FREEDOM OF INFORMATION AND THE UNIVERSITY

MICHAEL TAGGART*

On 1 April 1987 the New Zealand universities came under the freedom of information regime of the Official Information Act 1982 (hereafter the Act or OIA).[1] By so providing Parliament has recognised that the autonomous universities, as publicly-funded institutions, should be as open and accountable as the many other diverse organisations subject to the OIA.[2] The purpose of this paper is to examine the likely impact of the OIA on university affairs and governance.

At the outset it should be noted that New Zealand is not alone in subjecting its universities to freedom of information legislation. In Australia freedom of information statutes apply to universities at the federal level and in the State of Victoria;[3] covering the Australian National University, the University of Melbourne, Monash University, La Trobe and Deakin Universities. At the provincial level in Canada, all the universities in Quebec

* Faculty of Law, University of Auckland.
An earlier version of this paper was presented at a staff seminar at Auckland Law School. I am grateful to those present for their helpful comments. Special thanks to: Ron Paterson, for his help at a critical stage of the preparation; Grant Liddell, for his perceptive comments; and Ian Eagles, from whom I have learnt more about freedom of information issues than I ever wished to know.

1 The Universities of Auckland, Canterbury, Otago and Waikato, Massey University, Victoria University of Wellington and Lincoln College were added to the First Schedule of the OIA by the Official Information Amendment Act 1987 (hereafter the amendment Act or OIAmA), s23(1) and Second Schedule. The amendment Act also brought technical institutes under the OIA. See the definition of "Education Authority" (listed in the first Schedule to the OIA) in s2(1) of the Education Act 1964.

2 This emphasis on public funding and scrutiny can be seen in the different but related context of judicial review of university decisions. In *Norrie* v *University of Auckland* [1984] 1 NZLR 129 (CA), where a majority of the Court of Appeal held the University Visitor did not have exclusive jurisdiction over domestic disputes within the university, Woodhouse P said this (at 135): "Like other statutory corporations here [the universities] have been established by Act of Parliament as public institutions to promote public purposes, in this case higher education, and largely with public funds. And for that important reason alone I would agree with the view expressed by Mr Caldwell at p311 of his article ["Judicial Review of Universities – the Visitor and the Visited" (1980-2) 1 Canterbury LR 307] that they 'should be subject to public scrutiny in the courts'." See also Gellhorn and Boyer, "Government and Education: The University as a Regulated Industry" [1977] Ariz St LJ 569 at 572.

3 The definitions of "prescribed authority" in both the Freedom of Information Act 1982 (Cth), s4 (hereafter Australian FOIA) and the Freedom of Information Act 1982 (Vict), s5 (hereafter Victorian FOIA) clearly encompass universities and so it has been held. See eg *Re James and Australian National University (No 2)* (1985) 7 ALD 425 (AAT); *Re Burns and Australian National University (No 2)* (1985) 7 ALD 425 (AAT); *Hart* v *Monash University,* Victorian County Court, Hogg J, unreported decision, 30 July 1984, noted in [1984] Admin Review (No 2) at 28-29.

are covered by freedom of information law,[4] as is the Memorial University of Newfoundland.[5] Moreover federal[6] and many state[7] open record laws in the United States of America apply to universities to much the same effect.

Official Information

"Official information" is defined in section 2 to mean "any information held by . . . [a]n organisation". The original Official Information Amendment Bill 1986 merely listed "The Councils of" the six universities and Lincoln College as organisations. The Bill as reported back to the House of Representatives from the Justice and Law Reform Select Committee made specific provision in relation to official information held by universities. "Official information", as defined in the new paragraph (d),

> In relation to information held by a University (including Lincoln College), includes only information held by
> (i) The Council of the University; or
> (ii) The Senate, Academic Board, or Professorial Board of the University; or
> (iii) Any member of the academic staff of the University; or
> (iv) Any other officer or employee of the University; or
> (v) Any examiner, assessor, or moderator in any subject or examination taught or conducted by the University.

This provision is unique[8] and is intended to exclude from the ambit of

4 Quebec Information Act, ch 30, 1982 Que Stat 601. This is also the case in France. See Errera, "Right of access to administrative documents – competitive examination papers" [1987] PL 467 (casenote).

5 The Memorial University of Newfoundland is included in the definition of "government department" in s2(a)(ii) of the Freedom of Information Act 1981 (Nfl). This was criticised as an attack of university autonomy. See Pohle, "Newfoundland's Act of 1981" in D C Rowat (ed), *Canada's New Access Laws* (1983, Carleton University) 91 at 93.

6 Family Educational Rights and Privacy Act of 1974, 20 USC §438(a)(1)(A). See generally Mattessich, "The Buckley Amendment: Opening School Files for Students and Parental Review" (1975) 24 Catholic ULR 588 and Schatken, "Student Records at Institutions of Postsecondary Education: Selected Issues under FERPA" (1977) 4 J College and University Law 147.

7 Almost all states have open record laws and most apply to state universities. See Weber, "State Public Records Acts: The Need to Exempt Scientific Research Belonging to State Universities from Indiscriminate Disclosure" (1983-4) 10 J College and University Law 129. In several states open meeting laws apply to universities as well. See Vickory, "The Impact of Open-Meetings Legislation on Academic Freedom and the Business of Higher Education" (1986) 24 Am Business LJ 429 and the literature cited there. In New Zealand the open meeting provisions in Part VII of the Local Government Official Information and Meetings Act 1987 apply to the Councils of the six universities and Lincoln College.

8 No similar provision is made for any of the other 171 listed organisations. The "organisations" subject to the Act are listed in the First Schedule to the OIA (presently 116 organisations are listed) and in Part II of the First Schedule to the Ombudsmen Act 1975 (presently 62 organisations listed). Special provision was made for library materials and material placed in the National Library in para (e) of the definition of "official information" in s2 but this is not of the same order as that in para (d).

the Act information held by past and present students.[9] This has been done by listing those bodies or persons who hold "official information" in the university setting. The result is that information held by bodies or persons not mentioned in paragraph (d) (eg faculties, departments, committees of Council and Senate, elected members of Council, students) is not "official information" as such unless and until it is held by one or more of the bodies or persons listed in paragraph (d). This does not appear to cause any inconvenience due to the amplitude of the list in paragraph (d).

This leads on to a difficult question: what is "official information" in the university setting? To some extent the difficulty arises from the fact that New Zealand departed from overseas legislation in making "information", not documents or records, the subject-matter of access.[10] There is no definition of "information" in the Act and that of "official information" merely says that information (whatever that be) is "official" when "held by" a Department, a Minister of the Crown in his or her official capacity or an organisation.[11] In the only judicial decision so far to deal with the OIA directly, Jeffries J spoke of "the astonishing breadth of the definition of official information" and, in another passage, said:[12]

> Perhaps the most outstanding feature of the definition is that the word "information" is used which dramatically broadens the scope of the whole Act. The stuff of what is held by Departments, Ministers or organisations is not confined to the written word but embraces any knowledge, however gained or held, by the named bodies in their official capacities. The omission, undoubtedly deliberate, not [sic] to define the word "information" serves to emphasise the intention of the Legislature to place few limits on relevant knowledge.

The Danks Committee, which drafted the original Official Information Bill (enacted with only minor alterations), ventured this comment on the meaning of "information":[13]

> There is no definition of "information" in the Act. The Shorter Oxford Dictionary defines it in this context as "that of which one is apprised or told", in this case the Department, organisation or Minister; the Concise Oxford Dictionary as a "thing told, knowledge, (desired) items of knowledge".
>
> For the purposes of the Bill information includes not merely recorded data but knowledge of a fact or state of affairs by officers of the agency in their official capacity, eg when a particular report is to be presented. Note however that to constitute "official information" it must be "held" by the agency, or vicariously by one of its officers or employees.
>
> It is not contemplated that official information should include the giving by officials of their opinions or interpretations; the Bill is not intended to change existing laws, conventions, or practices in relation thereto.

9 *Report of the Department of Justice and the Information Authority on submissions to the Justice and Law Reform Committee in relation to the Official Information Amendment Bill 1986* (17 Nov 1986) 22-23.

10 Committee on Official Information, *Towards Open Government: Supplementary Report* (1981) 61 (hereafter referred to as *Danks Report,* vol 2). See also N S Marsh (ed), *Public Access to Government-Held Information* (1987) 295.

11 Section 2.

12 *Commissioner of Police* v *Ombudsman* [1985] 1 NZLR 578 (HC) at 586 (appeal pending).

13 *Danks Report,* vol 2, 61-62.

Leaving to one side the admissibility of the Committee's views in a court of law,[14] there seems no reason to doubt that "information" in this context means, at least, that of which one is apprised or told. This would cover things that a person has observed or said in public or heard others say.

One of the advantages of not restricting a freedom of information regime to documents or records is that there is less incentive to attempt to evade the regime by not recording information in some form. On several occasions where no formal note of decision or of the preceding discussion has been made, the Ombudsman in the course of investigation under the Act has asked one or more of the persons involved in the decision-making process to provide a written account of what was said or the reasons expressed orally for reaching the decision.[15] Nevertheless there are obvious limits to this approach. As the Ombudsman noted in another context, "all memories are fallible and an investigation on that basis poses problems".[16]

14 The extent to which the courts can use a permanent or ad hoc law reform committee report interpreting a statute enacted in response to that report is still controversial and the law is in a state of flux. See generally Scutt, "Statutory Interpretation and Recourse to Extrinsic Aids" (1984) 58 ALJ 483. As the law stood in New Zealand until very recently, the Danks Report could be resorted to only in the event of ambiguity and then only to ascertain the pre-existing law – the so-called "mischief" sought to be remedied: *Harding* v *Coburn* [1976] 2 NZLR 577 (CA) at 581, per Cooke J (note the qualifier "at least"); *NZEI* v *Director-General of Education* [1982] 1 NZLR 397 (CA) at 409, per Cooke J (same qualification). The Report could not be used directly to ascertain the meaning of the Act nor could the court look at the explanatory notes (as quoted in the text) accompanying the draft Bill. In this our courts followed, without discussion, a bare majority of the House of Lords in *Black-Clawson International* v *Papierwerke Waldhof-Aschaffenburg* [1975] AC 591 (HL) affirmed by the House of Lords in subsequent cases). In *Commissioner of Police* v *Ombudsman,* supra n 12 at 585, Jeffries J eschewed reference to the Danks Report as "a direct tool of statutory interpretation" leaving that course for clear guidance from higher courts. In recent cases, however, and without "explanation or apology" (Burrows, [1986] NZLJ 100 at 101) there has been increased reference to law reform committee reports and beyond the "mischief" use. See *L D Nathan & Co Ltd* v *Hotel Association of New Zealand* [1986] 1 NZLR 385.

15 L J Castle, "Some New Legislative Developments and Their Implications", paper presented to the Medical Superintendents' Association of New Zealand Conference held at Nelson in April 1986, at 10: "Several times now authorities have been asked to have officers' recollections of events put into writing for disclosure to the complainant. It is part of an organisation's duty to assist a requestor to offer to set down recollections of officers which have either never been reduced to writing or the written version of which has been destroyed", citing Ombudsmen Case Nos 44, 51, 709 and 731. These cases (one of which is noted in *5th Compendium of Case Notes of the Ombudsmen* (1984) at 106 (hereafter *5th Compendium*)), and two others unidentified by case numbers, are summarised in a letter to the writer from the Chief Ombudsman, Mr John Robertson, dated 23 April 1987. The case that goes the furthest (Case No 731) involved a request to the New Zealand Geographic Board for information relating to the proposal to change the name of Mt Egmont/Taranaki. In particular the requestor wished to know the views expressed by a Board member. At the outset of the investigation Mr Castle suggested that, if no written record existed of those views, the member concerned should provide a written summary. This was prepared and was accepted by Mr Castle as a reasonable one for the purposes of the request. A copy was made available to the requestor.

16 *Annual Report of the Ombudsmen* (1980) at 21 (LJ Castle) (local government investigation).

Teaching and research materials

Information gathered or generated by academic staff in the course of research or teaching is plainly "information held by . . . any member of the academic staff".[17] But is it "official" information? The Act draws a distinction between information held in an official capacity and that held in another, what may be assumed to be a private or personal, capacity. This can be clearly seen in section 2 where the definition of "official information" covers information held by a Minister of the Crown only in "his [or her] official capacity". For Departments and organisations the distinction is reflected in section 2(4) in this way:

> Information held by an officer or employee or member of a Department or organisation in his capacity as such an officer or employee or member or in his capacity as a statutory officer (other than information which he would not hold but for his membership of a body other than a Department or organisation) shall, for the purposes of this Act, be deemed to be held by the Department or organisation of which he is an officer or employee or member.

Obviously information not held by an officer, employee or member in his or her capacity as such is not deemed to be official information held by the Department or organisation.[18]

Academic staff are required by their contracts with the university to engage in teaching and research. I submit that information gathered for the purposes of teaching or research would be held by the staff member in his or her capacity as a member of the academic staff,[19] and that, pursuant to section 2(4), this information would be deemed to be held by the university.[20] Section 2(4) is unaffected by the specific provision in paragraph (d). The latter provision deals with who holds official information in a university and the former with the capacity in which the information is held. This conclusion is in line with the experience in Australia and the United States where research by university staff is covered by freedom of information legislation.

17 Para (d)(iii) of the definition of "official information" in s2.

18 See also s9(2)(g)(i) (". . . in the course of their duty"). Renn Wortley, in an article "Behind the FoI Desk at Monash" (1986) Freedom of Information Review 30, tells of a decision by the Victorian AAT recognising that an employee of an agency may create and retain possession of documents for private purposes in the course of carrying out his or her duties. In such a case, documents created to deal with personal concerns are not documents of the agency, nor in its possession, and therefore not accessible under the Victorian FOIA. The case is *Horesh* v *The Ministry of Education,* Victorian AAT, Mr K R Howie, 6 March 1986, unreported.

19 This is a different issue to the vexed one of whether the academic staff member or the university owns copyright in teaching and research material created by the staff member in the course of his or her employment under a normal teaching contract. See Copyright Act 1962, s9(4) and generally Bloom, "The Teacher's Copyright in His Teaching Materials" (1972-73) 12 JSPTL 333; Youngdahl, "Copyright Law and the Employment Relation" (1959) 5 St Louis ULJ 510; M V Brown, "Ownership of copyright in a lecturer's works" (unpublished LLM thesis, Monash University 1978). See also Harris, "Ownership of Employment Creations" (1985) 23 Osgoode Hall LJ 275.

20 J L Caldwell, "The Official Information Act and the Universities" (paper prepared in February 1985 for the Canterbury branch of the Association of University Teachers of New Zealand (Inc) and published in *AUTNZ Bulletin* (1985, No 103)) at 3-4.

Professor K J Keith, a member of the Danks Committee, had earlier suggested to the contrary in a memorandum to the Standing Committee of the Council of Victoria University of Wellington in 1984:[21]

> What, however, of the vast amount of information gathered by individual staff members and generated by them relating to teaching and research? Is this to be seen as official information? It seems to me that there would be considerable difficulty with that in principle and in practice. The legislation is about the impact of the powers of public authorities on the community and on those who are immediately involved with it, in our case staff and students. I do not think, as a matter of first impression, that it applies easily to the regular scholarly work of individual academics. The matter is, I immediately agree, quite different when that work has an impact on others, particularly students.

With respect, there is simply no support in the Act for this view. Somewhat unusually section 4 sets out the purposes of the OIA.[22] It is here if anywhere that one would expect to find out what the Act "is about" but there is no reference to the impact of the powers of public authorities on the community. I would certainly concede that the purposes set out in section 4 are not the only ones served by freedom of information legislation,[23] but it does seem to me difficult to give any other purpose primacy and, even more so, to endeavour to use such a purpose as a means to restrict the reach of the Act.[24]

In 1985 John Caldwell of the University of Canterbury pointed out that the OIA was drafted without the universities in mind and he urged that, if they were to come within the Act, specific provision be made excluding from the definition of "official information" that which is held by a member of the academic staff solely for the purposes of his or her teaching or research.[25] That call was not heeded by the legislature.

Teaching and research material is unquestionably "information" for the purposes of the Act and (in my view) is held by academic staff in their "official" capacity. The consequence is that teaching and research materials must be made available on request unless an exemption applies. As we will see shortly, the exemptions do not provide as complete protection from

21 K J Keith, "Memorandum to Standing Committee of Council: Application of the Official Information Act to Universities" (11 June 1984) para 7. The passage quoted in the text appears also in *AUTNZ Bulletin* (1985, No 103) at 3.

22 See *Danks Report,* vol 1, 25, and generally Hammond, "Embedding Policy Statements in Statutes: A Comparative Perspective on the Genesis of a New Public Law Jurisprudence" (1982) 5 Hastings Int and Comp LR 323.

23 Dr G D S Taylor, sometime Legal Counsel to the Ombudsmen, has said "[t]he discipline of having to expose one's views to outsiders: (1) encourages accuracy and care, (2) encourages reason and not prejudice, (3) promotes acceptance by others of what is done, and (4) makes for better decisions": "Freedom of Information in Australia and New Zealand" (paper presented at LAA-NZLA Conference held at Brisbane in August 1984) at 3.

24 Moreover the test proposed by Professor Keith is hardly workable. How is "impact" to be measured? How direct must it be? If university teachers have an "impact" on their students through teaching does this make their teaching materials accessible under the OIA? What about the research on which the lecture notes or materials are based, and so on?

25 Caldwell, supra n 20.

disclosure as some teachers would expect or like. But here again any blame for this lies with the legislature in failing to make adequate provision for the special needs of the university. Any attempt now to put a strained interpretation on the word "official" so as to exclude teaching and research materials should be sternly resisted as it would have ramifications far beyond access to university teaching and research materials.[26]

(i) Teaching materials

The wide variety of teaching materials and techniques used in different parts of the university make generalisations as to the likely impact of the Act difficult. Nevertheless one surprising consequence of applying the Act to universities is that students and others, upon request and payment of a reasonable charge,[27] will now be entitled to access to (and, it seems, copies of[28]) lecture notes. There is no obvious exemption which could justify withholding this "official information". It seems farfetched to say the lecture was "publicly available" when given;[29] assembling lecture notes is unlikely in the normal course to involve "substantial collation";[30] disclosure will not give the requestor an improper advantage (over the other students) as all the other students can apply;[31] and while such requests will likely vex some university teachers it would be surely going too far to describe the

26 I can foresee an argument along these lines: that the meaning of the word "official" in the official information couplet should be read down in the light of the stated purposes in s4, especially (it might be added) as the draftsperson did not have universities in mind in 1982. There are difficulties and dangers in such an approach: (1) it would seem to cut across the use the Ombudsmen have made of s4 in *narrowly* construing the exemptions; (2) the stated purposes are quite narrow, and certainly are not all the purposes actually served by OIA; if access to teaching and research material do not further the purposes then what else besides might not be "official" information? (3) access to teaching and research materials does promote accountability of university teachers.

27 Section 15(2) provides that any change must be reasonable and regard may be had to the cost of labour and materials in making the information available.

28 Where, as here, the information requested is contained in a document that information should be made available in the way preferred by the requestor (either reasonable opportunity to inspect, provision of a copy or a summary of its contents) unless to do so would impair efficient administration. It is unlikely that a requestor's preference for a photocopy could be justifiably declined (for which reasons would have to be given: s16(3)) in favour of inspection or a summary.

29 See s18(d) (a request may be refused if "the information requested is or will soon be publicly available"). The difficulty the law of copyright has had in dealing with the delivery of lectures and the concept of "publication" should be a warning. See generally *Copinger and Skone James on Copyright* (12th ed 1980) at 51-101.

30 See s18(f) (a request may be refused if "the information requested cannot be made available without substantial collation or research").

31 Section 9(2)(k). The Ombudsman so held in a case involving access to recycled examination questions; once the information is released to one person it is accessible on request to all other persons and so the requestor would gain no "advantage": *7th Compendium,* Case No 219, 159 at 161. Cf *Re ASCIC and Australian Federal Police* (1986) Aust Administrative Law Bulletin §419 (AAT), upheld in *ASCIC* v *Australian Federal Police* (1986) Aust Administrative Law Digest §554 (Fed Ct).

request as "vexatious"[32] or as subjecting lecturers to "improper pressure or harassment".[33]

In this regard some may remember that the University of Auckland considered tape-recording all lectures in 1985 but abandoned the idea in view of the extreme cost, complex copyright considerations and the essentially face-to-face nature of lectures.[34] As noted already, the copyright issue is a real and difficult one[35] but copyright cannot override the OIA.[36] It should be pointed out that nothing in the OIA authorises subsequent copying or publication by the requestor or third parties and the copyright owner (be it the staff member or the university or both) can restrain subsequent publication of lecture notes.[37]

The conclusion that lecture notes are "official information", and thus obtainable upon request and on payment of a reasonable fee, may not have been intended by the legislature. That is not to say that access is necessarily undesirable. It would promote accountability in teaching; in keeping with section 4(a)(ii). It could ultimately lead to sale of photocopied lecture notes to the students, which would liberate the university teacher from the bind "of getting through the material" and provide a spur to the adoption of more innovative and effective teaching techniques. It remains to be seen whether requests will be made for copies of lecture notes and, in that event, what will be the response of university teachers, the universities, the Ombudsmen and the legislature.

(ii) Research materials

Experience overseas, particularly in the United States of America and Australia, suggests that freedom of information legislation may have adverse effects on scientific research activity.[38] Of particular concern has been the disclosure of research proposals submitted to governmental granting agencies. It is said release of this information would permit other scien-

32 See s18(h) (a request may be refused if "the request is frivolous or vexatious or that the information requested is trivial"). The dictionary definition of "vexatious" is very wide, but the mischief the Danks Committee had in mind was "unbalanced, mischievous or malicious" individuals inundating departments with "time wasting requests": *Danks Report,* vol 2, 31 and 81. The question the Ombudsman may well ask is: is it reasonable to feel vexed by such a request?

33 Section 9(2)(g)(ii). Academics should be made of sterner stuff. See the quote in the text at n 115.

34 "Senate News: Taping of Lectures" (1985) University of Auckland News, vol 15, No 5.

35 See supra n 19.

36 See *5th Compendium,* Case No 30, 92 at 95-96 (G R Laking).

37 Section 48(1)(a) (as amended). This provision renders immune from suit the requestor's possession and knowledge of information justifiably disclosed under the OIA but any detectable further use or publication of that information by the requestor or a third party is actionable. See *Danks Report,* vol 2, 92. This was certainly true of the original, unamended s48(1)(a) and, in my view, this interpretation holds true of the amended provision.

38 See generally Stallones, "The Effect of the Freedom of Information Act on Research" (1982) 72 Am J Public Health 335; Morris, Sales and Berman, "Research and the Freedom of Information Act" (1981) 36 American Psychologist 819; Nelkin, "Intellectual Property: The Control of Scientific Information" (1982) 216 Science 704. See in the New Zealand context Gregory, "Access to scientific 'official information' " (1983) 40 NZ Science Review 67.

tists or business organisations to "steal a march" on the applicant by using the ideas or methodology outlined in the proposal.[39]

The leading American case on this point is *Washington Research Project* v *Department of Health, Education and Welfare.*[40] There a public interest group advocating the rights of human subjects of scientific experimentation sought disclosure of eleven specifically identified research projects that had been approved and funded by a branch of the respondent Department. (The eleven projects all involved research into the comparative effects of psychotrophic drugs on the behaviour of children with certain learning disabilities.) Amongst the information sought was the initial grant applications which included the research protocols and designs. The respondent resisted disclosure claiming the information was within the fourth exemption of the American Freedom of Information Act[41] (which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential"). The argument for the respondent was that the research designs were submitted with the expectation of confidentiality and were analogous to trade secrets or commercial information, premature disclosure of which would facilitate their misappropriation by others.[42] The District of Columbia Court of Appeals rejected the analogy. After noting that the reach of exemption four is "not necessarily coextensive with the existence of competition in any form", Judge McGowan went on to say this:[43]

> It is clear enough that a non-commercial scientist's research design is not literally a trade secret or item of commercial information, for it defies common sense to pretend that the scientist is engaged in trade or commerce. This is not to say that the scientist may not have a preference for or an interest in non-disclosure of his research design, but only that it is not a trade or commercial interest.

This decision prompted some scientists to exhort the scientific community not to request copies of grant applications,[44] and others to suggest that the names of those scientists requesting such information be widely publicised.[45] Professor K C Davis, while accepting that the court correctly interpreted the statute, thought it an "unsatisfactory result" and mooted an amendment to extend the exemption to non-commercial and non-

39 See Adler, "The Impact of FOIA on Scientific Research Grantees" (1981) 17 Columbia J Law & Social Problems 1.

40 504 F 2d 238 (1974) (US Court of Appeals, DC Cir); cert denied, 421 US 963 (1975).

41 5 USC §552(b)(4) (1976) (hereafter FOIA).

42 Supra n 40 at 244. The Court of Appeals observed that the Government had argued at some pains that biomedical researchers "are really a mean-spirited lot who pursue self-interest as ruthlessly as the Barbary pirates did in their own chosen field". Adler points out that the academic scientist competes both for research funds and for peer recognition and advancements: supra n 39 at 9-14.

43 Ibid at 244-5.

44 See eg Korn, Correspondence (1975) 190 Science 736.

45 Moore, and Ladda and Rapp, Correspondence (1976) 191 Science 136-7. Although another correspondent opined that this would violate the federal Privacy Act of 1974 (PL 93-579): Kuch (1976) 191 Science 1000. Still another suggested that granting agencies require applicants to submit a list of grant applications they have requested under the FOIA during the previous two years: (1980) 210 Science 590.

financial information.[46] The Department of Health, Education and Welfare in the late 70s explored the possibility of a statutory amendment to protect data from clinical trials and epidemiological tests which were preliminary, incomplete and not yet validated.[47] There is a similar call from the tertiary institutions in Victoria to extend the exemptions in that State's FOIA to cover research proposals which contain details of scientific or technical research projects.[48]

The possibility of academic "theft" of research proposals by request under freedom of information legislation is only one side of the coin. The other side is the public interest in knowing how public money is spent on research, ie "in the disbursement of public funds as an expression of policy as to both the goals of the research and its method".[49] University scientists and other researchers sometimes carry out lawful experiments with human and animal subjects in controversial research areas. The desire to monitor that research and the priority accorded it by granting agencies is understandable. It will be recalled that the applicant in the *Washington Research* case[50] was a public interest group advocating the rights of human subjects of scientific experimentation. There are indications that animal rights groups in Australia have been active users of the FOIA in the university research field. This, in turn, raises the possibility of harassment of researchers and threats to the physical integrity of the projects. Clearly a balance must be struck between the competing interests.

How accessible will research proposals be under the OIA?[51] Scientific, medical and social science research in New Zealand is funded from various sources, including the government, universities and private organisations.[52] Many of the more important funding agencies are subject to the Act.[53] But even where this is not the case, as with private organisations, the university staff member as grant applicant or successful grantee will in-

46 K C Davis, *Administrative Law Treatise* (2nd ed 1978) vol 1 para 5.32 at 440-1.

47 See Stallones, supra n 38 at 336.

48 Monash University has been at the forefront of this move, which is supported by the majority of post secondary education institutions in Victoria. The present provisions in the Victorian FOIA, specifically s34(4), are criticised as covering only premature disclosure of results of research and, it is said, do not cover proposals for research proposals. See letter date stamped 25 November 1985 from the Hon Ian Cathie, Minister for Education, to the Hon J Keenan, Attorney-General. See also Submission by the University of Melbourne to the Victorian Attorney-General dated October 1985 entitled "Review of the Freedom of Information Act 1982". There has been no such move at the Federal level as s43(1)(c) of the Australian FOIA seems to adequately cover the university researcher in these circumstances.

49 Adler, supra n 39 at 30.

50 Supra n 40.

51 For pre-OIA treatments of the general issue of freedom of scientific information in New Zealand, see Keith, "Constraints on Freedom of Dissemination of Scientific Knowledge" [1976] NZLJ 512; Clifford, "The Scientist and freedom of information" (1977-8) 9 VUWLR 451; "The Scientist and Freedom of Information" in M Harpham (ed), *Freedom of Information and Open Government* (1978) at 70-78.

52 See *New Zealand Official Yearbook 1986-87* (1987) at 392 and 401.

53 The OIA covers eg the University Grants Committee, Medical Council of New Zealand, National Research Advisory Council, New Zealand Planning Council and New Zealand Council for Educational Research.

variably "hold" a copy of the research proposal and this may be the subject of a request under the Act.[54]

The exemptions relevant to a request for grant applications are contained in section 9.[55] Research proposals relating to basic or strategic (as opposed to applied) scientific research[56] are unlikely to attract the "trade secrets" protection in section 9(2)(b)(i).[57] Nor is disclosure of research proposals in those fields of scientific research likely to prejudice the "commercial position" of the university researcher.[58] Section 9(2)(ba) comes closest to protecting basic research proposals submitted in confidence but it must be demonstrated that disclosure "(i) would be likely to prejudice the supply

54 At the federal level in the United States the FOIA does not apply to universities. Nevertheless much scientific research in American universities is funded by governmental agencies and an issue has arisen whether, by the mere fact that the research was funded by a governmental agency, the research data of private researchers (often university staff) is an "agency record" for the purposes of the FOIA notwithstanding that the agency does not possess, and never has possessed, the data? So far the American courts have answered in the negative. See *Forsham* v *Harris,* 100 S Ct 978 (1980) (US SC) and generally O'Connell, "A Control Test for Determining 'Agency Record' Status Under the Freedom of Information Act" (1985) 85 Col LR 611. In New Zealand this result would appear to follow where the private researchers were not themselves subject to the OIA (which *excludes* university staff) nor "independent contractors" so as to be caught by 2(5).

55 Relatedly, s9(2)(a), which protects the privacy of persons, might justify withholding the names of unsuccessful applicants for grants but the successful grantees cannot expect anonymity. Public disclosure of the names of grantees and the amount of the grant seems to be the normal practice of funding agencies subject to the Act. If disclosure of this information could be shown to be likely to endanger the safety of the grantee then s6(d) would provide good reason to withhold it. Short of danger to safety, s9(2)(g)(ii) protects employers from "improper pressure or harassment" where it is necessary to maintain the effective conduct of "public affairs".

56 The Report of the Ministerial Working Party on Science and Technology defines these terms as follows: 'basic' research is experimental or theoretical work undertaken primarily to acquire new knowledge without any particular application or use in view; 'strategic' research is carried out in a particular field or in relation to a particular problem which is considered to be of particular relevance to a potential future practical need; 'applied' research is directed towards a specific practical aim or objective; 'technological' research is relevant to a particular field of practical endeavour: *Key to Prosperity: Science and Technology* (November 1986) at 2-3 (Beattie Report).

57 It is suggested that the New Zealand courts are likely in this context to adopt a narrow definition of "trade secret", restricted to secrets relating directly to the productive processes. See Longworth, "Trade Secrets" in *'Official Information' Bulletin* (1987 no 4) at 4. For a good discussion of the two competing definitions of "trade secrets in American FOIA law – one narrow and the other wide – see Connelly, "Freedom of Information and Commercial Confidentiality" in J D McCamus (ed), *Freedom of Information: Canadian Perspectives* (1981) 97 at 106-108 (arguing for a narrow definition of trade secret in exemption 4 of the FOIA). This line was taken by the District of Columbia Court of Appeals in *Public Citizen Health Research Group* v *Food and Drug Administration* 704 F 2d 1280 (1983).

58 Notwithstanding the difference in wording between exemption 4 of the FOIA ("commercial information") and s9(2)(b)(ii) of our Act ("commercial position") it is suggested that the reasoning in *Washington Research Project Inc* v *Department of Health, Education and Welfare,* supra n 40, would apply in New Zealand in the non-commercial research context. The word in s9(2)(b)(ii) is "commercial" not "competitive" and it is difficult to resist the force of McGowan J's comment (in so far as it applies to basic research) that "it defies commonsense to pretend that the scientist is engaged in commerce": ibid at 244. Even the broader approach in *American Airlines Inc* v *National Mediation Board* 588 F 2d 863 at 870 (1978) (US Court of Appeals, 2nd Cir) ("Commercial surely means pertaining or relating to or dealing with commerce") would not affect the result.

of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or (ii) would be likely otherwise to damage the public interest". The suggestion has been made from time to time that disclosure of research proposals might result in applicants including less information in their proposals thereby making evaluation by the granting agency more difficult.[59] The contrary, rather cynical, view has been put that "scientists will continue to be as explicit in their grant proposals as they deem necessary in their self-interest".[60] One thing is certain; the Ombudsman will require evidence to substantiate claims of prejudice in the supply of proposals.[61] Even if section 9(2)(ba) is made out in a particular case, that "good reason" to withhold the information can be overriden if other considerations render disclosure desirable in the wider public interest.[62] As mentioned earlier, in some cases this will involve balancing the cross-cutting interests of the scientist and the public.[63] Finally, in cases where access to the proposal will give the requestor an "improper advantage" over the applicant scientist, section 9(2)(k) can be invoked.[64]

To sum up it is not clear that requests for research proposals relating to basic scientific research will be safe from disclosure under the Act. In marked contrast there appears to be ample protection for applied and technological research proposals.[65]

Of perhaps even more serious concern is use of the Act by the media[66] and others to secure scientific and social science research data in the course of on-going research projects. One American writer observed that release of work in progress is potentially the most damaging of the various effects of the FOIA on research activity, and called for an amendment to exempt research in progress from disclosure.[67] There is specific provision in the Victorian Act protecting "incomplete" results of scientific or technical research where disclosure is reasonably likely to expose the researcher,

59 See eg Korn, Correspondence (1975) 190 Science 736.

60 Batra, Correspondence (1976) 191 Science 137.

61 See infra n 85.

62 The exemptions in s9(2) are all subject to the public interest override in s9(1).

63 See Morris, Sales and Berman, supra n 38 at 822.

64 It should be noted, however, that the Ombudsmen have yet to uphold a decision to withhold on this ground. There is no such provision in the American FOIA. Under that Act decisions as to disclosure are made without regard to the requestor's purpose or the relevancy of the documents for a particular use: see eg *US* v *US District Court, LA California* 717 F 2d 478 at 480 (1983) (US Court of Appeals, 9th Cir). Several other provisions in our Act make need, motive or purpose relevant. See ss18(h) and 27(1)(h) ("the request is frivolous or vexatious or that the information requested is trivial"); s28(1)(c) (implicitly recognises the power to impose conditions on the use, communication or publication of information made available under the Act) and Ombudsmen Act 1975, s17(2)(a) (Ombudsman can refuse to investigate complaints under ss28 and 35 OIA if, in his or her opinion, the complaint is frivolous or vexatious or is not made in good faith).

65 See s9(2)(ba)(i) and (ii), (i), (j) and (k).

66 In the United States the print media appears to be active in seeking out under the FOIA research data from long-term research projects. See the instances given by Montgomery, "Abuses of Freedom of Information Act" (1979) 242 J Am Medical Association 1007.

67 Stallones, supra n 38 at 336-7.

agency or commercial undertaking unreasonably to disadvantage.[68] There is no similar provision in our Act. Indeed, in relation to basic scientific and other research without immediate commercial application there is no obvious protection against disclosure in section 9 and only the prospect of short-term protection under section 18.

Before examining these exemptions, it is important to bear in mind the concerns over premature disclosure of research data and results.[69] The potential for error in the results is higher as the research is incomplete and not verified, and the researcher has not had the benefit of constructive peer review.[70] Premature release under the OIA of incomplete and possibly misleading research could well damage the researcher's standing and career prospects in the academic and scientific communities. Such disclosure might also place the research project under threat; for example, by withdrawal of funding. Furthermore, in social science research widespread publicity given to incomplete data and preliminary results disclosed under a freedom of information regime might "poison the subject pool" by acquainting future respondents with how previous ones have responded.[71] In the particular context of medical research premature disclosure might mislead the public and raise false hopes of a cure (as occurred recently with AIDS) or unnecessary alarm.[72] Allied to all this is the prevalent notion that a researcher has a "right" of first publication of his or her research and, in so far as disclosure under the OIA might undercut this expectation, it could be seen as impinging on academic freedom in a broad sense.[73]

In the non-commercial research area very few exemptions in the OIA protect against premature disclosure of research data and results and none gives complete protection in all circumstances. The refuge of the academic researcher faced with a request for non-commercial research in progress will be section 18(d): that the information requested "will soon be publicly available". As long as "soon" is accepted by the Ombudsmen (one of whom has twenty-five years of university teaching and administrative experience to draw on) as having a longer connotation in the context of university research in progress than would normally be the case, then much work in progress will be protected long enough to allow the researchers to complete, validate and publish the data and results. However, it is likely that data or interim results from on-going research projected to take several years to complete would not be protected by section 18(d). In some instances a request for research in progress might involve substantial collation or further research and then section 18(f) provides good reason to withhold

68 Victorian FOIA 1982, s34(4)(b)(ii) and (iii).

69 See generally Note, "Forced Disclosure of Academic Research" (1984) 37 Vanderbilt LR 585 at 601-2.

70 Peer review, while common in the United States and utilised by the Medical Research Council in New Zealand, is "not well established for most programmes of non-medical basic and strategic research": Beattie Report, supra n 56 at 60.

71 Morris, Sales and Berman, supra n 38 at 820.

72 This might be caught under s9(2)(c).

73 See T Emerson, *The System of Freedom of Expression* (1970) at 594 (academic freedom means "the right of the individual faculty member to teach, carry on research and publish without interference") and also Hoornstra and Liethen, "Academic Freedom and Civil Discovery" (1983) 10 J College and University Law 113 at 124.

the information. (Unlike the exemptions in section 9(2), those in section 18(c) to (h) are not subject to public interest override and, once made out, there is no duty under the Act to disclose the information.) It is unsatisfactory to say the least that researchers have to grasp at these straws in section 18 in order to protect vital and legitimate interests. Specific provision could and should have been made,[74] as was done in Victoria.

It is important, however, to keep the matter in perspective. The Department of Scientific and Industrial Research (DSIR) and the Ministry of Agriculture and Fisheries, which between them employ over 4,000 scientific staff and expend 70% of the Government Science Grant,[75] have not experienced any problems with the OIA in relation to their research activities since coming under the Act in 1982.[76] It is hoped this will be true of universities.

Another issue raised by subjecting university researchers and granting agencies to the OIA regime concerns the confidentiality of personal information gathered in medical and social science research involving human subjects.[77] The privacy of the subjects will be assured, in most cases, by section 9(2)(a) and the names and other personal identifiers removed from any data disclosed under the Act.[78] There always remains the possibility, no matter how remote, that the privacy interest of human subjects of research may be outweighed in a particular case by other considerations which render disclosure desirable in the public interest.[79] But the privacy issue is not the only one. It is possible to envisage cases where, even though the privacy of the subjects is fully protected by deletions, disclosure would be likely to prejudice future supply of similar information or damage the public interest. This might bring section 9(ba) into play (again subject to section 9(1) override). The point is that it is no longer possible for medical or social science researchers to promise their subjects absolute confiden-

74 See Caldwell, supra n 20.

75 The percentage comes from the *New Zealand Official Yearbook 1986-87* (1987) at 392 and the staff figure comes from the Beattie Report, supra n 56 at 30 (and includes scientists, technicians and support staff). The *Yearbook* staff figure is much lower (approximately 2,300): ibid 394.

76 Letters to the writer from the DSIR dated 31 March 1987 and from the Ministry of Agriculture dated 17 March 1987.

77 This is not a new problem. A party to litigation can subpoena an academic researcher (who is a stranger to the dispute) to produce research in court where it is relevant to the law suit. In New Zealand the court has a discretionary power to set aside a subpoena but there is little authority on how the discretion is to be exercised. The best treatment in Anglo-Australasian law is Wood, "Challenging *subpoenas duces tecum:* is there a third party view?" (1984-85) 10 Sydney LR 379 but one has to turn to American law for consideration of the issues raised by the power of the court to subpoena academic research. See generally Note, supra n 69, and Bond, "Confidentiality and the Protection of Human Subjects in Social Science Research: A Report on Recent Developments" (1978) 13 Am Sociologist 144. While several of the American cases involve attempts to subpoena research to show or disprove a link between certain drugs and injury in tort actions (an issue which cannot arise here due to the Accident Compensation Act 1972) it requires little imagination to think of situations involving substantial property damage where (say) engineering research might be useful.

78 See s17. Note s6(d) will apply where disclosure would be likely to endanger the safety of any person (there is no public interest balancing in s6). See Morris, Sales and Berman, supra n 38 at 819.

79 Section 9(1).

tiality.[80] It is always possible that the public interest override in section 9(1) might trump the exemptions in section 9(2) and require disclosure in a particular case.

Deliberative Processes of the University

All freedom of information regimes protect to a greater or lesser extent the deliberative processes of decision-making. The Australian FOIA, for example, exempts "internal working documents" if they "would disclose matter in the nature of, or relating to, opinion advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or . . . the Government".[81] Our Act provides for such matters in section 9(2)(f) and (g). The former provides for the maintenance of certain constitutional conventions as to confidentiality of advice and ministerial responsibility which underpin our Westminster model of government, and clearly cannot apply to universities. The burden of protecting the deliberative processes of the university will fall primarily on section 9(2)(g):[82]

> (2) . . . this section applies if, and only if, the withholding of the information is necessary to — . . .
> (g) Maintain the effective conduct of public affairs through —
> (i) The free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any Department or organisation in the course of their duty; or
> (ii) The protection of such Ministers, members of organisations, officers and employees from improper pressure or harassment . . . .

Section 9(2)(g) was one of the most utilised exemptions in the early days of the Act's operation and consequently the Ombudsmen have considered it on several occasions.

By its terms section 9(2) applies if, and only if, the withholding of the information "is necessary to" achieve any of purposes specified in paragraphs (a) to (k). From the beginning the Ombudsmen have interpreted this test very strictly. In an early case, after noting that the dictionary definitions of "necessary" had in common the concept of inevitability (ie unavoidability) and that sections 4 and 5 required the exemptions to be construed narrowly, the then Chief Ombudsman, Mr (now Sir) George Laking, said this:[83]

> For "necessity" to be established, the unavoidable consequence of disclosure would have to be failure to achieve one of [the purposes in section 9(2)] . . . . Proof that a consequence would follow disclosure must approach that of beyond reasonable doubt if it is to be regarded as unavoidable.

80 See also Morris, Sales and Berman, supra n 38 at 824.
81 Section 36(1)(a).
82 Of course, other exemptions in s9(2) might apply. Section 9(2)(ba) will be particularly useful on occasions.
83 *5th Compendium,* Case No 52, 110 at 111.

This may go too far today,[84] but the Ombudsmen are surely right in requiring decisions to withhold to be supported by evidence and not general or vague assertions of harm unsupported by evidence.[85]

Resorting to the dictionary once again, the same Chief Ombudsman gave this interpretation of section 9(2)(g):[86]

> "Maintain" is defined in the Shorter Oxford dictionary as "to keep in being" or "to preserve unimpaired" and "effective" means "efficient". Section 9(2)(g) therefore requires that release of the information would have either or both the effects referred to in subparagraph (g) and having established that the Department must demonstrate that release would unavoidably impair the efficient conduct of public affairs".

So, for the time being, that is the standard the university must meet to justify withholding official information under section 9(2)(g). It has proved difficult to satisfy in practice. It bears remembering here that the university does not have the benefit of section 9(2)(f) which, in the case of Departments and some other organisations, protects the confidentiality of "advice".

The meaning of the phrase "public affairs" in subparagraph (i) of section 9(2)(g) does not appear to have been considered in any of the published case notes of the Ombudsmen. Are the various organs of the university involved in the conduct of public affairs? It seems to me that they are. All the organisations subject to the OIA were established for a public purpose or perform public functions and are funded, either completely or in large part, by public monies.[87] In my view, any organisation subject to the Act is, by the fact of its inclusion, conducting public affairs.

It is important to notice the wide reach of section 9(2)(g)(i). It authorises withholding where it is necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions (i) *by* members, employees or officers in the course of their duty, or (ii) *between* members, employees or officers in the course of their duty, or (iii) *to* members, employees or officers in the course of their duty. Note also that subparagraph (i) covers expression of "opinions" only and does not extend to factual material.[88] Although, of course, it may be difficult in some cases

84 The quoted passage continues: "That strict proof is required follows from the hierarchy in the protection provisions in Part I of the Act: 'can reasonably be expected' (s8); 'is likely to' (ss6, 7); and 'is necessary to' (s9)." Section 8 has since been repealed: OIAmA 1987, s4. Furthermore, the phrase "is likely to" now has been judicially interpreted very widely to mean "a distinct, or significant, possibility that the result might occur": *Commissioner of Police* v *Ombudsman* [1985] 1 NZLR 578 at 589, per Jeffries J (appeal pending). Generally speaking, the approach of Jeffries J in the High Court in interpreting s6(c) (and it remains to be seen whether the result and the reasoning will find favour on appeal) at least casts some doubt on the strict approach of the Ombudsman in two respects; (1) the invocation of almost the criminal *standard* of proof (Jeffries J held the Ombudsman also to have erred in law in casting the *burden* of proof on the decision-maker); (2) the very strict test adopted by the Ombudsmen in respect of s9(2) (in contrast to the comparatively lax test adopted for s6).

85 See eg *5th Compendium,* Case Nos 13 and 69, 34 at 37 (G R Laking).

86 Ibid at 39. See also *5th Compendium,* Case No 42, 52 at 62 (G R Laking).

87 See the considerations the Danks Committee took into account in determining whether an organisation should be subject to the OIA: *Danks Report,* vol 2, 104-5.

88 *7th Compendium,* Case No 585, 240 at 241 (L J Castle).

to separate fact and opinion. Nor is it sufficient to show that the opinions expressed were free and frank.[89] For the purpose of the subparagraph it must be shown that withholding is necessary to maintain the effective conduct of public affairs through the free and frank expression of opinions by, between or to members, officers or employees. The Ombudsmen have made it clear in two cases that section 9(2)(g)(i) "is intended to protect those especially frank opinions which only the assurance of complete confidentiality induces".[90]

The second subparagraph of section 9(2)(g) is invoked less often and, if the success rate in the published case notes of the Ombudsmen is anything to go by, so far without success. In order to establish that good reason to withhold exists under section 9(2)(g)(ii), the then Chief Ombudsman said in one early case, "one must demonstrate from what quarter one would expect pressure to be applied on those officers that they would unavoidably succumb to that pressure and that such pressure would be improper".[91] One advantage of subparagraph (ii) over (i) is that, once made out, it can protect fact and advice as well as opinion.[92]

Access to "Personal Information"

It can be expected that the primary users of the Act in the university context will be students, academic staff and other employees seeking access to information held about them by the university. The Act reflects the widely held view that a person has the strongest claim to information held about him or herself and section 24 confers a legal right of access to "personal information".[93]

"Personal information" is defined in section 2 as meaning "any official information held about an identifiable person". Personal information therefore is a subset of official information and like all information covered by the Act must come within the partial definition of "official information" in section 2. That means here it must be information held by the Council, Senate, a member of academic staff, any officer or employee, or any examiner, assessor or moderator.[94] In addition, to be "personal information" it must be about an identifiable person.

Section 24(1) provides in relevant part:

> . . . every person has a right to and shall, on request, be given . . . access to any personal information which –

89 *7th Compendium,* Case No 730, 250 at 256-7 (L J Castle).
90 *6th Compendium,* Case No 23, 75 at 80 (G R Laking). See also Case No 730, ibid at 257.
91 *5th Compendium,* Case Nos 13 and 69, 34 at 40 (G R Laking).
92 See *7th Compendium,* Case No 585, 240 (L J Castle).
93 Parts III and IV of the Act confer legal rights of access to certain types of "official information" (ss21-23) and to "personal information" (s24). The words "right of access" are not to be found in Part II which concerns official information in general (ie information not "about" the requestor). The omission was deliberate and can be traced to the Danks Committee's adversion to the creation of a legal right of access to "official" information. See further Taggart, "Freedom of Information in New Zealand" in N S Marsh (ed), *Public Access to Government-Held Information* (1987) at 224-6.
94 Paragraph (d) of the definition of "official information" in s2.

(a) Is about that person; and
(b) Is held in such a way that it can readily be retrieved.

The requirement that the requested personal information be "held in such a way that it can readily be retrieved" is a precondition to access under section 24. The extent of the duty appears to be to gather such information held about the requestor as can be found without difficulty. As a request for personal information may be a "blanket" one, there being no obligation on the requestor to particularise the information sought,[95] it is understandable that administrators should not have to scour files on the "off-chance" of finding something about the requestor.[96] Nonetheless, the "readily retrieved" standard is a lax one and administrators' assessments of ready retrieval are not easily supervised. Indeed, review for lax record keeping seems to fall outside the jurisdiction of the Ombudsman under the OIA.[97] More generally, the "fragmented nature"[98] of university administration may necessitate several requests for personal information to various parts of the university as it is unlikely that all important personal information about a requestor will be held in one place or be readily retrievable at one point.

There are several advantages a requestor of personal information enjoys that the seeker of official information in Part II of the Act does not: (1) there are fewer and, in some important respects, narrower exemptions in section 27 than in Part II;[99] (2) as already noted, there is no obligation on the requestor of personal information to specify the information requested with due particularly; and (3) access to personal information held about an individual is free of charge.[100]

That it is more difficult under the OIA to withhold "personal" information than it is "official" information can be illustrated by the facts of

95 Whereas under Part II of the Act the official information requested must be specified with "due particularity" in the request: s12(2).

96 See *Danks Report,* vol 2, 78 ("It is not intended that, for instance, the provisions should apply to incidental references to an individual contained in a general file").

97 A failure to find personal information which should have been readily retrievable in a competently kept record system does not come within s35 of the OIA. Such administrative failure might be investigated under the Ombudsmen Act 1975 but the universities are not yet subject to that Act. See Ombudsmen Act 1975, s13(1) (". . . act done or omitted . . . relating to a matter of administration . . .").

98 Memorandum, "Freedom of Information Act – Report on Activities", 25 August 1986, Monash University, at 2 ("When access to 'all documents relating to me' is requested by a student, some records are invariably overlooked by the university").

99 Section 27(1)(a) incorporates the exemptions in ss6(a) to (d) and s9(2)(b) but no other exemptions from s9.

100 Section 24(1). There are other important differences between the official and personal information regimes, all of which flow from the conferral of a legal right of access to personal information. The Ombudsman has only a recommendatory role in respect of personal information complaints (see s35), whereas in relation to official information under Part II the Ombudsmen's recommendations become legally binding after a certain period of time in the absence of a veto. The disgruntled requestor of personal information need not go to the Ombudsmen at all and can go direct to court for curial determination of his or her legal right. Under the official information regime in Part II the disgruntled requestor must seek investigation by the Ombudsman before going to court: s34.

an Australian case, *Re Burns and Australian National University (No 2).*[101] Burns had been a Professor of Political Science in the Research School of Social Sciences at the Australian National University until his appointment was terminated in 1981. He sought access to certain documents under the Australian FOIA but the following material was withheld: (1) those parts of the tape recordings of five meetings of the University Council where discussion of the applicant took place, and (ii) those parts (which referred to Burns) of a strictly confidential report submitted to the Vice-Chancellor by a committee of experts from outside the university that had undertaken a review of the Research School of Social Sciences. The claims to exemption under sections 36 and 45 of the Australian Act were upheld by the Administrative Appeals Tribunal.

Under the OIA the request by Burns would be for "personal" information and the narrower exemptions in section 27(1) would apply. On these facts section 27(1)(c) is the only exemption which could apply. In order to protect the tapes the university would have to show that all the information there is "evaluative material" within the meaning of section 27(2) *and* that express or implied promises were made to each of the persons participating in the discussion at the Council meetings that the "information" supplied by them would be held in confidence. It is impossible to give a definite opinion without knowing more but prima facie neither would appear to be satisfied. Certainly the confidential faculty review report appears not to be protected as it was likely not compiled "solely" for the purpose of determining the suitability of Burns for continuance in, or dismissal from, employment as required by section 27(2).

Compare this with the result where a disinterested person applied for this material as "official" information. First of all, section 9(2)(a) would protect Burns' privacy (subject to section 9(1) override). But more generally as to access to these types of information the answer is very different under section 9. The faculty review report would probably be protected by section 9(2)(ba) and the deliberations of Council could well come within section 9(2)(g)(i). Unless there was some strong public interest in disclosure, the information would likely be protected from disclosure. That was the result in the actual case under the Australian FOIA.

Examination Scripts

At times Ombudsmen have taken an expansive view of the meaning of "personal information". In an important investigation into the refusal of the Education Department to release requested School Certificate examination scripts to candidates, the then Chief Ombudsman formed the opinion that the scripts were personal information, saying[102]

> Most of the information to be found in a marked script was supplied by the requestor . . . . Both the script and the marks and comments were information about the examinee in the context of the OIA . . . .

101 (1983-5) 7 ALD 425 (AAT). The earlier proceedings are reported at (1982-4) 6 ALD 193 (AAT).

102 *6th Compendium,* Case No 216, 82 at 86.

While the grade given is certainly information *about* the candidate (as would be the examiner's comments, if any were made and not otherwise exempt) and hence accessible as personal information without charge to the student, I have my doubts that the script itself can properly be said to be information "held about" the student-requestor. It is the product of the candidate's intellect and endeavour but is not information about that person unless one takes the extreme view that one's actions always tell others something about one's self. The synonyms for "about" – concerning, touching, with respect to, in connection with, as regards to, in reference or regard to – support the view that the information must be *about* the person and not *of* the person. If this is correct then examination scripts should be treated as official information and not personal information. The practical importance of this as far as universities are concerned is that a reasonable charge can be made for making examination scripts available to requesting students;[103] whereas, on the Ombudsman's view, the scripts must be made available free of charge. The amount of money involved here could be considerable over time.

Referees and Examiners

References are clearly "personal information" when requested by the subject of the reference[104] but section 27(1)(c) plainly protects from disclosure the identity of the referee and the confidential reference given in relation to university job applications and promotions. It is not so clear that the reports and identities of examiners of theses submitted for higher degrees would come within section 27(1)(c). In order to gain the protection of that provision it must be shown that the report was given in response to an express or implied promise made to the examiner which was to the effect that the report and/or the identity of the examiner would be held in confidence; this may be easier to show for external examiners than internal ones.

A considerable body of jurisprudence surrounds the promise of confidentiality limb of section 27(1)(c). The promise can be express or implied but where implied this must be the understanding of both parties, here the university and the external examiner or the staff member acting as internal examiner.[105] Moreover, the Ombudsman in one case doubted that a longstanding practice of not making certain information available "could, by itself, be sufficient to constitute an implied promise".[106] Nor is it appropriate, said the Ombudsman in another investigation, to think in terms of an implied promise of confidentiality having been made to a staff member who is performing a necessary administrative function (in that case, filling in a routine report on an application for a transfer).[107] There is also Australian authority to the effect that where employees are bound to perform a task (in that case the completion of staff assessment forms)

103 Section 15(2).
104 When requested by others, s9(2)(ba) would likely apply.
105 *7th Compendium,* Case No 468, 209 at 212.
106 *6th Compendium,* Case No 216 et al, 82.
107 Supra n 105.

to the best of their ability this cannot be the subject of confidence.[108] While none of this is directly applicable to the present situation it does suggest caution in too readily assuming that an implied promise of confidentiality has been made to, and acted on by, internal examiners.

Nor is it sufficient for exemption that confidentiality and/or anonymity is promised to an examiner, the information supplied by the examiner must satisfy also the strict definition of "evaluative material" in section 27(2). Examiners' reports will only be exempt if the grade for a higher degree thesis can be seen as coming within the phrase in section 27(2)(a)(iv): "the awarding of contracts, awards, scholarships, honours or other benefits". In my opinion a grade for a higher degree thesis would clearly be an "award" within the meaning of subparagraph (iv). And this view would appear to be in line with an interpretation given by a former Chief Ombudsman.[109] Not that this conclusion brings me any joy, I hasten to add, for I believe that examiners' reports *should* be made available to the student;[110] but the suggested interpretation seems to me the only one true to the statutory context.[111]

108 *Re Low and Department of Defense* (1983-84) 6 ALDN 281 (AAT).

109 In a case involving access to School Certificate scripts the Ombudsman said something more difficult to achieve or of a rarer quality than School Certificate was contemplated by s27(1)(c): *6th Compendium,* Case No 216, 87 (G R Laking). If, as would seem to be the case, a higher university degree is more difficult to achieve than School Certificate, then on the Chief Ombudsman's reasoning s27(2)(a)(iv) might be satisfied.

110 In *Re Healy and Australian National University,* unreported AAT decision dated 23 May 1985 and noted in *FOL Memorandum No D65* (Attorney-General's Department, Canberra, November 1985), the applicant sought amongst other documents the reports by external examiners on his doctoral thesis. The AAT found the exemptions in ss36 and 40(1)(d) of the Australian FOIA to be made out but held they were outweighed by the public interest in disclosure. The Tribunal reportedly said the public interest in the public scrutiny of the university's examination processes outweighed the public interest in securing the best qualified examiners by protecting the confidentiality of their reports by ss36 and 40. In any event, the Tribunal observed, the career structure of academics would encourage them to agree to provide such reports even if confidentiality was not guaranteed. Nonetheless the reports were held exempt under s45 (breach of confidence exemption) on the ground that most examiners who supplied reports in confidence would expect confidentiality to be maintained at least for such a period as was necessary to protect them from the risk of unwanted persistent argument by the candidate. (Section 45, unlike ss36 and 40, is not subject to public interest override.)

111 A contrary interpretation was put to me along these lines: the words in s27(2)(a)(iv) connote that a candidate is singled out above all others; rather than, as is the case with university grades/degrees and School Certificate, a recognition of attainment (and an attainment potentially open to all who satisfy the entry criteria). Proponents of this view could point also to the fact that the Vice-Chancellor's Committee suggested without success to the Justice and Law Reform Committee that the words "degree, diplomas, grants for research" be inserted in s27(2)(a)(iv): supra n 9 at 23.
I accept that university degrees, and grades for higher degree theses, are a recognition of attainment. (See Christie, "The Power to Award Degrees" [1976] PL 358 at 369-370 esp n 40.) But so are some "scholarships" and "honours". Furthermore, it seems to me that by including "awards" after the large grouping of "contracts" but before the narrower categories of "scholarships" and "honours" the legislature must have intended to cover every "award" for which confidential appraisals or evaluations would be solicited. In this context the suggested interpretation in the text seems both sensible and reasonable. If this view is accepted, likewise a report on whether a degree or higher degree thesis grade should be "modified or cancelled" would be exempt by s27(2)(b). See generally Stevens, "Rescinding a College Degree: 'Ungowning' and the Law" (1985-6) 23 Am Business LJ 467.

It is certain, however, that nothing in section 27(1) justifies the withholding of grades (and percentage marks[112]) from student-requestors. But what of an examiner's comments, notes and work sheets? *Re James and others and Australian National University,*[113] a decision under the Australian FOIA, provides a useful focus. The university refused James and four other honours graduates in history access to information held by the university relating to assessment of their performance as students. In particular, the former students sought access to documents recording the comments of lecturers on their performance, reports of both the supervisors and examiners on their honours theses, and grade sheets showing raw and final grades for all subjects and the honours degrees. The university claimed exemption for these documents under sections 36 and 40 of the Australian FOIA.

The Administrative Appeals Tribunal found the documents to be within sections 36 and 40 but that disclosure, on balance, would be in the public interest and so ordered disclosure.

Addressing section 36 first, Deputy President Hall held the documents would disclose a matter in the nature of or relating to opinion, advice or recommendation recorded for the purpose of the deliberative processes (interpreted as "thinking processes"[114]) involved in the functions of the university, namely the academic assessment of the performance of its students. As to section 40, which deals specifically with prejudice to the effectiveness of procedures for the conduct of examinations, Deputy President Hall was satisfied on the evidence that disclosure could reasonably be expected to prejudice the effectiveness of the procedures adopted within the History Department for the conduct of examinations. In holding that the public interest in disclosure outweighed both these exemptions, Deputy President Hall said this:[115]

> I accept that some examiners may feel threatened by such disclosures and that there is a possibility that their approach to assessment of student work may be consequentially affected. On the other hand there is, I think, much to be said for the view expressed by [two witnesses] that an academic in assessing the work of a student must be prepared to make judgments honestly and impartially and be prepared to stand by those judgments. Indeed, those are the characteristics of a good academic that [another witness] referred to when he spoke of academic independence from authority, on the one hand, and from students' on the other. The question is whether graduate students should be denied access to information about their undergraduate performance because of fears that open disclosure might prejudice the assessment system exposing some members of academic staff to pressures with which they may be unable to cope. However, the pressures flowing from greater accountability are, in my view, an inescapable concomitant of more open government. To react too timorously to every anticipated situation of pressure could well negate the principles underlying the Freedom

112 In *Hart* v *Monash University,* supra n 3, a student succeeded in obtaining his percentage marks under the Victorian FOIA over the objection of the university which operated on a grade system. See the full discussion in Warburton, "Taking Student Rights Seriously: Rights of Inspection and Challenge" (1985) 8 UNSWLR 362 at 372-5.

113 (1984-5) 6 ALD 687 (AAT).

114 Following the earlier discussion of *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588 and rejecting the argument of counsel for the respondent that only documents relating to the "policy forming processes" were within s36(1)(a): ibid at 693-4.

115 Ibid at 703. For similar sentiments see *In re Dinnan* 661 F 2d 426 at 432 (1981).

> of Information Act. Whether those principles fit comfortably upon an academic institution such as the Australian National University may be another question. But is not a question to which I need to address myself. Parliament has made the decision that the Act is to apply.

How, then, would the information at issue in *Re James* be treated under our Act? The information is about the student-requestor and so is "personal" information. (Note the Australian FOIA does not distinguish, as the OIA does, between "official" and "personal" information.[116]) As noted earlier, the identity of the examiner of an honours thesis and the examiner's report *might* be protected if the strict requirements of section 27(1)(c) are satisfied. That possible exception aside, none of the section 27(1) exemptions would seem to justify withholding either a student's grade or any of the other assessment material discussed in *Re James.*[117] The OIA contains no specific provision like section 40 of the Australian Act dealing with examination procedures. And the equivalent in our Act to section 36(1) of the Australian one, section 9(2)(g), is not available as an exemption in respect of personal information.[118] In short, the result in *Re James* would be reached in New Zealand more directly and disclosure would be required. This is in keeping with one of the purposes of our Act, which is to promote the accountability of those who fall with its purview.[119]

In a recent determination of the Visitor of the University of Auckland there is the quite extraordinary assertion that the OIA does not apply to grading procedures within universities.[120] This heresy must be scotched before it spreads. In that case, H, a student enrolled at Auckland University for the degree of Master of Science with Honours, petitioned the Visitor seeking "an academic criticism" of his thesis which was awarded a C – grade. (The grades for the four course work papers were B +, B –, B + and B +; the thesis grade counted for three papers; and the average grade of B – gave H a masters degree with second class honours in the second division.) Basically, H wanted to know why his thesis was marked so low.

The University Visitor, the Governor General – His Excellency the Most Reverend Sir Paul Reeves – was satisfied that, in awarding a C – grade on the thesis, the university followed the prescribed procedure and the

116 For a useful comparison of the Australian and New Zealand legislation, see Taylor, supra n 23.

117 This conclusion would seem to follow under s27, irrespective of whether the student is a present or former one. Cf *Re James,* supra n 113, where the AAT stressed that its decision was confined to the issue of access by students who had graduated from university.

118 In the early days of the Act government agencies frequently invoked exemptions in s9(2) to refuse access to personal information. The Ombudsman consistently and quite rightly insisted that once satisfied that the information was personal information the only applicable exemptions are those in s27(1): see eg *5th Compendium,* Case No 10, 27 at 30. This approach was upheld in *Commissioner of Police* v *Ombudsman,* supra n 12 at 581. Out of what appears to be an excess of caution this approach has now received statutory endorsement: see s27(1A).

119 Section 4(a)(ii). Accepting that university staff are not "officials" in the public service sense, it would seem that the word should be read more widely in s4(a)(ii).

120 *Judgment in the Matter of the Petition of . . . H . . . against the University of Auckland* (undated; covering letter dated 2 July 1987).

Visitor denied any power to challenge any grade properly allocated under those procedures.[121] Furthermore, the Visitor said this:[122]

> To the further point that the university should have provided a "criticism" of the work, His Excellency finds that this argument cannot be sustained. His Excellency notes that the opportunity for criticism and constructive analysis is available throughout the preparation of a thesis, in consultation with its supervisor. His Excellency is also convinced that there should be no need to justify a grade properly awarded by duly appointed examiners exercising their professional judgment in a proper way. He must therefore decline the petitioner's request to require the University of Auckland to provide a written criticism of his thesis.
>
> Finally the Visitor has been advised that the Official Information Act 1982 does not apply to grading procedures within universities. For these reasons, therefore, the Visitor finds that he is unable to help the petitioner in the manner requested and the petition is *declined.*

In correspondence the Official Secretary to the Governor General has asked that the following qualification be added to these reasons:[123]

> I have since received advice from the Information Authority on this point. The Authority believes that all information relating to the awarding of grades by the university is subject to recovery under the terms of the Official Information Act. If this opinion is sustained, then the final statement by the Visitor in the H . . . decision (". . . the Official Information Act 1982 does not apply to grading procedures within universities") may well be subject to review.

But surely there can be no doubt as to the correctness of the advice from the Information Authority. Indeed, not only must the university disclose all grading information held but also, upon request by the student within a reasonable time of receiving the grade (as H did), the university is duty-bound to provide a written statement of the reasons for awarding that grade (rather than a higher or lower one). This right to reasons in section 23 of the Act (discussed further below) was plainly overlooked by the Visitor who could not see the "need to justify a grade properly awarded by duly appointed examiners exercising their professional judgment in a proper way". In short the result in this visitorial determination is incorrect and the reasoning discloses serious legal errors.

Reasons for decisions and recommendations

Where a request for official or personal information is refused, in whole or part, the university must inform the requestor of the exemptions relied on and that the requestor can complain to the Ombudsman.[124] On further request the requestor is entitled to "the grounds" in support of applying

121 While it is generally accepted that the mode of exercise of visitorial powers is left largely to the discretion of the Visitor (see *Norrie* v *University of Auckland,* supra n 2 at 136 and *R* v *Committee acting for the Visitor of the University of London, ex p Vijayatunga* [1988] 2 WLR 106 (QB)), this discretion is reviewable on ordinary administrative law grounds.

122 Supra n 120 at 2 (emphasis in the original).

123 Letter dated 28 July 1987 from the Office of the Governor General to the writer.

124 Section 19(a)(i) and (b). This provision is incorporated by s24(3). See also ss16(3) and 17(2).

the exemption(s).[125] These provisions are concerned with justifying non-disclosure of information requested under the OIA.

Section 23(1) goes much further and establishes a legal right to findings of fact and reasons in respect of all decisions or recommendations made within the university. It provides:

> Subject to section 6(a) and (d), section 7, section 9(2)(b), and section 10 of this Act and to subsections (2), (4) and (5) of this section, where a Department or Minister of the Crown or organisation makes, on or after the 1st day of July 1983, a decision or recommendation in respect of any person, being a decision or recommendation in respect of that person in his or its personal capacity, that person has the right to and shall, on request made within a reasonable time of the making of the decision or recommendation, be given a written statement of –
> (a) The findings on material issues of fact; and
> (b) Subject to section 27(1)(c) to (f) of this Act, a reference to the information on which the findings were based; and
> (c) The reasons for the decision or recommendation.

Section 23(1) is remarkable for both its breadth of coverage and specificity of requirement.[126] Anyone employed by the university making a decision or recommendation in respect of another person or body must, upon request, provide a written statement of findings on material issues of fact, a reference to the information on which the findings are based and the reasons. This is an onerous duty, the more so because the courts have held that the reasons given must be "adequate".[127] In one case the duty to give reasons pursuant to statute was described as a "responsible" one that could not be discharged by the use of vague words which did not bring home to the recipient a clear understanding of why the decision was reached.[128] Obviously the character, nature and extent of the findings and reasons given must to some degree be governed by the nature of the decision and the context.[129] Nevertheless the requirements of section 23(1) are clear and demanding.

There is an important restriction on who can request a statement under section 23. Only a decision or recommendation "in respect of [a] . . . person in his or its personal capacity" can be the subject of a request by that person. The wording of the section is convoluted because the draftsperson seemed intent on avoiding the word "affected";[130] possibly it was thought capable of too wide an interpretation. Nonetheless, the synonyms for the phrase "in respect of" which is used twice instead – about, concerning, touching,

125 Section 19(a)(ii) (unless the giving of those grounds would itself prejudice the interests protected by ss6, 7 or 9). See also ssl6(3)(b) and 17(2)(b).

126 Section 23 follows the form of reasons requirements in recent Australian legislation. See Administrative Decisions (Judicial Review) Act 1977 sl3(1); Administrative Appeals Tribunal Act 1975 s28(1) (see also ss38, 43(2), (2A) & (2B)). See *Danks Report,* vol 2, 77.

127 *In re Poyser & Mill's Arbitration* [1964] 2 QB 467 at 478, per Megaw J. For a discussion of the numerous cases on adequacy see Richardson, "The Duty to Give Reasons: Potential and Practice" [1986] PL 437.

128 *Elliott* v *London Borough of Southwark* [1976] 2 All ER 781 at 791, per James LJ (CA).

129 See *Metropolitan Property Holdings Ltd* v *Laufer* (1975) 29 P & CR 172 at 176 (DC).

130 The Danks Committee, borrowing from sl3(1) of the Ombudsmen Act 1975, used the word "affected" in clause 21 of the Draft Bill (see *Danks Report,* vol 2, 77) but this was later discarded.

regarding, in connection with – are equally capable of wide interpretation. The key words then are "in his or its personal capacity". This is a vague phrase[131] but I suggest it envisages that the decision or recommendation must have some impact on the private interests of the person or corporation before a request must be complied with.[132] It should be noted that the person requesting need not be adversely affected by the decision or recommendation as long as the requirements of the section are otherwise satisfied.

It takes little imagination to think of those who will request reasons under the Act: a student denied entry to a course of study or another whose thesis is rejected,[133] a disgruntled staff member whose research leave application is declined, a librarian or secretary denied promotion, and even a disappointed candidate for a Chair. The meaning of the vague phrase, "personal capacity", will be fully plumbed in the university setting. Indeed of all the provisions in the Act the findings and reasons requirement in section 23 is likely to have the most noticeable effect on university decision-making in the short term. And that is all to the good. For the underlying values of a reasons requirement – openness, rationality and fairness – are by no means inconsistent with the goals of the university.[134]

Conclusion

In another context John Willis spoke of places where "the constitutional shoe pinches".[135] This overview of the application of the OIA to universities suggests that in most places the shoe fits as it was intended to, eg access by students to scripts, grades and assessment material. In a few places, however, the constitutional shoe may be felt to pinch a little, eg access to teaching and research materials. The pinch is, in reality, the tension between accountability and autonomy in the university context.[136]

131 Keith, "The Ombudsman and 'Wrong' Decisions" (1970-1) 4 NZULR 361 at 366.

132 Cf *Danks Report,* vol 2, 77.

133 If a grade on a higher degree thesis is an "award" in terms of s27(2)(a)(iv) (as to which see supra nn 109-111 and accompanying text) *and* all the other requirements in s27(1)(c) are satisfied then the university is obliged under s23 only to give a written statement of the findings on material issues of fact and the reasons for the decision: s23(1)(b), which ordinarily requires a reference to the information on which the findings are based, is subject to s27(1)(c)-(f).

134 Gellhorn and Boyer, supra n 2 at 573.

135 J Willis, *The Parliamentary Powers of English Government Departments* (1933) at 4.

136 For an account of the growth of "academic accountability" in the United States of America see Fishbein, "New Strings on the Ivory Tower: The Growth of Accountability in Colleges and Universities" (1985) 12 J College and University Law 381.