cases with a security dimension. Is there anywhere an FOI review agency can go for a second opinion on pleadings such as these? From my perspective there is nowhere in particular where we can go to, with one result being that the reviewer is dependent largely on the integrity of the agency holding the information. In saying this I am not questioning the integrity or bona fides of either of the New Zealand security intelligence agencies, but the problem nevertheless remains.

Lessons from our experience

As I have previously suggested, our experience in New Zealand of reviewing complaints that information has been wrongly withheld on security grounds indicates that matters tend to be complicated further because, from time to time, matters of security often become intertwined with relationships with foreign governments and so on; possibly one of the particular challenges of working in a small country. This of course also has advantages: one is not

dealing with a plethora of security and security related agencies as is often the case in bigger countries.

Our experience has shown also that there is no need for a *'class exemption'* for all information relating to national security or for the security agencies to be removed from the scope of the law. It has shown that an objective test can be applied to the disclosure of security related information. The movement away from use of the *'neither confirm nor deny'* provisions of the Act by security agencies over the history of its operation indicates that they no longer assume that total secrecy is as necessary as often as was considered at the outset of the law's operation. Over time, agencies have released more information about what they do and seem to have recognised the worth of the Act's philosophy to their own work.

Another ground sometimes advanced by security agencies including police and other crime prevention bodies is that sometimes release of security based information can enable any researcher to piece together how an agency operates which can also be in conflict with national security objectives. I'm sure some of you will also have to consider such arguments (often referred to as the *'mosaic'* or *'jigsaw'* argument) from time to time. Again fine judgements are often necessary. Our experience in the New Zealand context is that it is important to keep in mind that a capacity to piece together information does not necessarily result in an outcome prejudicial to national security. There is a danger of the mosaic argument being accepted without asking how precisely the information requested could be used to the detriment of national

security. If the connection between the capacity to link the information requested to other information in a manner that would prejudice security is too remote then the 'would be likely test' under the OIA is not met.

I mentioned earlier that there has only been one occasion on which the Prime Minister of the day felt it necessary to issue a certificate under section 31 of the Act, preventing one of my predecessors from making a recommendation that information be disclosed. The issue of ministerial certificates was considered again by the New Zealand Law Commission in its report on the Act in 1997. Although the Commission stopped short of recommending the removal of this power since they had not mentioned it in their draft report and had not received comments on the suggestion, they said,

“Conclusive certificate provisions along the lines of section 31(a) are in principle difficult to justify and do not relate well to the scheme of the Official Information Act. Moreover the use of the provision only once in 15 years indicates that it is not an essential part of the Act, and that sections 6, 7 and 10 may be adequate by themselves. The repeal of section 31(a) would not permit the Ombudsmen to supplant the judgement of the executive concerning matters of defence, security or foreign relations. The government could still exercise the power of Cabinet veto under section 32 of the Act, in the same way as it would if the information it sought to protect concerned domestic affairs. It would simply place information concerning defence,

security or foreign relations under the same regime as other types of information in the event that the Ombudsmen's recommendations were to be overridden, and shift the key decision-making power from the Prime Minister to the Cabinet."³

No action has been taken to amend section 31 of the Act since the Commission reported.

The Ombudsmen have also experienced information moving beyond the scope of the OIA through the internationalisation of policy-making.

In our last two Annual reports to Parliament we have noted issues arising in the context of Trans-Tasman organisations (covering New Zealand and Australia) and section 6(b) of the OIA. Section 6(b) provides conclusive reasons for withholding information on the grounds that making it available would be likely to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by other governments, or their agencies, or by any "international organisation".

An issue that has arisen related to whether the New Zealand Minister for Food Safety could rely on this provision to withhold information about proposals for food labelling for New Zealand.

³ *Review of the Official Information Act 1982*, Report 40, Law Commission, 1997, paragraph 282

The question arose because the information comprised papers of the Australia New Zealand Food Regulation Ministerial Council.

The Council resulted from a treaty between Australia and New Zealand and fell within the meaning of '*international organisation*' as that expression is defined in the OIA. The Minister submitted as part of a decision on a request for Council documents that if New Zealand did not comply with the Council's confidentiality requirement, concerns would be created about New Zealand's ability to ensure confidentiality and it would likely be excluded from participation in Council deliberations, which would be detrimental to New Zealand's interests. In these circumstances, it was accepted that section 6(b) allowed the request to be refused.

This raises the question of whether it is appropriate for bodies established jointly by Australia and New Zealand (and the same principle may apply e.g. to EU members) for the purpose of formulating similar legal standards in both countries to be treated the same as other international organisations, or whether they should be regarded as domestic bodies of the members.

A further case that involved a similar enquiry was received from a New Zealand citizen who had unsuccessfully sought access to information held by a separate Trans-Tasman agency, the Food Standards Authority Australia/New Zealand (FSANZ). FSANZ is not currently subject to the OIA although it is subject to the Australian Federal Freedom of Information Act (AFFOIA). The enquirer advised that she had applied for access to

information held by FSANZ under the AFFOIA but was advised that as she could not provide an Australian address her request was not valid. At present, the only way information held by FSANZ can become the subject of a request under the OIA is if it is held separately by a New Zealand agency subject to the OIA. The question arises about the desirability of Trans-Tasman agencies with regulatory functions impacting on both New Zealand and Australian citizens being subject to the FOI regime in Australia only. There would seem to be a logical inconsistency in this.

While these cases relate to international relations and policy-making that concern food safety, rather than security issues, they are likely nonetheless to be relevant to colleagues from other countries who are also witnessing shifts in policy making from the domestic sphere to an international environment. There are, of course, also strong public interest reasons for wanting to know about food safety issues which have a high public profile.

The discussion of security-related policy is also frequently conducted at an international level these days, and the changes to passport technical standards and the exchange of airline passenger data between countries are just two of the examples that spring to mind.

Our experience more broadly has been that where there is a move to create a blanket withholding provision for whatever reason, there is a need to consider closely whether the potential effect on an individual requires the additional safeguard of a countervailing public interest test.

Security protected by greater openness

As Alasdair Roberts and Tom Blanton described in their presentations to last year's conference, there are occasions when moves toward greater secrecy can undermine the desire to improve security.

Inhibitions on information sharing amongst public services that need to know about potential risks and how to manage them is perhaps the biggest danger that can be pointed to. The reports of inquiries into intelligence reporting in the run up to the war in Iraq, and the sharing of information prior to the events of 11 September 2001 are well known. But this problem persists and is sometimes made worse by poorly researched media reporting that might be thought to have been engendered by government statements on the risks of openness. An example of this was seen just last month, when information on a government website designed to assist fire-fighters with tackling problems on Air Force One were it ever to get into difficulties on the ground, was removed after a newspaper report⁴ suggesting that it presented a security risk. This information had been disseminated previously and, it can be assumed, was known to those that might have a malign intent. The removal of the information from the website would not necessarily aid security, but hinder those who need to know how to treat a fire and rescue people.⁵

⁴ *San Francisco Chronicle*, 8 April 2006.

⁵ *Secrecy News*, 20 April 2006. http://www.fas.org/blog/secrecy/2006/04/a_flutter_over_air_force_one_s.html

This may be something of an aberration, and I'm sure we can all point to similar events in our own jurisdictions. But perhaps it is a telling indicator of how the concern that openness might lead to security breaches can go so far as to risk undermining what the secrecy was designed to protect.

However, there are more serious arguments about the type of society we live in and how the openness and accountability we enjoy, hopefully enhanced by effective FOI laws, actually enhances national security through the cohesion of people in our societies, giving them a sense of common interest in protecting the things they share with each other.

While a society which is unable to obtain a reasonable level of security is unable to give effect to the civil and political rights of its citizens, that society will also be able to enjoy those rights only if openness is also a prerequisite. In periods of emergency, governments may introduce measures to restrict civil and political liberties, but in times such as these, openness becomes even more important – enabling us to scrutinise whether additional state powers are being used properly or are being abused. Indeed, it seems clear that without openness and the ability to hold the executive to account for its actions and policies in times such as these, public distrust of government – already at worryingly high levels in some countries – will further increase. A lack of public trust in governing institutions is likely to degrade the very social cohesion on which true national security rests.

This point was recently touched upon by Dr John Gannon, the former Deputy Director for Intelligence at the CIA, in his testimony on 2 May 2006 before the US Senate's Judiciary Committee.

"I believe that the hard-won Constitutional freedoms enjoyed by Americans, along with our unparalleled commitment to civil liberties embedded in law, work against the development of domestic terrorist networks that could be exploited by foreigners."

When asked by a journalist to elaborate on this, he said:

"Americans have unparalleled Constitutional and legal protections to express grievances and to openly criticize government at all levels. This doesn't mean that terrorists wouldn't try to operate here. It means that the terrorists or other extremists would find less fertile ground to build networks in the US because local support would be harder to come by and because local opposition would be more certain. In this sense, our liberties are a powerful antidote to violent extremism. This is not an academic point for me. It is an observation from a career of watching the domestic consequences of repressive regimes elsewhere in the world."⁶

⁶ Secrecy News, 8 May 2006. http://www.fas.org/blog/secrecy/2006/05/civil_liberties_as_an_antidote.html

These are arguments which would not be unfamiliar to civil liberties and FOI advocates. It is perhaps refreshing to hear them coming from an experienced senior intelligence officer. To my mind it demonstrates that secrecy and security do not necessarily go hand in hand.

We also need to be clear that there are two different openness issues involved here.

1. The policy adopted by governments and security agencies as to what needs to be done in the interests of safeguarding national security.
2. The administrative actions of officials in implementing those policies in particular cases.

In circumstances of heightened security fears, there may be a case for greater secrecy about operational policy so that third parties cannot avoid or otherwise defeat legitimate mechanisms for protecting national security.

However, that should not be an excuse to shield the actions of individuals from independent scrutiny, where such scrutiny is often the only safeguard against abuse of the powers granted to the various security agencies.

I suggested previously that experience with the development of FOI laws around the world subsequent to the passage of New Zealand's legislation has shown that some believe that the grounds for withholding information to protect defence and international relations can in fact be subject to a

countervailing public interest test. I think we might also consider the possibility that greater state powers – intended to protect our security but also infringing on the liberties we have previously enjoyed – might point to a need for FOI review agencies to have the ability to recommend disclosure on the basis of the countervailing public interest in particular circumstances.

The capacity of FOI review agencies

From my comparatively limited experience I believe that FOI review agencies are not in the strongest of positions when it comes to responding to the claims for secrecy made by security and defence agencies. It is perhaps accentuated by the particular circumstances which face the Ombudsmen in New Zealand.

How we address this lack of capacity is perhaps a matter which this conference could usefully debate.

Cases we are asked to investigate and come to a conclusion on do not wait for annual conferences where we might or might not have a formal session like this on security issues. Opportunities for a quiet discussion with overseas counterparts arise infrequently, so that in spite of the able support we each have in our own offices, we are perhaps isolated from one another and lack peer group support. We are also – as I mentioned at the beginning of this paper – frequently preoccupied with more day-to-day issues and do not have the time to reflect on and consider some of these matters as we might wish to.

One possible tool I would like to suggest we consider is the development of a mechanism for sharing knowledge and expertise in this area on a more continuous basis than an annual conference. After all, security agencies worldwide traditionally have strong and well resourced ongoing networks. Why should we, the reviewers of the FOI activities of such agencies, not aspire to similar ongoing networking?

Technology now allows us to discuss things together without having to be in the same room. Perhaps our conference should consider creating some kind of facility to raise issues and seek advice from colleagues when faced with cases where we would value advice from one another. I know that security-driven FOI reviews probably constitute a comparatively small part of our workloads, but this is likely to increase as security considerations become more pervasive. Such an initiative might also enable us to learn from each other about some of the wider dimensions of policy development as they impact on FOI outcomes in the context of security considerations, and meet our need to enhance our capacities in the future.

Whether we do this via email, bulletin board, conference call or video conference is in some ways irrelevant - apart from time-zone considerations. We should also bear in mind the security of the means of transmission of any discussion, and the detail we need to go into when discussing a case, but the matter may be one on which fellow delegates might have views. I should add that this is not an offer for New Zealand to create such a network on its own!

Conclusion

I remarked at the beginning of this paper that some might feel that the juxtaposition of secrecy versus security was unusual, and that demands for openness are what pose the real risk to a country's security. However, I hope that I have made clear my belief that secrecy and security do not necessarily go hand in hand.

There are circumstances where openness can support security objectives, and this will be a challenge for security agencies as well as for FOI review agencies. I suggest it is up to us to try and find the time and the resource to look up and out from our daily work pressures and try and anticipate the future challenges to better FOI outcomes.

With today's understandable preoccupation of governments with security matters FOI objectives can be overlooked. Indeed it is not unlikely that security considerations may sometimes be advanced as a reason for restricting the scope of FOI legislation when the real reason for such restriction may be that the FOI shoe might be starting to pinch. To put it another way, whenever FOI legislation is effective, there will inevitably be occasions where governments suffer a measure of discomfort in accounting for the results of policies they have introduced.

As we face arguments that heightened security concerns mean that information should be restricted to a greater extent than in the past, we should not lose sight of these fundamental points:

- The underlying principle of FOI laws is that agencies should release requested information unless there is good reason for refusing;
- FOI statutes identify the reasons or grounds for withholding information that the legislature of each country has considered are necessary;
- The key question should always be, “*Why do we need to withhold?*”; and
- Heightened security concerns do not change that question and do not, of themselves, require blanket secrecy. It may mean that more information might need to be withheld, but that is a judgement to be made on the facts of each case.
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As Justice Brennan said in the Australian High Court as long ago as 1984,

*“It is of the essence of a free society that a balance is struck between the security that is desirable to protect society as a whole and the safeguards that are necessary to ensure individual liberty. But in the long run the safety of democracy rests on the common commitment of its citizens to the safeguarding of each man’s liberty and the balance must tilt that way.”*⁷

⁷ In *Alister v. R* (1984) 58 ALJR 97, 118, cited in Eagles, Taggart & Liddell, p.145

I am grateful for the opportunity to talk to you today and look forward to listening to other views on these issues.