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PRESENTED BY

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***“Secrecy versus Security
Heightened Security - The Challenge for FOI Outcomes”***

INTRODUCTION

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

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

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

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

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

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

Background

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

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

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

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

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

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

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

New Zealand's experience of security as a withholding ground

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

Statutory framework

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

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

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

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

The purpose of the Act follows, in section 4:

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

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

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

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

Public authorities subject to the Act and the Ombudsmen, in reaching conclusions after investigating complaints that the law has not been complied with, are required to determine matters so as to give effect to these purposes. As an observation, even after nearly 25 years since the enactment of the statute it is sometimes necessary to remind organisations that the Act promotes the release of official information rather than the withholding of it. The application of the grounds on which information may be withheld remain from time to time the subject of robust debate between my Office and holders of official information. This is notwithstanding the fact that a considerable amount of official information is now released as a matter of course without any reference to my Office at all.

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

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

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

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

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

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

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

This however might be stretching the point. In making the NZSIS, GCSB and other agencies with intelligence gathering functions subject to the OIA, Parliament may simply have been rebutting the Official Secrets logic that any information held by the security and intelligence agencies always needs to be withheld. Subjecting these agencies to the OIA regime is not so much accepting that *“there was some information about the*

¹ (E, T & L pp 149-50)

activities of the NZSIS which could safely be made public' but rather reflecting that the question *'does this information need to be withheld'* must always be asked. Even if the information is not released, the New Zealand public have the safeguard that the answer to the latter question can be the subject of independent scrutiny – in this case by the Ombudsman – against the test that Parliament has set.

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

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

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

Section 6 of the New Zealand Official Information Act

Section 6 of the OIA provides the grounds for withholding information relating to security, defence and international relations, amongst other matters. Subsections (a) and (b) are relevant to security concerns:

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

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

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

"It is obvious that the expression is capable of many shades of meaning conveying grades of probability. The context in which it is used - s 6 - deals with matters calling for a practical and common-sense assessment of the prejudice to the various interests described. In many cases it will

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

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

Section 6(b), as we have seen, protects information *'entrusted'* to the New Zealand government *'on a basis of confidence'* by the government of another country, or any of its agencies or by any international organisation. It is important to recognise here the effect on the ability of a government to be open despite the treaties it has signed. As Professor Alasdair Roberts has described in several articles, bilateral agreements between two countries on exchange of security related information can *'trump'* the requirements of access to information laws, by insisting that shared classified information cannot be disclosed to those outside government without the consent of the originating government.

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

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

I note however that some other countries do subject some similar grounds for withholding to a public interest balancing test, which enables the review agency to recommend – or even order - that the information in question be disclosed. One question for us to consider in New Zealand is whether the lack of a public interest balancing test in the OIA for withholding information on section 6 grounds is still

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

appropriate, nearly 25 years after the law was enacted, or if the development of freedom of information laws elsewhere has shown that we should look at this again.

Limits to Ombudsman's powers

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

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

Second, the Prime Minister can prevent an Ombudsman from making a recommendation that information be made available under section 31 of the OIA, if he or she certifies that it would be likely to prejudice *'the security or defence of New Zealand or the international relations of the Government of New Zealand'*. It is important to note that this power under the OIA is only available to the Prime Minister prior to a formal recommendation being made.

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

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

Cases under the Official Information Act

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

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

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

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

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

Some cases relevant to the issue

1. USS Buchanan

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

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

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

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

After considering the Ministry's explanation and reading the information at issue, the view was formed that there was some further information which could be made available

without prejudice to the interests the Ministry was seeking to protect. However, the balance of the information needed to be withheld to avoid prejudice to those interests. In reaching this view, regard was had to the fact that there are certain conventions of international diplomacy, in particular the convention that information communicated informally by another State through diplomatic channels will be kept in confidence. If these conventions are not observed by New Zealand, it would be likely that the international relations of the Government and the entrusting of information to it by another State would be prejudiced.

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

2. Individuals of interest to Security Agencies

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

The NZSIS and, I suspect from reading Professor Roberts' articles, similar agencies elsewhere, often refuse to release information supplied by other intelligence agencies. This is not always because of its content but because release - in the view of the agency - would prejudice future supply of similar information. On occasion, it is admitted by the agency that although such information is open source, it came from a sister organisation. Of course, in such cases requesters, provided they know where to look, can access this open source themselves. But the principle of the maintenance of relationships between agencies remains.

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

Lessons from our experience

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

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

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

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

“Conclusive certificate provisions along the lines of section 31(a) are in principle difficult to justify and do not relate well to the scheme of the Official Information Act. Moreover the use of the provision only once in 15 years indicates that it is not an essential part of the Act, and that sections 6, 7 and 10 may be adequate by themselves. The repeal of section 31(a) would not permit the Ombudsmen to supplant the judgement of the executive concerning matters of defence, security or foreign relations. The government could still exercise the power of Cabinet veto under section 32 of the Act, in the same way as it would if the information it sought to protect concerned domestic affairs. It would simply place information concerning defence, security or foreign relations under the same regime as other types of information in the event that the Ombudsmen’s recommendations were to be overridden, and shift the key decision-making power from the Prime Minister to the Cabinet.”³

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

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

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

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

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

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

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

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

A further case that involved a similar enquiry was received from a New Zealand citizen who had unsuccessfully sought access to information held by a separate Trans-Tasman agency, the Food Standards Authority Australia/New Zealand (FSANZ). FSANZ is not currently subject to the OIA although it is subject to the Australian Federal Freedom of Information Act (AFFOIA). The enquirer advised that she had applied for access to information held by FSANZ under the AFFOIA but was advised that as she could not provide an Australian address her request was not valid. At present, the only way information held by FSANZ can become the subject of a request under the OIA is if it is held separately by a New Zealand agency subject to the OIA. The question arises about the desirability of Trans-Tasman agencies with regulatory functions impacting on both New Zealand and Australian citizens being subject to the FOI regime in Australia only. There would seem to be a logical inconsistency in this.

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

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

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

Security protected by greater openness

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

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

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

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

While a society which is unable to obtain a reasonable level of security is unable to give effect to the civil and political rights of its citizens, that society will also be able to enjoy those rights only if openness is also a prerequisite. In periods of emergency,

⁴ *San Francisco Chronicle*, 8 April 2006.

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

governments may introduce measures to restrict civil and political liberties, but in times such as these, openness becomes even more important – enabling us to scrutinise whether additional state powers are being used properly or are being abused. Indeed, it seems clear that without openness and the ability to hold the executive to account for its actions and policies in times such as these, public distrust of government – already at worryingly high levels in some countries – will further increase. A lack of public trust in governing institutions is likely to degrade the very social cohesion on which true national security rests.

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

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

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

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

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

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

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

In circumstances of heightened security fears, there may be a case for greater secrecy about operational policy so that third parties cannot avoid or otherwise defeat legitimate mechanisms for protecting national security. However, that should not be an excuse to shield the actions of individuals from independent scrutiny, where such scrutiny is often the only safeguard against abuse of the powers granted to the various security agencies.

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

I suggested previously that experience with the development of FOI laws around the world subsequent to the passage of New Zealand's legislation has shown that some believe that the grounds for withholding information to protect defence and international relations can in fact be subject to a countervailing public interest test. I think we might also consider the possibility that greater state powers – intended to protect our security but also infringing on the liberties we have previously enjoyed – might point to a need for FOI review agencies to have the ability to recommend disclosure on the basis of the countervailing public interest in particular circumstances.

The capacity of FOI review agencies

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

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

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

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

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

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

Conclusion

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

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

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

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

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

As Justice Brennan said in the Australian High Court as long ago as 1984,

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

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

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