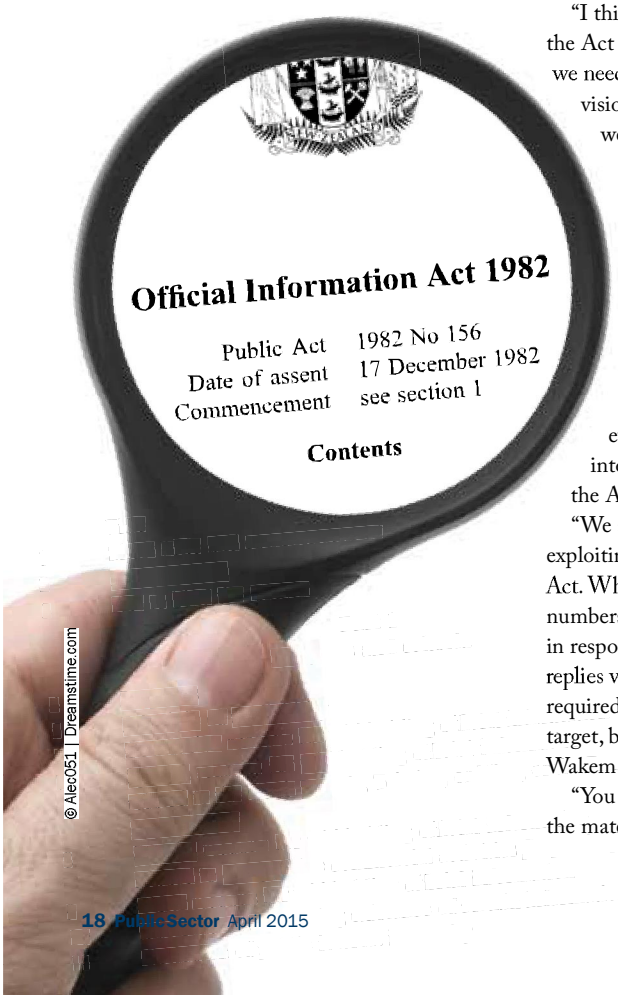
New Zealand's Official Information Act: Still fit for purpose?

New Zealand prides itself on its Official Information Act, which is a major instrument in keeping government honest. But is the Act as it currently stands still up to the job? Or does it simply need better policing and explaining? CARL BILLINGTON finds out.

The Official Information Act was established in 1982, replacing the Official Secrets Act 1951 (according to which government information should never be released without specific authorisation). The OIA took the opposite approach, embodied in its principle of availability: "information shall be made available unless there is good reason for withholding it" (Section 4 of the Act).

New Zealand's OIA went much further than the Freedom of Information legislation common among our international peers with all of their exclusions and restrictions. It viewed transparency and openness of government as central to a healthy democracy and as enabling individual citizens to participate effectively and have confidence in the administration of national governance.



© Alec051 | Dreamstime.com

Recent publicity, however, has raised questions regarding how well this piece of constitutional legislation is understood and enacted by New Zealand officials and ministerial offices. We spoke with Sir Geoffrey Palmer, Queen's Counsel, and Dame Beverley Wakem, Chief Ombudsman, as they consider the Act in light of today's environment and some of the potential challenges and "gaming" the Act may at times be subject to.

A ground-breaking Act that's fallen on hard times?

"The Act was ground-breaking when it arrived and there was a lot of effort by the government of the time to educate public servants about it. However, what was once a ground-breaking piece of New Zealand legislation has fallen on bad times," Palmer suggests.

"I think that what has happened is that the Act has become degraded in practice and we need a big effort to revitalise the original vision of the Act to make it something we can be proud of again.

"There are few Acts that are more important to the integrity of New Zealand's system of governance than this one," he adds.

Chief Ombudsman Beverley Wakem's office is currently reviewing OIA practices in the public sector. She says there is evidence of variations that have crept into people's understanding about how the Act works and how to apply it.

"We also have evidence of people exploiting any opportunity to game the Act. What first drew our attention were numbers of complaints about undue delays in responding and about people receiving replies well past the statutory date. The required response within 20 days is not a target, but an absolutely statutory deadline," Wakem says.

"You don't necessarily have to produce the material in that time. You just have to confirm what you are going to produce, by when and, if you need an extension, to ask for that and say why.

"Some agencies were delaying for legitimate reasons due to the number of parties involved in clearing confidentiality issues and so on, but others were delaying simply because – as the prime minister recently put it – it suited them."

"Being embarrassed by releasing information is no excuse for not releasing it. The Act is very clear that you will release information unless there are very good reasons for withholding it, as outlined in Sections 6 and 9 of the Act," adds Wakem.

This raises the question of whether the evidence of game playing and circumventing of the Act points to a weakness in the framework of the legislation itself, or whether the policing and understanding of the Act and its correct application are the cause of the erosion that's being observed.

Where the problem lies...

Nicola White's 2007 work, Free and frank: *making the Official Information Act 1982 work* better, is considered by many as the seminal review of the Act in regard to its continued fitness for purpose. Although White concludes that "the system as it works now is eroding trust in the state sector rather than building it," she argues that the Act itself is essentially sound but what is lacking is a correct understanding and application of the principles of the Act.

John Edwards, reviewing White's text in a 2008 LawTalk article (19 May 2008), summarises the general theme of commentary on the Act over the last three decades as essentially arguing that "the Act is ok, it's just the way it is being used and administered – more training is required; if people only knew about the mechanisms in the Act they wouldn't have these problems."

We asked Wakem and Palmer for their thoughts on these observations.

"Nicola White's book was a very good work, which we took as a kind of roadmap," Wakem notes.

"Over the years, and as budget allowed, we've been addressing the issues she raised. Similarly the Law Commission issued a very good report – *The Public's Right to Know* –

in 2012 which also indicated there's not much wrong with the basic framework, although some of the language might need modernising. It's still a very sound piece of legislation which I think has stood the test of time but we need to use it properly."

Palmer echoes these themes, although he takes the suggestion of reform a little further – pointing to comments he made in a speech titled A hard look at the *New Zealand experience with the Official* Information Act after 25 years (27 November 2007).

"I said then that, after 25 years the Act needs some systematic reconsideration. My firm view is that the first principles of the Act do not need to change. We should retain the basic framework of the Act because it's sound, but it needs some adjustment around the edges."

Palmer goes on to add, "We now inhabit a time when the importance of transparency in government decision-making is more important than it was at the time the Act came in. There are all sorts of challenges around the world that mean there are difficulties in rooting out corruption and other problems that beset public administration everywhere. While we are privileged to enjoy a high standard of integrity in the New Zealand public service, the value of transparency should be a prime concern for any democracy."

"It's quite significant that the former State Services Commissioner, Dr Mark Prebble, remarked in 2010 that the OIA is 'the best reform that's happened during my whole time in the public service. It's been good for every agency it's been applied in.'"

Palmer says there has been an attitude in the last few years of "making sure that less information comes out" and a tendency to game the Act. "We saw complaints in the run-up to the general election about that."

Gaming the Act?

Palmer says, "The suggestion is that response times are regularly abused and the purpose of that is to avoid political embarrassment – that the older the information is, the less likely it is to be newsworthy.

"The level of difficulty that people have with the Act has got to be reduced, but the problem lies with securing the incentive to reduce that difficulty because I suspect numbers of ministers simply don't like the Act – when, in fact, what it actually does is increase the public's knowledge of the public's own business."

Where there are questions of propriety relating to the application of the Act, these fall to the Office of the Ombudsman to investigate. Wakem describes some of the approaches they have taken in addressing such matters:

"Some time ago we began deeming delays as essentially a refusal to comply, and finding people guilty of breaching the law. This subsequently had an amazing effect on the response rate, which improved enormously. However, it would seem there's been some backsliding in recent times, which we are working to address.

"I have to say though, it's not all bad. I've yet to meet a public servant who comes to work and says, 'How can I screw up today?' They don't exist. Within state sector agencies, where we have been able to go in and help provide guidance and training, we see great improvements. There are some great examples of New Zealand agencies taking initiative and embracing the concept of Open Government by being proactive in releasing material.

"Yet, there have been significant cuts to the public service and we see a lot of OIA requests being left in the hands of less experienced staff members who often don't realise that anything you ask for in a government agency is official information and it's got to be dealt with within the parameters of the Act," Wakem explains.

"We're trying to encourage requestors and the media to target their requests more succinctly so it cuts down the barriers to prompt action. We also encourage public servants to go back and ask what it is that the requester really wants to know. It's a lot quicker for everyone if we help people refine their request. We're working on both sides of the fence to encourage more open conversations about requests between both parties.

"We're working with a number of agencies – running workshops and talking to as many staff as needed – to acquaint people with the ins and outs of the Act once again. We've done this for the media as well – workshopping examples and real life cases – to try and upgrade understanding and streamline the process of requesting," Wakem continues.

"The challenge is that we're not funded to do any of that work. It's important and we're clearly the best placed to do so, since we've lived with the Act now for well over 30 years. However, it comes at a cost of not doing our primary function – which is complaint handling and systemic review. The educational work is vital but it means taking people off the frontline, which isn't ideal," Wakem explains. >

Dame Beverley Wakem, Chief Ombudsman

"...We're working on both sides of the fence to encourage more open conversations about requests between both parties."

Sir Geoffrey Palmer, Queen's Counsel

"It's quite significant that the former State Services Commissioner, Dr Mark Prebble, remarked in 2010 that the OIA is 'the best reform that's happened during my whole time in the public service. It's been good for every agency it's been applied in.'"

"Justice delayed is justice denied and we have undoubtedly been hampered by a lack of resources."

Alongside the educational work the Office of the Ombudsman is undertaking, Wakem offers an additional suggestion for encouraging greater efficiency and compliance with the Act: "It's occurred to me that including OIA requests in the conversation when the State Services Commissioner conducts performance reviews with agency chief executives could be a very useful incentive, albeit one they perhaps won't thank me for," Wakem adds with a slight smile.

"When the State Services Commissioner conducts the reviews, he might inquire as to how many OIA requests they received, how many were resolved within the specified timeframes, how many resulted in complaints to the Ombudsman and, on review, how many of those were upheld?"

Still fundamentally sound

Returning to the currency and relevance of the Act itself, Wakem feels it remains a fundamentally sound piece of legislation: "When the Act was introduced it was world-leading legislation – and in many respects it still is. If you look at the Freedom of Information legislation in other countries there are lots of prohibitions on inquiry that we don't have here.

"The one thing I would like to see strengthened though is the oversight of legislative function – there is a requirement in the Cabinet manual that anybody proposing new legislation should make sure they consult with everybody who might be impacted by any change.

"Sometimes it can feel like we've had to run a counter-espionage service to find out what is going on with legislative proposals that affect us, or we're only remembered at the last minute, which isn't acceptable. I would like to see the implications of the OIA and the Ombudsman Act front and centre in consultation on any new legislation," Wakem adds.

"One key thing that does concern me though is the role of the political advisor. This issue was outlined in Frank Vibert's 2007 book, *The Rise of the Unelected*. It dealt with, among other things, unelected officials who have undue influence where they shouldn't. The role of the political advisor is clear: they're concerned for the re-electability of the person they are working for.

"I have no issue with this, but it has no place in the context of the Official Information Act and the availability of information to the public. The OIA exists to enable citizens to understand government policy, the rationale behind it, and to ensure that 'some light is let in to otherwise dark places,' as the old quote goes."

Palmer echoes this sentiment strongly: "This is an important constitutional statute. It runs to the heart of the functioning of our government and the ability of the public to hold the government to account. It is a fundamental instrument of accountability and because of that it's vital that it works in an optimum fashion.

"As has already been said, there are many departments that are releasing Cabinet papers and other information online so people can view them and know what was done and how it was done. That's enormous progress but it is not universally practiced."

Ministerial veto

Palmer says initially another concern was the use of the ministerial veto. The way the Act was first implemented, the responsible minister was given the final power of veto over any decision of the Ombudsman. Coming into office as the Minister of Justice in 1984, Palmer was keen to address what he saw as a very tempting conflict of interest.

"In the initial period of the Act, the ministerial veto was exercised 14 times. The ombudsmen indicated that they didn't want the veto taken away because it would essentially give the Office of the Ombudsman the power of decision and that was contrary to the character of their role," Palmer explains.

"What I devised instead was a solution that retained the ministerial veto but required it to be effected by an Order in Council – making it a Cabinet decision. This meant it was no longer possible for a minister to exercise the right of veto in the privacy of their own office. Interestingly, since that time, the right of veto has not been exercised once.

"My own experience, both as the Deputy Prime Minister and as the Minister of Justice, was that ministers' did not like this Act. Some appeared to view it as a restriction to their own freedom of action and were not keen for the public to know exactly what they had done in a number of policy debates," Palmer adds.

"We have had this Act since 1982. Surely we've had sufficient experience with it by now to know that the advantages of the transparency that it promotes are an enormous contribution to good governance. Lifting the veil of secrecy was not the end

of effective public administration. This Act sits at the very core of our constitution as a democracy."

An opportunity, rather than an intrusion

In fact, Wakem suggests that far from being viewed as an intrusion into their affairs, submissions under the OIA should be welcomed by ministerial officials and government agencies as a positive opportunity to highlight the very good things the organisation is actually doing.

"It's an opportunity to review their own practice, to do it better. It's an opportunity to highlight the good things that they are doing that people should know about," Wakem explains.

"Even though you may be dealing with requesters who can be pretty excited and sometimes pretty angry, they are taxpayers and we are their servants. We should not forget that.

"However irrational they may sometimes appear, there is a genuine complaint or need at the heart of every inquiry, and how you handle that will speak volumes about the efficiency and effectiveness of your organisation and ultimately your reputation, which in today's world is something we would all guard with our lives," she adds.

"In our experience, most people who request information really don't want compensation. They're not looking to see somebody hang in the public square for this. What they really want is to make sure that what happened to them won't happen to somebody else."

Recommendations from the Law Commission

Despite affirming the sound foundations of the Act, both Wakem and Palmer agree some change is required to ensure the Act functions as intended and is applied consistently across government. The 2012 Law Commission report outlined a range of suggested recommendations to address the concerns that are being discussed here.

Wakem says, "We worked with the Law Commission on that report. As with anyone else there were some things I agree with and some things I didn't, but I was really disappointed that the Government's response to it was so tepid. I think it would pay to revisit it. It was a really robust review with some really robust suggestions."

"However irrational they may sometimes appear, there is a genuine complaint or need at the heart of every inquiry, and how you handle that will speak volumes about the efficiency and effectiveness of your organisation and ultimately your reputation..."

Palmer comments, "The Law Commission provided detailed recommendations to try to encourage the production of more guidelines to lessen the 'at large' character of the case-by-case decision-making system. What this sought to produce was something in the nature of a system of precedent as an aid to consistency.

"If those recommendations had been followed it would have proved a much improved Act. It would also have expressly conferred on the ombudsman the function of publishing opinions and guidelines on the legislation and that should be done whatever happens.

"The Government's response was seriously disappointing. Although it responded affirmatively to some of the major recommendations (improved education and guidance, incorporating the administrative functions of the Courts, and accepting that new commercial protection should be provided), they rejected the coverage to the offices of Parliament, which really is unacceptable.

"It means that the legislative programme of the Government is not available under the OIA. It also rejected the suggestion to create a new oversight office and to combine the OIA with the Local Government Official Information Act. I don't think that the Government's response to this will be durable over time," adds Palmer.

Wakem goes on to outline some of the changes they are making as a result, numbers of which address the key criticisms that have been raised by Palmer and others.

"Since coming into the Office of the Ombudsman, I have taken the view that providing advice and guidance is actually a primary function of ours. We just haven't always had the resource to do so. Firstly, we've put a lot of effort into reconstructing our website – making it more accessible and publishing case notes and principles of precedence and practice from previous cases.

"Currently we're working to establish a database that will give us the ability to slice and dice the data from all of the cases and complaints we work on. This will give us a picture for every agency, which is something we haven't had before. So we're not only offering greater advice and guidance based on precedent and case history, we are also increasing our ability to monitor and track the response to requests across the sector," Wakem adds.

"The ability of people to access information they need to function more effectively in society and make sure the democratic process is working is fundamental to the development of trust in government and government processes. People need to know they can have some input into the system and actually influence events through submissions and other processes of democratic engagement.

"But if you can't access the information you need in the time that you need it, or if you feel you are at the mercy of the bureaucracy and its convenience, things can start to unravel.

"There are issues for concern, but they have been identified and we are actively working to address them," Wakem concludes.

Reasons for confidence

"The other thing I think people can take pride in is that we really do have a fantastic public service. People who go into the public service are people who want to make a positive difference. When I look across at some of the challenges that my ombudsmen colleagues around the world face – with levels of corruption that are hard for us to comprehend – we really are blessed here.

"People of integrity and energy continue to want to come and serve in the public service. We have work to do and we have improvements we need to make, but at the same time, it's not for nothing that we're at the top, or near the top, of every international transparency index for probity and integrity in public life." ▪