

Part IV

IV

Good Reasons for Refusing Access to Personal Information

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“A civil servant’s knowledge that an individual file is in fact accessible has a practical influence on promoting the accuracy and relevance of data.”

- David H Flaherty, *Protecting Privacy in Surveillance Societies*, 1989

“Although there has been a wide acceptance of the proposal that there should be a general right of access, there has been a great deal of debate on the question to what extent that right should be circumscribed to ensure that the privacy interest protected by a right of access is properly balanced against other legitimate interests. Those other interests include the interests of society at large. An unlimited right of access would mean, for example, that police intelligence and other records, used to prevent and detect breaches of the law, would be open to inspection by the very people whose activities they were designed, in the public interest, to frustrate. Again, there are the interests of record keepers which need to be protected. These interests might well be jeopardised unreasonably if access were to be given to all personal information which the record keepers hold.”

- Australian Law Reform Commission, *Privacy*, 1983

“An individual’s right of access tends to make the legislation self policing. It forces agencies to consider how they handle the personal information of customers and whether or not that information is accurate. This is of benefit not only to the individuals concerned but also to agencies.”

- NZ Law Society Privacy Working Group, submission L23

4.1 INTRODUCTION

4.1.1 The right of access by the individual concerned to personal information is one of the most significant entitlements in any privacy law. I was therefore pleased to receive 50 submissions on the discussion paper on access and correction - more than were made on any of the other 11 discussion papers. This chapter covers the Act’s withholding grounds and it should be read together with the material on principle 6 at paragraph 2.8, and the following chapter on procedural provisions.

4.1.2 Notwithstanding the importance of the right of access it cannot be absolute. There are competing private and public interests which need to be balanced against the individual’s right of access. However, if the right of access is to be meaningful the reasons for withholding must be very carefully circumscribed and subject to independent review. Part IV sets out “good reasons for refusing

access to personal information”. There is a finite list of such grounds and agencies are not generally permitted to withhold information for any other reason.¹ Clause 4 of the OECD Guidelines indicate that exceptions to the right of access, and other principles, should be “as few as possible.”

- 4.1.3 New Zealanders have had access rights to personal information held about them in the public sector since 1982 (central government) and 1987 (local government, education and health agencies). When the provisions governing access to personal information by the individual concerned were transferred from the Official Information Act to the Privacy Act the rights were extended to include both public and private sector agencies. However, the grounds for withholding information essentially remained the same.
- 4.1.4 Accordingly, in reviewing the grounds for withholding I have taken account of the fact that many of these provisions have existed in law since 1982. This has meant that a certain jurisprudence has grown up in interpreting the sections which should not be lightly discarded. Opinions of the Ombudsmen have been rendered on the provisions between 1983 and 1993. As the personal rights of access to information held in the public sector are “legal rights” it has been possible for individuals to also seek court judgments which offer further guidance. Since 1993 I have given my own opinions on the provisions and there have been a number of Complaints Review Tribunal decisions.²
- 4.1.5 I have borne in mind in considering possible change that there are advantages in remaining with the existing withholding grounds in some instances so as to retain the benefit of the jurisprudence developed to date. In respect of at least some of the provisions, corresponding provisions continue to exist in the Official Information Act.³

Legislative history

- 4.1.6 The Official Information Act 1982 was the outcome of recommendations of the Committee on Official Information (the “Danks Committee”) set up to study freedom of information and to review the Official Secrets Act 1951. The 1982 Act gave everyone the right to access information held by certain public sector bodies covered by the legislation and gave the individuals concerned special access rights to their own information under Part IV. The bodies covered were subsequently extended and now include, among others, government departments, state-owned enterprises, educational institutions, hospitals and others, such as my own office. The Local Government Official Information and Meetings Act 1987 applied a similar regime to local authorities.⁴ With the overall right of access was a special right for individuals to have access to personal information about themselves held by any of those bodies. There were fewer grounds for withholding that person’s information and no charge might be made for such access. For convenience a table of corresponding provisions in the official information statutes is set out in Appendix H.
- 4.1.7 In 1993 that individual right of access to personal information under Part IV was transferred to the Privacy Act, and at the same time it was applied to the private sector as well as the public sector. By and large, the grounds under the Privacy Act upon which any agency can decline to disclose to the requesting individual what it holds are the same as those previously applicable under the Official Information Act. Some of the withholding grounds may be relied upon by public sector agencies only.

¹ Privacy Act, section 30.

² My office published a compilation of Tribunal decisions in September 1997.

³ The main corresponding provisions are those relating to procedure and access to personal information by corporate bodies (see Parts II and IV of the Official Information Act).

⁴ The bodies covered by the two official information statutes corresponds generally to “public sector agency” defined in section 2 of the Act.

4.1.8 It is opportune to question whether the withholding grounds remain appropriate in their present form. As the grounds were originally drafted only to apply to the public sector it is also appropriate to consider whether or not they have proved suitable for private sector agencies and whether any new grounds should be added.

Law Commission review

4.1.9 The Law Commission received a reference from the Minister of Justice in 1992 to undertake a “fine tuning” review of aspects of the Official Information Act. That review was delayed. The Law Commission published its report in October 1997.⁵

4.1.10 The Law Commission analysed a number of provisions in the Official Information Act which are similar or identical to provisions in the Privacy Act. Accordingly, I have taken care to consider the Law Commission’s analysis and recommendations. In some cases, I have adopted the Law Commission’s recommendations for similar amendments to the Privacy Act. It is not essential for provisions in the two Acts to be identical as the statutes have different coverage and serve somewhat different purposes. However, it may be beneficial where practicable to maintain a general consistency between the statutes in certain areas. In some cases, my recommendation for change to the Act is accompanied by a suggestion that similar change be considered for the official information legislation.

4.1.11 The interaction between the Act and the official information legislation is such that I am fortunate that the Law Commission completed its review at the time that it did. However, that review was of limited usefulness from my perspective as the terms of reference were established in 1992 and did not touch upon some of the new issues apparent by 1997/98. This might point to the desirability, at some future point, of programming a concurrent review of aspects of the procedural provisions and withholding grounds in the Privacy Act and Official Information Act by the Ministry of Justice. For this reason I have offered some suggestions for further consideration even where I do not recommend immediate change to the Privacy Act.

Grouping of withholding grounds

4.1.12 It will not be apparent why the reasons for refusing a request are split into three groups: sections 27, 28 and 29. The grounds for withholding in section 27 of the Official Information Act were carried into the Act. That section in turn refers to other sections in the Official Information Act. The rather perplexing grouping of withholding grounds in sections in the Privacy Act 1993 is attributable to the way in which the grounds for withholding in respect of official information and personal information are broken down in sections 6, 7 and 9 of the Official Information Act.

4.1.13 The key aspect of the structure of the Official Information Act appears to be that the grounds for withholding in section 6 are identified as “conclusive” reasons for withholding information - a distinction not used in the Privacy Act. The other grounds do not have this “conclusive” status and are set out in section 9 with some special reasons separated into section 7. However, if one compares the breakdown in sections 27 to 29 of the Privacy Act the reason for the structure is not immediately clear. The confusing arrangement makes the Act more complex than would otherwise be the case.

4.1.14 I have therefore concluded that it would be desirable to reorganise sections 27 to 29 to better meet the needs of users of the Act. The wording of the withholding grounds should remain the same unless there is specific reason for change. I envisage three ways in which this reorganisation could be achieved.

⁵ Law Commission, *Review of the Official Information Act 1982*, 1997.

- 4.1.15 The first would place all the withholding grounds in a single section. This would have the merit of discontinuing the perplexing practice of splitting the withholding grounds into three sections. It would also mean that users of the Act would need look at only one section to locate all the withholding grounds. A significant disadvantage would be that the section would be very long. Our legislation does not follow the practice adopted in some jurisdictions of having marginal notes relating to individual subsections and therefore this option would not be particularly helpful for users to quickly locate the exact provision of relevance.
- 4.1.16 The second option would place each of the grounds for withholding in a separate section with its own marginal note. Users would be able to quickly identify if there is a provision of relevance. One minor disadvantage is that the rather unattractive alpha-numeric numbering system of sections will have to be followed (that is, section 27, 27A, 27B, 27C etc).
- 4.1.17 The third option would remove all the withholding grounds to a new schedule and allow each to have their own separate clause and heading.⁶ Parliamentary Counsel may have a view as to whether it is appropriate for this material to be so relocated.
- 4.1.18 Whichever option is adopted it would probably make sense for the reasons for refusing requests to be reordered for convenience of users. The early clauses should ideally set out the most important grounds for withholding or the ones likely to arise most frequently in practice. On this basis, the present ordering is the wrong way around. The section 27(1)(a) and (b) reasons are hardly ever relevant to requests whereas those in (c) and (d) are of considerable importance in the practical operation of the Act. Similarly, sections 27(2) and 28 are less frequently relied upon than the provisions in section 29.
- 4.1.19 Before making this recommendation I considered whether change in organisation or layout of the provisions might unduly confuse users of the Act. In my view, it will not. People who currently work with the Act, such as privacy officers and those involved in granting or refusing access, will quickly identify the new provisions because:
- they will be easy to find as each provision will have its own heading;
 - the substantive reasons for refusing requests will not have changed and familiar wording will continue to be used.
- Any modest inconvenience for existing users of the Act will be more than offset by the improved usability of the provisions in the new format.
- 4.1.20 Some consequential amendments will need to be made. Section 32 which allows an agency to neither confirm nor deny whether certain information exists will need to be amended to list the provisions to which it applies. If the provisions are placed in a schedule consideration may need to be given to whether that schedule should be expressly referred to in principle 6(3).



RECOMMENDATION 47

The existing reasons for refusal of requests set out in sections 27, 28 and 29 should be reorganised into an ungrouped list of reasons to make it easier for users of the Act to locate relevant provisions.

SECTION BY SECTION DISCUSSION

4.2 SECTION 27 - Security, defence, international relations etc.

4.2.1 Section 27 provides for the withholding of information which, if disclosed pur-

⁶ Schedules are arranged according to the order in which they are introduced in the Act. Therefore, this would presumably appear between the existing First and Second Schedules.

suant to principle 6, would be likely to prejudice certain security, defence, international relations, law enforcement, and safety interests. The section deals with the same types of interests dealt with in sections 6 and 7 of the Official Information Act.

Marginal note

- 4.2.2 The marginal note to this section is not as helpful as it might be. In particular, it fails to draw readers' attention to the fact that grounds relating to maintenance of the law and personal safety, which are much more frequently invoked, are also located within the sections. For this reason I have recommended elsewhere that the marginal note should be changed to make it more useful.⁷

27(1)(a): Security, defence, international relations

- 4.2.3 The first ground for refusing requests is where the disclosure of the information would be likely to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand. This is derived from section 6(1)(a) of the Official Information Act which in turn is closely modelled upon the provision recommended by the Danks Committee.⁸ Danks considered this withholding ground as being necessary in the interests of the country as a whole.

- 4.2.4 The withholding ground in section 27(1)(a) interacts, in relation to some aspects of international relations, with the grounds found in sections 27(1)(b) and 27(2). Similarly, in the Official Information Act there are at least five provisions dealing in a direct way with information relating to New Zealand's international relations.⁹ The Law Commission recently considered aspects of those provisions in its review of the Official Information Act as it had been asked by the Minister of Justice to consider "whether there should be special rules governing the treatment of some or all classes of diplomatic documents". That did not require a complete review of the withholding grounds and the Law Commission recommended no change to the existing law.¹⁰

- 4.2.5 Defence, security, and the conduct of foreign affairs, are areas of Government activity which have traditionally been relatively free from external scrutiny. The grounds for refusing requests for information of that type in both the Privacy Act and Official Information Act are relatively broad. However, there have to date been few complaints brought on review to my office. This is not entirely surprising since the sensitive holdings of information generally do not relate to personal information held about particular individuals but to various State secrets that agencies would wish to keep from prying eyes of researchers, the news media or other citizens. In this area, therefore the Ombudsmen have been called upon more frequently to review access complaints in the official information jurisdiction than I have in the personal access jurisdiction.

27(1)(b): Inter-governmental entrusting of information

- 4.2.6 Section 27(1)(b) provides for withholding if release of the requested information would be likely to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by another government or an international organisation. In recommending this provision the Danks Committee referred to a then recent report by the Chief Ombudsman on the Security Intelligence Service which had reached the conclusion that information received by New Zealand from its friends is of major importance in the political, economic, and strategic policy making fields. Danks had concluded that it

“Defence, security, and the conduct of foreign relations are areas of Government activity which have traditionally been relatively free from legislative and judicial scrutiny. The Official Information Act does little to disturb this relative freedom from scrutiny.”

- EAGLES, TAGGART, LIDDELL,
FREEDOM OF INFORMATION IN NEW
ZEALAND, 1992

⁷ See recommendation 2.

⁸ Committee on Official Information, *Towards Open Government: General Report*, 1980, page 17 and *Towards Open Government: Supplementary Report*, 1981, page 65.

⁹ Official Information Act 1982, sections 6(a), 6(b), 7, 10 and 31.

¹⁰ Law Commission, *Review of the Official Information Act 1982*, pages 91-97.

is in the national interest to continue to get as much of this information as possible and accordingly recommended that protection for disclosure should be absolute if disclosure is likely to prejudice essential interests including the continued flow of information.¹¹

- 4.2.7 The provision appears to have operated satisfactorily and I have received few complaints relating to its use to withhold information. In the light of this, and the recent recommendation of the Law Commission to make no change to similar provisions in the Official Information Act (albeit that the Law Commission’s brief was very narrow), I make no recommendation for change at this time.

27(1)(c): Maintenance of the law

- 4.2.8 Section 27(1)(c) allows an agency to withhold personal information from the individual concerned if its disclosure “would be likely to prejudice the maintenance of the law, including the prevention, investigation and detection of offences, and the right to a fair trial.” Typically this ground has been used for the police to hold back from a suspect the details of an ongoing investigation.

Informant identity

- 4.2.9 I have followed the Ombudsmen, who applied the same wording under the Official Information Act, in forming the opinion that this provision allows an agency engaged in maintaining the law to hold back the identity of informants.¹² The argument goes that the identity of an informant, together with the information given, is personal information about the subject of that information who is therefore entitled to request access to it. This was the prevailing orthodoxy under the Official Information Act and now seems accepted by the Complaints Review Tribunal in respect of the Privacy Act.¹³ However, if potential informants were to learn that their identity could be disclosed upon request to the person against whom they are informing, they would be far less likely to volunteer any information at all. Some agencies depend upon the flow of informant information in order to carry out their law maintenance functions effectively. The disclosure of informant identity would prejudice the maintenance of the law by tending to cause that flow to dry up. Therefore, while each case is considered on its merits, it is usually possible to withhold informant identity details, where:

- (a) the agency is engaged in maintenance of the law activities;
- (b) its efficiency in those activities depends substantially upon the receipt of information from informers; and
- (c) there is reason to believe that informants would be less likely to provide the information if they knew that their identities would probably be revealed upon request.

- 4.2.10 I have taken this one step further in recognising that sometimes informants will not provide their information directly to the law enforcement body but to another agency which effectively acts as a conduit for such information in certain circumstances. Thus an informant told a school about certain persons allegedly selling drugs in the school grounds¹⁴ and another told an insurance company of an alleged fraud against it.¹⁵ In both of those cases the agency was able to withhold the informant’s identity pursuant to section 27(1)(c) in my opinion.

Investigation and detection of offences

- 4.2.11 There are also a number of complaints concerning the withholding of information from individuals pending the completion of investigations. On a number

¹¹ Committee on Official Information, *Towards Open Government: General Report*, 1980, pages 17-18.

¹² See, for example, case notes 107, 115, 305, 549, 757, 2438 and 17375.

¹³ See *Hadfield v Police* (1996) 3 HRNZ 115, 118 and *Adams v Police* (CRT Decision No. 16/97).

¹⁴ Case note 2438.

¹⁵ Case note 17375.

“We are pleased to note that the Privacy Commissioner has held that section 27(1)(c) can be used to protect the identity of informants, acknowledging the disclosure of informant identity would prejudice the maintenance of the law by tending to cause the information to dry up. Sometimes informants will provide information not directly to the law enforcement agency, but to the agency directly affected, such as an insurance company, which can act as a conduit for such information.”

- INSURANCE COUNCIL,
SUBMISSION L9

of occasions I have agreed with an agency’s decision to withhold information while an investigation is continuing. In some of these cases I have issued a case note explaining the approach that I have taken.¹⁶ However, I have emphasised that the ground for withholding the information only applies until the investigation is completed. Once a decision has been made to prosecute the individual, or not to proceed any further with the investigation, information may no longer be withheld under section 27(1)(c).¹⁷

- 4.2.12 The withholding of personal information on the basis that disclosure would be likely to prejudice further investigation or detection of offences that might be committed by the requester was considered by the Complaints Review Tribunal in a case brought by an unsuccessful requester.¹⁸ The plaintiff in that case had a history of making threats which warranted investigation. The Tribunal found that the Police properly withheld details of an inquiry into a threat by the plaintiff in 1989 on the basis that disclosure would be likely to prejudice the investigation of any threats that might be made in a similar manner in the future. The Police were concerned that disclosure of these details could be used by the plaintiff to avoid detection. This is a relatively unusual circumstance since information is usually made available after a decision on a particular investigation has been made.

TAIC

- 4.2.13 The Transport Accident Investigation Commission suggested that this provision be modified. TAIC looks into accidents with the aim of furthering transport safety by identifying causes and contributing factors so that accidents may be avoided in future. The Commission, in some of its work may depend upon a flow of information from individuals who would not wish to have their identities revealed.
- 4.2.14 I canvassed the matter in the discussion paper and have received a number of submissions. I considered these and the merits of the TAIC position. I am not convinced that a new withholding ground, or a modification of existing grounds, is necessary to address safety issues generally or accident investigation issues in particular. If there is an issue with respect to this particular agency it would be more appropriately dealt with in its own legislation.¹⁹

Canadian law enforcement provisions

- 4.2.15 Modern provincial Canadian privacy and access laws spell out the law enforcement interests justifying, or not justifying, withholding with greater specificity than is the case with section 27(1)(c). For example, section 15(1) of the Freedom of Information and Protection of Privacy Act 1992 (British Columbia) sets out 12 law enforcement-related reasons for which information may be withheld. They are expressed in a plain fashion which does not invite the same degree of uncertainty as the general phrase “to prejudice the maintenance of the law”. For example, under the British Columbia law a public body may refuse to disclose information to the applicant if, amongst other law enforcement grounds, the disclosure could reasonably be expected to:
- harm the effectiveness of investigative techniques and procedures currently used or likely to be used, in law enforcement;
 - reveal the identity of a confidential source of law enforcement information;
 - reveal any information relating to or used in the exercise of prosecutorial discretion;
 - deprive a person of the right to a fair trial or impartial adjudication;

¹⁶ See case note 437 concerning an ACC investigation and case note 845 concerning an investigation by the Commerce Commission.

¹⁷ Except, for example, that information necessary to be withheld to protect informant identity as discussed above.

¹⁸ *Adams v New Zealand Police*, CRT Decision No 16/97.

¹⁹ The effect of a provision in such a statute is saved by section 7(2)(a).

“The Association does not believe that allowing TAIC to refuse to disclose personal information held about an individual to that individual will promote TAIC’s public safety function. NZALPA believes that to do so would inhibit co-operation by pilots and air traffic controllers and thereby reduce the full and free flow of information. What is at risk is the co-operative and contributive values which have characterised aviation safety culture.”

- NZ AIR LINE PILOTS’ ASSOCIATION,
SUBMISSION L6

- reveal a record that has been confiscated from a person by a peace officer in accordance with an enactment;
 - facilitate the escape from custody of a person who is under lawful detention.²⁰
- 4.2.16 The provision, in common with the general approach of Canadian legislation to access issues, also sets out circumstances in which public bodies may not refuse to give access to information. These have more relevance in the official information context than for an information privacy request (for example, requiring a report prepared in the course of routine inspections by an agency that is authorised to enforce compliance with an Act to be made available).
- 4.2.17 It is reasonably likely that a similar result will be arrived at in the application of both the New Zealand and Canadian provisions - although there may be particular, and important, differences in detail. However, the key difference is that the Canadian provision is easily understandable on its face whereas the full meaning of the phrase used in the New Zealand Act is only completely apparent when the case law, including opinions of the Ombudsmen and Privacy Commissioner, is also known.
- 4.2.18 It would be desirable at some stage for the section 27(1)(c)²¹ provision to be rewritten in such a way that it may be clearly understood by all those involved including:
- staff in law enforcement agencies;
 - requesters;
 - bodies exercising review functions.
- 4.2.19 If there is to be change it would be necessary that this be done in conjunction with consideration of similar provisions in the Official Information Act and the Local Government Official Information and Meetings Act. There is no immediate urgency as most “maintenance of the law” agencies have a good understanding of the withholding ground.



RECOMMENDATION 48

Consideration should be given to the merits of redrafting the “maintenance of the law” withholding grounds to make more plain the constituent law enforcement interests protected.

- 27(1)(d): Endangering the safety of an individual*
- 4.2.20 Section 27(1)(d) allows an agency to withhold material from an information privacy request if its disclosure “would be likely to endanger the safety of any individual.” The Complaints Review Tribunal has formed the opinion that this provision refers to physical safety, and would not allow withholding where there is a likelihood of harassment falling short of physical attack.²²
- 4.2.21 The Official Information Act allows “official information” (but not personal information about the requester) to be withheld if that is necessary for the “protection of Ministers, members of organisations, officers, and employees from improper pressure or harassment”. That ground is provided for in the context of “maintaining the effective conduct of public affairs” rather than personal safety.²³ Accordingly, there is some precedent in our information laws for considering harassment as a reason for withholding information from a requester in some circumstances.

²⁰ Section 15(1)(c), (d), (g), (h), (i) and (j).

²¹ Any rewriting of section 27(1)(c) might also incorporate 29(1)(e) concerning the safe custody of inmates.

²² *O v N (No 2)* (1996) 3 HRNZ 636. See also *M v Ministry of Health* (1997) 4 HRNZ 79 and *M v Police* (1997) 4 HRNZ 91.

²³ See Official Information Act 1982, section 9(2)(g)(ii).

- 4.2.22 I have raised on previous occasions the need to provide adequate legal protection to individuals from the threat of harassment. For example, I supported the enactment of the Harassment Act 1997²⁴ and advocated enabling electors to go on the confidential electoral roll when they had obtained restraining orders under that Act.²⁵ I have also suggested that there should be consideration of the desirability of enabling information to be withheld on an Official Information Act request where there is a likelihood of harassment of an individual as a result of the release of information.²⁶
- 4.2.23 The risk of harassment is probably more likely to arise upon an Official Information Act request or a public register request²⁷ than on an information privacy request. This is because the main circumstance in which harassment might be anticipated as the result of individuals obtaining personal information about themselves is where the identity of informants is revealed. However, identity of informants is commonly withheld under the maintenance of the law provision. However, in the Official Information Act context third party requests for a whole range of information might potentially be used for the purpose of harassment.
- 4.2.24 The Law Commission’s review of the Official Information Act was simply “fine tuning” and they were constrained by terms of reference they had been given. Accordingly, their report did not draw out any issues in relation to harassment. I consider it would be desirable for the matter to be considered and, if any change were to be warranted, for there to be similar provision in both the Privacy Act and the official information legislation.



RECOMMENDATION 49

Consideration should be given to the desirability of enabling the withholding of information where there is a significant likelihood of harassment of an individual as a result of the disclosure of information.

4.3 SECTION 28 - Trade secrets

- 4.3.1 Section 28 provides for the withholding of information in order to protect trade secrets or to avoid prejudice to certain other commercial interests. It is subject to a public interest override in that information may not be withheld if the withholding is outweighed by other considerations which render it desirable, in the public interest, to make the information available. This provision reflects section 9(2)(b) of the Official Information Act 1982 and rarely features in complaints to the Privacy Commissioner. Criticisms of the provision would probably include the following:
- section 28(1)(a) concerning “trade secrets” appears to have almost no application to information privacy requests by individuals;
 - section 28(1)(b) concerning likely “prejudice to a commercial position” is too narrowly drawn to enable withholding in all appropriate circumstances.
- 4.3.2 The marginal note is not as helpful as it might be. I have recommended elsewhere that it be changed to “trade secrets and prejudice to commercial position”.²⁸

²⁴ See Report of the Privacy Commissioner to the Minister of Justice on the Harassment and Criminal Associations Bill, January 1997 and discussion in this report at paragraphs 7.15.3 - 7.15.9.

²⁵ See Report of the Privacy Commissioner to the Minister of Justice on the Electoral Act 1993, April 1997.

²⁶ See Submission by the Privacy Commissioner to the Law Commission in relation to a “fine tuning” review of the Official Information Act 1982 on a reference from the Minister of Justice, April 1997.

²⁷ Submission S59 suggested that protesters at Wellington’s Parkview Clinic had engaged in harassment, some of which was facilitated through noting motor vehicle licence plate numbers and tracing personal details through the public register.

²⁸ See recommendation 2.

28(1)(a): Trade secrets

4.3.3 The term “trade secrets” is not defined in the Act. It is rarely cited in Privacy Act or Official Information Act cases. The Ombudsmen have commented:

“A general approach to the circumstances in which [the equivalent provision in the Official Information statutes] might apply has not been developed. It has been raised in very few cases, and where it has been raised, there have been difficulties in defining the term ‘a trade secret’.”²⁹

4.3.4 It appears from commentaries on the Official Information Act that the provision has been derived from American law.³⁰ In the USA there has apparently been debate and litigation concerning the breadth of what constitutes a “trade secret” with further divergence in other common law countries.³¹

4.3.5 That the term may not have a settled meaning is potentially problematic given that there is no statutory definition. It would be possible to await a suitable case to go to the Tribunal to provide a precedent and guidance. The wait may be protracted as it is difficult to envisage circumstances in which such a trade secret might be categorised as “personal information” about a requester.

4.3.6 It is worth questioning whether section 28(1)(a) is necessary. The Australian Law Reform Commission speculated in 1983 that “It may well be that some personal information encompasses trade secrets” but offered no concrete examples.³² The Danks Committee bill had no provision for refusing a request for personal information by the individual concerned on the trade secret grounds. Perhaps the relevance of trade secret in this context concerns the position of an employee who has been closely involved with the development of the formula, process, device etc and that the resultant information about the trade secret also comprises information about the employee? However that is hypothetical and seems unlikely to arise in practice. Another hypothetical example put forward is a personnel consultant’s questionnaire for assessing personality types or aptitudes. Perhaps an access request for a candidate might involve revealing the consultant’s “trade secrets” although it is possible that Part V of the Act can cope with this by providing a summary rather than a copy of the information. Alternatively, it might be suggested that section 28(1)(a) is intended to clearly indicate that where a trade secret is recorded in a document containing personal information that it can be deleted from the information in the document pursuant to section 43(1). This is not strictly necessary since such information is severable from the document anyway as not being personal information about the requester.

4.3.7 I accept that there is a need for agencies to be able to protect trade secrets from release in response to an access request. I simply doubt whether a specific withholding ground is even necessary since it is difficult to conceive of the information as “personal information” about a requester. Where the trade secret is in the hands of an agency other than the primary possessor of the trade secret (perhaps supplied with an application to a government agency for a licence) the trade secret can be protected on a personal access request through section 28(1)(b) or on an Official Information Act request under sections 9(2)(b), 9(2)(ba) or 18(a) of that Act.

4.3.8 However, if the reason is to remain in the Act it is desirable to provide some certainty through the inclusion of a definition. If a definition is provided it should probably be placed within section 28 itself rather than in section 2 since

²⁹ Office of the Ombudsmen, *Practice Guidelines No. 3*, September 1993, paragraph 5.2.

³⁰ See *Freedom of Information in New Zealand*, 1992, page 294.

³¹ *Ibid*, pages 293-297.

³² Australian Law Reform Commission, *Privacy*, 1983, paragraph 1273.

this is the only place that it is used. Some of the recent provincial statutes in Canada have defined “trade secret” in the following manner which appears suitable for our own Act:

“**Trade secret** means information, including a formula, pattern, compilation, program, device, product, method, technique or process that:

- (a) is used, or may be used, in business or for any commercial advantage;
- (b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use;
- (c) is the subject of reasonable efforts to prevent it from becoming generally known; and
- (d) the disclosure of which would result in harm or improper benefit.”³³



RECOMMENDATION 50

Section 28(1)(a) should be repealed as being unnecessary as a reason for withholding information. However, if it is retained a straightforward definition of “trade secret” should be inserted into the provision.

28(1)(b): Prejudice commercial position

4.3.9 Section 28(1)(b) allows an agency to withhold personal information if making it available “would be likely unreasonably to prejudice the commercial position of the person who supplied the information or who is the subject of the information”. The subsection does not allow the agency to withhold personal information if the disclosure would prejudice its own commercial position which may seem odd. An example of this oddity is that an employee in the throes of negotiating a redundancy settlement may be able to seek access to a company’s board minute setting out the parameters within which the company’s executives are allowed to settle such claims.

4.3.10 If the provision were to be amended, it would require care to ensure that agencies could not use a “commercial prejudice” argument to impose a blanket of secrecy over substantial areas of personal information which they hold. However, the inclusion of the qualifying “unreasonably” in subsection (1) and the public interest test set out in subsection (2) may suffice for this. It is also an area where there would desirably be consistency between the Act and official information legislation.

4.3.11 If there were to be change, the opportunity could be taken to bring together in a more coherent way some of the provisions revolving around commercial interests - the obvious candidate being the evaluative material withholding ground in section 29(1)(b). As an illustration (but not necessarily a suitable precedent), the British Columbia legislation has the following provision:

“Disclosure harmful to business interests of a third party

The head of a public body must refuse to disclose to an applicant information:

- (a) that would reveal:
 - i) trade secrets of a third party, or
 - ii) commercial, financial, labour relations, scientific or technical information of a third party,

³³ See Freedom of Information and Protection of Privacy Act 1993 (Nova Scotia), section 3; Freedom of Information and Protection of Privacy Act 1992 (British Columbia), Schedule 1; Freedom of Information and Protection of Privacy Act (Alberta), section 1.

- (b) that is supplied, implicitly or explicitly, in confidence, and
- (c) the disclosure of which could reasonably be expected to:
 - i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
 - ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
 - iii) result in undue financial loss or gain to any person or organisation, or
 - iv) reveal information supplied to, or the report of an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or enquire into a labour relations dispute.”³⁴

4.3.12 The provision quoted does not provide for the agency to withhold its own commercial information but, like section 28(1)(b), simply provides for the protection of third party secrets.³⁵ However, unlike section 28, the British Columbia section permits the withholding of a wider range of information which would be harmful to business interests such as information supplied to, or the report of, an arbitrator.

4.3.13 The scope for withholding information for reasons of commercial sensitivity has been controversial under the Official Information Act. In respect of certain commercial issues, or involving the trading activities of the public sector, aspects of the Danks regime have been departed from and variously amended since 1982. I have seen little point in developing a precise proposal for amending section 28(1)(b) since it would anyway have to also “pass muster” in relation to an amendment to the Official Information Act. Accordingly, I simply identify for consideration some suggestions for a future joint review, namely:

- the question of whether agencies should be able to withhold information to protect their own commercial position; and
- as a particular manifestation of that, whether a withholding ground specifically providing for information to be withheld when an individual has entered into negotiations with the agency and the disclosure of the information would unreasonably reveal the bargaining position of the agency.³⁶



RECOMMENDATION 51

Consideration should be given to amending section 28(1)(b) to provide for withholding of information where the disclosure would unreasonably prejudice the commercial position of the agency itself, particularly where the information requested would reveal the agency’s bargaining position in respect of negotiations involving the individual concerned.

4.4 SECTION 29 - Other reasons for refusal of requests

4.4.1 Section 29 completes the trio of sections providing reasons for the refusal of access requests. The provision is derived from section 27 of the Official Infor-

³⁴ Freedom of Information and Protection of Privacy Act 1992 (British Columbia), section 21(1). I have omitted subsections (2) and (3) as not being relevant to the discussion here.

³⁵ However, there is another provision in the British Columbia Act allowing the public sector agency to withhold information to protect its own interests: Freedom of Information and Protection of Privacy Act 1992 (British Columbia), section 17 (Disclosure harmful to the financial or economic interests of a public body).

³⁶ Something along these lines exists in section 9(2)(j) of the Official Information Act although this has never been a withholding ground in the personal access regime.

mation Act and section 26 of the Local Government Official Information and Meetings Act. Appendix H sets out a table which quickly identifies the equivalent provisions in those other statutes.

29(1)(a): Unwarranted disclosure of the affairs of another

- 4.4.2 Paragraph (a) allows withholding of information where disclosure would involve the unwarranted disclosure of the affairs of another individual, living or dead. Accordingly, there are two limbs to establish that good reason exists to refuse disclosure under the provision:
- the disclosure of the information would disclose the affairs of another person; and
 - such disclosure would be unwarranted.
- 4.4.3 This provision is frequently relevant where information requested is “mixed information” about both the requester and another person. I have released case notes in relation to a few of the cases on which I have reached an opinion.³⁷ The Complaints Review Tribunal has also considered the ground in cases brought before it.³⁸
- 4.4.4 Consideration of this withholding ground provides a clear example of how there can be a tension between the privacy rights or expectations of two individuals, one of whom would like to have access to information and the other who may prefer control of, or restriction on, the disclosure of that information. Cases can often be resolved through means such as:
- obtaining the consent of one individual to the release of the information;
 - giving access to a summary of information rather than the full information itself.
- 4.4.5 However, in many cases techniques such as severance of information, provision of summaries or the obtaining of consents, cannot resolve the issue and agencies, and on review I or the Tribunal, must reach an opinion as to whether the case involves the “unwarranted” disclosure of the affairs of another individual. I have sought to develop a consistent approach to the recurrent examples that come before me and in doing so have been assisted by the previous approach developed by the Ombudsmen.
- 4.4.6 This is not the place to summarise the jurisprudence that has developed in relation to the statutory provisions since that can be obtained from other sources such as my case notes, the case notes and Practice Guidelines of the Ombudsmen, decisions of the Tribunal and the various commentaries on the Privacy Act and Official Information Act. It may suffice to say that access reviews involving mixed information, and the balancing of privacy interests of two or more individuals, involve some of the most difficult complaints that come before me. Nevertheless, I consider the statutory test to be satisfactory and not in need of amendment.
- 4.4.7 However, at some future point when it is possible to give the withholding grounds in both the Official Information Act and the Privacy Act a thorough, and concurrent, review it may be possible to spell out a new set of withholding grounds which make some of the recurrent issues plainer to deal with both by agencies and on review. This ought to be achievable since a series of common approaches can be found in my case notes, those of the Ombudsmen and the guidance from courts and the Tribunal. The Canadian approach could be adopted whereby the Act spells out the common circumstances in which information must be withheld or must be released. However, while such an approach may be satisfactory

³⁷ See, for example, case notes 83, 567 and 15513.

³⁸ See, for example, *O v N (No 2)* (1996) 3 HRNZ 636, *M v Ministry of Health* (1997) 4 HRNZ 79, *M v Police* (1997) 4 HRNZ 91 and *Adams v NZ Police*, 12 June 1997, CRT Decision No 16/97.

for the recurrent issues there would remain a need for a test along the lines of section 29(1)(a) to deal with the less common situations on a case by case basis.



RECOMMENDATION 52

Consideration should be given to providing statutory guidance on the withholding of information in the common cases of “mixed” information concerning the requester and other individuals.

29(1)(b): Evaluative material

4.4.8 One withholding ground which features in many enquiries and complaints to the Privacy Commissioner is that set out in section 29(1)(b) and section 29(3) which relate to “evaluative material”. The provision has come directly from the Official Information Act. It allows an agency to withhold personal information “being evaluative material” where the disclosure would:

“breach an express or implied promise ... which was made to the person who supplied the information; and which was to the effect that the information or the identity of the person who supplied it or both would be held in confidence.”

4.4.9 Subsection 29(3) goes on to define restrictively what is meant by “evaluative material” in this section. It provides that “evaluative material” means “evaluative or opinion material” compiled solely:

- “(a) for the purpose of determining the suitability, eligibility, or qualifications of the individual to whom the material relates -
 - i) for employment or for appointment to office; or
 - ii) for promotion in employment or office or for continuance in employment or office; or
 - iii) for removal from employment or office; or
 - iv) for the awarding of contracts, awards, scholarships, honours or other benefits; or
- (b) for the purpose of determining whether any contract, award, scholarship, honour, or benefit should be continued, modified, or cancelled; or
- (c) for the purpose of deciding whether to ensure any individual or property or to continue or renew the insurance of any individual or property.”

4.4.10 The evaluative material reason for withholding is probably one of the most complicated to apply and most likely to vex both requesters and agencies. The Complaints Review Tribunal has given some guidance on the statutory tests.³⁹ The recommendations that I make will probably not diminish such difficulties as the subject matter requires careful limitation in scope, and weighing of competing interests, if it is adequately to perform its task. Possibly my recommendation to split the reasons for refusing requests into separate sections will slightly simplify matters by enabling users of the Act more readily to find the provision and by bringing the definition of “evaluative material” immediately adjacent to the provision to which it applies.

4.4.11 The evaluative material provision falls into an area where traditional views on secrecy come clearly into conflict with more modern attitudes involving openness towards employees and customers. Traditionally various pieces of information were supplied secretly to employers, insurers, and others, and decisions affecting the careers and entitlements of individuals were based upon it. As the definition makes clear, “evaluative material” concerns information which will be

“Insurance companies need to be able to withhold evaluative material relating to claims due to the fact that a claimant has the ability to request their personal information while the insurance company may be investigating the claim, thereby prejudicing the outcome of the investigation. It seems to us to be anomalous that the ACC can withhold information in an ongoing claims investigation by using section 27(1)(c), and yet there has been some question as to whether or not this same ability is extended to the private sector.”

- INSURANCE COUNCIL,
SUBMISSION L9

³⁹ *Westwood v University of Auckland* (1997) 4 HRNZ 107.



used in decisions affecting the individual. This is not trivial or inconsequential information sitting on a database never to be referred to or used. It is critical information which individuals may wish to check. In the absence of access rights, decisions may be taken on unreliable information which is not open to challenge by the person most directly concerned. I am therefore reluctant to recommend any “simplification” which might have the effect of diminishing rights of access or allowing larger segments of information to be held “off limits”. Submissions show a wide diversity of views being broadly evenly split between supporting the expansion of the provision, leaving it as it is, and narrowing it.⁴⁰

- 4.4.12 Nonetheless, within appropriate bounds, I remain of the view that there is a legitimate interest needing to be protected in relation to evaluative material. My two proposals will not significantly diminish the existing restrictions.

Meaning of “supply”

- 4.4.13 The first proposal that I have is to clarify the provision so that information generated *within* an agency by a person as part of his job cannot be withheld pursuant to this provision. One key element of the existing provision is that disclosure would breach a promise which was made to the person “who supplied the information”. Lying behind the provision is a concern, also reflected elsewhere in other reasons for withholding information,⁴¹ that information, will not be supplied on future occasions if a promise of confidentiality cannot be offered and be respected.

- 4.4.14 Evaluative material by its nature is used in decisions about an individual’s future and I am concerned that, if the provision is not carefully circumscribed, the access entitlement may be meaningless in a critical situation. In the case of the employee whose line supervisor has given a report to the employer in relation to future employment, the information should not be able to withheld pursuant to this provision (although there might be some other applicable holding ground in particular circumstances). However, that situation differs from the employer who seeks a report on a prospective employee from someone with something relevant to say who is unwilling to do so except on a promise of confidentiality.⁴² Although it is desirable that such people be willing to give comments, even critical comments, openly and on the basis that they could be shared with the individual, that does not always accord with reality. There is a public interest in ensuring that such information continues to be made available and, in limited and appropriate cases, able to be withheld.

- 4.4.15 The concern about prejudice to the future supply of information does not generally exist in relation to internally generated information. For example, if an employer asks a line supervisor for a report on an employee, the supervisor is in no position to insist on a promise of confidentiality - the evaluative comments will be supplied regardless as part of the supervisor’s job. With this in mind I have interpreted the reference to the *supply* of the information in the provision, to mean that the section does not generally apply to material which has been generated within the agency which holds it. However, this interpretation is not obvious in the wording of the section and might benefit from clarification in the legislation.

⁴⁰ Six submissions supported expanding the provision for withholding evaluative material - see submissions L9, L12, L13, L23, F20, F37. Four submissions would like to have it cut back in scope - submissions L14, L17, S2 and S42. Five submissions appear to support it as it is - submission L4, L7, L10, L19 and S36.

⁴¹ For instance, in relation to section 27(1)(b) which expressly articulates a fear that other governments or international organisations might cease to entrust information to New Zealand and section 29(1)(g)(ii) which is concerned with the prejudice of the supply of information to certain news organisations. Similar concerns exist, in relation to the protection of informant identity under section 27(i)(c) since future informants might not come forward if they could not be given an appropriately framed promise of confidentiality.

⁴² This will usually be someone outside the agency but may also, infrequently, include someone within the agency who is not obliged to give such information as part of the duties of his or her job. This latter situation arose in the *Westwood* case and the same result would arise under the proposal.

“WCC does not believe that 29(3) should be expanded and recommends a reduction.”

- WELLINGTON CITY COUNCIL,
SUBMISSION L14

**RECOMMENDATION 53**

It should be made clear that section 29(1)(b) is not available in relation to material that is provided by a person within the agency as part of his or her job.

Response to include grounds

- 4.4.16 There will remain cases where the evaluative material reason for refusing requests will continue to be applicable. Indeed, recommendation 53 will only affect a small proportion of the cases in which the reason is presently given.
- 4.4.17 Where evaluative material information is withheld by a public sector agency the resultant concern for the individual is usually mitigated by that person exercising a request under section 23 of the Official Information Act for reasons for the substantive decision. However, this is not available where a request is made of a private sector agency such as an employer or insurer.
- 4.4.18 I have given careful thought to whether there is some other means by which the needs of the individual might be better met while still protecting the interests of the agency. I have concluded that the agency should be obliged to provide a fuller response in refusing such a request than would normally be required by giving the requester both the reason for refusal and grounds in support. Normally an agency need only give the reason for refusal and a second request for the grounds is required under section 43(2)(b) or 44(a)(ii). The grounds will require a statement to be given of the considerations of fact, law and policy which led the agency to assign the reason for refusing the request in the particular case.
- 4.4.19 The grounds will have to be particularised for the case thereby ensuring that the agency carefully considers the statutory tests and the ability to withhold. The change may diminish the cases in which the reason is wrongly cited to brush-off a requester. It will also give the requester a better idea as to whether the information is properly withheld.

**RECOMMENDATION 54**

Sections 43 and 44 should be amended so that the grounds in support of the reasons for withholding evaluative material be given, without the requester needing to expressly ask, unless the giving of those grounds would itself prejudice the interests protected by section 29(1)(b).

Evaluative material held by author

- 4.4.20 At least upon first reading, section 29(1) seems to apply only to protect evaluative material in the hands of the recipient agency and not in the hands of its author. It may be that this was sufficient in the public sector under the Official Information Act when what was protected was material supplied by individuals or by private sector agencies, neither of which were subject to a right of access. The situation is different now with the extension of access into the private sector and it may seem odd if the provision did not allow the author of evaluative material to hold it back in circumstances where the recipient agency may do so.
- 4.4.21 Accordingly, in the discussion paper, I asked whether section 29(1)(b) should be revised to clarify that the author of evaluative material may withhold it from the subject in circumstances where the material may be withheld by the recipient agency. A good response was received to this question with 17 answers.⁴³ Every single one of them agreed that the provision should be so revised. The submission from the Ministry of Justice made the pertinent point that the issue would tend to arise only when the requester knew the identity of the supplier of the evaluative material - a detail frequently withheld. I have only occasionally seen the issue arise in practice in complaints to my office and I suspect that requesters have not yet worked out that where an agency withholds such mate-

“Sieghart made the pragmatic argument that the right of access ‘is a means rather than an end, because the end is to get the information system right, and if you give the data subject the right of access it is much more likely to be right’.”

- DAVID H FLAHERTY, *PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES*, 1989

⁴³ See submissions, L2, L4, L9, L10, L12, L13, L14, L17, L19, L22, S1, S2, S11, S13, S36, S37 and S42.



rial they might, through a process of deduction and multiple principle 6(1)(a) requests, identify who has supplied the information and request access to it.

- 4.4.22 In making the recommendation I acknowledge that the scope of this basis for withholding will be broadened which is a matter I have earlier expressed concern about. Nonetheless, if the basic shape of the evaluative material withholding provision is seen as reasonable and appropriate then I believe the case for protecting the information in the hands of the author is sound. Certainly those people who made submissions seemed to think so.



RECOMMENDATION 55

Section 29(1)(b) should be amended to clarify that the author of evaluative material may refuse an information privacy request in circumstances where the material may be withheld by the recipient agency.

29(1)(c): Physical or mental health

- 4.4.23 Section 29(1)(c) provides that an agency may refuse to disclose personal information relating to the requester’s physical or mental health if, after consultation (where practicable) with the individual’s medical practitioner, it is satisfied that disclosure of the information would be likely to prejudice the requester’s physical or mental health.

Use of provision

- 4.4.24 This withholding ground is not frequently relied upon by agencies and I have received few complaints. However, one unsuccessful complainant took such a matter to the Complaints Review Tribunal. In the case of *M v Ministry of Health*⁴⁴ the Tribunal gave consideration to the interpretation of the provision. One aspect related to the question of who is the “individual’s medical practitioner” when, as is common in these cases, the individual is receiving, or has received, treatment through the mental health system. The issue is whether the agency should consult the individual’s psychiatrist or general practitioner. The Tribunal took the view that it should be the “medical practitioner whose primary ethical obligation is to the individual” which it considered “most likely to be the requester’s general practitioner or the specialist with whom the requester has more than a passing patient/doctor relationship”.
- 4.4.25 There is a natural suspicion amongst patients, and individuals interested in information access issues, at suggestions that individuals ought not to be made aware of information about them because such knowledge would be likely to harm their health. Some worry at “doctor knows best” overtones which hark back to an era when individuals were generally not shown their medical records at all. However, in practice the withholding ground is relied upon in a very sparing manner. In the few cases that come for review the agencies, and medical practitioners involved, have usually done a great deal of soul searching before withholding the information. The concerns for physical or mental health are genuinely held and agencies often believe that the consequences of disclosure can be dire indeed. Provision for independent review also helps ensure that potential misuse of the ground is minimised. Some health agencies offer the availability of a counsellor or doctor to discuss concerns at the contents of documents revealed in order to minimise the risks consequent upon disclosure.

Psychologists

- 4.4.26 I received an unsolicited submission from a clinical psychologist who suggested that the present reference to an individual’s medical practitioner in section 29(1)(d) be replaced by one which would include an individual’s psychologist. Two scenarios were outlined. The first would involve a request directly to a psychologist. The submission was that the psychologist should be able to with-

⁴⁴ (1997) 4 HRNZ 79.

hold information under the provision without the need to consult with the individual's medical practitioner. The second suggestion was that other agencies holding information be permitted to consult with the individual's psychologist as an alternative to consulting the individual's medical practitioner.

- 4.4.27 I do not accept the case made in the submission to permit psychologists to dispense with consultation with an individual's medical practitioner before withholding information under section 29(1)(c). The withholding ground is directed towards "physical or mental health". "Physical health" is the province of medical practitioners. "Mental health" is also primarily the province of medicine although a psychologist may also possess relevant knowledge and insights. In the rare cases where the issue arises, a psychologist may be better informed to make the decision to withhold information having spoken to the individual's medical practitioner.
- 4.4.28 However, there may be merit in the suggestion to allow for consultation with an individual's psychologist in assisting to determine whether information should be withheld. The issue will arise rarely since practically all New Zealanders have someone they consider "their doctor" whereas few would say so in relation to a psychologist. However, in those circumstances where an agency proposes to withhold information and knows that the individual has a psychologist it does not seem unreasonable that that person be consulted as an alternative to the individual's medical practitioner in appropriate cases.
- 4.4.29 Alberta appears to be the only jurisdiction which has provided an explicit role for psychologists. Section 17(2) of the Freedom of Information and Protection of Privacy Act 1994 (Alberta) states:

"The head of a public body may refuse to disclose to an applicant personal information about the applicant if, in the opinion of a physician, a chartered psychologist or a psychiatrist or any other appropriate expert depending on the circumstances of the case, if disclosure could reasonably be expected to result in immediate and grave harm to the applicant's health or safety."

- 4.4.30 It is important in my view that the emphasis remain on consultation being with the *individual's* medical practitioner or psychologist not, as in the Alberta provision, just any practitioner. I am not proposing that agencies should seek a specialist opinion from a psychologist for the purpose of sustaining the withholding of information. It is simply that if the individual already has a relationship with a psychologist then it may be appropriate in some circumstances to consult that person rather than the individual's medical practitioner. It remains open to the agency to consult both the psychologist and doctor.
- 4.4.31 As I have received a submission from only one practitioner I couch my recommendation as a matter for further consideration.



RECOMMENDATION 56

Consideration should be given to amending section 29(1)(c) to provide for consultation with the individual's medical practitioner or, in the circumstances of the case, the individual's psychologist.

29(1)(d): Young persons

- 4.4.32 The Act permits refusal of a request in the case of an individual under the age of 16, where the disclosure of the requested information would be contrary to that individual's interests.
- 4.4.33 The provision has been carried over into the Act from section 27(1)(e) of the

Official Information Act although it was not included in the draft bill prepared by the Danks Committee.⁴⁵ That provision has been described as:

“A paternalistic but somewhat vague injunction not to release information.”⁴⁶

4.4.34 The withholding ground might arise in two slightly different circumstances. The first would concern a request for information by an individual under the age of 16 for information about him or herself the disclosure of which would be contrary to that individual’s interests. It is in this context that the ground is sometimes called paternalistic and in that respect it has something in common with the previous withholding ground whereby information can be withheld to protect the physical or mental health of an individual. However, the provision also has relevance to the circumstances where another person seeks access to information which is personal information about both the requester and a person under the age of 16. In that case, the requester can be denied information where disclosure would be contrary to the young person’s interests.

4.4.35 Notwithstanding that I received few complaints concerning refusal of requests based upon section 29(1)(d), a case has already been to the Complaints Review Tribunal in relation to it. In *O v N (No.2)*⁴⁷ the Tribunal held that the standard of proof implied by the expression “would” in the provision was the balance of probability. The Tribunal also surmised whether the “interests” of the child in section 29(1)(d) meant “best interests” - a phrase frequently used in family law. In particular, the Tribunal noted that article 3(1) of the United Nations Convention on the Rights of the Child it provides that:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

4.4.36 The Tribunal suggested that section 29(1)(d) might be considered to give effect to the Convention and that “interests” might denote “best interests” to accord with New Zealand’s international obligations. However, the issue was left open. I consider that little turns on the issue but that if it did, the Tribunal would likely interpret the meaning to be “best interests”. I do not consider it necessary to amend the provision.

29(1)(e): Safe custody or rehabilitation

4.4.37 Section 29(1)(e) provides that an agency may refuse to disclose information in respect of an individual who has been convicted of an offence or detained in custody where it would be likely to prejudice that individual’s safe custody or rehabilitation. The provision is derived from the Official Information Act and was included in the Danks Committee proposals.⁴⁸

4.4.38 The provision has been considered by the Complaints Review Tribunal in *M v Police*.⁴⁹ Interestingly, although the case mainly turned on prejudice to custody, although rehabilitation was cited, the requester was not in actual custody when the decision was made to withhold the information. Instead he had been released on licence but able to be recalled into custody. Nonetheless, the Tribunal took a relatively robust approach and concluded that this amounted to much the same thing as custody and allowed the withholding of the informa-

⁴⁵ Committee on Official Information, *Towards Open Government: Supplementary Report*, 1981.

⁴⁶ *Freedom of Information in New Zealand*, 1992, page 538.

⁴⁷ (1996) 3 HRNZ 636.

⁴⁸ See Committee on Official Information, *Towards Open Government: Supplementary Report*, page 80.

⁴⁹ (1997) 4 HRNZ 91.

tion on the basis that it would prejudice the requester’s safe custody or rehabilitation. I have no recommendation for amendment.

29(1)(f): Legal professional privilege

4.4.39 Section 29(1)(f) provides that an agency may refuse to disclose information where disclosure would breach legal professional privilege.

4.4.40 “Privilege” is a term borrowed from the common law and statutory rules about which evidence could be sought and given in court proceedings. The concept was developed before individuals had a right of access to personal information about themselves. Legal professional privilege protects certain communications between clients and their legal advisers and, if litigation is in prospect, communications with third parties for the purpose of that litigation. The law protecting legal privilege is not as wide as members of the public might think.

4.4.41 A problem did arise during the period under review when certain agencies withheld information on this ground but were reluctant to provide the documentation to the Commissioner on investigation of the resulting complaints. This issue was resolved to my satisfaction with an amendment to section 94 of the Act, as discussed at paragraphs 9.6.2 - 9.6.6.

4.4.42 “Legal professional privilege” is a concept understood by lawyers but not necessarily well understood by their client agencies or by requesters. It would be desirable to present the provision in a more informative fashion if that is possible. A recent review of the Australian Freedom of Information Act recommended that the relevant reason for refusal should contain an explanation of the common law of legal professional privilege. It was considered that this would effectively make the ground self-contained and thus easier for requesters and agencies to understand. Accordingly, it was recommended that the relevant section:

“Should be redrafted to provide that a document is exempt if it was created for the sole purpose of:
(i) seeking or providing legal advice; or
(ii) use in legal proceedings.”⁵⁰

4.4.43 Such a provision in New Zealand might refer to the “dominant” rather than “sole” purpose. At the present time the law of evidence is under review by the Law Commission which may make some further change in this respect. I have no wish to express a view as to what the extent of legal professional privilege ought to be, merely that it would be desirable to have its elements spelt out directly in the reason for withholding.



RECOMMENDATION 57

Section 29(1)(f) should be redrafted so that it provides a self-contained explanation of the meaning of legal professional privilege.

4.4.44 There has been some discussion in this review, and in the Law Commission’s review of the law of evidence, as to whether a kind of legal professional privilege should be able to be asserted where the relevant communications, do not involve a barrister and solicitor but some other kind of legal adviser or advocate. In particular it has arisen in the context of industrial advocates employed by School Boards of Trustees. It seems to me that the present position could be considered anomalous but I suggest that the matter be resolved through the reform of evidence law following the Law Commission’s report. The key issue to be addressed is the appropriate scope of privilege - not a matter determined

⁵⁰ Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, 1995, page 138.

by the Privacy Act but by the Law of Evidence. If any change is adopted there it will be followed in the reasons for withholding.

29(1)(g): Radio NZ Ltd/TVNZ Ltd

4.4.45 The information privacy principles generally do not apply to the news media. This is achieved by excluding any “news medium” in relation to its “news activities” from the definition of “agency”. Clearly both Radio New Zealand Ltd and Television New Zealand Ltd are each a “news medium”. However, the definition of that term in section 2 expressly excludes Radio New Zealand Ltd and TVNZ in relation to principles 6 and 7. Therefore they are agencies for the purposes of those principles.

4.4.46 This arrangement reflects the fact that as public sector organisations these two entities had been subject, since 1982, to the personal information access and correction regime then provided for in the Official Information Act and which is now reflected in principle 6 and 7. When this access regime was transferred to the Privacy Act it was considered important not to reduce those access and correction rights simply by reason of the transfer.

Restructuring of RNZ

4.4.47 One development during the period under the review concerned the restructuring of Radio New Zealand with a view to retaining Radio New Zealand Ltd as a Crown entity but separating the commercial operations to enable their possible sale - which also eventuated during the period. The Radio New Zealand Act (No 2) 1995 achieved this by deleting the words “Radio New Zealand Limited” and substituting the words “Radio New Zealand Ltd, The Radio Company Ltd, or”. This change was effected from the date that that Act commenced and, at a later date when the company was sold, a further amendment took effect which omitted the reference to “The Radio Company Ltd”.

4.4.48 I did not oppose the amendments to the Privacy Act.⁵¹ The first amendment simply reflected the restructured organisation and did not in any sense change the existing application of the Privacy Act. Similarly, when the privatisation was complete and the second amendment took effect, the application of the Privacy Act has still not in any real sense changed. From the time that the commercial part of Radio New Zealand was sold, the news activities of that commercial company were placed in exactly the same position as every other private radio broadcaster. Accordingly, while the personal information access rights in relation to the commercial part of RNZ diminished somewhat the fundamental position under the Privacy Act remained the same with respect to the exemption of the news media in their news activities.

Protection of sources

4.4.49 Complaints against Radio New Zealand and TVNZ are infrequent. Where such complaints are made they usually fall foul of the news media exemption. I have not released any case notes concerning the position of RNZ, TVNZ or the application of section 29(1)(g).

4.4.50 The two state broadcasters remain subject to the access and correction regime. Section 29(1)(g) has been crafted to ensure that *bona fide* news media journalists can protect their sources by withholding information where either:

- the information is subject to an obligation of confidence; or
- the disclosure of the information would be likely to prejudice the supply of similar information, or information from the same source.

4.4.51 I can anticipate circumstances in which I would need to investigate a complaint about the withholding of information against TVNZ or RNZ where it is neces-

⁵¹ See Report of the Privacy Commissioner to the Minister of Justice on the Radio New Zealand Bill, 10 July 1995.

sary to question a journalist as to whether information is subject to an obligation of confidence. I am aware from other dealings during the period under review, where enquiries have needed to be made of news organisations or journalists, that there is some misunderstanding about the manner in which such complaints can be dealt with. It is a delicate area which involves the balancing of important public and private interests. However, such balancing is “the bread and butter” of a Privacy Commissioner whose role is to investigate and resolve privacy complaints.

- 4.4.52 There is a mistaken belief in some quarters that it is somehow improper even to ask a journalist as to whether information is held or whether that information is subject to an obligation of confidence or is necessary to be withheld to protect sources of information. Quite clearly to do my job of investigating complaints these questions must sometimes be asked. It is no threat to press freedom to simply pose such questions. It is open for the journalist, in appropriate cases, to assert that the information held is subject to an obligation of confidence or that sources of information would be jeopardised if the information were to be released. However, journalists receive information from a whole variety of sources and the release of such information will not in all, or even necessarily most, cases jeopardise such sources. An example would be where information is obtained from a public source or pursuant to an Official Information Act request. There may also be cases where the matter can be resolved by asking the source of information. If they do object it may well be necessary to withhold the information to protect the confidential information. Where no objection is taken it may well be possible to release the information requested.
- 4.4.53 It is clearly in the public interest to have a free and fearless news media. However, this is not under threat in New Zealand from the access provisions of the Privacy Act and it is ridiculous to suggest that it is placed in jeopardy by questioning by the Privacy Commissioner to see whether a withholding ground applies. It is incumbent on the news media in my opinion to ensure that the cherished reputation of the “fourth estate” is upheld through professional and ethical conduct. This does not permit the hiding of sources of information in every case - sometimes it is essential to know the source of information to assess the credibility of material published. In many cases, it is as much a part of proper journalism to *reveal* sources, as it is to protect them, if the public is to have faith in what is published. Any move to make the position more difficult will only hamper my investigations. Approaches by my office to journalists seem to be met with less than a measured and considered reaction by newspapers with, in one case, use of news columns to castigate my approach before I had even reached the stage of deciding to require a response to a question as to the source.

Access, correction and the news media

- 4.4.54 Section 29(1)(g) is modelled on a provision which has appeared in the Official Information Act. It has operated, so far as I am aware, without any particular difficulty. An argument could be mounted to say that the complete exemption from the access and correction regime enjoyed by other news media organisations may not be warranted if any rights were accompanied with an appropriately crafted withholding ground such as section 29(1)(g).
- 4.4.55 A number of European laws have applied their access and correction regimes to the news media (sometimes only in respect of published material). While I do not believe that proposition should be rejected out of hand, I do not recommend such a course in this review. However, it would be desirable, in my view, for news media organisations singularly or collectively to consider whether some sort of entitlements could be provided to individuals on a self-regulatory basis. I note that some newspapers now have Internet sites on which it is possible to search a name. It does not therefore appear to be contrary to any fundamental freedom of such concept to be able to access information published about one-

self if it is reasonably retrievable for the publication. To be credible, there would need to be some kind of scrutiny external to the journalist concerned where information is withheld. This would not necessarily have to be an industry ombudsman, or a complaints body such as the Press Council, but might be in the form of, say, an organisation's ethical reviewer. Possibly that role could appropriately be held by an agency's privacy officer.

29(1)(h): Library, museum or archive

4.4.56 Under the Privacy Act there is a right of access to personal information contained in a library or museum. Such information is available as personal information except where the disclosure of it would be in a breach of a condition under which the material was placed in the institution.

4.4.57 I am unaware of any problems with this provision in operation and do not recommend change at this time.

29(1)(i): Contempt of court or Parliament

4.4.58 As with the Official Information Act, cases concerning the withholding of information on the grounds that the disclosure would constitute contempt of court or of the House of Representatives are very rare.

4.4.59 Although the reason for refusal is derived from the Official Information Act there was, in fact, no such withholding ground for personal information requests under Part V of the Official Information Act.⁵² Dr Roth has observed that the position taken under the Privacy Act “is more straightforward” than under the Official Information Act.⁵³ In particular, there is no provision in the Privacy Act which has the effect of placing a decision to disclose personal information outside the protection of the legislation's immunities as, Dr Roth advises, section 52(1) of the Official Information Act does. In particular, if personal information is disclosed in good faith pursuant to principle 6, and it does constitute contempt, the agency involved will enjoy the protection afforded by section 115 of the Act in respect of contempt of court proceedings.

4.4.60 I am unaware of any particular problems with this provision and have no recommendations for change.

29(1)(j): Frivolous, vexatious or trivial

4.4.61 Section 29(1)(j) provides that an agency may refuse disclosure where the request is frivolous or vexatious or the information requested is trivial.

4.4.62 The first part of the reason for withholding relates to the *request*. This allows for refusal where a request is frivolous or vexatious.

4.4.63 The second part of the paragraph relates to the *information*. This allows for refusal of a request where the information requested is trivial.

4.4.64 The provision has been carried over from section 27(1)(h) of the Official Information Act. The “frivolous or vexatious” ground is directed towards a request which is an abuse of the procedure and not bona fide. Essentially the requester is abusing the rights granted by the statute rather than exercising those rights as intended. The ground is hardly ever relied upon, certainly not in cases which have been brought on review to me. There may be many reasons for this. Perhaps requesters are careful not to misuse the access rights that have been

⁵² Under section 18(c)(ii) contempt of court or of the House of Representatives constitutes a reason for refusal of Part II requests under the Official Information Act and section 52(1) makes it clear that Act does not authorise or permit the making available of any official information if that would constitute a contempt of court or of the House of Representatives.

⁵³ *Privacy Law & Practice*, paragraph 1029.22.

granted to them. Perhaps agencies grant access and avoid a complaint notwithstanding occasional abuse of the rights. Probably on the occasions where resort might be had to the provision, agencies are reluctant to use it because they are unable to show that there was a vexatious intent. Such an intent may be difficult to prove if the requester has expressed no motive for a request.

- 4.4.65 Similarly, it appears that agencies very rarely rely upon the trivial information ground to refuse access to information. Often it is easier to simply give access to a trivial information than to refuse it on this ground and incur customer or employee displeasure and the possibility of a complaint. With respect to private sector agencies, the ability to charge for the information may filter out, or compensate for, the odd trivial request that might be received.
- 4.4.66 Elsewhere I have recommended a provision enabling an agency to apply for an exemption from having to deal with a named individual's access request for a fixed period where it can be shown that the individual has lodged requests of a repetitious or systematic nature which would unreasonably interfere with the operations of the agency and amount to an abuse of the right of access.⁵⁴ Clearly this has some similarity to the frivolous or vexatious ground for refusing requests. However, the proposal does not precisely replicate the existing provision and may add a safeguard in the very rare cases where this problem arises. That proposal would place an emphasis on the *systematic or repetitious* lodging of requests whereas the existing ground for refusal is directed towards a particular request (although a pattern of requests might give grounds to infer something of the requester's motives). It would also allow an agency to disregard, for a period, requests from the person who has systematically abused the right of access without needing to deal with each request on a case by case basis.
- 4.4.67 The Complaints Review Tribunal has the power to dismiss *any* proceedings (not simply access proceedings) if it is satisfied that they are trivial, frivolous, or vexatious or are not brought in good faith.⁵⁵ I have similar discretion to decline to investigate complaints under section 71(1)(c).

29(2): Unavailability of information

- 4.4.68 Section 29(2) sets out what have been called "administrative reasons" for not granting a request for personal information pursuant to principle 6. An agency may refuse a request where the information is not readily retrievable, does not exist or cannot be found, or where it is not held by an agency, and the person dealing with the request has no grounds for believing that the request can be transferred to another agency.
- 4.4.69 The reasons for refusal of requests under section 29(2) are reasonably plain and easy to understand and apply in practice. However, they each give rise to conceptual difficulties and the need for the provisions, or at least some of them, has been called into question. For example, Dr Paul Roth has suggested that paragraphs (b) and (c) "appear to serve no practical purpose".⁵⁶ Recently the Law Commission completed a study of the equivalent administrative reasons for refusing requests under the Official Information Act and its report, although not recommending change, highlighted a series of legal complexities in what one might have expected to be a relatively straightforward aspect of information law.⁵⁷

29(2)(a): Not readily retrievable

- 4.4.70 It is not immediately apparent why section 29(2)(a) is needed since it merely reproduces part of the precondition for entitlement to access personal informa-

⁵⁴ See recommendation 66.

⁵⁵ See Privacy Act, section 89 and Human Rights Act, section 115.

⁵⁶ *Privacy Law & Practice*, paragraph 1029.25.

⁵⁷ Law Commission, *Review of the Official Information Act 1982*, chapter 8.

tion under principle 6(1) - that personal information must be held “in such a way that it can readily be retrieved”.

4.4.71 Had there been no section 29(2)(a) an agency could still refuse a request because of the limitation of the entitlement under principle 6. Similarly, an agency might refuse a request for any of the following reasons notwithstanding that they are not set out as specific reasons for refusal:

- the request is not made by or on behalf of the individual concerned;
- the request is not for “personal information” but for information about a corporate body or some other thing;
- the request is made by a person who does not have standing under section 34.

4.4.72 Nonetheless, the existence of the withholding ground probably makes for a more workable access process since the agency has a ready reason to refuse the request and the requester gets a clear answer. Otherwise agencies who are perhaps not familiar with the Act, and who merely look through the list of withholding grounds, might fail to notice that they need not make the information available or may have to devise an appropriate response. From the requester’s point of view they will get a clear reply to their request notwithstanding that their request arguably does not constitute an “information privacy request” as falling outside their entitlements under principle 6 (although of course the requester would not have known that). Where individuals know, or believe, that information is held by an agency it is desirable that they receive a response making it clear that the information is “not readily retrievable” so that they may have the opportunity to discuss with the agency what information might be retrievable.

4.4.73 The withholding ground does appear anomalous notwithstanding that it has not caused any real problems in practice and is usefully listed amongst the reasons for refusing requests. One way of removing the anomaly would be to delete section 29(2)(a). This would bring disadvantages in terms of the orderly processing of access requests, the providing of responses, and the availability of review. The other, more promising, way of removing the anomaly would be to omit the “readily retrievable” condition precedent to the access right in information privacy principle 6(1) itself. This would have the effect of removing any redundancy without reducing individual rights. If change were to be made I would prefer this approach. However, I do not presently recommend change.

29(2)(b): Information requested does not exist or cannot be found

4.4.74 It has been suggested that paragraph (b) appears to serve no practical purpose in that information which does not exist or cannot be found can also be considered to be “not readily retrievable” in terms of paragraph (a) or not information held in such a way that it can readily be retrieved in terms of principle 6(1).

4.4.75 However, the prevailing view appears to be that information which is not readily retrievable may nonetheless exist and may be able to be found.⁵⁸ This was illustrated in the case of *Mitchell v Police Commissioner*.⁵⁹ In that case, the information, consisting of four affidavits, would have been returned by the person who physically held them if the defendant, who had the authority to ask for their return, had so requested. The defendant’s evidence indicated that the affidavits were not retrieved because it was not known where they were. The Tribunal stated that this explained why the affidavits were not retrieved but did not alter the fact that they were retrievable. The Tribunal also took the view that it is implicit in the phrase “cannot be found” that reasonable attempts have been made to find the information otherwise an agency making no attempt to

⁵⁸ See Law Commission, *Review of the Official Information Act 1982*, paragraph 292.

⁵⁹ [1985] NZAR 274.

find information, or only a desultory attempt, would be justified in refusing a request and the objective of the legislation would be thwarted.

- 4.4.76 While conceptually it is possible to take a position that paragraph (b) is not needed because it is implicit in the “readily retrievable” provisions I nonetheless support its retention. Even if implicit, the “does not exist” or “cannot be found” provision is more precise and provides a useful explanation to the requester when a refusal is made. The reason offers a guide to investigating the matter if a complaint is lodged. If information is refused for this reason, and a complaint is investigated, a primary line of enquiry will be the nature and quality of the searches made. The same could not be said of all “not readily retrievable” cases.

29(2)(c): Requested information is not held

- 4.4.77 The first part of paragraph (c) repeats a precondition for entitlement to access to personal information under principle 6(1), which entitles an individual to access only “where an agency holds personal information”.
- 4.4.78 Accordingly, as with paragraph (a), it might be argued that the reason for refusal is not necessary. Nonetheless, as with paragraph (a), there is probably merit in retaining the provision. The ground for refusal is useful when a request is broadly framed and only part of the information requested is held by the agency. The information that the agency does hold is readily retrievable but the balance of the information would be refused under this provision.
- 4.4.79 The ground for refusing a request has a second part which is that the person dealing with the request also has no grounds for believing that the information is either held by another agency or connected more closely with the functions or activities of another agency. Although the provision does not say so, the language seems clearly indicated to link to section 39 which concerns transfer of requests. It seems to be contemplated that such requests not be met with an outright refusal but instead a response informing the individual as to the transfer. However, this link is not very plain and would no doubt confuse some agencies unfamiliar with the provisions who may be perplexed, for example, as to why a request for information that is not held by the agency cannot be refused.
- 4.4.80 It might be preferable to redraft paragraph (c) to make the link with the transfer provision plainer. Something along the lines of the following might suffice:

“The information requested is not held by the agency and the person dealing with the request has no grounds for believing that the request should be transferred to another agency under section 39.”



RECOMMENDATION 58

Section 29(2)(c) should be redrafted to make plain the link with the obligations to transfer a request.

29(3): Evaluative material

- 4.4.81 Subsection (3) contains a definition of “evaluative material” which has been derived from the Official Information Act. I have discussed the refusal of requests for evaluative material in relation to section 29(1)(b) and made some recommendations for change.⁶⁰ I have also canvassed elsewhere the possibility that if the grounds for withholding were to be reorganised the provisions relating to evaluative material might be better located in conjunction with other provisions dealing with commercial and related interests.⁶¹

⁶⁰ See paragraphs 4.4.13 - 4.4.22 and recommendations 53, 54 and 55.

⁶¹ See paragraph 4.3.11.

4.5 SECTION 30 - Refusal not permitted for any other reason

4.5.1 Section 30 indicates that the good reasons for refusing disclosure, set out in sections 27, 28 and 29, are intended to form a code. In other words, no reasons other than one or more of those set out in those sections justifies a refusal to disclose information requested pursuant to information privacy principle 6. This is subject to three sections:

- section 7 - which saves the effect of other laws;⁶²
- section 31 - which has never been brought into effect, but were it to be, would place restrictions on persons sentenced to imprisonment; and
- section 32 - which allows an agency to “neither confirm nor deny” the existence of certain information.

Counselling and medical privileges

4.5.2 In the course of this review consideration was given to whether there ought to be any new reasons for refusal of requests created. Most submissions felt that there should be no further reasons for refusal.⁶³ However, drawing upon the analogy with legal professional privilege, suggestions were directed to other forms of privilege, such as counselling communications, which have certain limited privileges under the Evidence Act.⁶⁴ Privilege involving medical practitioners was also raised.⁶⁵ Such “privileged” information is frequently able to be withheld under section 29(1)(a) because its release would involve the unwarranted disclosure of the affairs of another individual. However, without a more tailored reason for refusal the matter has to be gone into on a case by case basis by the agency, and on review by my office and the Tribunal, and documents cannot be withheld on a class basis in the same way as communications which are subject to legal professional privilege.

4.5.3 For example, it is not unknown for persons who have been charged with, or convicted of, certain sexual offending to seek access to information which is held on the ACC counselling files of victims or alleged victims. Nearly all of this information is withheld on the basis that it is not in fact personal information about the requester. However, where it is mixed information about the requester and the person undergoing counselling, a careful process has to be gone into to identify in detail what is personal information about the requester and, of that, what can be withheld. These issues also arose when the access regime was solely within the Official Information Act. The new feature is that private sector agencies, such as counselling organisations and GPs, are now subject to the access regime.

4.5.4 This raises a question of competing privacy interests. There is very high privacy interest in the person who has consulted a doctor, or undergone counselling, and disclosed information in confidence. Against that is the privacy interest in a requester having access to a portion of the information that relates to him or her. The interest in having confidences respected in professional consultations or counselling may have more importance than the desire on the part of the requester to have access to what has been said about him or her. After all, generally speaking, what an individual discloses in counselling sessions, or in medical consultations, is not used in relation to the requester - it is a matter between individual and professional.

4.5.5 However, there are some classes of case where what is said in confidence may have a direct bearing upon actions taken in relation to the requester, particu-

“The medical (patient-doctor) privilege appears to be disregarded more than recognised. While there are exceptions to such privilege where disclosure is needed to prevent harm, I believe the doctor’s professional privilege should be no less respected than the lawyer’s. Counsellors would, no doubt, argue similarly. I expect there to be more harm resulting from disclosure than protection of confidence.”

- ROYAL NZ COLLEGE OF GENERAL PRACTITIONERS, SUBMISSION L4

⁶² I suggest elsewhere that relevant parts of section 7(2) and 7(3) should be transferred into Part IV itself. See recommendation 32.

⁶³ See submissions L7, L9, L13, L14, L19 and L22.

⁶⁴ See submissions L18 and L24.

⁶⁵ See submissions L4 and S2.

larly in relation to criminal proceedings. There are currently proposals to establish a criminal disclosure regime which may resolve a significant aspect of the problem with respect to persons who have been charged with an offence. If such a regime is established the case to include counselling or medical privilege would, I believe, be significantly strengthened since in such cases relevant information will be available, if appropriate, through court supervised processes without any need to rely upon Privacy Act access rights.

4.5.6 Although there may be merit in addressing the matter, I do not think that the time is right. Very shortly a major review of the law of evidence will be examined by the Government. Similarly, a proposal for a criminal discovery regime seems imminent after a wait of many years (see paragraphs 4.6.1 - 4.6.5). The possibility of creating any new withholding grounds may more appropriately be considered once the details of those two initiatives are known.

4. 6 SECTION 31 - Restriction when person sentenced to imprisonment

4.6.1 For some years there has been discussion of creating a criminal discovery procedure, that is, a formal means for defence and prosecution counsel to exchange information about a criminal case. In the absence of a statutory discovery procedure the Courts may make decisions under the Privacy Act and Official Information Act.

4.6.2 Once a criminal discovery procedure is enacted, section 31 may be brought into effect. Section 31 would allow the police to refuse a request for information relating to an offence where the person concerned has already been convicted for that offence. The section comes from the Official Information Act where it was introduced in 1987. It is waiting to be enacted by an Order in Council, as it was when it was in the Official Information Act.

4.6.3 In October 1997 the Ministry of Justice and Department for Courts began consulting in relation to a proposal regarding preliminary hearings and criminal disclosure. I have supported the creation of a statutory criminal discovery or criminal disclosure regime and in most major respects the detail of the joint position taken by the Ministry and the Department.⁶⁶ In my view the Privacy Act does not provide an ideal basis for a criminal disclosure regime although the position may be better than it is in common law regimes without such legislation. The consultation paper issued by the Ministry and Department raised the issue of whether section 31 of the Act should come into effect.

4.6.4 The consultation paper noted that reform of disclosure in Britain was precipitated by a series of high profile criminal convictions being overturned, some years later, on the grounds that the prosecution had failed to disclose certain evidence that would have been helpful to the defendant. The information only came to light by the defendant's continuing to seek disclosure after the trial had been completed. Given human fallibility - not to mention the possibility of improper behaviour - we should not always assume complete and perfect compliance with disclosure obligations.

4.6.5 It is not possible for me to know how the departmental proposals will develop and at what pace. In my view, section 31 should be repealed regardless of the outcome of that initiative.



RECOMMENDATION 59

Section 31 should be repealed.

⁶⁶ See submission by the Privacy Commissioner to the Ministry of Justice and Department for Courts in relation to the consultation paper regarding preliminary hearings and criminal disclosure, February 1998.

4.7 SECTION 32 - Information concerning existence of certain information

- 4.7.1 Section 32 allows agencies to respond for requests to access by neither confirming nor denying the existence or non-existence of the information in question. The provision is quite tightly drawn and only permits such a response where section 27 or 28 of the Act is being relied upon - that is primarily in cases involving national security or law enforcement and less frequently cases involving personal safety or international relations.
- 4.7.2 The provision is derived from section 10 of the Official Information Act and the issues arise far more frequently in that context. I have occasionally had to consider such matters especially in the context of access complaints involving the New Zealand Security Intelligence Service.⁶⁷
- 4.7.3 Section 10 of the Official Information Act was not one of the provisions considered by the Law Commission in its review of the Official Information Act. However, a similar provision was considered in a recent review of the Australian Freedom of Information Act. In the report of that review it stated that the equivalent section, section 25:

“... is especially problematic for applicants because it appears to perpetuate the kind of secretive, conspiratorial agency culture that the FOI Act is intended to break down. DP59 asked whether there is a problem with the ‘neither nor confirm’ response provided for s.25. A number of submissions consider that s.25 is contrary to the spirit of the Act and should be repealed. Others consider it a necessary provision.

“The review is concerned that s.25 can be used ‘bamboozle’ applicants with legalistic jargon. Nevertheless it considers that, unfortunately, provision is necessary where information about the existence (or non-existence) of a document needs to be withheld. However, reliance on s.25 will only be justified in rare situations.”⁶⁸

- 4.7.4 The Australian review recommended that the grounds upon which the neither confirm nor deny response could be made should be slightly narrowed (in circumstances not relevant to this review). I agree that it is necessary to have such a provision in an access law. I also take the view that a “neither confirm nor deny” response should only be justified in rare situations.

Broadening the application of section 32

- 4.7.5 However, it may be appropriate to consider whether the existing range of circumstances for which a neither confirm nor deny response can be given under section 32 is appropriate. Presently, there is broad brush approach applying the provision to circumstances in which section 27 or 28 apply (or would apply if the information exists). It cannot be utilised in respect of section 29. I consider that the reasons set out in sections 27 and 28(1)(b) are appropriate. It is perhaps not quite so clear that the provision has relevance to section 28(1)(a) but refusal on that ground is so rare that the issue probably has never arisen.
- 4.7.6 Notwithstanding my general wish that the “neither nor confirm nor deny” response should be available in limited circumstances, and utilised only rarely, it

⁶⁷ See, for example, case note 63W.

⁶⁸ Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982, 1995*, paragraphs 8.21 and 8.22.

occurs to me that there may be another circumstance in which the section 33 response should be available. Section 29(1)(e) concerns the disclosure of information which would be likely to prejudice the safe custody or rehabilitation of a convicted individual detained in custody. This provision is very similar to that contained in section 27(1)(c) concerning prejudice to the maintenance of the law. Overseas access laws that have a “neither confirm nor deny” provision for law enforcement reasons also permit such a response where disclosure might facilitate the escape from custody of a detained person.⁶⁹

- 4.7.7 At this time I merely raise the issue for consideration since it might appropriately be considered in conjunction with a review of the equivalent provision in the Official Information Act also. Any change to this provision would also have to be reflected in a change to section 44(a)(ii) which allows an agency to refuse to give grounds in support of reasons for refusal of access in certain circumstances.

**RECOMMENDATION 60**

Consideration should be given to extending the application of section 32 to information to which section 29(1)(e) applies.

⁶⁹ See, for example, Freedom of Information and Protection of Privacy Act 1992 (British Columbia), sections 8(2)(a) and 15.